



CLIENT ALERT

# 2016 Post Election Update

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## Post-Election Outlook: A New, Unpredictable World

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*In a shock to investors and political analysts around the world, Donald J. Trump won the 2016 Presidential election, putting the Republican Party in charge of the White House and Congress for the first time in a decade. Even though the voting has ended, the rancor in Washington and across the country over specific issues will only grow, including disputes within the Republican Party itself, as well as between the so-called “establishment” and those who want to pursue radical change, whether on the Left or Right. President-elect Trump ran as an anti-establishment candidate supported by a large portion of Americans, many of whom traditionally did not vote Republican, and who are angry at a political system they see as no longer serving their needs. President-elect Trump promised bold, often controversial, reforms. The details of these reforms and whether they will be supported in Congress are still developing.*

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Below is Pillsbury’s assessment of some of the top issues that will be faced by the new President and Congress and the potential impact on business interests, including:

- Foreign Policy, International Trade and Sanctions
- Financial Services, Tax Reform and International Enforcement
- Infrastructure and Public-Private Partnerships
- Cybersecurity
- Energy and Environmental
- Health Care

- Antitrust Policy
- Communications Policy and Regulations
- Government Contracts
- Ethics and Campaign Reform
- State and Local Government Activism

Beyond these highlighted issues, we also expect to see:

- Intense debates over cutting government spending, especially on entitlement programs, yet increasing defense and major project budgets.
- Increased deregulation around food, pharmaceuticals and other consumer products.
- Multi-faceted immigration reform, including greater border enforcement and, potentially, H-1B visas for high-skilled workers.

A Trump presidency creates significant opportunities for major policy changes. We expect congressional lawmaking and Executive Branch rulemaking to play a more central role in the creation of new policies and regulation than ever before.

Savvy businesses and other stakeholders will actively engage in the legislative and regulatory process as the pre-eminent way to influence outcomes during this period of uncertainty.

### **Foreign Policy, International Trade and Sanctions: A New Era**

President-elect Trump comes to office with little foreign policy experience and has promised radical changes from the approach taken by President Obama on trade and America's relationships around the world.

The most fundamental initial change will likely be the United States' relationship with Russia. President-elect Trump promised to seek a new engagement with Russian President Vladimir Putin in an effort to find common ground and build a new working relationship. How this will be achieved remains an open question, as well as whether President Trump would be constrained by the diplomatic and security realities he will confront when taking office. However, this rapprochement could have a profound impact on U.S. policy towards Ukraine, U.S. support for the European Union and NATO, the application of sanctions against Russia, and U.S. activities in Syria; all of which could shake longstanding U.S. relationships in Europe, the Middle East and Asia.

International trade will also experience a sea change under President Trump. The Trans-Pacific Partnership (TPP) and EU-U.S. Free Trade Agreement will likely be scrapped or fundamentally altered, likely to a point unacceptable to the other parties. President Trump will seek to reopen and renegotiate existing trade deals, especially the North American Free Trade Agreement (NAFTA). He will also pursue protectionist or punitive measures to keep industry in the United States or retaliate against other nations, such as pursuing domestic and international trade cases against China, especially those which he believes are unfairly hurting U.S. industry.

All of this will create tremendous unpredictability in international trade, disrupting markets and traditional trading patterns. Conversely, it also will create significant opportunities for businesses that would like to change trade rules, create or protect markets, or obtain more robust U.S. support for their trade issues.

*Businesses will need to better navigate this new trade reality, as well as determine how best to shape the Trump Administration's trade policy and utilize the new measures that may become available to advance their agendas in different markets. Business should also consider in what circumstances pursuing trade remedy cases will be an efficient vehicle to resolve their challenges as they will likely find increased support for such actions from a Trump Administration.*

Another major area of uncertainty will be the Trump Administration's approach to Iran. President-elect Trump criticized the Iran nuclear deal repeatedly during the campaign as being too weak. He will likely pursue some efforts to alter its terms, but it is unlikely he will find support from other allies. He also criticized the deal for not providing enough benefit to U.S. business. Therefore, in a scenario where it becomes impossible to change the deal itself, a President Trump will be faced with two options: taking aggressive unilateral measures, such as new sanctions, that would seek to hurt Iran; or providing relief for U.S. businesses to allow them to trade with Iran on equal footing as non-U.S. businesses.

In any event, we do not expect a relaxation of sanctions policy that would assist non-U.S. businesses in the near term. In fact, non-U.S. businesses should be extra cautious in dealing with Iran now as a Trump Administration may seek out companies that violate the existing rules to punish as examples.

