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ELECTION *SHIFTS* REGULATORY & LITIGATION RISK FROM WASHINGTON TO STATE ATTORNEYS GENERAL

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Election Shifts Regulatory & Litigation Risk From Washington to State Attorneys General

In his remarkable run for the White House, billionaire real estate developer Donald J. Trump presented himself as the ultimate political outsider to leap-frog over 16 Republican primary opponents and went on to best the well-organized, well-financed campaign of Democratic Hillary Clinton on November 8. Mr. Trump is now poised to become the 45th president of the United States on January 20, 2017. And because Republicans have retained control of both the US Senate and House of Representatives, they will therefore control both political branches in Washington, DC.

Because he has no political track record, it's too early to tell what specific actions Mr. Trump will take beyond the broad pronouncements he made during the campaign regarding immigration, trade, and regulation. What does seem clear, however, is that the regulation of business through federal executive agency rules will be less than what occurred during the Obama Administration, and this approach will "trickle down" through independent agencies as Mr. Trump's appointees take their posts.

This may be cold comfort to the business community. The state attorneys general, particularly Democrats, are independently elected and have perfected the use of "regulation through litigation," which has its roots in the last anti-regulatory effort in Washington—the Reagan Revolution of the 1980s. With Republicans controlling the Executive and Legislative branches at the federal level in 2017, the state attorneys general are expected to fill a predicted "regulatory vacuum" by stepped up enforcement efforts to compensate for a slowdown in federal regulation and policy initiatives. And in some cases, this stepped-up enforcement will be nonpartisan—both Democratic and Republican attorneys general can be expected to participate in multistate investigations and reviews of major law enforcement issues.

While it remains to be seen how and whether the partnerships the attorneys general have developed with federal agencies (such as the Consumer Financial Protection Bureau, Federal Trade Commission, Department of Justice, Food & Drug Administration, Department of Labor, Securities and Exchange Commission) will survive the seismic change in Washington, the attorneys general have ample enforcement authority under their own consumer protection, antitrust, environmental, labor, and securities laws, and, in many instances, have the authority to enforce federal law on their own.

In addition, this could impact the use of trial lawyers in some states. Should the attorneys general lack the prosecutorial resources they have previously found in federal agencies, they will find those resources readily available in contingent-fee trial lawyers ready, willing, and able to take on state enforcement, regulatory, and class action plaintiffs' work simultaneously.

Moreover, if past is prologue, cash-starved states will join actions against businesses whether their attorney general is a Democrat or a Republican. The Big Five states—California (D), Florida (R), Illinois, (D), New York (D), and Texas (R)—have partnered, and will continue to partner, on major cases going forward.

The States Split: 28 Republicans / 22 Democrats / 1 Independent

Republicans increased their majority among the attorneys general, picking up seats in Missouri and New Hampshire, and retaining the open seat in Indiana. Democrats retained open seats in Pennsylvania, North Carolina, and Vermont. Thirteen attorney general seats were directly or indirectly decided in this election cycle and (depending on the ultimate outcome in Maine) will lead to a 28 Republican/22 Democratic/1 Independent split among attorneys general. All incumbents were reelected on November 8. Republicans will continue to hold onto their majority established several years ago. At the same time, Republican dominance in state houses and governorships has continued, which is particularly important in determining redistricting of the US House of Representatives as well as potential state policy initiatives and regulation impacting business activities nationwide.

Impact of National Election on the States

Mr. Trump prevailed in every state where Republican attorneys general either retained or picked up an attorney general post—Indiana, Missouri, Montana, Utah, and West Virginia. And although Secretary Clinton prevailed in New Hampshire, the state elected a Republican governor, and the next attorney general there will accordingly be a Republican. Only in Pennsylvania, and likely North Carolina, did a Democratic attorney general candidate survive Mr. Trump's electoral victory. Democrats have retained attorney general posts in California, Oregon, Vermont, Washington, and likely Maine—all states in which Mrs. Clinton prevailed.

Attorneys General Election Results

California—Democratic Hold
Incumbent Kamala Harris (D) won her US Senate race and will resign prior to assuming that seat. Under California law and subject to confirmation by both houses of the legislature, Governor Jerry Brown (D) will appoint a successor to serve out the unexpired term, and a new attorney general will be elected in 2018.

