Broker-Dealers and Asset Managers:

The New Agenda for the SEC in the New Administration

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Proskauer

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Introduction

Philosophical differences likely to drive securities regulation and enforcement trends in the new Administration:

1) The scope of broker-dealers' fiduciary responsibilities attendant to their roles in effecting securities transactions and making investment recommendations to customers.

2) Democrats are critical of the current market structure, which they consider to be overly complex, fragmented, and opaque.

3) The party has highlighted the importance of shareholder rights, barriers to shareholder engagement and the proxy voting process in the new Administration agenda.

The New Agenda for the SEC in the New Administration

- We expect a renewed and altered focus in certain key areas
- Our topics include:
  - Payment for Order Flow
  - Regulation Best Interest
  - Proxy Plumbing
  - Stock Buybacks
  - E-Delivery

Payment for Order Flow

Payment for Order Flow

- Payment for order flow is any benefit received by a broker-dealer from another venue for routing orders to it.[1] The remuneration to the broker-dealer is in addition to any commission or fee charged to the customer for executing the trade.

1. "Payment for order flow" is defined broadly in Rule 10b-10(d)(8) to include any monetary payment, service, property, or other benefit that results in remuneration, compensation, or consideration from another broker-dealer or market center in return for routing customer orders to that venue, including research, clearance, custody, products or services; reciprocal agreements for the provision of order flow; adjustment of a broker or dealer's unfavorable trading errors; offers to participate as underwriter in public offerings; stock loans or shared interest; discounts, rebates, or other reductions or credits against fees, expenses or other financial obligations.

Agency/Dealer Obligations

- A broker is a fiduciary with respect to the execution of a customer's order as agent, and generally must disclose and obtain customer consent to any remuneration from another source in connection with the engagement.
- A dealer must deal honestly and fairly in transacting with customers.

SEC Payment for Order Flow Regime

- SEC regulation of payment for order flow centers on disclosure in (1) account opening, (2) trade confirmations, and (3) periodic reports.
- *Account Disclosure*—Under Rule 607 of Regulation NMS, a broker-dealer must inform its customers, in writing, upon opening a new account and annually thereafter, about (i) its policies on receipt of payment for order flow from any broker-dealer or exchange to which it routes customers' orders, including a statement as to whether it receives such payments and a description of the nature of the compensation received, and (ii) its policies for determining where to route non-directed orders subject to those arrangements and the extent to which they can receive price improvement.

SEC Payment for Order Flow Regime

- *Confirmations*—Under Rule 10b-10, a broker-dealer acting as agent in executing a customer order in a NMS stock or security traded on an automated interdealer quotations system must disclose on the confirmation whether it received payment for order flow in the securities and the fact that the source and nature of the compensation for the particular trade is available on request.
- *Reporting*—Under Regulation NMS, market centers and broker-dealers are required to publish electronically (on the Internet) reports on their order execution and routing practices.
- Rule 605 requires "market centers," including alternative trading systems (ATSs) and broker-dealers making markets, to provide uniform statistics on execution quality for "held" (market and limit) orders in NMS stocks.

SEC Payment for Order Flow Regime

- Rule 606 requires broker-dealers to post quarterly reports on the percentages of non-directed "held" and "not held" orders in NMS securities, including options (by category of market, limit, and other orders), routed to its top 10 venues (plus those of five percent or more), including descriptions of material aspects of the relationship with each venue. Under amendments that took effect last year, those reports must disclose the net aggregate amount of order flow or profit-sharing payments received, transaction fees paid and rebates received per venue, on a dollar amount and per share basis (for each category of orders, expanded to include marketable and non-marketable limit orders). Descriptions of relationships with each venue must include the terms of any payment for order flow, profit-sharing or other arrangements (written or oral), including (i) minimum order amounts, (ii) volume-based payments, and (iii) threshold incentives and disincentives for failing to meet them.

