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Eight US regulatory predictions for 2017

Davis Polk lawyers predict a new reform agenda in the US following the election

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With the imminent change in administration in the US, we offer our eight regulatory predictions for 2017.

1. A new reform agenda emerges

While President-elect Trump's transition team speaks of dismantling the Dodd-Frank Act, financial regulatory reform seems lower on Trump's agenda than trade, tax reform, immigration and healthcare. Many in Congress and at the agencies favour tackling the economic costs of post-crisis regulation and will seek to do so. No one is advocating wholesale repeal of Dodd-Frank, but we expect legislative changes, perhaps modelled on Representative Jeb Hensarling's Choice Act to permit banks to choose higher capital requirements in lieu of more intrusive regulation, to result in fundamental changes to the new financial regulatory infrastructure.

Legislative relief for regional and community banks is likely to happen more quickly and may include raising the $50bn floor for enhanced prudential standards. Relief for larger banks may take more time. Whether through stricter cost-benefit requirements or other means, it is also likely that there will be greater Congressional oversight of financial regulatory agencies and their regulations. New agency heads will have significant authority to amend interpretative statements of their agencies without notice and comment, as well as influence the tone of examination and enforcement programs.

Controversial pending rules are unlikely to be finalised anytime soon, including the CFTC's Reg AT and the joint agency rules on incentive-based compensation.

2. A gentler supervisory approach at the Federal Reserve

It is widely believed that Governor Tarullo, the Fed's current point person on supervisory and regulatory issues, will retire upon the appointment of a Fed Vice Chair for Supervision who will officially cover those important functions. The new appointee is expected to be someone who will favour a less intrusive regulatory posture and pay more attention to the costs and benefits of regulation. Chair Yellen and Vice-chair Fischer are expected to leave the Fed when their terms for those positions expire in 2018, ushering in an even greater shift in regulatory policy in the coming years.

3. The CFPB will assume a different form

The Consumer Financial Protection Bureau has been controversial throughout its existence as an activist agency run by a single agency head without budgetary or other accountability. We expect legislative activity to convert the CFPB to a five-member bipartisan commission, though any such attempt will be subject to significant resistance by Democrats. As long as the CFPB is controlled by Republicans, we expect it to engage in significantly scaled-back enforcement activity.

4. FSOC will exercise much less authority

Many Republicans in Congress favour significant changes to the Financial Stability Oversight Council, the inter-agency uber-regulator created by the Dodd-Frank Act. Opinions differ as to what powers FSOC should have, including the extent to which it should have discretion over whether banking entities are treated as systemically important. Most Republicans oppose FSOC's authority to designate nonbanks as systemically important. Any legislative changes would be later in 2017, but the new Treasury Secretary, as Chair of the FSOC, will wield significant authority immediately to change its tone and operation. As a result, we believe that it is unlikely that the FSOC's current focus on asset managers will result in any designations.

5. Agendas at the SEC and CFTC will change

The SEC and CFTC have met 118 Dodd-Frank rulemaking requirements over the past 6 years; by any measure, a Herculean feat. We expect their agendas to focus less than in recent years on adopting new regulations, though the administration's nomination of securities lawyer Jay Clayton may mean that disclosure simplification remains a priority. There are unlikely to be major changes to the Dodd-Frank derivatives framework.

We are hopeful that the CFTC, likely under the leadership of current Republican Commissioner Giancarlo, will work to rationalise the rulemaking and guidance of the past several years and focus on international mutual recognition of similar regimes.

6. The Volcker rule will undergo significant change

Congressional Republicans are likely to push to eliminate the Volcker rule, viewed as overly complex and intrusive, particularly in light of a recent Federal Reserve staff paper that indicates it has decreased market liquidity for stressed corporate debt. However, the likelihood of a Senate filibuster makes full repeal uncertain. Other options at the legislative level include a repeal of the complex covered funds provisions of the rule while simplifying the proprietary trading ban to focus on prohibiting banks from having in-house hedge funds. Changes could also occur through new agency interpretations.

7. Serious attempts of GSE reform

We expect the new Treasury Secretary and Congress to attempt some form of government-sponsored enterprise (GSE) reform. Treasury Secretary nominee Steven Mnuchin has said that GSE reform "will get . . . done reasonably fast," which seems optimistic for an issue that has stagnated for years. It is unclear whether GSE reform would mean a return to private ownership without any explicit or implicit government support, increased capital and other regulatory requirements on them, or a curtailing of the scope of their role in the housing and mortgage markets.

8. Implementation of the much maligned Fiduciary Rule

We expect the Department of Labor's new fiduciary rule, adopted in April 2016, to continue to garner Congressional focus. However, we do not think it likely that Congress will be able to act on the rule before its April 2017 compliance date, and therefore expect the incoming Secretary of Labor to use regulatory tactics to delay its implementation until Congress can develop a more permanent solution.

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