# Q3 Governance Update

U.S. ELECTION EDITION

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FRESHFIELDS

# Overview

## Just like predicting how an election will go, it is incredibly difficult to predict what will happen in any new Administration.

**Campaign rhetoric does not always translate into policy positions. Implementing policy changes takes time and is often complicated by congressional priorities and litigation. Court cases are increasingly resulting in nationwide injunctions issued against new administration policies, often delaying implementation for years (for example, Biden's campaign promise of student loan forgiveness continues to be delayed by litigation, despite multiple attempts to implement).**

**While markets may react quickly to election results, the government will move far more slowly for a few reasons:**

- Many policy changes require legislation, and whether legislation will pass depends on which party controls the House of Representatives and the Senate. When the House and Senate are controlled by different parties, major legislation tends to grind to a halt. And even if one party controls all three branches of government, the far left- and right-leaning factions in both parties increasingly buck party leadership and demand concessions or changes to Presidentially-proposed legislation.
- Either administration will face the daunting task of attempting to fill 4,000 political appointments, of which approximately 1,200 require Senate confirmation. It is not possible for the Senate to confirm 1,200 appointments even over the course of a year. If one party does not hold a supermajority of the Senate, and neither party will, confirmations can be subject to filibusters, further slowing confirmations. It has become common for a single Senator, even one in the minority, to block appointments to extract political concessions.
- For some senior positions in government, political appointees cannot assume the vacant position absent Senate confirmation. In those cases, civil servants often serve in those roles during the interim. While a Harris administration could benefit from retaining current Biden appointees, changing policy priorities are often complicated when "holdovers" or civil servants are in place due to inertia and failure to prioritize changes.
- Changing enforcement priorities is "low hanging fruit" because whether and how to enforce the law is purely an Executive Branch decision. But because of delays in political leadership transition, enforcement priorities rarely change overnight. There is often resistance by civil servants to drop existing investigations, even when priorities change. And new investigations take time to launch, as do new rulemakings. We anticipate changes will happen under either administration but expect it may take months for companies to experience those changes.
- Finally, it is easier to repeal rules and regulations than it is to draft and implement new ones. This will benefit a potential Trump administration, which could move quickly to repeal rules implemented by a Biden administration. A Harris administration is less likely to repeal rules, although her administration may seek to change them, which would take more time.

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# Antitrust

## Continued U.S. Antitrust Scrutiny Post-Election

**Notable Developments:**

- Recent years have witnessed a sustained increase in antitrust scrutiny both domestically and abroad.
- Heightened scrutiny has resulted in a slight uptick in lawsuits filed by the U.S. agencies—both merger and conduct challenges—including the FTC's recent complaint challenging conduct by Pharmacy Benefit Managers (PBMs).
- In October, the agencies finalized a new rule expanding HSR filing requirements effective in mid-January 2025. Although the final rule is less burdensome than the proposed rule, we expect a material impact on the time and expense for all HSR filings – even though fewer than 2% of mergers undergo material investigation.
- The FTC's final rule banning essentially all non-competes was struck down as: (i) an unconstitutional expansion of the FTC's rulemaking authority; and (ii) arbitrary and capricious under the Administrative Procedure Act.

**Focus has now shifted to the U.S. election—what to keep in mind regardless of outcome:**

- Changes, if any, will not happen overnight.
- The agencies' aggressive scrutiny of merger reviews and conduct is likely to continue, with a sustained focus on labor and consumer impacts.
- We anticipate continued scrutiny of sectors most directly affecting consumers (e.g., oil & gas, food & agriculture, pharmaceutical & healthcare).
- The newly released HSR form will increase pre-filing burden, but the potential for HSR early termination (shortening the waiting period) has been restored.
- The tech sector will face continued scrutiny, given ongoing federal and state lawsuits.
- We expect a sustained insistence on airtight merger remedies to fix alleged competitive harms; structural remedies will continue to be preferred over behavioral ones.
- The impact on deal terms (i.e., expanded outside dates, fewer HOHW provisions, higher break fees, etc.) is unlikely to change.

