The Road Ahead for Financial Regulatory Reform in a Time of Democrats in Control

January 19, 2021

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Tax changes, potential fiscal stimulus and ESG will be addressed in separate publications.

The Road Ahead: In Congress

- **Build Back Better:** The oft-repeated refrain of the campaign and the tag line of the Biden Administration's transition website—to "build back better"—signals activity at the intersection of financial regulation and social policy. This intersection is also a key goal of Maxine Waters, the Chairwoman of the House Financial Services Committee (**HFSC**) and Sherrod Brown, who will become the Chairman of the Senate Banking Committee (**SBC**).
- **Legislative Changes?** We do not expect that financial regulatory legislation will be a top priority for the Biden White House, but the Democratic majority in both houses of Congress opens up the possibility of legislative changes, especially in areas of common focus between Chair Waters and incoming Chair Brown. Sen. Brown, in particular, has several bills pending. We highlight these in the slides that follow.
- **Congressional Review Act:** Incoming Chair Brown has signaled that there will be discussion about which regulations and guidance finalized on or after August 21, 2020 could be overturned under the Congressional Review Act. Immediately upon taking office, President-Elect Biden is expected to issue a customary Executive Order to halt or delay regulations enacted during the lame-duck session, known as "midnight regulations."
- **Hearings and Oversight:** We can expect aggressive oversight of both the financial sector and the agencies through hearings.
  - The rules package passed in the House in early January makes clear that oversight will continue to be a focus of that body.
  - House subpoena power has been made more explicit, though continuing challenges may be expected.
  - Financial institutions are likely to come under scrutiny from the new House Select Committee on Economic Fairness and Disparity in Growth.

The Road Ahead: At the Agencies

- Chair Waters has provided the incoming Biden Administration with a long list of regulatory actions taken during the Trump Administration that she would like to see reversed (**Waters Letter**). Incoming Chair Brown has publicly stated that he would like to see the recommendations in a September 15, 2020 report by Better Markets (**Better Markets Report**) implemented. There is a great deal of overlap in their policy initiatives.
- Implementing all of the recommendations in the Waters Letter and those contained in the Better Markets Report would essentially amount to a reversal of the legislative and regulatory changes of the entire last four years, a fair number of which had bipartisan support. Practicality will likely demand that legislators and regulators make some reasonable choices about where to focus.
- That said, there is clearly a new agenda being set by Chair Waters and incoming Chair Brown.
  - Both of them have prioritized relief related to the pandemic.
  - The Waters Letter also describes Chair Waters' views as follows: "Trump appointees have attacked diversity and inclusion, undermined consumer safeguards, decreased oversight of the largest banks and systemic threats to the economy, and rejected international development and cooperation at the Department of the Treasury (Treasury) and the independent financial services regulators. The Department of Housing and Urban Development (HUD) and the other agencies with the responsibility to oversee our housing markets have also taken actions to weaken our mortgage markets, reduce access to housing and homeownership opportunities, and hamstring fair housing protections."
  - Incoming Chair Brown, in a press briefing on January 12th, made it clear that he expects a "more antagonistic" attitude towards Wall Street and a more "pro-consumer" attitude.* He has also briefed the media that "[t]his committee will be about the dignity of work," and "It will be about addressing wealth inequality. It will be about addressing structural racism and climate change."**

* Zachary Warmbrodt, "Brown sees 'more antagonistic' approach to Wall Street in Biden regulators", POLITICO Pro (Jan. 12, 2021)

** Jon Hill, "Top Dem Says Senate Banking Agenda To Put Workers First", Law360 (Jan. 12, 2021)

The Road Ahead: Regulatory Leadership

- 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.
  - The fact that Democrats control all three branches of government means that nominees might not be centrist and it is possible that nominees from the progressive left will become principals.
  - We also expect that the SBC will, in the nomination hearings, attempt to extract commitments to incoming Chair Brown's legislative and regulatory priorities.
  - It will take time for the new regulatory principals to be put in place and the pace of change at the regulatory agencies will vary.
  - Final regulations can only be changed with a new notice and comment process.
  - Proposed regulations can be withdrawn or ignored.
  - Interpretive statements can be withdrawn with reasons for the change given.
- The Biden Administration's personnel decisions are also likely to be strongly influenced by racial equity and the broader push for more **diversity and inclusion** among financial regulatory leadership.
  - Such representation has lagged drastically behind general demographics and representation in Congress and the federal judiciary. Recent scholarship has demonstrated, for example, that only 10 of the 327 individuals ever appointed to policy leadership positions at federal financial regulatory agencies have been Black.*
- For the status of financial regulatory leadership changes for the Biden Administration, see the next slide.