SEC Payment for Order Flow Regime

- Separately, broker-dealers must provide notice and disclose to customers on request the identities of the venues to which their orders were routed in the prior six months. The latest amendments require them to provide quality of execution information for "not held" orders, including (i) average net execution fee or rebate, (ii) average fee or rebate for orders providing liquidity, and (iii) average fee or rebate for orders removing liquidity.[2]

2. The new information requirement for "not held" orders is subject to *de minimis* exceptions.

Best Execution and Regulation Best Interest (BI)

- The SEC has said, and courts have recognized, that broker-dealers have a duty of "best execution," which requires they endeavor to execute customers' orders on the most favorable terms reasonably available in the market under the circumstances, taking into account, among other things, price, order size, trading characteristics, as well as the potential for price improvement. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266 (3d Cir. 1998).
- The Commission recognizes payment for order flow has the potential to create a conflicts of interest in market selection. Payment for order flow is permissible, provided it does not interfere with the broker-dealer's best execution responsibilities and the practice is disclosed to customers. *Payment for Order Flow*, Exchange Act Release No. 34902 (Oct. 27, 1994).

Best Execution and Regulation Best Interest (BI)

- Failure to obtain best execution as a result of payment for order flow arrangements may violate Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 under the Exchange Act. *Robinhood Financial, LLC*, Exchange Act Release No. 90694 (Dec. 17, 2020).
- Failure to disclose material facts about the arrangements also may violate a broker-dealer's duty to act in a retail customer's best interest when making a recommendation in accordance with Rule 15l-1 under the Exchange Act, Regulation BI (Best Interest), which went into effect last year.

Looking Forward

- *Market Structure Changes*—Senator Sherrod Brown, future Chair of the Senate Banking Committee, has endorsed the *Better Markets* special report, "Road to Recovery, Protecting Main Street from Dangerous Deregulation" (Sept. 15, 2020), which is highly critical of the current market structure that the report says is needlessly complex, fragmented, and opaque. Payment for order flow arrangements may be viewed as contributing to these conditions. Although there is no indication that major market structure changes will be high on the Commission's agenda, it is not inconceivable there may be further regulations or restrictions around payment for order flow.

Looking Forward

- *Fiduciary Duty*—Several state court cases have held that the SEC's payment for order flow regulatory regime preempts state agency law requiring stricter disclosure and consent or surrender of payments to customers.[3] Those cases were decided in the mid-1990s when the Commission was promoting exchange market competition under Regulation ATS and Regulations NMS, the proliferation of discount trading was just beginning and fully-disclosed commission charges generally exceeded order routing incentives. The regime may come under closer scrutiny in the new "zero commission" environment where they may be the primary or only source of remuneration for customer trades and their effects impact price improvement.

3. Among the considerations underlying the court decisions was the SEC's authority under the Exchange Act to promote a national market system and the impracticability of identifying the specific amount of payment, if any, attributed to a customer's order under the arrangements.

Looking Forward

- *Execution Responsibility*—There is likely to be increased scrutiny of the methods and tools used by broker-dealers to evaluate payment for order flow arrangements and adjusting their order routing decision as part of their best execution responsibilities. For years, many broker-dealers have established best execution committees and used data from market centers' Rule 605 and Rule 606 reports to evaluate execution performance. Firms no doubt will be expected to use the expanded information in Rule 606 reports in their best execution assessment protocols.
- *Disclosure and Reporting on Order Flow Arrangements*—In the past, descriptions of payment for order flow arrangements in compliance with Rule 606 and 607 were general. The amendments to Rule 606 will require much more detailed disclosure, including payment schedules, minimums, thresholds, and other conditions approaching the precise terms agreed with venues.

Looking Forward

- Under Regulation BI, detailed payment for order flow disclosure will be important with regard to both recommendations made by representatives and marketing of online and traditional discount brokerage accounts for retail customers.
- *Reporting Accuracy*—In July 2018, OCIE issued a risk alert reiterating investment advisers' best execution responsibilities. The amendments to Rule 606, in particular, are intended to enable advisers to evaluate conflicts at their order routing destinations and the quality of executions for their not held orders at those destinations. Rule 605 and Rule 606 reporting integrity can be expected to be the subject of increased attention in OCIE and FINRA exams and enforcement.

