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# The Policy Choices, Challenges, and Consequences of an Outsider in the White House: What You Need to Know After the 2016

For more than 70 years, Arnold & Porter has been the law firm of choice for businesses, corporations and individuals seeking to solve complex public policy problems that cut across Congress, the Executive Branch, and the federal court system. With more than 80 lawyers who have served in some capacity in the federal government, and a legislative group that has more than tripled in size in the last two years, the Arnold & Porter team is extraordinarily well-positioned to provide comprehensive public policy solutions for our clients.

Our analysis discusses how major policy issues and economic sectors will fare in the first two years of the new Donald Trump Administration. Our team is available at any time to talk with you about how best to engage Washington policymakers to achieve your business objectives.

## Introduction

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Businessman Donald Trump was elected the 45th President of the United States in the early hours of Wednesday morning, ending a historic election process and setting the stage for a federal government poised to roll back much of the domestic and foreign policy achievements of outgoing President Barack Obama.

Washington will have an all-Republican government, but the Capitol's ability to implement a common agenda of policy proposals is immediately threatened by extraordinary and unprecedented fissures between the President-elect and the Republican establishment in Congress. The burden of governing falls on President-elect Trump, who will have to quickly prove that he can effectively harness the full power of the Oval Office to deliver on his campaign promises. Most of official Washington is highly skeptical, if not openly hostile, to the goals and methods of Donald Trump, meaning his Presidency will face headwinds every day.

Donald Trump's election is the biggest populist uprising in federal politics since the 1828 election of President Andrew Jackson. There are multiple Jackson-Trump parallels, separated by nearly 200 years of history: a strong populist streak, hard-core attacks against the character of presidential candidates and parties, and a polarizing candidate whose personality and record were beloved and despised in nearly equal measure. While all politicians run against the status quo to one degree or another, the President-elect attacked the nation's leading political and media institutions as corrupt, incompetent, and actively colluding to implement an agenda that was harming the interests of working Americans. The only thing more remarkable than the platform was the fact it succeeded in this election.

Now, President-elect Trump will govern as he campaigned, which is what worries his opponents, and perhaps even some of his allies. Democrats

see President-elect Trump in apocalyptic terms that may make it hard to find common ground on most policy issues, though his policy flexibility may also provide unique opportunities to work across the aisle on some issues. Meanwhile, many establishment Republicans are skeptical that the President-elect is truly conservative or even a credible change agent who can unravel the policy victories of President Obama. The political establishment of both parties fears Trump's election upends most of the modern "rules" of the presidency and politics, leaving a political culture that is coarser and more likely to act impulsively and inconsistently, which serves to further undermine public confidence in government.

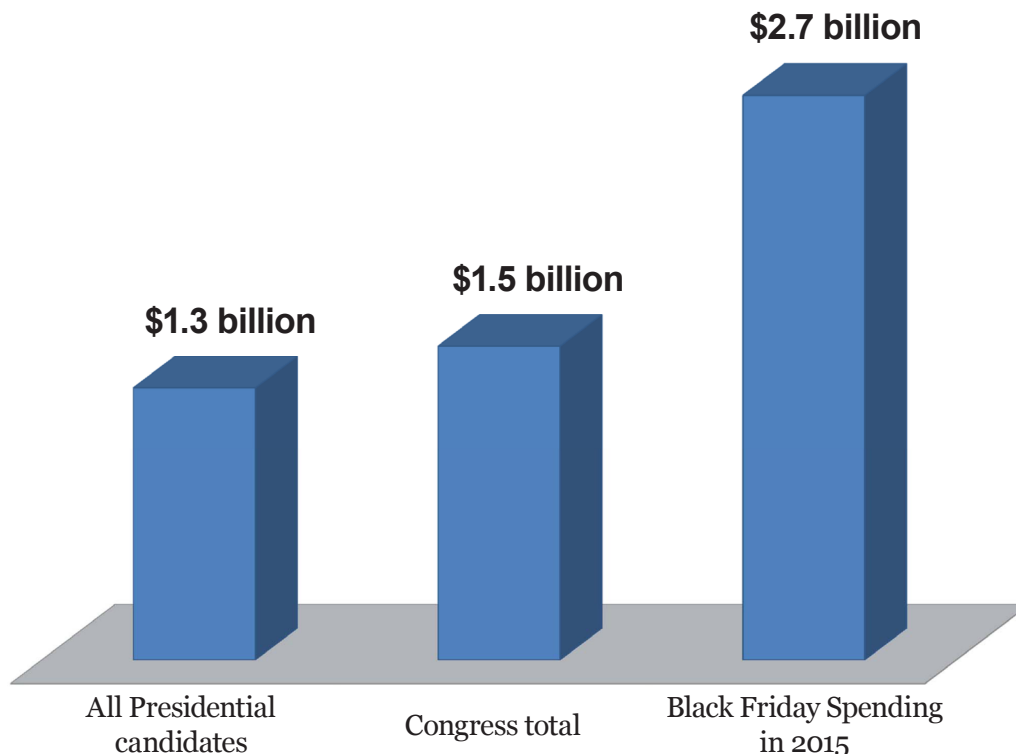
## 2017-18 - A Time to Define a Consequential Presidency

The next two years will be a frenetic period in Washington but it remains to be seen if it will be one of legislative accomplishment or logjam. One-party rule would normally suggest a peak period of legislative and regulatory action, but the odd dynamic between the President-elect and his majority in Congress suggest we will see something less than peak productivity in the next two years. While there is a pent-up demand for major legislative action on a range of issues, the gulf between President-elect Trump and his party's leadership must be bridged to maximize success in the next two years.

The first year of a new Presidency is typically a period of peak legislative activity, as the new President seeks to implement a new agenda and to spend the political capital built up in winning office. The majority of President Obama's most significant legislative accomplishments - the economic stimulus package, Dodd-Frank, the Affordable Care Act, the Lilly Ledbetter Fair Pay Act, Iran sanctions, sentencing reform, school nutrition policy - were all notched in the first two years of his first term when his party had complete control of Congress (and a stronger Senate majority). If President-elect Trump follows that model and forges strong congressional ties, he may enjoy a similarly comprehensive set of accomplishments, most of which will be targeted at dismantling the accomplishments of President Obama.

Whether one supports or opposes specific policy initiatives of the new administration, the next two years will belong to the players who engage in the policy conversation instead of watching from the sidelines. The first two years of the Trump Administration will see the federal government sailing in previously uncharted waters on many issues. Public policy problems increasingly defy easy categorization as purely legislative or executive branch issues. More and more, the business community confronts complex, multifaceted public policy challenges that encompass Congress, multiple federal agencies, and even legal action in the courts.

### Campaign Finance for 2016 Election Cycle Versus Black Friday Spending



## The Election

Donald Trump's election is a historical anomaly on many levels. He won a dramatic come-from-behind victory of 306 to 232 electoral votes over Hillary Clinton.<sup>1</sup> Donald Trump won without a majority of the popular vote, meaning that in four of the last seven campaigns a candidate has won the White House without winning a majority of votes cast. He also becomes the fifth President in the country's history to win without a plurality of the popular vote. The red state/blue state stasis of the last several presidential elections was turned on its head, with Florida, Pennsylvania, Ohio, Michigan, Wisconsin, and Iowa backing Donald Trump in 2016 after voting for Barack Obama in 2012. Hillary Clinton was unable to turn a single state that voted for Republican nominee Mitt Romney in 2012 to her column in 2016.

The winning coalition for Donald Trump was based on white males, a group whose electoral relevance was thought to be slipping in recent elections as America's population continued to diversify. The Trump coalition also relied heavily on working-class voters, especially those from the Rust Belt states of Ohio, Pennsylvania, Wisconsin (and perhaps Michigan), which provided the margin of victory in this race. The President-elect also rode to victory thanks to strong support from voters without a college degree, and voters who believed the Obama economy failed them personally.

Hillary Clinton could not successfully recreate the Obama electoral coalition of 2008 and 2012. She relied on a coalition of urban and suburban females, African-Americans, Hispanics, and voters with a college degree, but many of those demographics underperformed in comparison to the turnout they offered President Barack Obama in 2008 and 2012. In an election where voters talked of the need to bring new ideas and energy to Washington, Hillary Clinton's experience turned from asset to liability. The negative perception of her extensive experience, and voter concern that she was untrustworthy, were the leading elements of Clinton's defeat.

The high negative perceptions of President-elect Trump means he will need to achieve some quick policy successes to demonstrate his capabilities to a skeptical public. He will be looking to work with a Republican Congress to show voters an all-Republican Washington can make swift and effective policy changes that help everyday voters. The majority of the Trump campaign's core promises are for big changes in healthcare, tax reform, trade, immigration and foreign policy. These policy proposals will take time and political capital to move via a combination of Executive Orders, regulatory changes, and major new legislation.

President-elect Trump will be aggressive in using executive authority to undo as much of the Obama Administration's policies as possible. Almost every policy pushed via Executive Order by President Obama will be at risk from Day 1 of the Trump Administration. In fact, knowing the media-savvy ways of the President-elect, we would expect a number of executive orders to be issued immediately after he is sworn in on January 20, with a continuing series of orders in the future.

## Congress

Donald Trump's victory may have lacked the sort of traditional coattails that helped push individual Senate and House candidates of his party over the finish line, but there is no evidence that his candidacy was a drag on any Republican running for Congress this year. Very few in Washington predicted a Trump victory and fewer still envisioned an all-Republican Washington emerging from the 2016 election results. Republicans lost two Senate seats (Illinois and New Hampshire) and now have a slightly narrower majority (51 to 48) in the Senate, and still expect to prevail in the Louisiana runoff in December.<sup>2</sup> There is also a chance that Senator Joe Manchin (D-WV), who faces reelection in 2018, may become an independent who affiliates with the Republican majority. In the House, Republicans lost just 6 seats off of their historic high in 2014.<sup>3</sup>

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Voters sent an interesting message in the 2016 election. On the one hand, they elected Donald Trump, the biggest possible change agent to take the White House in decades. On the other hand, Gallup polling data show Congress with a 20 percent approval rating, even as voters allowed Republicans to keep control of both chambers of Congress. Indeed, less than 15 incumbent senators and representatives lost their reelection bids. The results also mean that either voters do not think the Trump Presidency needs a short-term check on his political power, or they trust congressional Republicans can work with the White House to move major legislation while using their constitutional powers to check the power of a president from their own party. We believe it is the latter.

There had been pre-election rumblings that that House Republican leaders would face a challenge from conservative members unhappy with the potentially negative election results. Many House Republicans took issue with how House Speaker Paul Ryan (R-WI) failed to support Donald Trump once he became the party's nominee, but the reality is that strategy worked on every level and helped Republicans retain control of both chambers of Congress. We do think that dissatisfaction from the most conservative House members are likely to help them claim a seat at the Republican conference leadership table through winning one of the the lower offices of the elected leadership team.

House Democrats will keep the same leadership team they have had in place for years now, with Nancy Pelosi (D-CA) as Minority Leader, Steny Hoyer (D-MD) as Minority Whip, and Jim Clyburn (D-SC) as Assistant Democratic Leader. House Democrats still have not identified the next generation of leadership that will succeed the current team comprised of members in their 70s. We may have to wait for the 2018 election cycle for the next generation of House Democratic leaders emerge.

In the Senate, Mitch McConnell (R-KY) will remain as the Majority Leader, while John Cornyn (R-TX) is expected to continue serving as Majority Whip. The retirement of Sen. Harry Reid (D-NV) means Sen. Chuck Schumer (D-NY) will be the new Minority Leader. There remains some uncertainty at this point about who will be the Minority Whip, with both current Whip Dick Durbin (D-IL) and Patty Murray (D-WA) potentially competing for the spot.

A normal environment where the White House and Congress are controlled by the same party would be a period of intense coordinated legislative and regulatory action by the majority party. Yet, the Trump Presidency will be different for many reasons. First, President-elect Trump previously had a strained and distant relationship with congressional leaders of his own party. Speaker Ryan has a frosty relationship with President-elect Trump, and declined opportunities to campaign together and, in an effort to preserve his House majority, stopped defending the Republican nominee weeks before the election. In turn, President-elect Trump regularly ridiculed the Speaker on the campaign trail and, at key moments, appeared to be campaigning as much against his own congressional majority as he was against his actual opponent, Secretary Clinton. This is an uneasy partnership where allies will have to be very careful in working together if they are to achieve their common goals.

In the Senate, Majority Leader McConnell was on record early in 2016 saying that it was essentially every candidate for themselves, and Republican Senators needed to do whatever it took to win reelection. It was a strategy that worked. The President-elect knows how to hold a grudge, and now his success is going to be closely linked to his ability to get along with his own party in Congress. We expect that the shared policy ambitions of President-elect Trump, Speaker Ryan and Majority Leader McConnell, each eager to see big things accomplished in a unified government, will be sufficient to work through the inevitable friction in their personal leadership styles.

There is one interesting constitutional upside to the strained relationship between the White House and Congress. For the last several Presidencies, there has been a continuum of activity that tilts the federal government's balance of power toward the White House and away from Congress. The deep, bipartisan skepticism and antipathy toward the incoming President creates the conditions needed for Congress to begin to shift the balance of power between coequal branches of government back to equilibrium.

President-elect Trump's relations with the Senate also will impact the speed with which his nominees move towards confirmation. Congressional Republicans will be concerned about the level of vetting done by the transition team and will be wary of being trapped supporting controversial nominees with issues that should have shaken out before nominees are submitted. Senate Democrats will have every incentive to throw up procedural roadblocks and coordinate with outside interest groups to attack the qualifications of President-elect Trump's nominees. To the extent that the Trump Administration seems likely to appoint more political outsiders and business leaders, some of the political attacks on nominees are sure to succeed, and those nominations will fail.

While President Obama suffered from a reputation of holding legislators at arms-length, President-elect Trump may have troubles of his own on this front. He will need to be magnanimous in victory and embrace key Republicans who were publicly skeptical or opposed to his campaign. In turn, congressional Republicans who opposed the Trump candidacy will need to reconcile with the President-elect. President-elect Trump could excel at the some of the interpersonal elements of his job and may use golfing and other social events as a way to build goodwill he can use to advance his agenda in Congress. If the President-elect's agenda stalls or fails in a Republican-controlled Congress, the autopsy will show the failure was a combination of policy disagreements exacerbated by poor relationships with individual senators and representatives essential to the policy issues involved.

House Minority Leader Nancy Pelosi (D-CA) and Senate Minority Leader Chuck Schumer (D-NY) are now the de facto heads of the Democratic Party. While both are articulate spokespersons for their party, their age and experience eliminate them as potential 2020 presidential nominees, limiting their control of the party to a short-term proposition. Instead, we will soon see an open battle among key senators, representatives and governors to be identified as heirs to the Bill Clinton-Barack Obama policy legacy. Hillary Clinton's defeat will make it hard for her to exert much control over the party's future. Indeed, the party bearer in fighting Trump in the next two years may be former President Obama himself, as he plans to live in Washington, DC for a few years until his younger daughter goes to college. With a leaderless party, former President Obama seems unlikely to stand by quietly as Republicans seek to unravel his signature achievements.

Overall, President-elect Trump enters office knowing he has the potential to achieve sweeping transformation to a smaller, more conservative federal government, but his success depends in large part on showing he can get along with others in Washington. To the extent he can forge relationships with congressional Republicans, he will see legislative success.

## Transition

The Trump campaign was slow to develop a transition team and skeptical Washington policy experts were even slower to engage with the transition effort. As a result, the President-elect already is behind in the process for quickly filling the administration's several thousand politically appointed jobs and compiling the detailed game plan for operating the myriad of departments and agencies of the executive branch. That shortcoming in transition planning from earlier in the year will echo for at least a year as the Trump Administration gets up and running in 2017.

It also will be harder for stakeholders to accurately predict who President-elect Trump will appoint to his cabinet and sub-cabinet positions. Wide swaths of well-qualified potential Republican nominees have jeopardized their chances of appointment to a Trump Administration by being openly critical of the Republican nominee during the campaign. In addition, while an incoming Republican Administration would typically draw from an experienced bench of appointees from the last Republican Administration, that is unlikely to happen here. President George W. Bush and his entire family opposed Donald Trump's election, as did hundreds of Bush appointees. In turn, President-elect Trump openly criticized the Bush Administration legacy, especially in regard to foreign policy.

Republican governors will be a top target for Cabinet appointments of the incoming Trump Administration, given their knowledge of working government and their status as Washington outsiders. The transition leader is Governor Chris Christie of New Jersey, and he may be a candidate for a top cabinet position but his viability may be undermined by the Bridgegate scandal. Compared to past administrations, we expect fewer senators or representatives to be considered for executive branch appointments, in part because so few elected officials warmed to the President-elect until after he clinched the Republican nomination. President-elect Trump cannot afford to appoint anyone who holds a seat that could reduce the Republican majorities in Congress. Alabama Senator Jeff Sessions (R-AL) is an example of the type of safe-seat Republican who will be in the cabinet mix, especially since he was the President-elect's top public supporter in Congress.

We foresee a large number of business leaders joining the Trump Cabinet, especially those few leaders who were publicly supportive of his campaign or quietly served as advisors to it. There also may be more nontraditional picks inside the White House staff than would be typical, as the incoming President seeks to keep his most trusted advisors close to him in the administration.

All of the potential cabinet appointees will want assurances that they will have the opportunity to lead their departments and agencies and will not face a White House that changes its position daily on key policy issues. The lack of uncertainty likely will cost the Trump Administration a few people who simply cannot reconcile concerns with the President's governing style and priorities.

The transition process has, over time, become more of a challenge for incoming presidents, making it more difficult for the president's team to be fully in place in the early months of a new administration. The average time for confirmation of a cabinet official has grown from 13 days in the Reagan Administration to 35 days in the Obama Administration.<sup>4</sup> But the real delay is at the crucial sub-cabinet levels of political appointees. In the first two years of the Obama Administration, Senate-confirmed appointees to the Executive Office of the President and various federal agencies waited an average of 93 days for confirmation.<sup>5</sup> President-elect Trump will be doing well if he has his full cabinet approved by mid-March (President Obama's Cabinet was not in place until the end of April in his first term) and all the deputies at each department are confirmed by the end of June.

One unanswered question for the incoming Trump Administration is whether he will lift the ban President Obama imposed on lobbyists serving in the administration. There are few Republican lobbyists who openly supported the Trump campaign, and the new President ran as the most anti-Washington of candidates. Nevertheless, the new President would benefit from people who can make the government work and have substantive policy experience.

**Economy**

In 1992, Arkansas Governor Bill Clinton boiled his first presidential campaign's mission down to one phrase: "It's the economy, stupid." In the modern presidency, voters generally fixate on the state of the economy as a foremost criteria for judging an incumbent president or, as in this year's election, the president's party when the current president is term-limited. Most pre-election polls showed President-elect Trump enjoyed strong support from voters who thought economic conditions had deteriorated over the eight years of the Obama Administration. President-elect Trump did poorly with voters who thought the economy improved for them under President Obama. At the end of the day, there were simply more voters who saw a negative economic forecast for their future and voted for change over more of the same in Secretary Clinton.



The Economy Clinton Voters See Under President Obama	The Economy Trump Voters See Under President Obama
More than 14 million jobs created <sup>6</sup>	A record number of Americans — 94.7 million — dropped out of the workforce <sup>10</sup>
The stock market rose 130.6% <sup>7</sup>	Worker pay is the same as 20 years ago <sup>11</sup>
Unemployment rate has dropped from 7.8% to 4.9% <sup>8</sup>	Slowest growth rate of any recent economic recovery
80 consecutive months of private job creation <sup>9</sup>	Doubled the national debt to \$19.6 trillion <sup>12</sup>
Historically low interest rates and inflation	Runaway entitlement spending
Raised the minimum wage	Unfunded pension obligation shortfall of \$20.4 trillion and growing <sup>13</sup>

Turbocharging economic growth is expected to be a top priority for President-elect Trump. His focal point will likely be the biggest tax reform legislation since the Reagan Administration. We would expect Speaker Ryan and Ways and Means Committee Chairman Kevin Brady (R-TX) to be particularly ambitious and aggressive in seeking a package that flattens the number of tax brackets, lowers effective tax rates, and simplifies a code that has grown increasingly complex since the last major reforms. Repatriation of foreign profits for international companies will be a priority in reform, allowing more money earned abroad to serve as seed funding for a wave of economic expansion in the United States. Repatriation will be part of a broader priority in the reform package to make America a much more competitive tax atmosphere for multi-national corporations.

We would expect Speaker Ryan will look at the budget reconciliation process as a valuable tool to drive a generational tax reform package through Congress and minimize procedural roadblocks from Senate Democrats. If tax reform uses the budget reconciliation process, congressional Democrats likely will be on the outside looking in, and will be sharp critics of the overall reform package.

## Supreme Court and Judiciary

The fate of the Supreme Court is one of the reasons many voters could rationalize their choice of Donald Trump in this election. With the balance of the Court hanging on the open ninth seat, and the fact that three justices will be 78 or older on Inauguration Day, the next President may be in position to appoint four justices in a single term. Regardless what he does in other aspects of his term, President-elect Trump’s biggest legacy might be his ability to shape the Supreme Court for the next 25-30 years through his nominations.

The election of Donald Trump means the end of the road for President Obama’s pending Supreme Court nomination of Merrick Garland to take the seat vacated by Justice Scalia’s death earlier this year. Senate Majority Leader McConnell declined to move the nomination, essentially punting the decision on the future direction of the court to the American people. Majority Leader McConnell will now keep the nomination from proceeding during the lame-duck session.

During the campaign, in a bid to win conservative support, President-elect Trump released a total of 21 candidates he would consider nominating for the Supreme Court. This unprecedented detailing of potential nominees did in fact garner Trump some support from conservative leaders who recognized shaping the Supreme Court’s future was a top political issue.

## Supreme Court

President-elect Trump's list of announced Supreme Court candidates includes:

- Keith Blackwell (Georgia Supreme Court)
- Charles Canady (Florida Supreme Court)
- Steven Colloton (8th Cir.)
- Allison Eid (Colorado Supreme Court)
- Neil Gorsuch (10th Cir.)
- Raymond Gruender (8th Cir.)
- Thomas Hardiman (3rd Cir.)
- Raymond Kethledge (6th Cir.)
- Joan Larsen (Michigan Supreme Court)
- Senator Mike Lee (R-UT)
- Thomas Lee (Utah Supreme Court)
- Edward Mansfield (Iowa Supreme Court)
- Federico Moreno (S.D.FL.)
- William Pryor (11th Cir.)
- Margaret Ryan (Court of Appeals for the Armed Services)
- David Stras (Minnesota Supreme Court)
- Diane Sykes (7th Cir.)
- Amul Thapur (E.D.Ky.)
- Timothy Tymkovich (10th Cir.)
- Don Willett (Supreme Court of Texas)
- Robert Young (Michigan Supreme Court)

We think it is highly likely that the first two Supreme Court nominees will come from this list of 21 candidates because it will show the President keeping a key promise to the conservative movement. If the President-elect has more than two nominations during his term, we think the list of candidates will expand and evolve over time.

For the first Supreme Court nomination from President Trump, we expect a process that takes at least two months, from nomination to confirmation. The last 11 Supreme Court Justices waited an average of 74 days between the date of their nomination and their Senate confirmation. In instances where the President's party also controlled the Senate, the confirmation process for recent nominees has not moved any faster, with an average of 72 days. The fastest confirmation process was 50 days (Justice Ginsberg) and the longest was 99 days (Justice Thomas). Thus, it seems likely the new Associate Justice would not be sworn in fast enough to take part in most of the cases pending before the Supreme Court in its 2016-17 term.

With a Republican Senate, one would think President-elect Trump's nominees would have an easy path to confirmation, but that may not be the case. First, Republicans have a narrow majority of only 51 or 52 seats in the Senate, and likely will have only a one or two-seat majority on the Senate Judiciary Committee, the starting point for the federal judiciary confirmation process.<sup>14</sup> President-elect Trump's top Senate ally, Sen. Jeff Sessions, is a key member of the Judiciary Committee and may emerge as the quarterback of administration efforts to move Supreme Court and key appellate nominees through the Committee. However, several Republican critics and opponents of President-elect Trump also are on the Judiciary Committee. Sen. Ted Cruz (R-TX) and Sen. Lindsey Graham (R-SC) both ran for the Republican nomination for President and were strong critics of Donald Trump's qualifications to serve in office. Sen. Orrin Hatch (R-UT) and Sen. Mike Lee (R-UT) come from a state Trump won despite the fact that a majority of voters thought he lacked the moral grounding to serve as President. The Republican senators on the Judiciary Committee will want to move the President's Supreme Court nominees, but political conditions suggest they will be cautious about getting behind nominees who might be controversial. The relationships between the Trump White House and Senate Judiciary Republicans will play a role in how bold the President can be in picking judiciary nominees.

