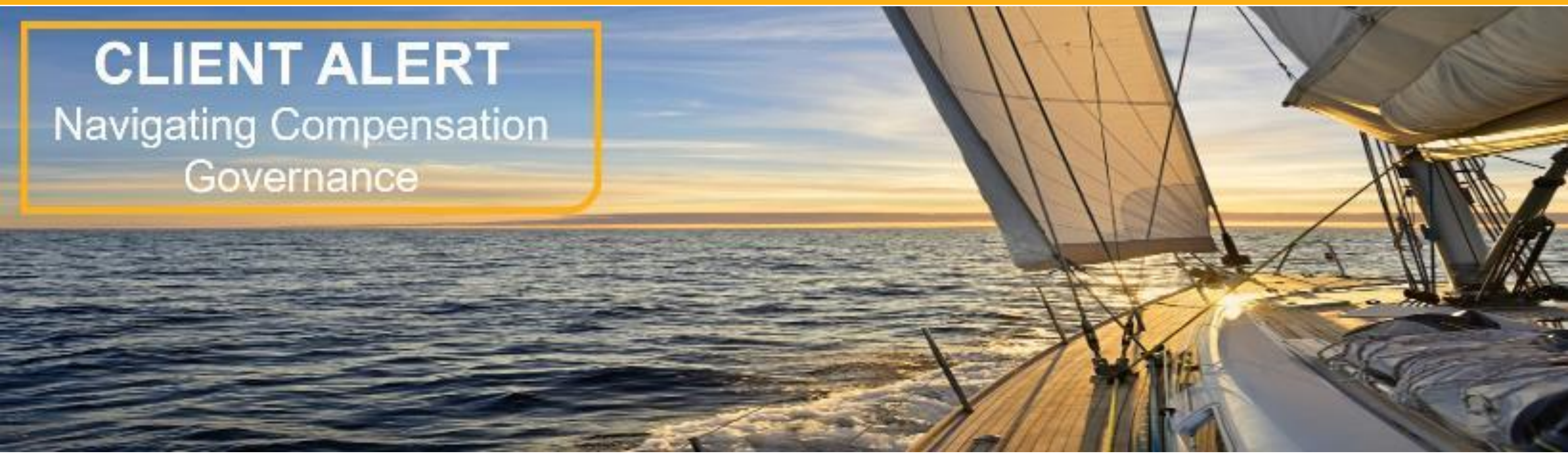
November 26, 2024 Volume 15, Issue 21

MERIDIAN COMPENSATION PARTNERS



Potential Impact of the Incoming Trump Administration on Disclosure Rules, the Noncompete Ban and Taxes

Coming this January, Republicans will be in control of the White House, Senate and House of Representatives.

Despite controlling all the levers of the legislative process, sweeping changes will face challenges due to Republicans thin majority in the House of Representatives.

The only certainty at this time is the uncertainty as to what the future holds (although we make a few predictions below).

What is certain, likely and unlikely to occur in the near term

- The chairs of the Federal Trade Commission and the Securities Exchange Commission **will** be replaced by President Trump. The incoming agency Chairs will almost certainly be focused on reducing business regulations.
- The FTC is highly likely to drop its appeal of a Texas district court decision striking down the agency's ban on non-competes; leaving the regulation of non-competes to state laws.
- The SEC is unlikely to issue any new disclosure rules on executive pay but may modify some disclosure rules on the margins.
- Neither the SEC nor Congress is likely to repeal or significantly modify pay disclosure rules.
- The extension of the Tax Cuts and Jobs Act of 2017 (which is set to expire at the end of 2025) will likely pass in some form subject to bargaining between the parties in the House of Representatives.
- Due to their high projected impact on the deficit, other discussed tax reforms will likely receive significant resistance.
- Passage of proposed tariffs is far from certain but if widespread tariffs are implemented companies would need to understand their direct economic impact when designing incentive arrangements.
- Wild cards include the impact of the Department of Government Efficiency on regulations impacting pay disclosures and tax policy and the personal views of whoever becomes the chair of the SEC.

FTC Chair Status and Disposition of Ban on Noncompetes

President-elect Trump will have the opportunity to name a new chair of the Federal Trade Commission (FTC) to replace Commissioner Lina Khan whose term as chair expired in September 2024[1]. President-elect Trump will almost certainly nominate an employer-friendly Chair. In addition, it is widely expected the FTC will dial down its aggressive litigation posture on corporate transactions.

