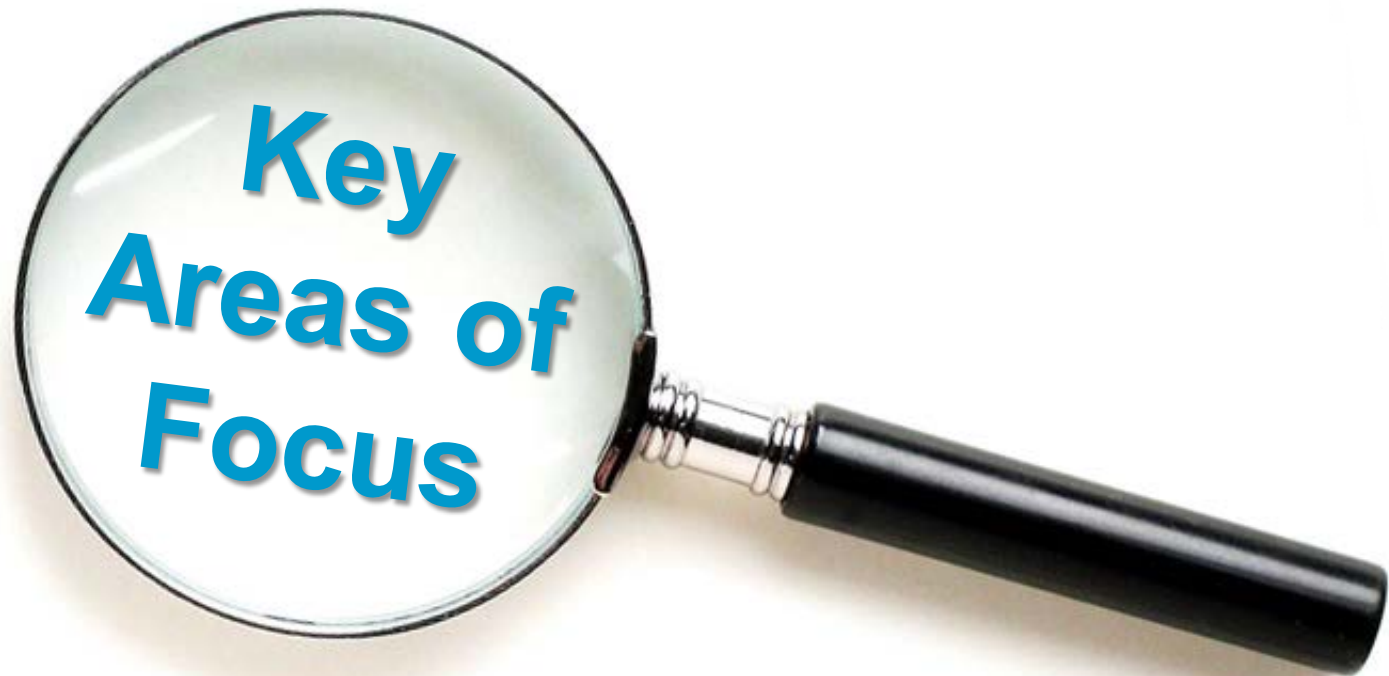


# Financial Services Regulatory Reform in the Biden Administration



November 9, 2020

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# The Road Ahead: Regulators at the Forefront During a Time of Divided Government

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**Key Areas of Focus:** This deck highlights key areas of focus, based on publicly available information gathered from statements by lawmakers, regulators, academics, think tank commentators, and advisers to the Biden campaign, and from transition, platform and related documents. We refer to this sphere of influence as the Bidensphere, and have included links to selected source documents in the [Appendix](#).

**Build Back Better:** The oft-repeated refrain of the Biden campaign and the tagline of the new Administration's transition website—to “build back better”—signals activity at the intersection of financial regulatory reform and social policy.

**Republican-Controlled Senate:** In light of the two Georgia runoffs and the uncalled North Carolina and Alaska Senate races, who will control the Senate is not yet known. For the purposes of this deck, we have assumed that the Republicans will retain a slim majority in the Senate. That assumption means that many of the items on the Bidensphere wish list, especially those from the progressive left, or which need legislative action, will be much less likely to be implemented. We also believe it implies that any new principals at the regulatory agencies will be more centrist and that the Republican-controlled Senate will not be willing to approve nominees who are viewed as being out of the mainstream.

**Focus on the Agencies, Not Congress:** We expect that most financial regulatory reform in the next two years will come from the regulators, that it will take some time for new principals to be put in place and that changes to existing regulations will need to meet the requirements of the Administrative Procedure Act, including notice and comment rulemaking and explanations of any changes. We have also assumed that the Biden Administration's legislative priorities will be on topics other than the financial sector.