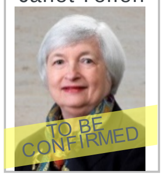
* Christopher J. Brummer, *What do the Data Reveal about (the Absence of Black) Financial Regulators?* (July 20, 2020, last revised Dec. 9, 2020). Available at SSRN **here**

The Road Ahead:
Status of Financial Regulatory Leadership Changes for the Biden Administration

As of January 19, 2021

Treasury

Janet Yellen



Secretary

Wally Adeyemo

Deputy Secretary

TO BE NOMINATED

Under Secretary for International Affairs

TO BE NOMINATED

Under Secretary for Terrorism and Financial Intelligence

TO BE NOMINATED

Under Secretary for Domestic Finance

Federal Reserve

Chairman Powell

Vice Chairman Clarida

Vice Chairman for Supervision Quarles

Governor Brainard

Governor Waller

Governor Bowman

TO BE NOMINATED

Governor

FDIC

Chairman McWilliams

TO BE NOMINATED

Vice Chairman

Director Gruenberg

Rohit Chopra

CFPB Director

TO BE NOMINATED

OCC Comptroller

SEC

Gary Gensler

Chairman

Commissioner Roisman

Commissioner Crenshaw

Commissioner Peirce

Commissioner Lee

OCC

TO BE NOMINATED

Comptroller

CFPB

Rohit Chopra

Director

CFTC

Chairman Tarbert

Commissioner Berkovitz

Commissioner Stump

Commissioner Behnam

Commissioner Quintenz

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. This would be consistent with the Paris Climate Agreement, which we expect the new Administration to cause the U.S. to re-enter as one of its first actions.
  - 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.
- **Regulatory Initiatives:** Late in the Trump Administration, financial regulators began to increase their attention on climate-related issues, and that can be expected to accelerate in the Biden Administration.
- **Federal Reserve:** Chair Powell has 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."
  - The Federal Reserve acknowledged climate risk for the first time in its November 2020 Financial Stability Report, which:
    - Provided initial illustrations of how climate change-related risks can increase financial system vulnerabilities
    - Identified policies, such as increased transparency to improve pricing of climate risks, to mitigate climate change-related financial vulnerabilities
    - Highlighted the need for continued research into the relationships between climate, the economy and the financial sector

Climate Change

- While Federal Reserve examination of climate change risks is at an early stage, materials from lawmakers, regulators, academics, think tank commentators and advisers to the Biden campaign, and from transition, platform and related documents, which we collectively refer to as the Bidensphere, 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 coordination with the Basel Committee on Banking Supervision
  - 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
- For predictions from one astute observer on how the Federal Reserve might approach climate change risks, see Douglas J. Elliott's January 11, 2021 paper, *Climate Change and the Federal Reserve*, available **here**.
- For an in-depth review of the Federal Reserve's legal authority in this area, see Christina Skinner's October 1, 2020 paper, *Central Banks and Climate Change*, available **here**.

Climate Change

- **Legislative Initiatives:** Regulatory initiatives may soon be mandated by legislation.
  - Democrats in both chambers introduced the Climate Change Financial Risk Act during the last Congress that would require:
    - The Federal Reserve to develop and update multiple climate change risk scenarios for use in stress testing, taking into account the recommendations of a new technical advisory group as well as "analytic tools and best practices" already developed by international banking supervisors
    - The FSOC to establish a subcommittee dedicated to identifying and responding to climate change-related risks to the stability of the U.S. financial system
  - This legislation would, at minimum, accelerate the gathering of data to support analysis of how climate change-related risks may translate to financial system vulnerabilities. It could bolster emerging efforts to embed those risks into actions taken by the Federal Reserve, including in how it deploys its prudential regulation authority over systemically important bank and nonbank financial institutions to prevent or mitigate risks to financial stability under Title I of Dodd-Frank.
- **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.
- **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.
- **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

