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REGULATORY MEASURES AVAILABLE TO THE TRUMP ADMINISTRATION TO PURSUE POLICY OBJECTIVES

It is common when a new president of one party succeeds a president of another party that immediate steps are taken to freeze or undo many rules promulgated by the former administration. The first weeks of the Trump presidency have followed that practice – albeit, perhaps, to a greater extent than usual. The new administration has also gone further by announcing new policies and procedures designed to ensure that there will be a net reduction in regulatory burdens and a strengthening of the standards under which the White House's Office of Management and Budget (OMB) will review and approve regulations.

A number of steps taken by the new administration have a direct impact on employee benefit policy. So it is useful to understand the legal tools available to the executive branch to undo rules promulgated by the Obama Administration, or to pursue new policies without waiting for Congress to act.

WHAT CAN THE ADMINISTRATION DO?

Regulatory Moratorium

Every President since Ronald Reagan has imposed a moratorium on new regulations, and all but the George H.W. Bush Administration have done so within days of taking office. This has usually been done through a memorandum instructing agency heads to withdraw regulations not yet published and to delay work on new regulations pending a review. White House Chief of Staff Reince Priebus issued such a "freeze" on the first day of the new administration.

A moratorium is prospective and therefore easily within the scope of executive authority. A moratorium (as opposed to other regulatory measures) has a relatively limited impact on employee benefits since most of the major rules issued by the Obama

Administration regarding retirement policy matters or for the Affordable Care Act (ACA), in particular, had already been finalized before the freeze could take effect.

Executive Orders Eliminating Regulations

Executive orders are statements of policy and directives to agencies that do not create new law and are not enforceable in the courts. To the extent executive orders are used to expedite the promulgation of regulations, they do so by directing agencies to speed up the authority already afforded them by statutes or to take a more expansive interpretation of their authority. However, once agencies have properly acted through the rulemaking process, it is no different than if they had acted on their own initiative and authority. Thus, final regulations cannot be simply reversed by an order from a new president. Once it has become effective, revising or rescinding a regulation nearly always requires the same, and in some cases a more extensive, process of public notice and comment than is required for its original promulgation.

One of the first actions taken by President Trump was to sign an Executive Order on "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act." Section 1 of the order directs executive branch agencies to "take all actions consistent with law to minimize the unwarranted economic and regulatory burdens" of the Affordable Care Act (ACA) and "to afford the States more flexibility and control to create a more free and open healthcare market." Section 2 directs the agencies to exercise all authority and discretion available to them to "waive, defer, grant exemptions from, or delay the implementation of any provision of the [ACA] that would impose a ….cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients of healthcare services, *purchasers of health insurance* (emphasis added), or makers of medical devices, products or medications."

Though not explicitly stated, one can assume that employers with self-insured plans would be included under the reference to "purchasers of health insurance". Despite its sweeping nature, the executive order has no effect on compliance until the various departments and agencies take action to implement it.

Beyond the ACA and due to expressed concerns that the Obama administration overreached in the use of executive orders to impose new regulatory requirements, the Trump administration, on January 30, 2017 signed an Executive Order on "Reducing Regulation and Controlling Regulatory Cost". This executive order directs agencies to:

- Identify at least two regulations to be repealed for each new rule proposed;
- Achieve a zero net cost impact of all regulatory actions over the next year; and
- Refrain from any action not included in the published "Unified Regulatory Agenda."

The January 30 executive order also directs the Office of Management and Budget (OMB) to take a number of steps to increase the future oversight and accountability in the promulgation of regulations by Executive Branch agencies. This includes a prohibition on issuing regulations unless they are first included in the semi-annual unified regulatory agenda, the integration of a regulatory burden budget into the Presidential budgeting process and the development of new guidance for the agencies on how reporting of regulatory burdens and the formulation of the cost benefit analysis required to justify a regulation. Significantly, the executive order notes that all of these actions must be undertaken within the requirements of the Administrative Procedure Act (APA) – the principal law governing the federal rulemaking process.

To further the objective of reducing regulatory burden, the Trump Administration issued an Executive Order on "Enforcing the Regulatory Agenda" on February 24, 2017. It directs agencies to establish Regulatory Reform Task Forces within 60 days to evaluate existing regulations and make recommendations to agency heads regarding their repeal, replacement, or modification consistent with applicable law. The Task Forces are to identify regulations that eliminate or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits; and create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies.

Interestingly, contrary to its intent, these executive orders could actually slow down, rather than accelerate, the speed with which regulatory reduction can be implemented. This is because eliminating or making changes to a regulation is, itself, a regulatory action with all the attendant notice and comment period requirements. If strictly adhered to, this could potentially delay relief from the employer reporting requirements under the ACA until this lengthy process is completed.