Regulation Best Interest

Regulation Best Interest

- Rule 15l-1 under the Exchange Act, Regulation Best Interest (BI), requires broker-dealers and their representatives to act in a retail customer's best interest when recommending a securities transaction or investment strategy, including an account recommendation, without placing their own interests ahead of the customer.[5]
- Regulation BI has four components: (1) disclosure, (2) a duty of care, (3) conflict management policies and procedures, and (4) compliance policies and procedures. Each must be fulfilled to comply with the general obligation.

5. A "retail customer" is a natural person (or the person's legal representative) who (i) receives a recommendation of a securities transaction or investment strategy from a broker-dealer or representative; and (ii) uses it primarily for personal, family, or household purposes.

Regulation Best Interest

- *Disclosure*–The broker-dealer and representative must disclose, in writing, all material facts about: (A) the relationship, including (i) the capacity in which they are acting, (ii) fees and costs associated with the transaction, and (iii) the type and scope of services provided and their limitations, and (B) conflicts of interest associated with the recommendation.
- *Duty of Care*–The broker-dealer must exercise reasonable diligence, care, and skill in making a recommendation, including (A) understanding the potential risks, rewards, and costs with reason to believe it could be in the best interest of at least some customers, and (B) reason to believe (i) the recommendation is in the customer's best interest based on the person's investment profile and the potential risks, rewards, and costs, and (ii) any series of recommended trades also is in the person's best interest and not excessive in light of the person's investment profile, in both cases without prioritizing their financial or other interests.

Regulation Best Interest

- *Conflict Management*–The broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to (A) identify and disclose or eliminate conflicts of interest associated with recommendations, (B) identify and mitigate conflicts associated with recommendations that would cause a representative to put the interest of the broker-dealer or the representative ahead of the customer, (C) identify and disclose limits on products and strategies and related conflicts and prevent them from causing the broker-dealer or a representative from making recommendations that place either one of their interests ahead of the customer, and (D) identify and eliminate sales contests, quotas, bonuses, and non-cash compensation based on sales of securities or types of securities in a limited period.
- *Compliance*–It also must establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with the rule, including the Disclosure and Duty of Care.

Looking Forward

- *Amendment*—The obligation under Regulation BI is not a fiduciary duty. It is "a new standard of conduct specifically for broker-dealers, which draws from key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act." The SEC expressly "declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act" out of concern it was not appropriate for the broker-dealer's business model—specifically, transaction-based recommendations and compensation—and would reduce investors' access to investment products and services and payment choices and increase costs. Instead, a broker-dealer's or representative's financial interests cannot be the "*predominant motivating factor*" behind a recommendation.

Looking Forward

- Democrats in Congress prefer to do away with Regulation BI and impose a full fiduciary standard on broker-dealers with regard to recommendations that goes beyond retail customers;[5] however, it would involve a significant legislative change unlikely in the narrowly divided House and Senate. The SEC with a Democratic majority might undertake to enhance the standard under Regulation BI, which also is unlikely considering how much work went into the new rules. Alternatively, the Commission might simply choose to reemphasize the Advisers Act's application to broker-dealers that implicitly charge for recommendations or other advice.
- *Examination*—Regardless of any change in the standard for recommendations, well documented policies and procedures—to support and to identify, disclose and mitigate or eliminate conflicts—will be at the forefront of broker-dealers' responsibilities going forward.[6]

6. Congresswoman Maxine Waters, Chair of the House Financial Services Committee, has written to President Biden recommending the rule be rescinded.
7. In April 2020, OCIE issued an alert saying it would focus on broker-dealers' progress in establishing and implementing the policies and procedures elements of the rule. In a statement on December 21, 2021, OCIE said intends to expand the scope of examinations this year to focus on specific requirements, including the duty of care element and how broker-dealers ensure they have a reasonable basis to believe recommendations are in customers' best interests, while conducting enhanced testing to examine whether they have implemented their written policies and procedures.

