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**FOERSTER**

LANDSCAPE OF 2017 –  
WASHINGTON BRIEFING  
MATERIAL

*Presented by Bruce Mann, Katie Thomson, and Brad Wine*

# Presenters

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Bruce Mann  
Senior Of Counsel, San Francisco  
[bmann@mofo.com](mailto:bmann@mofo.com)



Katie Thomson  
Partner, Washington, D.C.  
[kthomson@mofo.com](mailto:kthomson@mofo.com)



Brad Wine  
Partner, Washington, D.C. and Northern Virginia  
[bwine@mofo.com](mailto:bwine@mofo.com)

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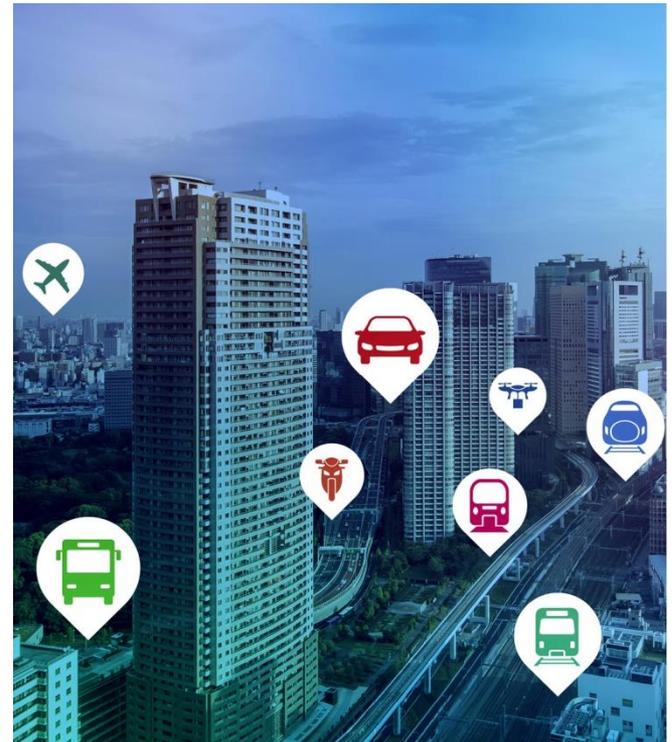
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TRUMP'S IMPACT ON  
TRANSPORTATION &  
INFRASTRUCTURE

# Critical Issues in Transportation Sector

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- Infrastructure Investment
- Autonomous Vehicles and Intelligent Transportation
- Energy and Sustainability
- Safety Management Systems
- International Trade



# Transportation Infrastructure:

## Current State of Play

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- Good News
  - Everyone agrees US needs to invest in infrastructure
  - Everyone agrees infrastructure is key to safety, efficiency, economic growth and use of intelligent transportation systems
- Bad News
  - Deficit in infrastructure spending is decades old
  - Debate over “pay for”
- DOT’s Build America Bureau
- Opportunities for US and Foreign Investment But Questions Abound

# Autonomous Vehicles and Intelligent Transportation Systems

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- Examples: Drones, Self-Driving Cars, Vehicle-to-Vehicle Communications, Positive Train Control
- Benefits
  - Safety
    - *E.g.*, 94% of auto crashes are tied to human error
    - Fatalities on US roads have increased in past 2 years after a steady decline in recent years
  - Mobility
  - Accessibility
  - Sustainability/energy efficiency
  - Drives innovation and competition around the globe

# Current State of Play: Significant Challenges

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- Safety Standards
  - *E.g.*, determining the level of acceptable risk
- Adequacy of Infrastructure
  - Readiness of aviation system, roads and other transportation systems to accommodate AI
- Cybersecurity
- Privacy
- Funding
- Federal v. State Laws
  - Preemption
- Data Sharing and Safety Management Systems
- Spectrum
- Sustainability/Energy Efficiency

# Energy & Sustainability

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- Transportation sector is now the biggest contributor of GHGs in the US
  - Exceeded power generation emissions for the first time in 2016
  - Petroleum products still fuel the majority of transportation operations in the US.
- Energy costs are the most significant driver of transportation costs
- Energy efficiency is good for the environment, business and consumers
  - *E.g.*, in US, transportation costs are the second highest expense for most American households.
- Role of Federal Government: Obama v. Trump

