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Securities Alert

Change and Continuity in Securities Regulation

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The election of Donald Trump as the next President and the continued Republican control of Congress raise questions as to what changes may be expected at the Securities and Exchange Commission (SEC or Commission) and what may stay the same. Although Mr. Trump has called for a repeal of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), he has provided few specifics about changes to the federal securities laws and what role he expects the SEC to play, what type of SEC Chair or other Commissioners he is likely to nominate, or how the financial markets would be policed.

Current SEC Chair Mary Jo White already has announced that she will be stepping down at the end of the Obama Administration, leaving three Commissioner openings for the Trump Administration. The President-elect's transition team for the independent financial agencies is being led by Paul Atkins, a former SEC Commissioner with a deregulatory focus. He will provide recommendations regarding financial regulation policies and personnel. In addition, Sharon Brown-Hruska, who is a former Commissioner and acting Chair of the Commodity Futures Trading Commission, has been named to Mr. Trump's landing team for the SEC.

In addition, the Financial CHOICE Act (CHOICE Act),[1] proposed during the current Congress by Representative Jeb Hensarling (R-Texas), Chairman of the House Committee on Financial Services, and cited with approval by the transition team, may provide some indication of potential changes the Trump Administration or Congress may seek to make to the Dodd-Frank Act. With a deregulatory focus by the incoming Republican Administration, and with the House and Senate both under Republican control, there is the potential that significant changes in policy and direction could be implemented at the SEC, including changes in personnel, authority, budget and policy.

Many key components of securities regulation, however, would likely remain unchanged. Despite concerns about various aspects of the SEC's approach to regulation and enforcement,

[1] The CHOICE Act, which was passed by the House Financial Services Committee on September 13, 2016, is styled as an Amendment in the Nature of a Substitute to H.R.5983 Offered by Mr. Hensarling of Texas (September 12, 2016), and is available at http://financialservices.house.gov/uploadedfiles/bills-114hr-hr5983-h001036-amdt-001.pdf.

both Republicans and Democrats appear to recognize the importance of the SEC's role in maintaining the preeminence and integrity of the US securities markets. Accordingly, challenges to the SEC's core focus are unlikely to develop. In addition, although the leadership at the SEC will change—including, in all likelihood, the directors of the major operating divisions—most of the experienced professional staff at the SEC likely will remain in place, thereby providing some continuity in how the SEC carries out its mission.

Given the fluidity of the regulatory environment, making accurate predictions regarding what to expect from the SEC under a new Administration and a new Chair is difficult. Nevertheless, in this Client Alert we explore possible key areas of securities regulation that may be affected under the new Administration.

1. SEC Chair and Commissioners

The SEC consists of five Commissioners, each of whom is appointed by the President with the advice and consent of the Senate. Their terms last five years and are staggered so that one Commissioner's term ends on June 5 of each year. The Chair and Commissioners may continue to serve approximately 18 months after their terms expire if they are not replaced before then. No more than three Commissioners may belong to the same political party, a structure that is designed to reduce partisanship on the Commission. The President also designates one of the Commissioners as Chair of the SEC. In practice, with a new administration, this means that the President will nominate a Commissioner who will serve as Chair.

Currently, there are only three SEC Commissioners. Earlier this year, President Obama nominated George Washington University law professor Lisa Fairfax and George Mason University law professor Hester Pierce to fill two vacancies on the Commission. Both nominations stalled in the Senate and the nominees are unlikely to be confirmed before President-elect Trump takes office. In addition to deciding upon an SEC Chair to nominate, President Trump will have to evaluate whether to resubmit one or both of those earlier nominations to the Senate or to instead select nominees of his own.

Chair White is an independent, Commissioner Kara Stein, whose term ends in June 2017, is a Democrat, and Commissioner Michael S. Piwowar, whose term ends in June 2018, is a Republican. As President, Mr. Trump will have the immediate opportunity to fill the Chair's position and the two vacancies on the Commission. We expect that two of his appointments will be Republicans, while one will be a non-Republican (*e.g.*, Democrat or independent). In addition, during his Presidency, Mr. Trump also will have the opportunity to appoint new Commissioners to replace Commissioners Stein and Piwowar when their respective terms are up. All these appointments will be subject to Senate confirmation.

