ELECTION RESULTS: PRELIMINARY THOUGHTS AND REACTIONS

As a result of Tuesday's election, Republicans will control the White House and both houses of Congress in 2017. It is likely there ultimately will be some significant changes affecting financial services regulation and enforcement, but they will take time to implement. The President-elect has articulated sympathy for less regulation and opposition to the Dodd-Frank Act but also an unconventional economic populism. The Congressional Republicans have already prepared, and in some cases passed, more specific changes to limit and cabin the CFPB. We anticipate efforts focused on changing the CFPB Director and CFPB structure, reduced regulation that may encourage product innovation (particularly in the FinTech space), and potentially less emphasis on certain Department of Justice ("DOJ") enforcement initiatives such as fair lending and the Residential Mortgage-Backed Securities ("RMBS") task force. Nonetheless, we expect continued enforcement and supervisory activity, including by states and by prudential regulators that are less directly tied to shifting political winds.

While much remains uncertain, below are our preliminary thoughts and reactions regarding the implications for the financial services industry.

THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

Changing the Director

We anticipate a change in CFPB leadership, but it is unclear when that will occur. In October, two of the three judges on the D.C. Circuit panel in *PHH Corp. v. CFPB* concluded that, to address constitutional defects in the CFPB's structure, the President must have the authority to remove the CFPB Director at will. While this has led to speculation that President Trump would remove Director Cordray immediately upon assuming office in January, the court's ruling is stayed pending appeal so it does not currently have the force of law. We expect the CFPB to appeal and that process to last for a year or more.

As a result, unless and until the appeals are resolved in favor of PHH on this point, the President's authority to remove the CFPB Director is governed by the Dodd-Frank Act, which states that "[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). Absent removal by the President, it appears that Director Cordray's term would expire in July 2018, which is five years after his Senate confirmation. President Trump may seek to remove Director Cordray under the Dodd-Frank Act's "for cause" standard, or it is possible that Director Cordray will choose to vacate the position earlier.

Changing the CFPB's Structure

We expect that congressional Republicans will renew their efforts to pass legislation reforming the CFPB. Previous efforts have sought to, among other things, replace the single Director with a five-member Commission and subject the CFPB to congressional appropriations. If ultimately adopted, these reforms could have a moderating effect on the CFPB's rulemaking activities and enforcement agenda by dispersing decision-making authority and enhancing congressional influence over the CFPB's operations.

It is also possible that Congress and President Trump could seek to abolish the CFPB entirely, although this would mean finding another agency or agencies in which to vest authority over consumer protection statutes such as the Truth in Lending Act and Equal Credit Opportunity Act. While we expect that Elizabeth Warren and Senate Democrats would fiercely combat efforts to dismantle the CFPB, it is less clear whether they would—or could—resist less aggressive reforms that leave the CFPB in existence but with a different structure, limited resources, and more oversight.

CFPB Rulemaking

Current CFPB leadership is expected to press forward with existing rulemakings, particularly on payday loans and arbitration. However, these rulemakings require certain procedural approvals by the Office of Information and Regulatory Affairs ("OIRA"), which can determine that major rules are subject to congressional override. In addition, the review process that precedes any proposed rule expected to have a significant impact on small businesses requires the cooperation of OIRA and the Small Business Administration ("SBA"). While neither agency has veto power over CFPB rulemakings, both are part of the administration and could slow the rulemaking process. Even if the CFPB were to rush out new regulations, new CFPB leadership could withdraw them before they take effect.

New legislation could also seek to reduce regulatory burden by repealing or requiring amendments to past CFPB regulations (such as the TILA-RESPA Integrated Disclosure Rule or the Ability-to-Repay Rule) and altering procedures to make future rulemakings more difficult. Of course, much of this could be accomplished by new CFPB leadership without the need for legislation.

CFPB Supervision

To reduce the regulatory burden on smaller institutions, new legislation could raise the threshold for exemption from the CFPB's supervisory jurisdiction above the current $10 billion in assets. In that case, supervision of these entities is likely to revert to the prudential bank and state regulators.

CFPB Enforcement

While it is unclear how the election will affect CFPB enforcement priorities and authority in the long term, current CFPB leadership is expected to continue to pursue aggressive enforcement actions in a variety of areas and may even attempt to accelerate the pace for as long as they are permitted to do so. However, in addition to the direct changes to the CFPB structure and authority, as discussed below, changes in leadership at the DOJ and the Department of Housing and Urban Development ("HUD") may alter the enforcement priorities of those agencies and reduce the resources available to the CFPB for fair lending enforcement.

DEPARTMENT OF JUSTICE ENFORCEMENT

While the new administration may devote fewer resources to DOJ in the long term, investigations and prosecutions already underway are unlikely to see significant change in the immediate future. These are commonly handled by career lawyers and, in many cases, are based on models that have been repeatedly successful or rely on company self-reporting to identify and investigate issues. Moreover, qui tam whistleblower actions under the False Claims Act impose statutory obligations on the government to investigate, and we have seen increasing numbers of those cases being filed relating to the Federal Housing Administration program. Finally, although fair lending may not continue to be the same focus for DOJ that it has been in recent years, prudential regulators likely will remain focused on fair lending issues.

STATE ENFORCEMENT

If federal regulators become less aggressive under a new administration, we expect aggressive attorneys general and state financial services regulators to attempt to fill the perceived void by increasing their enforcement efforts, including under state consumer protection statutes.

OTHER FEDERAL ENFORCEMENT AGENCIES

Even with significant changes to the CFPB, the Federal Trade Commission retains significant UDAP authority and in recent years has been regaining its momentum in the consumer protection space. Other agencies, like the Federal Communications Commission, have also taken aggressive roles concerning privacy issues, the Telephone Consumer Protection Act, and even consumer billing practices. Also HUD would likely retain its audit, enforcement, and referral authority, including in the false claims and fair lending space. Practically speaking, this means there are other agencies with the tools and authority to undertake enforcement actions, although the nature of that enforcement activity may differ.

PRUDENTIAL BANK REGULATORS

The current consumer and fair lending personnel at all of the banking agencies appear to support many of the CFPB's aggressive fair lending and UDAAP positions. The prudential banking regulators are less subject to White House and congressional intervention and oversight, so their focus on consumer issues is less subject to immediate change. However, President Trump will have the opportunity to begin replacing leadership at the banking agencies in 2017. Comptroller of the Currency Thomas Curry's term expires in March 2017, and FDIC Chairman Martin Gruenberg's term expires in November 2017. Janet Yellen, Chairman of the Federal Reserve, serves until February 2018.

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