Hogan Lovells

Election 2020 Snapshot:

Helping our financial services clients make sense of the U.S. election results

Post-election enforcement and regulatory waves: how the financial services industry can prepare

Brace for increased regulation of the financial services industry and federal enforcement under the Biden Administration with a focus on consumer protection and debt collection, discrimination in the housing and consumer credit markets, and climate change disclosure. If Republicans maintain control of the Senate, continued legislative gridlock will likely prevent new legislation that would broadly impact the industry except to perhaps extend mortgage forbearance programs and eviction moratoriums into 2021.

What to expect from a Biden Administration

A Biden inauguration on January 20, 2021 looks all but certain. What policy and regulatory changes the Trump Administration will implement before leaving the White House, however, is somewhat unpredictable. Removing Fannie Mae and Freddie Mac from conservatorship – a long-time goal of the Trump administration – could be on the list.

Once a Biden Administration is in place with adequate staffing, we expect much activity in the first 100 days. Biden will likely replace the Acting Comptroller of the Currency (OCC) as well as the Director of the Consumer Financial Protection Bureau (CFPB). Soon thereafter, we anticipate an uptick in enforcement, particularly at the CFPB, once a new director is installed and President Trump's political appointees leave. Although we expect federal financial regulators and enforcement agencies to be more aggressive in a Biden Administration, they will not be the only cops on the beat. Many state enforcement agencies that strengthened their own enforcement activities over the last several years will remain active and will perhaps even be emboldened by the support from a consumer-friendly federal administration (i.e. New York's Department of Financial Services (DFS), the Attorneys General Offices in New York and Massachusetts; the new California Department of Financial Protection & Innovation).

The Biden campaign has identified curbing racial discrimination in the housing market as a key priority and indicated that a Biden Administration would work specifically toward: (1) Ending redlining and other discriminatory practices; (2) Holding financial institutions accountable for discriminatory practices; (3) Strengthening and expanding the Community Reinvestment Act to ensure banks and non-bank financial services institutions are serving all communities; and (4) Enacting regulations that will require communities receiving certain federal funding to proactively examine housing patterns. We also expect that under a new Director, the CFPB will move expeditiously to enact more stringent Payday lending regulations, perhaps resurrecting an Obama-era regulation that would have required payday lenders to check that borrowers could afford to pay back their loan on time.

The Securities Exchange Commission is expected to move to require disclosures related to climate change risk and other environmental, social and governance (ESG) disclosures. Finally, the impact that the Biden Administration will have on FinTech is unclear. We will be watching to see if a new Comptroller defends the OCC's current litigation position for its FinTech charter. Biden's position on policies designed to facilitate FinTech innovation could shape the future for FinTech. These include the efforts by agencies like the CFPB to give limited assurances that innovative products are compliant with existing laws or will not prompt enforcement actions (i.e., "innovative sandbox" policies such as the CFPB's No-Action Letter Policy, Compliance Assistance Sandbox, and Trial Disclosure Sandbox). Conventional wisdom suggests that a Democratic administration will move to strengthen regulations and that these programs could draw scrutiny. However, because many FinTech innovations serve populations that have been under-served by traditional financial products, and may be a critical component to curbing lending discrimination, they could remain unchanged. FinTech is an area ripe for bipartisanship as key Congressional Republicans have all staked out an interest in this policy area, including Leader Kevin McCarthy (R-CA), House Financial Services Committee Ranking Member Patrick McHenry (R-NC) and soon-to-be Senate Banking Committee Chairman Pat Toomey (R-PA).

Although we do not expect an ambitious legislative agenda in the next Congress if the Senate is controlled by Republicans, Representative Maxine Waters, Chairwoman of the House Financial Services Committee, is focused on leveling the financial playing field. We therefore expect congressional hearings related to her efforts to expand access to lending and to hold financial institutions accountable for discriminatory practices to continue. We also think further congressional hearings on topics related to the CARES Act mortgage forbearance programs are likely. However, if the outlook for the Senate changes, the agenda would be more aggressive. The two Senate seats in Georgia are headed to a run-off on January 5th, and Democrats would need to win both seats to attain a 50-50 majority in the U.S. Senate with Vice President Harris casting the tie-breaking vote. If they do so, we may also see the Biden Administration look to use the Congressional Review Act to reexamine or reverse some Trump Administration rules.

Prepare now for changes ahead

Financial services companies can take several actions now to prepare for 2021.

- Work to resolve any outstanding investigations before Biden appointees are in place.
- Focus on compliance by: (1) reviewing past examination issues to ensure they have been fully resolved; (2) perfecting compliance policies and procedures – especially related to fair lending, CARES Act, and areas related to rules or amendments that have taken effect in the past four years; (3) ensuring compliance staffing is sufficient and considering appointing a fair lending officer if one is not yet in place; (4) examining and refreshing compliance training programs; and (5) ensuring compliance procedures include a mechanism to review consumer complaints regularly to spot potential problems early. It is also critical that companies thoroughly document these efforts, and any efforts to investigate and remedy compliance problems.
- Begin reviewing risks associated with climate change and designate a specific officer to asses these risks.
- Remain steadfast in building good relationships with your state and federal regulators so that you are in a position to quickly and effectively respond to any future regulatory inquiries.
- Identify the products that are currently benefiting from the CFPB "innovation sandbox" policies and closely monitor any changes to these programs.
- Prepare for requests for your executives to participate in congressional oversight hearings – this is especially true for larger financial institutions and leading FinTech companies. Taking time to prepare a potential witness before receiving a hearing invitation is always a good idea.