In considering the potential effect of the Trump Administration on the SEC, we note that the SEC is an independent agency. Therefore, as a practical matter, the Trump Administration may make recommendations as to how the SEC will act going forward. The Administration, however, cannot compel the SEC to follow those recommendations.

2. Mechanisms for Change

The Trump Administration could seek to implement changes in securities regulation by asking Congress to (i) amend or replace the relevant statutes (with or without SEC involvement); (ii) adopt legislation to change SEC rules or regulations; and/or (iii) decrease and/or redirect the

SEC's budget (again, with or without SEC involvement). In addition, the new Administration could advocate that the SEC (i) amend or repeal existing or pending SEC rules and regulations; (ii) issue interpretive guidance; and/or (iii) change enforcement and other staff priorities. The processes for changing statutes and regulations are complicated and generally time-consuming. Set forth below is a summary of the potential methods for making changes to existing requirements at the SEC.

- *Statutory Changes*. Congress could adopt new legislation to amend and/or replace existing statutes applicable to the SEC based on recommendations from the Administration, the Commission or on its own behalf. For example, the proposed CHOICE Act seeks to amend or repeal large portions of the Dodd-Frank Act that affect the SEC, both directly and indirectly. In general, adopting new legislation would require a majority of votes in the House and, because of the threat of a filibuster, which Democrats have indicated they are likely to use, 60 votes in the Senate.[2] With the Republican majority in place in the Senate after the recent election, eight Democratic Senators, in addition to all Republican Senators, would be needed to reach 60 votes in the Senate. The adoption of new legislation would likely involve protracted and complicated negotiations both within the Republican Party and with Democrats, although it is always possible that some less controversial legislation could be adopted quickly.

- *SEC Changes to Existing Rules*.

    - With a new Chair and Commissioners, the SEC could vote to repeal or amend previously adopted rules and regulations.[3] Such a repeal or amendment would ordinarily be subject to the notice and comment process, as well as cost-benefit analyses in certain cases. Accordingly, the repeal or amendment of an existing rule likely would take months to implement. The SEC could invoke the "good cause" exception to notice and comment (reserved essentially for emergencies) to accomplish a rule change immediately. Nevertheless, the Commission would have to show a compelling reason to dispense with the public notice and comment period if challenged. It also may be possible for the SEC to propose repeal of a current rule and, at the same time, announce that it will not enforce the rule until the new rulemaking is complete. The SEC also could adopt rules on a temporary basis, while seeking comment (for example, an interim final rule suspending certain requirements). Similarly, for rules that have been adopted but have not yet taken effect, or whose compliance dates have not yet been reached, the SEC could extend effective dates to provide it time to conduct a notice and comment rulemaking. An indefinite suspension of a rule could raise legal issues under the Administrative Procedures Act and might be challenged in court.

    - Congress also could repeal or amend any SEC regulation by adopting new legislation to make such a change. The process for adopting new legislation is

[2] Congress also could propose budget reconciliation legislation to avoid the 60-vote requirement in the Senate; such legislation only needs a majority (that is, 51 votes). It is unlikely that substantive legislation of the type involved in changing the securities laws would be subject to reconciliation. It is also possible that the Republican Senate majority could modify or abolish the filibuster.

[3] In general, a quorum of the Commission consists of three members, provided, however, that if the number of Commissioners in office is less than three, a quorum consists of the number of members in office. 17 C.F.R. § 200.41 (2016). As a practical matter, if the vacancies have not been filled by the time Chair White departs, any action by the Commission will require the assent of both Commissioners.

the same as discussed above. In addition, subject to certain limitations, the Congressional Review Act establishes certain time periods during which Congress can review and disapprove a final rule.[4]

- *Changes to SEC Guidance and Interpretations*. In contrast to an SEC rule, the Commission may issue guidance and interpretations, which are not subject to a notice and comment period as long as they do not amount to a "legislative rule."

