Clients&FriendsMemo

The Trump Administration: Change By Appointment

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The Trump Administration: Instituting Change

The election of Donald J. Trump as the 45th President of the United States, along with the Republican control of the majority of both the House of Representatives and the Senate, will likely result in significant changes in U.S. financial services, energy, and commodities laws and markets. The most sweeping changes may require legislation and may generate controversy within Congress – in particular in the U.S. Senate. This is due to differences in views between the Democrats and Republicans regarding economic regulation; these differences are amplified by the very narrow majority held by Senate Republicans and the Senate's existing rules that allow the minority to "filibuster" (or block) a bill absent 60 votes necessary for "cloture" to override the filibuster. However, even in the absence of legislation, President-elect Trump and the Republican Congress will have numerous means to reform and reshape economic regulation.

Many experts are engaged in educated speculation about the regulatory priorities of the now-forming Trump Administration. One way to analyze the likelihood (and timing) of various regulatory developments is through the lens of process: What is required for the new Administration and Republican-controlled Congress to implement various possible initiatives? This memorandum focuses on the ability of the President and the Republican Congress to reshape policy through the appointment process with respect to certain key agencies responsible for financial, commodities, and energy markets in the U.S. Subsequent memos in this Series will discuss other non-legislative means by which the new President can act, both directly and indirectly, to effect regulatory change, as well as certain limiting factors.

Less Through Legislation; More Through Regulation

There has been much speculation regarding the impact the Trump Administration will have on the 2010 legislation adopted on the heels of the financial crisis, the Dodd-Frank Act. Given the strong support for the Dodd-Frank Act by certain Democratic Senators, any attempt to significantly scale back or repeal the Dodd-Frank Act (or those aspects of the Dodd-Frank Act most favored by the Democrats) will almost certainly trigger an attempt by Senate Democrats to block that effort. Given the other priorities announced by the Trump Administration (including health care, tax, energy, and immigration reform), it seems unlikely that Mr. Trump would seek a heated Senate battle over large-

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scale Dodd-Frank Act reform early in his term as that could scuttle or delay his other priorities, especially since Mr. Trump's pre-election positions about Wall Street and the major banks were decidedly mixed. Moreover, while the Trump Administration has vowed to "dismantle" the Dodd-Frank Act, it has also indicated that it intends to replace it with something new, which would of course take time to develop (although existing legislation, such as Republican House Financial Services Committee Chairman Jeb Hensarling's Financial CHOICE Act, can serve as a starting point). In any case, simply repealing the Dodd-Frank Act in its entirety is not feasible; too much of the Dodd-Frank Act has become ingrained in U.S. financial services law, meaning that a complete repeal would create a gaping void in U.S. law and result in significant operational and regulatory disruption.

Thus, it seems more likely that the Trump Administration will adopt a targeted approach to economic regulation, seeking to repeal certain aspects of the Dodd-Frank Act, amend other aspects, and leave intact the remainder. Legislative efforts to change existing financial services law, therefore, are likely a more long-term and deliberative process. (In upcoming Clients & Friends Memos we will discuss the prospects for legislative change to the Dodd-Frank Act in more detail.)

This is not to say that the Trump Administration cannot have an immediate and significant impact on U.S. financial services, energy, and commodities regulations. The Trump Administration can, and will, fairly quickly reconstitute a number of federal agencies by appointing agency leaders that will advance the Trump Administration's policies. These changes in policy could be effectuated by slowing the pace of proposed or pending regulations, revising existing regulations, or altering the agency's interpretive, supervisory and enforcement positions.

In this regard, it is important to note that financial services, energy, and commodities laws in the U.S. are largely driven by complex and detailed agency regulations. The regulations of the four principal federal banking agencies alone – the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System (the "Fed"), the Federal Deposit Insurance Corporation ("FDIC"), and the Consumer Financial Protection Bureau ("CFPB") – span more than 7,000 pages covering eight volumes of the Code of Federal Regulations. These massive regulations are supplemented by an even more voluminous amount of orders, interpretations, no-action letters, guidance, and pronouncements.