## Key Takeaways

- We anticipate continued aggressive U.S. antitrust enforcement, including merger and conduct challenges (e.g., the recent complaint against PBMs).
- The FTC's blanket rule banning nearly all non-competes was set aside by a federal district court. The FTC is now appealing this ruling, but we expect another loss for the agency.
- DOJ and FTC issued the final rule expanding HSR filing requirements; the new rule will not take effect until mid-to-late Q1 2025 at the earliest (exact date to be determined after FTC publishes rule in Federal Register and subsequent 90-day window expires; legal challenge to rule also possible).
- We expect some adjustments in a new administration, but many changes are likely here to stay (e.g., focus on labor, scrutiny of tech, higher bar for accepting remedies to address alleged merger harms).

# CFIUS

## Evolving View of National Security

- CFIUS will continue its aggressive posture towards Chinese investment.
  - With Chinese investment into the U.S. decreasing, CFIUS is increasingly finding "China-adjacency Risks" through investors' business activities in China.
  - "China-adjacency Risks" are increasing the number of mitigation agreements for investors from countries that are traditional U.S. partners and allies.
- Trade, privacy, and economic issues are increasingly being considered by CFIUS, stretching CFIUS's historical definition of national security.
  - Broad consideration of supply chains outside of the defense and national security industries is complicating transactions involving consumer goods and data.
- Politicization and protectionism are weakening CFIUS's fact-based and staff-driven analysis and have led CFIUS to make decisions with tenuous national security basis, including with respect to investments from U.S. partners and allies.

## CFIUS Under Trump or Harris

- A Harris administration is likely to lead to few significant changes from the Biden administration and will more likely reflect subtle differences between existing Biden appointees and their Harris administration replacements.
- A Trump administration is more uncertain.
  - A traditional open investment-supportive Treasury Secretary would likely drive CFIUS to a more targeted approach on China, with less skepticism of investments from U.S. allied and partner countries.
  - A protectionist Treasury Secretary could attempt to use CFIUS as a tool in broader trade and political disputes with U.S. partners and allies, such as Japan and nations in Europe.

## Key Takeaways

- CFIUS will continue its aggressive posture towards Chinese investment under any administration.
- CFIUS's approach in a new administration will likely be determined by key appointments, in particular the Treasury Secretary.
- Deprioritization of the longstanding U.S. open investment policy will continue to drive increases in timelines and uncertainty for transaction parties.

# Sanctions & Export Controls

## Russia Sanctions

- If Harris wins the U.S. presidential election, sanctions on Russia will likely continue to expand and we expect enforcement will build.
- If Trump wins the election, sanctions will likely remain in place (and not be reversed), but relaxation of rules including through licensing may unfold and enforcement of Russia violations, if any, will likely slow.
- There continues to be systematic engagement between the U.S. and Europe to coordinate actions on Russia – the Harris administration will likely continue to be open to reasonably accommodating European players in the interest of diplomatic harmony, while the Trump administration may decide to take more of an isolationist position.
- Even if enforcement of the Russia sanctions is reduced under Trump, the statute of limitations for breaches of U.S. sanctions has recently been extended to 10 years, so future administrations will be able to investigate breaches and enforce against companies that violate the sanctions.

## China Export Controls, Sanctions & Trade

- The Biden administration has strategically increased export controls and sanctions on China, to continue to apply pressure in the U.S.-China trade war. These measures have included technology-focused export controls and human rights-related sanctions and import restrictions around concerns in the Xinjiang region. Rules targeting China now include investment in targeted securities, communications and information technology, and military-intelligence end use rules targeting certain exports to China.
- We expect both a Harris and a Trump administration to continue to focus on China and increase restrictions on exports of technology and on investment, in addition to continuing or increasing tariffs on goods from China.
- China has enacted blocking rules and retaliatory trade restrictions in response to U.S. and foreign measures targeting China and is likely to maintain or escalate its response as this pressure continues.

## Key Takeaways

- Sanctions will likely continue to be a favored foreign policy tool for the U.S. government, regardless of administration.
- We expect that the U.S. will continue to increase export control restrictions on, for example, exports to military-affiliated parties in China, Russia, and Venezuela, semiconductor technology, and AI models.
- A new administration could depart from the Biden administration's increased trade control cooperation between the U.S. and its European and NATO allies, including with respect to Russia and in connection with efforts to curb China's trade practices.
- Export control restrictions and enforcement are likely to increase under a Harris or Trump administration, as export controls have emerged as a key foreign policy tool alongside sanctions.