# Safety Management Systems

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- SMS relies on comprehensive data gathering, sharing and analysis to proactively mitigate risk
  - Safety Culture/Non-Punitive Reporting
- Standard throughout the aviation industry worldwide
  - Next step in the evolution of aviation safety
  - Used by air traffic controllers, aviation safety, airports, air carriers
- Beginning to be adopted in other modes of transportation but in early phases
  - Rail
  - Transit
  - Motor vehicles
- Use of SMS critical to integrating innovative technologies, such as AVs
- Unclear whether Trump Administration will support or oppose SMS

# International Transportation Issues

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- International Aviation – Will US Abandon “Open Skies” Policy?
  - What is “Open Skies”?
    - Predicated on reciprocal safety and economic fitness standards
    - Approximately 116 agreements in place (including with Israel)
    - Supports competition, levels playing field, provides consumers with options
  - Trump Administration talks a hard line on trade
  - Implications of Norwegian Air International and Gulf Carrier disputes
- Harmonization of International Standards
  - US has been an advocate for harmonization of safety standards for years as has business
  - Do Trump’s protectionist leanings signal a retrenchment?

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TRUMP'S IMPACT ON  
ISRAEL

# Trump Administration Key Players

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## **Cabinet Positions**

1. *Dept. of State – Rex Tillerson*
2. *Dept. of Commerce – Wilbur Ross*
3. *Dept. of Homeland Security – General John Kelly*
4. *Dept. of Defense – General James Mattis*
5. *Office of the U.S. Trade Representative – Robert Lighthizer*

## **Other Key Positions**

1. *Chief of Staff – Reince Priebus*
2. *Special Advisor – Jared Kushner*
3. *U.N. Ambassador – Nikki Haley*
4. *Israeli Ambassador – David Friedman*
5. *Senior Counselor – Steve Bannon*

# Diplomacy and Israel

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- Trump's diplomatic strategy towards Israel & Palestine still is not clear.
  - Trump supports Israel and the peace process.
  - Ambassador Friedman (if confirmed) and Jared Kushner have been tasked with Israel / Palestine peace talks
  - Trump pushed for the U.S. to veto the U.N. Resolution condemning settlements, and called it “unhelpful” when it passed.
  - Intends to move embassy from Tel Aviv to Jerusalem.
- Trump is very critical of the Iran nuclear deal (the JCPOA).
  - Trump: “Iran cannot be allowed to have a nuclear weapon.”
  - Defense Sec. Mattis: Iran is “the single most belligerent actor in the Middle East.”
  - Unclear whether the JCPOA can be repudiated so long as Iran abides by it.
  - Enforcement likely to toughen.

## Impact on Israeli Businesses

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- *Commercial Item Sales* – Rules likely to be further simplified.
- *Vehicle Automation* – DOT likely friendly to autonomous vehicles.
- *Aerospace and Drone Tech* – DOT likely friendly re. drones; aerospace companies should watch out for flying tweets.
- *Investors in U.S. Commercial Real Estate* – Largely positive.
- *Energy Companies* – Embrace all tech in push for energy independent U.S.
- *Internet Companies* – Cybersecurity is high on Trump's agenda.
- *Banking and Financial Services* – Reforms likely.

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TRUMP'S IMPACT ON THE  
U.S. LANDSCAPE

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U.S. Landscape --  
Antitrust

# Antitrust Background

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- **Compliance:** There are over 100 Antitrust review regimes worldwide.
  - Deals often have 5 or more filings
  - Most common: US, Europe, China, Korea, Taiwan, Japan
- **Enforcement:** U.S. antitrust laws are primarily enforced by the Department of Justice's Antitrust Division, and the Department of Commerce's Federal Trade Commission.
  - Mostly shared and overlapping jurisdiction;
  - DOJ has exclusive purview over cartel actions.
  - Antitrust enforcement was somewhat more active under the Obama Administration.

# Antitrust Enforcement Under Pres. Trump

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- Trump's Antitrust enforcement may be more selective.
  - Sen. Sessions (Justice) and Steven Mnuchin (Treasury) historically have favored big deals.
  - DOJ Antitrust Division & FTC both likely more pro-business.
- Things that may change:
  - Fewer challenges based on decrease in innovation or decrease in “potential” competition.
  - Market concentration *per se* unlikely to be grounds to challenge deal.
  - May expand “investment only” exemption.

