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Hello I am Doug Hallward-Driemeier, a partner in the Washington, D.C. office of Ropes & Gray and chair of the firm's Appellate and Supreme Court practice. Today I am joined by my colleague Justin Florence, who previously served as Special Assistant and Associate Counsel to President Obama in the White House and before that served on the staff of the Senate Judiciary Committee.

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This is part of our Capital Insight series that examines the issues and potential regulatory enforcement changes emanating from our nation's capital as we transition to a new political administration.

Justin: Thanks, Doug. I thought we might discuss the potential levers of policy change that are available to the incoming Trump administration and the new Congress. What are the opportunities for and obstacles to major legal and policy change that we may see, and are there some big picture guidelines that will structure how change happens?

Doug: Sure, as a rule of thumb, I think it is fair to say that the same way that a policy was adopted is what you have to do to change that policy. So if policy was adopted through legislation, you have to go through legislation to undo it or to change it; likewise if you went through notice and comment rule making, similarly to change it where as more informal action such as executive orders can be undone that same way.

Another general rule, I think, is that it is easier to stop something than to start it. And so that is true with enforcement initiatives or regulatory initiatives that might be underway that could be stopped whereas getting something new on the books is going to take a longer time. One way to think about these changes is to think about it branch by branch, I suppose. In starting with the legislature, Justin, you had worked with the Senate previously, but some might think that given that the Republicans control both houses of Congress before and do so now that there is not going to be a major change on the Hill. I suspect you have a different view?

Justin: I do and that is because of the tremendous influence that the President and the administration have over the legislative process and that starts with the State of the Union, with setting forward a budget, with testifying at legislative hearings, and, central to that influence that the Executive Branch has is the veto. Or course, nothing can become law unless the President signs it or refrains from vetoing it. And so when there is either a veto in the wings or a threat of a veto, it really constrains what type of actions Congress takes legislatively. Now, I think one thing we will see in the very near future because the threat of a Democratic presidential veto is gone, is use of the Congressional Review Act which is a statute that allows Congress to roll back regulations on an expedited timeline and with a simple majority vote – that hasn't done that much work in the prior administration because the President would veto these measures but the incoming President is unlikely to do so, so I think we will see some uses of that in the near future.

Another area where we may see changes in Congress is its oversight role. In the last several years Congress has focused most of its oversight attention on the Obama administration, on Hillary Clinton, on the emails, and it is unclear how much Republican controlled Congressional committees will want to use their powers and their resources to investigate a Republican presidential administration. They may instead turn that focus to the private sector looking at companies, individuals, NGOs, for different matters, and so that is something that folks will want to be aware of. It is not just what happens through legislation but through oversight either of the private sector or of the administration.

Doug: Well maybe let's now transition in looking at the Executive branch and agencies. I suppose it is probably very important to look at many of these questions agency by agency, issue by issue and I know that some of our colleagues have done that in other podcasts in this series. But, it seems to be also helpful to think a little more generally with respect to formal rulemaking, for example, that that can be very cumbersome, and we are seeing just now the Obama administration in its final days finalizing regulations that have been in the works for many years, since perhaps the beginning of the second administration, and so to the extent that the incoming administration has to go through that process that would be very cumbersome.

One thing to note as we come to this transition between the agencies is that I would expect to see that the new Chief of Staff, Reince Priebus, would issue a memorandum similar to what we saw with the transition from the Clinton administration to Bush with Andrew Card, or from the Bush administration to President Obama with Rahm Emanuel, which is a memo that tries to freeze in place administrative actions so any regulation that has been perhaps finalized and sent to the Federal Register, but not yet published, would be withdrawn from that or anything that has been published, but not yet gone into effect, would be delayed. Both the Card memo and the Emanuel memorandum did that and I would expect to see that again in this administration. As we discussed before, though, there is a lot of what agencies do that is not formal notice and comment rulemaking, executive orders or more informal guidance in policy documents. Those I would expect to see changing much more rapidly, and as you mentioned, enforcement priorities is something that can change very rapidly, especially to the extent that the government has been doing something affirmatively it can pull back from that pretty quickly. Are there areas where you expect to see that kind of change pretty quickly?

Justin: I do think that enforcement priorities is a great example there because there is no other branch of government that can quickly and easily check what the government is doing there. We saw it in the Obama administration with the immigration executive actions: although some of those through court challenges, through opposition from Congress, the changed in prioritization and resource deployment for deportations has gone virtually unchecked, and I think the Trump administration will see in that, that shifting around resources, focusing in different areas is something they can do quickly and can do without other branches interfering. It is a little bit hard to prognosticate where that may happen but it could be within any agency focusing on particular industries, focusing on particular companies, given the way the dialogue has gone lately, any of those areas. Another thing that the administration can do quickly is change its litigation position. I know you worked in the Solicitor General's Office and am curious if you can talk about more about how that process happens?

Doug: Well, at least for the core Executive agencies, they are represented by the Department of Justice and anything on appeal, that position of the United States is adopted by the Solicitor General, and so it is certainly true that in change from one administration to another, sometimes you see policy change reflected

through no longer defending, perhaps a regulation or informal guidance, that was challenged and struck down by a lower court. Interestingly one of the major pieces of regulation that had been in litigation is the Clean Power Plan. When I was in the Solicitor General's Office, we did see that from one administration to another a change in policy with respect to environmental issues. There sometimes, as is the case with the Clean Power Plan, regulations there are interveners, private parties that are defending the regulations, who would want to continue to press that. So, we may actually see an issue get up to the Supreme Court about whether that is permissible. The Affordable Care Act cost sharing subsidies are also in litigation where the Congress, or House or Representatives, has challenged the government's policy, the administration's policy, as inconsistent with the Appropriations Clause, another area where we might see the administration's position change in litigation. Sometimes it is even more direct, in the transgender student litigation that is currently before the Supreme Court. That is there on a question of deference to the Department of Education's interpretation of sex discrimination, as including gender identity discrimination. If that policy interpretation were to change, that would obviously influence the litigation. So, there are lots of ways in which the government's position, as represented by the Solicitor General, can influence how rapidly some of these policy changes can be made.

Justin: Unfortunately that is all the time we have today. It will be fascinating to see how these issues play out. We will have another podcast coming soon on changes that we can expect to see in the judiciary. Thank you Doug, for joining me in this interesting conversation. Thank you all for listening. I hope everybody will visit our newly launched Capital Insights page at www.ropesgray.com for more news and analysis on noteworthy enforcement and regulatory issues.