Looking Forward

- *Enforcement and Defense*—It remains to be seen how enforcement will play out under Regulation BI, which ascribes liability to broker-dealers and their representatives.
- The Commission could pursue individual-based infractions in particularly egregious cases (like a recent New Hampshire Bureau of Securities settlement involving a broker who made unsuitable recommendations and churned the account of the State's former Governor, which resulted in losses of more than $24 million). Historically, these cases have been handled by the SROs, and there does not appear to be any interest or utility in prosecuting them at the Commission level.

Looking Forward

- Cases against broker-dealers for systemic failures in conflict management and due diligence are much more likely—once they have had reasonable time to implement the policies and procedures to address them. The question is whether they will be driven by particular events (like the losses sustained in auction-rate securities (ARS) in 2008) or the Commission tries to get ahead of them by using Regulation BI to force enhanced due diligence and disclosure (which could implicate countless recommendations if losses materialize later). The SEC already has sufficient means to discipline firms for products and strategies marketed improperly that result in losses. Meanwhile, there is no private right of action under Regulation BI, which makes it a useful tool for imposing due diligence and disclosure standards by enforcement instead of rulemaking.

Looking Forward

- Best interest is undefined, and liability is grounded in negligence. For broker-dealers, protection against liability will depend primarily on compliance with the policies and procedures elements, which determine how they meet their disclosure and due responsibilities. They must be “reasonably designed” to achieve their objectives. In order to demonstrate compliance, their installation and maintenance should adhere to corporate governance and industry standards for establishing, verifying, testing, and modifying company policies and procedures of similar importance.

Proxy Plumbing

Introduction: What is "Proxy Plumbing"?

- "Proxy Plumbing" broadly refers to a broad spectrum of issues around proxy processing and voting, including the transparency and accuracy or fairness of the process.
- Broad spectrum of issues, some debated for decades. Some milestones include:
  - Adoption NOBO-OBO System (1983)
  - SEC Adopts New Shareholder Communications Rules (1992)
  - SEC amends shareholder proposal rule, Rule 14a-8 (1998)
  - Restrict Broker Discretionary Voting (for directors) (2010)
  - SEC Proxy Plumbing Concept Release (2010)
  - Proxy Access Adopted (2010; Invalidated by DC Cir. 2011)
  - Interpretations loosening restrictions on Rule 14a-8 (2010-2017)
  - NYSE Proxy Fee Advisory Committee Report (2012; SEC approves new fees 2013)
  - SEC Roundtable Proxy Plumbing (2019)
  - SEC Proxy Advisor Regulation (ISS and Glass Lewis) (2019-20)
  - NYSE Strikes Fee Table from Its Rules (2020)
  - SEC restricts Rule 14a-8 (2020)
  - Industry Proxy Working Groups (Ongoing)

Proxy Plumbing Under the New Administration

- Financial regulation is a priority of the new Administration, and the last flurry of broad active intervention in proxy plumbing came in 2010-13, during the Obama Presidency.
- Letter from Democratic members of the House Committee on Financial Services to President-elect Biden, December 4, 2020:
  - "Trump's [SEC] has taken several actions that have eroded shareholder rights, established regulatory barriers to shareholder engagement, increased issuer involvement in the proxy voting advice process and stripped away fundamental investor protections . . ."
- Focus on the four issues where we expect movement from the SEC in the next four years:
  - Proxy Advisors – ISS and Glass Lewis
  - Universal Proxy Card
  - "NOBO/OBO" – Company Access to "Street Name" Shareholders
  - Potential Change of Regulator of Reimbursement Rates for Proxy and other Distribution

Proxy Advisors

- Debate over decades about influence of proxy advisors (e.g., ISS and Glass Lewis) on proxy voting between companies, the SEC, and institutional investors.
- Companies believe proxy advisors apply a one-size-fits-all approach, without adequate diligence, in formulating voting recommendations, and that institutional investors sometimes too quickly defer to the advisor's recommendations.

