

The Regulatory Environment Under the Trump Administration

Impact on the Energy and Financial Sectors

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No more business as usual

Topics

1. Shaping the regulatory environment

- President Trump
- Congress
- Federal agencies (CFTC focus)
- Economy and time

2. Hot topics

- Legislation
- Regulators leveraging resources
- Swap dealer *de minimis* threshold
- Position limits
- Regulation of automated trading
- Qualified financial contracts

3. Takeaways

Shaping the regulatory environment

President Trump

Shaping the regulatory environment

President Trump



Image source: whitehouse.gov

Setting the tone

- Ambitious goals
- Appointments
 - Federal agencies
 - Judicial
- Executive orders and memoranda
 - Generally not applicable to independent agencies

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On February 24, 2017, President Trump issued an executive order furthering his regulatory reform agenda to stimulate economic growth. To move forward, our first step is to reduce excessive regulatory burdens. The President's executive order directs federal agencies to designate a Regulatory Reform Officer and establish a Regulatory Reform Task Force.

Although not strictly bound by the executive order, I am today announcing the launch of Project KISS, which stands for "Keep It Simple Stupid".

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– CFTC Chairman Giancarlo

Shaping the regulatory environment

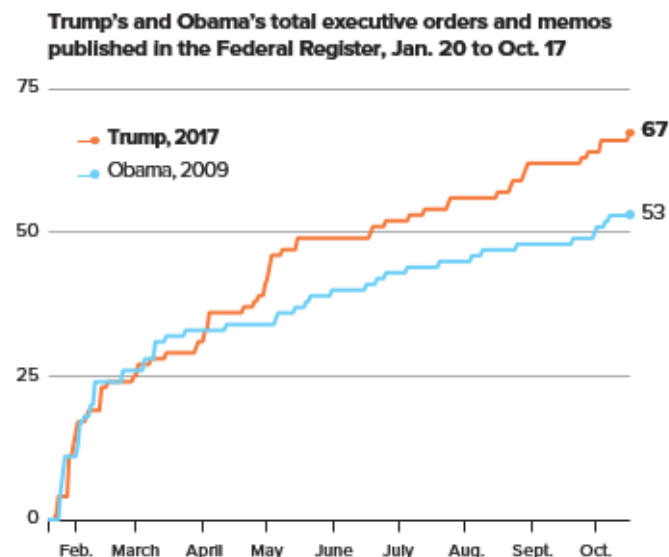
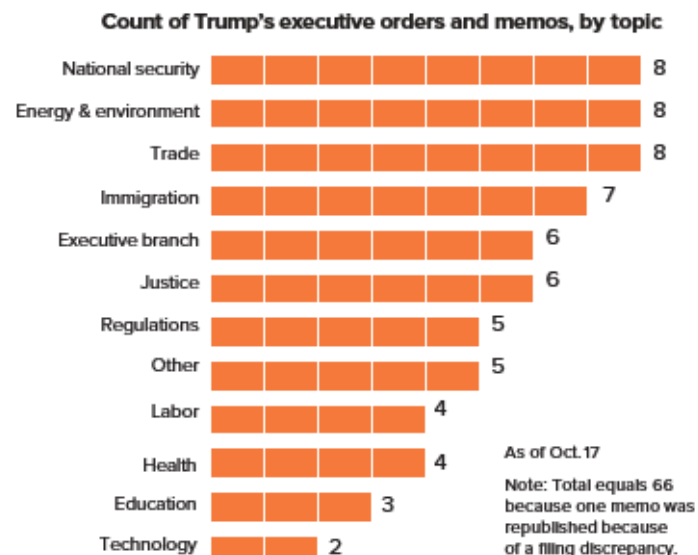
President Trump

POLITICO PRO
DATAPONT
ON POLITICS & POLICY

March 8, 2017 | Updated Oct. 18, 2017

All of President Trump's Executive Orders and Memoranda

President Donald Trump has issued executive orders and memoranda — which presidents increasingly use interchangeably and are equally legally binding — at a faster pace than former President Barack Obama from the beginning of their respective presidencies. Trump has wielded his executive power most often for issues related to energy and the environment, national security and trade.