# Tax

## Understanding Potential Tax Implications of the U.S. Election

Below we outline the tax proposals of each candidate. Significant tax changes like those presented below generally require legislative action. Although substantial bipartisan tax reform is unlikely, many of the provisions of the 2017 Tax Cuts and Jobs Act (TCJA) sunset at the end of 2025. As there are TCJA provisions that each party will not want to lose, there is a possibility of a negotiated tax bill in the next administration even with a divided Congress.

### Harris

- Proposed increasing the corporate tax rate from 21% to 28%.
- Proposed raising the top capital gains rate to 28%, along with a minimum tax on unrealized capital gains for taxpayers with net wealth above $100 million (the "wealth tax").
  - Increase to corporate tax rate would increase disparity in taxation of corporate versus individual and/or pass-through structures – e.g., an individual subject to maximum tax rates would have a higher aggregate tax rate on corporate investment due to two levels of tax (28% corporate tax and 28% individual capital gains tax).
  - Combination of a higher capital gains tax rate and wealth tax could incentivize applicable taxpayers to (i) accelerate gains prior to implementation of the wealth tax and/or (ii) defer deductions that offset gains until implementation of the wealth tax.
- Proposed replacing the base erosion anti-abuse tax (BEAT) with an undertaxed profits rule (UTPR) in line with the OECD Pillar 2 framework.
  - Could require multinationals to reassess certain arrangements subject to BEAT (e.g., licenses, royalties) to minimize tax costs under a new UTPR.

### Trump

- Proposed reducing the corporate tax rate to 20%, and 15% for companies making products in the U.S., incentivizing companies to prepare contingency plans to repatriate and/or develop their domestic production.
- No proposed changes with respect to capital gains taxation.
- **TCJA Implications**
  - Proposed eliminating the cap on the deduction for state and local taxes (SALT) that was instated under the TCJA.
  - Proposed extending or making permanent other aspects of the TCJA, including the reduced individual income tax rates.

## Key Takeaways

- Harris administration proposed raising corporate tax rate to 28%, increasing the disparity between corporate and individual and/or pass-through taxation.
- Harris administration proposed to tax certain unrealized gains, potentially incentivizing taxpayers to accelerate gain or defer deductions.
- Trump administration may offer lower corporate tax rate for companies with domestic production.
- Although candidates' proposals are unlikely to be enacted exactly as presented, sunsetting TCJA provisions suggest that meaningful tax legislation may be passed in the next administration regardless of Congressional control.

# Congressional Investigations

## Anticipating Political Risk from the 119th Congress

Regardless of which party controls the Senate and the House, we expect certain issues to be top of mind for oversight and investigations at the start of the new Congress in January 2025:

- Antitrust
  - The effect on consumers, cost of living, and competition
  - Effectiveness of FTC and DOJ enforcement
- Climate/ESG/DEI
  - Republicans view ESG investing as pushing a social agenda at investors' expense and believe ESG-related organizations are a "climate cartel"
  - Democrats support ESG efforts, but argue that companies should be doing more to support environmental justice and the fight against climate change
- Relationships with China
  - Reliance on factories/labor/supply chain
  - Compliance with China's national security law
- Recipients of Federal Funding (CHIPS, IRA)
- Threats to Critical Infrastructure
- Sanctions and AML Compliance, especially regarding terrorist financing
- Prescription Drug Pricing
- Online Safety (both parties are focused on children's safety and AI)

## Key Takeaways

- Congress is increasingly looking to the private sector as a proxy to inflict political damage on the opposing party in control of the White House/Executive Branch.
- When Congress is unable to gain information/cooperation from the Executive Branch, it can quickly pivot to investigating the private sector, including to highlight alleged policy and enforcement failures by the administration.
- This process can include requests to testify at hearings and subpoenas, including to access repositories of information.
- Hearing prep should include strategic planning to limit reputational risk from politically charged questions.
- Requests and subpoenas from Congress differ from requests from DOJ or other federal agencies; any response strategy should account for those differences.