Proxy Advisors

- In July of last year, the SEC amended its proxy rules to effectively subject proxy advisors to additional requirements, including:
  - New conflicts of interest disclosure.
  - A requirement to provide voting recommendations to companies no later than when they are provided to the proxy advisor's clients.
  - Notice and a hyperlink if the company files with the SEC its reasons why it disagrees with the proxy advisor's recommendation.
- The SEC also provided examples of how the proxy anti-fraud rule might apply to proxy recommendations.

We believe there is a good chance that the SEC under the new Administration will roll back some of these changes.

Universal Proxy Card

- Current Rules: In a proxy contest, the company's director slate is on its proxy card, and the insurgent's slate is on a separate card. In order to pick and choose nominees from both cards, an investor has to attend the shareholder meeting.
- With a universal proxy card, all candidates are on a single proxy card (or voter instruction form), and an investor can pick and choose from each slate of nominees.
- The SEC proposed a universal proxy card in 2016, in 2019 the SEC's Investor Advisory Committee recommended adoption, and Chairman Clayton put it on the SEC's agenda for adoption in October 2020, but the agency has not yet adopted the new rule.

We expect adoption quickly after the new SEC Chairman is confirmed.

Potential Change in Proxy Fee Regulator

- The NYSE has historically set the rates at which companies must reimburse brokers and other financial firms for distributing proxy and other materials.
- On December 15, 2020, the NYSE filed a proposal to strike its fee rates from its rules, intending to withdraw from its role as rate setter.
  - New NYSE rule would refer to rules of other SROs.
  - NYSE suggests FINRA more appropriate because covers a larger group of brokers.
- FINRA has filed a comment letter objecting to the proposal, noting that the NYSE had not consulted FINRA nor provided any advance notice.
  - FINRA suggests that the SEC should set rates.
  - It points out that it does not regulate issuers, an important constituency in rate setting, and it does not cover all brokers entitled to reimbursement for proxy distribution.

Potential Change in Proxy Fee Regulator

- On December 14, 2020, the NYSE also filed a rule proposal that no broker may seek reimbursement for distribution of proxy materials that the broker transferred at no cost or substantially below the market cost.
  - Some brokers are offering no cost shares as a promotion.
  - Proposal seems inconsistent with NYSE's proposal to exit rate setting.

We expect that the SEC will take its time to consider the agency best suited to set proxy fee rates, and is unlikely to adopt the NYSE's proposal any time soon, nor to accept the responsibility itself.

"NOBO-OBO": Public Company Access to Identity of Financial Firm Clients

- Some companies and transfer agents seek access to names and contact information (particularly email addresses) for customers of financial firms, arguing that they should be able to:
  - Choose and negotiate terms with their own agents to disseminate proxy and other required SEC reports (the SEC's proxy rules currently require companies to reimburse financial firms for the cost of distributing proxy and other materials to their shareholders); and
  - Communicate directly with all of their shareholders, other than just NOBOs.

“NOBO-OBO”: Public Company Access to Identity of Financial Firm Clients

- What are NOBOs?
  - Stands for “Non-objecting beneficial owners.”
  - Under the proxy rules, companies may obtain a “NOBO" list of those street name holders who do not object to disclosure of their personal information to companies in which they have invested.
  - Companies generally may not use the NOBO list to send required reports to shareholders, or for purposes other than shareholder communications.
  - Among retail investors, 76% are NOBOs and 24% OBOs, and among institutional investors 12% are NOBOs and 88% are OBOs[4].

