

# TRUMP'S REGULATORY TAPESTRY

BROAD BRUSHSTROKES, WIDE-OPEN SPACES, AND MAJOR OPPORTUNITIES

**T**wo-term presidencies have a way of inducing collective amnesia when a new chief executive comes to town. So it's worth remembering: a new administration always has different (and often dramatically different) objectives than its predecessor. At the same time, some things remain the same: the rulemaking process, the very similar process of “unmaking” a rule, and the unchanged role of the federal courts in this process. For corporations, a change in administration usually means both new opportunities and regulatory uncertainty. This same tension presents itself under the Trump administration, but seemingly to a greater degree at the extremes—with the president's personal emphasis on deal-making, the opportunities appear to be enormously tantalizing, but the prognosis for his aggressive *de*-regulatory agenda remain very difficult to predict.

Industry shouldn't wait. It should act. The reality is that the regulatory tableau is evolving but needs the input of the business community that Candidate Trump pledged to help. First-to-move companies have a potentially historic opportunity to make a difference in the regulatory arena, not just for this administration but for years to come.

“The fact of the matter is that the Trump administration has extended an open invitation to industry to come to Washington and share its ideas,” says [Angela Styles](#), chair of Crowell & Moring and the former administrator for federal procurement policy within the Office of Management and Budget at the White House. “While with every new administration there are usually vast differences between campaign rhetoric and executive action once the new president takes office, what we've seen in the first 100 days of the Trump administration is that he really wants to make good on his campaign pledges. He's clearly not content to cast aside as ‘rhetoric’ everything he promised in the campaign.”

So while Donald Trump's presidency may not represent revolutionary change, neither does





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it represent business as usual in the regulatory world—it’s more a reset against the backdrop of all the “inside-the-Beltway” constants. The bottom line is that President Trump’s approach to regulation presents a new opportunity for corporations to reexamine their objectives in Washington and to probe opportunities for achieving those goals.

### TRUMP’S CAMPAIGN AGAINST THE “ADMINISTRATIVE STATE”

Trump launched his bold regulatory agenda in both general and specific ways. He gave early definition to his philosophy of scaling back the regulatory state through an executive order calling for the federal government to rescind two regulations for every new one it promulgates. And he took quick action on specific pledges made on the campaign trail by, for example, approving completion of the Keystone XL and Dakota Access pipelines, thus reversing two very controversial determinations of the Obama administration.

Indeed, literally from Day 1, Trump has shown a desire both to pull back on specific actions of his predecessor and to create the blueprint for longer-term shrinking of federal regulation. And in addition to his own direct actions, he moved quickly and successfully to fill the vacancy on the Supreme Court with a judge famously skeptical of agency authority (see sidebar, page 7). Moreover, his election has single-handedly emboldened Congress to utilize the Congressional Review Act to kill 13 regulations to date after having done so only once since its enactment 20 years ago (with still more CRA actions anticipated).

As the contours of the game board take shape, there are a lot of ways for businesses to move within it. Executive branch agencies are expressly asking the business community—in-

deed, the public generally—for their input on which rules impose outsized economic burdens or no longer make sense.

“In a certain sense, it’s a jump ball,” Styles explains. “The Trump administration has made clear, and even acted on, its intentions in a number of regulatory areas, and that creates some tremendous opportunities. This president prides himself on being a dealmaker, and so far he has not presented agencies with ideological mandates. He wants to shake things up and get things done, and this approach provides a huge opening for businesses that may have felt they’ve been waiting eight years or even longer for just this moment.”

To be sure, every administration undergoes shifts in regulatory priorities, particularly when control changes from one party to the other. And Styles notes that while Trump may represent a bigger shift than usual, it’s not as though we’re without historical comparisons. President Ronald Reagan, for example, also took a big swing at the regulatory apparatus, deregulating airlines and savings and loans with tremendous consequences for each industry and for America. Business should recognize the similar opportunities presented by Trump.

Despite moving quickly to effectuate some of his campaign promises with regard to regulation, much uncertainty remains. For example, Candidate Trump repeatedly promised to revive the U.S. coal industry, and President Trump moved quickly to begin rescinding the prior administration’s Clean Power Plan, a comprehensive greenhouse gas reduction rule. But what now? How this and other similar incomplete puzzles will be filled in is where the business opportunity exists. To help shape the regulatory agenda, as opposed to merely waiting to do business in it, the time to act is now.

“Time is of the essence,” Styles says. “The senior leader-



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ship teams have landed in all the agencies and White House components, and now is the time to develop your policy goals and help shape the administration's."

