

# BIDEN ADMINISTRATION

## Employment, Cybersecurity/Privacy & Securities

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**PAUL**  

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**HASTINGS**



January 11, 2021

Confidential – Do not distribute

2020



# HARVARD LAW **TODAY**

## How COVID-19 has changed the workplace in 2020

**t** TRUTHOUT

## In 2020, COVID Put a Mirror Up to Our Society



## Coronavirus changed everything in 2020. Will the pandemic wind down in 2021?

Updated 8:15 AM; Today 8:15 AM

**Bloomberg Opinion**

Technology & Ideas

## Goodbye to 2020 (and Good Riddance)

It was a learning experience, at least.

EDITION: INTERNATIONAL ▾

 **REUTERS**



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PICTURES | FRI JAN 1, 2021 | 2:45PM EST

## World rings in 2021 and says good riddance to 2020



# PRIORITIES

We aren't just going to rebuild what has worked in the past. This is our opportunity to build back better than ever.



**COVID-19**



**ECONOMIC RECOVERY**



**RACIAL EQUITY**



**CLIMATE CHANGE**



# 100M shots in the first 100 days: Biden unveils Covid priorities, introduces health team

We aren't just going t

Start Survey » We are running a quick survey. Would you like to participate?

Home / News / America 2020

## Erasing Trump's Legacy With the Stroke of a Pen

# Biden told civil rights leaders in private meeting that progressives' hopes for executive actions are 'way beyond the bounds' of his presidential authority



COVID-19



ECONOMIC REC



Hot Topics LIVE UPDATES: Ga. Rep. Collins: Close races | LIVE UPDATES: City removes benches due to Covid

# Biden should pull off executive order 'blitz' before people can react, leftists say

# SPEAKERS



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- New Political Dynamic
- Employment Law: New and Unfinished Business
- Privacy & Security
- Securities



# NEW POLITICAL DYNAMIC



# THE NEW POLITICAL DYNAMIC

- Democrats win the White House.
- Democrats lose seats in the House. Narrow majority (222-212, 1 race uncalled).
- Senate: 50/50.
- Legislating vs. “pen and a phone?”



# STATE ISSUES

Blue states/cities looking at many issues:

- Independent Contracting (ABC+ test)
- Minimum Wage (\$15+)
- Predictive Scheduling
- Portable Benefits (Prop 22)
- Hazard Pay
- At-Will Employment
- Paid Leave





# EMPLOYMENT LAW: NEW AND UNFINISHED BUSINESS



# ACTIVE TRUMP ADMINISTRATION

 PACIFIC LEGAL FOUNDATION

BATTLEGROUND'S ▾ CASES ▾ BLOG ABOUT ▾ NEWSROOM GET INVOLVED ▾ [DONATE](#) 

MAY 20, 2020

President Trump signs executive order containing "Regulatory Bill of Rights"



Religious Freedom Arguments Give Rise To Executive Order Battle



**DOL Women's Bureau Awarded \$1.1M to Research & Analyze Paid-Leave Programs**

 AUGUST 15, 2016 |  [UNCATEGORIZED](#)

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*The Atlantic*

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**BUSINESS**

**Trump's 'Two-for-One' Regulation Executive Order**

Will the president's plan to reduce the cost and burden of rules work? And is it even necessary?

**BOURREE LAM** JANUARY 30, 2017

JDSUPRA®

**EEOC Closes EEO-1 "Component 2" Pay Data Collection; Upcoming Filing Requirements Not Yet Clear**

**NATIONAL LAW REVIEW**

**New York Federal Court Strikes Down Primary Element of DOL's New 'Joint Employer' Rule**



**DOL Finalizes Joint Employer Rule**

**January 15, 2020**

**EEOC Rule To Revamp 'Conciliation' Process Is On Horizon**

# OUTGOING ADMINISTRATION ACTION

## Executive Orders Impacting Regulation

EO 13771: Reducing Regulation & Controlling Regulatory Costs

EO: 13987: “Promoting Rule of Law Through Improved Agency Guidance Documents”

EO 13924, Sec. 6: “Regulatory Bill of Rights”

## OFCCP

Diversity Training—Prohibiting certain “divisive concepts”

Rule: “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (in effect on January 8, 2021)