### **Financial Services, Tax Reform and International Enforcement: Front and Center**

Ever since the enactment of the Dodd-Frank Act, congressional Republicans have argued that the regulations to implement the law stifle innovation and reduce lending by financial institutions that is critical to economic success. For his part, President-elect Trump, while criticizing Secretary Clinton for her close ties to Wall Street, also stated in broad terms that he believes the Dodd-Frank Act represents onerous regulation that should be rolled back significantly. As such, it is likely that legislation similar to the Financial CHOICE Act, a bill advanced but not enacted this year by House Financial Services Committee Chairman Jeb Hensarling, will serve as a guidepost for financial services reform efforts. That legislation would generally loosen capital requirements for banks, repeal the ability of the Financial Stability Oversight Council to designate institutions as Systemically Important Financial Institutions and repeal sections of the Volcker Rule, which currently limits the ability of financial institutions to engage in proprietary trading.

Apart from these measures, congressional Republicans will also likely mount an effort to curb the increasingly aggressive efforts by the Consumer Financial Protection Bureau (CFPB) to regulate non-bank financial institutions and to penalize financial institutions of all stripes for allegedly unfair, deceptive or abusive behavior. In a recent decision, the U.S. Court of Appeals for the District of Columbia Circuit handed an important victory to a company that challenged the CFPB's broad authority. *PHH Corporation, et al., vs. Consumer Financial Protection Bureau*, No. 15-1177 (DC Cir. Oct 11, 2016).

As a result of this ruling, President-elect Trump will have the power to supervise the CFPB's Director and may remove the Director at will. The CFPB will continue to operate, but will now do so as an executive agency. The CFPB is likely to appeal this decision even while congressional Republicans may seek passage of legislation that would convert the Bureau into a Consumer Financial Opportunity Commission that is governed by a bipartisan panel (rather than a unitary director) and is subject to congressional appropriations (rather than receiving a direct transfer of funds from the Federal Reserve). Republicans envision that Commission having the dual purpose of protecting consumers and ensuring competitive

markets and would require it to submit all of its major rulemakings to cost-benefit analysis. Alternatively, congressional Republicans may choose to pursue legislation that eliminates the CFPB altogether and reverts consumer protection functions back to the other financial regulators. Congressional Democrats will likely vehemently oppose any wholesale changes to the structure and actions of the CFPB.

With regard to taxes, President-elect Trump promised to slash U.S. tax rates to stimulate economic growth. A key feature of this plan is to lure U.S. companies operating overseas, especially those in manufacturing, back to the United States. Beyond tax cuts, President-elect Trump has also floated the idea of punitive tax rates and other measures that would penalize U.S. businesses that move jobs overseas or keep earnings on operations outside of the U.S.

This latter approach is also consistent with recent actions by the U.S. Department of Justice to pursue U.S. taxpayers hiding assets overseas, as well as the foreign financial institutions that assist them. Recently, many Swiss banks reached financial settlements with U.S. authorities and provided information about their U.S. customers. Combining this information with that obtained in the Panama Papers leaks and elsewhere, the Trump administration may look to continue and expand these enforcement actions, including into the Middle East, Mediterranean and Latin America/the Caribbean.

### Infrastructure And Public-Private Partnerships

Infrastructure may be the biggest winner of this election cycle. President-elect Trump supported the need for new infrastructure investment throughout his campaign. He has advocated a program to use infrastructure bonds to take advantage of low-interest rates. This is an area in which the Trump Administration can achieve common ground with Congress, including Democrats, who share his interest in improving airports, roads, water systems, power grids and the rail system. We expect significant opportunities for public-private partnerships (PPPs) which are cooperative arrangements between one or more public and private sector actors.

### Cybersecurity: Risk Management Strategies are More Important than Ever

One area that will likely receive more attention than ever will be cybersecurity thanks to the pivotal role it played in the Presidential election. *General counsels of companies big and small will need to prepare for more debate in Congress on a variety of cybersecurity initiatives, as well as increased regulatory action and state-level intervention in cybersecurity issues.*

Areas to watch include:

*New NHTSA Vehicle-to-Vehicle Regulations:* The National Highway Traffic Safety Administration (NHTSA) is expected to release proposed rules in 2017 to require vehicle-to-vehicle (VsV) communications systems for all new cars. Automakers have been pushing for these new regulations which are seen as a key next step in the development of connected cars. However, a concurrent debate continues over access to the radio spectrum that would be used by V2V systems. The Federal Communications Commission [FCC] is evaluating ways to share the radio frequencies to unlicensed users. These developments will play out in early 2017 under the Trump administration with new priorities. President-elect Trump's appointment of a new Secretary of Transportation will be key to achieving swift action on this issue which is expected to have a significant impact on the auto industry.

*Increased state-level regulation:* The New York Department of Financial Services recently issued a complex and detailed cybersecurity regulation for financial institutions that do business in the state.