Source: Federal Register, POLITICO Pro staff reports

By Janie Boschma, POLITICO Pro DataPoint

Shaping the regulatory environment

President Trump

Executive Order 13777

- Entitled “Enforcing the Regulatory Reform Agenda”
- Signed on February 24, 2017
- Directs certain agencies to, among other things, establish a Regulatory Reform Task Force to identify regulations that:
 - Eliminate jobs or inhibit job creation
 - Impose costs that exceed benefits
 - Create a serious inconsistency or otherwise interfere with regulatory reform and initiatives and policies
 - Rely on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility
 - Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified
- Oversee Executive Order 13771

Executive Order 13771

- Entitled “Reducing Regulation and Controlling Regulatory Costs”
- Signed on January 30, 2017
- Directs “that for every one new regulation issued, at least two prior regulations be identified for elimination”

Top 20 regulation topics affecting U.S. businesses

From 1995 to 2017



Shaping the regulatory environment

President Trump

Relationship between branches is key

- Success with President Trump's agenda will largely depend on his relationships with the federal agencies as well as Congress



Shaping the regulatory environment

Congress

Shaping the regulatory environment

Congress

Senate

- For top level change, the Senate matters most
- Current Senate composition
 - 51 Republicans
 - 47 Democrats
 - 2 Independents (caucus w/ Democrats)
- Consider Senate seats up for reelection in the 2018 midterm
 - For control of the Senate to flip, Democrats would have to gain 2 Republican seats and keep all of their own

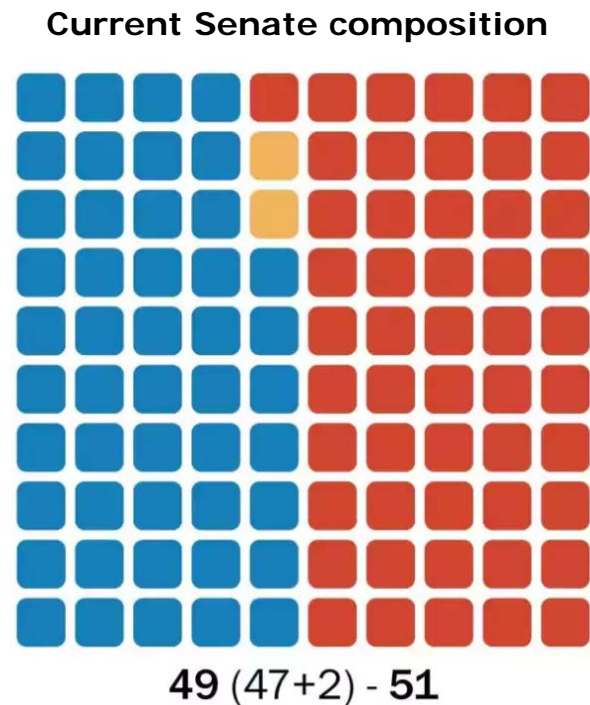


Image source: Washington Post

Shaping the regulatory environment

Congress

Senate seats on the ballot for the 2018 midterm

- 33 Senate seats up for regular election
 - 23 seats held by Democrats
 - 2 seats held by Independents (caucus with the Democrats)
 - 8 seats held by Republicans
- 1 Senate seat up for special election
 - Democrat seat in Minnesota held by an interim appointee (Smith) after Franken resigned
- Various predictions with differing outcomes – not static
- Next slide provides some stats to consider re the Senate seats on the ballot in the 2018 midterm

