Insight

# Comparing Trump and Biden Administration Policy: Financial Services

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**Executive Summary**

- A Biden-Trump election contest affords voters the unusual opportunity to compare the presidential records of both candidates in assessing the next presidency's likely impact on financial services policy.
- While the Trump presidency was characterized by efforts to reduce the worst burdens of the Dodd-Frank Act and better tailor regulation and supervision to the character of individual firms, the Biden presidency instead reversed much of this progress and has additionally brought an undisciplined approach and a patchwork of legislation to ESG, crypto, and "junk fees."
- The next president will need to navigate a complex web of ongoing and new policy concerns, from a federal framework for crypto, to navigating the complexities of marijuana banking, to the inevitability of future bank failures; these issues would be challenging enough even without the background of persistent high inflation.

**Introduction**

As it becomes increasingly clear that the 2024 federal election will see a rematch between former President Donald Trump and the incumbent President Joe Biden, voters are afforded an unusual opportunity to judge both candidates not simply on campaign promises but on the regulatory record of their presidencies. While financial services may not be top of mind for either candidate, significant matters of policy will need to be determined over the next four years, from BASEL III implementation to the exposure of mid-size banks to interest rate risk. At a time when the overall health of the economy is strong but inflation stubbornly refuses to subside, either candidate will have the opportunity to capitalize on America's financial stability – or upend markets.

**Policies**

*Trump Administration Initiatives and Analysis*

Dodd-Frank Reform

The 10-year anniversary of the Dodd-Frank Act, the most sweeping overhaul of the U.S. financial system since the Great Depression, occurred early into the Trump presidency. During the Trump Administration, the most striking actionto limit the damage of this cumbersome regulatory framework was to "roll back" some of the more onerous requirements for midsize banks.

In May 2018, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (S.2155) , a landmark financial services deregulatory bill aimed at scaling back and addressing some of the most burdensome aspects of Dodd-Frank. The law sought to reform the prudential regulatory landscape, including reform of banking capital requirements, and was primarily aimed at community and mid-tier banks. In

particular, S.2155 raised the threshold for systemically important financial institutions from $50 billion to $250 billion, while also empowering the Federal Reserve to articulate a new regulatory approach to supervising banks with assets exceeding $100 billion. Enhanced tailoring in regulatory approach was at the time a welcome indication that the Fed would apply higher degrees of nuance, recognizing that not all banks are the same or face the same risk.

In addition, the financial services regulatory agencies embarked on an ambitious proposal to amend the Volcker Rule. American Action Forum scholars continue to hold the view that proprietary trading was not a cause of the 2007–2008 financial crisis. Rather, the crisis was caused by banks acting in their primary capacity as lenders of credit (albeit on poor risk assumptions), and not as a result of securities trading, rendering the Volcker Rule "a solution in search of a problem."

## The Collapse of the Financial Stability Oversight Council

The Financial Stability Oversight Council (FSOC), created by the Dodd-Frank Act in the wake of the 2008 financial collapse, sought to limit systemic risk in the financial system and prevent future financial instability via the designation of certain firms as "systemically important." In October 2018, after a lengthy and embarrassing court battle for FSOC, Prudential Financial, the last non-bank on this list, was de-designated. This has since prompted significant questions as to the appropriate role of the FSOC as it continues its search for relevance and meaning.

## The Constitutionality of the CFPB and the FHFA

In the wake of the financial collapse of 2008, the federal government created new regulatory bodies to oversee aspects of the financial services industry, most notably the Federal Housing Finance Agency (FHFA) and the Consumer Financial Protection Bureau (CFPB). From inception, scholars have questioned the constitutionality of both agencies, as they were designed to be significantly insulated from traditional oversight. In June 2020, the Supreme Court found the CFPB structure unconstitutional given the inability of the president to fire the CFPB director at will, although the Supreme Court preserved the agency by severing the removal clause from the law.

## The Community Reinvestment Act

Multiple presidencies have attempted to update the Community Reinvestment Act (CRA), a system introduced by Congress in 1977 to prevent banks from withholding loans or general banking services to individuals from low-income areas, a practice known as "redlining." The CRA is administered by three agencies – the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve, although it has been difficult to engage the Fed on tri-party reform efforts. The OCC and FDIC released their reform proposal in late 2019, encouraging banks to provide more targeted support to low- and middle-income individuals, regardless of where they live.

## Regulation Best Interest

After the collapse of the Department of Labor's (DOL) fiduciary rule, the Securities and Exchange Commission (SEC) announced steps to meet the same goal of investor protection. Although no longer explicitly using the language of "fiduciary," the SEC's proposed best interest regulation meets or exceeds that standard, including requiring financial advisors to mitigate, rather than simply disclose, conflicts of interest. The rule as proposed would hold brokers to a higher standard of obligation without the imposition of undue regulatory burden. It would also better protect investors while still allowing them access to a range of financial advice.