Companies should expect other states to follow with their own regulatory schemes. To date, efforts to push back on these regulations have been met with little success.

*Information sharing battles:* The passage of the Cybersecurity Information Sharing Act (“CISA”) in 2015 was the start of the vigorous debate over how the public and private sector should or can share valuable cybersecurity intelligence. Following the enactment of CISA, many in the private sector remain concerned about the liability that could attach to sharing information or the decision to use/not use shared information. Congress will likely be forced to act on these issues in the near future. Given that the White House and Congress are now controlled by one party, companies should expect new cyber-related proposals to move more quickly than in past years.

*Internet of Things regulations:* With the recent spate of attacks using compromised internet-connected devices (more commonly referred to as “Internet of Things devices”), there has already been a major push in Congress to examine how to minimize the possibility of such attacks in the future. In addition to legislative developments, we expect questions from regulatory agencies on how they will protect against such attacks.

## Energy & Environmental

From the energy industry point of view, climate change is the key concept to watch in a Trump Administration. President-elect Trump has expressed doubts about the validity of climate science. The green agenda of the last eight years is likely to change fundamentally – e.g., potentially scrapping the Paris Agreement, reducing or ending alternative energy subsidies, tanking the Clean Power Plan (an anticipated D.C. Circuit en banc decision upholding the regulation could actually be reversed with a new Scalia-like Supreme Court appointment), new offshore oil and gas lease permitting, relaxing emissions standards, granting the Dakota Access Pipeline easement, etc.

Such a policy may not deter other nations from the sweeping plan to phase out net global greenhouse gas emissions between 2050 and 2100 by shifting from coal and oil to cleaner energies such as wind or solar power. For example, Japan's delegation chief Shigeru Ushio told Reuters that Japan's policies will not change. He also pointed out that the agreement says it would take four years for any country to pull out of the agreement – the length of Trump's presidential term.

The election of Trump is good news for the coal industry as Secretary Clinton had vowed to close it down. The industry is still challenged but there is some possibility that if suppliers can hang on, new technologies could be available to use coal in a climate friendly way.

As to the related energy policy issues, President-elect Trump has said that hydraulic fracturing will lead to energy independence and that he would revoke policies that impose unwarranted restrictions on new drilling technologies. He has said little concerning nuclear power, although after the Fukushima disaster he stated that “nuclear is a way we get what we have to get, which is energy.”

## Health Care

Based on President-elect Trump's “seven point plan” released on March 3, 2016, the Trump Administration will attempt to reduce health care costs by repealing and replacing the Affordable Care Act. Without a supermajority in the Senate, however, this is unlikely to occur. In addition, wholesale repeal would affect certain aspects of the Act that President-elect Trump has otherwise argued in favor of, such as the protections for those with pre-existing conditions and coverage for dependents 25 years or younger. It is more likely without a supermajority in the Senate that the Act will undergo major surgery to eliminate its

most criticized elements, such as the individual mandate to purchase health insurance and related federal income tax subsidies that have made insurance affordable (and tax penalties for those who did not procure insurance) and the federally funded expansion of the Medicaid program that has increased coverage for millions of Americans in states that adopted the program. What is uncertain is how a Trump Administration and the new Congress can restore the balance that was built into the Act with respect to the budget deficit by affecting only some, but not all, of its aspects.

Assuming Congressional support, implementation of the “seven point plan” will allow for tax deductibility for health insurance premiums coupled with the availability of Health Savings Accounts (HSAs), in which contributions would be pre-tax. The plan will also attempt to increase competition in the health insurance market by allowing health insurers to sell insurance across state lines through a repeal of McCarran-Ferguson; allowing re-importation of pharmaceuticals, removing barriers to generic drug development and allowing the Medicare program to negotiate for drug prices; and among health care providers by mandating price transparency. Lastly, the plan will replace current Medicaid funding programs for the states with a system of block grants that could reduce federal scrutiny of funding of care for the poor and curtail Medicaid funding for some services, like birth control.

President-elect Trump’s criticisms of the Veterans Administration could lead to private health care options for veterans.

### Antitrust Policy

Typically, antitrust appointments to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have not been high on the agenda of a newly-elected President. It takes many months – sometimes more than a year – before such appointments are in place. The head of the antitrust division at the DOJ and each FTC Commissioner appointment must be confirmed by the Senate. Trump will get to name three FTC Commissioners because of two current vacancies and another sitting FTC Commissioner whose term expires in a year, and he will also get to name the Chairman.