The incoming Republican administration likely sounds the death knell for the FTC's ban on noncompetes. The ban has been subject to several legal challenges with a split among the district courts upholding and striking down the ban. Currently, the FTC is appealing to the Fifth Circuit Court of Appeals a Texas district court decision to strike down the ban based on its determination that the FTC exceeded its authority. The FTC will likely withdraw its appeal and let the Texas district court decision stand.

SEC Chair Status and Disposition of Executive Pay and Governance Disclosures

The Securities and Exchange Commission currently is chaired by Commissioner Gary Gensler whose term as chair expires in 2026. Chair Gensler has indicated that he will resign[2] as chair and from the SEC on inauguration day paving the way for President-elect Trump to name a replacement Commissioner and Chair. As with the appointment of a new FTC chair, it is widely expected that President-elect Trump will nominate an employer-friendly Chair who will look for opportunities to dial back proposed and existing regulations. In addition, it is widely expected that the SEC will issue fewer rules than during the Biden administration.

President-elect Trump's commitment to deregulation is not likely to focus on executive pay and governance disclosures, at least not in the early days, for several reasons.

- These disclosures are unlikely to be at the top of the list of corporate lobbyists (and trade associations) most wished for changes in the regulatory environment. This reflects the low compliance burden (including associated costs) of disclosure regulations relative to high compliance burden and costs of other regulatory areas, such as environmental, labor and employment, safety, taxation, immigration and the like.
- The SEC (like other federal agencies) faces legal hurdles in undoing regulations. Generally, a federal agency may not arbitrarily withdraw final rules and regulations[3] but must satisfy various requirements under the Administrative Procedures Act prior to withdrawing a rule.
- The Supreme Court decision striking down Chevron deference raises the legal bar for withdrawing rules and regulations based on an agency's determination that the rule was based on ambiguous or silent statutory provisions.

In the case of statutorily prescribed rules, generally a major revision or withdrawal of such rules would require amending or rescinding the underlying statute. For example, pursuant to Dodd-Frank, the SEC adopted rules that require a public company to disclose: (i) the relationship between executive officer pay and company performance, (ii) its mandatory clawback policy, (iii) CEO pay ratio and (iv) its hedging policy. To rescind these rules, Congress would be required to repeal the applicable provisions in Dodd-Frank. Absent a wholesale repeal of Dodd-Frank, we believe it is highly unlikely that Congress would solely repeal the portion of Dodd-Frank related to these disclosures. To date, the incoming administration has not signaled its intention to seek either to repeal or revise Dodd-Frank.

[1] Ms. Khan's term as an FTC Commissioner expires in June 2028.

[2] Additionally, SEC Commissioner Lizárraga announced he intends to step down on January 17, 2025.

[3] In 2022, the SEC rescinded certain regulations of proxy advisory firms on the basis that such regulations posed significant risk to the timeliness and independence of proxy voting advice. A legal challenge to the SEC's actions was rebuffed at the district court level. However, in June 2024, the Fifth Circuit Court of Appeals court overturned the district court's judgment and held that the SEC's action to pare back regulation of proxy advisory firms was arbitrary and capricious because (i) the agency failed adequately to explain its decision to disregard its prior factual finding that regulations posed little or no risk to the timeliness and independence of proxy voting advice and (ii) the agency failed to provide a reasonable explanation why these risks were so significant as to justify their rescission.

Disposition of 2017 Tax Cuts and Jobs Act

The 2017 Tax Cuts and Jobs Act ("TCJA") is set to expire at the end of 2025. If Congress fails to extend TCJA, the implications would be significant for individual taxpayers:

- Individual income tax rates would increase for the majority of Americans[4], with the top marginal income tax rate increasing to 39.6% from 37.0%.
- Standard deduction would be reduced to $12,700 from $24,000 for joint filers (and $6,350 from $12,000 for single filers).
- Alternative minimum tax would snare a significantly greater number of taxpayers (the number of taxpayers subject to AMT decreased to 250,000 taxpayers in 2018 from 5 million due to reforms under TCJA).

Unlike individual income tax rates, TCJA made permanent the reduction in corporate income tax rates from 35% to 21% (however, tax provisions relating to certain corporate deductions would be phased-out or tightened if TCJA is not extended).

The Republicans do not have a filibuster proof majority in the Senate. Therefore, unless the Republicans can convince a handful of Senate Democrats to support the extension of TCJA, the Republicans would be required to pass a bill extending TCJA through the budget reconciliation process, which requires a simple majority. The budget reconciliation process requires any tax bill to be budget neutral – that is, the bill cannot increase the federal deficit over a ten-year period. The American Enterprise Institute estimates that extending the TCJA, in its entirety would increase the 10-year federal budget deficit by $3.8 trillion, which means concurrent spending cuts and tax increases of the same amount would be necessary to extend TCJA through the budget reconciliation process.