Shaping the regulatory environment

Congress

Senate seats on the ballot in the 2018 midterm

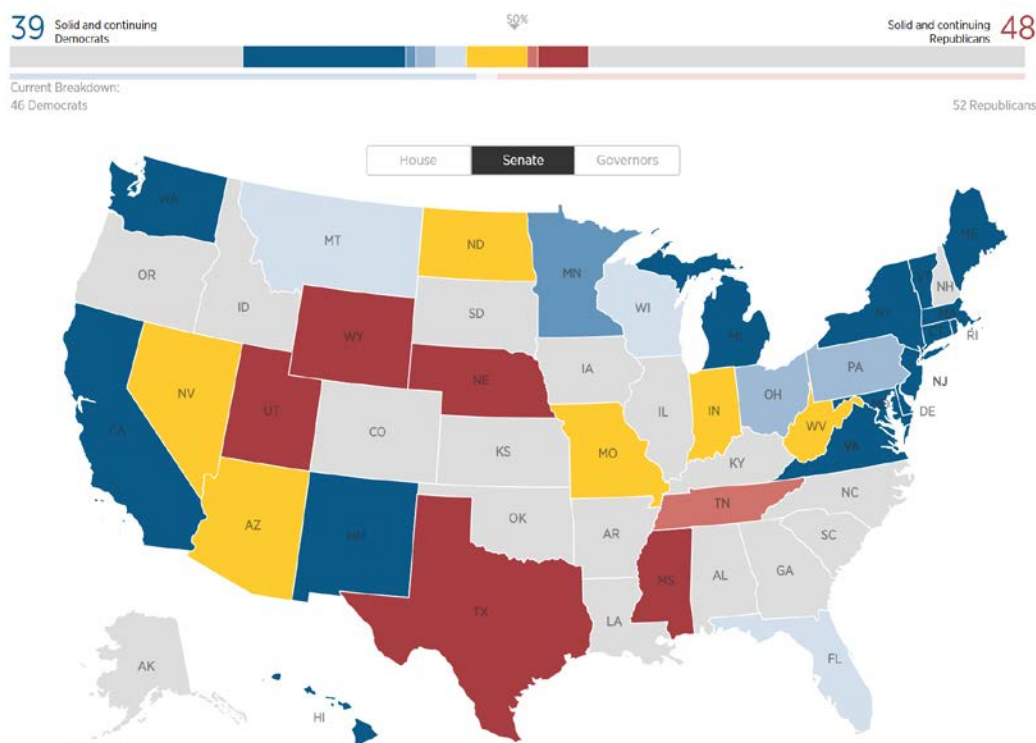
— Of the 24 Democrat seats:

- 10 are in states that Trump won in 2016 – 5 of which he won by a considerable margin

- WV
- ND
- MO
- IN
- MT

— Of the 8 Republican seats:

- 6 generally considered safe
- 2 generally considered toss up
 - AZ – Flake retiring
 - NV – Clinton won in 2016



Shaping the regulatory environment

Federal agencies (focus on CFTC)

Shaping the regulatory environment

Federal agencies

Focus of this presentation will be on the CFTC

- The energy and financial sectors will be impacted by several federal agencies; however, the CFTC will be the focus of this presentation



Shaping the regulatory environment


Federal agencies

Why focus on the CFTC?

- Broad jurisdiction of the CFTC, in part from Dodd-Frank
 - Exclusive jurisdiction over commodity futures, options, and swaps (with some exceptions) (7 U.S.C. 2(a)(1)(A))
 - General anti-fraud and anti-manipulation authority over “any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity” (7 U.S.C. 9(1))
 - Oversight authority over retail commodity transactions (7 U.S.C. 2(c)(2)(D))
- There have been discussions of revisiting Dodd-Frank
- Actions taken by the CFTC may influence global derivatives regulatory reform (*e.g.*, Canadian provinces)
- Derivatives regulations are important to the energy and financial sectors for purposes of business planning, trading operation considerations, and risk management

Shaping the regulatory environment

CFTC Commissioners

	 <p>J. Christopher Giancarlo, Chairman</p>	 <p>Brian D. Quintenz</p>	 <p>Rostin Behnam</p>	 <p>Vacant</p>	 <p>Vacant</p>
Term expires	April 2019	April 2020	June 2021		
Sworn in	June 16, 2014 <ul style="list-style-type: none"> • Designated Acting Chairman Jan. 20, 2017 • Confirmed as Chairman Aug. 3, 2017 	Aug. 15, 2017	Sept. 6, 2017		
Appointed by	Obama	Trump	Trump		
Political party	Republican	Republican	Democrat		
Previous experience includes	<ul style="list-style-type: none"> • Served as the Executive Vice President of GFI Group Inc., a financial services firm • Executive VP and U.S. Legal Counsel of Fenics Software • Corporate partner in a New York law firm • Founded law practice Giancarlo & Gleiberman 	<ul style="list-style-type: none"> • Founded and served as Managing Principal and Chief Investment Officer of Saeculum Capital Management, a registered CPO • Worked at Hill-Townsend Capital, a registered IA • Worked for Congresswoman Pryce (R-OH) 	<ul style="list-style-type: none"> • Served as senior counsel to Senator Stabenow (D-Mich), Ranking Member of Senate Ag Committee • Practiced law in New York City and worked at the NJ Office of the Attorney General 		

Shaping the regulatory environment

Economy and time

Shaping the regulatory environment

Economy and time

Where we are now

- Almost 10 years since the 2008 financial crisis
- Almost 8 years since the Dodd-Frank Act was signed into law on July 21, 2010

“

Much of the regulatory work in the past half dozen years has been to implement Congress' crisis response – the Dodd-Frank Act. Therefore the regulatory approach, both at the CFTC and across the federal government, was in a sense backward looking.

