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First Steps: Trump Administration's Initial Executive Actions Target the Affordable Care Act and Obama Administration's Midnight Regulations

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On Friday, January 20, 2017—within hours of President Trump's inauguration—the new Administration took its first executive actions. These executive actions included:

1. President Trump's issuance of an Executive Order titled "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" (ACA Executive Order).
2. Chief of Staff Reince Priebus's issuance of a memorandum that (1) freezes most regulations that have not yet been submitted to or published by the Office of the Federal Register (OFR) and (2) orders a 60-day delay in the effective date of most regulations that had been published in the Federal Register but had not yet taken effect on January 20, 2017. See Memorandum of The Hon. Reince Priebus, Chief of Staff, Office of the President 1 (Jan. 20, 2017) (Midnight Regulations Memorandum).

Neither of the two executive actions described above is, by itself, likely to represent an immediate sea-change in the substance of the existing regulatory landscape. President Trump's ACA Executive Order does not grant agencies any new authority or discretion unavailable under current law, and appears largely to set the stage for future agency actions. And Chief of Staff Priebus's order of a 60-day delay in the effective dates of final but not-yet-effective regulations, which is largely consistent with the historical practice of incoming Presidents, does not rescind or modify any so-called midnight regulation of the preceding administration, and simply affords the new Administration additional time to review such regulations to determine whether to initiate a rulemaking to rescind or modify them.

These executive actions nonetheless reinforce President Trump's desire to scale back aspects of the regulatory agenda of the Obama Administration, especially those concerning health care reform.

ACA Executive Order

The ACA Executive Order does not directly make any changes to the ACA, nor does it mandate any specific executive action or grant agencies any authority or discretion that they did not already have. Rather, the ACA Executive Order directs agencies to exercise their existing authority and discretion, within the bounds of the law, to ease regulatory burdens and constraints occasioned by the ACA.

Specifically, the ACA Executive Order directs the Secretary of Health and Human Services (HHS) and the heads of other agencies "with authority and responsibility under the [ACA]" to exercise their existing authority and discretion to "waive, defer, grant exemptions from, or delay the implementation of" any provision of the ACA that imposes fiscal or regulatory burdens on states, individuals, insurers, or drug or device manufacturers. ACA Executive Order § 2. The ACA Executive Order also directs agencies to provide greater flexibility to states in implementing federal health care programs, and to encourage the development of a "free and open market in interstate commerce" for health care and health insurance. *Id*. at §§ 3-4. Where appropriate to carry out its directive, the ACA Executive Order instructs agencies to utilize Administrative Procedure Act (APA) notice-and-comment rulemakings to revise existing regulations. *Id*. at § 5.

It remains to be seen how HHS and other agencies will carry out the ACA Executive Order. Many of the obligations under the ACA may not be changed without action from Congress or rulemakings to revise existing regulations, which can take months or years. Any immediate changes are likely to be limited to those areas where HHS and other agencies have authority and discretion to act without revising the existing regulatory regime and without requiring congressional action. While the scope of the ACA Executive Order is not limited to agency actions related to the individual mandate, examples of areas where HHS has such authority and discretion and could potentially make immediate changes include:

1. Expand exemptions to the individual mandate tax penalty. HHS could expand the scope of "hardship" exemptions from the tax penalty imposed on individuals who do not maintain minimum essential coverage under the individual mandate. The ACA grants HHS broad authority to establish and administer hardship exemptions for individuals who have "suffered a hardship with respect to the capability to obtain coverage under a qualified health plan." I.R.C. § 5000A(e)(5). The Centers for Medicare & Medicaid Services (CMS) included a catch-all provision in the implementing regulations that could permit the expansion of the scope of such hardship exemptions through guidance. See 45 C.F.R. § 155.605(d)(iii).
2. Expand definition of minimum essential coverage. HHS could expand the scope of what qualifies as "minimum essential coverage" (i.e., the types of coverage that count under the individual mandate). The ACA grants HHS discretion to define additional coverage that counts as minimum essential coverage, and CMS's implementing regulations contain a catch-all provision for coverage that "substantially meet[s]" certain ACA requirements. I.R.C. § 5000A(f)(1)(E); see also 45 C.F.R. §§ 156.602, 156.604. CMS has some discretion in determining whether coverage "substantially meets" those requirements and it could use this discretion to allow more types of coverage to qualify.

That said, it is far from clear that these are the types of agency actions that will follow from the ACA Executive Order, as such actions could destabilize the health insurance markets.

In addition, HHS could exercise its discretion to more liberally grant applications for demonstration projects and waivers by states, in furtherance of the ACA Executive Order's instruction to "exercise all authority and discretion available to provide greater flexibility to states and cooperate with them in implementing healthcare programs." ACA Executive Order § 3. Section 1332 of the ACA grants HHS discretion to waive certain provisions of the ACA related to the health insurance exchange regime, subject to certain standards, *i.e.*, the state's proposed alternative must provide coverage to at least a comparable number of residents, provide coverage that is at least as comprehensive and affordable, and not increase the federal deficit. CMS has issued guidance that allows it some discretion in determining whether a proposal meets these requirements. *See* 80 Fed. Reg. 78,131 (Dec. 16, 2015). Similarly, section 1115 of the Social Security Act grants HHS discretion to waive certain Medicaid requirements for states that propose demonstration projects that "[are] likely to assist in promoting" the objectives of Medicaid. It is expected that CMS will allow states enhanced flexibility in designing and administering their Medicaid programs.