Indiana—Republican Hold
Four-term Elkhart County Prosecuting Attorney Curtis Hill (R) defeated retired Judge Lorenzo Arredondo (D) and will succeed Republican Attorney General Greg Zoeller. Zoeller had held the post for two terms and lost a congressional bid earlier this year. Mr. Hill has promised to create a "federalism unit" within the office to "defend [Indiana] from the excessive overreach of the federal government," especially in the areas of environmental enforcement, the Affordable Care Act, and the Second Amendment. He has pledged to make consumer protection a priority and to concentrate on cybercrimes and deceptive practices that disproportionately affect the elderly. Mr. Hill also has promised to increase "food security" within his state by ensuring both the safety and affordability of food, and he has vowed to continue his predecessor's fight against substance abuse.

Maine—Pending
The state legislature elects the attorney general. While current projections suggest the Democrats will retain control of the legislature, final returns are pending. If the Democrats retain control, they could either retain incumbent Attorney General Janet Mills or elect another Democrat. The election will occur in December.

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Missouri—Republican Turnover
Constitutional law professor Josh Hawley (R), who clerked for US Supreme Court Chief Justice John Roberts, defeated Democratic former Cass County Prosecutor Teresa Hensley and will succeed Chris Koster, the Democratic attorney general and unsuccessful gubernatorial candidate. Mr. Hawley will be the first Republican attorney general in the state since 1993. He positioned himself as the outsider in the race, telling voters, "I'll stand with you, not with the Washington bureaucracy." The main tenets of his campaign included "fighting federal overreach" in the energy, agricultural, environmental, labor, and healthcare arenas; instituting lawsuit reform; prosecuting criminals; and shutting down "scam artists."

Montana—Republican Hold
Attorney General Tim Fox (R) won his second term by defeating former State Senator Larry Gent (D). During his first term, Mr. Fox spent considerable resources addressing human trafficking and sexual assault, continued his Democratic predecessor's efforts to stem prescription drug abuse, and urged the US Congress to "stop federal agency overreach," especially by opposing the Environmental Protection Agency's Clean Power Plan and challenging President Barack Obama's executive orders. In this election cycle, Mr. Fox pledged to continue to address human trafficking, sexual offenders, prescription drug abuse, and "large corporate scams." He promised further to fight "power grabs" by the EPA.

New Hampshire—Republican Turnover
Republican Chris Sununu prevailed in the governor's race and will appoint a new attorney general to succeed Democratic incumbent Joe Foster.

North Carolina—Democratic Hold
With 100% of precincts reporting, former State Senator Josh Stein (D) leads State Senator Buck Newton (R) by fewer than 21,000 votes out of more than 4.5 million cast and is poised to succeed his former boss, Democratic Attorney General Roy Cooper. House Bill 2, the state's transgender "bathroom bill," which Senator Newton sponsored, dominated both the gubernatorial and attorney general races. Mr. Stein, who served for eight years as the chief of Mr. Cooper's Consumer Protection Division before his election to the state senate, stressed his work on financial regulation, payday lending, privacy, and social media responsibility during his campaign. In addition, he stressed his work as both an enforcer and legislator on clean water and energy issues.

Oregon—Democratic Hold
Attorney General Ellen Rosenblum (D) defeated Veterans' Justice Project Director and former US Army Judge Advocate Daniel Crowe (R) to win her second term. Ms. Rosenblum has served as attorney general since June 2012, when she was appointed to fill the unexpired term of her predecessor, and was subsequently elected to her first term in November 2012. During her tenure, Ms. Rosenblum has focused her consumer protection efforts on prescription drug marketing and abuse; for-profit colleges and student debt; online security; telephone privacy; and payday lending. She highlighted these achievements during her reelection bid and also stressed her support of crime victims, prioritization of child support, and continued efforts to address elder abuse.

Pennsylvania—Democratic Hold
Democrat Josh Shapiro defeated Republican John Rafferty, notwithstanding Mr. Trump's victory in the commonwealth and the reelection of Republican Senator Pat Toomey. Mr. Shapiro is the chair of the Montgomery County Board of Commissioners and a former state representative. The election is expected to bring stability to an attorney general's office that has been roiled following an investigation and the July conviction of former Democratic Attorney General Kathleen Kane on charges of perjury and

obstruction of justice. Mr. Shapiro campaigned on a platform of bringing "integrity" back to the office of attorney general; "dramatically expand[ing] the office's consumer protection function"; holding "big companies and powerful interests accountable" (stating that "it is absolutely the role of the attorney general to hold pharmaceutical companies accountable if they are engaging in unlawful practices"); promising to "tackle ... fraud ... by big banks"; ensuring safe drinking water by "holding ... frackers accountable"; confronting the heroin epidemic; protecting seniors and other consumers from scams; and worker protections.