- **Financial Regulators to Play a Role:** President-Elect Biden 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
  - Place intense pressure on the OCC and the Federal Reserve to align their standards under the Community Reinvestment Act
- Incoming Chair Brown introduced the Fair Access to Financial Services Act in the last session of Congress which would explicitly make the financial sector in its entirety subject to the Civil Rights Act of 1964. The bill states 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).”
  - In a Democratic Senate, this bill may have some traction.
- Incoming Chair Brown also helped to introduce, and co-sponsored, the Federal Reserve Racial and Economic Equity Act in the last session of Congress. The bill would expand the mandate of the Federal Reserve, requiring it and the Federal Open Market Committee to carry out their duties “in a manner that fosters the elimination of disparities across racial and ethnic groups with respect to employment, income, wealth, and access to affordable credit.”

Bank M&A – Size and Structure

- **Challenges ahead for M&A?** Campaign materials call for a review of antitrust, racial equity and workers' rights of **all banking mergers** concluded during the Trump Administration. The Biden Administration may attempt to appoint regulators who are committed to increased scrutiny of banking acquisitions.
- As a result, it could become harder for large bank M&A transactions to be approved, although where the balance would be struck among asset size, the financial stability risk factor, antitrust and social concerns is unclear.
  - There are some lessons to be learned from the recent pattern of approvals, dissents and abstentions by Governor Lael Brainard.
  - We believe that transformative GSIB acquisitions remain off the table and that specialty acquisitions by GSIBs like Schwab/TD and Morgan Stanley/E*Trade will be more difficult (Governor Brainard dissented on both) but not off the table.
  - Recently announced deals (PNC/BBVA, Huntington/TCF) are bets that, even with the political change, the creation of super-regionals will still be politically desirable, even if there is higher scrutiny. These deals may accelerate other regional bank M&A both in the higher and lower asset ranges.
  - We think that deals over **$250 billion** will face higher political scrutiny and require more attention on the Hill, but will still be possible, as BB&T/SunTrust's creation of Truist was possible (Governor Brainard did not dissent but approved).
    - Regional bank acquisitions under **$100 billion** will be easier than larger ones, with those under **$50 billion** being the easiest.
    - The Department of Justice is considering a long overdue update to the 1995 Bank Merger Competitive Review guidelines, which could take thrift and digital bank deposits more into account in the HHI analysis.

Bank M&A – Size and Structure

- **Neo-Glass-Steagall:** Campaign materials 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 closely divided Senate.
- **Break Up the Banks:** Incoming Chair Brown has stated that reimposing Glass-Steagall is not "a panacea," and instead has prioritized breaking up the biggest banks by imposing size restrictions, together with heightened capital standards.
- In December 2020, incoming Chair Brown stated his continuing support for "breaking up the biggest banks and limiting the risky activities they can invest in." In a September 2020 Q&A, he emphasized that "big banks clearly have too much power," and referenced the amendment he proposed in 2010 during legislative negotiation of Dodd-Frank. That amendment, which he also introduced as a standalone bill, would have placed limits on the size of the largest financial institutions as measured by:
  - Deposits held as a percentage of the total amount of deposits of U.S. insured depository institutions
  - Non-deposit liabilities as a percentage of U.S. GDP
  - Failure to comply with specified leverage ratios

Underbanked and Basic Access

- **Banking Access:** Campaign materials 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, but that universal access is likely to remain on the agenda.
- **Banking for All Act:** In January 2021, incoming Chair Brown voiced his continued support for the Banking for All Act, which would require Federal Reserve member banks to offer digital U.S. dollar accounts to all U.S. individuals and businesses.
  - The accounts would be required to offer certain minimum banking services no less favorable than those that the bank offers for existing transaction accounts, provide a minimum interest rate and would not be able to charge account fees or have minimum or maximum balance requirements.
  - In areas with limited access to Federal Reserve member banks, banks would be required to partner with U.S. Postal Service retail facilities to provide access to accounts.