For two reasons, Democrats on the Judiciary Committee are unlikely to offer much support to the Supreme Court nominees from President-elect Trump. First, the Judiciary Committee is packed with ideologically motivated people in both parties who simply oppose the other party's guiding principles in making these appointments. Second, Judiciary Democrats will be looking to provide a difficult path for Trump's nominees as payback for the way Republicans handled the Merrick Garland appointment this year and slow-walked President Obama's judicial nominees the last two years.

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One thing that is notable about President-elect Trump’s list of nominees and his likely philosophy in picking nominees to the federal courts is his consideration of state Supreme Court justices. It is likely that a President Trump will have a more expansive list of federal court nominees that includes experienced judges from state systems, and also more legal practitioners that can bring a different perspective to the bench. This experiential diversity would be a marked departure from what recent presidents have done.

## Lame-Duck Session

While all of the attention is naturally on the new administration and the 115th Congress, focus soon will shift back to the 114th Congress and the unfinished business that must be completed in a post-election “lame-duck” session. Congress is expected to reconvene on November 14, and its session is likely to last into at least the first week of December.

Of the numerous items that may see action in the lame-duck session, the only truly “must-pass” items are appropriations measures to address funding the government beyond December 9 (including a defense supplemental funding request for additional funds needed to fight terrorism in the Middle East), when the current Continuing Resolution (CR) expires, and the National Defense Authorization Act (NDAA), which specifies the budget and expenditures for the Department of Defense and has passed Congress for 54 straight years. Prior to the election, both parties expressed optimism that Congress will finish its appropriations work and not leave FY 2017 business for the new administration to handle (via a long-term CR), but that optimism will be tested in the lame-duck session. Indeed, in the lame-duck session following the last presidential election in 2012, Congress ultimately had to pass a long-term CR through the following March. Multiple CRs, in fact, have become commonplace in recent years.

At this time, both Speaker Ryan and Majority Leader McConnell have indicated that they prefer to enact several smaller appropriations packages (or “mini-buses”) rather than one large “omnibus” bill. House Minority Leader Pelosi, along with other Democrats, strongly oppose this strategy, fearing the Republicans would pass a defense spending bill and simply allow domestic programs to settle for a long-term CR. With Republicans maintaining control of Congress and capturing the White House, we expect leadership will want to wrap up its work in short order so as to clear the decks for the new Congress and administration. Republicans may even make short-term funding concessions to Democrats, knowing that taking control of the White House in January will leave congressional Republicans better positioned to implement their long-term budgetary and spending priorities.

Congress also will need to consider potential supplemental funding packages for Hurricane Matthew and other disaster relief. On immigration, action may be pursued to reauthorize the EB-5 Regional Center Program. The somewhat controversial program allows immigrants to apply for legal permanent residence if they invest \$500,000 in a US commercial project or create 10 jobs in the country. While Congress extended the program as part of the CR, there are technical and legal questions raised by the Congressional Research Service (CRS) about whether the program’s extension through a CR properly meets the sunset provisions outlined in the law.

During the election season, congressional staffers have continued to negotiate a final conference agreement for the Water Resource Development Act (WRDA), and it is possible this agreement will be voted on by Congress before the end of the year. One element likely to be in the bill will be about \$200 million in aid for the residents of Flint, Michigan, who face an ongoing water quality crisis caused by infrastructure failures.

In addition to the appropriations and NDAA endgame, both Speaker Ryan and Leader McConnell have suggested that the *21st Century Cures* bill, which would invest new money in medical research and speed up the Food

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tax extenders set to expire at the end of 2016.

and Drug Administration approval process for new drugs and devices, will be a priority in the lame-duck session. The bill enjoys bipartisan support; however, it has been delayed thus far over negotiations on how to offset its cost, particularly mandatory new spending that is a Democratic priority. With Republicans poised to hold control of the next Congress, they may force some reduction in this mandatory spending as the cost of getting the bill to the finish line in the lame duck.

What is normally an annual ritual of renewing dozens of expiring temporary tax breaks — or “tax extenders” — is less likely to be repeated this year. While last year’s bill made many of the extenders part of permanent law, there remain 36 tax extenders set to expire at the end of 2016, and they include popular provisions for homeowners and renewable energy incentives, among other items. It is likely that Congress will consider an extenders package in some form in the lame-duck session. However, Republicans may simply hold off on those provisions until next year, figuring that with Donald Trump in the White House, they can fold the extenders into a much broader comprehensive tax proposal that will be a legislative priority in 2017 or leave the orphaned extenders out altogether.

There is also a possibility that Congress could consider legislation to technically amend the Justice Against Sponsors of Terrorism Act (JASTA), which passed earlier in the fall by overriding President Obama’s veto. A bipartisan collection of senators and representatives have indicated they may push for changes to JASTA to protect American service members abroad from retaliatory actions and to address other concerns raised by foreign governments.

Finally, President Obama could make one final public plea for Congress to consider ratifying the Trans-Pacific Partnership (TPP) during the lame duck, but this would be an exercise in futility. Both Presidential candidates opposed TPP in its current form and opposition to it was a signature element of President-elect Trump’s electoral appeal. It would be unfathomable that a Republican majority would use the lame duck to pass something so controversial and opposed by their incoming President.

## Why the 2018 Senate Races Affect the 2017-18 Legislative Agenda

In the months leading up to the nominating convention, Washington Republicans were fearful that Donald Trump’s nomination would mean collapsing support for House and Senate Republicans. Yet, even at Donald Trump’s lowest pre-election moments, there was plenty of evidence that Senate Republicans in particular were capable of running well ahead of their Presidential nominee and would not be beholden to the top of the ticket to pull them to victory on Election Day.

Now, as with many things in a world where Donald Trump is the President-elect, we reach a unique point in electoral politics. Typically, the off-year elections of a new President have resulted in losses for the President’s party. President George W. Bush is the only Republican President in the last 100 years to gain both House and Senate seats in the first off-year election of his Presidency. Three of the Republican Presidents since World War II gained one or two Senate seats in the first off-year of their terms (Nixon gained 2, Reagan 1, and George W. Bush 1), but the average post-WWII Republican president has lost 12 House seats in the first off-year election.

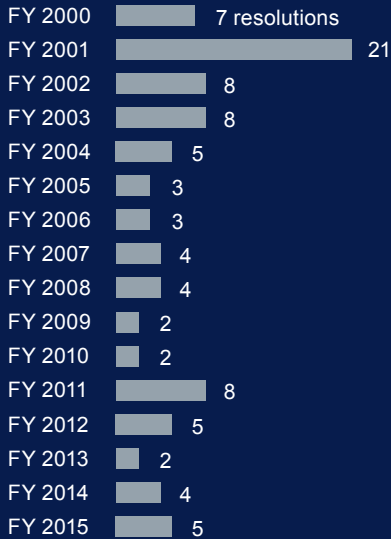
Given the slightly narrower Republican majorities in both chambers of Congress (51 seats in the Senate and 238 seats in the House), it would normally not take much of a wave against President Trump’s policies to bring Democrats to power in in 2018.<sup>15</sup>

While President-elect Trump and congressional Republicans do not have history on their side in the upcoming 2018 elections, they have significant structural elements in their favor. First, in the House, the 2010 redistricting process reduced the number of competitive House races, so Republicans just have fewer toss-up seats to defend,

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## Number of CRs Enacted since Fiscal Year 2000

The number of times Congress passed a continuing resolution to keep the government funded past the end of the fiscal year on Sept. 30.



and many of those toss-ups were won by the Democrats this week. Second, the lack of a presidential race means a turnout model that is generally more favorable for Republicans than the electorate that turns out in presidential years. Republicans have picked up both House and Senate seats in three of the four past off-year elections, but that one loss was under President George W. Bush, when Democrats retook Congress in the 2006 elections as a rejection of President Bush’s policies. The Bush collapse in the 2006 elections is fresh in the minds of top congressional leaders in both parties and will drive many of the strategic policy and political decisions they each make in the next two years. Third, the dominance of Republicans in state government and Congress means Democrats have a thinner bench to draw on in finding candidates for 2018 Senate races.

The 2018 elections will be very difficult for Senate Democrats, as they must defend 25 seats in 2018 (including the two independent senators who vote with the Democratic Caucus, Sen. Angus King (I-ME) and Sen. Bernie Sanders (I-VT)), compared to the 8 seats Republicans will need to defend. In many respects, it will be the mirror image of the 2016 line-up when Republicans defended 24 seats to the 10 held by Democratic Senators. Republicans have not held more than 56 seats in the Senate since 1923, but 2018 may be their best chance in decades to do so if voters generally approve of the first two years of President Trump’s Administration.<sup>16</sup>

Included in that 2018 election list are Democratic-held Senate seats in states that have voted for Donald Trump, Mitt Romney, and John McCain in the last three elections, including: Montana, North Dakota, and West Virginia. There are also several “purple” states - Florida, Indiana,

Missouri, Ohio, Pennsylvania, and Wisconsin - each won by Donald Trump in this election, and which now make Democratic incumbents running in those places in 2018 vulnerable. Democratic party leaders will target Republican incumbents in Arizona and Nevada where fast-growing Hispanic populations make it more likely a Democratic challenger can win, but overall the Senate Democratic Caucus will be playing defense in the 2018 election cycle.

Five moderate Democrats in traditionally Republican states – Heidi Heitkamp (D-ND), Jon Tester (D-MT), Claire McCaskill (D-MO), Joe Manchin (D-WV), Joe Donnelly (D-IN) – will have some level of outsized influence on the legislative process because they are vulnerable in 2018. President-elect Trump and Senate Majority Leader Mitch McConnell will be looking for opportunities to secure support from those five senators, giving them the potential to craft deals where they trade a vote for some say in shaping major legislation. Alternatively, the Trump Administration and Senate Majority Leader will look for ways to target those five Senators and place them in a position where they are casting tough votes against popular legislative proposals, allowing Republican candidates to campaign against the voting records of those Democratic incumbents.

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★ KEY TAKEAWAYS ★

- President-elect Trump has not outlined an official antitrust policy agenda, but he has expressed a willingness to investigate mergers in concentrated industries and companies he sees as having too much market power.
- There are no obvious candidates to run the DOJ’s Antitrust Division, but we do expect President-elect Trump to prioritize FTC appointments.
- In Congress, antitrust policy is expected to continue to focus on ways to increase competition in the healthcare and pharmaceutical marketplace.

**ADMINISTRATION PRIORITIES**

President-elect Trump’s campaign has addressed the topic of antitrust enforcement in specific instances; however, President-elect Trump has not outlined a formal antitrust policy agenda. He has campaigned in part on the notion that the economy is “rigged” but has not made clear if or how that view may affect antitrust enforcement more broadly.

Therefore, it is difficult to extrapolate whether the Trump Administration will follow a more traditional Republican approach, which in recent years has been somewhat less enforcement-oriented than the approach of Democratic administrations, or whether perhaps it will be more enforcement-minded in general, or just with regard to certain industries, such as the media.

No matter what the overall approach, it is important to keep in mind that there are institutional limitations with regard to the magnitude of any shift in enforcement policy. The antitrust agencies are not regulatory agencies — they are law enforcement agencies, and their actions are eventually reviewed by federal courts. The Department of Justice (DOJ) cannot “block” a transaction — it can only challenge it, in court, though the threat of a court challenge is often all that’s needed to derail a proposed combination. The Federal Trade Commission (FTC) is an administrative agency and thus can seek to litigate against transactions or unilateral conduct within the FTC administrative process (and the FTC does have some additional flexibility based on its authority under Section 5 of the FTC Act), but those decisions, too, are eventually subject to federal court review.

In this context, the Trump Administration can more easily step back than step forward — i.e., less aggressive agency enforcement policy can allow more deals and more conduct to go unchallenged, and in that sense if the administration desires a less aggressive enforcement policy it can be implemented. A more aggressive policy also can be implemented, but such an approach has its limits — certainly more aggressive enforcement by the agencies can (and does) change the risk calculus for potential deals and can extend the time needed for deals to be consummated — and the approach of the agencies is a very significant issue that can change the economics associated with a deal. However, antitrust agencies cannot, merely by virtue of more aggressive review, whether in general or within a particular industry, fundamentally re-write the antitrust laws; the agencies need to win in court

to make fundamental changes in the way the antitrust laws are applied. Of course, this does sometimes happen (i.e., *F.T.C. v. Actavis, Inc.*), and it is more likely to happen if the agencies are very aggressive in their enforcement efforts, but merely planning to be aggressive does not in and of itself dictate a change in legal outcomes.

**AGENCY LEADERSHIP**

**Department of Justice.** President-elect Trump campaigned aggressively against those he considers to be “Washington insiders” so his administration may be reluctant to appoint someone with previous high-level agency experience to lead the DOJ Antitrust Division.

**Federal Trade Commission.** The FTC finds itself in an unusual situation, because only three of five commissioners — the Chair Edith Ramirez (D) and Commissioners Terrell McSweeney (D) and Maureen K. Ohlhausen (R) — are currently serving. Once President-elect Trump takes office, he would presumably name Commissioner Ohlhausen as acting Chair (if Commissioner Ohlhausen is chosen by the administration to be the permanent Chair, she would need to be confirmed in that position, and thus could only be acting chair in the interim), and Chairwoman Ramirez would revert to being a commissioner. This would create an odd situation where the acting chair is a Republican appointee but the Democratic appointees constitute a majority on the Commission. The Commission can function this way — under Commission rules, a majority of the members of the Commission (1) in office and (2) not recused from participating in a matter constitutes a quorum for the transaction of business in that matter. So the FTC will be able to conduct business and take enforcement actions on 2-1 votes or even on 2-0 votes, in instances where one commissioner is recused. But the chair will be in the minority. Even if Chair Ramirez were to leave, which she is generally expected to do, Commissioner McSweeney would still maintain an effective veto. In either scenario, this would leave the Republican President with a Commission controlled by Democrats, and the potential for deadlock or for the Democratic commissioners to outvote the acting chair means that the Trump Administration will prioritize nominations for the open Commission seats. With a Republican Senate, that will likely be completed swiftly.

**CONGRESSIONAL LEADERSHIP**

**House.** Rep. Tom Marino (R-PA) is expected to continue to chair the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law. This will be Rep. Marino’s second term as the subcommittee chair. Rep. Hank Johnson (D-GA), who has been ranking member of the subcommittee since 2013, also should retain his post.

**Senate.** Sen Mike Lee (R-UT), is likely to have his second term as chair of the subcommittee, and Sen. Amy Klobuchar (D-MN) should remain subcommittee ranking member.

**CONGRESSIONAL PRIORITIES**

With the national attention given to dramatic increases in the price of drugs in recent years, antitrust policy is expected to continue to focus on ways to increase competition in the healthcare and pharmaceutical marketplace. Both the House and the Senate committees, as well as President-elect Trump, have addressed the rising cost of drugs. The House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law has examined the role of Pharmacy Benefit Managers (PBMs) and health insurance companies and consolidation in those sectors, and can be expected to continue oversight on mergers and potentially anticompetitive actions that have an impact on the cost of healthcare. As part of his health care plan, President-elect Trump also has indicated support for repeal of the McCarran-Ferguson Act, which currently provides insurance companies with a certain degree of exemption from federal antitrust laws.

Separately, the Republican leaders on the House subcommittee have expressed concern regarding the discrepancy between the litigation process and standards applied to FTC litigation, and litigation by DOJ antitrust enforcement

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policies. In 2016, the House passed the *Standard Merger and Acquisition Reviews Through Equal Rules Act* (H.R. 2745), which seeks to standardize the process by which the FTC and the DOJ pursue action against proposed mergers, and this topic could remain a priority for the Republican-led House and Senate subcommittees. Another topic that could receive greater attention is international antitrust, with the subcommittees focusing on China's antitrust policies and their impact on US markets.

**Pay for Delay.** Sen. Klobuchar, along with Senate Judiciary Chair Chuck Grassley (R-IA), introduced the *Preserve Access to Affordable Generics Act* (S. 2019) in the 113th and 114th Congresses. This legislation, a priority for both senators, would impact the ability of pharmaceutical companies that produce brand-name drugs to reach patent-settlement deals with generic companies that delay competition from those generic competitors. Sens. Klobuchar and Grassley have called this practice anticompetitive, and have taken the position that such patent-settlement deals artificially inflate drug prices. Given the recent attention on drug prices, both in the public and in Congress, it is likely that this legislation will be a continued priority.

**Risk Evaluation and Mitigation Strategy.** The bipartisan leaders of both the full Senate Judiciary Committee and the Antitrust, Competition Policy and Consumer Rights Subcommittee introduced *The Creates Act* (S. 3056), aimed at increasing generic competition for pharmaceutical drugs. The bill addresses the Risk Evaluation and Mitigation Strategy program (REMS), which is designed to ensure that high-risk drugs are dispensed safely to patients, but which the sponsoring senators argue has been used by brand-name drug companies to prevent potential generic competitors from obtaining drug samples needed as part of the generic development process. The bipartisan nature of this legislation, and the focus on drug pricing, mean that this issue will likely continue to receive attention in the Judiciary Committee next Congress.

## CONTACT INFORMATION

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★ KEY TAKEAWAYS ★

- Even with a Republican sweep of the White House and Congress, we expect a unified Republican Congress to attempt a return to regular order on the budget and appropriations process.
- Resistance from congressional Democrats will persist throughout the 115th Congress against President-elect Trump’s policy agenda. Democrats will attempt to use the debt limit as leverage to extract some limited concessions on Democratic spending priorities.

**ADMINISTRATION PRIORITIES**

President-elect Trump will face several fiscal challenges, including how he will fund defense and non-defense discretionary spending, addressing growth of mandatory spending programs — including major entitlement programs, such as Medicare and Social Security — and finding the revenue to offset increased discretionary spending. The Trump Administration’s FY 2018 budget proposal will outline a blueprint of his federal funding priorities and revenue plans. It also will provide insight into the administration’s vision for addressing the landscape of fiscal challenges the country faces both short and long-term. The first budget proposal will be a significant marker for how the administration will approach changing the trajectory of federal debt. President-elect Trump’s budgetary and tax proposals drew heavy skepticism from economists and fiscal conservatives during the campaign season over their large projected deficits. As a result, a revised version was put forth in September 2016, following significant criticism on its lack of specificity and conflicting fiscal positions.

During the first year of a new administration, it is unlikely the President-elect will adhere to the budget timeline due to the presidential transition process. We expect the administration to release a less detailed outline of his FY 2018 budget proposal after the first Monday in February (February 6) deadline, followed by a more detailed version of the budget later in the year (likely by April or May). The Office of Management and Budget (OMB) plays a central role in the presidential transition process, so President-elect Trump will likely select an OMB director shortly after the election who will be involved in helping with the preparation process for the FY 2018 budget even prior to the presidential inauguration. Robert Grady, a former OMB Associate Director under the George H.W. Bush Administration has been mentioned as a potential OMB director.

President-elect Trump’s budgetary priorities focus on making large investments in defense and marginal discretionary spending increases in a few key areas, coupled with a mix of lower tax rates he hopes will yield more economic activity to generate higher tax revenues and select discretionary funding cuts. However, the administration’s success largely will depend on finding common ground with Congress. Additionally, the President-elect’s spending priorities will face intense resistance from congressional Democrats, who will focus on obstructing passage of unpalatable priorities, and other third-party stakeholders such as think tanks and associations.

**Discretionary and Defense Spending.** During the campaign, President-elect Trump proposed drastically



increasing spending on defense, veterans, and border control, while walling off reforms to federal entitlement programs. Some of the proposed spending priorities include:

- **Defense.** President-elect Trump has called for increasing defense spending by \$450 billion over a decade, including escalating spending on defense procurement, modernizing missile defense systems and Navy cruiser ships, and increasing military troop levels.
- **Cuts.** President-elect Trump has proposed cutting non-defense and non-entitlement programs (Social Security and Medicare) through the appropriations process by 1 percent each year for a decade to save one trillion dollars. Conversely, there are some agencies where he has proposed spending increases, such as the Department of Homeland Security’s Customs and Border Protection Agency and the Department of Veterans’ Affairs.
- **Immigration.** President-elect Trump will aim to secure increased investments in border security funding and hiring 5,000 additional border patrol agents and tripling deportation officers. This would represent a 24 percent increase in authorized jobs.

**Revenues.** During the campaign, the President-elect proposed a comprehensive tax overhaul plan, similar to congressional Republican tax reform proposals of the past, but on a much larger scale. Under President-elect Trump’s tax plan, he proposes lowering tax rates for individuals and corporations, closing tax loopholes, and scaling back deductions. Details on whether the tax cuts will be paid for is unclear and initial estimates are that his tax plan may reduce revenue by approximately 4 to 6 trillion dollars over the next decade (not accounting for any increased revenue from economic growth as a result of the tax cuts).

**Sequestration.** President-elect Trump will attempt to end the sequester of across-the-board spending cuts on defense programs only, which are scheduled to be reinstated in 2018. However, eliminating the sequester will cost an estimated \$560 billion over ten years. Trump has not indicated specific pay-fors; however, he has suggested he would fully offset the costs through “common sense reforms that eliminate government waste and budget gimmicks.” The two-year budget agreement reached by Speaker Paul Ryan (R-WI) and Sen. Patty Murray (D-WA) in 2015, which provided temporary relief from deep budget cuts through sequestration, will expire in 2017 and once again will set up a large budget battle between the administration and Congress. Congressional Democrats will push strongly for ending sequestration cuts on domestic spending as well, though they will have limited leverage in the Republican-controlled Congress.

## CONGRESSIONAL LEADERSHIP

**House.** Rep. Hal Rogers (R-KY) is term limited as chair of the full House Appropriations Committee and has announced his intention to seek the top seat on the Subcommittee on Defense. The current Subcommittee on Defense Chair, Rep. Rodney Frelinghuysen (R-NJ) is favored to become the next full Committee chair. The Subcommittee on Financial Services Chair, Rep. Ander Crenshaw’s (R-FL) retirement will open up the top position for Rep. Tom Graves (R-GA) to replace him. Rep. Graves, who currently serves as chair of the Subcommittee on Legislative Branch, is second in seniority on Financial Services. On the Democratic side, Rep. Nita Lowey (D-NY) is expected to remain as ranking member of the full House Appropriations Committee. Rep. Rosa DeLauro (D-CT) is expected to replace Rep. Sam Farr (D-CA), who is retiring, as the ranking member of the Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies. While the Appropriations Committee is expected to see significant movement within its leadership positions, only two retiring members will be departing the committee.

Rep. Tom Price (R-GA) will remain as chair of the House Budget Committee in the 115th Congress. Rep. Chris Van Hollen (D-MD), who was elected to the Senate will be replaced by Rep. John Yarmuth (D-KY) as the ranking member of the committee.

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**Senate.** Sen. Thad Cochran (R-MS) will remain chair of the Senate Appropriations Committee. The ranking member of the Senate Appropriations Committee is less certain depending upon the outcomes of the Democratic leadership races. Sen. Patty Murray and Sen. Dick Durbin (D-IL) are contenders for the top spot to replace Sen. Barbara Mikulski (D-MD) who will be retiring this year. Sen. Murray may decide to stay on as ranking member of the Senate Health, Education, Labor and Pensions (HELP) Committee, however she may decide to challenge Sen. Durbin for the Democratic Whip position. Sen. Durbin may be given the ranking member position on Appropriations if he loses the whip race. Sen. Mikulski's retirement will also open up the ranking member position on the Subcommittee on Commerce, Justice, Science and Related Agencies, and Sen. Mark Kirk's (R-IL) loss will open up the chair position on Military Construction and Veterans Affairs.

Sen. Mike Enzi (R-WY) is expected to remain serving as the chair of the Budget Committee where he will continue to push for his budget overhaul bill. The Senate Budget Committee ranking member remains unclear. If Sen. Bernie Sanders takes the ranking member position on the Senate Environment and Public Works Committee, or Senate HELP Committee (if Sen. Murray moves to ranking member of Appropriations) then Sen. Sanders would have to relinquish his ranking member spot on the Budget Committee. If this occurs, Sen. Sheldon Whitehouse (D-RI) would be likely to become ranking member of the Budget Committee.

<b>Budget Process Key Dates*</b>	
<b>On or Before:</b>	<b>Action to be completed:</b>
First Monday in February	President submits budget.
February 15	Congressional Budget Office submits report to Budget Committees.
April 1	Committees submit views and estimates to Budget Committees (Frequently, the House Budget Committee sets own date based on Legislative Calendar)
April 15	Senate Budget Committee reports concurrent resolution on the budget.
May 15	Congress completes action on the concurrent resolution on the budget (This is not signed by the President).
June 10	Annual appropriation bills may be considered in House.
June 15	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation (If required by the budget resolution).
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

\* This table represents the timeline in the Congressional Budget Act of 1974. In recent years, Congress has prolonged the budget process and has considered, reported, and aimed to complete action on appropriations bills in the spring and summer months.