The Appointment Power

In a very real sense, Mr. Trump's best ability to make an immediate impact on financial services, energy, and commodities laws, without triggering heated (and public) disputes in Congress, is through his ability to reconstitute certain federal agencies through appointment and direction. Below we summarize the composition of these critical agencies and the ability of the Trump Administration to alter the regulatory landscape through prompt changes to the agencies' leadership.

CFPB

The most watched change may be at the CFPB. The CFPB was created by the Dodd-Frank Act and is controversial due to its sweeping mandate and powers with respect to consumer financial services, its method of funding that is wholly outside traditional appropriations processes, and its unique structure whereby the single CFPB Director is, by statute, immunized from control or removal by the President. In a very recent decision, the D.C. Circuit ruled that the CFPB's structure was unconstitutional and that the CFPB Director therefore must be subject to control and removal at-will by the President. This decision, if upheld, would subject the CFPB Director to removal by Mr. Trump. See *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, at 10. While the CFPB indicated prior to the election that it was considering an appeal of the D.C. Circuit's decision, it is unclear whether that appeal will continue (given that the Trump Administration would not have any reason to support the appeal). If such an appeal is filed, it is also unclear whether the D.C. Circuit's decision will be stayed. The CFPB is the product of Senator Elizabeth Warren, a Massachusetts Democrat and an outspoken critic of Mr. Trump.

The CFPB Director is appointed by the President and serves for five years. Currently Richard Cordray serves as the CFPB Director. Director Cordray's term expires in July 2018. Of course, if the D.C. Circuit decision is not stayed or upheld, Director Cordray can be removed at will by Mr. Trump immediately after inauguration in January. While the CFPB has rulewriting and supervisory authority, the CFPB also has sweeping enforcement authority that has been liberally used in recent years. Thus, a change in the CFPB Director may have enormous and immediate impact on consumer financial services.

OCC

The most immediate change may be felt at the OCC, the regulator of national banks and federal thrifts. The OCC, the oldest of all financial regulators and established in 1863, is an office of the U.S. Treasury Department, a traditional executive agency. The OCC is headed by a Comptroller, who is appointed by the President and serves five years in office. The current Comptroller is Thomas J. Curry, formerly the Commissioner of the Division of Banks of Massachusetts. While the President has the power to remove the Comptroller only upon "reasons to be communicated by the President to the Senate," Comptroller Curry's term ends in April 2017, just three months following Mr. Trump's inauguration (unless Comptroller Curry decides to resign, or is removed, prior to that date).

Given that virtually all of the largest U.S. banks are national banks regulated by the OCC, a change in leadership at the OCC will have widespread impact across the banking industry.

SEC

The Securities and Exchange Commission ("SEC") operates pursuant to the Securities Exchange Act ("SEA"); its reach extends over initial securities offerings and secondary market trading, registered investment companies under the Investment Company Act ("ICA") and private funds under the Investment Advisers Act ("IAA"). It is primarily responsible for administration and enforcement of various statutes, including: the Securities Act, the SEA, the ICA, the IAA, the Trust Indenture Act of 1939, the Sarbanes-Oxley Act, and the JOBS Act. SEC authority over U.S. securities markets encompasses securities, including security options, security futures (jointly with the CFTC), and security-based swaps.

The SEA provides for the Commission to be led by up to five Commissioners appointed by the President, with the advice and consent of the Senate, to serve staggered five-year terms so that one Commissioner's term ends on June 5th of each year. Terms end at the later of (i) five years or (ii) when a successor has been appointed and qualified.

The President names one Commissioner as Chairman. An SEC Commissioner, as a member of an "adjudicatory body," may be removed by the President only for "inefficiency, neglect of duty or malfeasance in office." While the Chairman has only a single vote, the Chairman in fact controls the agenda as well as most of the resources of the agency (the other Commissioners are allocated little resources individually). No more than three Commissioners at any one time may be from the same political party.