In the House of Representatives, Republicans hold a slim 219 to 213 edge, with 3 seats yet to be decided[5]. Given this slim majority, the Republicans can only afford a few defections to be able to pass TCJA intact without compromise. What appears to be more likely is that passage of a TCJA extension will require successful bargaining between both parties to push some type of extension over the finish line. The Republicans appear focused on extending the TCJA in the first 100 days of the new administration[6].

Proposed Tax Policies

In addition to extending TCJA, President-elect Trump campaign promises covered a number of tax reforms including the following:

- Reduce corporate income tax rate to 15% from 21%.
- Eliminate taxation of tip wages.
- Eliminate taxation of Social Security benefits (prior to 1984 Social Security benefits were not subject to taxation).
- Increase childcare tax credit to $5,000 from $3,000.

[4] *Expiring TCJA Tax Provisions in 2026 Would Produce Substantial Tax Hike across the US,* Tax Foundation (May 7, 2024). Available at https://taxfoundation.org/data/all/federal/2026-tax-hike-by-congressional-district/.

[5] However, the number of Republican held seats at the beginning of the next session of Congress is actually 218 due to Rep. Matt Gaetz's resignation and will be reduced to 216 upon Rep. Elise Stefanik's confirmation as UN Ambassador and Rep. Michael Waltz assuming his position as national security advisor. In accordance with applicable state law, special elections will be held to fill those seats each of which are in safe Republican jurisdictions. Presumably, these special elections will occur in advance of negotiations on TCJA extension.

[6] *GOP Plans Roadmap for Renewing 2017 Tax Law in First 100 Days*, Bloomberg Tax Daily Tax Report (November 25, 2024).

Like the extension of TCJA, these tax proposals would almost certainly need to be approved through the budget reconciliation process. However, according to the Committee for a Responsible Federal Budget, these tax proposals would add nearly $6 trillion to the federal deficit over the next ten years (without any concurrent offset in spending). If these figures prove correct by the CBO, they will almost certainly doom the passage of these tax proposals, in the aggregate.

Proposed Tariffs on Imported Goods

During the presidential campaign, President-elect Trump indicated he would seek to impose 60% to 100% tariffs on goods imported from China and 10% to 20% tariffs on all other imported goods. The imposition of such tariffs would require Congressional action. The enactment of such tariffs (which would be the highest since the Great Depression) is far from certain with some Republican Senators expressing doubt or reservations about the merits.

If President-elect Trump's tariff proposals are implemented, company boards and management will need to anticipate the economic impact of the tariffs on their organizations. The impact of tariffs would likely vary across industries and companies, with some companies realizing lower revenues, greater cost of goods sold, reduced profits or significant layoffs. Whatever the impact, if and when it becomes clear that tariffs will be implemented, companies will need to assess how the impact of tariffs may affect incentive plan design and the setting of performance goals and payouts.

Wild Cards: Perspective of Department of Government Efficiency and SEC Chair

Assumptions regarding the fate of pay and governance disclosures could be upended by the perspective of those leading the Department of Governance Efficiency (DOGE) and the SEC.

Elon Musk and Vivek Ramaswamy, the co-heads of DOGE, are on a self-described mission to "cut the federal government down to size." In a recent Wall Street Journal op-ed piece[7], Messrs. Musk and Ramaswamy outlined the objectives and strategy of DOGE. Specifically, they note that DOGE will "pursue three major kinds of reform: regulatory rescissions, administrative reductions and cost savings." To accomplish regulatory rescission, Messrs. Musk and Ramaswamy intend to "present a list of regulations to President Trump, who" they claim, "can by executive action, immediately pause the enforcement of those regulations and initiate the process for review and rescission."

Putting aside the legal issues associated with this approach, the key question here is whether the DOGE's zeal to cut down federal regulations is likely to encompass executive pay and governance disclosures. At this juncture, Messrs. Musk and Ramaswamy have only indicated they will broadly target "illicit" regulations. However, Mr. Musk's attention may be drawn to the disclosure rules due to his personal dealings with the SEC, awareness of the disclosure rules due to his position as Tesla's CEO and the court-ordered rescission of his stock option mega-grant (due in part to supposed inadequate disclosure of the grant to Tesla shareholders). Right now, it is too early to tell.

Separately, the yet to be named successor to SEC Chair Gensler could hold strong views on the need to reshape the pay disclosure environment. Who is named may provide clues as to the future Chair's disposition on this matter.

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[7] *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, Wall St. J. (November 20, 2024)

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