In June 2018, however, following the Trump Administration's unwillingness to defend the fiduciary rule, the Fifth Circuit Court of Appeals vacated the rule, noting that the DOL's implementation represented " an arbitrary and capricious exercise?of administrative power."

The Federal Reserve

President Trump showed an unprecedented willingness to comment on, and attempt to influence, macroeconomic policymaking at the Federal Reserve. The independence of the Fed is vital to the functioning of a healthy economy, and President Trump's remarks at the time risked destabilizing macroeconomic policy and could have severe adverse impacts on inflation and employment.

Real-time Payments

It was during the Trump Administration that the Fed first embarked on the project of a federal real-time payments network. The creation of this platform would prove to be costly, time consuming, and duplicative. It would also discourage competition, retard progress of existing real-time services, and was likely not consistent with the Fed's mandate. The Fed's real-time payment system, FedNow, has only recently come into use and banks are in the process of managing the adoption and use of both federal and private systems.

The Coronavirus Pandemic

In the face of the economic and social disruption caused by the coronavirus, Congress passed?three significant stimulus packages?to provide relief to the U.S. economy, businesses, and consumers. With an estimated trillion-dollar price tag, the third stimulus package would end up one of the largest and most significant stimulus packages in U.S. history. While Congress and the financial services regulatory agencies introduced a wide range of relief programs, from business interruption insurance to loan forgiveness, the single most effective mechanism was the creation of the Paycheck Protection Program (PPP). All in all, the federal government in partnership with private banking issued $953 billion in in business loans via the PPP program in what has been described as the single most effective policy tool deployed by Congress.

The Federal Reserve announced a sweeping range of measures designed to support the economy, from the creation of multiple lending facilities to an ambitious program of quantitative easing.

*Biden Administration Initiatives and Analysis*

The Coronavirus Pandemic

The American Rescue Plan Act of 2021 (ARP) represented the Biden Administration's response to COVID-19 in the form of a $1.9-trillion stimulus plan. Unlike the measured, targeted stimulus packages Congress released in the Trump presidency, the ARP sought to achieve long-term Democratic policy goals under the guise of an immediate response to the challenges of the coronavirus, and causing the rapid inflation that remains in place today. For financial services, the most significant aspect of ARP was $60 billion in aid to small businesses, with $25 billion earmarked solely for the use of restaurants.

Dodd-Frank Reform

Reversing the trend of attempting to minimize the negative results of the Dodd-Frank Act, the CFPB introduced a proposed rule, meeting Dodd-Frank requirements only a decade later, to significantly increase the reporting burden of lenders

. These extensive reporting requirements would add millions of dollars in compliance costs to a wide range of lenders, including the smallest community banks, in the hope that the CFPB would be able to use this data to better facilitate access to credit for small businesses – by hobbling the providers of that credit.?

Dodd-Frank and the capital requirements of banks have since come back into focus following the collapse of Silicon Valley Bank(SVB). While it is certainly true that moving between the new size categories of S.1255 led the Fed to an uneven supervisory approach, there is no evidence that the 2018 bank capital reform informed SVB's fall – no amount of capital held in reserve could have prevented a run of that magnitude. The collapse of SVB, however, complicated conversations regarding bank capital more broadly, and in particular the implementation of regulation known as Basel III. Since 2009, all members of the G20 major economies, and some others, have been voluntary participants in the Basel Committee on Banking Supervision, seeking an international standardized approach to banking regulation. What was first expected to be a largely technical affair has instead morphed into new categories of risk and hefty capital surcharges on certain kinds of assets. The resulting furor was such that the Fed was put in the awkward position of having to withdraw the proposal entirely. The Basel endgame was only supposed to make technical changes to the Basel Accords, not create a new set of capital requirements that former Fed Vice Chair for Supervision Randy Quarles has said could lead to?capital hikes of 20 percent at some large banks.

The Constitutionality of the CFPB and the FHFA

In June 2021, the Supreme Court, following its own decision in *Seila Law*, also found the structure of the FHFA unconstitutional. In both cases the Supreme Court held that provisions preventing the president from firing the director of either agency at will are unconstitutional, but in both cases preserved the existence of the agency by severing the problematic provisions from the law otherwise empowering them.

Curiously, in neither case did we see significantly less activity at either agency. Instead, the CFPB has aggressively promoted its mission, most glaringly in April 2022 when the agency announced its intent to exercise a "dormant" authority granted to it under Dodd-Frank to expand the scope of the entities it supervises.? The CFPB will claim the authority to regulate and supervise any financial actor that performs any kind of activity that could cause risk to consumers – including nonbanks and particularly fintechs (see below). Little is known about how the CFPB will make this assessment. Leadership at the other financial services regulators have followed a similar path: SEC Chairman Gary Gensler has issued a near-unprecedented number of rulemakings with the potential to upend the operations of broad swaths of the economy; nearly double that of his predecessors at the same point in their tenures.?