4. Broadridge Financial Solutions, Inc. for period 7/1/19-6/30/20

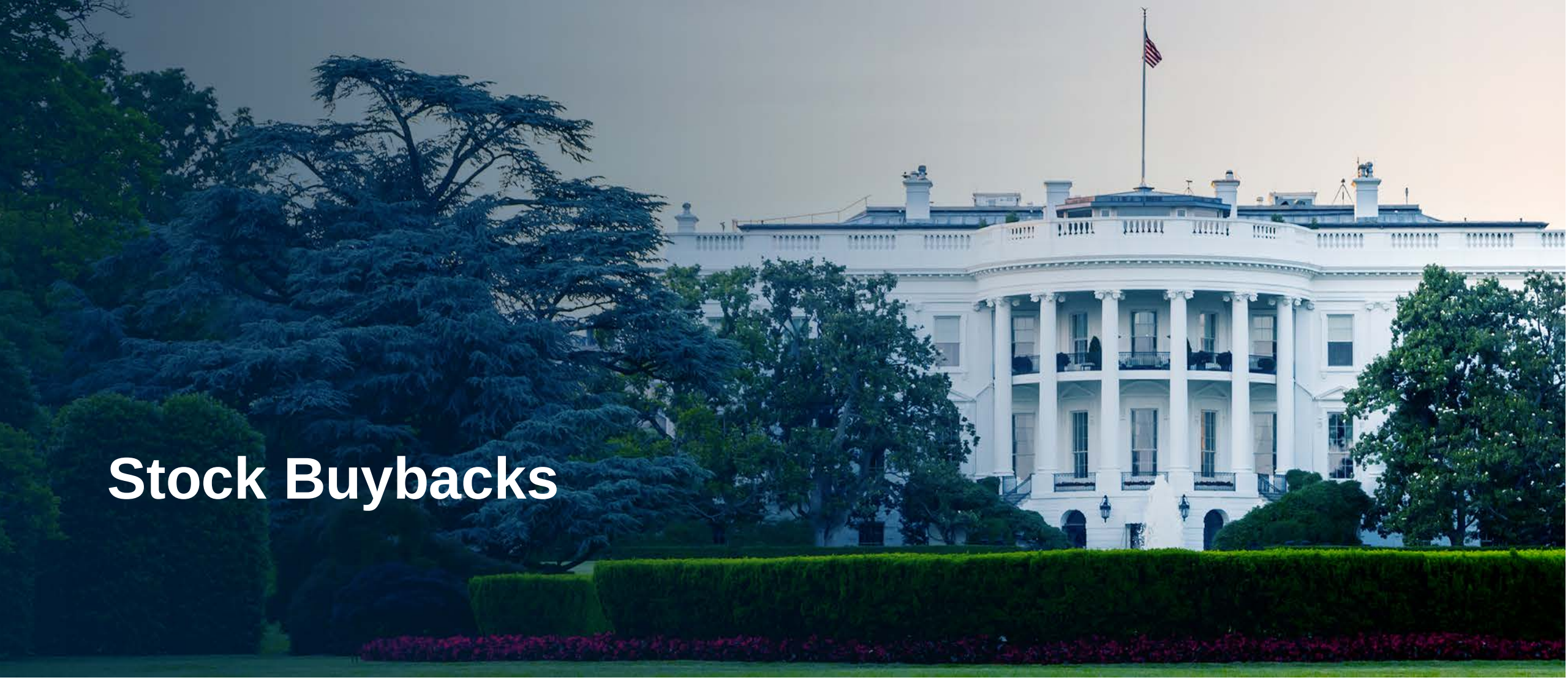
NOBO-OBO Under Biden Administration

- Under Chairman Clayton the SEC acknowledged the NOBO-OBO debate, and an ongoing industry working group with all parties represented has been discussing the NOBO-OBO issue, following a 2019 SEC roundtable on proxy plumbing.
- As noted above, the Democrats on the House Financial Services Committee have called for action to promote “shareholder engagement,” and the last flurry of activity on this issue was in the Obama administration.