# SEC Agenda & Rulemaking

## ESG & DEI Will Continue to Be Hot Button Issues

- ESG and DEI remain major points of divide between the two parties, with a Trump administration pushing an anti-ESG agenda while a Harris administration anticipated to be more favorably disposed to pro-climate and diversity initiatives.
  - However, pro- or anti-ESG legislation would require control of Congress and the White House.
  - In the absence of that, the ESG agenda will depend upon appointments and rulemaking, neither of which will happen quickly and the latter of which is complicated by the recent Supreme Court ruling overturning *Chevron* which granted deference to the agencies. But repealing rules is easier than making them.
    - Trump-appointed SEC chair and commissioners could repeal or amend the Commission's recently-adopted climate disclosure rules.
    - Human capital management rules under consideration unlikely to move forward under a Trump administration.
    - Pace of rule-making more generally likely to slow under a Trump administration.
- Irrespective of the SEC agenda on these topics, U.S. companies will continue to be subject to state legislation (e.g., California; and other states have proposed or are considering their own ESG rules) and global compliance (e.g., CSRD in Europe and other regimes globally).
  - This patchwork of compliance requirements and regulations, added to voluntary reporting that U.S. companies engage in in response to their various stakeholders, will cause U.S. companies to continue to expend tremendous effort on ESG matters.
  - This will subject U.S. companies to ESG and anti-ESG pressures alike, from a risk, reputational and litigation perspective, irrespective of which administration is in the White House.

### Key Takeaways

- ESG and anti-ESG are here to stay, irrespective of which administration is in the White House, exposing companies to increased reputational and litigation risks.
- Trump administration would spur the anti-ESG movement and potentially roll back SEC climate rules.
- Irrespective of the SEC agenda, companies will continue to be subject to state and global ESG compliance regimes.

# Shareholder Activism

## How Will the Election Impact Shareholder Activism?

**Historically, there is no clear impact (positive or negative) of elections on shareholder activism.**

- The economic policies enacted by the incoming president will drive the economy and may create opportunities for activism.
  - If interest rates are cut further, spurring investments and debt, companies that have not levered up may be targeted with more campaigns.
  - Lower/stable interest rates tend to spur M&A (especially from private equity), which is a common activist thesis.
  - Economic changes can create differentiation and resulting outliers may become the next activist targets.

**Election results could influence specific fights and enforcement activity.**

- A Trump administration could encourage activism against certain disfavored companies or sectors.
- A Republican administration could result in less SEC enforcement activity and fewer checks on some of the more egregious activist activities.
- A Democratic administration could implement more shareholder-friendly policies (as seen with the universal proxy rules), which could encourage more activism.

**ESG activism will likely be impacted by which party is in power as it is often tied to politics.**

- If Republicans are in power, direct attacks on ESG from the executive and legislative branches may bolster anti-ESG voices.
- If Democrats are partially in power, divided government would likely continue to feed the conservative anti-ESG movement (e.g., Robby Starbuck).
- If Democrats are fully in power, anti-ESG campaigns may become part of Republicans' overall strategy to challenge the Democrats' agenda.

### Key Takeaways

- Changes in economic policy following the election may create opportunities for activism, but the overall impact is hard to predict.
- To the extent the SEC is less active under a Republican administration, activists may be emboldened.
- Additional shareholder-friendly policies under a Democratic administration may also encourage activist activity.

# Securities Litigation

## Relative Stability in Securities Regulation Expected to Continue into Next Administration

**Enacted in 1995 to curb abusive lawsuits, the Private Securities Litigation Reform Act (PSLRA) makes it harder for plaintiffs to get to discovery in a securities case than in most other class actions. We expect the PSLRA to survive the election and the litigation environment to be stable.**

- Harris surrogate Mark Cuban posted that Harris' team has told him "in no uncertain terms that they are against 'regulation through litigation.'" But Harris will not gut enforcement, especially in the event of a recession; she is running on her record of suing big banks.
- Trump and some of his most-prominent supporters have been defendants in securities-fraud cases and advocates for reducing regulation. Trump-appointed justices joined recent business-friendly controlling opinions in:
  - *Loper Bright Enterprises v. Raimondo:* instructing courts not to defer to agencies' interpretations of statutes.
  - *Securities and Exchange Commission v. Jarkesy:* holding that when the SEC seeks civil penalties, defendants are entitled to a jury trial.
  - *Macquarie Infrastructure Corp. v. Moab Partners, L.P.:* unanimously holding that pure omissions are not actionable as fraud.