When there is a vacancy in the Commission, SEC action is governed by common law and statutorily authorized quorum and voting rules. Under those rules, two out of three Commissioner votes are sufficient to adopt rules in the absence of all five positions being filled. However, when there are three or fewer sitting Commissioners, all sitting Commissioners are necessary to form a quorum unless a Commissioner has been disqualified from the matter at hand.

Currently there are only three SEC Commissioners: Mary Jo White (Chairman, Democrat, 2013-2019), Kara Stein (Democrat, 2013-2017), and Michael S. Piwowar (Republican, 2013-2018). President Obama had nominated Lisa Fairfax (Democrat) and Hester Peirce (Republican) to fill the current Commission vacancies but the Senate Democrats had placed a "hold" on the confirmation of both of the President's nominees. It would seem unlikely that the Republican Senate will confirm the two pending nominees during the lame duck session; thus the new Administration will have the ability to appoint two Republican Commissioners. In addition, current Chairman Mary Jo White has already announced her plans to step down from the Commission when President Obama exits the Oval Office. Note that, when a vacancy exists in the position of Chairman, the President will designate a Commissioner to serve as acting Chairman until a permanent Chairman is selected. Thus, Mr. Trump will likely have the ability to nominate Commissioners for the three vacancies (at least one of which will need to be a Democrat) and designate one Commissioner as Chairman.

At least until the new Commissioners are named, it is expected that the President would name Commissioner Piwowar as Chairman.

CFTC

The Commodity Futures Trading Commission ("CFTC" or "Commission") gained enhanced authority over U.S. financial markets following the Dodd-Frank Act, which expanded the CFTC's jurisdiction over U.S. swaps markets (in addition to its pre-existing regulatory authority over commodity futures and options contracts and market participants). The Dodd-Frank Act also expanded the CFTC's enforcement authority over the broader commodities markets and market participants. The CFTC's swaps rulemaking process following Dodd-Frank was controversial; the CFTC was criticized by the industry and Congressional Republicans due to the rapid manner in which it issued regulations implementing the Dodd-Frank Act, and then "clarified" flawed rules through hundreds of no-action letters. This process was characterized by some as unnecessarily disruptive. The CFTC's efforts to regulate aggressively cross-border or extraterritorial swaps transactions and foreign institutions was also met with stiff criticism abroad.

The CFTC was established in 1975 as an independent agency that is run by five Commissioners, each appointed by the President and confirmed by the Senate. A Commissioner serves a five-year term that is staggered from the other Commissioners, and can only be removed for cause. No more than three Commissioners may be from the same political party. The President appoints one of the Commissioners as the Chairman of the CFTC. The Chairman serves at the pleasure of the President. Should the Chairman be removed from his or her position by the President, the removed Chairman may continue to serve as a Commissioner for the remainder of their unexpired term. If the position of Chairman becomes vacant, then the remaining Commissioners must elect one among them to be the Acting Chairman of the CFTC, who serves until the President appoints, and the Senate confirms, a new Chairman.

Commissioner vacancies do not limit the remaining Commissioners from exercising any and all of the powers of the CFTC. There is no minimum quorum requirement, and only a bare majority of the quorum must reach consensus for the CFTC to take actions that require the approval of the Commission. In the past, the CFTC has acted with as few as two Commissioners.

Currently there are only three CFTC Commissioners: Timothy G. Massad (Chairman, Democrat, term expires April 13, 2017); Sharon Y. Bowen (Democrat, term expires April 13, 2018); and J. Christopher Giancarlo (Republican, term expires April 13, 2019). Two of President Obama's Commissioner nominations are still pending before the Senate: Christopher Brummer (Democrat, a Georgetown University Law Center professor) and Brian D. Quintenz (Republican, a commodity pool hedge fund founder). Even with the impending transition to the new Administration, it is possible that the Republican-controlled Senate could move forward with the existing nominations.

