

# Client Alert

## The United States Withdraws From the Paris Agreement on Climate Change

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Yesterday, June 1, 2017, President Trump confirmed that he will carry out his campaign promise to withdraw the United States from the Paris Agreement on Climate Change.

The decision isolates the United States from the 194 other countries that signed the Agreement in December 2015. The Paris Agreement, which came into force on November 4, 2016, has been widely regarded as a watershed moment in the global fight against climate change.

Since yesterday's announcement, other countries have restated their strong support for the Agreement, but the withdrawal by the United States will still have negative implications for international climate policy. In addition, U.S. businesses face even greater uncertainty, given the need to comply with Paris-driven regulations in the rest of the world, while simultaneously responding to attempts to roll back federal climate-related regulation in the United States. Increased proliferation of U.S. state-level regulation and litigation is also likely.

Meanwhile, as a matter of international law, even if the United States immediately provides formal notice of its intent to withdraw, such withdrawal can only take effect four years after its entry into force, or November 4, 2020, notably the day after the next U.S. Presidential election.

### PRESIDENT TRUMP'S ANNOUNCEMENT

Former U.S. Secretary of State John Kerry signed the Paris Agreement on Earth Day, April 22, 2016. It sets goals for countries around the world to cap and reduce emissions, with the central aim to combat climate change by keeping the increase in the global average temperature to "well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius."

At the White House yesterday, President Trump stated that the U.S. would “withdraw from the Paris climate accord” and “begin negotiations to re-enter either the Paris accord or [an] entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers”. Such renegotiation would be “under a framework that is fair and with the burdens and responsibilities are equally shared among the many nations all around the world.”

The President cited the potential financial disadvantages to the United States in remaining within the Agreement, and the “serious obstacles” it would create for the United States “as we begin the process of unlocking the restrictions on America’s abundant energy reserves”. The President referenced the “lack of binding obligations” on other states, particularly China and India, and the impact of the Agreement on the U.S. economy.

President Trump stated that implementation of the Paris Agreement would cease “as of” June 1, including the implementation of the United States’ (non-binding) Nationally Determined Contribution (“NDC”), and all U.S. contributions to the Green Climate Fund.

Notably, the President’s remarks did not indicate any intention to withdraw from the underlying UN Framework Convention on Climate Change (“UNFCCC”). Nor did the President give any indication as to the method of withdrawal from the Paris Agreement under international law.

### WITHDRAWAL MECHANISM

Under U.S. law, international agreements fall into three categories: treaties, congressional executive agreements, and sole executive agreements:

- **Treaties** are international agreements whose entry into force, as laid out by the Constitution, requires the advice and consent of two-thirds of the Senate.
- **Congressional executive agreements** are approved and implemented into U.S. law by an act of Congress, requiring a simple majority of both the House and Senate.
- **Executive agreements** can be entered solely by the President under certain circumstances by relying on existing Congressional legislation, a pre-existing Senate advice-and-consent treaty, or the President’s own Constitutional powers.

President Obama signed the Paris Agreement as a sole executive agreement, deriving authority from the UNFCCC, the Clean Air Act and his own

Constitutional powers. Since the Paris Agreement was signed without the approval of Congress, it could not establish binding emission targets and new binding financial commitments. Nevertheless, the Paris Agreement does establish a set of binding procedural commitments, including the requirement to prepare and maintain successive nationally determined contributions (“NDC”) where each successive NDC needs to “represent a progression beyond the Party’s then current [NDC],” and the obligation to “pursue domestic mitigation measures.” As a matter of U.S. law, in most circumstances the President can withdraw unilaterally (i.e. without Congressional approval) from sole executive agreements.

For the purposes of international law, executive agreements are regarded as agreements giving rise to binding obligations and are subject to the same termination and withdrawal requirements as treaties. Under international law, states parties may only withdraw from treaties in conformity with the provisions of the treaty, or with informed consent of all the states parties (Vienna Convention on the Law of Treaties (“VCLT”), Art. 54). Withdrawal is separate to termination of a treaty, as withdrawal only affects the party withdrawing from the treaty: the other parties remain bound. Here, notwithstanding the U.S. withdrawal, the Paris Agreement will remain in force for the other countries that are party to it, including notably China and India.

Under Article 28 of the Paris Agreement, a country may give notice of its intention to withdraw after 3 years have elapsed from the Agreement coming into force on November 4, 2016. Withdrawal will then take place 1 year after the receipt of the notification. So even if President Trump can withdraw without Senate approval, U.S. withdrawal from the Paris Agreement could only take effect from November 4, 2020, notably the day after the next U.S. Presidential election. Such withdrawal could be revoked at any time before it takes effect (VCLT, Art. 68).

If the United States ceases implementation of at least the binding elements of the Agreement as of June 1, 2017, there is significant risk the United States would be in breach of international law, as the United States remains bound by its Paris Agreement commitments until withdrawal takes effect (i.e., at a minimum, in four years).

The United States has long stood for the defense of the rule of law, both at home and abroad. While immediately halting implementation of the Paris Agreement likely is not independently actionable before a binding international forum, it would undermine the ability of the U.S. to hold other countries accountable under other international treaties and customary international law, potentially

impacting a wide array of international agreements reaching far beyond climate change. This may also lead to domestic litigation against the U.S. Government for breach of its international commitments.

Notably, President Trump's announcement did not address the **UN Framework Convention on Climate Change (UNFCCC)**, ratified by the United States in 1992, which provides the framework within which the Paris Agreement operates. Under Article 25 of the UNFCCC, withdrawal is also only possible after 3 years from entry into force of the Convention, and withdrawal takes effect a further one year from receipt of the notification. However, since the UNFCCC is a treaty, unilateral Executive withdrawal is subject to the U.S. Constitutional obstacles noted in our Client Update dated November 23, 2016.