    - In determining whether "guidance" or an "interpretation" voted on by the Commission is a legislative rule requiring notice and comment on the one hand, or a policy statement or interpretive rule not requiring notice and comment on the other, a court will look to the actual legal effect of the agency action and the agency's own characterization of its action. A court also will consider whether the agency action creates a substantial regulatory change. Adoption of binding norms will likely be a legislative rule. A statement on how the agency intends to enforce an existing legal norm probably is a policy statement. A construction of an existing norm is likely an interpretive rule.[5] Therefore, as long as the SEC does not adopt new binding norms, issuing new guidance and interpretations could be done more expeditiously than changes to the rule itself.

    - The CHOICE Act contains provisions that would prohibit the Commission from voting on any interpretation or guidance without conducting formal notice and comment.[6] Given that the CHOICE Act originally was offered under a Democratic Administration, however, a Republican Administration may not reintroduce this provision, because Congress may not want to constrain the new leadership of the SEC. On the other hand, Congress and others tend to object to what they view as rulemaking through interpretation by an independent agency, so the approach in the CHOICE Act may reappear in new legislation.

    - Agency staff also could change the SEC's direction through issuance of guidance on which the Commission does not vote. Staff-issued guidance, such as "FAQs" often published regarding a new rule, would not amount to a legislative rule. In general, however, new leadership brought in by a new SEC Chair would be unlikely to change course on matters of significance without at least seeking concurrence from the SEC Chair. Moreover, certain Republicans have criticized "informal rulemaking" by the SEC staff through means such as enforcement decisions, no-action letters or accounting guidance, rather than statutorily mandated procedures, thereby raising the question as to whether such methods would be utilized.

3. Budget

In recent years, Congress has made various efforts to limit the SEC's budget. For example, the CHOICE Act provides for greater Congressional constraints on the SEC's finances, including a

[4] 5 U.S.C. §§ 801-808 (2012).

[5] *See Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission*, 67 F. Supp. 3d 373 (D.D.C. 2014).

[6] Section 412, Title IV.A of the CHOICE Act.

cut in the SEC's annual budget of almost $700 million.[7] Although such efforts were unsuccessful under the Obama Administration, the Republican Congress could act to reduce the SEC's budget. Any such reduction could lead to shifts in priorities at the SEC, as well as an overall reduction in enforcement, rulemaking and other agency activity.

4. SEC Divisions

In the wake of the election, the SEC also may see structural changes as well as changes in the specific subject areas governed by, and priorities of, each of the SEC divisions. For example, the CHOICE Act would remove the SEC Ombudsman from the control of the agency's Office of Investor Advocate and make the position report directly to the Chair. Discussed below are potential changes affecting the divisions of Enforcement, Trading and Markets, Investment Management, and Corporation Finance, including management changes as of the date of this Alert.

a. Enforcement

- *Management*. Andrew Ceresney, the Director of the Division of Enforcement under Chair White, has made no announcement of his plans as of this writing, but he is widely expected to announce that he will be leaving the SEC prior to the new Administration taking office. Who the new Chair would appoint as Mr. Ceresney's successor and whether that person would be from within the agency or from the private bar remains to be seen. On November 21, 2016, the SEC announced that Matthew C. Solomon, the Chief Litigation Counsel for the SEC's Enforcement Division, will leave the agency in December 2016. Following Mr. Solomon's departure, David Gottesman, the Enforcement Division's Deputy Chief Litigation Counsel, and Bridget Fitzpatrick, a supervisory trial counsel in the Enforcement Division, will serve as acting Co-Chief Litigation Counsels.

- *Penalties*. Over the past decade or so, the SEC has had a policy of seeking extraordinarily large financial penalties against firms charged with securities fraud.[8] That approach to sanctions might well be reconsidered. Republican opponents of extracting such large financial penalties against corporations assert that such penalties punish shareholders who, in many cases, already have been victimized by the company's fraud. Instead, there could be an even greater focus on holding individuals within these enterprises accountable for any alleged violations by the corporations for which they work, notwithstanding the already aggressive efforts by the SEC to hold individuals accountable. This would certainly reduce the magnitude of the financial penalties being obtained by the SEC and would escalate the already aggressive effort by the agency to impose more accountability on individuals.