Opportunities for businesses to effect regulatory change will come in four main buckets, Styles suggests:

- **Executive orders:** Out with the old, in with the new. President Trump has already used his unilateral authority to reverse previous executive orders by President Obama on several occasions. Executive orders, unlike regulations, are the classic "low-hanging fruit" in that they can be done and undone by a new administration with the stroke of a pen. And although executive orders are not regulations, "they have huge, practical, day-in, day-out effects in terms of executive agenda-setting," Styles says.

"Executive orders give definition to a president's priorities," Styles explains. "Through an executive order, the president is saying 'this is what's important to me and this is how we're going to operate around here with respect to this or that subject matter.'"

The same is true of reversing a prior executive order—saying "this is not a priority is just as much priority-setting as affirmatively saying what is," Styles adds.

- **Congressional Review Act rescission:** Another opportunity for swift reversal of burdensome regulations is the Congressional Review Act, under which agency rules promulgated during the last 60 legislative working days of the prior Congress may be rescinded by Congress, by a simple majority vote. The CRA window dates back to June of last year, and therefore covers a period during which the Obama administration finalized a flurry of final regulations that are currently up for grabs.

The CRA was rarely used after Congress passed it in 1996, but the new Congress is making up for lost time. For example, Congress abolished a rule passed late in the Obama administration that required the Social Security Administration to identify individuals whose rights to gun ownership should be restricted. And it reversed the SEC's "resource extraction" rule, a Dodd-Frank regulation

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## GORSUCH MAY AFFECT SUPREME COURT BALANCE ON REGULATION

With Neil Gorsuch now on the Supreme Court, his impact on regulatory regimes, including the deference doctrines, is still unclear.

Before his confirmation, Gorsuch was depicted as an intellectual clone of the late Justice Antonin Scalia, a strict constructionist expected to be a dependable conservative vote. But Gorsuch has made clear, in his opinions and his Senate testimony, that he could differ from Scalia in important ways on regulatory matters.

Principally, Gorsuch disagrees with Scalia on the constitutionality of *Chevron* deference, a longstanding principle of administrative law requiring courts to defer to interpretations of ambiguous statutory provisions offered by the government agencies charged with enforcing them, unless such interpretations are unreasonable.

"Gorsuch believes the duty to interpret the law—even ambiguous law—rests properly with the courts and not with the executive," says [Thomas Lorenzen](#), a partner in Crowell & Moring's [Environment & Natural Resources Group](#) and former assistant chief of the Department of Justice's Environment & Natural Resources Division, where he managed the legal defense of all rules issued by the EPA for nearly a decade. "If he can garner additional support for that view from other justices, it could result in a fundamental shift in Supreme Court doctrine."

Lorenzen says that the newest justice also "would

want to limit *Auer* deference," which takes its name from an opinion authored by Justice Scalia and refers, similarly to *Chevron*, to the latitude agencies get when interpreting their own regulations. Under *Auer*, such interpretations are entitled to the highest levels of deference and are disregarded only where they cannot be squared with the regulation's terms. "As a circuit court judge, Gorsuch was bound by *stare decisis*," says Lorenzen, "but on the Supreme Court, he could join conservative justices to overturn" the *Auer* doctrine, as Scalia himself had signaled over the last few years he was ready to do.

Taken together, Gorsuch's heavy skepticism toward agency deference "could affect every federal agency's ability to announce interpretations of statutes or revise prior interpretations of statutes and prior regulations," Lorenzen explains. "So, his position on the high court could have profound consequences."

Along those lines, Gorsuch could be expected to author opinions limiting the authority of federal agencies in pending challenges to the Waters of the United States Rule and the Clean Power Plan.

"But Gorsuch's presence may also set up an interesting conflict between a conservative president who wants to roll back regulations and needs deference to accomplish his ends and a conservative court that limits deference to what President Trump wants as the executive," Lorenzen adds.



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requiring publicly traded mining, oil, and gas companies to disclose payments they make to foreign governments—a rule that many corporations viewed as federal overreach.

- **“Two-For-One” regulatory relief:** Trump’s “two-for-one” executive order poses a challenge and opportunity for every executive branch agency (but not the independent agencies), as well as an opening for the business community to focus on redundant or burdensome regulations that could be packaged with new proposed regulations.

“They want ideas not only on how to execute the two-for-one but also on businesses’ other concerns,” Styles says. “Businesses can help get the wheels in motion.”

- **Enforcement discretion:** In most cases, agencies have broad discretion to choose which areas of their enforcement authority they choose to prioritize. “Although agencies are charged with, and have an obligation to do, whatever Congress says needs doing by statute, they have a lot of discretion in execution as well as prosecutorial discretion in enforcement,” Styles says. This discretion can have important ramifications in areas such as environmental policies, workplace safety and health, financial regulation, and consumer protection.