Utah—Republican Hold
Republican Attorney General Sean Reyes was appointed in 2013 to fill the unexpired term of his predecessor and in 2014 was elected to complete the term of that predecessor. He was elected overwhelmingly after his Democratic opponent dropped out of the race in September. Since his appointment, Mr. Reyes has focused his enforcement efforts on online predation, prescription drug abuse, human trafficking, and encouraging the creation of a white collar crime registry. We expect him to continue his online and pharmaceutical-related enforcement priorities in his second term.

Vermont—Democratic Hold
Three-term Chittenden County State's Attorney TJ Donovan (D) defeated attorney Deb Bucknam (R) and will succeed 19–year Democratic Attorney General Bill Sorrell, who did not run for reelection. Mr. Donovan serves as co-chair of the Governor's Criminal Justice and Substance Abuse Cabinet and—as both state's attorney and a candidate—advocated for treatment on demand for drug addiction. His experience as a state's attorney has colored his campaign themes, including "restorative" justice and making public safety a "top priority." He has also said that civil rights, environmental regulation, consumer protection, union rights, and "fighting for a solution to the scourge of opiate addiction," including by holding pharmaceutical companies responsible, will be among his priorities as attorney general.
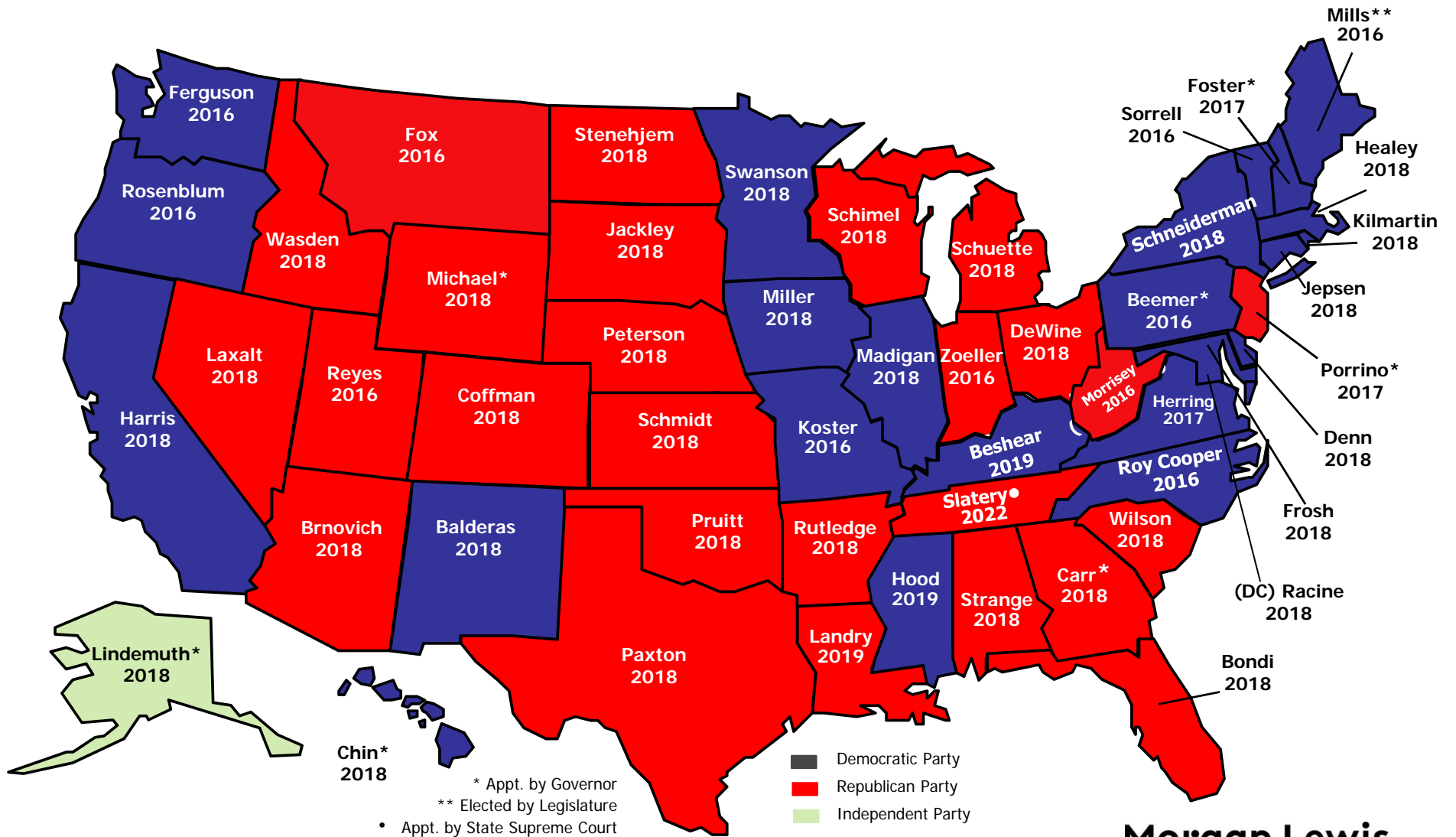
Washington—Democratic Hold
Democratic Attorney General Bob Ferguson was elected to his second term with no Republican opposition. Mr. Ferguson's first term was marked by an increased emphasis on consumer protection enforcement. He increased the number of attorneys devoted to consumer protection enforcement to 20 from five. His consumer protection efforts included actions against pharmaceutical, telecommunications, online, and dietary supplement companies. In addition, he brought suit against the US Department of Energy and its contractor alleging that hazardous tank vapors at the Hanford Nuclear Reservation endangered workers.