**If our assumptions about a Republican Senate prove to be wrong, we will update this deck after the Georgia runoffs.**

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# Regulatory Leadership in Flux

The pace and tenor of change under the Biden Administration will be heavily influenced by the leadership of and senior personnel at the federal prudential and market regulators. An overview of that landscape is below. **In light of the need for any nominee to attract the support of Republican Senators, we expect that nominees will be more centrist and that there will be an emphasis on those who can build consensus.**



Treasury

- We expect the new Administration to act rapidly to nominate a replacement for Treasury Secretary Mnuchin.
- Senate confirmation will be required for Secretary Mnuchin's replacement as well as for any replacement of Deputy Secretary Muzinich.



Federal Reserve





- There are two pending nominations to the vacant seats on the seven-member Federal Reserve Board. The Senate could theoretically vote on these seats during the lame-duck session. Otherwise, nominations to fill those seats likely would be among the first personnel moves under the new Administration.
- Federal Reserve leadership may be in transition over the next eighteen months. Chair Powell's and Vice Chair Clarida's terms in those positions both expire in early 2022, and Vice Chair for Supervision Quarles' term in that position ends in late 2021. Vice Chair Quarles' FSB term goes through the end of 2021, and any person who is appointed as Vice Chair for Supervision will not inherit that seat. Clarida's term as Governor ends in early 2022, Powell's term as Governor extends to 2028 and Quarles' term as Governor doesn't expire until 2032.
- The remaining members of the Board, Governor Brainard and Governor Bowman, have full terms ending in 2026 and 2034, respectively.



FDIC

- Chairman McWilliams' tenure at the head of the FDIC is not set to expire until late 2023, after which her term as a Director extends until 2024.
- The identities of the two external Directors are likely to change promptly, with the incoming Comptroller of the Currency and CFPB Director stepping into those roles.
- Of the two additional internal seats, the Vice Chairman position has remained vacant throughout the Trump presidency, and Director Gruenberg's term officially expired in 2018. Expect President-Elect Biden to enter nominations to fill these two positions, one of which must be filled by a Republican.

# Regulatory Leadership in Flux

 <p>OCC</p>	<ul style="list-style-type: none"><li>• The new President can replace Acting Comptroller of the Currency Brooks at will and is expected to do so promptly.</li></ul>
 <p>CFPB</p>	<ul style="list-style-type: none"><li>• The new President can replace Director Kraninger at will and is expected to do so promptly.</li></ul>
 <p>CFTC</p>	<ul style="list-style-type: none"><li>• Chairman Tarbert may be replaced at the head of the CFTC as soon as next year, either by one of the existing Democratic Commissioners, Berkovitz or Behnam, or by a new Democratic Commissioner appointed to fill the seat now occupied by Republican Commissioner Quintenz, whose term expired earlier this year. Tarbert's term as a Commissioner does not end until 2024.</li><li>• Commissioners Stump and Berkovitz have terms extending to 2022 and 2023, respectively. Commissioner Behnam's current term expires mid-2021.</li></ul>
 <p>SEC</p>	<ul style="list-style-type: none"><li>• Chairman Clayton's tenure on the Commission will expire in mid-2021. The new President will presumably nominate a Democrat to the seat on the Commission. The Chairman position could go to that replacement, or to one of the current Democratic Commissioners, Lee or Crenshaw, whose current terms extend to mid-2022 and mid-2024, respectively.</li><li>• Commissioners Roisman and Peirce have terms extending to 2023 and 2025, respectively.</li></ul>

# Climate Change

- **General Outlook:** Addressing climate change is one of the highest priorities of the new Administration. President-Elect Biden has set a goal to transition to a net-zero carbon emissions economy by 2050, consistent with the Paris Climate Agreement. The preferred roadmap described in the campaign documents includes mandates to reduce carbon emissions, public and private investment in climate friendly technologies and stimulation of the economy through clean energy initiatives. The need to attract Republican votes in the Senate will make this preferred program harder to achieve. Even with a Republican-controlled Senate, however, it is likely that the new Administration will seek to include climate-related initiatives in other bills that may move quickly through Congress, such as stimulus bills.
- **The First Hundred Days:** Expect a number of actions to be taken very quickly by President-Elect Biden upon assuming office.
  - **Paris Climate Agreement:** As one of its first actions, we expect the new Administration to cause the U.S. to re-enter the Paris Climate Agreement and work with other signatories to increase their carbon reduction commitments. But we also expect the Republican leadership in the Senate to maintain that the Paris Climate Agreement is not binding on the U.S. without the Senate's consent.
  - **Executive Orders:** President-Elect Biden has indicated that among his first acts will be to issue executive orders that address climate change and that undo several actions taken by President Trump through executive order. These could include executive orders restoring Obama-era methane standards, ending fossil fuel leases on public lands, and possibly imposing more stringent vehicle fuel efficiency standards.
  - **Executive Office on Climate Change:** Platform documents propose an executive office in the White House focused on climate change issues.
  - **Personnel is Policy:** Appointing agency heads who are committed to addressing climate change issues will be a priority for the new Administration. With legislation difficult to achieve in a split Congress, there will be increased pressure to achieve climate change goals through the regulatory agencies. We expect that identifying suitable candidates for such roles who can still attract the necessary support from Senate Republicans will be a challenging balance to strike.