EO: Respect and & Protect Freedom to Engage in Religious & Political Speech

## EEOC

Conciliation Process

Pay Data Reporting

Arbitration

## DOL

US-Mexico-Canada Agreement Labor Protections

New Joint Employer Standard Under FLSA

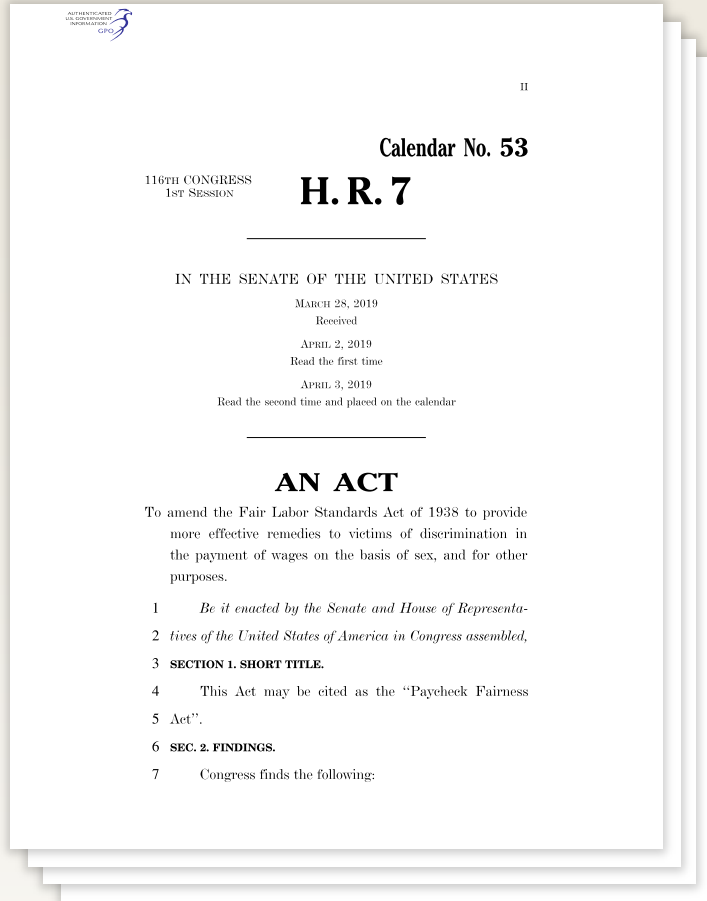
Rule on Independent Contractors Under FLSA