West Virginia—Republican Hold
Republican Attorney General Patrick Morrisey was reelected to his second term, defeating Democratic State Delegate Doug Reynolds in a hotly contested race. Mr. Morrisey worked during his first term to address prescription drug abuse. This included a best practices initiative to address overprescribing and over dispensing as well as suing a prescription drug distributor for "failing to identify, detect, report and help stop the flood of suspicious drug orders" into West Virginia. He has expanded his office's consumer protection capabilities and staffing and has been a leader among attorneys general in challenging the Obama Administration's policies, including "stopping EPA overreach." Mr. Morrisey has vowed that during his second term he will fight against "a tendency for some in Washington, DC, to seek to expand our federal government every chance they get."

Pre-Election Attorneys General

Ferguson 2016
Rosenblum 2016
Fox 2016
Stenehjem 2018
Swanson 2018
Wasden 2018
Jackley 2018
Michael* 2018
Schimel 2018
Schuette 2018
Miller 2018
Schneiderman 2018
Laxalt 2018
Reyes 2016
Coffman 2018
Peterson 2018
Madigan 2018
Zoeller 2016
DeWine 2018
Beemer* 2016
Harris 2018
Schmidt 2018
Koster 2016
Morrisey 2016
Herring 2017
Brnovich 2018
Balderas 2018
Pruitt 2018
Rutledge 2018
Slatery● 2022
Beshear 2019
Roy Cooper 2016
Wilson 2018
Hood 2019
Strange 2018
Carr* 2018
Lindemuth* 2018
Paxton 2018
Landry 2019
Bondi 2018

Mills** 2016
Foster* 2017
Sorrell 2016
Healey 2018
Kilmartin 2018
Jepsen 2018
Porrino* 2017
Denn 2018
Frosh 2018
(DC) Racine 2018

Chin* 2018

* Appt. by Governor
** Elected by Legislature
● Appt. by State Supreme Court

■ Democratic Party
■ Republican Party
■ Independent Party

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Post-Election Attorneys General

ME – To be Elected by Legis.**

NH – Gov. to appt.*

Donovan 2018

Healey 2018

Kilmartin 2018

Schneiderman - 2018

Jepsen 2018

Shapiro 2020

Porrino* 2017

Denn 2018

Herring 2017

Frosh 2018

(DC) Racine 2018

Ferguson 2020
Fox 2020
Stenehjem 2018
Swanson 2018
Schimel 2018
Schuette 2018
Rosenblum 2020
Wasden 2018
Jackley 2018
Michael* 2018
Miller 2018
Madigan 2018
Hill 2020
DeWine 2018
Laxalt 2018
Reyes 2020
Coffman 2018
Peterson 2018
Hawley 2020
Morrisey 2020
2018
Schmidt 2018
Beshear 2019
Stein 2020
Brnovich 2018
Balderas 2018
Pruitt 2018
Rutledge 2018
Slatery● 2022
Wilson 2018
Hood 2019
Carr* 2018
Lindemuth* 2018
Strange 2018
Paxton 2018
Landry 2019
Bondi 2018
Chin* 2018

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* Appt. by Governor

** Elected by Legislature

● Appt. by State Supreme Court

	Democratic Party
	Republican Party
	Independent Party
	Race too close to call

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