# Antitrust Enforcement: Industries & Priorities

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- Trump has espoused different views on different industries:
  - **Health Care** – Free market approach as Obamacare is modified.
  - **Defense** – Increase in defense spending while controlling costs.
  - **Media** – Antagonists during Trump’s campaign, media companies have been subjected to “War by Tweet,” and Presidential skepticism of AT&T-Time Warner deal.
  - **International** – “America 1<sup>st</sup>” may relegate international cooperation to 2<sup>nd</sup>.
  - **Cartels** – Cartel enforcement by DOJ is bipartisan; some speculate Trump may take things further (such as by bringing actions against OPEC)

# Antitrust Enforcement: Industries & Priorities

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- Where possible, companies should emphasize the Administration's priorities:
  - Protecting US jobs
  - Protecting US business
  - Avoiding concentrations of power
  - Pricing concerns – particularly in Pharmaceuticals
  - China concerns
- President Trump's use of Twitter for direct messaging is both a challenge and an opportunity.

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U.S. Landscape -- Foreign  
Investment in the United  
States

**It is the established policy of the U.S. government to “support unequivocally” international investment in the United States, “consistent with the protection of the national security.”**

Executive Order 13456; January 23, 2008, section 1

**“The Commission recommends Congress amend the statute authorizing the Committee on Foreign Investment in the United States (CFIUS) to bar Chinese state-owned enterprises from acquiring or otherwise gaining effective control of U.S. companies.”**

U.S.-China Economic and Security Review Commission  
Annual Report to Congress, November 16, 2016

**“In a Trump administration, CFIUS also would take into consideration whether the home country of a foreign buyer would allow a similar acquisition by a U.S. company. The plan makes specific reference to Chinese companies buying firms in America although the Chinese government restricts foreign purchases of its companies.”**

Congressional Quarterly, Reporting on Trump Trade “Action Plan”

## Background on CFIUS

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- Executive branch interagency committee chaired by the Secretary of the U.S. Treasury Department
- Reviews or may review any merger, acquisition, sizable investment, or takeover:
  - By or with any foreign person
  - That could result in foreign control of any person engaged in interstate commerce in the United States
  - That may implicate national security
- The President has the authority to block deals assessed as negatively impacting national security.

# CFIUS Members and Roles

## Voting Members



Steve Mnuchin\*



Wilbur Ross\*



Gen. James Mattis



Gov. Rick Perry\*



Gen. John Kelly



Sen. Jeff Sessions\*



Rex Tillerson\*



TBD



Robert Lighthizer\*

## Non-Voting Members

- Office of the Director of National Intelligence (produces threat analyses)
- Department of Labor (ensures consistency of mitigation with labor laws)

## Observers

- Council of Economic Advisers
- National Security Staff
- Office of Management and Budget

Other U.S. Government agencies may be asked to participate in specific cases on an ad hoc basis

# CFIUS Enforcement Under Trump Admin

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- New voting members of CFIUS may bring fresh perspectives.
- CFIUS enforcement may be strengthened.
  - Law could be amended to place additional restrictions on particular countries, such as China, gaining control of U.S. corporations.
  - Administration may add to those things it considers may impact national security (e.g., food security or job security).
  - May consider whether the home country of the buyer would allow a U.S. company to control one of its businesses.
- Trump unlikely to reconsider cases previously cleared by CFIUS.

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U.S. Landscape – Foreign  
Corrupt Practices Act  
("FCPA")