Rule on Fluctuating Workweek Method of Computing Overtime

Rule on White Collar Exemptions for Overtime Pay



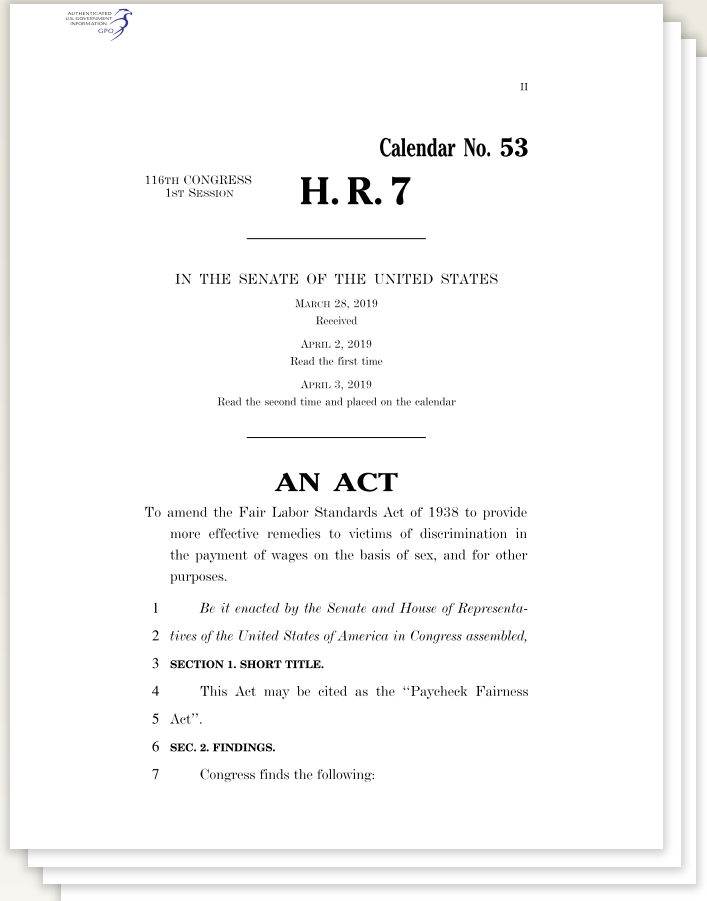
# PAY EQUITY: HOUSE BILL



## Paycheck Fairness Act (H.R. 7)

- *Status: Passed House 3/27/2019.*
- Would amend equal pay provisions of the FLSA to:
  - Restrict the use of the bona fide factor defense to wage discrimination claims,
  - Enhance non-retaliation prohibitions,
  - Increase civil penalties for violations of equal pay provisions, and
  - Make it unlawful to require an employee to sign an NDA regarding wage information.

# PAY EQUITY: HOUSE BILL (CONT'D)



## Paycheck Fairness Act (H.R. 7)

- Other features of the bill:
  - EEOC employees will be trained on wage discrimination;
  - DOL will establish a grant program for negotiation skills training programs and studies to address pay disparities between men and women;
  - Awards for employers who make “substantial effort” to eliminate pay disparities; and
  - EEOC will issue regulations for collecting pay data.

# PAY DATA COLLECTION

## Pay Data Reporting:

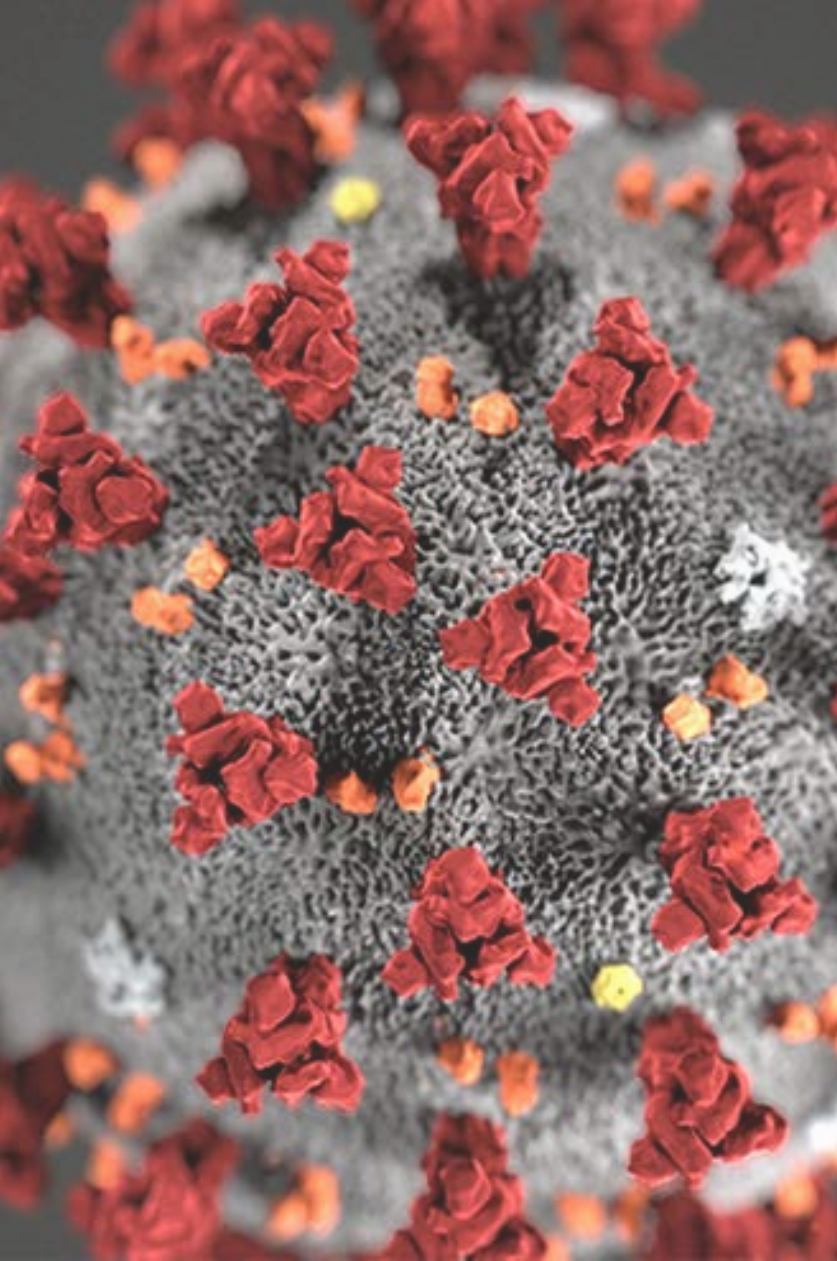
- EEO-1 Component 2
- EEOC stopped reporting; declined to release any data already collected.
- Commission formed to study methods of pay data collection (report due December 31, 2021).