## CONGRESSIONAL PRIORITIES

Although the congressional ban on earmarks has made serving on the Appropriations Committee generally less attractive in recent years, the dysfunction in which Congress has continued to operate and the level of gridlock in the past few Congresses has driven more policymaking into the appropriations process. As fewer legislative authorizing packages are passed, members who sit on the appropriations committees have gained increasingly more relevance in policy debates.

**The Budget Process.** House Speaker Paul Ryan will once again attempt to restore “regular order” to the budget process in the new Congress. As a former Budget Committee Chair, Speaker Ryan will continue to make it a top priority for the House to pass a budget resolution and allow the 12 separate appropriations bills to be considered, passed and conferenced individually through regular order, instead of passing short-or long-term continuing resolutions and larger omnibus spending packages at the end of the fiscal year or later. However, even with a Republican-controlled Congress in the 114th Congress, Republicans were forced to abandon regular order as divides within the party fractured their ability to pass a budget that met the demands of some of the most conservative wing of the House GOP caucus. In the 115th Congress, House Republicans will face continued resistance in their own party over any budget deal which doesn’t meet the approval of conservatives. House Freedom Caucus and Republican Study Committee members opposed their party’s efforts to pass a FY 2017 budget because it did not make deep enough cuts. Nevertheless, we expect President-elect Trump to see the budget as an opportunity to improve relations with Speaker Ryan, by allowing Ryan to be the driving force in Washington on budget reform issues.

Though Congressional Democrats will have little leverage in the 115th Congress, the fact that they have picked up a few Senate seats will allow them to have a strong voice in: (1) passing FY 2018 spending bills; (2) reaching a new budget deal with a Trump Administration; and (3) addressing the debt ceiling. The Senate Democrats will be the leading check on proposed budget reforms coming from Speaker Ryan and the House.

**Budget Overhaul.** With a Republican-controlled Congress and administration, congressional Republicans may have the opportunity to enact an overhaul to the budget process. Proposals to change the Budget Act of 1974 (Pub. L. 93-344) have been long proposed by Republicans in previous Congresses. House Budget Committee Chairman Rep. Tom Price and his Senate counterpart, Sen. Michael Enzi, worked on proposals expected to be released before the end of 2016, and which will likely be re-introduced for consideration in the 115th Congress. Their preliminary proposals would change the budget from a one-year to a two-year cycle and would aim to establish long-term fiscal targets to control spending. With a Republican controlled Senate and administration, the Senate could employ budget reconciliation procedure without needing 60-votes to expedite the passage of budget-related legislation in the Senate. Proposals to reform the budget process have enjoyed bipartisan support in Congress, however, any such attempt to alter the budget will receive resistance from members of both parties who sit on the appropriations committees.

**Debt Limit.** Congress will have to address the debt limit shortly after the start of the 115th Congress. The federal debt limit cap was suspended through mid-March 2017 following the passage of the Bipartisan Budget Act of 2015. The Treasury may use available extraordinary measures allowing the government to borrow to pay for federal obligations until mid-summer 2017. Congressional Democrats will use the debt limit in an attempt to force policy concessions from the Trump Administration, as Republicans have done in the past with the Obama Administration. However, it is unclear if this will be a viable negotiating tactic for Democrats, given

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President-elect Trump's conflicting statements on how he will address the issue of raising the debt limit. Congress will not reach an agreement on the debt ceiling until forced to do so up against the March or June deadlines.

## **CONTACT INFORMATION**

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★ KEY TAKEAWAYS ★

- President-elect Trump’s full education policy agenda is currently unclear, as are his top contenders to lead the Department of Education. The education community will be looking at the administration to release its detailed plan within his first 100 days in office, given that both congressional education committees have prioritized the reauthorization of the Higher Education Act for next year.
- While there will be no leadership changes on the Senate HELP Committee, Rep. Virginia Foxx (R-NC) will likely take the helm of the House Education and the Workforce Committee.
- With a Republican sweep, Congress and the Trump Administration will likely roll back or repeal burdensome regulations in K-12 and higher education and address points of contention with the Department of Education’s implementation of ESSA.

**Transition Team for Education**

**Gerard Robinson** -Resident Fellow at AEI; former state roles as education commissioner and secretary

**Williamson Evers** - Research Fellow at the Hoover Institution at Stanford University and former Department of Education official

**Education Advisors**

**Dr. Ben Carson** - former Republican presidential candidate and pediatric neurosurgeon

**Robert Goad** - Senior Policy Advisor to Rep. Luke Messer (R-IN)

**ADMINISTRATION PRIORITIES**

President-elect Trump has not produced a robust education policy agenda, but his education priorities started taking shape last month with public statements made during a campaign stop to Columbus, Ohio. Earlier in the campaign, much of his comments on education centered around school choice and eliminating the Department of Education and the Common Core State Standards. While achieving these goals will prove to be difficult, President-elect Trump may spend significant resources working to defund signature Obama Administration education grant programs or restructure them as block grants or “smart grants” (as the transition team refers to them).

To date, the Trump campaign’s only education proposal has been on school choice. Because the President-elect does not have a public record on education and has released very few details about his education agenda, the

administration may take a backseat to education leaders in Congress, responsible for passing major education legislation overdue for reauthorization (e.g., the Higher Education Act). President Trump’s top education advisors likely will work with those leaders — whether through authorization vehicles or standalone legislation — on expanding school choice simplifying student loan repayment, and instituting accountability measures for institutions of higher education. They also will look to work with other agencies to improve and expand support for child care, but most of those changes must be made through tax reforms. The administration also may consult with members of Congress to reform or repeal a number of President Obama’s regulations, including the controversial gainful employment rule.

**Child Care Support.** While President-elect Trump did not discuss early childhood education much on the campaign trail, he frequently touted his plan, along with his daughter Ivanka Trump, to improve child care support for working families. His proposal, which seeks to guarantee six weeks of maternity leave and provides additional benefits in the tax code to offset the cost of care, as well as incentives for employers to offer on-site day care, could see some bipartisan support in Congress depending on the pay-for mechanisms.

**Every Student Succeeds Act.** The Department of Education has been aggressive in implementing the Every Student Succeeds Act (ESSA) prior to President Obama leaving office. It is likely that the Trump Administration will try to walk back some of the final rules or soon to be final rules under President Obama, particularly those with which Republican leaders in Congress disagree, such as the “supplement, not supplant” rule, proposed state plan requirements (e.g., new definitions of “educator effectiveness”), and proposed requirements on the School Quality or Student Success indicator.

**Expanding School Choice.** There is little doubt President-elect Trump will implement his school choice plan, which reprioritizes federal funding to create a \$20 billion block grant for students living in poverty to attend the school of their choice. While the plan does not specify which federal funds would be reprioritized to create the program, individual states will be given the option of how to use the funding by developing their own formulas to ensure federal dollars follow the students. There will be incentives developed for states to kick in funding as well.

**College Affordability and Student Debt.** President-elect Trump has not released a written plan to address college affordability, but he did commit to making the repayment process easier for student borrowers during the campaign. He discussed the need for a single new loan repayment program that caps repayment at 12.5 percent of graduates’ incomes and provides loan forgiveness for all borrowers who repay their loans after 15 years. The President-elect also questioned colleges’ spending and vowed to force institutions to cut tuition rates. We expect the Trump Administration to propose a plan to remove the tax-exempt status of colleges and universities with large endowments who are not reducing tuition rates. President-elect Trump, however, likely will attempt to do this in conjunction with a plan to reduce or eliminate burdensome federal regulations to help reduce costs for institutions of higher education that can then be passed along as savings to students.

**AGENCY LEADERSHIP**

For months, Dr. Ben Carson was the only person floated as a possible Secretary of Education after the pediatric neurosurgeon dropped his bid for the White House and endorsed President-elect Trump. While other names have been discussed, we expect the future Secretary will seek to limit the role of federal government in education, cut red tape, and empower states, local leaders, and parents. Some other individuals who might get the nod from President-elect Trump include:

- Rep. Luke Messer (R-IN). Robert Goad, a senior advisor to Rep. Messer on the House Education and the Workforce Committee, took a leave of absence in August to advise President-elect Trump's campaign on education issues. While the President-elect's relationship with most members of Congress has not been great, Rep. Messer and Vice President-elect Pence both hail from Indiana, and the move could be seen as an olive branch to congressional Republicans.
- Gerard Robinson. Mr. Robinson is a resident fellow at the American Enterprise Institute and former Florida commissioner of education and Virginia secretary of education. He has legitimate conservative chops on school choice and regulatory issues and has experience at the state level on K-12 and higher education issues. Additionally, he has served on President-elect Trump's transition team for education.

## CONGRESSIONAL LEADERSHIP

**House.** It is widely expected that former community college president Rep. Virginia Foxx (R-NC) will take the helm of the House Education and the Workforce Committee in January. She serves as secretary of the House Republican Conference and as the vice chair of the powerful House Rules Committee. Additionally, she is the chair of the Subcommittee on Higher Education and Workforce Training and has made known her candidacy for the education committee's top spot. Rep. Virginia Foxx has supported Trump and will likely look to work with his administration to roll back regulations she believes have hurt the higher education industry, including rules related to overtime pay, defining the credit hour, gainful employment, distance education, and teacher preparation.

Her Democratic counterpart on the committee will be the current ranking member, Rep. Bobby Scott (D-VA). Despite differing views on education policy, Rep. Scott worked well with outgoing Chair John Kline (R-MN), particularly on crafting a bipartisan career and technical education reauthorization bill. With a Republican sweep across Congress and the executive branch, however, it is unlikely Republicans in the House will have a need to cultivate Democratic support for major initiatives. Reps. Foxx and Scott have worked together on very few policy items while on the House Education and the Workforce Committee. Yet, they may find some common ground on the need for additional data transparency measures for higher education, given their previous support for the *Strengthening Transparency in Higher Education Act* (H.R. 3178) that passed the House in July 2016 but did not see any action in the Senate.

**Senate.** Sen. Lamar Alexander (R-TN) will remain chair of the Health, Education, Labor and Pensions (HELP) Committee. He and Sen. Patty Murray (D-WA), the committee's current ranking member who is expected to stay on unless she decides she'll have more influence as Democratic leader of the Senate Appropriations Committee, have established a productive working relationship and should transition seamlessly into the new Congress. It is likely they will team up at times to block or deride select joint priorities of President-elect Trump and House Republicans, such as defunding the Department of Education.

## CONGRESSIONAL PRIORITIES

Despite the fact that both chambers will remain in Republican hands, the congressional dynamics around education policy are expected to change in a number of ways in the 115th Congress. The work of the House Education and the Workforce Committee and Senate HELP Committee will be marked by continued oversight efforts related to implementation of ESSA and the Workforce Innovation and Opportunity Act (WIOA), in addition to several final regulations published by the Department over the last month. In fact, Congress could work with the Trump



Administration to reform or repeal regulations to provide relief to the higher education sector in addition to addressing areas where Republicans believe there is federal overreach within ESSA guidance and regulations. Congressional Republicans could fast track select bills, with the administration taking a back seat. We also expect to see a reinvigorated effort on several policy issues that have been stalled in recent years, including reauthorization of the Higher Education Act (HEA) and Carl D. Perkins Career and Technical Education (CTE) Act, if not authorized during the lame-duck session. While these rewrites historically have been bipartisan, Republican leaders, particularly in the House, may argue they have a mandate based on the election to quickly push through partisan legislation on overdue reauthorizations.

**Higher Education Act Reauthorization.** HEA reauthorization is on the top of the list of priorities for both Rep. Foxx and Sen. Alexander in the 115th Congress. There was some hope that the goodwill built between the House and Senate education leaders during the passage of ESSA would lead to a bipartisan HEA reauthorization bill in the 114th Congress. Despite this sentiment, most of the work on HEA in the last year has been at the committee staff level, and there have been no serious efforts made to introduce an HEA bill this year. We expect work to begin on HEA reauthorization legislation early in 2017.

The Senate is likely to continue to work in a bipartisan fashion on HEA reauthorization given the strong working relationship between Sens. Alexander and Murray. Sen. Alexander has consistently stated his priorities include simplifying how financial aid is made available and providing regulatory relief to institutions to help keep costs down.

Sen. Murray has said she will focus on increasing access to college for low-income students and making college more affordable for all students.

With President-elect Trump in office, college affordability aspects of HEA are likely to include provisions to refinance student loans, simplify repayment programs, and cap income-based repayment. Rep. Foxx has said she plans to focus on decreasing the number of burdensome regulations on institutions of higher education and ensuring data collected from universities is more transparent and useful. President-elect Trump agrees and has stated institutions will be able to pass on to students the cost savings from regulatory relief by lowering tuition. The Trump Administration also may push for more accountability measures including risk-share and working with the Judiciary Committee on reviewing the relationship between endowments and some institutions' tax status. In the 112th Congress, Sen. Chuck Grassley, current chair of the Judiciary Committee, conducted oversight on how colleges and universities use their endowments.

**Career and Technical Education.** Congress may complete its work on CTE reauthorization during the lame-duck session. The House overwhelmingly passed its CTE reauthorization bill on September 13, and the Senate may take action on a companion measure when it returns to Washington, DC later this month. A major hold-up was a disagreement over secretarial authority in the Senate between Chair Alexander and Ranking Member Murray. Sen. Murray, however, may reconsider her argument given the results of the election and look to reach an agreement with the chair. We believe this is unlikely to rise to the top of the overall Senate priority list during the lame duck; if that is the case, we expect the 115th Congress to move quickly to re-introduce and pass CTE legislation early next year.

**Student Data Privacy.** Student data privacy is likely to remain a popular topic in the 115th Congress as members attempt to update current privacy laws to ensure they recognize the complexity of student privacy in an increasingly digital world. Despite not marking up a student data privacy bill prior to the election, the House Education and the Workforce Committee made a serious effort last year on legislation to update the Family Educational Rights and Privacy Act (FERPA). It is unclear whether an updated FERPA bill would remain a priority under Rep. Foxx.

We expect many of the lead sponsors of the various student data privacy bills in the 114th Congress, such as Rep. Jared Polis, Rep. Luke Messer, Sen. Edward Markey (D-MA), and Sen. Orrin Hatch (R-UT), will re-introduce some of these measures in the 115th Congress.

## **CONTACT INFORMATION**

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★ KEY TAKEAWAYS ★

- President-elect Trump plans to take the US government in a very different direction on energy and environmental policy. He will attempt to reverse a number of President Obama’s regulations intended to reduce global climate change, halt progress on implementation of the Paris Agreement, and reemphasize domestic natural resource development to make the US energy independent.
- If President-elect Trump is successful in changing the direction of federal environmental policy, including enforcement, we would not be surprised to see an increase in regulatory activity and environmental enforcement in key states, including California and others. In the past, we have often have seen an inverse correlation between enforcement activity at the state and federal level.
- President-elect Trump is likely to have a willing partner in a Republican-led Congress that will work to pass a development-focused, comprehensive energy bill and collaborate in an effort to reverse President Obama’s legacy regulations. While the Republican Congress will not have enough votes in the Senate to simply force partisan energy legislation across the finish line, both chambers will work as hard as they can to secure legislative victories through the appropriations process and through regular order, picking up Democratic support where possible.

**Transition Team for Energy and Environment**

**The Honorable Chris Christie** - Governor of New Jersey

**Mike McKenna** - Lobbyist

**David Bernhardt** - Attorney

**Myron Ebell** - Competitive Enterprise Institute, Director of the Center for Energy and Environment

**ADMINISTRATION PRIORITIES**

President-elect Trump’s energy and environment agenda will represent a sharp departure from the Obama Administration, which established and carried out an expansive regulatory agenda designed to combat global climate

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change. As President, Mr. Trump plans to dramatically stimulate natural resource development in a goal to “unleash American’s \$50 trillion in untapped shale, oil, and natural gas reserves, plus hundreds of years in clean coal reserves.” In doing so, President-elect Trump intends to make the United States completely energy independent (though he may mean that he will make North America energy independent -- the US has a large energy trade with Canada and Mexico). Of course, these goals cannot be achieved while also implementing or enforcing legacy regulatory items initiated by the Obama Administration. As a consequence, President-elect Trump will likely undertake efforts to rescind what he has called “all job-destroying Obama executive actions,” including the Clean Power Plan, as well as the US’s global climate change commitments under the Paris Agreement.

**Implementation of the Paris Agreement.** The international community secured a landmark global climate change accord known as the Paris Climate Agreement in December of 2015 at the COP21 conference after more than 190 countries agreed to take steps to: (1) maintain global temperature increases below 2 degrees Celsius above pre-industrial levels; (2) aspire to maintain a more ambitious 1.5 degree increase; and (3) raise \$100 billion per year, beginning in 2020, from the public and private sector to help developing nations lower their greenhouse gas (GHG) emissions and adapt to climate change. That Agreement is now in force, as more than 55 parties to the Agreement representing more than 55 percent of global emissions (including the United States and China) formally ratified the Agreement. And while the United States is already taking steps to meet its obligations under the Agreement, including a commitment to reduce its GHG emissions by 26-28 percent below its 2005 level by 2025, a Trump Administration has pledged to halt those activities and completely ignore the US commitments under the Paris Agreement – or withdraw from the agreement entirely.

**Clean Power Plan Implementation.** The Clean Power Plan represents the Obama Administration’s most ambitious regulatory effort to satisfy US commitments under the Paris Agreement. The rule would limit GHG emissions from power plants with a goal of reducing emissions by 30 percent in 2030. After an extensive rulemaking process, the Environmental Protection Agency (EPA) published a final rule in the Federal Register on October 23, 2015. The Clean Power Plan’s future, however, remains in doubt as a result of ongoing judicial review in the US Court of Appeals for the District of Columbia after the Supreme Court stayed implementation of the rule on February 9, 2016. The full court in the District of Columbia heard oral arguments on the rule on September 27, 2016. Regardless of the outcome in the Court of Appeals, it seems unlikely that a Supreme Court with a Trump appointee would uphold the rule. Even if the Clean Power Plan survives judicial review, it is likely a Trump Administration will direct the EPA not to implement it and will take steps to rescind the proposal if he can legally do so.

**Methane and Volatile Organic Compounds Emission Standards.** The incoming Trump Administration opposes the Obama Administration’s efforts, which the EPA announced on May 12, 2016, to reduce methane, volatile organic compounds (VOCs), and toxic air emissions from existing sources in the oil and gas industry. The EPA is currently conducting an information collection review (ICR) process through which it is surveying oil and gas operators regarding a range of issues, with a focus on technology that could be used to limit methane emissions and reduce costs. While President-elect Trump may permit the EPA to complete the ICR process, his campaign trail commitments suggest that he will direct the EPA to eliminate the methane and VOC reduction effort as part of the Trump plan to stimulate additional natural gas and oil production.

**Natural Resource Development.** President-elect Trump’s 100-day plan for energy and environmental policy calls for a declaration of “American energy dominance” as a “strategic and foreign policy goal of the United States.” That plan calls for the US government to stimulate development of American natural resources in an effort to achieve total energy independence. He would aim to develop as much of the nation’s on and offshore natural resources as possible, on public lands and in the private sector, and then use revenue derived from that production to invest in infrastructure, education, and agriculture programs.

**Waters of the United States.** EPA and the Army Corps of Engineers published a regulation on June 29, 2015 called the “Waters of the United States” rule, expanding the definition of wetlands and other areas that are regulated under the Clean Water Act. During his campaign, President-elect Trump vowed to rescind that rule. He would take steps to do that, and meanwhile would presumably direct EPA and the Corps not to enforce it.

## AGENCY LEADERSHIP

President-elect Trump’s formal and informal circle of energy and environment policy advisors revolves largely around a small circle of senior level corporate executives, economists, and even a member of Congress with deep experience in natural resource development. A number of these individuals could emerge to serve in senior positions in the White House, the EPA, the Department of Energy, and the Department of Interior, including:

- **Rep. Kevin Cramer** (R-ND) - US House Member
- **Harold Hamm** - Chief Executive Officer of Continental Resources
- **Stephen Moore** - Chief Economist, Heritage Foundation
- **Kathleen Hartnett-White** - Senior fellow in residence and director of the Armstrong Center for Energy & Environment at the Texas Public Policy Foundation
- **Forrest Lucas** - Co-Founder of Lucas Oil
- **Myron Ebell** - Competitive Enterprise Institute, Director of the Center for Energy and Environment

## CONGRESSIONAL LEADERSHIP

**House.** There are several top contenders vying for the chair position of the House Energy and Commerce Committee. Rep. John Shimkus (R-IL) who has the most seniority on the committee has been campaigning for the top position for several months. Yet, despite Rep. Shimkus’s seniority, Rep. Greg Walden (R-OR) who has led the National Republican Campaign Committee for the last two election cycles, has made it clear he would like the chair position. Both Rep. John Shimkus and Rep. Greg Walden have chaired powerful subcommittees of the committee and are well-known, well-respected members of the House Republican Conference. Rep. Joe Barton (R-TX) also is seeking chair of the committee. Given that he previously served as chair of the full committee from 2004-2007, before becoming the ranking member from 2008-2010, he would need to obtain a waiver from the House Republican Steering Committee to win the gavel. Meanwhile, Rep. Frank Pallone (D-NJ), the committee’s current ranking member, is expected to remain the lead Democrat during the 115th Congress.

The House Natural Resources Committee is not expecting to turn over any of its leadership positions, leaving current chair Rep. Rob Bishop (R-UT) as the head of the committee and Rep. Raúl Grijalva (D-AZ) remaining as ranking member. This also is true for the House Ways and Means Committee, where we expect Rep. Kevin Brady (R-TX) to remain chair and Rep. Sander Levin (D-MI) to keep his position as ranking member.

**Senate.** Sen. Lisa Murkwoski (R-AK) will continue to chair the Senate Energy and Natural Resources Committee with Sen. Maria Cantwell (D-WA) remaining as the committee’s ranking member. Sen. John Barrasso (R-WY) is expected to chair the Senate Environment and Public Works (EPW) Committee. The Senate EPW ranking member is also expected to change, following the retirement of Sen. Barbara Boxer (D-CA), to Sen. Thomas Carper (D-DE) as he is next in line to serve based on his seniority. The Senate Finance Committee will remain the same with Sen. Orrin Hatch (R-UT) as the chair and Sen. Ron Wyden (D-OR) as the ranking member of the committee.

## CONGRESSIONAL PRIORITIES

While the 114th Congress was an especially busy time for energy policy, we are likely to see even more movement in the 115th. With Republicans retaining control of both the House and Senate, and controlling the White House,

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we are likely to see a flurry of activity around energy efficiency, repealing or reforming large energy agreements made by the Obama Administration, and an increased focus on moving forward with a comprehensive energy legislation and updating outdated energy policies.

**Comprehensive Energy Legislation.** If Congress fails to pass a comprehensive energy bill in the lame-duck session this year, passing a comprehensive energy bill with an emphasis on natural resource development, regulatory reform, and other conservative priorities will continue to be a top priority of House Energy and Commerce leaders and Sen. Lisa Murkowski in the 115th Congress.

With the Trump Administration, House Energy and Commerce Committee, and Senate Energy and Natural Resources leadership under Republican control, it is likely many of the issues that have held up energy and environmental legislation will move. Republicans will begin to rewrite pieces of the legislation related to strengthening protections for the coal, oil, and gas industries, reducing current regulatory burdens, and cutting new programs included in previously passed legislation. Additionally, Republicans are likely to limit the government’s overall involvement in the energy sector and reduce the amount of spending on new loan programs or subsidies and instead focus on investing federal dollars in new innovative technologies and grid modernization efforts.

**International Energy and Environment Agreements.** Halting the Obama Administration’s Clean Power Plan and implementation of the Paris Agreement are likely to remain top priorities for a Republican-led Congress and Trump Administration. While Republican leadership on the House Energy and Commerce Committee will change, it is unlikely the committee will dial back its efforts to stop the Clean Power Plan. It is more likely than ever to continue to draft legislation, hold hearings, and engage stakeholders to apply further pressure on the EPA. Further, many Senate Republicans, such as Sen. Mitch McConnell (R-KY), have been outspoken on the Paris Agreement, and how the Obama Administration did little to engage with Congress to receive its approval before moving forward with such a significant international agreement. Due to the lack of consultation with Congress, and in particular Republican leaders, it is likely Republicans will work hard to roll back the Obama Administration’s climate-change measures during the 115th Congress.

