
2. The Legislative Legacy of the Obama Years - Retrospective and Outlook

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With President Obama's term coming to an end, an assessment of the President's legislative accomplishments and their possible future should, in theory be a manageable undertaking because the agenda of his potential successors should have been known at the time this article went to print. But then, during a primary season that was unprecedented in at least a generation, if not a century, all political conventions were thrown overboard. Tired of the gridlock and disappointed with the political establishment, the electorate in both parties showed a preference for outsider candidates. This voter upheaval calls into question the dogmas and the coalitions that both parties have relied upon to win elections. Even the distribution of power within the parties and between the legislative and executive branch of the U.S. government looks much more unsettled than at any time in recent history.

All of this makes any contemplation of the future of President Obama's legislative priorities as speculative an endeavor as gambling at the last casino that still bears a presidential candidate's name or investing in the collateralized debt obligations whose collapse set the stage for a freshman Senator from Illinois to become the first African-American President. So, let's begin with what we know.

The Obama Legacy: Financial Market Regulation, Health Care Reform and Trade

President Obama's major legislative accomplishments, the Dodd Frank Wall Street Reform and Consumer Protection Act and the Patient Protection and Affordable Care Act were passed during his first two years in office when Democrats controlled both Houses of Congress. In pushing these laws through Congress, the President spent much of his political capital. Even so, he was only able to get the Affordable Care Act approved through legislative maneuvering. Not surprisingly, when the Republicans took control of the House of Representatives in 2010, it was payback time. In the ensuing battle of principles, Congressional Republicans and the President effectively neutralized each other. There was some hope that this political lethargy could be overcome when the Republicans took control of the Senate in 2014. But if there ever was a chance that the House Majority Leader would be able to get any compromise past the Tea Party members of his party, the President's unilateral action on immigration in early 2015 rapidly dispelled any such hopes.

The only area where the President and (most) Congressional Republicans saw eye to eye was international trade. In the face of seismic geopolitical shifts, it seemed certain that at least one of the two ambitious trade agreements that the United States was negotiating with trade partners across the Atlantic and the Pacific might be signed and ratified by the Senate before the end of President Obama's second term. The likely candidate was the Trans-Pacific Partnership (TPP) signed in February of this year because progress on its European counterpart, the Transatlantic Trade and Investment Partnership (TTIP), is stalled as a result of stiff opposition in Europe. However, in light of the vilification of free trade by the presidential candidates in both parties, which resonated well

with the electorate, it remains to be seen whether the Senate will be able to muster the political will to ratify a major trade agreement before the end of the year. If not, it could be years before enough politicians will again be receptive to a nuanced analysis of the benefits of specific free trade agreements.

Regulation of Financial Markets

Eight years after the financial crisis, the jury on Dodd Frank is mixed. Of the 15 banks that received the lion's share of the U.S. government's bailout funds during the financial crisis, 13 are bigger now than they were before the financial crisis. This consolidation can hardly be viewed as anything but an unhealthy concentration of risk that could overwhelm the financial system once again. Another worry is the fact that the increased regulatory burden and technological innovation are moving banking activities from regulated banks to unregulated institutions, thereby bypassing Dodd Frank's supposed safeguards. Not that all of these safeguards currently are in place: As of late 2015, less than two-thirds of all regulations mandated by Dodd Frank were finalized. On the positive side, the U.S. financial system has been stabilized. The capital base of large financial institutions has increased, they now have living wills intended to facilitate an orderly dissolution, and the most excessive risk taking has been discouraged.

Despite some campaign rhetoric to the contrary, it is unlikely that financial regulation will change fundamentally in the near future. Accordingly, now that the hysteria caused by the tax controversy has hopefully passed, Swiss asset managers and investment advisers might want to carefully reassess their approach to the U.S. market which represents almost 50% of the institutionalized global asset management market. Those that have the courage will be surprised to find that, in comparison to the emerging regulatory regime in Switzerland, U.S. regulation of asset management and investment advisory activities is comparatively moderate.

Health Care Reform

The health care reform that began with the adoption of the Affordable Care Act in 2010 will be forced to evolve no matter the outcome of the 2016 elections. Its failure to stem the rise of health-care related costs frustrate many middle-class Americans. The health care exchanges, a cornerstone of the law, did not live up to their expectations. Bankruptcies of low-cost insurance cooperatives left their customers without coverage, and the withdrawal of established health insurers from these exchanges has eroded the public's trust in their purported benefits.

Despite these problems, neither a wholesale repeal of the law, as called for by the far right, or the state-controlled single payer system favored by the far left are probable. More likely are changes to the current system, such as permitting competition across state lines, increasing government subsidies, introducing price-controls and limiting the scope of insurance coverage. The complexity of these issues and the many interests involved will hamper the speed of any such efforts.