BSA/AML

- **Legislative and Regulatory Changes:** The Anti-Money Laundering Act of 2020 (**AMLA**) is the most important BSA/AML legislation in years and could have a significant impact on AML compliance and supervision once it is fully implemented.
  - The legislation's ultimate impact will be determined by implementing regulations to be issued by the Treasury Department and other government stakeholders and which are not expected in the near term.
  - Once implemented, AMLA will affect banks' and other financial institutions' AML compliance obligations and the way they are evaluated through:
    - Issuance of national AML and countering the financing of terrorism priorities
    - The creation of a national beneficial ownership registry maintained by FinCEN
    - Pared back beneficial ownership requirements applicable to banks and other covered institutions
    - Streamlined Suspicious Activity Reports
    - Codification of the BSA's applicability to virtual currency
- **Our visual memorandum on AMLA is available here.**
- **Continuation of Ongoing AML Reform Efforts:** Initiatives begun in 2020, such as FinCEN's ANPR on Program Effectiveness and significant changes to the Travel and Recordkeeping Rules, will continue despite new leadership.
- **AML Supervision and Enforcement:** AML is likely to continue to be a high priority for the financial regulators and, while overall enforcement numbers have been down in recent years, regulators, especially the New York State Department of Financial Services, will not be hesitant to use their enforcement powers in cases involving serious AML program breakdowns.

Prudential Standards: Capital and Liquidity

- **Capital & Liquidity:** Some in the Bidensphere have suggested increasing capital requirements on banks, and both Chair Waters and incoming Chair Brown want to reverse many of the tailoring changes.
  - Both Chair Waters and incoming Chair Brown have expressed support for changes to the application of the SLR, LCR and NSFR requirements and reinstating the CCAR qualitative objection, all of which would require amendments to the relevant final rules.
  - Incoming Chair Brown voted against the bipartisan Economic Growth, Regulatory Relief, and Consumer Protection Act, and has been openly critical of the Federal Reserve's tailoring of capital requirements pursuant to that Act.
    - Consistent with incoming Chair Brown's broad support for the agenda set out in the Better Markets Report, we can expect him to focus on material increases in "the quantity and quality of capital throughout the banking and financial systems," and note that he sponsored legislation in 2013 that would have imposed a 15% minimum leverage ratio on financial institutions with $500 billion or more in total consolidated assets.
- **Reversal of 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
    - But some have proposed making the temporary exemption for reserves (but <u>not</u> Treasury Securities) from the SLR calculation a permanent change.*
  - Requiring a larger range of banks to retain even more capital by extending or further limiting capital distributions and share buybacks
    - Incoming Chair Brown has also advocated for a worker dividend that would require corporations to issue a dividend to non-executive workers based on the amount spent on capital distributions and share buybacks.

* Nellie Liang & Patrick Parkinson, *Enhancing the Liquidity of U.S. Treasury Markets Under Stress*, Brookings Institute (Dec. 16, 2020)

Prudential Standards: Other Areas

- **Supervision:** The tone and tenor of supervision might change under the new Administration. For firms with at least $50 billion in total assets, this could include:
  - More emphasis on supervisory secrecy, opacity and discretion
  - Finalization of the Federal Reserve's Board and Senior Management Effectiveness Proposals
- **Data and Privacy:** We expect greater attention to the use of artificial intelligence, machine learning and algorithms in financial services.
  - We also expect greater attention to data governance, privacy and data ownership.
  - These critical issues were not on the agenda the last time the Democrats were in power.

Short-Term Wholesale Funding

- **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.
- **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.
- **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.
- **FSOC:** A more aggressive FSOC may use its name and shame powers for activities or its powers under Title VII to force changes in these markets.