- *Enforcement Priorities*. Under the new Administration, enforcement program emphasis could shift dramatically and the direction of the program will depend upon the priorities of the new Chair and the Director of Enforcement. In what direction the SEC might allocate its enforcement resources is very unclear. The efforts directed at the financial services industry and the banks following the collapse of the mortgage market may indeed be

[7] *See, e.g.*, Title IV.A and X.D of the CHOICE Act.

[8] The SEC obtained a record $4 billion in disgorgement and penalties in its fiscal year 2016. SEC Announces Enforcement Results for FY 2016, SEC Press Release 2016-212 (Oct. 11, 2016).

over. It is unclear whether the agency will continue its current emphasis on insider trading and on accounting and financial disclosure cases involving public companies, will focus on more basic or conventional fraud and misappropriation investigations, such as Ponzi schemes, and/or become less aggressive in pursuing more novel cases or theories. In the past, certain Republicans have encouraged the SEC to direct its law enforcement efforts at such straightforward securities fraud cases, rather than pursuing more novel theories in its enforcement actions.

- *Administrative Hearings*. The Dodd-Frank Act gave the SEC the authority to obtain monetary penalties against any person (rather than just registered persons and those directly regulated by the agency),[9] thereby facilitating the increased use of administrative proceedings rather than federal court trials. The use of administrative proceedings has been criticized and is the subject of court challenges. The CHOICE Act proposes to curtail the agency's use of administrative hearings.[10] Even if the CHOICE Act provision is not enacted, the SEC could on its own initiative reduce the use of administrative proceedings.

- *Enforcement Process*. Certain tools used by the Division of Enforcement and the consequences of being charged by the SEC could come under greater scrutiny. For example, certain provisions of the CHOICE Act would decrease the authority of, and enforcement tools available to, the SEC's enforcement staff, including, among other things, through elimination of what are called statutory disqualifications (disabling a defendant's use of certain offerings and other exemptions if an order or injunction is entered against the entity) and broad-based "industry" bars (if an individual is the subject of any order alleging violations, keeping that person totally out of the financial services industry). There also could be an enhanced process to close SEC investigations, to expand the rights of investigated parties, and the creation of an enforcement Ombudsman to report to the Chair of the SEC.[11] Similarly, the Commission could demand greater review and approval over the Enforcement Division's policy of requiring admissions by parties as a condition to the settlement of certain cases. At present, the Enforcement Director and senior staff determine when admissions should be requested as part of a settlement from an entity or individual.

- *Whistleblower Rules*. The SEC's whistleblower program provides monetary awards to eligible individuals who come forward with high-quality original information that leads to an SEC enforcement action in which significant sanctions are ordered. Although the program as a whole may not be at risk, certain Republicans have criticized particular aspects of the program. For example, the program protects whistleblowers from having to report wrongdoing to their own companies before they contact the SEC.[12] Critics have asserted that this provision has an adverse effect on a firm's internal compliance processes. Accordingly, the SEC under new leadership could seek to require whistleblowers to report internally first.

[9] Section 929P(a) of the Dodd-Frank Act.

[10] Title IV.A of the CHOICE Act.

[11] *See id.*

[12] *See* Securities Exchange Act Release No. 64545 (May 25, 2011), 76 Fed. Reg. 34300 (June 13, 2011).

- *Attorney-Client Privilege*. The SEC has, in some cases, sought waivers of attorney-client privilege from entities involved in enforcement investigations. While the agency has retreated somewhat from this approach, certain Republicans have objected to this practice in principle.