Nevertheless, the pain felt by voters is real and the pressure on politicians to “do something” is tangible. Swiss pharmaceutical and medical technology companies should therefore begin to think about how best to embrace a future where there will be increased pressure on the cost of their products and services in the United States.

Immigration

Immigration reform proved to be as elusive to President Obama as to any of his recent predecessors. The strong anti-immigration sentiment within large parts of the Republican and Democratic parties was a serious impediment to a sensible reform of the nation’s immigration policies long before the President’s unilateral actions after the 2014 mid-term elections buried any hope for a lasting reform during his final term in office. The future of immigration now largely depends on who will be the next occupant of the White House. However, the strong allure of anti-immigration rhetoric with a significant part of the electorate leaves little hope for comprehensive immigration reform anytime soon.

For the foreseeable future, the restrictive policies that often make it difficult for Swiss companies to bring needed talent to the United States are unlikely to change. Quite to the contrary, based on the voter sentiment that jobs are lost to immigrants, it is not inconceivable that the requirements for bringing foreign workers to the United States could be tightened further. In light of overwhelming evidence that a sound immigration policy would benefit the United States economically and create the jobs that politicians erroneously try to protect with restrictive immigration policies, this development is lamentable.

Corporate Tax Reform

During the financial crisis, corporate tax reform was proposed as a means to stimulate the economy by exponents on the right and left. The topic remained on the forefront of the political agenda throughout the entire Obama presidency. Although U.S. corporate tax rates that are second to none in the developed world, powerful interests that benefit from the status quo and a fundamental disagreement over tax policy between Congressional Republicans and the Obama administration made reform impossible. In the meantime, corporate America voted with their feet and moved their headquarters abroad until changes in tax regulation made these inversion transactions unattractive.

Whether tax reform will become a legislative priority under the next president will not only depend on who that will be, but also on the balance of power within the two Houses of Congress. Accordingly, it would be premature to speculate on the likelihood or the specifics of any future reform. Generally, Swiss companies with business interests in the United States could mostly be expected to benefit from a corporate tax reform. However, future reforms will probably make it less attractive for U.S. companies to maintain corporate headquarters in foreign low tax jurisdictions or keep their overseas profits abroad. Thus, a trend from which Switzerland benefited in recent years would be reversed.

Unaddressed Issues and the Supreme Court

Although President Obama began his presidency with a call for “change,” in his legislative initiatives and his attempts to stimulate the economy following the financial crisis he often followed proven tracks. Accordingly, one would have expected a stronger push for large-scale infrastructure, one of the pillars of the New Deal. However, opposition in Congress made any attempt to repair the nation’s frail public infrastructure impossible. In light of promises made on the campaign

trail, this could change under a president of either party. Infrastructure spending could help the next president make good on promises to “make America great again” or “create well-paying jobs for the middle class.” It would be much easier to create jobs for disaffected voters with construction projects, where labor continues to play an undiminished role, than in manufacturing or in technology where either automation has largely replaced human labor or these voters lack the skills to succeed. Infrastructure projects could provide interesting opportunities for Swiss engineering companies that can find a way to comply with “Buy America” provisions in procurement laws.

Another area where President Obama was unable to change a worrisome trajectory is education. Rising costs of a college education and student loans reaching \$ 1 trillion hamper individual aspirations, and the absence of a cohesive policy to train skilled labor affects many industries. Because attempts to harmonize standards or influence the direction of education consistently end up in a quagmire of public, private, state and local interests, there is little hope for a change of direction anytime soon.

An assessment of President Obama’s legislative legacy should not omit his role in nominating Supreme Court Justices. The Supreme Court’s importance in shaping legislation is on par with the president’s legislative accomplishments. This was underscored when the nation’s highest court twice rejected challenges to the Affordable Care Act. President Obama’s appointment of two liberal justices did not change the Supreme Court’s balance of power with five conservative and four liberal Justices. Earlier this year, this balance was upset when conservative Justice Antonin Scalia unexpectedly passed away. The current equilibrium between liberal and conservative justices has already had an effect when the widely expected overturn of a California law favoring public employee unions by the Supreme Court fell victim to a deadlocked court.

Whether President Obama can put a more liberal imprimatur on the Supreme Court by appointing the highly regarded Judge Merrick Garland during his final months in office will depend on the outcome of the presidential election. If the Democrats win the White House, the Senate’s opposition to Judge Garland, who is considered a moderate, may fade fast. If the next president is a Republican, Judge Garland will likely be sacrificed on the political altar. The significance of this issue should not be underestimated. Two of the remaining liberal Justices, Ruth Bader Ginsburg and Stephen Breyer, are 83 and 77 years old. Justice Anthony Kennedy, known for being the swing vote on the Supreme Court is 79 years old. Accordingly, the next president may be able to nominate replacements for one or more of these Justices and set in stone the composition of the Supreme Court for years to come. This, in turn, could have the most profound impact on President Obama’s legislative legacy.

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