# Climate Change

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- **Regulatory Initiatives:** Financial regulators are showing a focus on climate-related issues.
  - Federal Reserve Chair Powell recently stated that the Federal Reserve is “very actively in the early stages of ... getting up to speed” on how climate change risks will affect the financial sector. He stated that “the science and art of incorporating climate change into our thinking about financial regulation is relatively new.” While Federal Reserve examination of climate change risks is at early stage, the Bidensphere materials would put the following items on the agenda:
    - Including stress testing under climate scenarios and explicitly taking into account climate change in systemic risk regulation
    - Supervisory focus on financial institutions’ risk management practices relating to climate risk, including exposure to floods and wildfires, as well as transition risk from a shift to carbon neutrality
    - Critical evaluation of portfolio concentrations and the extent of credit underwriting related to sectors and assets deemed not climate friendly (e.g., fossil fuel companies)
    - Linking higher or lower risk-weighting of assets for capital purposes to whether associated activities are “climate change-accelerating”, although we expect that any such move would involve the Basel Committee
    - Encouragement of investment in local community disaster recovery efforts as Community Reinvestment Act-eligible activities, with an emphasis on the effect of climate change on “particularly vulnerable” low-to-moderate income communities
  - SEC Commissioner Crenshaw has signaled that the SEC could play a role in climate change regulation, particularly with respect to standardized disclosure of climate risks.
  - The CFTC’s Market Risk Advisory Committee, headed by Commissioner Behnam, recently issued a report on managing climate risk in the U.S. financial system, noting that the FSOC, of which the CFTC is a voting member, has a mandate to monitor and identify emerging threats to financial stability.

# Climate Change

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- **NYDFS:** The New York State Department of Financial Services has announced it expects New York State-regulated depository and nondepository financial institutions to engage actively to integrate climate risks. NYDFS Superintendent Lacewell has stated that such engagement is “critical for the safety and soundness of the financial services industry.”
  - The NYDFS expects depository financial institutions, mortgage bankers, mortgage servicers, and limited purpose trust companies to consider how climate risk may be approached in their disclosure and how to embed climate risks into:
    - Governance frameworks
    - Risk management processes
    - Business strategies
  - The NYDFS expects nondepository institutions, including money transmitters, licensed lenders, sales finance companies, premium finance agencies and virtual currency companies, to conduct climate risk assessments and to develop strategic plans to manage that risk.
  - These stated NYDFS expectations, first laid out in October 2020, may influence the new Administration or other states.
- **Basel Committee:** The FRBNY’s head of Banking Supervision, Kevin Stiroh, is co-chairing a Basel task force on climate-related financing risks. The task force is evaluating how the Basel framework incorporates climate risk and is aiming to issue recommendations by mid-2021.
- **Flood Insurance:** Reform of flood insurance is not a focal point of the Biden platform, but both Republicans and Democrats have struggled with it for years. Whether a reassessment of the National Flood Insurance Program would be part of any serious discussion is uncertain.



# Racial Equity

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- **Financial Regulators to Play a Role:** The Biden transition website and campaign materials have made clear that the new Administration will seek to appoint financial regulators who will carry out its policies on racial equity, including by seeking to:
  - Require the Federal Reserve, as part of its mandate and its “broad-based and inclusive” employment goal, to aggressively investigate, target and report regularly on “persistent” racial differentials in jobs, wages and wealth
  - Expand the reach and capacity of Community Development Financial Institutions (**CDFIs**) to channel micro- and larger loans to start-ups and small businesses, stabilizing CDFIs in underserved communities by doubling their direct funding and “making them a top vehicle for funding from the Small Business Opportunity Fund”
  - Increase supervisory and enforcement use of the disparate impact standard in evaluating financial institutions’ lending practices and holding accountable those financial institutions whose lending practices are found to be discriminatory under that standard
- Senator Brown has recently introduced the Fair Access to Financial Services Act, a bill that would explicitly make the financial sector in its entirety subject to the Civil Rights Act of 1964, stating that:
  - “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations of any financial institution [...] without discrimination on the ground of race, color, religion, national origin, and sex (including sexual orientation and gender identity).”
  - It is unclear whether this bill will remain a messaging bill or whether, as part of some other compromise, it might be passed by a Republican-controlled Senate.
- Racial equity and the broader push for more diversity and inclusion among senior policy makers will also be important factors in many of the new Administration’s personnel decisions.