Assuming that Chairman Massad tenders his resignation – which is not unexpected – Mr. Trump may appoint two new Republicans and one new Democrat as Commissioners, and may name one of the Republicans as Chairman. The Republican Chairman will control the executive and administrative functions of the Commission, and the Republican majority – the Chairman and the other two Republican Commissioners – likely will work together to implement Mr. Trump's financial regulatory agenda.

FDIC

The FDIC, formed in 1933, serves multiple roles — it administers the Deposit Insurance Fund, it oversees the resolution of failed FDIC-insured depository institutions, and it supervises state-chartered banks that are not members of the Federal Reserve System as well as state-chartered thrifts.

The FDIC is a bi-partisan agency headed by a board of directors. The FDIC Board comprises five directors: three appointed by the President; the Comptroller; and the CFPB Director. Not more than three of the directors of the FDIC Board may be from the same political party, and each director serves for a six-year term. One of the directors of the FDIC Board serves as its chairperson for a five-year term and is appointed to that role by the President. Members of the FDIC Board can be removed by the President only for cause.

Currently, the FDIC Board comprises Richard Cordray (the CFPB Director, a Democrat), Thomas J. Curry (the Comptroller, a Democrat), Martin J. Gruenberg (the chairman of the FDIC Board, a Democrat), and Thomas M. Hoenig (the Vice Chairman, a Republican). This composition leaves one vacancy that could be filled immediately by a presidential appointment. Chairman Gruenberg's term as a director expires in early 2018 (although his term as chairperson expires in November 2017). Vice Chairman Hoenig's term as a director also expires in early 2018. Accordingly, not only can Mr. Trump fill the existing vacancy, and refill the seats allocated to the Comptroller and CFPB Director by making changes to those agency heads, but Mr. Trump also will have the ability to replace the chairmanship as early as 2017 and Hoenig's and Gruenberg seats in 2018, if he so chooses.

The Fed

The Fed, established in 1913, has the dual role of managing U.S. monetary policy as well as supervising bank holding companies, savings and loan holding companies, and state banks that chose to join the Federal Reserve System. Given that virtually all significant U.S. banking organizations are in holding company form, the Fed is perhaps the most powerful of the U.S. banking agencies.

The Fed is headed by a Board of Governors, comprising up to seven members (each a "Governor"), to be appointed by the President from a different district of the Federal Reserve System. Each

Governor serves for 14 years, from February 1 of the closest even-numbered year, and cannot be reappointed after serving a full term. Each Governor can be removed only for cause by the President. This restriction on removal is by design, in order to keep the Fed somewhat independent from political influence of the Executive Branch due to the Fed's critical role in establishing U.S. monetary policy.

From these existing Governors the President chooses one to serve as Chair. The Chair serves for four years and is the Fed's executive officer. Currently Janet Yellen serves as the Chair. Her term as Chair expires February 3, 2018, but her term as a Governor expires in 2024.

There are only five Governors currently serving: Stanley Fischer (term expires January 31, 2020); Daniel Tarullo (term expires January 31, 2022); Janet Yellen (term expires January 31, 2024); Lael Brainard (term expires January 31, 2026); and Jerome H. Powell (term expires January 31, 2028).

Two vacancies remain on the Board of Directors. One vacancy is particularly noteworthy. The Dodd-Frank Act requires that the Board have a "Vice Chairman of Supervision," to "develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board, and [to] oversee the supervision and regulation of such firms." This position was never filled by President Obama. While Mr. Trump is largely unable to reconstitute the Fed, he can influence the direction of the Fed through by filling the remaining seats on the Board, including the crucial Vice Chairman of Supervision and naming the Chair in 2018.