NOBO-OBO Under Biden Administration

- The hurdles on this issue include the following:
  - The current system is complex and embedding a new approach could be costly given that sending a report by email or through the postal service is just the tip of the iceberg.
  - The current system is reliable and efficient, honed over decades (administered by a small handful of broker intermediaries).
  - GLBA and Regulation S-P privacy laws assume that contact information for street name holders will remain with brokers, subject to narrow exceptions for sharing.
  - Institutional investors generally are set against automatic company access to their information, as reflected above–almost 90% are OBOs.
  - Companies currently can communicate with all of their shareholders through intermediaries of financial firms, often with great speed, particularly where the client receives e-delivery.

While we expect the incoming Commission to focus on NOBO-OBO more intensely, although not as a first priority, it is unclear if any changes will materialize in the short term.



Stock Buybacks

Stock Buybacks – Critiques of the Current Rule Regime

- There has been increasing criticism of the use of corporate liquidity to repurchase a company's common stock.
- After the enactment of the *Tax Cuts and Jobs Act* in 2017, the use of buybacks increased significantly, drawing additional scrutiny on using the tax cuts to fund buyback programs rather than to "create jobs."
  - Repurchases surged 64% in 2018, and topped $1 trillion overall.
- During his campaign, President Biden criticized buybacks, particularly during the COVID-19 pandemic, and the Democratic members of the House Committee on Financial Services have called for a ban on buybacks until the end of the pandemic in a recent letter to President Biden.

Stock Buybacks – Critiques of the Current Rule Regime

- Both Democratic and Republican senators have called for revised rules governing stock buybacks, including Senators Chuck Schumer, Tammy Baldwin, Bernie Sanders, and Marco Rubio.
- In the past, Commissioners from both parties have supported a review of the rules that govern buybacks, and we expect such a review to be high on the list of priorities for the new Commission, as Democratic Commissions have generally been more vocal in their criticism and more focused on inhibiting buybacks rather than merely updating the rules.

Current Rules – Rule 10b-18

- The SEC's primary rule governing stock buybacks is Rule 10b-18.
- Provides a "safe harbor" from liability for market manipulation under the Exchange Act if a company performs its stock repurchases consistent with the conditions of the rule:
  - **One broker**: the purchases are effected through or from only one broker or dealer on a single day.
  - **Timing**: not the opening purchase, and not made 10–30 minutes before the close.
  - **Price**: does not exceed highest independent bid.
  - **Volume**: may not exceed 25% of the ADTV (block purchases permitted once per week).

Current Rules – Rule 10b-18

- Rule 10b-18 is a safe harbor, and purchases outside of the 10b-18 parameters are not a violation and are not per se "manipulative."
  - Other common buyback structures that are not covered by the Rule 10b-18 safe harbor include accelerated share repurchases ("ASRs").

Proposed Changes to Stock Buyback Rules

- In 2010, the SEC issued a rule proposal to relax some of the conditions of Rule 10b-18, and to seek feedback on certain other changes, including covering ASRs with the Rule 10b-18 safe harbor.
- More recent proposed changes would further restrict buybacks, requiring more disclosure, scaling back the availability of the safe harbor, or imposing additional governance or substantive obligations on companies.
  - AFL-CIO Proposal – almost 20 organizations submitted a rulemaking petition to the SEC in 2019 to "*revise Rule 10b-18 to curb manipulative practices by firms and encourage corporations to fairly compensate American workers.*"

Proposed Changes to Stock Buyback Rules

- The AFL-CIO proposal would:
  - Limit the volume of purchases to 15% of ADTV.
  - Narrow the safe harbor, and require repurchases that fall outside of the safe harbor to be reviewed and approved on a case-by-case basis.
  - Provide that repurchases inconsistent with the safe harbor and not approved are expressly unlawful "*as fraudulent, deceptive or manipulative.*"
  - Require additional disclosure, including officer or director transactions, the source of funds for the buybacks, and the impact of the repurchases on the value of the outstanding securities.