– CFTC Chairman Giancarlo

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Shaping the regulatory environment

Economy and time

What is happening now

- Revisiting laws and regulations
 - Addressing unintended consequences
 - Considering appropriate scope
 - Cost vs. benefit
 - Utility of information
- Forward thinking
 - Moving away from reactionary laws and regulations
 - Embracing technology
 - Concerns and caution
- Movement to more principles based approaches
 - *E.g.*, CFTC rule amending recordkeeping requirements

Hot topics

Legislation

Hot topics

Legislation

Legislation related to financial and energy markets (115th)

- Discussed in the context of rolling back Dodd-Frank, but direct impact to energy companies may be limited:
 - H.R.10, Financial CHOICE Act
 - S.2155, Economic Growth, Regulatory Relief, and Consumer Protection Act
- Notable legislation:
 - H.R.238, Commodity End-User Relief Act
 - S.1460, Energy and Natural Resources Act of 2017

Hot topics

Legislation

H.R.238, Commodity End-User Relief Act

- Passed the House January 12, 2017
- Would reauthorize the CFTC
 - Most recent CFTC reauthorization was in 2008
 - Supposed to be reauthorized every 5 years
- Similarities to legislation from previous Congress
- Notable provisions to energy market participants
 - Swap dealer *de minimis* threshold
 - Position limits and bona fide hedge exemption

Hot topics

Legislation

S.1460, Energy and Natural Resources Act of 2017

- Introduced June 28, 2017
- Similarities to legislation from previous Congress
- Notable provisions in Sections 4401-4403 (June 28, 2017 version)
 - Two new governmental bodies would be established to analyze and make recommendations regarding energy, commodities, and derivatives markets
 - One of these new governmental bodies would investigate the effect of increased financial investment in energy commodities on energy prices and recommend to the President and Congress laws (including regulations) that may be needed to prevent excessive speculation in energy markets
 - DOE's EIA would collect information identifying all oil inventories and other physical oil assets that are owned by the 50 largest traders of oil contracts (including derivatives) as well as company-specific data

Hot topics

Legislation

Legislative cycle

- 2018 is an election year - not much time left this Congress (115th)
- Even the legislation that is not passed this Congress still matters:
 - Legislation and ideas tend to get reused

Hot topics

Regulators leveraging resources

Hot topics

Regulators leveraging resources

Delegation of responsibility

- Regulators may increasingly delegate responsibilities to SROs (*e.g.*, the NFA) and exchanges
- Allows federal agencies to focus on core missions
- Consider the impact on relationships between regulatory authorities and market participants

Hot topics

Regulators leveraging resources

Whistleblower incentives and protections

- General idea is that whistleblower information will help regulators bring a successful enforcement action
- Various whistleblower incentive and protection frameworks (*e.g.*, CFTC, SEC)
- CFTC recently amended its whistleblower rules and reinterpreted its anti-retaliation authority

Hot topics

Regulators leveraging resources

CFTC's whistleblower amendments

- Would likely encourage whistleblowers to step forward due to the amendments to the CFTC whistleblower rules aimed at providing clarity and protection from retaliation as well as the potential for an increased whistleblower award
- May increase chances of being investigated for potential violations of the CEA and CFTC Regulations due to amendments to the whistleblower award program that encourage more whistleblowers to provide information to the CFTC
- Provide an added risk that the CFTC might also bring an enforcement action to enforce the anti-retaliation provisions

Hot topics

Regulators leveraging resources

Cooperation incentives

- Cooperation incentives are not new
 - [FERC Penalty Guidelines](#) (Sept. 2010)
 - [DOJ Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance](#) (Apr. 2016)
- But given the push to leverage resources, there may be an increased focus on cooperation incentives
 - [CFTC Company Cooperation Advisory](#) (Jan. 2017)
 - Replaces the 2007 cooperation advisory for companies
 - [CFTC Individual Cooperation Advisory](#) (Jan. 2017)
 - CFTC's first enforcement advisory on cooperation factors that is specific to individuals

Hot topics

Swap dealer *de minimis* threshold

Hot topics

Swap dealer *de minimis* threshold

Swap dealer – general framework

- Implications of being a swap dealer include increased regulatory obligations and expenses
- A “swap dealer” is any person who holds itself as a dealer in swaps, makes a market in swaps, regularly enters into swaps with counterparties as an ordinary course of business for its own account, or engages in activity causing the person to be commonly known in the trade as a dealer or market maker in swaps
- A swap dealer is required to be registered; however, a person whose swap dealing activities are below the applicable *de minimis* threshold will not be obligated to register as a swap dealer