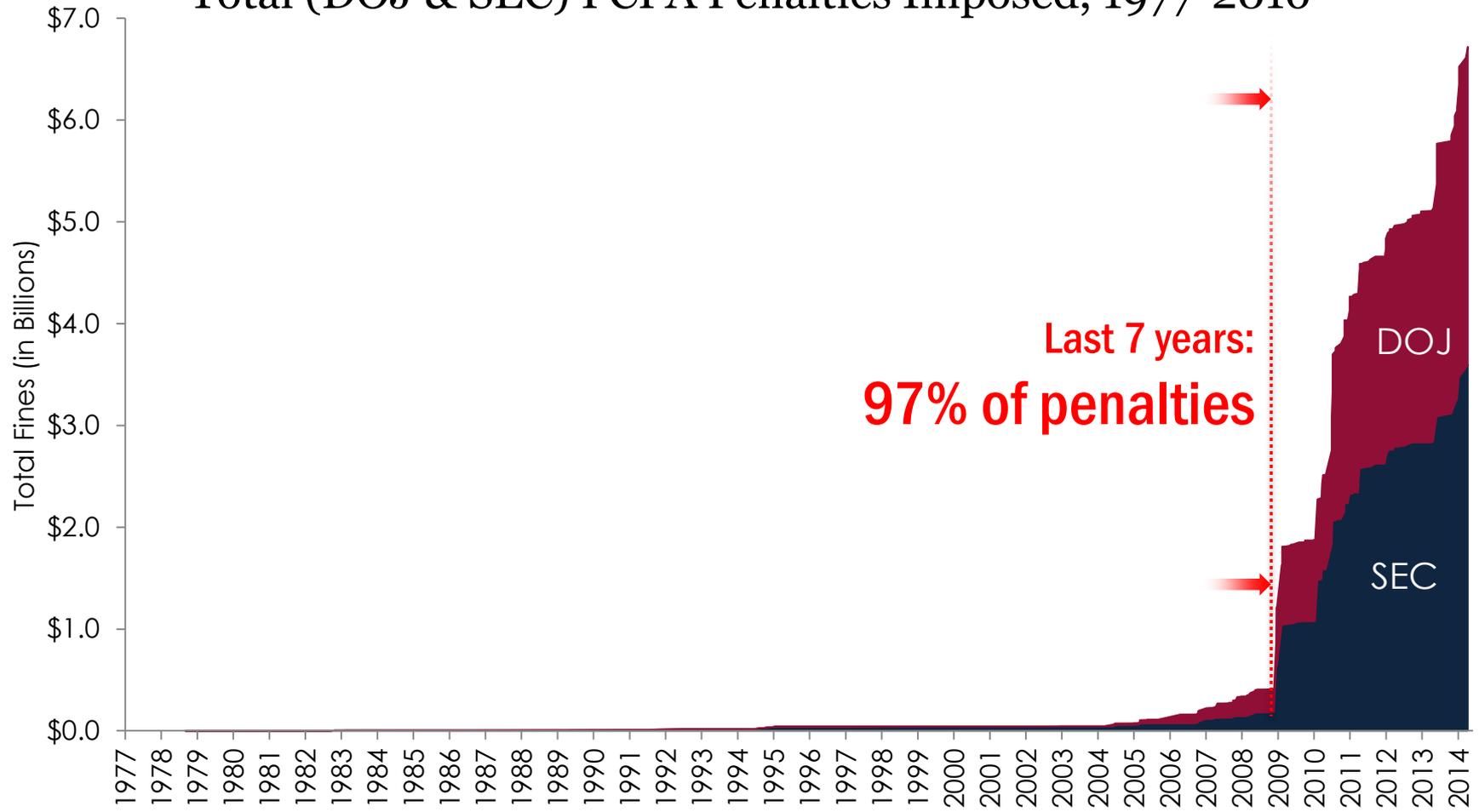
# FCPA Background

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- Anti-Bribery Provisions
  - Prohibits any offer or payment of **bribes** to **foreign officials** to assist in **obtaining or retaining business**
  - Applies to **issuers, domestic concerns, and foreign nationals or entities in U.S. territory.**
- Accounting Provisions
  - Applies only to publicly traded companies.
  - Books and Records Provision: Requires companies to make and keep books, records, and accounts, which, in reasonable detail, **accurately and fairly** reflect the transactions and dispositions of the assets of the issuer
  - Internal Accounting Controls: Requires companies to devise and maintain a system of **effective internal accounting controls**

# Enforcement Under Pres. Obama

## Total (DOJ & SEC) FCPA Penalties Imposed, 1977-2016



# Trump's Impact on FCPA Enforcement

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- **Bribery provisions.** There are indications that the FCPA bribery provisions will no longer be a priority under the Trump Administration, and that policy overhauls may be on the horizon.
  - Trump has called the FCPA a “horrible law” that puts U.S. companies at a “huge disadvantage.”
  - SEC Chair Jay Clayton likely less confrontational than predecessor, and has questioned unilateral approaches to anti-corruption.
  - Under Sen. Sessions, DOJ use of Deferred Prosecution Agreements and Non-Prosecution Agreements may decrease, though overall enforcement impact is uncertain.
  - Push for internal controls and global enforcement will continue.
- **Transparency Provisions.** Enforcement of transparency provisions less likely to change; and multinationals would still be subject to EU provisions anyway.