# Community Reinvestment Act

- **Community Reinvestment Act:** The Biden platform materials committed to expand the reach and impact of the CRA, but it seems unlikely that any of the changes will make it past a Republican-controlled Senate.
  - Expanding the CRA to mortgage and insurance companies, payment companies, marketplace lenders and FinTechs seems unlikely unless part of a grand compromise.
  - Requiring financial institutions to produce explicit statements setting out their public interest commitments could likely be done at a regulatory level.
  - The call to reverse the OCC's recent CRA rulemaking by the use of the Congressional Review Act is presumably off the table after the Senate rejection of a resolution to overturn the rulemaking.
- **Federal Reserve ANPR:** The Federal Reserve issued an advance notice of proposed rulemaking to update the CRA regulatory framework in September 2020. There are both common elements and key differences between the OCC's final rule and the Federal Reserve's proposal.
  - **CRA Scoring:** The Federal Reserve proposal would score retail lending and community development performance separately, while the OCC's rule combines all metrics into a single score.
  - **Data Collection:** The Federal Reserve's proposed metrics would rely on existing data while the OCC's rule requires banks to submit new compliance data.
  - **Assessment Areas:** The Federal Reserve proposal requests feedback on a number of different assessment area options, but is skeptical that the OCC's deposit-based assessment areas for certain institutions would adequately address the reinvestment needs of affected communities.
- The Federal Reserve's proposal provides for a 120-day comment period, which may, as Governor Brainard stated when the proposal was released in September 2020, allow the Federal Reserve, OCC and FDIC time to “converge on a consistent approach to strengthening the CRA that has consistent support among stakeholders.”

# Bank Size and Structure

- **Challenges ahead for M&A:** The Unity Task Force Recommendations call for a review of antitrust, racial equity and workers' rights of all banking mergers concluded during the Trump Administration. The new Administration may attempt to appoint regulators who are committed to increased scrutiny of large acquisitions and who are critics of the consumer welfare standard.
- If the new Administration is able to appoint such persons to the Federal Reserve Board, it could become harder for large bank M&A transactions to be approved, although where the balance would be struck among the financial stability risk factor, antitrust and social concerns is unclear.
  - The Department of Justice is already considering a long overdue update to the 1995 Bank Merger Competitive Review guidelines.
- **Limits on size:** Some in the Bidensphere would put asset size limits on large banks, but this point does not appear in the Biden platform. Others in the Bidensphere are believers in “too big to manage,” and point to recent risk governance consent orders. Still others have suggested that the Federal Reserve could use its general authority over safety and soundness to force divestitures, although this would be unprecedented. If the Biden Administration is able to appoint such persons to the Federal Reserve Board, then we could see:
  - Increased scrutiny of living wills and a reprise of deficiencies, which could lead to forced asset sales
  - The Federal Reserve's use of its general authority over safety and soundness to force divestitures
- **Neo-Glass-Steagall:** The Unity Task Force Recommendations include a drive to reverse “the over-financialization of the American economy by maintaining and expanding safeguards that separate retail banking institutions from more risky investment operations.” We read this as a reference to some type of neo-Glass-Steagall, which we view as unlikely in a Republican-controlled Senate.
- **Volcker:** We view a regulatory move, by interpretation or rulemaking, to undo some of the changes made in the revised Volcker Rule regulations, as less likely to be an important part of the agenda and to occur only if the Senate is willing to approve persons committed to such a course of action as principals at the Volcker agencies.

# Enhanced Prudential Standards

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- **Capital & Liquidity:** Some in the Bidensphere have suggested increasing capital requirements on banks.
  - **Possible pandemic-related actions:** Some in the Bidensphere have spoken out against recent capital actions taken by the Federal Reserve in response to the pandemic. Their preferred policies include:
    - Unwinding some or all of the agencies' recent temporary capital relief, such as the exclusion of reserves held at the Federal Reserve and Treasuries from the supplementary leverage ratio
    - Requiring banks to retain even more capital by extending or further limiting capital distributions and share buybacks
  - **Stress Testing and Capital Planning:** Changes to stress-testing and capital planning requirements might include:
    - More severe stress scenarios, which would have the effect of increasing the stress capital buffer
    - Possible return of the formal qualitative objection to capital plans
  - **Climate Change Initiatives:** There are a number of ways that the Bidensphere emphasis on climate change could make its way into capital requirements. These include:
    - Increasing risk weights for exposure to fossil fuel companies and decreasing risk weights for exposures to clean energy companies, bringing social goals into what has, until now, been largely a credit risk analysis
      - Any such change would presumably be coordinated with the Basel Committee.
    - Incorporating a climate change scenario into stress testing
  - **Tailoring:** Revising the 2018 legislative changes to prudential standards tailoring is off the table, but they may be modulated by regulation. For example, the regulatory thresholds and criteria for application of certain prudential requirements above the statutory thresholds could be modified by the Federal Reserve.