- *Delegated Authority*. Under former Chair Mary Schapiro, the SEC changed its practice for authorizing formal inquiries and empowering the staff to issue subpoenas. Now, the Enforcement Division staff has authority to open investigations and issue subpoenas for testimony and documents without first obtaining formal approval from the Commission. Traditionally, the authority to open such an investigation, obtain subpoena power or move to enforce subpoenas in the federal district courts, required Commission approval. Commissioner Piwowar has questioned whether that delegation of authority, without notice and public comment before the delegation was approved, is appropriate.[13] If delegated authority to obtain formal orders and/or to enforce those subpoenas is removed from the staff level, that will restore a measure of full Commission control over the use of the agency's powerful enforcement resources. Whether restoring that power to the full Commission will slow the process down and encourage more informal fact-finding by the staff prior to issuing subpoenas is unclear. However, it would certainly restore to the full Commission both a say over and insight into the deployment of the agency's enforcement resources.

b. Trading and Markets

- *Management*. On November 21, 2016, the SEC announced that Stephen Luparello, Director of the Division of Trading and Markets, will leave the agency by January 1, 2017. Upon Mr. Luparello's departure, Heather Seidel, Chief Counsel for the Division of Trading and Markets, will become the acting Director.

- *Order Protection Rule of Regulation NMS*. The SEC could consider changes regarding Rule 611 of Regulation NMS, often referred to as the trade-through rule, which provides intermarket price protection of orders by restricting the execution of trades on one venue at prices that are inferior to displayed quotations at another venue. The rule has been criticized by certain Republicans and others as failing to enhance the efficiency of the markets, and having a detrimental impact on competition and innovation.[14]

- *Incentive-Based Compensation Arrangements*. As required by the Dodd-Frank Act,[15] the SEC, acting jointly with five other agencies, in 2015, proposed rules to prohibit incentive-based compensation arrangements that encourage inappropriate risks at covered financial institutions.[16] Certain Republicans have requested that the SEC not move forward with this proposal prior to the beginning of the Trump Administration.

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[13] *See, e.g.*, Michael S. Piwowar, SEC Commissioner, Remarks to the Los Angeles County Bar Association Securities Regulation Seminar (Nov. 22, 2013) ("Given the significant ramifications for persons who are on the receiving end of a subpoena issued pursuant to a formal order, we should make sure that public comment is allowed on any review of the formal order process.").

[14] *See, e.g.*, Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS, Securities Exchange Act Rel. No. 51808 (June 9, 2005), 70 Fed. Reg. 37496, 37632 (June 29, 2005).

[15] Section 956 of the Dodd-Frank Act.

[16] Securities Exchange Act Release No. 77776 (May 6, 2016), 81 Fed. Reg. 37670 (June 10, 2016).

- *Expanded Role within the SEC*. The CHOICE Act would expand the Division's authority to include the Offices of Municipal Securities and Credit Ratings, effectively eliminating the provisions of the Dodd-Frank Act that required these offices to report to the Chair.[17]

c. Investment Management

- *Fiduciary Rules for Financial Advisers*. The SEC has been considering a uniform fiduciary standard for brokers and investment advisers who provide investment advice to retail customers,[18] as authorized, but not required, by the Dodd-Frank Act.[19] In light of the opposition to such a rule by certain Republicans, it would appear unlikely that such a rule will be proposed.

- *Hedge Fund Adviser Regulation*. As required by the Dodd-Frank Act,[20] in 2011, the SEC approved final rules and rule amendments under the Advisers Act to require advisers to private funds (including hedge funds, private equity funds and other private funds) to register and file certain reports with the SEC, subject to certain new exemptions created under the Advisers Act of 1940.[21] Efforts in the House of Representatives to scale back registration requirements for private funds failed to gain traction during the Obama Administration. Such efforts, however, may gain more traction under the Trump Administration. For example, the CHOICE Act would exempt private equity fund managers from Advisers Act registration.[22]

d. Corporation Finance

- *Financial Reporting Regulations*. The SEC has been engaged in efforts to improve and modernize financial reporting. Chair White directed a review of corporate reporting requirements and the SEC has sought public comment on how to prioritize the information companies disclose to better serve investors.[23] Chair White came under substantial criticism by certain Democratic members of Congress and investor groups, who asserted that these initiatives would reduce disclosure available to investors. At the same time, the 2015 Fixing America's Surface Transit Act (FAST Act) directed the SEC to study Regulation S-K and issue a report to Congress containing, among other things, "specific and detailed recommendations on modernizing and simplifying [disclosure requirements] in a manner that reduces the costs and burdens on companies while still providing all material information."[24] The SEC issued the report on November 23, 2016 and the SEC is then directed to propose regulations to implement its recommendations within one year after issuance of the report. In light of the FAST Act, disclosure effectiveness and simplification efforts may well continue under the new SEC leadership, although the focus may shift more dramatically toward reducing regulatory burdens.