**Energy Policy and Conservation Act Reforms.** Earlier this year the House Energy and Commerce Committee held a hearing to kick off a potential process to reform provisions of the Energy Policy and Conservation Act (EPCA) that address mandatory energy conservation standards and the Department of Energy’s implementation of the statute. During the hearing, House Republicans made clear they are unhappy with both the existing law and Department’s application of the statute, and believe that the Department’s regulatory activities are driving up costs without producing commensurate energy savings for consumers. We anticipate that Republican leaders on both sides of the aisle will continue to develop the EPCA reform process in 2017 under unilateral Republican control of the federal government, even if the Office of Energy Efficiency & Renewable Energy’s agenda for appliance standard review and amendment slows or stops altogether under President-elect Trump.

## CONTACT INFORMATION

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★ **KEY TAKEAWAYS** ★

- President-elect Trump will pursue policies that are intended to reduce regulatory burdens and accelerate robust job growth, increased lending, and capital creation. The exact parameters of the new administration’s regulatory agenda have not yet been detailed. Financial firms should remain attentive to developments in Washington, DC and be ready to adjust to new circumstances in the near future.
- Republican efforts to make major changes to Dodd-Frank will face stiff Democratic opposition. Democrats may be successful in thwarting such action in the Senate given the Republicans’ narrow majority.
- More minor reforms to Dodd-Frank have a much better chance for enactment in the current climate.

**Transition Team for Financial Services**

- William Hagerty** - Director of Appointments, Trump Transition Team
- Eric Ueland** - Staff Director, Senate Budget Committee
- Paul Winfree** - Heritage Foundation economist
- Daris Meeks** - Attorney

**Financial Services Advisors**

- Stephen Moore** - Heritage Foundation
- Peter Navarro** - Professor, Univ. of California Irvine
- Wilbur Ross** - Investor, WL Ross and Co.
- Anthony Scaramucci** - Managing Partner, SkyBridge Capital
- Steve Feinberg** - CEO of Cerberus Capital Management
- Stephen Calk** - Founder and chairman, The Federal Savings Bank
- Howard Lorber** - Chairman of Douglas Elliman (real estate brokerage)

**Financial Services Advisors (continued)**

**David Malpass** - Founder of economic consulting firm Encima Global

**Steven Mnuchin** - Former Goldman Sachs banker and film producer

**John Paulson** - President and CEO of investment firm Paulson & Co.

**Steven Roth** - Founder and chairman of Vornado Realty Trust

**Larry Kudlow** - Economic analyst, commentator, and syndicated columnist

**ADMINISTRATION PRIORITIES**

President-elect Trump has not announced a specific agenda for the regulation of the financial services industry. As with other sectors of the economy, the Trump Administration likely will follow a general de-regulatory policy that is focused on allowing businesses to expand and increase hiring. Indeed, the President-elect has committed to repealing or at least reforming the Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). With respect to regulatory policy, the Trump Administration will begin with an effort to identify wasteful and unnecessary regulations that impede job growth and that can be eliminated. The following describes specific areas that may be targeted for reform and provides a general overview of the new administration’s approach toward the financial sector.

**General Regulatory Atmosphere.** President-elect Trump likely will afford broader latitude for financial firms to provide their services. Financial institutions may anticipate that the growth of regulatory initiatives to slow substantially. This is particularly the case in areas where regulation is perceived to delay economic growth. In a similar vein, the new administration would likely advance a more balanced enforcement policy. As a candidate, President-elect Trump especially criticized the Consumer Financial Protection Bureau (CFPB) and its extensive enforcement agenda. Even if the new administration cannot abolish the CFPB, it will discontinue the Obama Administration’s aggressive pursuit of enforcement actions by the agency and other regulators. The new administration will not rely on “disparate impact” theories in enforcement litigation.

**Systemic Regulation.** The new administration’s policies as to the scope and scale of financial regulation may be shaped by fallout from ongoing inquiries into misconduct at large institutions. The Republican Party platform, however, included a surprising goal of reinstating the Glass-Steagall Act. If the Republican Congress achieves this goal, then there will be calls for a fundamental re-evaluation of a host of regulations adopted since 1999.

The new administration will take its own tack and not defer to international banking groups, such as the Financial Stability Board (FSB), with respect to systemic regulation and “shadow banks” (financial companies that are not banks). This will likely make the administration take a more measured approach toward implementing any new capital, margin, or collateral requirements that are advocated by the FSB, the Basel Committee on Banking Supervision, or International Monetary Fund. The new administration is likely to resist changes to US financial regulations unless changes are simultaneously implemented in comparable form by other financial centers.

**Housing Finance.** The status of Fannie Mae and Freddie Mac remain open questions. The Government-Sponsored Enterprises remain in conservatorship, and currently pay nearly all of their earnings to the federal government. It is thought that the President-elect may embrace proposals to transfer their portfolios and businesses entirely to the private sector or to create a new entity that would perform similarly to the Government-Sponsored



Enterprises, albeit in a more limited fashion. In the meantime, the new administration will seek to make rental housing and home ownership more affordable by decreasing regulatory burdens for real estate developers, rental housing providers, and the real estate markets in general. It also will seek to increase banks' willingness to provide housing finance by reducing the burdens associated with CFPB rules and the likelihood of CFPB enforcement actions.

**Financial Crimes, System Security, and Technology.** Certain regulatory priorities are expected to remain in place and possibly enhanced. Financial regulatory agencies will likely continue to expect that institutions maintain and enforce strong anti-money laundering programs. Cyber-security also will continue as a high priority as threats in this area increase. Regulators will pay significant attention to cyber-preparedness when examining any financial institution. Regulators also will assess how new technologies may be incorporated into the financial system. For example, the Comptroller of the Currency will continue its consideration of a new limited-purpose charter for "fintech" companies.

**AGENCY LEADERSHIP**

The Trump Administration is expected to be heavily-populated by non-career politicians with substantial ties to business and the financial sector. The Treasury Secretary position is no exception. The President-elect is expected to nominate Steve Mnuchin, former Goldman Sachs partner and cofounder of hedge fund Dune Capital Management. Other rumored picks for the post currently include:

- **Larry Kudlow**, economic analyst, commentator, and syndicated columnist
- **Bob Corker**, US Senator from Tennessee
- **Carl Icahn**, investor, founder of Icahn Enterprises
- **Henry Kravis**, co-founder of private equity firm KKR & Co.
- **Jack Welch**, former CEO of General Electric

**CONGRESSIONAL LEADERSHIP**

**House.** Rep. Jeb Hensarling (R-TX) will remain chairman of the House Financial Services Committee, a position he has held since 2013. Chair Hensarling has been a vocal critic of the Dodd-Frank Act and has pursued (generally unsuccessfully) a number of changes to the law since its enactment. His Democratic counterpart on the committee will once again be Ranking Member Rep. Maxine Waters (D-CA).

**Senate.** Sen. Michael Crapo (R-ID) will likely be the new chair of the Senate Banking Committee, as the outgoing chair, Sen. Richard Shelby (R-AL), is term-limited. Sen. Crapo previously served as ranking member of the committee from 2013-2014. Sen. Sherrod Brown (D-OH) will remain as ranking member of the committee.

**CONGRESSIONAL PRIORITIES**

With the Republicans retaining control of Congress and seizing the White House, we expect that Chair Hensarling and the House Financial Services Committee will continue to revisit proposals to scale back Dodd-Frank Act reforms. The Senate Banking Committee will follow suit to some extent, but will be more susceptible to pushback from Sens. Brown and Elizabeth Warren (D-MA). Both Senators will fight attempts that they believe will weaken Dodd-Frank at both the committee level and on the Senate floor, where procedural rules give the minority greater ability to obstruct or at least delay action.

It is likely that the Senate will be ground zero for Democratic efforts to block action on GOP priorities. The Republicans' narrow majority in the Senate, combined with procedural rules that give the minority party substantial power, mean that Democrats will be able to obstruct certain policy measures. The dynamics may be similar to what Senate Republicans did in the first two years of the Obama Administration. Thus, the possibility of major reforms to Dodd-Frank, while greater given next year's unified Republican control, is tempered by the narrow margin they hold in the Senate.

**Dodd-Frank Overhaul.** The opening salvo from Republicans happened when Chair Hensarling introduced his plan to replace Dodd-Frank earlier this year in the form of his Financial *CHOICE (Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs) Act*. With full knowledge that there is no chance for enactment in this Congress, the bill was clearly intended to set the table for 2017 by defining the parameters of the financial regulatory reform debate. Among the reforms included in the Financial CHOICE Act are:

- Repealing the FSOC's ability to designate Systemically Important Financial Institutions (SIFI). This would repeal the entirety of Title II of Dodd-Frank and add a new chapter to the bankruptcy code designed for large financial institutions.
- Establishing a voluntary "off-ramp" from Dodd-Frank regulation and Basel III standards for banks choosing to maintain certain capital standards.
- Eliminating the Volcker Rule.
- Replacing the CFPB with a 5-member commission subject to Congressional oversight.
- Abolishing the Office of Financial Research.
- Reauthorizing and reforms the Securities and Exchange Commission for 5 years.
- Repealing the Department of Labor's Fiduciary Rule.
- Repealing the entirety of Title VIII of Dodd-Frank (Financial Market Utility Designations).
- Repealing the Chevron deference doctrine for financial regulators.
- Requiring cost-benefit analyses for financial regulations.
- Imposing greater congressional oversight of financial regulators' appropriations.

These reforms represent a laundry list of Republican priorities and will have varying prospects for success in the coming Congress. Senate Democrats may well be able to block many of these reforms.

**Volcker Rule/Incentive Compensation Limits.** Republicans have made no secret of their desire to overturn the Volcker Rule as well as remove the incentive compensation limits under Section 956 of the Dodd-Frank Act. Both of these priorities were included in Chair Hensarling's Financial CHOICE Act that was adopted by the Financial Services Committee (along near-party lines) in September. Republicans, however, would need to convince a number of Senate Democrats to join them on this effort to overcome a likely Democratic filibuster, and their ability to do so remains to be seen.

More incrementally, Federal Reserve Chair Janet Yellen, in testimony before the House Financial Services Committee on September 28, expressed support for exempting community banks from the Volcker Rule and from the incentive compensation limits under section 956 of Dodd-Frank. There has been some bipartisan agreement on the need for relief for community banks, and it is possible that action in this area could be pursued. While we expect that the progressive wing of the Democratic Party will push back on any such changes, some relief for community banks remains possible. Trump is unlikely to support anything Elizabeth Warren is pushing.

**Consumer Financial Protection Bureau.** Congressional Republicans, with Rep. Hensarling chief among them, have long criticized what they describe as the CFPB's nearly unlimited power. They will undoubtedly continue efforts to curtail its authority under the Trump Administration.

Two developments in particular will embolden Republicans on this front. First, the ongoing investigations of Wells Fargo have already provided an opening for Republicans to say that the CFPB was asleep at the switch, and we expect that this line of criticism will continue in the new Congress. Second, the recent DC Circuit Court decision holding that the CFPB's structure is unconstitutional (while allowing it to continue operating with a director that can be removed without cause) will ensure continued focus on the Bureau's future.

**\$50 Billion Threshold for Enhanced Supervision of Bank Holding Companies.** A number of members of Congress, particularly Republicans, have advocated for raising the current threshold of \$50 billion in assets for bank holding companies to be subject to enhanced prudential supervision under Dodd-Frank. Legislation aiming to do that (among other Dodd-Frank reforms) was marked up in the Senate Banking Committee in 2015, but thus far the bipartisan consensus needed to enact such reforms has proven elusive. Still, Federal Reserve Board Governor Daniel Tarullo has specifically advocated raising the threshold, and Federal Reserve Chair Yellen has signaled an openness to it as well.

**Wells Fargo.** If there has been any area of financial services policy where partisan lines have virtually disappeared, it has been in the investigation of Wells Fargo's unauthorized accounts. We expect that congressional investigations will continue into 2017, and it is conceivable that the probe could widen its focus to other banks if there is evidence of similar incentive structures to those that drove the Wells Fargo scandal.

To be sure, partisanship will return as the discussion turns to how to prevent such fraud in the future. Chair Hensarling has already used the scandal to attack the CFPB, while Democrats have used it to criticize the *Financial CHOICE Act*. For now, we can expect a fair amount of cooperation until the investigation concludes.

**Glass-Steagall.** The Democratic National Committee supported adopting an updated and modernized version of Glass-Steagall in its platform. The surprising inclusion in the Republican National Committee platform of reinstating Glass-Steagall has raised numerous eyebrows in the financial services sector, but it remains to be seen whether such a proposal would have any chance in the 115th Congress. We view its inclusion there largely as a product of new participants in the platform process who reflect the populist bent that fueled the Trump candidacy. It remains to be seen whether the parties can work together on such legislation.

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★ KEY TAKEAWAYS ★

- President-elect Trump’s foreign policy will be a dramatic shift from the Obama Administration’s, and is likely to include more cordial relationships with Russia, demands for NATO countries to fund their share of peacekeeping operations, and efforts to renegotiate international trade agreements.
- Leadership on key House and Senate committees is unlikely to change. There will likely be oversight of the Trump Administration related to military buildup in China and relations with Russia.
- The Syrian refugee crisis, the Iranian nuclear deal, and the escalating conflict in Yemen will continue to be a priority for the Trump Administration and Congress.

**ADMINISTRATION PRIORITIES**

Under the Trump Administration, foreign policy will be undergoing a sea change from the Obama Administration. We expect President-elect Trump to prioritize a few foreign relationships, notably the United Kingdom, where the Brexit vote forced a leadership change in government. Cultivating a relationship with the United Kingdom’s Prime Minister also serves as a quick check on the European Union (EU), where Trump skepticism is quite high.

As for China, President-elect Trump is likely to initially seek a much harder line against the country that will reshape American relations with other countries worried about China’s growing sphere of influence. Some American diplomatic and military resources also will be newly focused on Russia’s resurgence.

We expect President-elect Trump’s foreign policy agenda to focus on five key principles:

- Focusing military assets on winning the War on Terror and pursuing terrorist organizations wherever they reside;
- Restraining other military intervention to instances where American interests are directly threatened;
- Revamping trade policy to more broadly represent American economic interests;
- Recasting relationships with Russia and China to check their growing influence in world events; and
- Restricting the proliferation of weapons of mass destruction by Iran and North Korea.

In an environment where the American military faces high-tech threats from Russia and China along with low-tech warfare from a range of terrorist organizations, we expect President-elect Trump to work with Congress to increase long-term defense spending, handle needed procurement reform, and rebuild American military capabilities.

## CONGRESSIONAL LEADERSHIP

**House.** Rep. Ed Royce (R-CA) will continue to chair the House Foreign Affairs Committee (HFAC), a post he has held since January 2013. Rep. Eliot Engel (D-NY), ranking member of the committee since 2013, also will retain his position.

Rep. Kay Granger (R-TX) has chaired the Appropriations Subcommittee on State, Foreign Operations, and Related Programs since 2011, but she has expressed interest in becoming chair of the Subcommittee on Defense in the 115th Congress. Should she move to the Defense Subcommittee, Rep. Mario Díaz-Balart (R-FL) will be the most senior Republican on the State, Foreign Operations, and Related Programs Subcommittee. Rep. Nita Lowey (D-NY) will retain her post as ranking member of the subcommittee.

**Senate.** Sen. Bob Corker (R-TN) will chair the Senate Foreign Relations Committee (SFRC). If Sen. Bob Corker (R-TN) is appointed to a position in President-elect Trump's Cabinet, the gavel will likely go to Sen. Jim Risch (R-ID), the second most senior Republican on the committee. Sen. Ben Cardin (D-MD) will remain the ranking member, a position he held in the 114th Congress.

Sen. Lindsey Graham (R-SC) is expected to remain in his position as chair of the State, Foreign Operations, and Related Programs Subcommittee. Similarly, Sen. Patrick Leahy (D-VT) is expected to remain on as the subcommittee's ranking member.

## CONGRESSIONAL PRIORITIES

Rep. Ed Royce has demonstrated a commitment to the cause of global human rights, which will likely be a continued focus for the House Foreign Affairs Committee. In response to the State Department's confirmation that its \$400 million payment to Iran was conditioned on the release of American prisoners, he sponsored the *Prohibiting Future Ransom Payments to Iran Act* (H.R. 5931), which passed the House by a vote of 254 to 163, but stalled in the Senate. Under his leadership, the committee could use its oversight authority to review Iran's implementation of the nuclear accord.

On the appropriations side, Rep. Kay Granger is likely to continue to seek decreased spending on foreign assistance. The geographic distribution of foreign assistance funds is heavily concentrated in Africa, particularly throughout Sub-Saharan Africa, and in parts of Southwest and Southeast Asia. The House Appropriations bill set funding levels for FY 2017 at \$595 million below FY 2016 and \$691 million below the President's budget request.

President-elect Trump has praised Russian President Vladimir Putin for his strength and leadership. He has stated that German Chancellor Angela Merkel is his favorite world leader, but he nonetheless criticized her for allowing a large number of refugees into her country (476,000 Syrian refugees received asylum in Germany in 2015).

President-elect Trump, in addition to being critical of other North Atlantic Treaty Organization (NATO) countries' support levels, has said he would like to see NATO's priorities shift away from Russian deterrence toward combating international terrorism and migration. A Republican Congress is not likely to support the President-elect's threat of withdrawal from NATO, but Republican leaders could take a closer look at the balance of indirect spending among NATO partners.

**Syria.** President-elect Trump has expressed concern regarding the Syrian refugee crisis, and has not called for the ousting of Syrian President Bashar Al-Assad, arguing that Russia and the Syrian leader should be allowed to continue fighting the Islamic State in Syria (ISIS).

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In contrast to President-elect Trump’s call for “extreme vetting” of all immigrants, including Syrian refugees, Reps. Royce and Eliot Engel, the Chair and Ranking Member of the HFAC, have called for restricting resources to the Assad regime in response to the “[annihilation] of its own people.” On the Senate side, SFRC Chair Bob Corker has expressed concerns about Russian activity in Syria, and criticized the Obama Administration for failing to resolve the issue or reach a successful ceasefire. The conflict in Syria is likely to continue to force Russia and the US to the negotiating table again, with world leaders, including German Chancellor Angela Merkel and French President François Hollande, who are pressing for a ceasefire. While Republican leaders in Congress may disagree with the Administration’s approach to Syria and the refugee crisis, the President-elect will have wide latitude to act on his campaign promises.

**Russia.** Republican leaders in Congress do not share President-elect Trump’s views on US relations with the Kremlin. HFAC Chair Rep. Royce has said that Russia and President Putin’s interests conflict directly with those of the US. He has also been critical of the Obama Administration for trying too hard to cooperate with Russia. Similarly, SFRC Chair Bob Corker criticized Obama Administration Secretary of State John Kerry for “laying prostrate” in front of Russia, and will be unlikely to look favorably upon strengthening ties between the US and the Kremlin. Sen. Corker’s views on Russia may mean he is more likely a pick for the Treasury spot in the Trump Cabinet, rather than State.

**China.** President-elect Trump has been critical of China with respect to its economic policy and expansion efforts in the South China Sea. He said he will label China a currency manipulator, crack down on hacking efforts, and threaten the Chinese government with increased tariffs unless current trade agreements are rewritten. The President-elect has outlined a policy that will instruct the US Trade Representative to bring trade cases against China in the US and at the World Trade Organization to contest China’s subsidy policies that favor Chinese companies and give them a competitive advantage in global trade, to the detriment of US interests.

President-elect Trump has said he would expand US military presence in the South China Sea as a deterrent to China’s territorial claims in the region. HFAC Chair Royce and SFRC Chair Corker have also expressed concerns about Chinese actions in the South China Sea, but would likely oppose a military buildup and could withhold funding as a check on the power of the Executive Branch. Rep. Royce has also been a champion of expanding human rights and freedom of information in China and throughout Asia as a counterweight to China’s influence in the region.

**Iran.** Sen. Corker supported the 2015 Iran nuclear agreement, but Rep. Royce has repeatedly expressed concerns about a nuclear Iran and what it could mean for the US. Whether the deal is renegotiated, we can expect to see a shift in US relations with Iran under the Trump Administration.

Many Republicans in the House and Senate opposed the Obama Administration’s 2015 nuclear deal with Iran, and HFAC Chair Ed Royce is expected to introduce a renewal of the 1996 Iran Sanctions Act (ISA), which is due to sunset on December 31, 2016. The ISA, including several subsequent amendments to it such as 2010’s Comprehensive Iran Sanctions Accountability and Divestment Act, provides a statutory basis for many of the sanctions that were imposed on Iran to combat nuclear proliferation. While the House is expected to push for a vote on the renewal before the ISA expires, it is less clear how the Senate will react. Assuming there are no new sanctions in the renewal legislation, it is likely that the measure will be approved with strong bipartisan support. The Obama Administration, however, has made clear that it does not believe the measure is necessary, stating that although the ISA has expired, it allows the President and the Treasury Department to retain the ability to reinstate sanctions if Iran violates the nuclear agreement.

While Rep. Ed Royce hopes to move the ISA before the next Congress, reactions to President Obama’s landmark nuclear deal will continue into 2017. The Prohibiting Future Ransom Payments to Iran Act (H.R. 5931) passed

the House in 2016, and would prohibit future cash payments to Iran for any reason. Rep. Ed Royce referred to the payment as “dangerous,” and has made clear that preventing any future payment is a priority for him. This legislation is not likely to continue to move this year, but could arise again next year.

**Yemen and the Persian Gulf.** For over a year, Yemen has been engulfed in a series of conflicts that have pushed it to the edge of civil war. The conflict, fought mainly between the Yemeni government and Zaidi Shia rebels known as Houthis, has escalated since September 2014, when Houthis took control of Yemeni capital Sanaa. This led to formation of a coalition of Arab states intervening on behalf of the government and President Abdrabbuh Mansour Hadi.

In October, 2016 the Saudi-led campaign conducted airstrikes killing more than 140 people in Yemen. The US sent Navy warships to the area, and just one week later the ships were targeted (though not struck) by the Houthi rebels. The US responded by initiating its own airstrike against coastal radar sites in Houthi-controlled Yemeni territory. While the US has been indirectly involved in the conflict for some time (without any troops on the ground) this incident is likely to focus attention of both the Trump Administration and Congress on the region.

The Obama Administration announced plans to review its support to the Saudi-led coalition following the recent attacks. It is difficult to predict what will happen with the Trump Administration in the Red Sea or elsewhere in the region. Both House Foreign Affairs Committee leaders have spoken out against the Houthi rebels, and against Iran for its support of them. Until this point they have advocated only for logistical and intelligence support in the area, but it is possible this could shift in light of the strikes against US warships. We can also expect congressional leaders to be concerned about the humanitarian crisis the conflict has created and lack of civilian protections.

## **CONTACT INFORMATION**

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★ KEY TAKEAWAYS ★

- Affordable Care Act (ACA) repeal is now a near reality, threatening loss of coverage for an estimated 20 million Americans. The incoming administration’s plan to repeal the ACA and replace it with free market principles is simple as a sound bite, but the devil is in the details.
- Drug pricing will continue to be a key issue for both the new administration and Congress, but we do not expect major policy change in the near term.
- While Senate health committee leaders will remain, the 115th Congress will bring new leaders to the Energy and Commerce Committee, both at the full committee and Health Subcommittee levels.

**Transition Team for Healthcare**

**Rich Bagger** - Executive Vice President at Celgene Corp.

**Jamie Burke** - Principal at Burke Consulting, LLC

**Healthcare Advisors**

**John Ridings Lee** - CEO of North American National Risk Service, LLC.

**ADMINISTRATION PRIORITIES**

President-elect Trump’s transition team for healthcare is led by Rich Bagger, who is currently an executive at Celgene Corp. and was previously at Pfizer. Mr. Trump’s principal healthcare advisor, John Ridings Lee, is a longtime insurance company executive and personal friend. The campaign’s healthcare agenda was developed with little input from inside-the-Beltway veterans of previous Republican administrations.

**Affordable Care Act.** The healthcare agenda for the incoming administration is as simple as a sound bite, but the devil is, as always, in the details. The President-elect campaigned by promising to repeal the ACA and replace it with a series of reforms that will follow free market principles, including eliminating the individual mandate and broadening healthcare access, purporting to make healthcare more affordable and higher in quality. A full repeal of the ACA also would eliminate popular insurance market reforms, such as community rating and guaranteed issue, as well as the Medicare Part D coverage gap discount program. Repealing the ACA’s payment rate cuts to healthcare providers, such as hospitals, post-acute care facilities, and Medicare Advantage plans, would increase federal entitlement spending by over \$700 billion, according to the Congressional Budget Office’s (CBO) 2012 estimate.



President-elect Trump's platform also includes a plan to permit the sale of health insurance across state lines, while converting Medicaid to a block grant program. States are expected to make up any shortfalls in federal funding by eliminating fraud and abuse. The plan also would permit individuals to fully deduct health insurance premium payments from their taxes, and permit tax-free contributions to health savings accounts that could be used by any member of a family and passed on to heirs without a death penalty.