# PAY DATA COLLECTION: STATE ACTION

## SB 973

### California—SB 973

- DFEH authorized to prosecute discriminatory wage rates
- Required reporting:
  - Private employers
  - 100+ employees
  - March 31, 2021, and annually thereafter:
    - Job categories by race, ethnicity, and sex.
    - Annual earnings within pay bands by race, ethnicity, and sex.



## **OSHA**

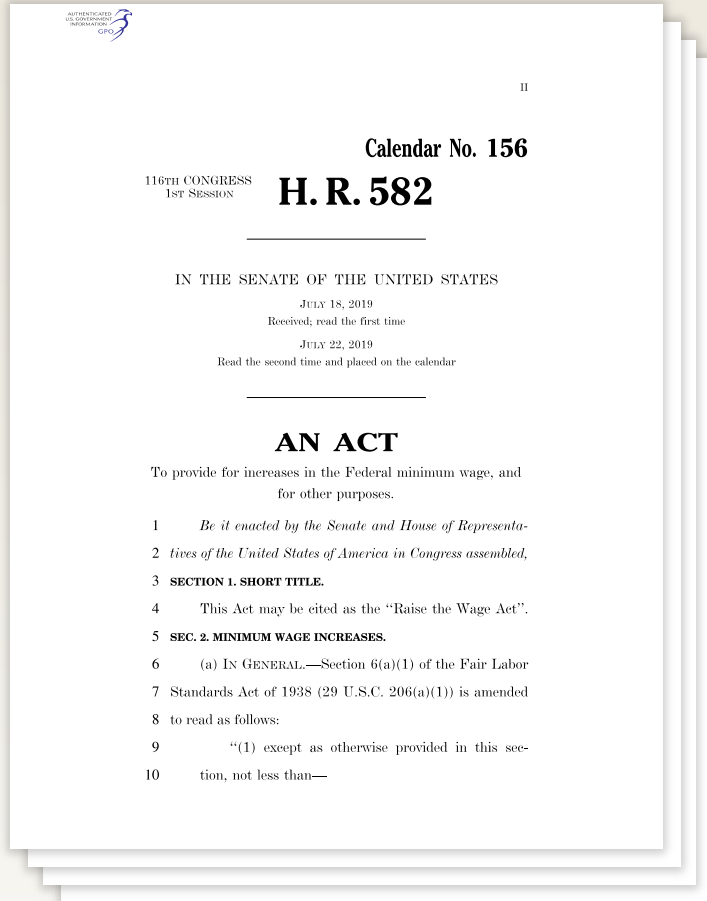
- Emergency Temporary Standard
- Mandatory health and safety procedures for COVID.
- Current administration relying on guidelines and the General Duty Clause.

## **Paid Leave**

- Biden supports Healthy Families Act and Emergency Federal Fund (14 days' paid leave, up to \$1,400 per week) for COVID-related leave



# FEDERAL MINIMUM WAGE INCREASE



- Raise the Wage Act (H.R. 582)
  - Raise federal minimum wage to \$15 per hour using 6-year phase-in approach.
  - Annual increases thereafter determined by DOL Secretary.
  - Economic impact to be studied during early stages.
  - Passed in the House in July 2019 as a result of centrist compromises.

# INCREASE IN MINIMUM SALARY FOR EXEMPT STATUS

- Current minimum salary requirement for exempt status: \$35,568 (\$684 per week).
  - Effective 1/1/20.
  - Increased threshold from \$455 per week.
  - Allows up to 10% of the standard salary to come from bonuses and commissions.
  - Raised minimum for highly-compensated exemption to \$107,432.
  - No automatic updates.
  - No change in duties test.