FHFA

The Federal Housing Finance Agency ("FHFA") serves a critical financial role due to its supervision of the government sponsored enterprises — Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. The FHFA is headed by a single director. The FHFA Director serves for a term of five years and is subject to removal by the President only for cause. Currently Mel Watt, a former Democratic member of the House of Representatives, serves as the FHFA Director. Director Watt's term expires early 2019.

FSOC

The Financial Stability Oversight Council ("FSOC") is a body created by the Dodd-Frank Act. Most notably, the FSOC was given the authority to determine whether the potential failure of a nonbank entity poses significant risk to the U.S. financial system and thus to designate the entity as a "nonbank financial company," subject to Fed oversight in many respects as if the entity were a bank holding company. The FSOC is comprised of ten voting members, nine of which consist of the agency heads of many of the agencies discussed above – the Fed, OCC, FDIC, CFPB, SEC, CFTC, and FHFA – along with the Secretary of the Treasury (who acts as the FSOC Chair), the Chairman of the National Credit Union Administration, plus one independent member selected by

the President. The FSOC largely will be re-constituted automatically as the President makes appointments to these other agencies.

DOL

The U.S. Department of Labor ("DOL") is a Cabinet-level department responsible for administering and enforcing numerous employment and labor-related laws. The DOL carries out its mission through several agencies and offices, including the Employee Benefits Security Administration ("EBSA"). EBSA is responsible for administering, regulating and enforcing Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, including the fiduciary responsibility and prohibited transaction rules applicable to the investment of ERISA plan assets. The DOL recently issued the final regulation redefining the term "fiduciary" in connection with the provision of investment advice, which regulation is slated to become applicable on April 10, 2017. The DOL is headed by the Secretary of Labor and EBSA is headed by the Assistant Secretary of Labor of the Employee Benefits Security Administration. The Secretary of Labor and the Assistant Secretary are nominated by the President and subject to Senate confirmation. The Trump Administration has not yet indicated who will be appointed to these positions.

FERC

The Federal Energy Regulatory Commission ("FERC") regulates various interstate transactions involving the sale of electric energy and natural gas, certain mergers of public utilities and the licensing of hydroelectric facilities, among many other things. The Commission comprises five Commissioners appointed by the President, with the advice and consent of the Senate. The President names one of these Commissioners as the Chairman, who generally sets the regulatory agenda of the agency.

A Commissioner serves a five-year term that is staggered from the other Commissioners and can be removed only for cause by the President. No more than three Commissioners may be from the same political party. The minimum quorum for FERC to take "Commission action" is three Commissioners. Commission action includes issuing proposed and final regulations and initiating enforcement proceedings.

There are currently three Commissioners: Norman C. Bay (Chairman, Democrat, term expires June, 2018); Cheryl A. LaFleur (Democrat, term expires June, 2019); and Colette D. Honorable (Democrat, term expires June, 2017).

Assuming that Chairman Bay tenders his resignation – which is not unexpected – Mr. Trump may appoint possibly one Republican and one Democrat as Commissioners, and may name one of the Republican Commissioners Chairman. Mr. Trump may then replace Commissioner Honorable after her term expires in June of 2017. These changes would represent a shift, giving FERC a Republican majority that could advance Mr. Trump's financial regulatory agenda.

All of the above-mentioned positions in all of the above agencies would be subject to Senate confirmation proceedings, and thus it is difficult to know precisely when new leadership will begin within the agencies.

Conclusion

President-elect Trump, directly or through appointees, and perhaps with the assistance of a Republican-controlled Congress, will now have available those levers of power that, for the last eight years, have been in the hands of President Obama. This memorandum reviewed Mr. Trump's appointment powers as to a number of the agencies most significant to the economy. In a series of memoranda to come, we will discuss other non-legislative means by which a President can act, both directly and indirectly. We will also discuss limiting factors on the power of the President, indeed even on the power of the President with the co-operation of Congress, such as treaties and other international agreements to which the United States is a party, as well as likely changes in legislation or agency rulemakings and policies.

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