Short-Term Wholesale Funding

- **Reform ideas:** The following are some of the short-term wholesale funding reform ideas under discussion.*
  - Creating a permanent Federal Reserve repurchase facility to act as a backstop during a crisis
  - Expanded, and potentially mandatory, use of central clearing for Treasury securities
  - Increased regulation by the Federal Reserve and SEC of dealers and principal trading firms
  - Expanding the use of swing pricing, in which the costs of trading are allocated to the trading investors, rather than to the fund as a whole, through adjustments to the net asset value of the traded shares
  - Improved data collection and greater disclosure, including for the balance sheets and activities of dealers and for uncleared bilateral repurchases
  - Collateral haircuts on short-term financing transactions

- See, e.g., Nellie Liang & Patrick Parkinson, *Enhancing the Liquidity of U.S. Treasury Markets Under Stress*, Brookings Institute (Dec. 16, 2020) and Barbara Novick, Joanna Cound, Kate Fulton & Winnie Pun, *Lessons from COVID 19: Overview of Financial Stability and Non-Bank Financial Institutions*, Blackrock (Sept. 2020)

Nonbanks / FSOC

- **General Outlook:** Both Chair Waters and incoming Chair Brown have called for a more aggressive FSOC.
- **Activities:** There is likely to be an increased focus on activities regulation, including in emerging FinTech areas such as stablecoins and payments, in addition to a focus on the nonbanking financial sector.
- **FSOC Designation Procedures:** Based upon past writings by incoming Treasury Secretary Yellen, Biden-appointed financial regulatory agency principals on the FSOC are highly likely to revisit the Trump Administration reform of the nonbank SIFI designation procedures.
- **Wholesale Short-term Funding:** 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."
- **Leveraged Lending:** There is likely to be an increased focus on leveraged lending and the role of hedge fund deleveraging during the Pandemic.
- **High Frequency Trading:** The FSOC may take a closer look at the role of high frequency trading in the market volatility in March 2020.

Marijuana Legalization

- **"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 social justice goals such as ensuring that marijuana businesses are owned by and employ individuals that have been targeted by the War on Drugs, expunging criminal records related to non-violent marijuana offenses, granting pardons and imposing a social equity tax.
  - The MORE Act passed the House on December 4, 2020.
- 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 Senate. The sharp rise in cannabis stocks after the results of the Georgia runoff were announced illustrates a sentiment that the situation will be different in a Democratic-controlled Senate.
- **Our visual memorandum analyzing the MORE Act, SAFE Banking Act and STATES Act is available here.**

Executive Compensation and Accountability

- **Incentive Compensation:** It is unclear when and how the interagency incentive compensation rule reproposed in 2016 would be finalized or if it would be further reproposed, but we expect that the HFSC and SBC may exert some pressure for it to be done. 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.**
- **Clawbacks:** 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 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.**
- Incoming Chair Brown has repeatedly derided the growth in executive compensation over the past decade, and is supportive of the Better Markets Report, which highlighted the need to implement the Dodd-Frank clawback rule and limit incentive compensation to financial institution executives.
- Based on public statements by incoming Chair Brown, including his op-ed “message to America’s corporate executives” in June 2020, we expect him to focus on issues including:
  - Increasing the minimum wage to $15/hour
  - Paid sick days and family leave, as well as stricter occupational safety standards
  - Diversification of top executives and boards of directors
  - End of a business model that relies on independent contractors
  - Stricter scrutiny of executive compensation, such as bonuses, especially when employees are being laid off

Infrastructure Investments

- **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. In a Democratic-controlled Senate, it is likely to move up in the legislative agenda:
  - 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, which is 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
- Timing of infrastructure spending may well be bifurcated with near-term priorities and longer term strategic objectives.

