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DIRECTOR EFFECTIVENESS

Potential Effects of a Trump Administration on Corporate Boards

BY JULIAN PERLMAN

In any article about what the Trump administration is likely to do when it takes office, the standard preamble has become that the president-elect has never held an elected office, and appears to be nominating numerous cabinet officials without government experience, making it uniquely difficult to predict what the future may hold.

Thus, all commentators are fundamentally limited to making educated guesses regarding what a Trump presidency might mean, including for corporate regulation. That being said, Trump certainly appears poised to become a deregulation president. While his campaign did not discuss specifics of its overall plans, it appears that the Trump administration, supported by a Republican-controlled Congress, will move to reduce regulations in the financial industry. This assumption is based on the fact that Trump repeatedly assailed regulation as ''disastrous'' and has stated that ''regulations have grown into a massive, job-killing industry, and the regulation industry is one business I will put an end to.'' At the same speech from September of this year, Trump claimed that ''overregulation costs our economy $2 trillion dollars a year and reduces household wealth by almost $15,000'' and vowed to ''eliminate all needless and job-killing regulations now on the books.''

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If the President does take steps to lessen regulation, particularly in the financial industry, including by repealing or replacing Dodd-Frank (including the Volcker Rule), it is almost certain that boards of directors will become less burdened with overseeing risk management and regulatory compliance. Needless to say, simply because certain regulations are relaxed doesn't mean that all corporations will necessarily engage in a race to the bottom in terms of governance standards—boards will need to assess the cost-benefit of changing their compliance programs, particularly if it appears that the applicable regulations could change again in just four short years.

The steps taken so far by President-elect Donald Trump may "significantly lessen the compliance burdens on corporate directors."

The president-elect also possesses the power to reshape key regulators including the Federal Trade Commission and Securities and Exchange Commission. For example, just three commissioners are currently heading the FTC, following the departures of former Commissioners Joshua Wright and Julie Brill, namely Chairwoman Edith Ramirez, Maureen Ohlhausen and Terrell McSweeny. Given Chair Ramirez's impending departure from the FTC, President-elect Trump will have the opportunity to appoint (with Senate confirmation) three out of the five FTC commissioners, including a new chair, for seven-year terms. It appears likely that Maureen Ohlhausen will be appointed the new chair of the FTC—she is the only Republican currently on the commission (in addition to Chairwoman Ramirez, Commissioner McSweeny is also a Democrat). (Irrespective of who ends up chairing the FTC, the president-elect will almost certainly have to nominate at least one Democrat to the commission, as no more than three commissioners may be from the same political party.) These commissioners will not only set antitrust enforcement and consumer protection priorities and policies, but also review potential mergers for anti-competitive effects. A Trump presidency will likely reverse the trend under the Obama administration of increased review of mergers that have the potential to reduce competition, a move that will likely be cheered by corporate boards who would obviously prefer to transact business unfettered by concerns over competition and concentration.

As for the SEC, Trump has tapped former SEC Commissioner Paul Atkins to manage the transition at the SEC, and it is likely he could be named chairman in the future. Atkins has been critical of the policing of corporate auditors after the Enron collapse and has advocated for individual responsibility of corporate wrongdoers (as an alternative to punishing shareholders); he has also urged that whistle-blowers be required to raise issues internally before reporting to the government. All of the above could significantly lessen the compliance burdens on corporate directors.

Only time will tell what this all means. Bank stocks are hitting record highs, spurred by the belief that Trump's deregulation agenda will boost their bottom lines, including by lessening capital requirements. However, it should be recalled that many of the regulations Trump may seek to repeal were enacted in the wake of the Great Recession and in response to corporate conduct that exposed the weaknesses in the financial system. If the country were to face a looming collapse again as a result of the lessening of the restrictions enacted during the Obama administration, the cost of deregulation may prove too high, no matter how the stock has performed until that point.

The point to remember: Nobody likes regulations; however, sometimes they can save us from ourselves.

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