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FINANCIAL POLICY PRIORITIES IN THE INCOMING BIDEN ADMINISTRATION: WHAT CAN WE EXPECT?

By Roscoe Jones Jr., Joel M. Cohen, Michael D. Bopp, Arthur S. Long, Jeffrey L. Steiner, Samantha J. Ostrom, Maggie Zhang and Alexandra Farmer

Roscoe Jones is counsel, Michael Bopp and Jeffrey Steiner are partners, and Samantha Ostrom is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. Joel Cohen and Arthur Long are partners in the firm's New York office. Maggie Zhang and Alexandra Farmer are associates in Gibson Dunn's San Francisco office. Contact: rjones@gibsondunn.com or jcohen@gibsondunn.com.

New presidential administrations use the early days before and as they assume authority to identify and articulate their priorities. At the time of this writing, with the Georgia Senate runoff races in January, Senate control is undecided. However, it is likely President-elect Joe Biden could arrive in Washington as the first newly-elected president in over three decades to take office without his party controlling both chambers of Congress. As a result, major Congressional action will be difficult at best, meaning the new administration will have to sharpen its executive tools in order to execute its agenda. Those tools will be on display as the administration focuses on managing the COVID-19 crisis and helping strengthen the economy while also guarding against another financial crisis.

President-elect Joe Biden has indicated that his administration will revitalize U.S. financial agencies to be more aggressive in their enforcement over Wall Street firms and public companies. This alone will be a dramatic shift from the polices of the Trump Administration, which were generally aimed at deregulation. But the way that shift manifests will differ across agencies. So what exactly should companies expect of the changing landscape?

In this article, we discuss a few of the incoming administration's anticipated financial regulatory priorities, focusing on several U.S. financial agencies, including the United States Securities and Exchange Commission ("SEC"), the Consumer Financial Protection Bureau ("CFPB"), the Federal Reserve System ("Fed"), the United States Department of the Treasury ("Treasury"), and the Commodity Futures Trading Commission ("CFTC").

The SEC

We anticipate the SEC under Biden will incorporate into its agenda a number of Democratic priorities, including combating the climate crisis, pursuing racial and environmental justice, and building a stronger and fairer economy.

Mandating ESG-related disclosures. Public companies listed in the U.S. may

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soon need to disclose more about their susceptibility to climate-change risks in their SEC filings. Major priorities for President-elect Biden during his campaign were climate change and racial justice. With a Democratic-majority SEC commission in the near future, we expect the SEC to adopt regulatory changes in the areas of environmental, social, and governance ("ESG") initiatives. The SEC may also push companies to disclose their human capital resources, including their commitments to workforce diversity, higher compensation, and job stability. Enhancing these disclosures helps the new administration to tackle the climate emergency and advances its policy priority to protect the American workforce during the ongoing pandemic.

Rollback on shareholder proposal rules. The SEC is likely to rollback shareholder proposal rules. The SEC recently adopted amendments to modernize its shareholder proposal rules. These amendments would make it harder for shareholders to successfully submit a shareholder proposal. Under the old rule, a shareholder was required to have continuously held at least $2,000 in market value for one year; the new one requires a shareholder to have held that amount of investment for at least three years. Further, the one-proposal rule now applies to each person, so a proponent may only submit one proposal, regardless of whether it is in her capacity as a shareholder or as a representative on behalf of another shareholder. Given that these amendments will only be effective for shareholder proposals submitted starting in the 2022 proxy season, they could be modified or repealed before they ever become operative.

Tightening Best Interest Regulation. We also anticipate possible changes to the SEC's Regulation Best Interest ("Reg BI"), a rule enacted in 2019 that requires broker-dealers to act in the "best interest" of a customer when making recommendations for securities transactions or investment strategies to a retail consumer. Under a Democratic-majority SEC commission, the SEC may revisit Reg BI and impose a higher "fiduciary standard," requiring that financial advisers place their investors' interests ahead of their own. Reg BI is not included in the Democrats' draft party platform, but this change aligns with Biden's plan to protect American "Main Street" investors.

Continued enforcement against "spoofing" activities. One area that may remain unchanged at the SEC even with a new administration is spoofing enforcement. Spoofing generally involves placing a bid with the intent to cancel such bid before its execution. The SEC has stepped up its enforcement against spoofing activities thanks to increased coordination and information sharing between the SEC, the Department of Justice, and the CFTC. We expect the SEC to continue prioritizing spoofing enforcement activity, which advances the SEC's mission of ensuring market integrity and keeping U.S. markets competitively transparent.