**Crypto is likely to see some relief.**

- In October, prominent crypto investor and former Trump backer Ben Horowitz announced his support for Harris, saying that he is "hopeful that the Harris [a]dministration will be much better" than the Biden administration on crypto.
- Trump recently headlined a popular Bitcoin conference and launched a crypto business.

**A Harris administration would shift some of the SEC's attention towards ESG issues. Her platform includes core ESG tenets, including climate change and workers' rights, and she has championed legislation to remedy racial inequity.**

### Key Takeaways

- With a closely divided Congress, there are unlikely to be major legislative developments.
- Under a Harris administration, the SEC would largely stay the course. It would, however, shift some of its focus from crypto to ESG.
- Under a Trump administration, a less-threatening SEC enforcement environment would be expected.

# International Arbitration

## Investment Treaties: A Strategy for Defending Against Mistreatment by Foreign Regulators

Investment treaties are agreements between countries that protect private foreign investors. There are 3,000+ investment treaties in force worldwide. These treaties typically include protections against legislative, regulatory or judicial acts that are discriminatory, arbitrary or otherwise unfairly prejudicial to the investor's business. Critically, investment treaties typically also grant foreign investors the right to sue the foreign country in international arbitration for state conduct that violates the protections in the treaty.

### Election Risk

- Under a Harris or Trump administration, further tensions with China or other major economies could result in the U.S. government acting adversely to foreign investors from those countries and those countries' governments acting against U.S. companies.
  - For example, Harris has said she "will make sure that America, not China, wins the competition for the 21st Century," while Trump has proposed to "stop China from buying American Real Estate and Industries."
- U.S. investors and foreign investors in the U.S. should consider preparing to defend themselves against similar actions.

## Key Takeaways

- No matter which candidate wins the U.S. presidential election in November, there will be risk that the new administration will escalate tensions with other countries with significant economies and take discriminatory or arbitrary measures against companies from those countries, and that those countries' governments will take similar measures against U.S.-headquartered companies.
- Investment treaties can provide important protections for companies and tools to push back on such government mistreatment.
- U.S. companies investing abroad and foreign companies investing in the U.S. should consider structuring their investments to obtain those treaty rights. Treaty structuring can be straightforward and cost-efficient.

# Corporate Criminal & Regulatory Enforcement

**Key criminal and regulatory enforcement priorities of the Biden Administration have included:**

- Encouraging voluntary self-disclosure of legal violations
- Requiring robust corporate compliance programs effective at preventing and detecting misconduct
- Use of data analytics to assess the efficacy of compliance programs
- Increased focus on individual accountability
- Whistleblowing initiatives to encourage reporting of potential corporate misconduct

**A Harris administration** would not necessarily continue these priorities but is more likely to than a Trump Administration.

**Under a Trump administration**, we would expect that more resources would be diverted to enforcement issues such as immigration and violent crime, with perhaps less of a focus on corporate enforcement given the perception that the first Trump administration was more "business friendly." We would also anticipate the DOJ under a Trump Administration to be less focused on "regulating" corporate compliance programs. Lastly, there have been suggestions that a Trump administration may encourage DOJ to pursue criminal prosecutions based upon a broad swath of political activity.

**However, changes, if any, will not happen overnight as much of the "line staff" will remain in role and pending cases will frequently continue.**

## Key Takeaways

- The level of focus, as well as the approach and tactics, regarding corporate criminal and regulatory enforcement are likely to be different for a Harris or a Trump administration.
- Changes, if any, will not happen overnight as much of the "line staff" will remain in role and pending cases will frequently continue.
- The new administration will, however, have the opportunity to replace the senior agency personnel who set enforcement priorities and policies.
- Agencies will have wide discretion to set enforcement priorities. While there was significant corporate enforcement during the first Trump administration, a Harris administration is more likely to make this a greater priority.

# Thank you



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