Executive orders Q&A

Summary

In this Q&A we answer a number of key questions regarding President Trump’s use of executive orders, including the impact on the business climate and financial markets.

Introduction

In his first days in office, President Trump has issued a flurry of executive orders and presidential memoranda, ranging from imposing a freeze on new hires in the federal workforce to ordering the withdrawal of the US from the Trans-Pacific Partnership. This raises the question as to what extent a US President can govern by decree; and what we can expect going forward. In this Q&A we explain the role of executive orders in the US political system, how they are implemented, and how they can be overturned. Then we discuss the implications of Trump’s use of executive orders for businesses and financial markets.

Who runs the country?

According to the US Constitution the federal government consists of three branches: the legislative (the Congress), the executive (the President), and the judicial (the federal courts). The Congress – which consists of the Senate and the House of Representatives – writes the laws. Once the Senate and the House agree on a bill, it is sent to the President for final approval or veto. If approved, the President is to see that the law is faithfully executed. However, federal courts and state courts have the power of judicial review, which means that they can check whether decisions made by Congress or by the President are constitutional. If not, they can strike down the decisions of the legislative and executive branches of government. On Friday, a federal judge in Seattle blocked Trump’s immigration order and on Sunday a federal appeals court in San Francisco denied the government’s request to overturn that decision. Decisions of federal courts apply nationwide, in contrast to decisions of state courts. The government can appeal the decisions of the courts, but in the end the Supreme Court has ultimate jurisdiction over all federal laws.

What is the executive power of the President?

So the President has to work with Congress to get his plans written into law. This process can take months or even years. However, the President can also act unilaterally and take the fast track. After all, Article II of the Constitution gives the president ‘executive power’. This is a vague concept, but in practice presidents have used this power to issue ‘executive actions’, which include ‘executive orders’, presidential memoranda, directives, proclamations, and proposals. Note that the various types of executive actions, such as executive orders, are not explicitly described in the Constitution.
What are executive orders?

An executive order is an official document signed by the president that declares government policy. In an executive order the President gives instructions to government agencies and departments about how to operate in a certain area. An executive order is legally binding and written into the official journal of the government, the Federal Register. In the early 20th century the State Department started numbering executive orders, retroactively back to 1862. Donald Trump started with executive order 13765. A presidential memorandum is very similar to an executive order, but slightly less prestigious. An executive order must cite the authority the President has to issue it, such as the Constitution, or a specific statute. This is not a requirement for a presidential memorandum. While executive orders are required by law to be published in the Federal Register, this is not the case for presidential memoranda. However, in order to give a presidential memorandum ‘general applicability and effect’ it needs to be published. In contrast to executive orders, there is no official numbering system for presidential memoranda.

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Source: Federal Register

Have executive orders been used before?

The first President of the United States, George Washington, is known to have used them, and all his successors have followed his suit in doing so too. Champion of executive orders was Franklin D. Roosevelt, who issued 3522 such orders in his years in office during the depression and throughout World War II. More recently, President Barack Obama has been criticized for their frequent use. Ironically, also by Donald Trump who tweeted in 2012: ‘Why is Barack Obama constantly issuing orders that are major power grabs of authority?’

There is also a degree of predictability to issuing executive orders at the beginning of one’s term: “Presidents, when they take office, usually try to place their immediate stamp on executive branch processes and policies. Executive orders are an excellent way to do this,...” Again, President

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1 With the exception of President W.H. Harrison, who died after one month in office.
Roosevelt provides a telling example with a proclamation on his Inaugural Day, inter alia closing all banks for four days to restructure the financial system.\(^4\)

The use of executive orders may also occur in a later phase if the President has to deal with gridlock in Congress. This could occur if the opposition party gains the majority in the Senate and/or the House of Representatives in midterm elections. For example, only in his first two years in office President Obama was supported by a Democratic Congress. Then the Republicans took over the House of Representatives and finally the Senate as well. In response, President Obama used executive orders to break the gridlock.