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[17] Sections 406 and 407, Title IV.A of the CHOICE Act.

[18] *See, e.g.*, SEC Staff, Study on Investment Advisers and Broker-Dealers (Jan. 2011).

[19] Section 913 of the Dodd-Frank Act.

[20] Title IV of the Dodd-Frank Act (Private Fund Investment Advisers Registration Act of 2010).

[21] Investment Advisers Act Release No. 3308 (Oct. 31, 2011), 76 Fed. Reg. 71128 (Nov. 16, 2011).

[22] Section 450, Title IV.B of the CHOICE Act.

[23] *See, e.g.*, Securities Act Release No. 10110 (July 13, 2016), 81 Fed. Reg. 51607 (Aug. 4, 2016).

[24] Section 72003, Title LXXII of the Fixing America's Surface Transportation Act.

- *Corporate Disclosure Rules*. Certain enhanced corporate disclosure requirements for public companies that have been proposed or under consideration at the SEC are likely to be reconsidered by the SEC under new leadership:

    - *Pay Ratio Disclosure*. In 2015, as required by the Dodd-Frank Act,[25] the SEC adopted amendments to Item 402 of Regulation S-K to require public companies to disclose the median of the annual total compensation of all their employees (excluding the chief executive officer), the annual total compensation of their chief executive officer, and the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer.[26] The rule change becomes effective in 2017. Opponents of this rule change have argued that it fails to enhance the total mix of information being provided to investors while imposing a significant cost on public companies. Proponents of the rule argue, however, that the rule brings transparency to a company's compensation practices. This provision of the Dodd-Frank Act and the corresponding rule, which would be repealed by the CHOICE Act,[27] are likely to be reconsidered by the Trump Administration.

    - *Conflict Mineral Disclosure*. In 2012, as directed by the Dodd-Frank Act,[28] the SEC adopted rules requiring public companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo or an adjoining country.[29] This disclosure rule, along with similar rules regarding resource extraction and mine safety, would be repealed by the CHOICE Act,[30] and also is anticipated to receive new scrutiny with the change in the Administration.

    - *Political Spending Disclosure*. Certain Democrats and investor groups have urged the SEC to require public companies to disclose their political spending, and Chair White has been heavily criticized by progressive groups and certain Democrats for not pushing for this requirement to be adopted by the agency. Although recognizing the arguments for and against such a rule, Chair White declined to make the rule an agency priority. Such a rule is highly unlikely to be proposed or adopted in the new political environment.

- *Focus on Smaller Companies*. Certain Republicans have been strong proponents of amending the SEC regulatory regime to take into consideration the needs of smaller companies, including tailoring market structure requirements and certain disclosure rules such that they make the requirements for such smaller companies more user friendly. Similarly, the CHOICE Act includes provisions focused on promoting capital formation

[25] Section 953(b) of the Dodd-Frank Act.

[26] Securities Act Release No. 9877 (Aug. 5, 2015), 80 Fed. Reg. 50103 (Aug. 18, 2015).

[27] Section 449(a)(24), Title IV.B of the CHOICE Act, repealing Section 953(b) of the Dodd-Frank Act.

[28] Section 1502 of the Dodd-Frank Act. *See also* Section 13(p) of the Securities Exchange Act of 1934 (Securities Exchange Act).

[29] Securities Exchange Act Rel. No. 67716 (Aug. 22, 2012), 77 Fed. Reg. 56273 (Sept. 12, 2012).

[30] Section 455(a)(1)-(3), Title IV.B of the CHOICE Act, repealing Sections 1502-04 of the Dodd-Frank Act.

for smaller issuers, as well as other provisions intended to assist smaller companies.[31] The CHOICE Act also would increase the thresholds for requiring audits of internal controls over financial reporting.[32] Going forward, it is likely that the SEC, under new leadership, will place increased emphasis on reducing compliance costs and increasing access to capital for smaller companies.