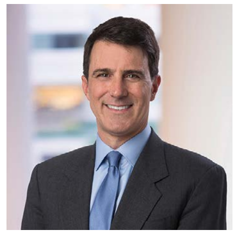
We can help

As your company prepares for 2021, keep the following in mind:

- Our Government Relations and Public Affairs and Legislation teams can help you strategize in the face of emerging policy risks and opportunities. With team members having served in prior administrations, the government relations team monitors, advises on and helps shape legislative and executive branch actions – including appointments to key administration positions – and can help you prepare for what's around the corner.
- Our regulatory team is equipped to assist you in implementing compliance for current or proposed regulations, drafting comments to proposed regulations, and analyzing potential regulatory risks for current or planned products. We can also conduct an audit of your compliance programs, and review and revise compliance policies, to put you in the best position in the face of increased enforcement.
- Our Government Relations and Public Affairs and Investigations, White Collar and Fraud teams have deep experience preparing executives to provide congressional testimony and responding to congressional requests for documents.
- Our Financial Services Regulatory Investigations and Enforcement and Financial Services Litigation teams are ready to help you navigate any supervision or enforcement inquiries. Whether it's the CFPB, an attorney general's office, or a state department of financial services, our Consumer Finance Litigation and enforcement teams have handled inquiries, investigations and enforcement actions for our financial services clients.
- Our FinTech team can help you navigate ensuing legal shifts and new regulations as financial services players continue to adopt and deploy innovations and new technologies.
- With more than 6,000 people globally, across 14 U.S. offices and 35+ other offices around the world, we are ready to assist.

Key contacts

Aaron Cutler
Partner
Washington, D.C.
+1 202 637 5648
aaron.cutler@hoganlovells.com

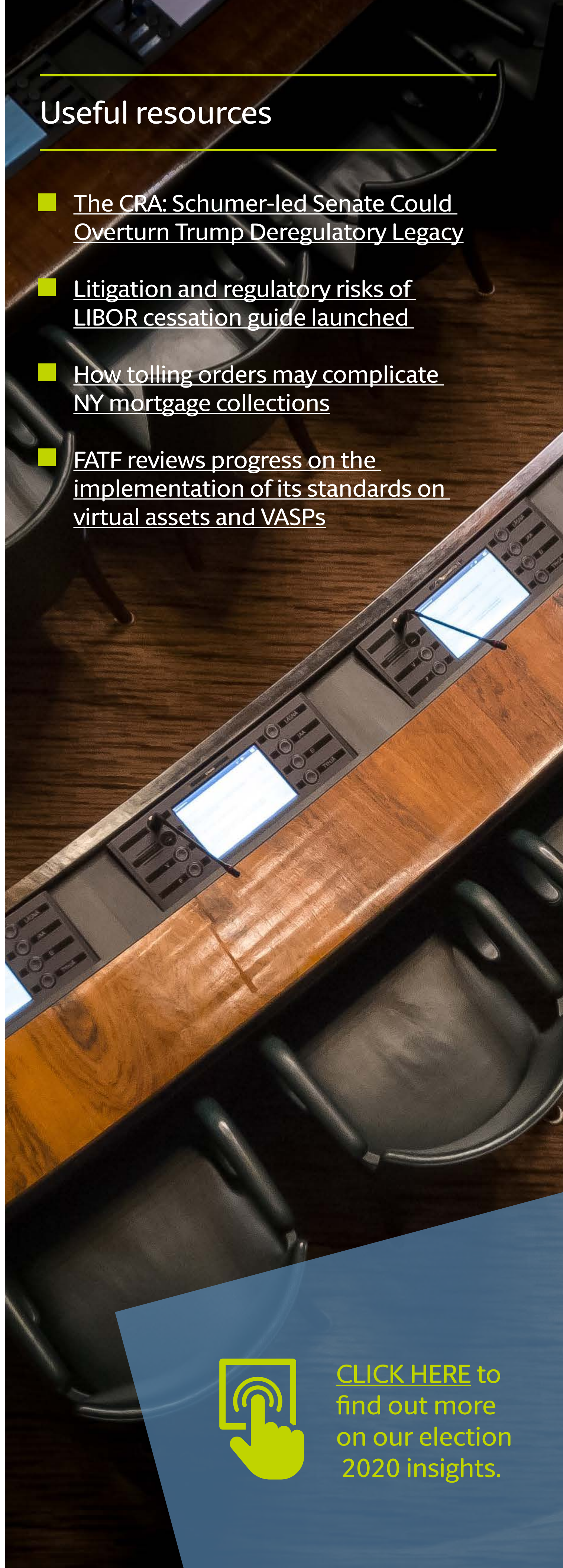


Gregory Lisa
Partner
Washington, D.C., New York
+1 202 637 3647 (Washington, D.C.)
+1 212 918 3644 (New York)
gregory.lisa@hoganlovells.com

Allison Schoenthal
Partner
New York
+1 212 918 3647
allison.schoenthal@hoganlovells.com

Ashley Hutto-Schultz
Senior Associate
Washington, D.C.
+1 202 637 5409
ashley.huttoschultz@hoganlovells.com

Rebecca Umhofer
Knowledge Lawyer
Washington, D.C.
+1 202 637 6939
rebecca.umhofer@hoganlovells.com



Useful resources

- The CRA: Schumer-led Senate Could Overturn Trump Deregulatory Legacy
- Litigation and regulatory risks of LIBOR cessation guide launched
- How tolling orders may complicate NY mortgage collections
- FATF reviews progress on the implementation of its standards on virtual assets and VASPs

CLICK HERE to find out more on our election 2020 insights.

www.hoganlovells.com