Midnight Regulations Memorandum

As expected, Chief of Staff Priebus issued a memorandum to all agencies requesting that certain steps be taken with respect to pending regulations that had not yet been submitted to or published by the OFR, as well as midnight regulations of the preceding administration that had been published in the Federal Register but had not yet reached their effective date. The memorandum orders the following:

1. Freeze on regulations not yet submitted for publication in the Federal Register. Subject to any exceptions that the Director or Acting Director of the Office of Management and Budget (OMB) permits for emergency situations or urgent circumstances (instances involving health, safety, financial, or national security matters, or otherwise), the Midnight Regulations Memorandum orders agencies to "send no regulation to the OFR until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation." Midnight Regulations Memorandum at 1 (permitting the agency or department head to delegate the power of review and approval to another person appointed or designated by the President, if consistent with applicable law).

2. Withdrawal of not-yet-published regulations. The Midnight Regulations Memorandum also orders that any regulations that have been submitted to the OFR for publication—but not yet published—be withdrawn, if withdrawal is consistent with OFR procedures.

3. Sixty-day delay of the effective dates of any final but not-yet-effective regulations. With regard to regulations that had been published in the Federal Register but had not yet taken effect as of January 20, 2017, "as permitted by applicable law," the Midnight Regulations Memorandum orders a "temporar[y] postpone[ment] [of] their effective date for 60 days from the date of this memorandum," subject to any exceptions recognized by the Director of OMB for emergency situations or other urgent circumstances. *Id.* at 2. The Midnight Regulations Memorandum also instructs that, "[w]here appropriate and as permitted by applicable law," the agencies "should consider" initiating a new notice-and-comment

rulemaking to delay the effective date of such regulations beyond the 60-day delay period. *Id.* at 1.

The Midnight Regulations Memorandum is largely consistent with the historical practices of past Presidents. It is well-established that regulations typically may be withdrawn prior to their publication, absent a statutory or judicial order establishing a deadline for agency action. And—since the Reagan Administration—every President who has taken office after a different-party transition of power has issued some form of a 60-day delay on final but not-yet-effective regulations.

The instructions contained in Chief of Staff Priebus's memorandum are generally consistent with the instructions contained in the memoranda issued by prior Presidential administrations. But one point of ambiguity may be whether the 60-day delay begins on the date of the Midnight Regulations Memorandum's issuance or whether the 60-day delay begins on the date on which a regulation was originally scheduled to take effect. The language of the Midnight Regulations Memorandum suggests that the 60-day clock starts on *the date of the memorandum's issuance* on January 20, 2017. *See* Midnight Regulations Memorandum 1 ("[T]emporarily postpone the[] effective date [of final but not-yet-effective regulations] for 60 days *from the date of this memorandum*.") (emphasis added).

In contrast, prior 60-day delay memoranda did not include the qualifying phrase "from the date of this memorandum," such that, under those memoranda, the 60-day clock appeared to start on *the date on which a regulation was originally scheduled to take effect*. For example, in the Obama Administration, Chief of Staff Rahm Emanuel's memorandum stated: "Consider extending *for 60 days* the effective date of regulations that have been published in the *Federal Register* but not yet taken effect." Memorandum of Rahm Emanuel, Chief of Staff, White House (Jan. 20, 2009) (emphasis modified). And, in the G.W. Bush Administration, Chief of Staff Andrew Card's memorandum ordered agencies to "temporarily postpone the effective date of [final but not-yet-effective] regulations *for 60 days*." Memorandum of Andrew H. Card, Jr., Chief of Staff, White House (January 20, 2001) (emphasis added). Agencies understood these prior 60-day delay memoranda to direct the start of the 60-day delay based on a regulation's original effective date—rather than the date of the 60-day delay memorandum's issuance. *E.g.*, 66 Fed. Reg. 16,134, 16,134 (May 23, 2001) (delaying the effective date of a regulation "for 60 days, from the originally scheduled effective date of March 23, 2001, to a new effective date of May 22, 2001").

Given the language used in the Midnight Regulations Memorandum regarding when the 60-day delay clock starts, the Trump Administration may be signaling a different approach. But it remains to be seen whether the Trump Administration will ultimately adopt this approach, notwithstanding the language of the Midnight Regulations Memorandum.

Another potential ambiguity concerns the provision of the Midnight Regulations Memorandum that excepts "regulations subject to statutory or judicial deadlines." Midnight Regulations Memorandum 2. While the exception is stated broadly, it may be that the Trump Administration will interpret the exception to be generally inapplicable where a statutory deadline has already passed. In other words, it may be that the Trump Administration will interpret the exception to apply only where a 60-day delay in the effective date of a regulation cause a statutory deadline to be missed.

Subject to the discussion above, the Midnight Regulations Memorandum is largely consistent with the historical practice of past Presidents. Our previous client alert offers additional details on the 60-day delay practice, as well as other steps that President Trump and the new Congress could potentially employ to halt or delay various Obama Administration regulations. *See* Hogan Lovells, *Rolling Back the Clock – What the New Administration and Congress Can Do to Halt or Delay the Obama Administration's Midnight Regulations* (Nov. 22, 2016).

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The ACA Executive Order and Midnight Regulations Memorandum are two of the Trump Administration's first efforts toward rolling back certain Obama Administration regulatory policies. Although neither of the two executive actions appears to be independently sweeping in scope, in the coming weeks and months, President Trump and his partners in the new Congress are likely to attempt to press forward with further initiatives that roll back Obama-era regulatory policies and introduce new policy priorities. Hogan Lovells will continue to monitor and report on these developments and their effects on regulated industries.

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