- *Executive Compensation*. Executive compensation also may be a focus of the SEC under new leadership. There remain three corporate finance governance and compensation-related rulemaking mandates from the Dodd-Frank Act—"pay for performance,"[33] "hedging disclosure,"[34] and "clawbacks"[35]—that have been proposed but not adopted by the SEC. We expect that these rule proposals likely will not move forward in their current form, and may become moot if Congress eliminates the rulemaking mandates. The CHOICE Act would repeal or amend Dodd-Frank provisions and related rules regarding disclosure of hedging activities by corporate employees and directors,[36] the frequency of required shareholder votes on executive compensation[37] and clawbacks of executive compensation.[38]

5. Public Company Accounting Oversight Board (PCAOB)

The PCAOB, which is overseen by the SEC, could face questions about its organization, operations and priorities. The current PCAOB Chair's term has expired, and the SEC will be in a position to appoint his successor as well as to fill the seats of other PCAOB members whose terms have expired or will do so in the next year. Certain Republicans have raised concerns about the PCAOB's budget and its overly prescriptive auditing standards, and have criticized the PCAOB for taking on matters such as mandatory audit firm rotation or requiring accounting firms to disclose the name of individual partners working on company audits. Any changes to the PCAOB's structure would require an act of Congress. Nevertheless, the SEC could influence the PCAOB's priorities through its control over the PCAOB's budget and power to approve changes in auditing standards. For example, the PCAOB has indicated that its staff intends to present for adoption in the fourth quarter of 2016 a final rule that would expand substantially the content and form of the auditor's report on financial statements. The SEC would have to approve this standard, which has been opposed by some industry groups and audit committee members.

Another pending PCAOB issue is whether PCAOB disciplinary proceedings, which under current law are closed, should be opened to the public. A provision to open disciplinary proceedings was omitted from the final version of the CHOICE Act, but in the past it has attracted bipartisan congressional support.

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[31] *See* Title X.C, X.I, X.J, X.L, X.M and X.P of the CHOICE Act.

[32] Section 445, Title IV.B of the CHOICE Act, amending Section 404(c) of the Sarbanes-Oxley Act of 2002.

[33] *See* Securities Exchange Act Rel. No. 74835 (Apr. 29, 2105), 80 Fed. Reg. 26239 (May 7, 2015).

[34] *See* Securities Act Rel. No. 9723 (Feb. 9, 2015), 80 Fed. Reg. 8485 (Feb. 17, 2015).

[35] *See* Securities Act Rel. No. 9861 (July 1, 2015), 80 Fed. Reg. 41143 (July 14, 2015).

[36] Section 449(a)(25), Title IV.B of the CHOICE Act, repealing Section 955 of the Dodd-Frank Act.

[37] Section 443, Title IV.B of the CHOICE Act, amending Section 14A(a) of the Securities Exchange Act.

[38] Section 447, Title IV.B of the CHOICE Act.

6. State Securities Laws

State blue sky laws[39] may be another potential area of focus for President-elect Trump's transition team. The Trump Administration may consider drafting legislation that would make such state laws secondary to federal statutes in more situations than currently provided for. For example, the CHOICE Act seeks to limit the reach of state blue sky laws.[40] The states, however, are likely to oppose any such limitation in their power, as the states generally view state securities statutes as providing important and basic protections to investors and consumers.

7. Conclusion

It is impossible to predict what the SEC's agenda will look like after the appointment of a new Chair, two new Commissioners, a new Enforcement Director and a new Director of Trading and Markets. What is clear is that there is likely to be a different regulatory and enforcement approach on a number of fronts.

[39] For example, the Martin Act provides the New York State Attorney General with broad enforcement authority to bring both civil and criminal actions without a showing of scienter or intent. N.Y. Gen. Bus. Law §§ 352-c & 353 (McKinney 1996).

[40] *See, e.g.,* Title X.S of the CHOICE Act (extending state blue sky preemption to any security that is listed on any national securities exchange, or tier or segment thereof, or to any senior security of such a listed security).

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