While some see a potential sea change in the US regulatory landscape, many of the US requirements are substantively redundant with what is required or mandated by other nations’ regulatory regimes. As companies become more global, their advisers must become more global as well, to properly advise on requirements and potential liabilities from jurisdiction to jurisdiction.

The push to US deregulation
Since President Donald Trump and his administration took office, the White House and Republicans in control of the House and the Senate have used the Congressional Review Act (CRA), 5 U.S.C. §§ 801-808 (2006), to block 14 out of the 15 “midnight” regulations promulgated by the Obama Administration, and the global effects are yet unknown.\(^1\) However, for at least three of the regulations which impact companies and the way they conduct business, the repeals are largely symbolic. The CRA has received a lot of attention in the first few months of Trump’s presidency because of its widespread use in the White House initiative to roll back regulations. Prior to 2017, the CRA had only been used once.\(^2\) Repealing other regulations will likely take more time and effort from Congress, and may not be as effective.

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1. Only the Bureau of Land Management rule targeting methane emissions survived the use of the Congressional Review Act with a vote of 49-51 in the United States Senate.
In 2017, Congress disapproved the following 14 administrative regulations:

1. Fair Pay and Safe Workplaces Executive Order
2. Stream Protection Rule
3. Gun Limits for the Severely Mentally Ill
4. Oil Anti-Corruption Rule
5. Unemployment Compensation Drug Test Rules
6. Women’s Health Care Protections
7. Bureau of Land Management’s Land Use Planning Rule
8. Every Student Succeeds Act (ESSA) Accountability and State Plan Rules
9. ESSA Teacher Preparation Standards
10. State Retirement Savings Plans Rules (I)
11. State Retirement Savings Plans Rules (II)
13. Occupational Safety and Health Administration (OSHA) Recordkeeping Rule
14. Broadband Privacy Protections

Repealed regulations impacting the energy industry

For clients operating in the US energy sector, a number of the repealed regulations are noteworthy—the Interior Department’s Stream Protection Rule, the Securities and Exchange Commission’s Oil Anti-Corruption Rule, and the Occupational Safety and Health Administration’s Recordkeeping Rule. The repeals of these regulations are significant for at least three reasons. First, and most obviously, corporate compliance with these regulations is no longer necessary, and these regulations will not be reissued in the same or substantially the same form. Second, these repeals are evidence that the administration and the current US Congress are committed to their campaign promises to cut down on regulations and government, though the accepted expedited mechanism under the Congressional Review Act may now be foreclosed. Third, while corporate compliance with the regulations is no longer necessary, it is important to note that driving industry forces and obligations under foreign regulations that target the same issues remain untouched.

The Stream Protection Rule required coal mining companies to avoid surface coal mining practices that adversely affected water supplies, surface water and groundwater quality, streams, fish, wildlife and related environmental values. See 81 F.R. 93066 (2016). Members of Congress said that this regulation would kill coal-mining jobs, harming the coal industry and the American economy. The White House signed the joint resolution on February 16, 2017, preventing the Interior Department from reissuing the regulation, or a variation that is substantially the same, in the future. It is unclear if or when the Interior Department may try to address the subject matter of the regulation. That said, industry, market and consumer forces continually drive industries, like mining, to find better, safer and more efficient technologies.

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The Securities and Exchange Commission (SEC) promulgated the Oil Anti-Corruption Rule under the authority of Section 1504 of the Dodd-Frank Act, also known as the Cardin-Lugar Amendment anti-corruption provision. See 81 F.R. 49359 (2016). At a high level, this regulation required any oil, gas or mining company that files an annual report with the SEC to include a disclosure of the type and total amount of both country and project-level payments to host governments. Members of Congress contended that the authority for the regulation may be suspect, that the regulation would put companies that are publicly traded in the US at a disadvantage, and that the regulation enforces social objectives, a purpose inconsistent with the core mission of the SEC. The White House signed the joint resolution on February 14, 2017, announcing that rejection of this regulation will bring back energy jobs to America. Notably, Canada, Norway, and the 28 countries of European Union have established largely equivalent transparency rules requiring companies to disclose this same information to other regulators around the globe. Congress appears to want the SEC to issue a new regulation that is not as anti-competitive, though what form that regulation will take is unknown. In the interim, the nullification of this regulation will have little impact on multinational energy companies that make disclosures under other regulatory regimes, although they need not make these disclosures to the SEC.

The Occupational Safety and Health Administration’s (OSHA) Recordkeeping Rule addressed a 2012 court ruling that vitiated recordkeeping violations that are more than six months old. See 29 C.F.R. 1904 (2017). The regulation sought to clarify
OSHA’s recordkeeping directive and extend accurate recordkeeping of the serious workplace injuries and illnesses obligation of employers from six months to five years. Members of Congress claimed that this regulation would reduce jobs and harm the American economy. The White House signed the joint resolution on April 3, 2017. At this time, OSHA can only issue citations for recordkeeping violations that have occurred in the preceding six months. However, most companies with robust process safety policies that track key performance indicators and try to employ leading indicators will continue to maintain records for as long as they deem necessary internally. Additionally, destroying records related to an incident that then turns into litigation can subject a company to a spoliation instruction unless the company can show a business purpose for its conduct, such as a short document retention policy.

Contemplating the path forward

While the unprecedented use of the Congressional Review Act to nullify the “midnight” regulations of the previous administration may be at an end, some conservatives urge a novel continued use of the act. They advocate using the Congressional Review Act to nullify regulations going back to 1996, arguing that these regulations were not submitted for Congressional review in compliance with the act, and thus Congress may yet review these regulations once the regulators properly promulgate them. It remains to be seen whether such an action will be effective; however, it is clear that the current administration and Congress have an appetite for removing regulations, and the ones that have fallen under the Congressional Review Act are likely just the beginning of what could be a drastic sea change in the United States regulatory regime. Nonetheless, globalization and the rise of regulatory regimes around the world will likely blunt the impact of regulatory changes in the US as companies seek to comply with the greatest common global denominators of regulations for efficiency’s sake.

The UK government, for example, had been seeking to reduce the regulatory burden on industry for some time. Its most recent strategy last year was to implement a “one in, three out” policy, requiring that the cost of every new regulatory burden is matched by a removal of three times the cost of an existing regulatory obligation. In relation to energy, the UK government has stood out in Europe as supporting shale gas exploration and has sought to simplify aspects of the planning regime to facilitate this. It is also looking more broadly at ways to reduce overall energy costs and complexity for businesses. This includes potential regulatory changes in respect of clean energy, including energy storage, as part of a wider industrial strategy, and abolishing the long-criticized CRC Energy Efficiency Scheme. Whether the UK can continue its move towards deregulation following the implementation of Brexit (the UK’s exit from the European Union) remains to be seen, as the details are still being developed.

In determining how to navigate the shifting waters of the regulatory regimes around the world, it is important to collaborate with trusted and committed advisers who are in touch with and deal with regulations and the local administrative bodies on a regular basis. Companies should be mindful of the greatest common global denominators of regulations to ensure that they comply with, or exceed, the requirements of the various regulatory regimes they might encounter. Companies should work with their advisers to find innovative solutions to this new global uncertainty.

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