President-elect Trump has made a number of statements suggesting that his administration may press for an aggressive – even populist – antitrust agenda reminiscent of another Republican President, Theodore Roosevelt. In October, President-elect Trump publicly declared that his administration would not approve the proposed AT&T/Time Warner \$85 billion merger “because it’s too much concentration of power in the hands of too few.” Previously, he suggested that Jeff Bezos, owner of both Amazon and the *Washington Post*, faces “a huge antitrust problem.”

The only thing for sure about this election is that nothing is predictable, but the early indications are that Trump will pursue vigorous antitrust enforcement.

### Communications Policy and Regulations

President-elect Trump has said very little about communications policy and regulation, although he has publicly expressed his opposition to the AT&T-Time Warner merger. As part of his vision to improve America’s infrastructure, Trump has included unspecified investments in telecommunications as part of the package. The Trump presidency does hand control of the FCC to the Republicans (the FCC has five commissioners; three of which, including the Chairman who sets the FCC agenda, are from the President’s party).

A Republican-controlled FCC can be expected to either roll back or choose not to enforce the numerous regulatory mandates that have been adopted (mostly along party lines) under the chairmanship of Tom

Wheeler. These could include: repeal of net neutrality, loosening restrictions on ownership of radio and television stations; and increased funding for Universal Service programs. President-elect Trump and other key Republicans have expressed opposition to the FCC's Open Internet Order and net neutrality. The Republic Party platform supports universal broadband access and promoting greater availability of spectrum, and we would expect an acceleration of the clearing of incumbent commercial and federal government users from spectrum and making it available for auction of flexible use licenses. We also expect a more restrained Enforcement Bureau.

In addition, communications policy may be affected by Republican control of Congress. In particular, Republican leadership has called for a major rewrite of the Communications Act, which was last done in 1996 before the emergence of the internet as a tool for communications and commerce. We also expect to see a strong push by law enforcement to update statutes that would facilitate access by law enforcement to communications technologies and services not expressly covered by existing laws.

### Government Contracts

President-elect Trump plans to advocate for building up the military (all agencies) in terms of size but at the same time he plans to pull back from global operations. To accomplish these goals, President-elect Trump will have to work with Congress to repeal the sequestration ceilings on defense spending.

That will also mean a slow-rollback or a re-look at the Defense Base Closure and Realignment Commission because these new additions to our military forces will have to live and train somewhere. If our global footprint will not be as great, this will occur within U.S. installations and bases.

We also expect President-elect Trump will focus on improving the missile defense systems.

### Ethics and Campaign Reform

Over the last several weeks, President-elect Trump has expressed his plans for government ethics reforms. This includes calling upon Congress to pass legislation that would institute a five-year ban on all executive branch officials lobbying the government after they leave government service. If the ban is passed into law it cannot be lifted by an Executive Order. Currently there is a two-year revolving door ban on Executive Branch officials leaving office and registering as lobbyists.

President-elect Trump said he will also call on Congress to enact a similar five-year ban to prevent members of Congress and their staff from becoming lobbyists when they leave their Congressional positions and obtain private sector jobs. As it stands now, former U.S. Senators are banned from contacting Congress for two years after leaving office. Former officers and senior staff are banned for one year and all former Senate employees are prohibited from making certain lobbying contacts for one year. The House currently imposes a one-year revolving door ban on former Members, officers and certain covered employees. Convincing Congress to pass laws that would directly restrict itself may be challenging. Trump has also expressed his desire to expand the definition of "lobbyist" to close the loopholes he believes exist allowing former government officials to claim that they are advisors and consultants when they are really lobbyists. Also, under Trump intends to issue a lifetime ban on senior executive branch officials lobbying on behalf of foreign governments.

President-elect Trump will undoubtedly nominate a conservative Supreme Court Justice, which means it is unlikely that *Citizens United* will be overturned. The Supreme Court in *Citizens United* held that non-federal contractor corporations and labor unions may make unlimited independent expenditures in federal



elections. The ban on contributions made directly to federal candidates and committees from corporations and labor unions was not affected by the decision.

### State and Local Government Activism

Gridlock over major policy issues in Washington may continue to drive legislative and executive action at state and local levels. Business interests should be prepared to play offense and defense related to legislation that will grow their business or to ward off potentially harmful regulations.

A key flashpoint in state legislative and regulatory activity may be occupational licensing, which the Obama Administration has criticized as a barrier to labor market entry and competition and as an inhibitor of job portability between jurisdictions. President-elect Trump has not spoken in any great detail about the implications of state licensing requirements, but has generally observed that there is too much red tape in government at all levels. It will be interesting to see whether the Trump Administration actually picks up the mantle of the Obama Administration on this issue by working with states to determine which licensing requirements serve the public good and which ones do not. Such actions could catalyze efforts in a variety of states to reform their licensing laws to ensure greater labor market competition and a freer flow of labor.

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