**How are executive orders implemented?**

The instructions given by the President to government agencies and departments may sometimes be difficult to implement. For example, an executive order cannot overturn a law passed by Congress, such as Obamacare. In this case an executive order should be seen as a declaration of intent, which can only be implemented by Congress. In case of Obamacare this means that it is up to Congress to repeal (and replace) the Affordable Care Act. With a Republican dominated Congress in place, President Trump would seem to have a benign environment to put forward his political agenda. But he will need active support from the legislative arm for many of his orders.

Even if an executive order does not require changing an existing law, its implementation may depend on funding. In the US political system, the Congress is responsible for government spending and taxation. As many media have pointed out, his order to begin planning, designing and constructing a wall along the US-Mexico border remains meaningless without funds for its execution.

In other cases, practical feasibility is also a requirement for effective implementation of presidential orders. Withdrawing from the Trans-Pacific Partnership does not require much implementation. But a look at the list of other presidential orders does raise questions in this respect: exactly how will the Secretary of Commerce, instructed by presidential order to create a plan for pipelines created, repaired or expanded in the United States ‘to use materials and equipment produced in the United States to the maximum extent possible and to the extent permitted by law’ ensure that all iron or steel products used in such pipelines be completely manufactures in the United States, ‘from the initial melting stage through the application of coatings.’?

**How can executive orders be overturned?**

Do executive orders allow the President to rule the country by decree? No, the US political system has several checks and balances in place. First of all executive orders, like laws, are subject to judicial review by the courts. If an executive order is deemed unconstitutional, it can be overturned by federal or state courts. The government can appeal their decisions, but the Supreme Court has ultimate jurisdiction over all federal laws. However it should be noted that the President also nominates candidates of the Supreme Court. So any vacancy allows the President to change the composition of the Supreme Court in his favor. In this light President Trump’s nomination of Judge Neil Gorsuch to replace the late Judge Antonin Scalia, after the Republican Senate refused to consider any nomination by President Obama last year should help Trump in case of judicial review of his executive orders.

An executive order can also be derailed by Congress. While the President instructs government agencies and departments about how to operate, the Congress can deny them the funds to implement the executive order. Congress can also make laws that prevent the implementation.

\(^4\) Conrubis, John, 1999 (see footnote 3 above)
Alternatively, Congress may opt to enforce an executive order, or tweak it towards its own objectives.

Finally, it should be noted that executive orders have a limited life span. Any executive order of the current President can be overturned by an executive order of the next President as former President Obama found out in recent days.

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Source: White House

What is the impact of Trump’s executive orders on the business climate?

The advantage of executive orders is that they allow the President to change government policy rapidly, while getting a law through Congress takes much more time. Trump’s display of decisiveness and his pursuit of a pro-business agenda may contribute positively to the domestic business climate. However, some of his executive orders seem poorly designed, which makes them less effective. Press reports suggest that Trump is not consulting federal agency lawyers or lawmakers when drafting his executive orders. This could lead to orders that are unworkable, unenforceable or even illegal. For example, in certain cases it appears that the government agencies that have to carry out Trump’s orders have been poorly informed. While President Reagan also started with a flurry of executive actions, his were better prepared. And President Obama took weeks to write his executive orders, obtaining feedback from agencies and lawmakers. What’s more, although Trump’s executive orders are meant to jumpstart the economy, some of his orders have negative side-effects. While he has a pro-business agenda, some of his decisions could backfire. For example, his executive orders on immigration hurt the staffing of US businesses as we have seen in recent days.
What is the impact of Trump’s executive orders on markets?

For financial markets, Trump’s executive orders have become as important as key economic data and central bank decisions. Well before Inauguration Day the Trump Rally had lost momentum (figure 1), but the flurry of executive orders seemed to rekindle the rally, as he decisively pursued a pro-business agenda. However, the reaction to his immigration order shows that sloppy preparation and negative side-effects of executive orders can also spark risk-off episodes in the markets. Going forward, we expect Trump’s fiscal policy initiatives and deregulation efforts to support the US economic outlook and market sentiment, while trade conflicts and immigration issues – and of course poorly prepared executive orders – are the main downside risk to Trump’s actions.

Figure 1: S&P500 before and after Election Day and Inauguration Day

Source: Macrobond

For a more detailed analysis of possible trade conflicts under a Trump administration and their impact on markets, we refer to our earlier special The Trump Trade War Game.
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