Digital Transformation and Fintech Competition

- The digital transformation and FinTech competition can be expected to intensify, which will lead to regulatory reform, although the views of the Bidensphere are opaque in this area.
- We expect most marketplace lenders to either acquire banks or be acquired by banks.
  - A Biden-appointed Comptroller may try to undo the true lender rule, but that would require notice and comment rulemaking, and some may push for a Congressional Review Act overturn.
  - Exportation of interest rates looks to be more stable than before the election, while a nationwide usury cap, linked to the Military Lending Act cap of 36%, may receive some Congressional consideration.
- We expect most neo-banks to enhance their partnerships with banks.
- Online broker-dealers will come under pressure on operational and compliance issues.
- The FinTech charter is likely to stay bogged down in court cases for some time, although there is a small chance that a Biden-appointed Comptroller may choose to send the concept to Congress and reverse positions in the court case.
- There will be pressure on the Federal Reserve to make FedNow operational as soon as possible.
- Central Bank digital currency is years away and unlikely absent legislative reform.
- FSOC may take a deep look at stablecoins, especially after the statement, released by the President's Working Group on Financial Markets on December 23, 2020 and available **here**. The statement provided an initial assessment of key regulatory and supervisory considerations of stablecoins.
- Customer ownership of data, as previewed in the CFPB's recent ANPR, will remain on the table, as will third party access to bank information when cleared by consumers.
- The OCC's interpretive letter on the custody of digital assets is unlikely to be overturned, but the broader project on updating for digital assets will slow down.
- The Wyoming SPDI charter will continue to expand but may come under SEC or prudential banking agency pressure.

SEC & DOL Fiduciary Standards

- **Revisiting Retirement Plan Fiduciary Standards:** The new Administration likely will seek to revisit the fiduciary rule proposals finalized by the Department of Labor (**DOL**) in December 2020 and due to become effective on February 16, 2021.
  - A number of retiree and investor groups, plus Better Markets, have been critical of the DOL rule, and may push the Biden Administration and Congress to suspend the rule for further review.
  - 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.
- **SEC Regulation Best Interest:** An SEC with Democratic leadership could seek to amend Regulation Best Interest to impose a full fiduciary standard.
  - The Better Markets Report asserts that Regulation Best Interest is "misleadingly labeled", relying "primarily on ineffective and often confusing disclosures" and preserving "multiple baffling standards for different types of advisors," while enabling brokers and advisors to lull "unsuspecting investors into thinking they have an actual fiduciary's best interest obligation when they do not."
  - In the Waters Letter, Chair Waters advised the Biden Administration to rescind Regulation Best Interest.
- Congress could also amend the Exchange Act to require the SEC to adopt a uniform fiduciary standard. A previous court challenge arguing that Regulation Best Interest was inconsistent with Dodd-Frank was rejected by the Second Circuit on the basis that Dodd-Frank authorizes, but does not mandate, the SEC to adopt such a standard.

Consumer Financial Protection

- **Consumer Financial Protection Bureau:** Progressives will likely have significant influence on who becomes the next director of the CFPB, making it likely that the CFPB will be active in the next few years. 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 advocated in Biden campaign materials and 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
  - Small dollar lending practices and underwriting standards, and the establishment of a federal usury limit, though this would require Congress to act
  - Bolstering protections against abusive debt collection practices
- **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, may receive Congressional consideration.

Consumer Financial Protection

- **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:** The creation of a Public Credit Reporting Agency may receive Congressional consideration.
  - 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.

Student Loan Forgiveness?

- Student loans have become the largest unsecured consumer debt category—more than credit cards and almost as much as mortgages.
- The size of losses on student loans for the U.S. government approaches the size of losses incurred by banks during the subprime mortgage crisis.
  - One study says that U.S. taxpayers will be on the hook for defaults of about $435 billion.
- The Warren and Sanders presidential campaigns had made full student loan forgiveness a centerpiece of their platforms.
- President-Elect Biden's position has been more centrist, with his incoming deputy director of the National Economic Council stating on January 8, 2021 that Biden "supports Congress immediately canceling $10,000 of federal student loan debt per person" in response to the Pandemic.
- There are also various proposals to make bankruptcy protection easier, such as making some student loans dischargeable without a showing of a undue hardship.
- None of the forgiveness proposals impact private student loans, but the bankruptcy proposals might.
- There is already pushback, suggesting that it would be a "Brahmin bailout" benefiting the upper middle class the most.*
- That said, most defaults are from those with $25,000 or less, who went to community colleges, trade schools or for profit colleges and stopped part-way through.**

* Zaid Jilani, "Canceling Student Debt Would Be a 'Brahmin Bailout'", Wall Street Journal (Nov. 29, 2020)

** Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, Brookings Papers on Economic Activity (Fall 2015)

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