Repealing the ACA is estimated to result in a loss of insurance coverage for about 20 million Americans, according to a RAND Corporation economic model. Permitting a new tax deduction for health insurance would cause a smaller loss of coverage, of 15.6 million individuals. On the other hand, converting Medicaid to a block grant program would result in 25 million fewer individuals having coverage in 2018. The political fallout that would result from such a massive loss of insurance coverage likely will cause Congress to look for alternative strategies, as discussed below.

**Prescription Drug Pricing and Drug Importation.** On the campaign trail, President-elect Trump broke rank with many Republicans in Congress, such as House Ways and Means Committee Chair Kevin Brady (R-TX), when he announced that he would permit Medicare to negotiate prescription drug prices. The campaign website describes only one proposal relating to lowering prescription drug prices, which would permit importation of “safe and dependable drugs from overseas.” Whether President-elect Trump will actually effectively move on such initiatives, however, remains to be seen.

**Regulatory Actions.** President-elect Trump's campaign website claims that he will “put the job-killing regulation industry out of business,” “issue a temporary moratorium on new agency regulations,” and “cancel immediately all illegal and overreaching executive orders.” Republican members of Congress have expressed concerns about many of the activities of the Center for Medicare and Medicaid Innovation (CMMI), but the CBO has estimated that repealing its authority would cost \$34 billion over the next decade. That being the case, expect President-elect Trump to wind down current CMMI initiatives, such as the Comprehensive Care for Joint Replacement Model, the Oncology Care Model, and certain accountable care organizations (ACOs) over the next few years, and to halt new initiatives that were proposed by the Obama Administration but have not yet started, such as the Medicare Part B Drug Payment Model.

**Food and Drug Administration.** Although little has been said by the Trump campaign about FDA policy, it is likely that President-elect Trump would support federal enactment of the “Right to Try” legislation that has been enacted in many states, and seek to lower barriers to expanded access to drugs by terminally ill patients. More generally, we expect the Trump Administration's deregulatory agenda to include efforts to speed drugs to market, such as through greater reliance on real-world evidence. The FDA also will be under enormous pressure to issue guidance clarifying the boundaries for communication of truthful, non-misleading, scientific unapproved use information; if not, Congress will act to redefine the FDA's authority from a statutory perspective. This may be part of a lame duck attempt to pass the *21st Century Cures Act*, or as part of user fee reauthorizations next year. We also expect that the effort to institute broader FDA regulation of laboratory-developed tests will be greatly diminished in scope, if not abandoned.

**MACRA Implementation.** *The Medicare and CHIP Reauthorization Act of 2015* (MACRA) was passed by Congress a few weeks after Health and Human Services (HHS) Secretary Sylvia M. Burwell announced a goal of tying 50 percent of Medicare fee-for-service payments to quality or value through alternative payment models (APMs), such as accountable care organizations or bundled payments, by the end of 2018. The incoming Trump Administration's deregulatory agenda could wind down the CMMI's APM pilots, leaving only the highest-performing physicians and other healthcare professionals in the Merit-Based Incentive Payment System (MIPS) eligible to benefit from MACRA's \$500 million pool of bonus payments. If the Centers for Medicare and Medicaid

Services (CMS) does wind down the number of APMS, forcing virtually all physicians to participate in MIPS, then it is likely that CMS will continue to provide other avenues for physicians to avoid penalties, such as extending the policy for 2017 where reporting of a single quality measure avoids penalties. The MACRA final rule, released October 14, gives eligible clinicians in MIPS flexibility to report for a 90-day period rather than a full year as proposed, and will help those in small practices and those that have not previously participated in the legacy programs with the transition. The final rule revises the low-volume threshold to exclude roughly one-third of clinicians from the reporting requirements and payment adjustments and reduces the number of improvement activities participating clinicians must report. CMS will not count the cost category toward clinicians' total scores in the first year and has further reduced the number of required objectives and measures for clinicians' use of electronic health records (EHRs). However, CMS expects that most MIPS-eligible clinicians will be ready to meet Stage 3 objectives and measures using an EHR certified to the 2015 edition, which may prove to be an overly ambitious goal as no such EHR is yet on the market. President-elect Trump has not spoken publicly about MACRA or physician payment reform, so it remains unclear whether the new administration will support MACRA implementation. Republican (and Democratic) support offers some level of protection for the overreaching goals of the law, but implementation issues could lead to policy modifications and delays.

## **AGENCY LEADERSHIP**

President-elect Trump's choice for a Secretary of Health and Human Services will most certainly be a strong critic of the Affordable Care Act. Potential nominees include Florida Governor Rick Scott, Louisiana Governor Bobby Jindal, and retired pediatric neurosurgeon Ben Carson, MD, who ran in the Republican primary. The fate of FDA Commissioner Califf is not clear at this time, although it is possible that he will remain in place in the near term.

## **CONGRESSIONAL LEADERSHIP**

**House.** The 115th Congress will bring new leadership to the Energy and Commerce Committee, both at the full committee and Health Subcommittee levels. Republican term limits prevent Rep. Fred Upton (R-MI) from continuing as chair of the full committee. Rep. Upton has served as the Republican lead of the committee since 2010, and has spent the final years of his tenure championing the 21st Century Cures Initiative, which aims to accelerate the pace of drug and device discovery, development, and delivery. Three committee members are vying for the gavel, including Rep. John Shimkus (R-IL), National Republican Congressional Committee (NRCC) Chair Greg Walden (R-OR), and a long-shot bid from Chairman Emeritus Joe Barton (R-TX), who chaired the committee from 2004 to 2007. While Rep. Shimkus's seniority was thought to give him a slight edge, Rep. Walden has been praised for his fundraising prowess and leadership this cycle, which helped to preserve the Republican majority in the House. Both Reps. Shimkus and Walden have impressive records of service on the committee, though it would be notable if the Steering Committee disrupted regular order of seniority. Rep. Frank Pallone (D-NJ) is expected to continue to serve as ranking member.

The Energy and Commerce Subcommittee on Health will also see a shakeup as Chair Joe Pitts (R-PA) will retire after serving ten terms in Congress, and the past six years leading the Health Subcommittee. There are two healthcare professionals pursuing the role of ranking member, including Rep. Tim Murphy, PhD (R-PA), a psychologist who earned distinction by championing mental health reform, and Rep. Michael Burgess, MD (R-TX), an obstetrician, who has long taken an informal leadership role at the committee on health policy issues. While Rep. Burgess currently serves as the Commerce Subcommittee chair, we expect a sincere attempt to win the leadership post on the Health Subcommittee. Rep. Gene Green (D-TX) will likely continue to serve as ranking member.

Chair Kevin Brady (R-TX) and Ranking Member Sander Levin (D-MI) are expected to continue to lead the Ways & Means Committee, which oversees tax policies and several federal healthcare programs. While Rep. Pat Tiberi

(R-OH) will likely remain as chair of the Health Subcommittee, Ranking Member Jim McDermott (D-WA) will leave a vacancy when he retires at the end of this year. Rep. Mike Thompson (D-CA) and Rep. Ron Kind (D-WI) are the next Democrats in line on the subcommittee.

**Senate.** With the Republicans retaining control of the Senate, Chair Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) will continue in their roles to lead the Health, Education, Labor, and Pensions (HELP) Committee.

Similarly, on the Finance Committee, Chair Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) are expected to retain their positions. Health Subcommittee Chair Pat Toomey (R-PA) won a tight race, and is expected to continue as chair. Ranking Member Debbie Stabenow (D-MI) will continue as ranking member of the Health Subcommittee, unless Sen. Murray moves to a leadership position on the Appropriations Committee.

## CONGRESSIONAL PRIORITIES

Following a challenging election year, the 114th Congress will adjourn with several, significant healthcare proposals left unresolved. We anticipate that lawmakers will have several key policies to grapple with from the start. Medical innovation reforms – which have been championed by outgoing Energy and Commerce Committee Chair Upton, and have been named as a top priority for Speaker Paul Ryan (R-WI) and Majority Leader Mitch McConnell (R-KY) – will remain a priority, if not passed before the end of the year. Other unresolved issues may include mental health reform and funding to respond to the opioid epidemic. There will be several must-pass healthcare packages in the 115th Congress that could serve as a vehicle for these policies, with authorizations for several healthcare programs expiring at the end of FY 2017, including the Children’s Health Insurance Program (CHIP) and the FDA user fee programs (Prescription Drug User Fee Act (PDUFA), Medical Device User Fee Act (MDUFA), the Biosimilars User Fee Act (BsUFA), and the Generic Drug User Fee Act (GDUFA)).

**Affordable Care Act.** With Republicans in control of the administration and both chambers, they will be in the ideal position to repeal and replace the ACA, and overcome Democrats’ calls to improve the existing law. While many implemented provisions may prove challenging to undo, we can expect the Republican Congress and Administration to pursue repeal vigorously.

The Republicans’ ACA repeal-and-replace effort will be guided by Speaker Paul Ryan’s *A Better Way*, which the Speaker has repeatedly called “our plan for 2017.” Republicans support repealing the ACA in its entirety, and have emphasized provisions that they perceive as particularly burdensome or costly, including the individual and employer mandates, the Independent Payment Advisory Board (IPAB), the Center for Medicare & Medicaid Innovation (CMMI), the medical device tax, and the excise tax on high-cost employer health benefit plans (Cadillac tax). Republicans propose replacing the ACA with a competitive, consumer-driven plan that provides individuals and families with a monthly, universal, advanceable, refundable tax credit, adjusted for age, that could be used to help offset the cost of purchasing coverage. The Republican’s plan would expand the use of health savings accounts (HSAs) and health reimbursement accounts (HRAs), make coverage portable from job-to-job, and allow purchase across state lines. It would likely retain popular consumer protections enacted under the ACA, including the ban on coverage denials or exclusions based on preexisting conditions. While Speaker Ryan has suggested that the House may use reconciliation to repeal the law, they may not have to rely on the procedure with a Republican-controlled administration and Congress.

In some instances, Republicans may be joined by the growing number of Democrats who have become open to exploring fixes to the ACA. For example, a bipartisan majority voted to place a moratorium on the medical device tax through December 31, 2017. While there is a significant cost associated with permanent repeal, lawmakers are expected to consider attaching a short-term extension of the moratorium on the medical device tax to the Medical Device User Fee Act (MDUFA) reauthorization bill.

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**Medicare.** With a Republican Congress and administration, we anticipate that traditional GOP themes on entitlement reform will be back in play. The CBO projects that Medicare spending will double by 2026, and the Medicare Trustees estimate that the Medicare Hospital Insurance (HI) trust fund will expire in 2028, which is two years earlier than last year’s report.

House Speaker Paul Ryan’s plan, endorsed as the official Republican platform, calls for significant changes to the Medicare benefit. Those changes include combining Part A and Part B with a unified deductible, 20 percent coinsurance, and a catastrophic limit, which the CBO in 2013 estimated would reduce federal spending by \$54 billion over the next decade. Another element of the plan would permit the Medicare Advantage program to compete against traditional Medicare in a premium support model where the government makes a defined contribution and beneficiaries are liable for additional costs. CBO estimated in 2013 that premium support could reduce Medicare spending (and shift costs onto beneficiaries) by anywhere from \$22 billion to \$275 billion over the next decade, depending upon how the federal contribution is structured.

In an effort to address rising costs, the Ways and Means and Finance Committees will likely continue to examine payment reforms, which will be informed by the Medicare Payment Advisory Commission’s (MedPAC) repeated call for bundled and site-neutral payments. A particular emphasis during the 114th Congress has been addressing the treatment of chronic conditions, which accounts for 93 percent of Medicare spending. If the Finance Committee’s bipartisan Chronic Care Working Group, led by Sen. Johnny Isakson (R-GA) and Sen. Mark Warner (D-VA), is not able to pass legislation before the end of this year, we expect that it will continue its effort in the 115th Congress.

Lawmakers are also expected to continue efforts to combat Medicare fraud and abuse, which contributes to billions of dollars in improper payments per year. A particular focus during the past year has been exploring reforms to the Stark law, which prohibits physician self-referrals in the Medicare and Medicaid programs. Following a December 2015 roundtable, jointly hosted by the Senate Finance and House Ways and Means Committees, Finance Committee Chair Hatch released a white paper on stakeholders’ perspectives for improving the law. While policy proposals have not been distilled into legislation yet, this effort will likely continue in the 115th Congress.

Congress will also closely oversee CMS’s implementation of MIPS and APMs, the new physician payment systems under MACRA. Both the Ways and Means Committee and the Finance Committee called CMS Acting Administrator Andy Slavitt to testify on MACRA implementation earlier this year. More recently, bipartisan House members “urged” Secretary Burwell to consider “flexibilities for all practitioners” when implementing the Quality Payment Programs under MACRA.

**Medicaid and the Children’s Health Insurance Program.** Nearly five years after the US Supreme Court ruled that states may choose whether to expand Medicaid, lawmakers continue to debate how to cover individuals in the 19 non-expansion states. Democrats have vowed in their platform to “keep fighting” until Medicaid expansion is adopted in all states. However, with a Republican Administration and Congress, lawmakers will be in a strong position to push policies that emphasize state authority and administration of the program. Speaker Ryan’s *A Better Way* proposes two alternatives to Medicaid expansion that states could choose between: (1) block grant; or (2) per capita allotment, which would make available starting in 2019, a total federal Medicaid allotment that states could draw down on based on their federal matching rate.

Congressional discussions will be influenced by recommendations from the Medicaid and CHIP Payment and Access Commission (MACPAC), which recently conducted analyses of drivers of Medicaid spending and made recommendations to Congress looking at ways to reduce state and federal expenditures through alternative financing approaches and policy choices. In addition, MACPAC is conducting analyses around how Medicaid expansion affects states’ uncompensated care, impacting states disproportionate share hospital (DSH) allotments, findings which will influence recommendations to the 115th Congress on DSH payments.

Lawmakers will also look to reauthorize CHIP, which was extended under MACRA through FY 2017. CHIP reauthorization has historically enjoyed bipartisan support, though Republicans will have to contend with the 23 percent enhanced Federal Medical Assistance Percentage (e-FMAP) under pressure from states relying on the additional support. A proposal to allow states to use CHIP funds to purchase coverage for eligible children in the exchanges has been critiqued by MACPAC Commissioners and is not likely to be supported by either party. Many of the Commissioners have agreed CHIP funding should be extended for a minimum of five years, but are divided over whether the maintenance of eligibility provision and enhanced federal match should be extended or phased out, proposals which will be voted on in December 2016 and will influence legislative proposals on children's healthcare coverage.

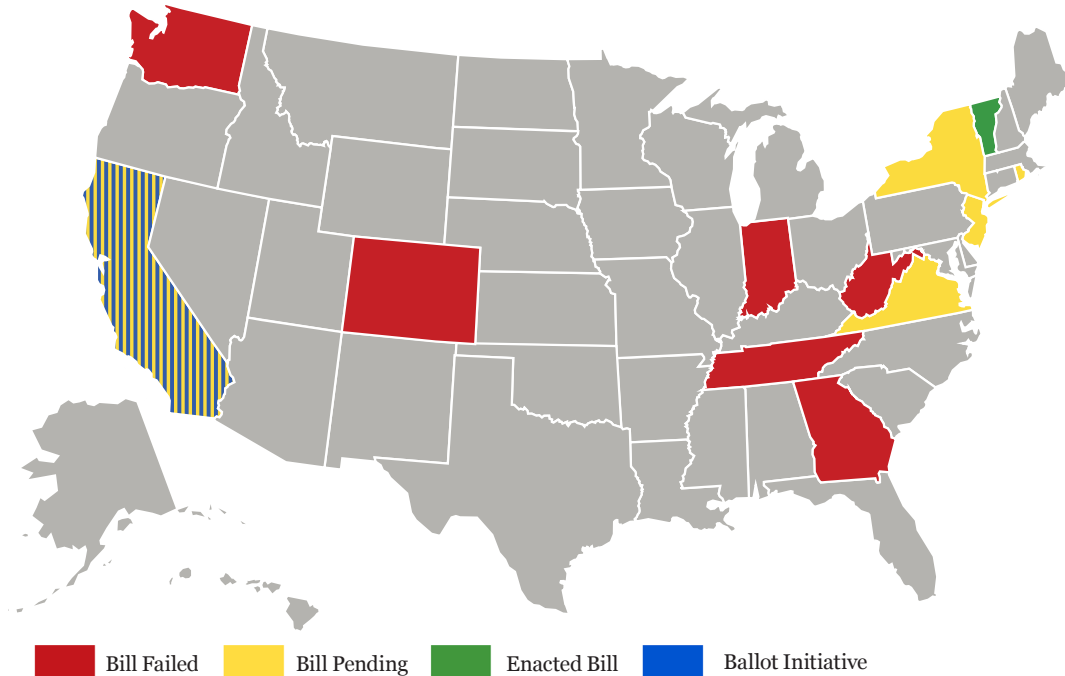
**Prescription Drug Pricing.** As publicity and congressional scrutiny over rising prescription drug prices has intensified, drug pricing is going to be a key issue in 2017. During the 114th Congress, several healthcare and oversight committees held hearings on drug pricing practices, and several bills aimed at increasing competition and lowering federal drug spending were introduced. While Republicans have traditionally been a more sympathetic audience on issues surrounding research and development, we expect prominent leaders like Sen. Chuck Grassley (R-IA) to remain vigilant in their work to combat rising drug prices. As is the case historically, we expect that proposals aimed at curbing spending under Medicare Part D, which is estimated to account for \$94 billion of government spending in 2017, will be reintroduced during the 115th Congress. Common Part D drug pricing proposals include repealing the noninterference clause, requiring rebates from manufacturers for drugs for low-income beneficiaries, reimportation, accelerating closure of the Part D coverage gap, and prohibiting pay-for-delay agreements, all of which enjoy support from congressional Democrats but many of which have been fiercely opposed by Republicans. We expect little action on major policies despite potential pressure from the Trump Administration on policies such as reimportation.

Part B drug pricing has also gained increasing attention, in light of CMS proposing a new Part B Drug Payment Model to test alternative payment models for Part B drugs in an effort to drive down the \$22 billion Medicare spent on Part B drugs in 2015. Though not yet finalized, bipartisan lawmakers have criticized the far-reaching, mandatory nature of the proposed model through means such as a House letter sent to CMS with 242 member signatures. Unless the final rule makes necessary modifications, we expect the new Congress to continue fighting to ouster the demonstration. Rep. Larry Bucshon (R-IN) introduced legislation this Congress to block the program, which we expect to be reintroduced next Congress, unless the new administration pulls the demonstration first. The bill was scored at \$395 million over ten years, lower than many initially expected, boding well for potential action in Congress. We also expect to see Republican efforts to abolish CMMI altogether, either as part of ACA repeal or stand-alone.

An increase in spending on drugs by the federal government also impacts safety-net hospitals who rely on the 340B Drug Discount Program in order to provide outpatient drugs to the low income populations they serve. To date, Congress has held off on any major reforms to the 340B program, awaiting HRSA to clarify certain 340B guidelines through regulation. However, we may see legislation introduced prior to any actions taken by the agency.

The battle over the cost of drugs is not restricted to the federal government, with nearly a dozen state governments considering legislation to increase transparency into manufacturers' practice of drug pricing, which was already signed into law in the state of Vermont. Efforts at the state level are likely to put added pressure on the federal government to take action. Aside from federal proposals to increase transparency of drug prices through means like the creation of a drug pricing oversight panel, other proposals likely to seek attention in the next Congress aim to introduce more generics into the marketplace to increase competition and drive down costs.

## 2016 State Drug Pricing Transparency Proposals



A bill attracting significant interest is the *Creating and Restoring Equal Access to Equivalent Samples Act (CREATES Act)*, which seeks to reduce delays and anticompetitive practices in bringing generic drugs and biosimilars to the market. The bill addresses the Risk Evaluation and Mitigation Strategies (REMS), which are designed to ensure that higher-risk drugs are dispensed safely to patients, but which the sponsoring senators allege has been used by brand-name drug companies to prevent potential generic competitors from obtaining drug product needed as part of the generic development process. House and Senate health committee leaders are considering modified language that could be used as an offset for the 21st Century Cures medical innovation bills.

**Medical Innovation.** If congressional leaders are not able to move a package of biomedical innovation bills during the lame duck session, action will be a top priority at the beginning of the 115th Congress. Both chambers have independently considered legislation that aims to accelerate the pace of drug discovery, development, and delivery. The House passed the comprehensive *21st Century Cures Act*, while the Senate HELP Committee’s analogous effort, known as *Innovation for Healthier Americans*, stalled amid negotiations over offsets and whether to authorize mandatory funding for the National Institutes of Health (NIH). While the medical innovation package could move on its own, it is likely that it would be attached to one of next year’s several must-pass healthcare vehicles - most likely, PDUFA reauthorization.

**Food.** Though the Child Nutrition Act (CNA) expired at the end of FY 2015, Congress will continue discussing reauthorization of the law that governs the school meals programs and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). The House Education and Workforce Committee and the Senate Committee on Agriculture, Nutrition, and Forestry have both moved reauthorization bills out of committee, but neither has been brought to the floor.

Additionally, with the Agricultural Act of 2014 (Farm Bill) expiring at the end of FY 2018, the 115th Congress will need to reauthorize the law that governs several nutrition and agriculture programs, including the Supplemental Nutrition Assistance Program (SNAP), commodity programs, and crop insurance. Debates that were raised during the 2014 Farm Bill reauthorization are expected to resurface, including the Republican-backed proposal to block grant SNAP.

**Cosmetics.** The push for increased FDA oversight over cosmetics may gain some traction in the 115th Congress. Sens. Dianne Feinstein (D-CA) and Susan Collins (R-ME), Energy and Commerce Committee Ranking Member Pallone, and Rep. Leonard Lance (R-NJ) have increased visibility of this issue. Their bicameral proposals include requiring manufacturers to register with the FDA, directing FDA to establish good manufacturing practice (GMP) regulations for cosmetics, updated labeling requirements, giving FDA mandatory recall authority, and requiring manufacturers to report serious adverse events to the agency. If passed by Congress, the legislation would likely face a veto from President-elect Trump. Though President-elect Trump has not specifically addressed this policy, he has called for reducing the role of the federal government and rolling back FDA's food safety regulations.

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★ KEY TAKEAWAYS ★

- President-elect Trump’s immigration proposal will be a non-starter for Democrats in both chambers and may force a bipartisan effort in the Senate to negotiate with the White House. Democrats will rally behind a path to citizenship as a non-negotiable.
- Both sides of the aisle will feel pressured to make immigration reform a policy priority given the high stakes of the 2018 mid-term election with 25 Democratic Senate seats in play.
- While some expect Republicans to unify on an immigration reform measure, it is likely that Republican leaders will face significant challenges, especially in the House, with the growth of the Freedom Caucus in its size and capacity to influence. In the Senate, some Republicans will look to serve as a check on the Trump Administration, given the large number of Latino voters in their states.

**ADMINISTRATION PRIORITIES**

President-elect Trump campaigned with immigration reform as a top priority, a priority based on a few principles which reject business as usual in Washington. Now, he will have the capability to implement many of those principles, but will need congressional approval for implementation of his full immigration reform agenda.

We should expect to see President-elect Trump issue Executive Orders in the opening days of his Administration suspending, withdrawing, or limiting many of the executive actions President Obama took on immigration in the last eight years. The Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs are likely to be halted immediately. The Trump Administration will seek unprecedented new resources for the Border Patrol in upcoming budget requests as the President-elect often singled out Border Patrol officers – a cause and group he regularly championed in campaign speeches. It remains doubtful that the Trump Administration can actually request and receive from Congress enough money for a major increase in the deportation of illegal immigrants already in the country, so look for the White House to focus its efforts on making it more difficult for more illegal immigrants to enter the country.

The President will now need to focus on fulfilling his campaign promise to build a wall on the Mexican border, a wall he promised Mexico would pay for directly or indirectly. It will be easy for the President-elect to make such a budget request and to blame the Republican Congress if it fails to fund it in full while he pursues a plan for Mexico to pay. That will force Republicans in Congress to fund the wall, at least in part, because they will likely not want to handle the intra-party criticism that comes with blocking a signature program of the new President. We also expect to see President-elect Trump propose a tax on remittances to Mexico as the primary funding vehicle for the new wall.