# DEFINING “EMPLOYEE”—WORKER CLASSIFICATION

- Reclassifying independent contractors as employees.
- Targeting gig economy.
- Misclassification substantive violation with additional penalties.
- New definition for all federal labor, employment, and tax laws.
- Adopting the MA and CA “ABC” test for employee status.

# DEFINING “EMPLOYEE”—WORKER CLASSIFICATION (CONT’D)

- ABC test—deemed employee unless:
  - **A.** Free from control and direction.
  - **B.** Performing services “outside the usual course of business.”
  - **C.** Customarily engaged in independently established business.
- CA legislated numerous carve-outs.
- Sparked challenges in court and a successful ballot initiative.



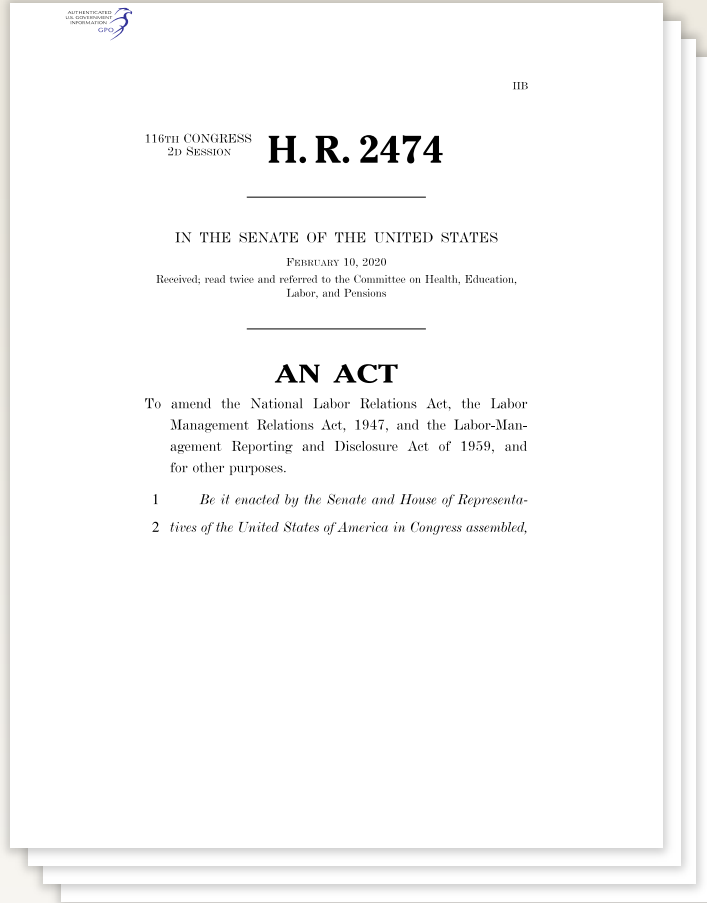
# EMPLOYMENT ARBITRATION & NONCOMPETES



- “Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration[.]”  
<https://joebiden.com/empowerworkers/>
- Biden’s “Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions” states that:
  - Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements.



# EXPANDING LABOR RIGHTS: PRO ACT



## PRO Act (H.R. 2474)

- Class and collective actions would be protected activity under Section 7.
- Reinstate use of “micro-units.”
- Expand employees’ access to employer systems.
- Expand scope of joint-employment under NLRB.



# PRIVACY & SECURITY

# TOP PRIVACY ISSUES IN 2021



As we look forward to 2021, the combination of the new administration, new and proposed laws in the US and abroad and the ever-present threat of cyberattacks means that the coming year will be a big one for privacy and cybersecurity.