Republican administrations typically approach administrative enforcement through more public-private cooperative models of regulation rather than measuring success through citations and civil penalties, and that is virtually certain to be the case in this administration. So, for example, the IRS is in the process of redesigning its model for auditing large businesses with the goal of making the process more collaborative. The IRS is looking to work

more with taxpayers to identify and resolve issues earlier in the process and thereby avoid contentious, costly litigation.

### SETTLING IN FOR THE LONG HAUL

Much political and media attention has been paid to the four swifter forms of intervention described above. But after the initial blitz of executive orders and CRA rescissions, the new administration is now staffing up and settling in for the time-honored and arduous process of rulemaking and legislating that will determine the arc of this presidency. Business leaders have the opportunity to influence actions in a variety of regulatory areas. While “repeal and replace” will no doubt be a popular refrain in the halls of many agencies, savvy companies will also be looking to this administration to shape regulation through entirely new, albeit more business friendly, regulatory programs that will provide for certainty and consistency—and that will outlive this administration.

Be that as it may, while businesses should be gearing up to engage in what is clearly a new era in federal regulation, they shouldn’t necessarily expect easy, quick, or always favorable results. Both rescinding regulations and promulgating new ones will take time and will invite lengthy, complex litigation. Congress will continue to have a huge role, and legislating—even with Republican majorities in both houses—does not guarantee easy success, as shown by Congress’s recent attempt to “repeal and replace” the Affordable Care Act.

In addition, as the federal government moves to push authority increasingly to the states in areas such as health care and environmental regulation, a new brand of federalism may emerge that the business community will have to grapple with. If regulatory authority recedes in Washington



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and devolves outward to the states, businesses operating across state lines will need to bone up on their state programs, especially in areas where compliance is no longer being dictated from Washington.

“The best advice we can give to our clients is neither to overreact to some of the more sweeping remarks that have characterized the first 100 days of this new administration, nor to sit back and wait for things to happen,” Styles advises. “The opportunity to engage with Washington is now.”

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## CONGRESS’S ROLE IN SHAPING REGULATORY STRATEGY

Regulatory reform isn’t just a hot topic at the White House. Congressional Republicans also want to notch wins for business.

“There is near unanimity across the Republican party on the need for regulatory reform,” says [James Flood](#), chair of Crowell & Moring’s [Government Affairs Group](#) and former counsel to Senate Minority Leader Charles Schumer (D-N.Y.). “And President Trump has made one thing clear: he wants to do regulatory reform in the interest of unleashing more economic growth.”

Congress is likely to find Democrats working with Republicans on requiring more transparency and public disclosure from federal agencies in proposing new regulations. “These are basic reforms that Republicans and Democrats can agree upon, as well as modernizations that can get bipartisan support,” says [Scott Douglas](#), a senior policy director in Crowell & Moring’s [Government Affairs](#) and [Health Care](#) groups who served as finance director for Senate Majority Leader Mitch McConnell.

“While in some circles compromise has become a dirty word, Americans are looking for Washington to take action on the issues that keep them up at night,” says Douglas. “The issue that matters most is the economy. Under a jobs-first agenda, there will be new discussions about tax reform, infrastructure investments, removing regulatory barriers for business expansion, and the need for access to quality education to train the workers of the future.”

However, Flood and Douglas note, Congress will have a far tougher time enacting tort reform, an initiative that has deadlocked legislators for decades, despite its popularity in the business community.

To be most effective in making arguments in any area of regulatory reform, business leaders should be prepared to explain how their priorities are consistent with the administration’s goals. “In addition to putting your best foot forward,” Douglas explains, “you must use the language they use and marry your agenda with the Trump administration’s agenda.”

## MAKING AN IMPACT IS UP TO YOU

When you’re ready for your voice to be heard, here are some practical tips for how business leaders can engage with Washington:

### Count the Cost

Track new proposals and calculate the economic impact on you. Devote resources in D.C. to the legislation and regulation that most hurts you. Tell lawmakers and regulators how the new bill or regulation will impact jobs, investment, and your ability to compete.

### Go Through the “In” Doors

The Trump administration established a new Office of American Innovation to work with business leaders on making government more effective. Call it. And if you know any CEOs who now are on various White House advisory panels, contact them.

### Don’t Wait

President Trump will continue to use executive orders and other “fast action” authority to cut regulation and spur the U.S. economy. Speak early and often. The opportunity will not be there forever.

### Be Ready for Tax Reform

Tax reform affects every corporation in America. This administration’s efforts present the greatest opportunity for a major reset since the Reagan administration. Engage on the details of tax reform that impact your business.

### Watch for Unexpected Openings

Rulemaking takes time, and the administration prefers not to regulate unless it has to—but be prepared to engage in the process, either proactively or defensively, when these opportunities arise.