## AGENCY PRIORITIES

President-elect Trump has made immigration reform one of his signature campaign issues and will likely try to push a policy reform measure through Congress before the 2018 mid-term election, where Republicans have the advantage to retake the Senate with 25 Senate Democratic seats in play. A Trump Administration’s proposal will likely end a path to citizenship and include reforms on:

**Border Security.** President-elect Trump will propose building an “impenetrable physical wall” on the southern border, an idea frequently touted on the campaign trail. At this point, he does not intend to request funding from Congress to pay for the wall, but would require Mexico to cover all costs. He also will look to increase the number of Border Patrol agents.

**Executive Orders.** President-elect Trump will quickly repeal President Obama’s executive orders DACA and DAPA. While most stakeholders expect the Trump Administration’s immigration reform measure to be considered by Congress, it may be possible that some aspects of the proposal would be implemented through executive actions.

**Deportations and Detentions.** While he has not specified how, President-elect Trump will look to deport undocumented immigrants who have criminal records, as well as end catch-and-release practices. As part of the proposal, he has stated that a process will be in place to ensure the countries from which the immigrants left will accept them once deported. On the campaign trail, he also mentioned that he does not plan to place immigrants in detention centers.

**Refugee Status.** President-elect Trump has called for a “vetting” of Muslims entering the United States. He has characterized the Syrian refugee crisis as the “Trojan horse” and will most likely not set a goal for the number of Syrian refugees to enter the US, as President Obama created with a benchmark of 10,000 Syrian refugees in 2016. Trump’s controversial proposal will receive considerable push back from immigration reform groups, as well as Democrats and some Republicans.

**H-1B Visa Program.** President-elect Trump also will look to reform the H-1B visa program, a non-immigrant visa that allows US companies to employ highly-educated workers. While Silicon Valley will look to protect the existing program, the President-elect has expressed concerns with the program related to wage theft and having immigrants eligible for H-1B visas pitted against US citizens for high-skilled jobs, particularly those in the tech industry. He could release a proposal increasing wages paid to H-1B visa recipients to an extent where companies may be more inclined to hire Americans for entry-level jobs. The proposal also may require companies to offer jobs to Americans first before foreign workers.

**Sanctuary Cities.** The Trump Administration will look to end sanctuary cities, which aligns with Republican efforts in the House and Senate this year.

## AGENCY LEADERSHIP

President-elect Trump has not indicated who is on his short list to serve as his Secretary of Homeland Security, but former New York City Mayor Rudy Giuliani’s name has been floated. With Giuliani being one of Trump’s top surrogates and given his experience as mayor of New York City during the September 11, 2001 terrorist attacks, President-elect Trump will view him as well positioned for the Cabinet position. Law enforcement unions were a source of strong support for the Trump campaign and we would not be surprised if the Secretary of Homeland Security comes from the ranks of successful big city police chiefs or even from the military.

## CONGRESSIONAL LEADERSHIP

**House.** Rep. Bob Goodlatte (R-VA) will continue to chair the House Judiciary Committee and Rep. John Conyers (D-MI) will continue as ranking member. Rep. Trey Gowdy (R-SC) will likely remain the chair of the Subcommittee on Immigration and Border Security, with Rep. Zoe Lofgren (D-CA) staying on as ranking member.

**Senate.** We expect Sen. Chuck Grassley (R-IA) to remain chair of the Judiciary Committee and Sen. Patrick Leahy (D-VT) staying on as the ranking member.

## CONGRESSIONAL PRIORITIES

Immigration reform will be a top legislative priority for both parties. While Congress will not overhaul the immigration system until 2017, in the lame-duck session it is likely that both chambers will look to reauthorize the EB-5 Regional Center Program temporarily or long-term, which was set to expire on September 30. The somewhat controversial program allows immigrants to apply for legal permanent residence if they invest \$500,000 in a US commercial project or create 10 jobs in the country. While Congress extended the program as part of the continuing resolution (CR) ending on December 9, there are technical and legal questions raised by the Congressional Research Service (CRS) about whether the program’s extension through a CR properly meets the sunset provisions outlined in the law.

Democrats and Republicans in both chambers also will prioritize immigration reform on their agenda as major reforms have not been enacted since 2000. Both parties understand the importance of appealing to Latino voters, especially Republicans, who remain wary that Latino support for Democrats will cost them future national elections even as this year’s election swung in large part on immigration proposals opposed by Latino voters. In the House, Speaker Paul Ryan (R-WI) has indicated his willingness to address immigration reform in 2017, despite his hesitations to do so in 2016. Additionally, following the presidential campaign, there will be considerable pressure on both parties to address national security concerns as it relates to border security.

In the House, Speaker Ryan or his successor will have serious challenges to contend with in getting meaningful immigration reforms passed, and he may largely defer to President-elect Trump to show hardliners that some of their proposals can’t pass. The Speaker would then be able to offer some more moderate proposals that could pass. There also will be large numbers of members that have served in Congress for less than six years, which means the leadership will need to spend significant time educating members on relevant immigration reform issues and the recent legislative history of those issues. The President-elect’s biggest battles with his own majority in the House may come from the questions building a wall along the southern border and enacting a ban of all Muslims or Muslims from certain countries. While Speaker Ryan expressed the need for strong border security, a Trump Administration may be at odds with Speaker Ryan’s position on border security and an all Muslim ban, which Ryan has denounced as unconstitutional.

Additionally, congressional Democrats will do their best to unify around an alternative comprehensive immigration reform bill, which will give Latino voters and their allies something to rally around in the immigration fight and heading into the 2018 mid-term elections. For Democrats in the House, efforts to reform the immigration system are already underway as Reps. Luis Gutiérrez and Zoe Lofgren have held discussions about drafting immigration reform legislation to be introduced in 2017.

Given the narrow margin of party control in the Senate, there will be questions about a “Gang of 8” revival and its influence it could have over immigration reform discussions, especially as many Democratic stakeholders will view the closely-divided Senate as the singular check on a Trump Administration. Current Senate Majority Whip John Cornyn (R-TX) has called the revival of the “Gang of 8” as a “non-starter,” while other Senators have

expressed interest, including presumed Minority Leader Chuck Schumer (D-NY), an original “Gang of 8” member. Other original “Gang of 8” members who may be most likely interested in the group reconvening are Sens. Jeff Flake (R-AZ) and Robert Menendez (D-NJ). Of note, Sen. Flake has been a staunch critic of President-elect Trump throughout the election. Yet, there are original members, including Republican Sens. John McCain (AZ) and Marco Rubio (FL), who will be much more careful about articulating their immigration positions this year, especially since President-elect Trump carried both their states in this week’s election.

While discussions on immigration reform will include numerous issues, some of the key issues that will likely be considered are:

**Border Security.** Overall, Republican and Democratic leadership in both chambers will favor increased funding to support a multi-asset approach to secure the border, including more Border Patrol agents, aerial vehicles, land monitors, and drones. Republican leaders in both chambers, especially Speaker Ryan, will have to contend with those Republicans pushing to enact President-elect Trump’s policy proposal to fund building a wall along the southern border of the country. While there may be bipartisan support to build a wall at certain points along the southern border, the issue overall will be a non-starter for Democrats. It will also be problematic for Republicans up for re-election in 2018 and who have a high population of Latino voters in their states. Congress also will consider the issue of granting the Border Patrol better access to federal lands to assist with enforcement. Both parties will approach legislating on border security from a national security perspective and introduce bills that better secure ports of entry in detecting and guarding against weapons of mass destruction threats.

**Pathway to Citizenship.** Democrats have indicated that reform measures that fail to include a pathway to citizenship are non-starters in both chambers. President-elect Trump has indicated he would not consider the pathway question until Congress has effectively improved border security. Senate Democrats will likely make this issue a central part of their efforts to derail any immigration bill that lacks a path to citizenship.

**Employment Eligibility Verification and Worksite Enforcement.** The current Employment Eligibility Verification (E-Verify) system, which confirms that employees are authorized to work in the US, has raised numerous concerns, including a lack of minimum and uniform standards of compliance for states. It is likely that Republicans will look to require all employers to use the E-verify system and address compliance standards and funding for the system. Many Democrats will likely take issue with the requirement, citing civil rights concerns and objecting to reforming the E-Verify system through a piecemeal approach. Depending on the language of the bill, privacy groups will raise questions should proposals require elements such as photo matching requirements. These groups will not only appeal to some Democrats, but also to libertarian and privacy hawk Republicans, such as Sen. Rand Paul (R-KY). Congress also will likely attempt to change the exemption from E-Verify for independent contractors because many allegedly use it as a workaround to avoid verifying the status of potential or new employees.

**Visa Security and Refugee Status.** One of the issues that will likely break partisan lines in Congress is reforming the H-2A worker program, which helps the agriculture industry address seasonal work demands that result in worker shortages. The industry will likely seek reforms that modernize and streamline the application process as agricultural employers have said it is too slow to meet industry’s demands. Additionally, many in the agriculture industry will argue that Congress must reform the visa program to allow current skilled laborers to have a pathway to legal status.

Congress also will look to reform the H-1B visa program and will need to consider President-elect Trump’s proposal, as he is concerned with wage theft and lowering incentives for companies to hire American workers.

There will be much debate over President-elect Trump’s proposals for “extreme vetting” of people entering the US from countries with high Muslim populations, including how to address the Syrian refugee crisis. President-elect Trump characterizes the current process to allow Syrian refugees to enter the US as a “Trojan horse.” While Democrats, Speaker Ryan, and other Republicans have denounced an outright ban on Muslims, the issue of a some type of ban may be considered.

Both parties will introduce legislative measures to modernize the visa security process with proposals to expand the Visa Security Program to locations where terrorist groups have a presence. Additionally, the reform would help federal agencies better detect fake documents, complete fraud assessments, and track individuals digitally. There also will likely be a debate on whether to authorize federal agencies to revoke visas of foreign nationals for security purposes.

**President Obama’s Executive Actions on Immigration.** With a Republican Congress and administration, President Obama’s first executive order on DACA in 2012 will be ineffective. The executive order grants illegal immigrants under the age of 31 years who came to the US at 16 years of age or younger a two-year stay of deportation and work permits. As such Democrats and some congressional Republicans will look to afford some protections for immigrants such as “DREAMers.”

**Sanctuary Cities.** A Republican Congress will likely pass measures to defund sanctuary cities — cities and counties where local law enforcement decide not to cooperate with the federal government on immigration enforcement. Earlier this year, Republicans in the Senate were unsuccessful at passing a bill eliminating funding to sanctuary cities, led by Sen. Pat Toomey (R-PA), in large part due to Democrats unifying against the bill.

## CONTACT INFORMATION

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**INSURANCE**

★ **KEY TAKEAWAYS** ★

- President-elect Trump will take office with two big unfinished items from the Obama Administration — a covered agreement with the EU and finalization of the Federal Reserve’s capital standards for insurers.
- Congress will be focused largely on reauthorization of the NFIP for most of 2017, where dramatic changes to the program could result.

**Transition Team for Insurance and Financial Services**

- William Hagerty** - Director of Appointments, Trump Transition Team
- Eric Ueland** - Staff Director, Senate Budget Committee
- Paul Winfree** - Heritage Foundation economist
- Daris Meeks** - Attorney

**Insurance and Financial Services Advisors**

- Stephen Moore** - Heritage Foundation
- Peter Navarro** - Professor, Univ. of California Irvine
- Wilbur Ross** - Investor, WL Ross and Co.
- Anthony Scaramucci** - Managing Partner, SkyBridge Capital
- Steve Feinberg** - CEO of Cerberus Capital Management
- Stephen Calk** - Founder and Chairman, The Federal Savings Bank
- Howard Lorber** - Chairman of Douglas Elliman (real estate brokerage)
- David Malpass** - Founder of economic consulting firm Encima Global
- Steven Mnuchin** - Former Goldman Sachs banker and film producer
- John Paulson** - President and CEO of investment firm Paulson & Co.
- Steven Roth** - Founder and chairman of Vornado Realty Trust

## ADMINISTRATION PRIORITIES

President-elect Trump’s policy agenda in the insurance realm will likely be limited — as it is for most administrations — given the state-based regulatory system. Nevertheless, the Trump Administration will inherit a number of outstanding insurance matters that will require high-level attention.

**Covered Agreement Negotiations with the European Union.** The Obama Administration’s Treasury Department and the US Trade Representative (USTR) have been in the process of negotiating a “covered agreement” with the European Union (EU) over the past year to address concerns regarding the treatment of US firms by European regulators under Solvency II, as well as concerns by non-US reinsurers about state-level reinsurance collateral requirements.

While negotiations are ongoing, both sides continue to express optimism that an agreement will be reached. An agreement is likely to grant the United States “temporary equivalence” under Solvency II, while providing for some form of collateral reduction for EU-based reinsurers (likely based in part on the National Association of Insurance Commissioners’ (NAIC) Credit for Reinsurance Model Law). An agreement along these lines was contemplated even prior to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) — indeed, the covered agreement provisions of Title V were crafted with this purpose in mind — and there is increasing interest on both sides of the aisle to see an agreement concluded. Should an agreement be reached it may only take effect after a 90-day “layover” period for congressional review.

The ability of a covered agreement to preempt state law on a limited basis, while seen as necessary to effectuate international commitments, is the NAIC’s principal reason for opposing the current negotiations. The NAIC’s opposition, however, may not be enough to prompt congressional action to stop a deal if it is seen as positive for the United States.

If an agreement is not reached prior to President-elect Trump taking office, several of the US negotiators are likely to change, and an agreement is likely to be delayed further. It is unclear, however, whether there would be any substantial shift in position on the covered agreement from the Obama Administration to the Trump Administration.

**Insurance Capital Standards.** The Federal Reserve (Fed) continues to develop capital standards tailored for insurers that they supervise by virtue of the fact that the insurer (a) has been designated as a systemically important financial institution (SIFI) by the Financial Stability Oversight Council (FSOC), or (b) owns a bank or thrift.

The Fed issued a long-awaited advance notice of proposed rulemaking laying out a proposed regulatory framework in June 2016, but final regulations do not appear imminent. The next administration will be tasked with finalizing these regulations while continuing to engage with stakeholders.

**Cyber Insurance.** The Treasury Department, particularly Deputy Secretary Sarah Bloom Raskin, has taken an active interest in promoting the development of the cyber insurance market. Treasury, as well as some members of Congress, have taken the view that such insurance can be an effective market-based driver of better cyber hygiene among businesses of all sizes. While this issue has generally not been a partisan one, it is unclear whether the incoming administration will take a similar interest in monitoring the growth of the cyber insurance market and pursuing policies to foster its development.

## AGENCY LEADERSHIP

There are only two positions at the federal level that deal specifically with insurance: the independent insurance expert serving on the FSOC and the Director of the Federal Insurance Office (FIO).

In the case of the FIO Director, that position is appointed by the Treasury Secretary — not the President — so the most likely candidates may not be known until after the new Treasury Secretary is named. Current FIO Director Michael McRaith is almost certainly not a candidate to continue in the position in a Trump Administration.

The FSOC’s Independent Member with Insurance Expertise, Roy Woodall, is nearing the end of his six-year term, which will expire in September 2017, and thus the Trump Administration will need to either reappoint Mr. Woodall or appoint a replacement.

**CONGRESSIONAL LEADERSHIP**

**House.** Rep. Jeb Hensarling (R-TX) will remain chair of the House Financial Services Committee, a position he has held since 2013. His Democratic counterpart on the committee will once again be Ranking Member Maxine Waters (D-CA).

**Senate.** Sen. Michael Crapo (R-ID) will likely be the new chair of the Senate Banking Committee, as the outgoing chair, Sen. Richard Shelby (R-AL), is term-limited. Sen. Crapo previously served as ranking member of the committee from 2013-2014. Sen. Sherrod Brown (D-OH) will remain as ranking member.

**CONGRESSIONAL PRIORITIES**

With Republicans retaining control of the Senate and the House and gaining the White House, they will have a freer hand to pursue legislative priorities in Congress provided it is not contrary to the administration’s agenda. The Republicans’ narrow majority in the Senate combined with procedural rules that give the minority party substantial power, however, mean that Democrats will be able to obstruct certain policy measures. The dynamics may be similar to what Senate Republicans did in the first two years of the Obama Administration. All that having been said, insurance regulatory policy debates do not always fall neatly along party lines.

**Flood Insurance Reauthorization.** *The Biggert-Waters Flood Insurance Modernization Act* of 2012 is due to sunset on September 30, 2017, perhaps making the reauthorization of the National Flood Insurance Program (NFIP) the most pressing congressional insurance priority. The issue is likely to remain in the forefront given that Sen. Chuck Schumer (D-NY), who has been extremely active on flood insurance issues following Superstorm Sandy, will take over as Senate Minority Leader.

With a current debt estimated at \$23 billion, the NFIP remains controversial on a variety of fronts, and we anticipate numerous proposals to drastically change the program in the coming year. Chair Hensarling and a number of his Republican colleagues have made no secret of their desire to see greater participation of the private sector in flood insurance, while Ranking Member Waters has advocated forgiveness of the \$23 billion debt as part of the reform effort.

There have been a number of flood insurance-related hearings in Congress during 2016 in preparation for the reauthorization, and we expect there will be more throughout 2017. Given the timing of the program’s expiration, action on reauthorization legislation is likely to commence quickly in the new year. The Trump Administration will be, to some extent, a latecomer to this debate, but will play no less critical a role.

**International Capital Standards.** With Republicans holding their majority in the House, we expect that congressional scrutiny of US participation at the International Association of Insurance Supervisors (IAIS) will continue much as it has in recent years. In particular, the concern that the IAIS may adopt an international capital standard that is inconsistent with the US regulatory structure has led to numerous congressional hearings over the past several years focused on how the US participates at the IAIS, and what the implications such standards could have for US competitiveness.

**Terrorism Risk Insurance Act.** While the Terrorism Risk Insurance Act (TRIA) is not set to expire until 2020, some industry stakeholders have suggested that Congress continue to examine potential changes to the program far in advance of that sunset, given the market disruption caused by last-minute reauthorization (or, in the case of the latest reauthorization, the brief lapse of the program). To this end, congressional hearings on TRIA are possible in the 115th Congress, although we do not anticipate any effort to move legislation.

## **CONTACT INFORMATION**

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★ **KEY TAKEAWAYS** ★

- It remains unclear what specific policies the new administration will push in 2017, but most congressional Republicans will look to inform the Trump Administration’s policy agenda on Intellectual Property.
- With many congressional proponents of comprehensive patent reform returning, the prospects that the 115th Congress will act on patent reform are strong.
- With Senate Democrats still in the minority, it remains to be seen if the “pro-patent holder” post-grant process changes pushed by Sens. Durbin and Coons and supported by universities and the BIO/PhRMA community will fare better in the new Congress.

## ADMINISTRATION PRIORITIES

During the campaign, President-elect Trump released a policy statement on protecting American intellectual property (IP) holders from Chinese piracy in the broader context of reforming US trade policies with China. Details about proposed reforms were not discussed, but President-elect Trump opposes the Chinese government requiring US companies to transfer technology to Chinese companies before entering the country’s market. Given President-elect Trump’s protectionist statements on trade and foreign policy, including his opposition to the Trans-Pacific Partnership, it is reasonable to presume his policies on intellectual property also will focus on strengthening protections for US companies. It remains unclear what specific policies the new administration will push in 2017, but most congressional Republicans will likely seek to educate the Trump Administration’s IP policy agenda.

## AGENCY LEADERSHIP

Neither President-elect Trump nor anyone on his transition team has signaled who might assume cabinet level or under-secretary level positions at the Department of Commerce.

## CONGRESSIONAL LEADERSHIP

**House.** On the House side, Republicans retained their majority and shake-ups in leadership are not expected. Rep. Bob Goodlatte (R-VA) will continue to chair the House Judiciary Committee and Rep. John Conyers (D-MI) will continue as ranking member. Rep. Darrell Issa (R-CA), a strong proponent of patent reform, is expected to continue chairing the Subcommittee on Courts, Intellectual Property and the Internet, while Rep. Jerry Nadler (D-NY) should continue as the subcommittee’s ranking member. Overall, the congressional players on potential patent reform legislation in the 115th session of Congress will likely remain the same as those in this session.

**Senate.** Sen. Chuck Grassley (R-IA) will continue to chair the Senate Judiciary Committee and Sen. Pat Leahy (D-VT) will remain ranking member. Sens. Grassley and Leahy co-authored bipartisan legislation (S.1137, the *PATENT Act*) with Sen. John Cornyn who also is on the committee and currently Majority Whip.

## CONGRESSIONAL PRIORITIES

During the 114th Congress, there was a bipartisan effort to introduce comprehensive patent reform legislation in both the House (H.R. 9, the *Innovation Act*) and Senate (S.1137, the *PATENT Act*) that contained many provisions widely supported in Congress and by the Obama Administration. Both bills aimed to curb abusive practices in patent litigation through provisions including heightened pleadings requirements, fee-shifting, limits on discovery, stays of customer suits, and better disclosure of real party-in-interest information. The Senate’s *PATENT Act* also contained a popular provision aimed at abusive demand letters in patent litigation. The provision was amended in committee to change the post-grant process before the Patent Trial and Appeal Board (PTAB) and require the Board to construe claims under the same standard used in district court. This would have done away with the “broadest reasonable interpretation” standard long used by the Patent and Trademark Office (PTO) in an attempt to make the bill more palatable to the patent holders’ side. The provision, however, was opposed by many in the technology community and by those in the BIO/PhRMA sector who lobbied intensely for a carve-out from the PTAB changes.

The PTAB changes also were included in a Democratic bill (S.632, the *STRONG Patents Act*) along with other provisions seen as balancing the process at the PTAB towards the interests of patent holders. That bill, authored by Sens. Dick Durbin (D-IL) and Chris Coons (D-DE), was supported by the higher education community and BIO/PhRMA, but did not have the same level of broad bipartisan support as the *PATENT Act*.

With many of the patent reform proponents returning to Congress, the prospects that the 115th Congress will act on patent reform are strong. On the campaign trail, President-elect Trump did not detail his positions on the reform bills that moved in this Congress, meaning that Republican congressional leaders will look to inform the administration on patent reform to build on the momentum of 2015 and restart negotiations. With Senate Democrats still in the minority, it remains to be seen if the “pro-patent holder” post-grant process changes, pushed by Sens. Durbin and Coons and supported by universities and the BIO/PhRMA community, will fare better in the new Congress or again be the cause for derailing the bill.

## CONTACT INFORMATION

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★ **KEY TAKEAWAYS** ★

- The House Armed Services Committee will face large turnover of some of its most senior members leading to concerns about a defense brain-drain and the loss of institutional knowledge.
- Increasing defense funding and bolstering border security will be a top priority for Congress and the Trump Administration.
- President-elect Trump will significantly shakeup existing national security and defense policy positions which will impact key US alliances.
- Congress will continue to debate the appropriate course of action in Syria and Iraq while also addressing the threat of ISIS and homegrown extremism.

**Transition Team for National Security**

**J.D. Gordon** - retired Navy Commander

**National Security Advisors**

**George Papadopoulos** - formerly at the Hudson Institute

**Joseph Keith Kellogg** - retired Army Lieutenant General and Vice President of CACI International

**Joseph Schmitz** - former Inspector General of the Department of Defense

**Walid Phares** - former foreign policy campaign advisor to Gov. Mitt Romney and Fox News Commentator on Terrorism and Middle Eastern Affairs

**ADMINISTRATION PRIORITIES**

President-elect Trump’s national security policy agenda will shake up existing US foreign policy and national security frameworks. Most notably, we expect a more skeptical view toward US alliances with both the North Atlantic Treaty Organization (NATO), and Asian allies such as South Korea and Japan.

**Iran and Other Foreign Policy Issues.** President-elect Trump opposed the nuclear agreement with Iran, and has suggested that he will seek to re-negotiate the deal or reject the deal altogether. Therefore, he may not continue some of the Iran sanctions relief that the US granted after Iran met its initial commitments under the nuclear deal, which was effectuated through executive orders that can be changed by the new President. President-elect Trump also has promised to “reverse” President Obama’s loosening of the Cuba sanctions. While he will

continue the fight against the Islamic State of Iraq and Syria (ISIS), we expect that he will end any effort to support those seeking to force regime change in Syria. We also expect a much more pro-Russia foreign policy in Europe on such issues as Ukraine. The Baltic NATO members (Estonia, Latvia, and Lithuania) already have expressed concern that President-Elect Trump will not defend them against Russian aggression.

**Defense.** President-elect Trump supports a strong military, and we expect a significant increase in the defense budget. President-elect Trump has called for increasing defense spending by \$450 billion over a decade, including escalating spending on defense procurement, modernizing missile defense systems and Navy cruiser ships, and increasing military troop levels. One area where government contractors may see additional growth opportunities under the Trump Administration is support for offensive cyber operations. During the campaign, President-elect Trump placed an emphasis on the offensive (as opposed to defensive) use of US capabilities in cyberspace, saying that “[t]he United States must possess the unquestioned capacity to launch crippling cyber counter-attacks. This is the warfare of the future.” He has also expressed a desire to see wholesale changes in the General officer ranks, and will likely make significant and unprecedented changes to the Joint Chiefs of Staff and the Combatant Commands.