One example of a regulation motivated by a directive from the president that cannot be readily reversed through another directive is the guidance on state retirement plans and mandatory IRAs, finalized by the U.S. Department of Labor (DOL) on August 30, 2016 that placed certain state-sponsored retirement arrangements outside the purview of ERISA. This regulation was proposed and went through the notice-and-comment process before becoming final. This makes it difficult to be withdrawn without using the formal APA procedures. This is undoubtedly why Congress has taken steps to overturn the rule under procedures spelled out in the Congressional Review Act (CRA), as described more fully in a later section of this Blueprint). Similarly, the secondary piece of the state retirement plan guidance package, addressing the ability of cities and municipalities to fit within the guidance, was finalized on December 19, 2016. Therefore, the latter guidance has been included in Congressional legislation designed to overturn the state rule under the CRA.

A new executive order that narrows an interpretation may be given considerable weight in a judicial challenge to rules originally motivated by a prior executive order. It was an interpretation of the scope of agency authority that led to the November 22 ruling by the U.S. District Court for the Eastern District of Texas delaying the effective date of DOL's regulations on overtime pay.

Executive orders may expedite judicial or regulatory action, especially when a rule is not yet in effect or "applicable". This is relevant to the current litigation and DOL action involving DOL's final regulations redefining fiduciary duty under ERISA as well as a handful of other recent rules that are not yet in place. It is less relevant to rules that have been in effect for any meaningful period.

Modification of Existing Rules using the Administrative Procedure Act Procedures

Under the APA, any regulation may be changed to reduce requirements or establish new provisions. As noted above, the modification of a rule, even when it eliminates requirements or reduces the regulatory burden, itself necessitates the promulgation of a rule that must adhere to the time-consuming APA process. The APA requires rules that establish new law or impose new requirements (known as "legislative" rules) to go through the notice-and-comment process that typically takes a year or more to properly complete.

Rules that are "interpretive" are permitted to be issued using sub-regulatory guidance (e.g., Advisory Opinions, Interpretive Bulletins, Frequently Asked Questions) that can be more rapidly issued without notice-and-comment. However, in several important cases, the courts have ruled that even when changing a rule originally issued without notice-and-comment, once there has been significant reliance on an interpretation, the notice-and-comment process is required to change it.

The Trump administration may pull back rules that were established through various forms of sub-regulatory guidance. .. This could include the Department of Treasury guidance on de-risking defined benefit pension plans that effectively prohibits lump sum distribution of benefits already being paid. An aggressive approach could issue a different interpretation through the same expedited sub-regulatory guidance process that was employed to issue the guidance. If challenged, however, this might be deemed to require the longer notice-and-comment process before it can be effective.

Delayed Effective Dates

An interim form of regulatory relief is to delay the effective dates of regulations that have already been published but are not yet applicable. The ability and process to do this remains somewhat murky and is therefore a function of how aggressive a new administration is willing to be and whether efforts to delay regulations survive a court challenge.

While it is certainly feasible that sub-regulatory guidance such as Interpretive Bulletins, FAQs or Advisory Opinions can be suspended or modified simply through the required Federal Register notices, it is conceivable that the removal of requirements imposed on employee benefits plans could be construed by the courts as imposing potential harm to participants.

On February 3, 2017, the White House directed the DOL to review the fiduciary definition rule to determine whether the final rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis of the likely impact of the final rule as part of that examination. In response, the DOL has proposed a 60-day delay in the April 10 "applicability" date, with a 15-day comment period on the delay proposal and a 60-day comment period related to the examination of the rule. The proposal was published on March 2. The delay will be effective upon publication of the final rule on the delay after the 15-day comment period. The DOL is expected to follow up with additional delays in order to obtain sufficient time for the review and possible revisions or maybe withdrawal and replacement of the original rule. It is interesting to note that in approving the proposed delay, OMB did not require that that the new two for one requirement be adhered to because, as the proposal notes, the proposed action would, by itself, diminish the regulatory burden. OMB also allowed this action to go forward without being included in the Unified Regulatory Agenda indicating that the new requirements may be selectively imposed during a transition period.

This action was possible despite the fact that the rule is already "effective" because it is not "applicable" until April 10, 2017, (for partial compliance) and January 1, 2018 (for full compliance). The concept of distinguishing between an "effective" and "applicable" date is a new twist not contemplated in the administrative law governing the regulatory process and likely will be tested in the courts if a challenge to the delay is raised. The fact that the regulation remains the subject of extensive litigation may have had some effect in supporting imposition of a delayed effective date that ultimately leads to withdrawing the regulation.

Proposed changes to the EEO-1 reports are another potential rule that might be readily delayed for reconsideration. The proposed revisions and comment request have been published and the form was released on September 29, 2016, but it is not effective until the 2017 plan year and the first filing for calendar year plans is due on March 1, 2018.

Non-Enforcement Policies

Another *de facto* means of achieving regulatory reduction is through enforcement discretion by executive branch agencies. This can be done informally by simply directing resources to other activities; or more formally through stated non-enforcement

policies that have been used in other circumstances pending resolution of regulatory or legislative uncertainty. The Obama Administration's non-enforcement policy with respect to the Defense of Marriage Act (DOMA) is an example of using administrative discretion to nullify outcomes inconsistent with an administration's policy. Similarly, the Obama administration adopted a policy of "transition relief" in which the ACA's "employer shared responsibility" provisions were not enforced during 2014.