# Enhanced Prudential Standards

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- **GSIB Requirements:** Changes to the regulations applicable to GSIBs could include:
  - Adjustments to the GSIB surcharge, including further emphasis on the short term wholesale funding factor
  - Increased external TLAC requirements
  - New internal TLAC requirements
- **Other Initiatives:** Independently of any change in Administration, there are a number of pending rulemaking initiatives on the banking agencies' agenda, including:
  - Finalization of the implementation of Basel III, including the market risk capital rule (Fundamental Review of the Trading Book)
  - Potential deployment of the countercyclical capital buffer
- **Living Wills:**
  - The FDIC's forbearance on the requirement for IDI living wills until a new regulation is in place could be reversed.
  - Recent revisions to the living wills time cycles could be reversed by regulation.
  - Scrutiny of remediation plans, living wills and operational readiness could become more intense.
- **Supervision:** The extent and type of supervision might change under the new Administration. This could include:
  - More emphasis on supervisory secrecy, opacity and unaccountable discretion
  - Finalization of the Board and Senior Management Effectiveness Proposals

# Short-Term Wholesale Funding

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- **Reforms of Short-Term Wholesale Funding:** In the aftermath of the Financial Crisis, there were reforms seeking to significantly decrease reliance on the use of short-term wholesale funding (including money market funds, repo and commercial paper), and the introduction of a U.S. GSIB surcharge that included a short-term wholesale funding indicator.
- **Decrease in the Use of Short-Term Wholesale Funding:** These reforms and market evolution have led to a significant decrease in the use of short-term wholesale funding over the past decade.
  - The U.S. banking agencies recently finalized the Net Stable Funding Ratio rule, which will become effective July 1, 2021 and further incentivizes less reliance by banks on short-term wholesale funding.
- **Revisiting Reform:** There is a consensus that more needs to be done in the short-term wholesale funding markets, particularly after, in the spring of 2020, vulnerabilities in the markets for Treasuries, commercial paper, repos and money market funds affected nonbanks and highlighted their reliance on the banking sector for credit and liquidity. There has been bipartisan focus on further short-term wholesale funding reform, but no consensus on what reforms in this area of interconnectedness between the banking and nonbanking sectors might look like.
  - After contrasting the large outflows from nonbanks with the inflow of deposits to banks, Vice Chair Quarles stated: “Looking across the areas in which strains suggest a need for further reforms, I am struck at the prominence of the continued need to focus on vulnerabilities associated with short-term funding.” – Speech by Vice Chair for Supervision Randal Quarles, October 15, 2020
- **FSB Steering Group:** The FSB has created a steering group of public and private individuals to study the role of nonbank financial institutions at the beginning of the pandemic, including their role in the short-term wholesale funding market.

# Short-Term Wholesale Funding

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- **Treasuries:** In light of the unexpected vulnerabilities in the Treasury markets, there has been some support for central clearing of Treasury securities (Darrell Duffie and Blackrock).
- **Academic Proposals:** Academics, including some in the Bidensphere, have proposed other changes, including rules for securities financing transaction collateral eligibility, registration of participants in the short-term wholesale funding markets, licensing requirements for short-term borrowings regardless of charter, and government insurance for cash providers in the short-term wholesale funding markets.

# Nonbanks / FSOC

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- **General Outlook:** The FSOC may revive the designation of nonbanks as systemically important and increase its focus on activities.
- **Sector Reform:** Stresses and strains in the nonbank financial sector during the pandemic are likely to lead to a reform agenda in that area which will be tied to the reform agenda on wholesale short-term funding.
  - Vice Chair for Supervision Quarles spoke in October about the necessity of focusing on the role and performance of the pivotal but “fragile” nonbank financial intermediation sector. Quarles emphasized that “The interconnectedness of our financial system means that it is not enough to understand the vulnerabilities arising from the banking sector. We must also understand vulnerabilities in the nonbank sector and how shocks are transmitted to or from the nonbank sector.”
  - The FSB is expected to publish a report in November on the resilience of the financial system during the COVID crisis, including the role of nonbank financial intermediation, which is likely to be influential in setting any reform agenda.
- **Activities:** There is likely to be an increased focus on activities regulation, including in emerging FinTech areas such as stablecoins and payments.
- **Leveraged Lending:** There is likely to be an increased focus on leveraged lending and the role of hedge funds.
- **FSOC Designation Procedures:** Biden-appointed financial regulatory agency principals on the FSOC are highly likely to revisit the Trump Administration reform of the nonbank SIFI designation procedures.