**Counterterrorism.** President-elect Trump will make significant changes to counterterrorism policies. In particular, he will use his executive authority over the Department of Homeland Security to significantly reduce, if not eliminate, travel by foreign visitors from countries thought to be home to terrorists. He has also indicated that he would reinstate waterboarding as a permissible interrogation practice, despite resistance from officials of the agencies that would be affected by that policy change.

## AGENCY LEADERSHIP

The open question for President-elect Trump is whether seasoned Republican national security experts, many of whom opposed him in the election, would be willing to accept a position in the Trump Administration. Possible appointees include:

- **Sen. Jeff Sessions** (R-AL), an early supporter of President-elect Trump, who would be a candidate for Secretary of Defense.
- **Sen. Bob Corker** (R-TN), Chairman of the Senate Foreign Relations Committee, has several staffers on the transition team, and is a serious candidate for Secretary of State.
- **Gov. Chris Christie**, is a leading candidate for Attorney General or Secretary of Homeland Security.
- **Lt. General Michael Flynn**, former Director of the Defense Intelligence Agency, is a candidate for Director of the Central Intelligence Agency (CIA) or Secretary of Defense.
- **Rudy Giuliani**, former Mayor of New York, is likely to be offered a national security position, such as Attorney General or Secretary of Homeland Security
- **Newt Gingrich**, former Speaker of the House, is a candidate for Secretary of State.
- **Stephen Hadley**, former National Security Advisor to President George W. Bush, was one of the few prominent Republican foreign policy experts to remain silent during the election. He could return to the position of National Security Advisor or accept a position in the Department of State or Department of Defense.

## CONGRESSIONAL LEADERSHIP

**House.** Rep. Mac Thornberry (R-TX), chair of the House Armed Services Committee (HASC), is expected to remain in his role, as is HASC Ranking Member Rep. Adam Smith (D-WA). At least eight seats on the HASC will be vacant because members ran for other office or have announced their retirement. Three of these members hold subcommittee leadership positions, including Rep. Randy Forbes (R-VA), who was defeated in his primary and chaired the Subcommittee on Seapower and Projection Forces in the 114th Congress. There are also two members who are running for the Senate: Rep. Joe Heck (R-NV), who will vacate his position as chair of the Subcommittee on Personnel and give up his position on the House Permanent Select Committee on Intelligence (HPSCI); and Rep. Loretta Sanchez (D-CA) who serves as ranking member of the Subcommittee of Tactical Air and Land Forces and is second in seniority on the House Homeland Security Committee. Other notable vacancies include Rep. Jeff Miller (R-FL), a senior member of the HASC and second in seniority on HPSCI, who announced his retirement earlier this year.

Rep. Hal Rogers (R-KY), who is term limited from remaining as the full chairman of the House Appropriations Committee, is expected to move to become chair of the Subcommittee on Defense after announcing his candidacy earlier this fall. He is favored for the position, but will compete against the Subcommittee on Defense Vice-Chair, Rep. Kay Granger (R-TX), who will otherwise continue to chair the Subcommittee on State, Foreign Operations and Related Programs. The current Subcommittee on Defense Chair, Rep. Rodney Frelinghuysen (R-NJ), is vying for the top spot as full Appropriations Committee chair and is favored to take the gavel. The current ranking member of the Subcommittee on Defense, Rep. Pete Visclosky (D-IN) is expected to hold his position. Two senior retiring members will be departing the Subcommittee on Defense.

The House Homeland Security Committee leadership is expected to remain unchanged with current Chair Michael McCaul (R-TX) and Ranking Member Bennie Thompson (D-MS), who has served as the committee's top Democrat since 2006. The leadership of HPSCI also is expected to remain unchanged in the 115th Congress with Rep. Devin Nunes (R-CA) and Rep. Adam Schiff (D-CA) staying on as chair and ranking member, respectively.

**Senate.** Sen. John McCain (R-AZ) is expected to remain as chair of the Senate Armed Services Committee (SASC) and Sen. Jack Reed (D-RI) will remain as ranking member of the full committee.

Sen. Thad Cochran (R-MS) who is expected to remain serving as chair of the Senate Appropriations Committee, is also expected to stay on as chair of the Subcommittee on Defense. Sen. Dick Durbin (D-IL) is expected to remain as ranking member of the subcommittee.

Sen. Ron Johnson (R-WI) is likely to continue to chair the Senate Homeland Security and Governmental Affairs Committee (HSGAC) Sen. Tom Carper (D-DE) may remain as the ranking member, but he may seek to serve as ranking member on the Senate Environment and Public Works Committee. In that event, Sen. Claire McCaskill (D-MO) may seek the ranking member position on HSGAC. Sen. Richard Burr (R-NC) will remain as chair of the Senate Select Committee on Intelligence (SSCI) and Sen. Dianne Feinstein (D-CA) will remain as ranking member.

## CONGRESSIONAL PRIORITIES

With Republicans in the White House and controlling both chambers of Congress, we expect to see a shift in favor of increased defense spending, although some of President-elect Trump's defense and national security policies will draw opposition from members of his party. Additionally, Republican leaders who withdrew support from President-elect Trump late in the campaign are likely to face challenging working relationships with the new administration. For instance, Senate Armed Services Committee Chairman John McCain, a respected voice on national security and defense issues, has spoken out against President-elect Trump's policies on how he would address the threat of terrorism, his comments on abandoning NATO partners, and comments regarding torture

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and bringing back interrogation techniques such as waterboarding. While President-elect Trump has walked back his comments on banning all Muslims from entering the US, some of the Republican leaders have called such efforts unconstitutional and impossible to implement.

**National Defense Authorization Act (NDAA).** One of the key decisions Congress will consider is funding for conflicts in Afghanistan, Syria, and Iraq. With President-elect Trump’s proposal to drastically increase defense spending, Congress will likely increase funding levels in the FY 2018 NDAA. The chairs of the Armed Services committees are likely to continue their focus on the implementation of the sweeping defense acquisition system reforms and modernization of the military health system initiated in the FY 2017 NDAA bill, and to seek additional funds to support local forces fighting against ISIS. Efforts to combat the nuclear modernization and military modernization efforts will also be among HASC Chair Mac Thornberry’s priorities.

**Combating ISIS and Terrorism.** The deadly ISIS-inspired attacks in San Bernardino and Paris renewed the debate in Congress over how to address the growing threat of ISIS and homegrown terrorism, prompting Republicans to push for further restrictions on Syrian refugees resettlement in the US. Under President-elect Trump’s Administration, Republicans are likely to enact enhanced vetting processes and tightened visa security standards for those seeking asylum and placing stronger restrictions on entry into the US from war-torn countries like Syria and Iraq, as proposed in the 114th Congress. However, even congressional Republicans will be resistant to President-elect Trump’s efforts to place a ban on Muslims entering the country, a campaign promise that received resistance from House Republican leadership, including House Speaker Paul Ryan (R-WI) and House Homeland Security Committee Chair McCaul, who raised concerns over banning people from an entire religion from entering the country. Rep. McCaul is also likely to advance policies focusing on combating ISIS propaganda through social media and developing counter-narratives through the Departments of Homeland Security and State.

**Nuclear Proliferation and Relations with North Korea and Russia.** Rep. Thornberry has focused on nuclear deterrence during his tenure as HASC chair and has been deeply concerned about North Korea and Russia’s capabilities. House Foreign Affairs Committee Chair Ed Royce (R-CA) has said the new administration must work with China to pressure North Korea over North Korean leader Kim Jong-un’s bold actions to promote the country’s nuclear ambition. It is difficult to predict how President-elect Trump will approach the issue with North Korea, given his conflicting statements during the campaign, including suggesting he would negotiate a deal with North Korean Supreme Leader Kim Jong-un, while also calling for China to solve the problem for the US. Republicans will likely introduce and pass sanctions bills and continue advocating for raising economic pressure on North Korea and China.

Given President-elect Trump’s suggestions that the US should withdraw from strategic alliances like NATO, and that countries such as Japan and South Korea should arm themselves, Republicans may support efforts to push NATO partners to pay more of their fair share, but will resist abandoning important allies. Republican leadership, including Senate Majority Leader Mitch McConnell (R-KY), distanced themselves from President-elect Trump’s statements that he would not automatically defend NATO allies in Eastern Europe if they are threatened by Russia. Additionally, questions regarding the direction of the US’s relationship with Russia will be a significant concern among not only congressional Democrats but also top Republican leaders, given President-elect Trump’s affinity for Russian President Vladimir Putin.

**Encryption and Cybersecurity.** Following the hacking of the Office of Personnel Management, Congress has called for proportional responses to hacking by state actors such as China and Russia. Republicans will seek to allocate more resources for the military, intelligence community, and law enforcement to combat cybercrime. Cybersecurity will remain an important focus for the 115th Congress, as members attempt to address a new frontier in data breaches and cyber threats.

Following the public battle between the Federal Bureau of Investigation (FBI) and Apple, over the San Bernardino terrorist's encrypted iPhone data, Congress recognized the need to update current laws to ensure that law enforcement and the intelligence community are able to address potential threats and access smartphones to aid their investigations. President-elect Trump, who called for a boycott of Apple over the incident, has sided with security and law enforcement advocates, and some Republicans have called for legally creating backdoors for law enforcement to circumvent encryption. House Homeland Security Chair Michael McCaul and Senate Intelligence Committee leaders, Sen. Richard Burr and Sen. Dianne Feinstein, introduced bills addressing encrypted data in the 114th Congress, and will re-introduce some of these measures in the 115th Congress. But any such legislation will face heavy scrutiny from the tech industry and privacy advocates, and opposition from many congressional Democrats. In the 115th Congress, a bipartisan working group, created by the House Judiciary and Energy and Commerce Committees, will continue its work to develop policy recommendations on encryption to prevent exploitation of it by bad actors.

Despite President-elect Trump's comments on restoring provisions of the Patriot Act that allow for bulk data collection, it is unlikely Congress will be willing to reopen that debate, given the continuing divide between defense hawks who have been proponents of restoring the program and more libertarian members of the Republican caucus.

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★ KEY TAKEAWAYS ★

- Despite one-party control of the political branches, we expect a certain level of congressional oversight of the Trump Administration as a check on executive overreach given the rifts within the party, President-elect Trump’s unilateral approach to governing, and the corresponding need for Congress to assert its institutional prerogatives.
- While Democrats will encourage and support oversight of the executive by the majority, private entities remain at risk of high-profile bipartisan investigations in both chambers.

**ADMINISTRATION PRIORITIES**

Our constitutional framework is designed to constrain what each branch may do by itself. For instance, federal courts interpret laws passed by Congress and determine the constitutionality of administration actions. Congress can pass legislation, but the President retains the right to veto a bill. The President may issue executive orders and agency directives, but they last only as long as the term of that Presidency, and can be voided by the courts.

One of the virtually unchecked tools available to the legislative branch, however, is the power of the majority to investigate and hold hearings. Congress considers oversight and investigations to be one of its core constitutional obligations, along with legislating, budgeting and appropriating funds, and consenting to administration nominees in the Senate. Historically, however, when the same party controls Congress and the executive branch, oversight of the administration is generally somewhat tepid—absent unusual circumstances. Given the poor relationships between seasoned Republican leaders in Congress and President-elect Trump, and general skepticism of his ability to govern with a measured hand, we expect the Republican-led Congress to exercise its oversight prerogatives to keep any overreach by the executive in check—up to a point. Republican committee leaders may be cautious about scheduling too many oversight hearings, given the opportunity such hearings would provide Democrats to question Trump Administration officials on camera. Moreover, most congressional Republicans will be leery of challenging a Republican administration to the extent it could harm their electoral chances in the mid-term elections. Nevertheless, the dynamic at play with President-elect Trump creates an unprecedented opportunity for Congress to use its oversight function to reset a balance of power that has shifted too far to the advantage of the Executive branch.

We can expect the Democratic minority to use some of the tactics Republicans used to thwart the Obama administration from implementing its agenda. Congressional Democrats will shine as much light as possible on every misstep by the President-elect’s administration as they keep an eye on the 2018 elections. Look for Democrats to attempt investigations of the new administration’s activities (albeit without a gavel or subpoena power); seek audits and investigations by Inspectors General and the Government Accountability Office; filibuster legislation and administration nominees in the Senate; intervene in private litigation against the



administration as amici curiae; and request administration ethics and law enforcement officials to investigate any misconduct, self-dealing, or abuses of power, and potentially demand a special prosecutor to investigate the President-elect or members of his administration.

Although congressional oversight hearings involving the executive branch can devolve into highly partisan political theater, the more credible and widely covered investigations tend to be bipartisan in nature, generally with private industry leaders on the hot seat. Witness, for example, September’s Senate Banking and House Financial Services Committees’ counter-punch hearings on Wells Fargo’s creation of accounts without customer consent, at which both Republicans and Democrats vied to express outrage on behalf of consumers and constituents. Likewise, pharmaceutical manufacturers have been the target of high-profile bipartisan, bicameral hearings in this session of Congress, with joint demands for volumes of sensitive commercial information about pricing and cost. We believe pharmaceutical pricing will continue to be a focus for bipartisan inquiries in the 115th Congress, along with issues such as fraud, abuse, and industry consolidation in various economic sectors.

The committees with the broadest jurisdiction in Congress are the House Committee on Oversight and Government Reform (HOCR) and the Senate Committee on Homeland Security and Governmental Affairs (HSGAC). These two committees have been vested by their parent chambers with wide-ranging authority to investigate virtually any activities involving the federal government, directly or indirectly.

## CONGRESSIONAL LEADERSHIP

**House.** With Republicans retaining control of Congress, Rep. Jason Chaffetz (R-UT), a former public relations executive, will continue chairing HOCR in the 115th Congress. Chaffetz served as prosecutor-in-chief for Republicans in the 114th Congress, zealously investigating the Obama Administration on issues such as the preliminary inquiry into Benghazi; implementation of the Affordable Care Act; misconduct in the Secret Service, Drug Enforcement Administration, and the Environmental Protection Agency; Internal Revenue Service targeting of conservative 501(c)(4) organizations; and the Office of Personnel Management data breach. Rep. Elijah Cummings (D-MD), an attorney and former leader of the Maryland legislature, will continue to serve as ranking member on the committee, as he has for the past two Congresses. Despite their philosophical differences and the highly partisan charge given their committee, the two leaders have maintained a working relationship with each other. They toured each other’s congressional districts before Rep. Chaffetz took the helm in 2015, and found common ground in the 114th Congress on issues involving the private sector, such as pharmaceutical pricing.

We also expect other House committees to conduct oversight on matters under their jurisdiction. For example, the House Energy and Commerce Committee’s Subcommittee on Oversight and Investigations has a tradition of bipartisan investigations involving the federal agencies under its aegis and the industries they regulate. Such oversight has often resulted in sweeping legislative reforms, such as the *Food Safety Modernization Act*, passed after a series of hearings on food-borne illness outbreaks, and the *Drug Quality and Security Act*, enacted in response to the fungal meningitis outbreak.

**Senate.** HSGAC has jurisdiction not only over the functioning of the federal government, parallel to that of HOCR, but also over matters related to the Department of Homeland Security. Sen. Ron Johnson (R-WI) is likely to remain as chair. Sen. Tom Carper (D-DE) may move to the Environment and Public Works Committee as ranking member, leaving the full committee Democratic post to Sen. Claire McCaskill (D-MO),

As for the Permanent Subcommittee on Investigations (PSI), Sen. Rob Portman (R-OH) is likely to continue chairing the subcommittee. Sen. Portman is widely recognized as a collegial and effective senator. During

his campaign against former Ohio Governor Ted Strickland, he noted that “referring to your opponent as the ‘enemy’ is part of the problem in Washington. I don’t believe you can be an efficient senator if you believe that the people on the other side are your enemy.” Although a staunch conservative, he is a pragmatic dealmaker with an understanding of how the executive branch works, having served as the Director of the Office of Management and Budget under President George W. Bush. He is likely to find ways to work across the aisle with Sen. Claire McCaskill (D-MO), who will likely continue serving as ranking member on PSI. PSI, with its broad investigative jurisdiction and its historic origins as “the Truman Committee” that exposed war profiteering in the 1940s under former Missouri Senator and President Harry S. Truman, has special meaning for Sen. McCaskill.

## CONGRESSIONAL PRIORITIES

**House.** While HOCR’s primary focus may remain on the government, the private sector will not be exempt from scrutiny by this committee and other committees in Congress. Recent examples include HOCR’s bipartisan hearings in February and September on drug pricing. Congress’s appetite to investigate various facets of pharmaceutical pricing, such as the role of pharmacy benefit managers, investors, patient assistance programs, rebates, discounts, and federal healthcare policy, has been whetted in the 114th Congress, and we expect additional focus on the pharmaceutical sector in the next Congress.

Even when congressional oversight ostensibly targets governmental actions or programs, corporate entities and individuals can be drawn in as sources of information and/or witnesses, particularly if they are government contractors or grantees. If a Trump Administration bristles at inquiries from the legislative branch (let alone flatly refuses to accommodate congressional requests), committee investigators will turn to additional sources, such as those doing business with the government, to gain insight into the government’s activities. Companies facing a request or subpoena for information or testimony from a congressional committee should promptly consult counsel for assistance.

With an all-Republican Congress, we think it highly likely that HOCR will revise and extend past congressional investigations of Hillary Clinton’s email scandal and the operations of the Clinton Global Initiative/Clinton Foundation.

**Senate.** The structure, role, and size of the Senate make it less subject to popular passions and high drama, but congressional oversight in the Senate can be just as fierce as in the House. Given the temperament of the leaders of the full HSGAC committee, and the anticipated need to address legislative matters within its jurisdiction, we believe much of the investigative work will fall to PSI. Sen. Portman’s position at the helm of PSI, with its sweeping investigative authority and powers, could provide a platform for high-profile clashes with the President-elect’s administration. It is also possible that Sen. McCaskill may be able to persuade Sen. Portman to join her in examining the pharmaceutical market, despite their different views of the causal factors for high drug prices.

**Other Senate Committees.** As is the case with the House, we expect other committees in the Senate—many with seasoned congressional investigative staff—to be active in congressional inquiries and hearings on matters under their jurisdiction. Among the most likely to remain active is the Special Committee on Aging, a non-legislative committee focused on policy and oversight relating to older Americans. It is also worth mentioning that some Senators, with or without gavels or the ability to hold hearings, have skilled professional oversight staff, either in their personal offices or through committee positions. For example, Sen. Elizabeth Warren (D-MA) has professional investigative staff, and has partnered with other senators

to investigate various matters. Although they are in the minority, should Democratic senators' investigations of President-elect Trump's administration encounter resistance, we may see holds on President-elect Trump's nominees until their requests are satisfied.

## **CONTACT INFORMATION**

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★ **KEY TAKEAWAYS** ★

- President-elect Trump’s tax plan focuses on dramatic tax cuts for businesses and individuals, while retaining certain deductions and incentives that might have otherwise made the plan less costly from a budget perspective.
- Congressional Republicans’ focus on a broader tax overhaul that is heavy on tax cuts, has substantial common ground with the President-elect’s agenda and could result in major action on a broad-based tax code overhaul in the 115th Congress.

<b>Transition Team for Tax Policy</b>
<b>William Hagerty</b> - Director of Appointments, Trump Transition Team
<b>Eric Ueland</b> - Staff Director, Senate Budget Committee
<b>Paul Winfree</b> - Heritage Foundation economist
<b>Tax Advisors</b>
<b>Peter Navarro</b> - Professor, Univ. of California Irvine
<b>Wilbur Ross</b> - Investor, WL Ross and Co.
<b>Anthony Scaramucci</b> - Managing Partner, SkyBridge Capital
<b>Larry Kudlow</b> - Economic analyst, commentator, and syndicated columnist

**ADMINISTRATION PRIORITIES**

President-elect Trump has outlined a tax plan that would provide substantial cuts across the economy, particularly for businesses and wealthy individuals. The major elements of his plan for individual income and corporate tax reforms are outlined below.

**Individual Income Tax Changes.** President-elect Trump proposes a number of cuts and reforms affecting individual taxpayers:

- **Rate Consolidation and Cuts.** President-elect Trump’s plan would consolidate individual tax brackets down to three: 12 percent, 25 percent, and a top rate of 33 percent. The plan would eliminate the individual alternative minimum tax (AMT) and repeal the 3.8 percent “Obamacare tax” on investment income.

- **Deductions.** President-elect Trump would propose to eliminate personal exemptions and dramatically raise the standard deduction to \$30,000 for joint filers and \$15,000 for individuals.
- **Childcare.** The President-elect’s proposal would enact an above-the-line deduction for children under age 13 and provide exclusions for childcare of up to \$5,000 per year.
- **Estate Tax Reform.** President-elect Trump would propose to eliminate the estate tax but would tax capital gains held at death valued over \$10 million.
- **Other.** The President-elect’s plan would not change the current capital gains rate structure and would tax carried interest as ordinary income.

**Corporate Tax Reforms.** President-elect Trump has made corporate tax reform a centerpiece of his tax strategy, maintaining that making business tax rates more competitive will help keep jobs in the US. He has promised to pursue the following issues:

- **Tax Rate.** President-elect Trump would dramatically lower the business tax rate from 35 percent to 15 percent. The rate would be available to all sizes of businesses.
- **AMT.** President-elect Trump would eliminate the corporate AMT.
- **Offshore Profits.** President-elect Trump would provide a deemed repatriation of corporate profits held offshore at a “one-time” tax rate of 10 percent.
- **Expensing.** President-elect Trump would permit firms engaged in manufacturing in the US to elect to expense capital investment while losing the deductibility of corporate interest expenses. Such an election may only be revoked within the first three years (which would then prompt amended returns in prior years).
- **Corporate Tax Incentives.** President-elect Trump would eliminate most corporate tax expenditures but proposes keeping the Research and Development credit. His plan also would expand the tax credits for onsite childcare and would permit businesses to deduct contributions made to an employee’s childcare expenses.

In all, President-elect Trump’s plan would result in dramatic cuts, and while some tax expenditures would be eliminated under the plan, a number of deductions/exemptions remain, which could have otherwise helped defray the cost of the cuts. Even some of the most optimistic analyses of the plan place the price tag at nearly \$5 trillion over 10 years.

## AGENCY LEADERSHIP

The Trump Administration is expected to be heavily-populated by non-career politicians with substantial ties to business and the financial sector. The Treasury Secretary position is no exception. The President-elect is expected to nominate Steve Mnuchin, former Goldman Sachs partner and cofounder of hedge fund Dune Capital Management. Other rumored picks for the post currently include:

- **Larry Kudlow**, economic analyst, commentator, and syndicated columnist
- **Bob Corker**, US Senator from Tennessee
- **Carl Icahn**, investor, founder of Icahn Enterprises
- **Henry Kravis**, co-founder of private equity firm KKR & Co.
- **Jack Welch**, former CEO of General Electric

## CONGRESSIONAL LEADERSHIP

**House.** Rep. Kevin Brady (R-TX) will remain chair of the House Ways & Means Committee, having ascended to the position in 2015. On tax matters, Chair Brady will undoubtedly be working in close concert with Speaker Paul Ryan (R-WI), who chaired the Committee for 10 months in 2015 and remains a leading voice on tax policy. Rep. Sander Levin (D-MI) will remain the ranking member of the Committee, a position he has held since 2011.

**Senate.** Sen. Orrin Hatch (R-UT) will remain chair of the Senate Finance Committee, a position he has held since 2015. Sen. Hatch also is the President pro tempore of the Senate and is the most senior Republican senator. Sen. Ron Wyden (D-OR) will remain ranking member of the committee. Sen. Wyden previously served as chair in 2014.

## CONGRESSIONAL PRIORITIES

With the Republicans retaining control of Congress and seizing the White House, we expect that the tax reform debate will begin in earnest in 2017. In June 2016, the House GOP released its tax plan, which, like the President-elect's plan, includes substantial tax cuts for individuals and businesses. While there remain substantial differences between the Trump plan and the House GOP plan, we do not expect this to prevent Congress's consideration of reforms.