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U.S. Landscape -- False  
Claims Act

# False Claims Act Background

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Originally enacted in 1863 in response to fraud on the U.S. government during the Civil War



Punishes the submission, and the causing of submission, of false claims to the government



Civil and criminal components and penalties for both corporations and individuals; rewards for whistleblowers / “qui tam” relators.



Applies to prime contractors, subcontractors, grant recipients, sub-recipients, and other federal program participants

## FCA: DOJ's Civil Weapon of Choice

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# Substantial penalties

\$53 billion in federal civil recoveries since 1987

**Treble damages**  
(i.e., three times actual damages)

**Fines of \$5,500 to \$11,000**  
for each false claim

**Attorneys' fees and costs to prevailing plaintiff**  
(if case goes to trial)

**Suspension and debarment**

# Trump's Impact on FCA Enforcement

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- FCA enforcement will be a focus of the Trump Administration
  - Strong financial incentive to continue enforcement.
  - Trump has vowed war on fraud, waste, and abuse.
  - Senator Sessions' record on the Judiciary Committee indicate a focus on tough enforcement measures.
  - Sophisticated *qui tam* bar would prosecute cases even if DOJ cut back.
- Trump may reign in enforcement for simple mistakes, such as in billing.
  - Rep. Price, HHS Secretary nominee, said focus should be on finding blatant fraud, not billing errors.
  - “Materiality requirement” imposed by U.S. Supreme Court also limits implied certification causes of action.
  - Combined, these may bring FCA back around to its original purpose – punishing actual fraud against the government, rather than simple errors or failures in compliance.

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U.S. Landscape --  
Securities Regulations

# Trump's Impact on Securities Regulations

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- Two vacancies on five member SEC
  - Three vacancies if current Chair resigns when replaced as Chair
  - Past three SEC Chairs were women who came from regulatory and enforcement backgrounds
  - Jay Clayton is a business lawyer advising companies and negotiating transactions

# Trump's Impact on Securities Regulations

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- Changes can be expected
  - More cases being settled and less headline seeking enforcement litigation
  - Less onerous restrictions on foreign public companies
  - Less zealous enforcement of Foreign Corrupt Practice Act
    - Clayton has expressed views on a less zealous approach to FCPA, but that was before the DOJ and SEC targeted many non-US Companies; with DOJ and the SEC collecting a total of \$1.8 billion in FCPA fines, penalties and disgorgement in 2016.
    - Clayton questioned the unilateral approach of the US and since his comments. DOJ and the SEC have accomplished much in building international coalitions and relationships with law enforcement agencies around the globe. In effect, DOJ and the SEC have “institutionalized” global anti-corruption enforcement, and it will be extremely difficult for any future administration to dismantle this existing infrastructure.

# Trump's Impact on Securities Regulations

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- Changes can be expected (cont'd)
  - Settlements are more likely to seek new safeguards, not fines that punish stockholders
  - Less use of disclosure to promote corporate governance
    - Focus on financial disclosure meaningful to investors, not executive compensation
    - Possible reduced access to proxy statement disclosure by public interest groups
  - Scale back rules viewed as slowing economic growth
  - Emphasis on speed of review and increased effort to promote capital formation
  - Less emphasis on regulation and reduced oversight of asset managers

# Trump's Impact on Securities Regulations

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- Impact on mergers and acquisitions will be minimal, but processing proxy statements for those subject to SEC regulation will be more rapid
  - Only mergers involving issuance of securities registered with SEC or requiring shareholder approval by publicly traded companies are regulated by SEC
  - SEC processing delays calling for different or more proxy statement disclosure may be reduced
  - Less potential for SEC insistence on revised proxy solicitation because of changes in transaction.

# Questions?

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