# Marijuana Legalization

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- **“We will decriminalize marijuana, and we will expunge the records of those who have been convicted of marijuana.”** – Vice President-Elect Harris, at her October 7, 2020 debate with Vice President Pence
- As a Senator, Vice President-Elect Harris sponsored the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (**MORE Act**). Unlike other bills in this space, it had no Republican sponsors.
  - The purpose of the bill is to deschedule cannabis on a nationwide basis while accomplishing the social justice goals related to business ownership, employment and criminal records, as well as pardons and a social equity tax.
  - In the House, where the MORE Act is sponsored by Representative Nadler, a vote on the MORE Act is expected in the lame-duck session.
- Other approaches to banking the cannabis sector, such as the Secure and Fair Enforcement Banking Act (**SAFE Banking Act**) or the Strengthening the Tenth Amendment Through Entrusting States Act (**STATES Act**), are designed to address compliance and supervisory issues for financial institutions and have bipartisan sponsors.
- All of the legislative approaches would involve the complex interaction of federal and state law and likely involve significant transition periods.
- 2020 election results showed strong support for cannabis-friendly ballot initiatives in five states, which proponents are likely to interpret as a mandate for pro-cannabis policy changes at the federal level as well, spurred by the referendum sweep.
- All three legislative options have, to date, languished in the Republican-controlled Senate, and it is unclear whether the 2020 election has changed that dynamic.
- **Our visual memorandum analyzing the MORE Act, SAFE Banking Act and STATES Act is available [here](#).**

# Executive Compensation and Accountability

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- **Executive Accountability:** There will be more focus on executive compensation and accountability, including more public clawbacks of compensation for actions that result in consent orders.
  - Dodd-Frank requires listed companies to implement clawback policies to recover incentive-based compensation received by current or former executive officers in the event of certain financial restatements. The SEC, which proposed a rule in 2015, would likely finalize the rule and direct the stock exchanges to implement the rule.
  - **Our memorandum discussing the Dodd-Frank Clawback Rule is available [here](#).**
- It is unclear when and how the interagency incentive compensation rule repropose in 2016 would be finalized or if it would be further repropose. It is mandatory under Dodd-Frank.
  - The 2016 reproposal provided for prescriptive requirements as to the structure of incentive compensation for larger financial institutions, including significant and lengthy deferrals and the increased possibility of forfeitures and clawbacks.
  - **Our visual memorandum analyzing the 2016 reproposal is available [here](#).**
- **Extend Criminalization of Executive Conduct:** Legislation to enhance criminal liability for corporate leadership would be difficult under a Republican-controlled Senate.
  - President-Elect Biden's team has voiced support for "criminal penalties for reckless executives who illegally gamble with the savings and economic security of their clients and American communities," which may herald increased enforcement action rather than legislative change.

# Infrastructure Investments

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- **Infrastructure at the forefront:** Promotion of infrastructure investment is key to the Biden platform, dovetailing with other goals related to addressing climate change, equity, accessibility and economic stability. Some, but not all, of the items in the Biden platform may become part of a legislative compromise, although it is too soon to assess which ones:
  - Investment in green infrastructure, including clean energy production, transmission and storage capabilities to further climate goals and as a key driver for stimulating the economy
  - Planning for universal broadband internet access deemed “critical to broadly shared economic success”
  - Investment in the restoration and upgrading of roads and highways to improve safety, better serve rural and disadvantaged communities and support innovation in more environmental-friendly transportation and climate-resilient transportation networks
  - A revival of rail infrastructure and development of high-speed rail, in collaboration with the private sector, to support clean energy initiatives and reduce emissions
  - A focus on infrastructure investment as an engine of job creation across a diverse, well-trained and unionized workforce
  - Funding of “anchor institutions,” including hospitals and colleges, as part of a focus on revitalizing distressed cities
  - A commitment to ensuring that infrastructure investments benefit historically underserved communities and workers
- We expect that progressive calls for a public bank or a national investment authority are off the table but that the concept of some kind of public/private infrastructure funding vehicle could still be on the agenda.