Perhaps most importantly for employee benefits, ERISA provides for substantial private rights of action that would likely be unaffected by a decision by the executive branch to decline to enforce various rules. Therefore, non-enforcement policies are most likely to be effective in relation to data collection and reporting requirements and the imposition of penalties such as those imposed by regulation under the ACA.

WHAT CAN CONGRESS DO?

The ultimate authority to achieve regulatory reductions lies with Congress and its ability to enact legislation that removes the basis within individual statutes for the promulgation of regulations. A full or partial repeal of the ACA would immediately obviate many regulations under this authority and a similar outcome could be achieved with revision of other laws governing employee benefits.

Enactment of "repeal and replace" of the ACA could include changes in regulatory authority, but there is currently little indication of what this may look like. A similar legislative effort could also be pursued to clarify or narrow the scope of DOL's authority over Individual Retirement Accounts or to indirectly impose standards and private rights of action in relation to investment advisory services – controversial aspects of the recent fiduciary rule that potentially could be overturned with congressional action.

Disapproval Under the Congressional Review Act

Under the Congressional Review Act (CRA), Congress is able to reject through expedited procedures regulations that have been finalized within a recent time frame. The prescribed period is 60 "legislative days" which refers to days when Congress is in session. Most of the significant rules related to employee benefits were published sufficiently before the end of the Obama administration and are therefore not subject to the somewhat simpler process the CRA prescribes for overturning rules.

As noted above, the DOL's guidance on state retirement plans and mandatory IRAs and the related city and county guidance are examples of rules that were finalized sufficiently close to the end of the Obama administration that they are subject to CRA revocation. On February 15, the U.S. House of Representatives passed a resolution of disapproval of these rules and the Senate is expected to consider the resolution within

the coming days. Another regulation potentially subject to rescission under the CRA is the DOL Claims Procedures for Plans Providing Disability Benefits, published in the Federal Register on December 19, 2016.

Whether Congress uses the CRA to strike these or other regulations will depend on the priorities and attention of the new Congress. The CRA requires a separate resolution passed by both houses of Congress for *each* rule, rather than permitting one omnibus resolution setting aside *all* pending rules. (The recently introduced Midnight Rules Relief Act of 2017 (H.R. 21) would amend the CRA to allow Congress to consider a resolution to disapprove multiple regulations instead of the current procedure of considering only one regulation at a time).

The combination of these circumstances is likely to limit the potential for the CRA to be a significant means of reducing employee benefit regulations.

Moving to an Affirmative Rather than Negative Review Standard in the Congressional Review Act

A legislative change that would fundamentally alter federal rulemaking would be to flip the CRA review from potential disapproval to a requirement for an affirmative approval action for major regulations. This concept is the core of the Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 26) which would require all "major rules" to receive the approval of both the House of Representatives and Senate within 70 legislative days in order to take effect. The House GOP *A Better Way* plan published in June 2016 suggests that the REINS Act "should be given serious consideration."

Strengthening the Statutory Foundations for Regulatory Analysis

Many regulatory reform proposals suggest moving the review process and standards from the more transitory policies and procedures articulated in executive orders into a comprehensive and enforceable statutory framework. This sort of approach would expand the requirements for cost-benefit analysis and standards of review and ensure that adherence to the analytical requirements are followed when developing a regulation.

The Regulatory Accountability Act, passed by the House of Representatives in 2015 and cited extensively in *A Better Way*, would move the pre-rule analytical requirements into law and, importantly, introduce a "substantial evidence" standard under which the substance of agency decision-making is explicitly brought into judicial review of regulations. *A Better Way* also extends this concept of legislating regulatory decision-making standards by contemplating statutory limitations on agency interpretations of rulemaking authority.

CONCLUSIONS

The Trump administration has a variety of means to pursue its policy objectives through the regulatory process. In the short term, these are mostly forward-looking by halting the flow of new regulations through the imposition of a moratorium on new rules and imposing more stringent review and approval requirements. These prospective reforms are one area for which executive orders are a viable means of advancing a deregulatory agenda.

Most efforts to undo existing rules will be a cumbersome process that necessitates undertaking the notice-and-comment procedures under the APA. This requirement may extend even to rules put forth under the expedited sub-regulatory process. It could, therefore, take up to a year to make meaningful modifications to many existing rules; unless Congress first intervenes to do so through legislation.

An aggressive short-term approach to deregulation entails relatively rapid efforts to extend the effective dates of rules not yet in effect, exercising discretion in compliance enforcement and reinterpretation of the scope of authority that facilitates judicial challenges. This may be of limited consequence for many employee benefits issues where private rights of action may remain in place. It would be most consequential in delaying potentially costly recordkeeping and reporting requirements until more sustainable revisions could be implemented.