While Sen. Hatch and the Finance Committee have been working on a number of reform proposals, Senate Republicans have not offered any tax plan as broad or detailed as their House counterparts. Thus, we expect Speaker Ryan and Chair Brady to drive the debate initially, which could lead to action on some of the major components of the House GOP plan, including:

- **Corporate Rate Cuts.** The House GOP will aim to reduce the corporate tax rate from 35 percent to 20 percent. It also would eliminate the corporate AMT and create a new tax rate for pass-through entities to be capped at 25 percent.
- **Individual Rate Cuts.** Like President-elect Trump's proposal, House Republicans will look to consolidate individual tax brackets down to three: 12 percent, 25 percent, and a top rate of 33 percent. They also will propose to eliminate personal exemptions and the individual AMT. Additionally, they are likely to increase the standard deduction substantially, although not to the level proposed by President-elect Trump.
- **Eliminating Deductions.** The GOP plan proposes eliminating nearly all itemized deductions — including even the deduction for state and local taxes. The only itemized deductions that the House GOP proposes to keep would be the mortgage interest deduction and the charitable contribution deduction.
- **Business Expensing.** We expect the GOP to eliminate the deduction for net interest expenses, but allow capital investment costs to be fully and immediately deductible. The plan also would prohibit carryback of net operating losses but allow them to be carried forward indefinitely and increased to account for inflation.
- **Territorial System.** Republicans propose creating a territorial tax system that exempts foreign income from US tax.
- Finally, we expect Congress to continue its almost annual process of extending some non-controversial tax provisions that are otherwise scheduled to expire at the end of 2016. There will certainly be debate about putting an extenders package together though there seems to be less enthusiasm for such a package than in recent years.

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While there is a fair amount of common ground between the President-elect's proposals and the House GOP plan, it remains to be seen how well the two sides will work together, given the discord between Speaker Ryan and President-elect Trump during the campaign. With Trump as President, there also are questions about Paul Ryan retaining his leadership role as Speaker, with dissension in the Republican Conference.

Assuming a mutually agreeable plan is pursued, it is possible that parts of the GOP tax overhaul plan could be moved via the budget reconciliation process (which would allow the plan to pass the Senate by a simple majority rather than needing a filibuster-proof 60 votes). This scenario is particularly possible if Senate Democrats use procedural tactics to block consideration of tax legislation. Indeed, it is likely that the Senate, with the Republicans holding only a narrow majority, will be ground zero for Democratic efforts to block action on GOP priorities — much the same as it was for Republicans in the first two years of the Obama Administration. The possibility of major tax reform, while greater now given unified Republican control, is tempered by the narrow margin they hold in the Senate.

## **CONTACT INFORMATION**

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★ KEY TAKEAWAYS ★

- Unified Republican control of the federal government will likely produce significant opportunities for regulatory and legislative change in the technology and communications space in the 115th Congress. While many of President-elect Trump’s policy positions are not clear, we expect that his administration and the FCC will take a far less ambitious regulatory approach than the previous administration - and also may revisit policies adopted by the FCC under President Obama’s leadership, beginning with the Open Internet rules.
- However, President-elect Trump’s administration could adopt an aggressive posture towards media regulation that departs from a relatively light-touch approach of the past.
- We expect that a Republican-controlled Congress will largely align with the President-elect on most policy issues. Additionally, Congress could devote significantly more bandwidth to comprehensive reform of the Communications Act, particularly given that there will be a less active regulatory agenda from the FCC as compared to the Obama Administration.
- Regardless, a Communications Act reform process will require a significant push from the President-elect - and if so, congressional leaders may be disappointed as President-elect Trump is far more likely to pursue policy priorities that are far afield.

**ADMINISTRATION PRIORITIES**

Unlike Secretary Clinton’s technology platform, which is well established and published in detail on both the candidate’s website and through the Democratic National Committee’s platform, little is known regarding President-elect Trump’s technology and communications policy priorities. Regardless, the Republican National Committee (RNC) platform and statements from the President-elect suggest that as president, President-elect Trump will attempt to transform the US government into a partner with the private sector, not an aggressive regulator. President-elect Trump’s administration will seek to facilitate access to spectrum and pave “the way for next generation broadband deployment and competition on the Internet for internet services.” His administration will also encourage the sharing economy, create a hospitable environment for the Internet of Things (IoT) to thrive, and encourage public-private partnerships to provide rural Americans with reliable broadband Internet connections. In addition, there is at least a chance that a Trump Administration-led Federal Communications Commission (FCC) could take a more hands-on approach towards media regulation. During the campaign, the President-elect did, after all, suggest that his Administration would “open up those libel laws” when criticizing media criticism of his campaign, and President-elect Trump may find it irresistible to make life difficult on media



operations he believes were biased against him in the campaign. It is therefore reasonable to assume that the Commission could become more active in media regulation as well.

**Open Internet Policy Change.** While President-elect Trump did not publish an official policy position regarding the FCC Open Internet rules as a candidate, he has a history of attacking the FCC’s regulatory actions and President Obama’s encouragement of the Title II common carrier reclassification approach. As a private citizen, Mr. Trump once tweeted: “[President] Obama’s attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.” As a consequence, we expect that President-elect Trump will appoint a chairman to run the FCC who is committed to reversing the FCC’s reclassification of Broadband Internet Access Service (BIAS) as a precondition of service.

**FCC Regulatory Approach.** In general, under an FCC that is run by a President-elect Trump-appointed nominee, the Commission will likely recede from Chairman Wheeler’s ambitious regulatory agenda and serve as a “cop on the beat,” as opposed to an advocate for specific policy changes. This regulatory posture will appeal to congressional Republican leaders who openly crave a less-aggressive FCC that, in their view, should be focused on enforcing clearly established existing rules rather than pressing the boundaries of the agency’s statutory authority. Such a shift could reverse the Commission’s current regulatory trajectory, with the possible exception of aggressive enforcement and policymaking in the media space.

**Infrastructure Policy.** The President-elect’s campaign team made a subtle, but potentially significant, addition to the campaign’s infrastructure policy during the wee hours of the night between November 8th and 9th. The President-elect’s infrastructure policy now includes a commitment to invest in “transportation, ... telecommunications, security infrastructure, and other pressing domestic infrastructure needs,” in an effort to create “thousands of new jobs in construction, steel manufacturing, and other sectors.” While very few details exist supporting this big-picture commitment, the campaign’s insertion of the term “telecommunications” into the campaign’s vision for infrastructure policy is noteworthy.

## AGENCY LEADERSHIP

President-elect Trump’s transition team remains a work in progress, but there is a growing team devoted to technology and communications policy under the leadership of Jeffrey Eisenach, the former president and chief executive officer of the Progress and Freedom Foundation and fellow at the American Enterprise Institute. Mr. Eisenach is an outspoken opponent of the current FCC leadership’s policy agenda, and he has a long history of advocating for free-market oriented communication and technology policy. Under a Trump Administration, the following individuals could be in line for senior-level positions in the administration or at the FCC:

- **Ajit Pai**, a current commissioner of the FCC and former Senate Republican policy advisor and attorney.
- **Jeffrey Eisenach**, a visiting scholar and director of the Center for Internet, Communications, and Technology Policy at the American Enterprise Institute.

## CONGRESSIONAL LEADERSHIP

**House.** In light of Republican term limits that prevent Rep. Fred Upton (R-MI) from continuing to serve as chair of the House Energy and Commerce Committee, the role of chair will be awarded to one of three committee members who have expressed interest in leading the full committee: (1) National Republican Congressional Committee (NRCC) Chair Greg Walden (R-OR); (2) Rep. John Shimkus (R-IL); and (3) Chairman Emeritus Joe Barton (R-TX), who chaired the committee from 2004 to 2007. Rep. Frank Pallone (D-NJ) is expected to continue to serve as ranking member. The transition at the top of the dais also could result in a new leader of the Subcommittee

on Communications and Technology because current chair Rep. Walden will either move on to chair the full committee, or will give up the subcommittee gavel at the end of his six-year term unless he secures a waiver.

**Senate.** Sen. John Thune (R-SD) will retain his position as Chairman of the Senate Commerce, Science, and Transportation Committee. Sen. Bill Nelson (D-FL) will stay on as ranking member.

## CONGRESSIONAL PRIORITIES

In the 115th Congress, we expect that Congress will continue to develop bipartisan legislation that seeks to balance the advancement of innovative technology with consumer privacy and security concerns. With a Republican Congress and White House, Congress may take a more aggressive posture towards legacy regulatory priorities from President Obama’s administration. Nevertheless, the 115th Congress will likely prioritize many of the same technology legislative issues as in the last Congress, as President-elect Trump has given very little indication that his legislative priorities in the technology space depart radically from existing Republican efforts to ensure a light-touch regulatory environment .

To that end, it is certainly possible that Republican congressional leaders could move quickly to amend the Communications Act or otherwise block the Open Internet rules if judicial review does not do so first. While securing a veto-proof majority in the Senate will be a challenging undertaking, Republican leaders could seek a number of legislative vehicles, including through the appropriations process, to limit the Commission’s authority in this area.

The work of the House Energy and Commerce Committee and Senate Commerce, Science, and Transportation Committee will be marked by continued oversight of the FCC and its regulations. We also are likely to see continued efforts to advocate for comprehensive telecommunications reform, building off of the House’s work in the 114th Congress to build a body of comments on the record about the need for comprehensive reform. While there are some members of Congress that are interested in this type of reform, it is a large undertaking that may not be possible without some buy-in from President-elect Trump. We expect any technology-related work will begin in earnest in early 2017, as significant progress on these issues during the lame-duck session is unlikely.

**FCC Transparency.** Republicans remain interested in making FCC procedures more transparent by changing the reporting and information sharing requirements that the FCC must follow. Sen. Dean Heller (R-NV) could reintroduce legislation similar to his bill - the *Federal Communications Commission Process Reform Act* - again next year. That legislation made it through the Senate Commerce, Science, and Transportation Committee in April 2016 but never made it to the Senate floor. In an effort led by Rep. Walden, the House voted unanimously to pass a similar legislative package in September 2016 that would update the FCC’s procedures and require additional transparency measures. These bills are likely to be reintroduced and considered in the 115th Congress, and we also expect Sen. Thune will continue the work he started in the 114th Congress to pass a full FCC reauthorization bill.

**Net Neutrality.** In light of President-elect Trump’s criticism of the FCC’s rules on net neutrality, we are likely to see renewed efforts in Congress to prevent the FCC’s implementation and enforcement of the Open Internet Order. These legislative efforts may echo the proposal that Sen. Thune and Rep. Upton introduced in the 114th Congress that would limit the FCC’s authority to implement the net neutrality rules.

**Cybersecurity.** Given the increased attention paid to cybersecurity during the election cycle, Congress is likely to continue its efforts to conduct oversight of the federal government’s cybersecurity programs and initiatives. Cybersecurity policy is a traditionally bipartisan topic, with dividing lines drawn around policy perspectives and not necessarily partisan affiliation. For that reason, it is possible Congress may advance legislation to update cybersecurity standards for the federal government and provide more resources to protect networks from cyber-

attacks. We also expect that encryption policy will continue to draw congressional attention as the US government grapples to balance consumer privacy with the need to provide law enforcement agencies with access to information for national security purposes. Sen. Mark Warner (D-VA) and Rep. Michael McCaul (R-TX) could reintroduce legislation to create a national commission to study encryption, and members of Congress will continue to debate the role that Congress should play in the debate on the merits of encryption. We also expect Congress to reintroduce data security legislation, including renewed efforts to create a uniform, federal data breach standard that could streamline the existing patchwork of requirements across all 50 states.

**Internet of Things.** Members of the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee will continue working to define the federal government’s role in IoT as more devices and consumer appliances are connected to the Internet. Given the continuous expansion of IoT technologies, multiple agencies now have a stake in IoT policy and the potential for congressional oversight continues to grow. In the 114th Congress, members created a new bipartisan Congressional Caucus on IoT and a new bipartisan working group inside the House Energy and Commerce Committee. Both focus on IoT education and policy development. Additionally, both chambers passed resolutions related to the need for a national strategy for the IoT to promote economic growth and consumer empowerment. Though Congress started conversations about IoT in the 114th Congress, there is much work to be done. Policymakers in the next Congress will be faced with the task of developing a strategic plan and addressing other IoT challenges, such as inadequate funding and workforce capabilities, aging infrastructure, privacy and security concerns, and the rapidly evolving nature of the technology itself.

As Congress works on developing legislation addressing IoT, including the *Developing Innovation and Growing the Internet of Things (DIGIT) Act* (H.R. 5117), we expect policymakers will continue to engage with and rely on IoT industry leaders as trusted partners and resources.

**Drones.** Though the Federal Aviation Administration (FAA) has overseen the vast majority of recent policymaking related to drones, Congress included unmanned aerial systems (UAS) provisions in the most recent short-term extension of legislation to authorize FAA programs and is expected to revisit these issues in the 115th Congress. In July 2016, Congress passed a short-term reauthorization bill, extending FAA’s regulatory authority until September 2017. While transportation leaders in the House and Senate praised the passage of the extension bill, many members were disappointed that the House and Senate could not reach an agreement on a full authorization bill this year. The small drone provisions included in the bill focused on improving safety and promoting further research. We expect the next FAA reauthorization bill to expand on these provisions and consider additional language on other UAS issues members could not agree on in the short-term reauthorization bill.

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★ KEY TAKEAWAYS ★

- The Trump Administration will be a strong proponent of trade enforcement, as it will look to impose sizeable tariffs on certain goods imported from China and Mexico, which may run afoul of WTO obligations. The administration also will look to address currency manipulation through countervailing duty laws or other legal provisions.
- Along with President-elect Trump, there is a broad base of the electorate, including both Democrats and Republicans, strongly opposing the current TPP agreement and other trade agreements. This opposition will create challenges for Congress to pass any trade agreements in the 115th Congress.

## ADMINISTRATION PRIORITIES

Trade played a prominent role throughout the presidential elections. This was due in part to President-elect Trump’s strong trade enforcement stance and his harsh criticism of existing and potential trade agreements. Trade enforcement will be a top priority for the Trump Administration, and, at least in the near term, the Trump Administration will not support the Trans-Pacific Partnership (TPP) or any other regional trade agreements.

**Trade Enforcement.** The Trump Administration will be a strong proponent of trade enforcement. President-elect Trump has stated that he will seek a blanket 45 percent tariff on goods imported from China and a 35 percent tariff on certain goods, such as cars and trucks, imported from Mexico. He also has indicated that his administration will impose defensive and countervailing duty tariffs on countries that are “currency manipulators” and will pressure the World Trade Organization (WTO) to change its treatment of value-added taxes (VAT).

- **Increasing Tariffs on Imports from China, Mexico, and Other Countries.** President-elect Trump has not yet specified the legal basis through which his administration will increase tariffs on imports from China, Mexico, and other countries. There are certain means through which the United States can increase tariffs under current US law, such as antidumping, countervailing duty, and safeguard laws; however, these laws have specific requirements, and the resulting tariffs would be narrowly focused. Any broad imposition of blanket tariffs likely would run afoul of US WTO obligations.
- **Defensive and Countervailing Duties on Currency Manipulators.** Claims of currency manipulation by countries such as China have been circulating for many years. The biggest challenge has been to find the right legal remedy under US law to address such conduct. Earlier in 2016, Congress amended US law, permitting the President to impose remedial measures if bilateral talks with a country accused of manipulating its currency proved ineffective. The new legal provisions, however, stopped short of making currency manipulation subject to US countervailing duty law. At this time, it is unclear whether the Trump Administration would simply pursue currency manipulation through these new legal provisions or seek to amend US countervailing duty law.

- **WTO Treatment of VAT.** President-elect Trump has stated that, under WTO rules, countries with a VAT regime are treated more favorably than the United States, which has an income tax regime. He has claimed that the WTO permits VAT exemptions when companies export goods from a VAT regime country. When US companies export good to those countries, however, their goods are subject to VAT. Therefore, according to President-elect Trump, the VAT exemption functions as an export subsidy for companies in these other countries, while the imposition of VAT on imports of US goods serves as a trade barrier for US companies. Although President-elect Trump has suggested that his administration would “use its status as the world’s largest economy, the world’s largest consumer, and the world’s largest importer to put pressure on the WTO to change this unequal treatment,” he has not yet described the specific legal basis and mechanism through which his administration intends to bring about this change.
- **Trans-Pacific Partnership.** President-elect Trump made his opposition to TPP one of the central trade themes of his campaign. He also announced the Trump Trade Doctrine, under which his administration would only consider trade agreements that will increase the US gross domestic product (GDP) growth rate, decrease the trade deficit, and strengthen the US manufacturing base. Based on this doctrine, it is unlikely that the Trump Administration would support TPP in its current form.
- **Other Regional Trade Agreements.** Based on the Trump Trade Doctrine, it appears unlikely, at least in the near term, that the Trump Administration would support any other regional trade agreements, including the Transatlantic Trade and Investment Partnership (T-TIP). President-elect Trump also has stated that he intends to terminate or re-negotiate existing trade agreements such as the North America Free Trade Agreement (NAFTA). At this time, it is unclear whether the Trump Administration will seek to terminate or re-negotiate any existing agreements though it is reasonable to assume he will try to re-negotiate any agreement before making a decision to terminate.
- **Cuba.** During the campaign, President-elect Trump shifted his position on President Obama’s executive orders on Cuba, with the latest order issued in October. In March, then presidential candidate Trump remarked that “[m]aybe it won’t work out, but I will tell you, I think Cuba has a certain potential and I think it’s OK to bring Cuba into the fold.” In September, however, President-elect Trump shifted his position saying he would “reverse” President Obama’s orders. Since then, his statements have been backed up by Vice President-elect Mike Pence, who has reiterated that a Trump Administration would overturn the executive orders and reinstate the 50-year embargo that President Obama had lifted. Both President-elect Trump and Vice President-elect Pence’s statements do not necessarily mean there is no interest to negotiate deals with Cuba, but it appears that a Trump Administration believes that the current normalization of relations with Cuba is “one-sided” because it only advantages the “Castro regime.”

## AGENCY LEADERSHIP

President-elect Trump has not yet indicated who will take the helm of the Office of the United States Trade Representative (USTR) or the Department of Commerce. Some possibilities include:

- **Dan DiMicco** - Former Chief Executive Officer of steel company Nucor Corporation.
- **Peter Navarro** - Professor of economics and public policy at the Paul Merage School of Business, University of California, Irvine.

## CONGRESSIONAL LEADERSHIP

**House.** Current House Ways and Means Committee Chair Kevin Brady (R-TX) is likely to retain his role in the 115th Congress with Rep. Sander Levin (D-MI) continuing to serve as ranking member. Rep. Dave Reichert (R-WA) is the current chair of the Subcommittee on Trade and also is likely to remain in that leadership role next year. Current ranking member of the Subcommittee on Trade, Rep. Charles Rangel (D-NY), will retire this year. The lead Democratic seat on the subcommittee will be up for grabs with Reps. Richard Neal (D-MA), Earl Blumenauer (D-OR), and Ron Kind (D-WI) in line for the seat.

**Senate.** In the Senate, current Senate Finance Committee Chair Orrin Hatch (R-UT) is likely to remain in his role as the leader of the committee along with current Ranking Member Ron Wyden (D-OR). Sen. John Cornyn (R-TX) previously served as the Subcommittee on International Trade, Customs, and Global Competitiveness chair and is likely to remain in that role unless he chooses to sit on another subcommittee on the Senate Finance Committee. Sen. Wyden is likely to remain the ranking member on the subcommittee.

## CONGRESSIONAL PRIORITIES

With the July 2015 passage of Trade Promotion Authority (TPA) legislation that allows for expedited consideration of trade agreements in Congress, the 114th Congress set the stage for President Obama to push forward his agenda to approve the TPP and other free trade agreements. Yet, with a presidential campaign that was negative on trade liberalization policies and a broader electorate that now questions the value of free trade, many members of Congress in both parties who previously voted for TPA were forced to pivot their positions on free trade while on the campaign trail. These political dynamics will make it very difficult for Congress to do anything on trade in the lame-duck session and into the 115th Congress.

**Trans-Pacific Partnership.** While President Obama would like to see quick action in Congress to approve the TPP in the lame-duck, the election of Donald Trump means Congress will let TPP die this fall. Speaker of the House Paul Ryan (R-WI) has said that the House does not currently have the votes to pass TPP, and Senate Majority Leader Mitch McConnell (R-KY) said that TPP “will not be acted upon this year.” Without buy-in from the leadership, it seems very unlikely that TPP will be voted on the lame-duck session. President Obama and outside stakeholders in support of TPP will work to convince pro-trade members of Congress that this is their best chance of passing the agreement before President-elect Trump takes office but few members of Congress will want to become new advocates for the deal after the election of a President who campaigned and won arguing against the deal.

Many members of Congress have called for the US government to renegotiate specific portions of TPP, including the provisions related to intellectual property rights for biologics and tobacco policies included in the agreement. At this point, it does not seem likely that President-elect Trump will attempt to renegotiate the TPP agreement, but in the event that he does, the 115th Congress could very likely approve it.

**Transatlantic Trade and Investment Partnership.** Congress will be watching closely to see what a Trump Administration does with the Obama Administration’s work in negotiating the T-TIP. If negotiations move forward and the negotiators are able to reach a deal, Congress will be able to approve the final proposal by a simple majority vote under the TPA legislation. There is less resistance in Congress to the T-TIP agreement in general, particularly when compared to TPP, but it remains to be seen how the negative views on trade coming from President-elect Trump will affect how members vote if a T-TIP agreement came to a vote.

**Trade Enforcement.** Throughout the Obama Administration, we saw a significant increase in the number of antidumping and countervailing duties cases at the Department of Commerce. The increase is due in part to

pressure from members of Congress that want to protect US industries against unfair trade. We expect this trend to continue as members of Congress encourage the Department to use all tools available to enforce antidumping and countervailing duty trade laws and ensure compliance with trade agreements. We also expect members of Congress to follow the lead of President-elect Trump and push for increased trade enforcement against products coming from China, while also calling for the Trump Administration to label China as a currency manipulator.

**Cuba.** Republicans in Congress will work with the Trump Administration to ensure that President Obama’s executive orders on Cuba are overturned. Most Republicans have heavily criticized President Obama for ending the embargo on Cuba, including current Speaker of the House Paul Ryan, who has characterized the administration’s efforts as “efforts to appease the oppressive regime.” In fact, this year, Republicans already have made attempts to challenge the Obama Administration on Cuba, including through the FY 2017 appropriations process where the House has included policy riders in the Financial Services bill ensuring that the Department of Treasury’s Office of Foreign Assets Control cannot use funds to ease trade and travel to Cuba. Reinstating the embargo will be a priority of both branches of government for reasons including the need to appeal to Cuban voters in the mid-term election. Both the administration and Congress, however, will need to ensure they do not undermine the interests of the agriculture industry, as this sector views the lifting of the embargo as a benefit to the industry.

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## Endnotes

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1. At the time of publication, five states had not been called (AK, AZ, MI, MN, NH). Our electoral college figures above assume the candidate leading each of these five uncalled states on election night will win when the race is finally called.
2. At the time of publication.
3. At the time of publication, there were still four House races where a winner had not been determined.
4. Harry Enten, *Obama Has Waited Longer for Cabinet Confirmations than Any Other Recent President*, FiveThirtyEight (Apr. 23, 2015), <http://fivethirtyeight.com/datalab/obama-has-waited-longer-for-cabinet-confirmations-than-any-other-recent-president/>.
5. Maeve P. Carey, et al, *Presidential Appointments to Full-Time Positions in Independent and Other Agencies During the 111th Congress*, Congressional Research Service (Jan. 22, 2013), <https://www.fas.org/sgp/misc/R42932.pdf>.
6. Heather Long, *Key Truths about the Obama Economy*, CNN Money (Jul. 28, 2016), <http://money.cnn.com/2016/07/28/news/economy/obama-clinton-economy/>.
7. Dow Jones Industrial Average Historical Data (Nov. 8, 2016), <http://www.investing.com/indices/us-30-historical-data>.
8. *Labor Force Statistics from the Current Population Survey*, Bureau of Labor Statistics (Nov. 7, 2016), <http://data.bls.gov/timeseries/LNS14000000>.
9. *15.5 Million Private Sector Jobs Created*, Democratic Policy & Communications Center (Nov. 4, 2016), <https://www.dpcc.senate.gov/?p=blog&id=462>.
10. Susan Jones, *Record 94,708,000 Americans Not in Labor Force; Participation Rate Drops in May*, CNS News (Jun. 3, 2016), <http://www.cnsnews.com/news/article/susan-jones/record-94708000-americans-not-labor-force-participation-rate-drops>.
11. See footnote 6 (Heather Long).
12. *Has President Obama Doubled the National Debt?* (Jul. 25, 2016), <http://crfb.org/blogs/has-president-obama-doubled-national-debt>.
13. Bob Bryan, *The US government has a \$20.4 trillion retirement problem*, Business Insider (Apr. 6, 2016), <http://www.businessinsider.com/us-government-7-trillion-pension-shortfall-2016-4>.
14. At the time of publication.
15. At the time of publication.
16. *Party Division in the Senate, 1789-Present*, US Senate, <http://www.senate.gov/history/partydiv.htm>.