# Payments and Digital Assets

- **Focus on Real-Time Payments and FinTech:** The debate over who should regulate payments will continue and become more urgent as real-time payments expands. Topics likely to be on the agenda include:
  - The official position of the new Administration on the FinTech charter, including whether the new principals believe that Congress, not the OCC, should decide the issue of whether a national bank can be nondepository, is unknown.
    - A new Comptroller could change the litigation position in the Second Circuit so that the OCC no longer defends the FinTech charter, even though it was originally proposed by an Obama-appointed Comptroller.
    - At stake is whether the emerging fast and real-time payments systems will be subject to 50 different state regulators or a national regulator at the federal level.
  - Strong encouragement for the development of FedNow with an emphasis on how faster payments will help the low income population
- Additional focus is likely on:
  - The role of government-provided payment systems vs. private sector payment systems
  - AML obligations of payment systems and their providers
- **Central Bank Digital Currency:** We expect to see continuing legislative interest and work within the Federal Reserve on FedAccounts or a U.S. central bank digital currency. The focus may be on how to facilitate stimulus and other payments to U.S. residents and as support for instant consumer payments. There may also be a focus on national security aspects of money and monetary policy, given recent announcements in China and other countries about the launch of digital fiat currencies.
- **Open Banking:** Some development of regulations governing authorized third-party access to financial records is expected, following on from the CFPB's October 2020 ANPR. Future CFPB leadership is likely to continue this endeavor in light of the Dodd-Frank mandate for greater access by consumers to their financial data, which helps facilitate consumer use of a wider array of financial products.
- **Digital Assets:** We also may see legislative and regulatory efforts to enhance federal regulation of stablecoins and other digital assets, in light of international initiatives by the Financial Stability Board, G-20, G-7 and the Financial Action Task Force, among others.

# Fiduciary Standards

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- **Revisiting Fiduciary Standards?** The new Administration likely will seek to revisit the fiduciary rule proposals promulgated in June 2020 by the Department of Labor (**DOL**).
- The Democratic Party Platform highlights, without naming, Trump Administration regulations that allow “financial advisors to prioritize their self-interest over their clients’ financial wellbeing” that should be reversed.
- The DOL’s June 2020 proposal provided for a class exemption from ERISA’s prohibited transaction restrictions, allowing financial services companies and their investment professionals to:
  - Receive compensation while acting as investment advice fiduciaries, including in connection with offering advice on individual retirement account rollovers
  - Execute certain principal trades for retirement assets to which they act as investment advisers
- The Impartial Conduct Standards set out in the DOL proposal closely follow the approach of Regulation Best Interest.
- Vice President-Elect Harris was one of the signatories to an August 2020 letter from Congressional Democrats to the DOL criticizing both the June 2020 proposal and the DOL’s determination not to appeal the Fifth Circuit’s 2018 decision to vacate the Obama Administration’s fiduciary rule, which was more protective of retirement investors and less friendly to the financial industry.

# Environmental, Social and Corporate Governance

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- **Disclosure:** Disclosure mandates may replace the current voluntary disclosure regime.
  - It is possible that the SEC may mandate standardized public company ESG disclosures, particularly on climate risk, diversity and inclusion, and human capital resource metrics. On climate disclosures, the SEC is expected to focus not on the financial sector's direct emissions, but on the indirect emissions associated with financing.
  - Pending legislation that would mandate ESG and climate disclosures, such as the pending ESG Disclosure Simplification Act and Senator Warren's Climate Risk Disclosure Act, is much less likely than regulatory action, although the regulators could always be influenced by the content of the bills.
- **Investment Adviser ESG Regulation:** The SEC may require ESG disclosure from investment advisers marketing ESG funds. The SEC may also require investment advisers to adopt ESG investing policies and procedures, including those governing asset selection and proxy voting.
- **Board and Corporate Diversity:** Federal legislation aimed at increasing diversity on corporate boards and perhaps C-suites, drawing on recent California and Washington laws setting quotas for female directors and directors from underrepresented communities, is unlikely, but regulatory pressure is likely.
  - The SEC may introduce disclosure requirements that encourage identification of directors by demographic category and an explanation of what, if anything, a board intends to do to improve diversity.
  - President-Elect Biden is likely to reverse President Trump's September 2020 executive order regarding diversity training and policies for companies with government contracts.
- **Shareholder Proposals:** Recent changes to the shareholder proposal rule are unlikely to be reversed, but there is potential for changes intended to make it more difficult for companies to exclude ESG shareholder proposals, such as those relating to political spending, climate change, workforce diversity and executive compensation.