Hot topics

Swap dealer *de minimis* threshold

Swap dealer – *de minimis* threshold (general)

- The CFTC provides an initial phase-in period for the *de minimis* exception
- During the phase-in period, a person may carry a gross notional amount arising from its swap dealing activity of up to \$8 billion over the course of the 12 months immediately preceding the calculation date without having to register as a swap dealer
- However, if the CFTC does not act, the \$8 billion *de minimis* threshold will drop to \$3 billion on December 31, 2019

Hot topics

Swap dealer *de minimis* threshold

Issues related to the swap dealer *de minimis* threshold

- Market uncertainty
 - CFTC has issued a series of orders extending the automatic drop
 - Difficult to plan business activities without certainty
- Consideration of the appropriate measure
 - Currently using notional amount
 - Issues with the calculation of notional amount
 - Alternative measurements?
 - Capturing the appropriate market participants?

Hot topics

Swap dealer *de minimis* threshold

What could be next?

- Legislative fix?
- Regulatory fix?
- Considerations
 - Political climate

Hot topics

Position limits

Hot topics

Position limits

Position limits – overview

- Dodd-Frank broadened the CFTC's authority to adopt position limits for futures and swaps for purposes of curbing excessive speculation
- General idea is limiting the size of positions held for speculation
- Long history of drafts – has been called the “eternal rulemaking”
 - Since 2011, CFTC has issued multiple versions of the position limits proposal
 - Rule challenged in court, and in 2012, the court struck the position limits rule and held that the CFTC had misread the provisions of Dodd-Frank
 - Continues to be a topic of discussion at Congressional hearings

Hot topics

Position limits

Position limits – general framework

- There are federal position limits, but the framework currently applies only to certain agricultural futures and options contracts – at this time, no federal position limits exist for energy contracts
- Position limits for energy contracts are currently established at the exchange level by each respective exchange
- The CFTC has issued proposed rules on position limits that would impose federal position limits on 25 Core Referenced Futures Contracts (comprised of energy, agricultural, and metals futures contracts) and their economically equivalent futures, options, and swaps

Hot topics

Position limits

Who will make the next move?

- CFTC?
- Congress?
- Considerations
 - Political pressures
 - Prices
 - Election year

Hot topics

Regulation of automated trading

Hot topics

Regulation of automated trading

CFTC proposal on the regulation of automated trading

- Referred to as Reg AT
- Originally intended to target automated and high frequency traders
- Current proposal could cause many large energy market participants to register with the CFTC
- If finalized, could cause pull-back by large energy traders
- Registration of these large traders may be the goal of the CFTC even under a Republican Chairman

Hot topics

Regulation of automated trading

What could be next?

- Further Congressional hearings?
- CFTC action?
- Obstacles and considerations
 - Potential impact if there is a future flash crash
 - Agreeing on scope

Hot topics

Qualified financial contracts

Hot topics

Qualified financial contracts

QFC Rules limiting rights w/r/t QFCs with GSIB entities

- Recently, each the Fed, FDIC, OCC issued final rules that limit rights with respect to qualified financial contracts (QFCs) with certain entities of global systemically important banking organizations (GSIBs) – referred to as the QFC Rules
- At a very high level, the QFC Rules require certain institutions that the Fed, FDIC, and OCC regulates (Covered Entities) to ensure certain of their contracts conform to specific stay and transfer requirements, including with respect to cross-default rights

Hot topics

Qualified financial contracts

QFC Rules limiting rights w/r/t QFCs with GSIB entities

- In general, the affirmative requirements of the QFC Rules do not apply directly to commercial energy companies
- However, Covered Entities will not be permitted to transact under QFCs with counterparties unless those QFCs comply with the requirements of the QFC Rules
- Because the QFC Rules will limit default rights and other contractual rights that commercial energy companies have historically relied upon in their QFCs, the QFC Rules may materially impact commercial energy companies

Hot topics

Qualified financial contracts

QFC Rules limiting rights w/r/t QFCs with GSIB entities

- Reason for bringing this up
 - Flagging it
- Implementation timeline of the QFC Rules
 - Phased-in starting on January 1, 2019

Takeaways

Takeaways

- Revisiting laws and regulations
- Election year may limit legislative momentum
- Legislation and ideas from this Congress may come up next Congress
- Environment in DC changes rapidly
- The only constant is change

Questions?

Thank you



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