There are six main areas that we see as the key focus for privacy and cybersecurity for both the Biden administration and for the private sector:

- Priorities in the Biden Administration
- State and Federal Privacy and Cybersecurity Legislation
- The FTC and State Attorneys General
- Health Privacy and Cybersecurity
- Cybersecurity Threats and Data Protection
- The European Union, Brexit, Data Transfers and Other International Issues

# PRIORITIES IN THE BIDEN ADMINISTRATION



## PRIORITIES

- The increase in cyberattacks and related threats to both the US government and the privacy of US citizens will likely require the Biden Administration to focus on privacy and cybersecurity in the coming months
- As agency heads are nominated and confirmed, a better picture will emerge
- Enforcement activity is unlikely to abate
- Vice President Elect Harris' influence has the potential to further elevate privacy issues



# STATE AND FEDERAL PRIVACY AND CYBERSECURITY LEGISLATION



- California voted in November 2020 to supplement the CCPA with the new California Privacy Rights Act (CPRA)
- Other states may follow suit
  - Washington? New York?
- There may be both comprehensive vs. sector-specific legislation
- There is a prospect of a national privacy law in the coming years

# THE FTC AND STATE ATTORNEYS GENERAL



- FTC enforcement is likely to continue, and may even expand as Democratic Commissioners assume the majority
- Legislative changes in coming years may address limitations on the agency's authority
- Changes to Gramm Leach Bliley security regulations are on the horizon
- State Attorneys General are increasingly active

# HEALTH PRIVACY AND CYBERSECURITY



- COVID has changed the way that the government and companies handle health data
- Because of COVID, telehealth has become far more common and has raised a number of privacy and cybersecurity issues for companies
- Cybersecurity breaches in the health industry increased significantly in 2020
- There are potential updates to the HIPAA Privacy Rule coming in the near future
- Other regulators are jumping into health privacy



# CYBERSECURITY AND DATA PROTECTION



- Because of the increase in cyber breaches (and associated costs and litigation) there is a greater national focus on cyber threats
- SolarWinds and other major breaches have highlighted weaknesses in the US government and private sector cyber infrastructures
- The SolarWinds breach has also highlighted the importance of vendor and third party security
- Preparation for breaches is becoming a critical business need



# THE EUROPEAN UNION, BREXIT, DATA TRANSFERS AND OTHER INTERNATIONAL ISSUES



- The international privacy and cybersecurity landscape is rapidly changing
- In the EU:
  - *Schrems II* has made the future of EU-US cross-border data transfers unclear
  - New standard contractual clauses offer some protection but must be finalized and then implemented by companies
  - Brexit adds new complexities to the landscape
- In other international jurisdictions:
  - New GDPR-like privacy law in Brazil
  - New and proposed legislation in other major international jurisdictions, including China, India and Canada



# SECURITIES

# WHAT TO EXPECT FROM THE SEC



Priorities articulated by Biden campaign, coupled with Obama administration focus, suggest big changes in SEC leadership, regulation and enforcement, including:

- More progressive tone from the top;
- Enhanced disclosure requirements;
- Human capital mandates;
- Focus on shareholder engagement; and
- Increased enforcement activity.

# SEC LEADERSHIP CHANGE



Commission Chair Jay Clayton departed prior to year-end.

- Emphasis on increasing market access to investors
- Focus on “Main Street” fraud
- “Modernization” of existing regulation

Expected shift in focus

- Mary Jo White’s “broken window” strategy
- Implementation of broad social policy goals
- End to shareholder capitalism



# ENHANCED DISCLOSURE REQUIREMENTS



Expect to see increased regulatory oversight of market participants, especially in the form of enhanced ESG-related disclosure requirements:

- Climate change/environmental reporting
- Board composition
- Human capital resources
- Move from principles-based reporting to more standardized, prescriptive disclosure requirements

# HUMAN CAPITAL MATTERS



Regulations aimed at achievement of articulated social policy goals:

- Board diversity mandates
  - California public company legislation
  - Nasdaq proposal of revised listing rules
- Outstanding Dodd-Frank Executive Compensation Rules
  - Clawback
  - Pay-versus-performance

# FOCUS ON SHAREHOLDER ENGAGEMENT



The new SEC regime is expected to take action designed to encourage shareholder engagement and expand shareholder access

- Shareholder board nominees
- Shareholder proposals
- May revisit recent changes to ownership and holding period thresholds

# INCREASED ENFORCEMENT ACTIVITY



More aggressive SEC investigation and enforcement activity expected

- Increased funding for exam and enforcement personnel
- Focus on financial and corporate frauds
- Increase in actions against big business and large financial institutions
- Focus on insider trading/market manipulation
- Limitations on bad actor waivers
- Increase in judicial challenges to SEC authority



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