# Environmental, Social and Corporate Governance

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- **Stock Buybacks:** Legislation to limit stock buybacks or to tie buybacks to worker salaries, offshoring, etc., is unlikely. SEC scrutiny of buybacks is expected to increase.
- **Corporate Conscription:** We expect an increased willingness to use public companies to carry out political, social, foreign policy and economic policy goals through measures similar to the rules for conflict minerals disclosure.
- **Stakeholder Capitalism:** There is likely to be increased regulatory and market pressure on boards to consider stakeholder interests alongside shareholder value in corporate decisionmaking, following the Business Roundtable statement.
- **Political Spending:** We expect SEC disclosure requirements around corporate spending on lobbying and corporate donations to trade associations that engage in lobbying and political spending.
- **Universal Proxy:** There likely will be a revival of the SEC's previous push for universal proxies in contested elections.
- **Credit Rating Agencies:** The SEC may consider encouraging credit rating agencies to provide increased transparency on how they incorporate climate and other ESG factors into their ratings and factor ESG considerations into their annual examinations of credit rating agencies.

# Consumer Financial Protection

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- **Consumer Financial Protection Bureau:** The desire of many on the progressive left that President Biden install a new director of the CFPB who will undo many of the changes made in the Trump Administration is likely to be modulated by opposition to such a candidate from the Republican-controlled Senate, resulting in a more moderate director and agenda. We expect a focus on:
  - Increased enforcement efforts, which would build on the recent upward trend under current agency leadership, with a reinvigorated Office of Fair Lending and Equal Opportunity empowered to target lenders found to engage in discriminatory practices
  - Use of the disparate impact standard to hold “major financial institutions accountable for discriminatory lending practices,” as discussed above in the Racial Equity slide
  - Enhanced scrutiny of higher education lenders, servicers and debt collectors and forbearance of federal student loans
  - Establishment of a federal standard for appraisals and appraiser training requirements to address racial biases that contribute to persistent undervaluation of properties in communities of color
  - The establishment of a federal usury limit, though this would require Congress to act and is therefore unlikely to be high on the agenda.
- **Housing Protections:** Low interest rates and a possible tax credit for first-time homebuyers are expected to increase demand for mortgages. The creation of a new Homeowner and Renter Bill of Rights, which the Biden platform documents highlighted as a vehicle to penalize predatory mortgage lending, is only likely if it could be done by regulatory as opposed to legislative action.



# Consumer Financial Protection

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- **Strengthen Fair Lending:** The Biden platform anticipates rolling back regulatory measures undertaken during the Trump Administration that are viewed as reducing the efficacy of fair housing protections, including:
  - Reversing the Trump Administration’s decision to scrap the Affirmatively Furthering Fair Housing Rule, which was adopted under President Obama and which ties the receipt by communities of certain federal funding to a requirement to affirmatively track housing patterns and root out policies with discriminatory effect
  - Reinstatement of the federal risk-sharing program to incentivize private sector funding of affordable housing
- **Credit Reporting:** It seems unlikely that the creation of a Public Credit Reporting Agency will remain on the agenda, since it would require legislative action.
  - Former CFPB director Cordray has characterized such an agency as “a big, big undertaking,” cautioning that “it’s not an easy thing to do, and it’s not going to be done quickly.”
  - Nonetheless, we believe that there may be continued pressure on the credit rating agency business models. House Democrats have sponsored a bill to give consumers greater rights with respect to their credit reports, including an appeal process for reports, limitations on the use of reports by prospective employers, and a shorter time period in which negative information would appear on reports.
- **Banking Access:** The Unity Task Force Recommendations emphasize the necessity of universal access to basic, low-cost banking services. Some have suggested the provision of bank accounts by the Federal Reserve or locating bank branches in post offices, with proponents of broader measures advocating for the U.S. Postal Service itself to offer accounts, remittance and lending services. We believe that postal banking is unlikely to gain traction in a Republican-controlled Senate but that universal access may remain on the agenda.

# Appendix: Selected Source Documents



# Selected Source Documents

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- Biden-Harris Transition Website, Build Back Better ([Transition Website](#))
- 2020 Democratic Party Platform ([Democratic Party Platform](#))
- Biden-Sanders Unity Task Force Recommendations: Combating the Climate Crisis and Pursuing Environmental Justice ([Unity Task Force Recommendations](#))
- The Case for Climate Action: Building a Clean Economy for the American People, the Senate Democrats' Special Committee on the Climate Crisis ([The Case for Climate Action](#))
- The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future ([Infrastructure and Energy Plan](#))
- The Biden Plan for a Clean Energy Revolution and Environmental Justice ([Climate Plan](#))
- The Biden Plan to Build Back Better by Advancing Racial Equity across the American Economy ([Advancing Racial Equity Plan](#))
- Lift Every Voice: The Biden Plan for Black America ([Lift Every Voice](#))
- The Biden Plan for Investing in our Communities through Housing ([Housing Plan](#))
- The Biden Plan to Invest in Middle Class Competitiveness ([Infrastructure and Middle Class Plan](#))

If you have any questions regarding the matters covered in this deck, please contact any of the lawyers listed below or your usual Davis Polk contact.

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