Proposed Changes to Stock Buyback Rules

- Senators Schumer and Baldwin proposed in 2018 to require detailed disclosure of buyback plans and execution, give the SEC the authority to stop companies from implementing such plans, and require boards and CEOs to certify that the buybacks are in the long-term best interest of the company.
- In 2019, Senators Schumer and Sanders published an op-ed calling for more substantive restrictions that would limit the ability of companies to conduct buybacks until they had met certain requirements, including a $15 minimum wage and other employment-related obligations.
- Given the political headwinds on the issue and the expressed views of several Commissioners, we expect the SEC to take some further action in the near term. While the full framework requested by proponents is unlikely to be adopted, some of their changes may be incorporated, including additional and more rapid disclosure requirements.

E-Delivery

Accelerated Adoption of E-Delivery

- The SEC's current document delivery framework is based on interpretations that are nearly 30 years old, and assumed a market where most deliveries were still postal deliveries.
  - Existing rules require affirmative consent or proof of actual delivery for each recipient of e-delivery.
- Since the current delivery framework was adopted, we have seen significantly increased market acceptance and adoption of e-delivery, and improvements of communications technology.
- In response to the COVID-19 pandemic, there has been an accelerated adoption of electronic communication methods, and the SEC temporarily relaxed certain requirements with respect to document delivery and execution.

Accelerated Adoption of E-Delivery

- In September of 2020, SIFMA and SIFMA AMG, along with FSI and IAA, submitted a white paper to the SEC seeking:
  - Rule amendments to permit financial services firms to shift the default delivery method from postal delivery to electronic delivery, along with safeguards for those who wish to continue to receive postal delivery; and
  - Elimination of obstacles under the now-outdated E-Sign Act, which in some cases imposes requirements that exceed the SEC's current rules.
- The SIFMA white paper is available at this link:

  https://www.sifma.org/resources/submissions/e-delivery-modernizing-the-regulatory-communications-framework-to-meet-investor-needs/

Accelerated Adoption of E-Delivery

- Fidelity, Charles Schwab, and BlackRock submitted a separate proposal that would also have the SEC replace paper delivery with digital communications as the primary method of transmission.

There has been increasing recognition that we have reached a tipping point where the default should become e-delivery over postal delivery, including within the SEC itself, and we believe that rule amendments are inevitable.

Accelerated Adoption of E-Delivery

- In November 2020, the SEC's Asset Management Advisory Committee ("AMAC"), citing SIFMA's proposal, recommended that the SEC update its rules and interpretations to, among other changes:
  - Permit firms to use an investor's digital address (email or smart phone number) as the primary address when delivering regulatory documents.
  - Remove obstacles presented by the now-outdated E-Sign Act, and permanently allow for digital methods of authorization, rather than requiring manual wet signatures.
- In November 2020, the SEC adopted rules permitting the electronic authorization of filings made with the SEC, moving away from the requirements for manual wet signatures by officers, directors, and other persons obligated to sign SEC filings.

Accelerated Adoption of E-Delivery

- Last August, in proposing to amend the disclosure framework for open-end funds, the SEC acknowledged the value to investors of disclosure methods that are facilitated by e-delivery, such as “layering,” where the investor can access a summary and click through to more detail as warranted.

Further Move Towards E-Delivery

- Despite piecemeal progress in some discreet areas, the SEC will have to address its overall delivery framework, and change the default from postal delivery.
- Changes will also need to be made to some FINRA, MSRB, and tax delivery rules.
- Key documents that still default to paper delivery include, for example:
  - Operating company, mutual fund, and business development company prospectuses.
  - Confirmations of sale and alternative periodic reporting (Rule 10b-10; FINRA Rules 2230 and 2232).
  - Brokerage statements (FINRA Rule 2231).

Further Move Towards E-Delivery

- Transaction filings (e.g., tender offer materials, going-private materials, merger proxies).
- Regulation BI (Rule 15l-1).
- Investment adviser brochures (Rule 204-3).
- Regulation S-P privacy notices (Rules 248.4 – 248.9).
- Form CRS for broker-dealers and investment advisers (Rule 17a-14 and Rule 204-5).
- Credit balance notice requirements (Rule 15c3-3(j)).

Questions?

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Broker-Dealers and Asset Managers:

The New Agenda for the SEC in the New Administration

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