### INTERNATIONAL IMPLICATIONS

The geo-political blowback for the U.S. from withdrawal is already unfolding and will be significant. Unilateral withdrawal from such a significant international agreement jeopardizes the soft power and diplomatic leverage available to the U.S. across its international engagements. Former President Obama has criticized the decision, and former Secretary of State John Kerry has described the decision as "possibly the most self-defeating action in American history."

U.S. withdrawal likely will adversely affect the momentum of the Paris Agreement and UNFCCC processes by signalling that the world's second largest emitter of greenhouse gases has withdrawn its prior commitment to international action to address the issue. In particular:

- The success of the Paris Agreement depends on the common application of standards to *all* countries, and a unified, global approach to combatting climate change through increasing national commitments.
- U.S. withdrawal can potentially serve as a disincentive to countries for strengthening their NDC targets and demotivates countries that have yet to ratify the Agreement to do so. (Of the 194 other parties that have signed the Paris Agreement, 147 have formally ratified the Agreement, leaving 47 to do so, including Russia, the Netherlands, and Turkey).
- If technology and finance commitments made by the United States proceed to be eliminated, the withdrawal will also reduce the chances of developing countries meeting their own targets. However, some countries have said that they will increase aid to replace that planned by the United States, but whether such statements can fill the void remains to be seen.

- By refusing to be bound by this provision, the United States also signals that it is not willing to participate in other elements of the Paris Agreement, including technology development and transfer, global adaptation efforts, capacity building, and international assessment and review processes for greenhouse gas accounting.
- The termination of funding to the Green Climate Fund will also have significant implications for climate mitigation and adaptation internationally. Under President Obama, the United States committed to transferring \$3 billion to the Green Climate Fund, of which \$1 billion was transferred. The U.S. is the largest contributor to the Fund - the next largest contributions have been pledged by Japan (\$1.5B), the UK (\$1.2B), France (\$1.035B), and Germany (\$1.003B).

### U.S. DOMESTIC IMPLICATIONS

The U.S. NDC states that the U.S. “intends to achieve an economy wide target of reducing its greenhouse gas emissions by 26 - 28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%”. The NDC lists a number of regulatory actions that were underway to meet this target, including:

- cutting carbon pollution from new and existing power plants;
- promulgating post-2018 fuel economy standards for heavy-duty vehicles;
- developing standards to address methane emissions from landfills and the oil and gas sector;
- reducing the use and emissions of certain pollutants; and
- reducing building sector emissions.

The Trump Administration has not addressed the NDC actions explicitly, but has taken other steps to reverse or review climate regulation under the Obama Administration. On March 28, 2017 President Trump signed an Executive Order on “Promoting Energy Independence and Economic Growth,” revoking President Obama’s Clean Action Plan and ordering a review of President Obama’s Clean Power Plan. This Executive Order also lifted the Obama-era moratorium on new coal mining leases on federal lands, a move which has since been challenged in U.S. courts by California, New York, New Mexico and Washington as being in breach of the U.S. Government’s statutory duties.

The U.S. state and municipal response is already unfolding. New York, California and Washington have established the U.S. Climate Alliance, convening those States that wish to uphold the commitments in the Paris Agreement. Notably,

the U.S. Constitution vests the power to negotiate and enter into treaties to the federal government, but under the Compact Clause, states also have the authority to enter into “agreements” and “compacts” with Congressional approval, which may be explicit or implied. States may also be able to enter into such agreements without Congressional approval, provided that the ultimate effect does not “encroach upon the supremacy of the United States” (*United Steel Corp v Multistate Tax Commission* 1978).

Regardless, it is highly likely that state-level regulation, such as emissions trading schemes and vehicle emissions limits will continue and even increase as progressive states seek to make up for the lack of federal regulation on climate change. If cities take similar action, the proliferation of regulations could be highly burdensome for business. The concern for business is that these efforts will now be decentralised and not standardised at a federal level.

It is also likely that litigation against the Federal Government will increase as progressive states seek to limit the environmental damage likely to be caused by the President’s position on climate change. Such litigation creates more uncertainty for business, leaving companies exposed both domestically and in their overseas operations.

Major U.S. corporate stakeholders such as ExxonMobil, Chevron, BP, Shell and Peabody Energy have been broadly in support of the Paris Agreement. Many business organizations spoke out after the announcement of the withdrawal. Major concerns for business are the implications of the U.S. being “left behind” in the global energy transition, and “left out” of key international discussions. Recent reporting from Climate Action Tracker identified that both India and China were forecast to surpass their promised emissions reduction targets as they focus investment on renewables and limiting new greenhouse gas emissions. Moreover, products and services exported internationally will still need to comply with potentially different (and perhaps more demanding) international and regional environmental standards (e.g. EU requirements), from which the U.S. will be increasingly isolated. Global investors increasingly conscious of the impact of their investments (e.g. funds divesting from fossil fuel investments) may also favor investments outside of the United States in favour of countries adhering to the Paris Agreement.

Commentators are already considering the legality of border carbon adjustments on U.S. products under international trade law. Such schemes would need to comply with World Trade Organisation prohibitions on arbitrary or unjustified discrimination and disguised protectionism.

Finally, both the withdrawal from the Paris Agreement and President Trump's recent policy reversals constitute changes or reversals in environmental policy that foreign investors may have reasonably relied on when investing in the United States. Such impact also may result in investor-state claims under North American Free Trade Agreement and/or bilateral investment treaties to which the U.S. is party.

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In sum, President Trump's decision to withdraw the United States from the Paris Agreement, even if not legally effective until after the next Presidential election, likely will have significant ramifications on global climate change policy and U.S. businesses.

Please do not hesitate to contact us with any questions.