The CFPB

Under the incoming Biden Administration, we can expect a revitalized CFPB. During his campaign, Biden championed strengthening Dodd-Frank era reforms that protect consumers from deceptive practices and predatory lending by financial institutions. Biden also promised to provide greater access to credit and financial services to a broader section of Americans and to prevent banks from engaging in risk lending and investment activities.

This shift will likely include a rapid uptick in the frequency and scale of enforcement investigations at the CFPB. Among other areas, the CFPB, along with the Justice Department, could concentrate on pursuing criminal charges against corporate executives for consumer abuses. In terms of civil enforcement, whereas the CFPB collected $12 billion in fines for consumer abuses during the Obama Administration, in the second quarter of 2020, the CFPB collected only $8.00. Industry actors should expect the Biden fines to mirror the Obama era's. In particular, the CFPB will likely focus on payday lenders, requiring them to underwrite loans only to consumers who have an ability to repay them. This will affect millions of people buckling under the COVID-19 recession—people particularly susceptible to financial scams and exorbitant interest rates.

We also anticipate rulemaking changes under Section 1033 of the Dodd-Frank Act. CFPB-regulated entities could be required to make available to consumers, upon request, certain information concerning the consumer financial products or services that consumers obtain, including information relating to any transaction, any series of transactions, or to the particular consumer's account including costs, charges, and usage data. This provision has been viewed by consumer advocates as giving consumers rights to the data their transactions create and would be congruent with Biden's consumer rights-centric platform during his campaign.

In addition, in a potentially major shift, the Biden Administration may seek to build a more accurate, non-discriminatory, and inclusive credit scoring system and establish a public credit reporting agency. A Biden CFPB may create a new public credit reporting and scoring division within the CFPB to provide consumers with a government option that seeks to minimize racial disparities by ensuring the algorithms used for credit scoring do not have a discriminatory impact. President-elect Biden may also push for the acceptance of non-traditional sources of data like rental history and utility bills to establish credit. To accomplish this, the Biden Administration may call on federal housing programs to accept these scores in their financial assessments and underwriting requirements.

The Federal Reserve System

Over at least the next four years, the Federal Reserve System, of all government entities, is perhaps best equipped to shape the nation's economy. The Fed, which sets interest rates, addresses financial crises, manages the U.S. money supply, and regulates many banking institutions, has many tools at its disposal and will be all the more important if legislative solutions are unavailable through a divided Congress.

The Fed may use its authority under the Expedited Funds Availability Act section 4002(d), which regulates the handling of deposit holds at commercial banks, in order to permit individual banking customers quicker access to their own money, reducing demand for expensive and, at times, predatory payday loans, as well as overdrafts and the fines associated with overdrafts.

U.S. Department of the Treasury

As the vehicle that sets tax policy and issues government debt, the Treasury Department will execute Biden's financial platform and play a leading role in any economic response to COVID-19.

A Biden Treasury Department may also choose to roll back Trump Administration modifications that made it harder for the Treasury panel to designate financial firms as "systematically important." This is significant as only financial firms deemed "systematically important" are subject to heightened supervision by the Treasury.

The CFTC

The CFTC, which regulates the U.S. derivatives markets, including futures, swaps, and certain kinds of options, has been increasingly active in enforcement activity during the Trump Administration and that trend is expected to continue under Biden. The Biden CFTC may well strengthen or re-write the cross-border rule (cross-border application of certain swap dealers registration thresholds), the swap dealer capital rule (new capital and financial reporting requirements for swap dealers), and the position limits rule (amended regulations on speculative position limits to conform to Dodd Frank amendments to CEA). We may also see heightened enforcement of Title VII rules by the CFTC, which would mean more robust disclosure and reporting requirements, in addition to a continued focus on market manipulation, especially spoofing.

Conclusion

Bear in mind that not every development after the inauguration will represent a new initiative. Notwithstanding the much-noted lack of collaboration between old and new administrations, some of which has been happening beneath the radar under Trump will continue under Biden. This includes agencies' enforcement or litigation activity in the early period of a new administration, which builds on years of previous investigative work that ripens into public view under new leadership. Discerning new or merely continuing regulatory activity will require keen observation.