The Community Reinvestment Act

Having refused to join the OCC and FDIC's reform proposal (which following the withdrawal of the FDIC led to the OCC finalizing the proposal on its own), the Fed further complicated matters by releasing its own, separate CRA reform proposal. Under President Biden, however, new leadership at the OCC announced that it was "reconsidering" the implemented CRA rule. In July 2021 the three regulators announced that they would once again approach CRA reform as a joint body, releasing a new joint proposal in May 2022. The proposed modernized CRA would finally give banks credit for online banking, stratify the assessment process based on a bank's size and activity, better define qualifying activities, and significantly increase the data collection and reporting requirements of some banks.?

## Best Interest Regulation

Following the collapse of the efforts of two previous administrations to create a new Best Interest standard, the SEC then provided its own interpretation: Notably, the new standard would apply to all investment accounts (reducing fragmentation) and suggested a "best interest" standard that all but knocks on the door of fiduciary – but neglected to define the term, trading one amorphous standard for another.

Into this confusion stepped the Department of Labor for a third bite of the apple. The DOL's proposed rule seeks to extend existing standards to cover IRA rollover recommendations by amending a small section of a test that determines whether a fiduciary responsibility exists.?Yet the proposed change to the law is so broad that it would potentially cover all financial advice, creating higher costs for investment advisors, necessarily raising the cost of financial advice and thus reducing the financial advice available to consumers.

The Biden Administration positioned this new attempt at the creation of a fiduciary duty as part of an administration-wide assault on what it termed "junk fees." Despite the implied threat to financial services this term carries, and the frequency with which it appears, the actual meaning of a junk fee is rarely defined and covers an ever-shifting landscape of disapproved practices.?The use of the term therefore acts as a Trojan horse for policy based on politics – poorly thought-out initiatives based on poorly thought-out rationales with little regard to the results, intended or otherwise.

## The Role of ESG

The Biden Administration saw an increased focus on the approach of financial services firms to "ESG" (environmental, social, and governance goals).

To Republicans, the approach by some market actors calling for ESG mandates for public companies represents a threat to capital markets – a threat the Republican-led House Financial Services Committee sought to combat with the creation of an ESG Working Group. This backlash is best seen by increasing calls from elected officials at the state and federal levels for financial services firms to cease what they see as aggressive ESG policies. In acute cases, states have enacted legislation preventing them from contracting with banks and asset managers with ESG policies, removed state funding from these firms, or reinvested state pension policies. Private actors should be allowed to follow whatever course is set by their shareholders, and government officials by their constituents, and that ideological restrictions on market transactions will necessarily decrease competition and quality and increase costs for the stakeholders government officials seek to represent.

To Democrats, the financial services regulators are in a unique position to realize social goals, whether or not that is expressly part of their mandate. This has been most evident in the SEC's decision to require public companies operating in the United States to provide climate-related information in both their registration statements and annual reporting. These disclosures would require businesses to provide information on the climate-related risks they face, their governance and risk management processes in place to mitigate those risks, and their greenhouse gas emissions (although following intense criticism, the SEC dropped the most controversial aspect of the rule: the requirement that disclosures cover not just the financial risks stemming from climate but the emissions of all actors in their "value chain," including suppliers and product end-users).??

## Fintech, Crypto, Stablecoins, and the Digital Dollar

While digital assets pre-date the Biden presidency, no other administration has made such a concerted effort to regulate the new class of assets. In March 2022 President Biden signed a long-awaited?executive order embarking on a whole-of-government, comprehensive approach to the regulation of cryptocurrencies and other

digital assets. Despite this initiative, the development of a new regulatory framework has been characterized less by a top-down approach led by Congress and instead via a series of jurisdictional annexations by the SEC and CFTC. Of particular note is the SEC's attempt to regulate via enforcement in its aggressive legal campaigns against crypto actors including Binance and Coinbase. Even the development of a regulatory framework for stablecoins, considered the lowest-hanging fruit for digital assets, has failed in Congress. It was also under the Biden presidency that the Federal Reserve took its first steps into the creation of a digital dollar, or centrally backed digital currency.

**Conclusions**

The next president will need to navigate a complex web of ongoing and new policy concerns, from a federal framework for crypto, to navigating the complexities of marijuana banking, to the inevitability of future bank failures. These issues would be challenging enough even without the background of persistent high inflation, but – when it comes to financial services policy – the American public can assess both candidates' ability to tackle future challenges based on their track records.