100 Days In: What Hedge Funds can expect from Congress, the SEC and the Trump administration
On April 19, 2017, the Hedge Fund Industry Practice team hosted an event at the New York Yacht Club titled “100 Days In: What Hedge Funds Can Expect from Congress, the SEC and the Trump Administration.” Hedge fund professionals, including general counsels, hedge fund principals, and chief compliance officers attended the event, which featured an engaging panel discussion moderated by Mark Kornfeld, a partner in BakerHostetler’s Hedge Fund Industry and Securities Litigation and Regulatory Enforcement Practices.

The panelists included Marc D. Powers, national leader of BakerHostetler’s Hedge Fund Industry and Securities and Regulatory Enforcement Practice Groups; Troy A. Paredes, former Commissioner of the U.S. Securities and Exchange Commission and Paredes Strategies LLC Founder; Marie Noble, Partner, General Counsel and Chief Compliance Officer, at SkyBridge Capital; and the Hon. Michael A. Ferguson, Former U.S. Congressman, and National Leader of BakerHostetler’s Federal Policy team.

Who Has the President’s Ear?

Mark Kornfeld kicked off the panel discussion with a request for Michael Ferguson to provide a brief overview of the current political landscape surrounding the Trump administration and how decisions are made, and to share his thoughts on who has the President’s ear. In response, Ferguson noted that although “it’s kind of a wild time in Washington,” there has been “something different going on in the country over these last couple of years.” Ferguson served in Congress with Vice President Pence, and bringing to bear his decade-long experience as a U.S. congressman, Ferguson emphasized that Trump’s win was a great lesson for the establishment.

According to Ferguson, Trump has gone from “upending the political establishment for the last year and a half” to “spending the last three months or so upending the government establishment.” Ferguson noted that although “it’s kind of a wild time in Washington,” there has been “something different going on in the country over these last couple of years.”

Ferguson also noted that Trump’s push on healthcare is not over, because it is a “lynchpin to getting tax reform done.” Ferguson emphasized that if Trump can get through healthcare, then tax reform will become a lot easier. Ferguson remains hopeful that Trump can succeed on infrastructure, trade and financial reform, including reforms to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Ferguson acknowledged, however, that it becomes harder to do without passing healthcare.

Ferguson believes that without healthcare reform, tax reform could still get done, but it would be a “less robust package,” and would be harder to attract the votes.

The Business Perspective

After Ferguson’s introductory remarks, Kornfeld turned to Marie Noble for insight on how the general counsel of a global alternative investment firm like SkyBridge would approach the Trump Administration from an investment perspective.

Noble noted that her investment team “views the Trump presidency through the lens of macroeconomics.” According to Noble, “if Trump is able to deliver on at least some of what he promised in the campaign, we should be in a better position economically.” Noble emphasized that “job growth, economic stimulation, the promises in the areas of deregulation, infrastructure spending to the tune
of trillions of dollars and tax reform” should all be highly stimulative to the economy. According to Noble, Trump would not need to get all of these things right for the economy to benefit.

Noble used community lenders as an example of how reforms could lead to increased economic activity. Noble highlighted that after the election, bank stocks rallied, but community lenders remained in an interesting position, because they have been squeezed the most. Noble noted that although community lenders are not the “big banks,” they are nonetheless “subject under Dodd-Frank to the rules that apply to the big banks.” Noble noted that the community banks also have the burden of securing a disproportionate compliance infrastructure in order to keep up with all the rules that apply.

According to Noble, “if you could have some sort of relief in the deregulation area,” perhaps by raising “the asset standard from 50 billion to 250 billion to be designated a systemically important financial institution,” then community lenders would not be subject to stress testing, and they would have some relief. Noble noted that deregulation could also lead to more bank M&A, because currently, banks are cautious about tripping the $50 billion threshold. Noble maintained that increasing the threshold would not only open up more M&A but would also stimulate growth.

Noble emphasized that her fund views the Trump Administration “through the lens of the economy, while tuning out the noise that comes along with everything else that has been happening.” According to Noble, “blocking out the noise” also applies to President Trump’s tweets. Noble highlighted that the market has yet to react in a significant way to the President’s tweets on trade, China or North Korea, which suggests that Trump’s tweets have yet to adversely impact the market. Noble suggested staying focused on the macroeconomics, but acknowledged that the tweets are yet another unpredictable factor for investors to consider.

SEC Enforcement Under Trump

Shifting from investment philosophy to enforcement, Kornfeld turned to Troy Paredes, former Commissioner of the U.S. Securities and Exchange Commission (“SEC”), to provide insight on the impact the Trump Administration may have on the SEC.

According to Paredes, one of the top priorities at the SEC will be ensuring that senior staff positions are filled, given the number of staff departures since Trump took office.

Paredes noted that the change in staff will likely lead to a different focus at the agency, depending on whom Jay Clayton picks to head the divisions at the SEC. Clayton was approved by the Senate as Trump’s choice to lead the SEC, on May 2, 2017, and will succeed former SEC Chairman Mary Jo White, who was appointed by President Obama in 2013.

Paredes also noted that there remain two SEC commissioner positions that will eventually need to be filled. Kara Stein, a Democrat, and Michael Piwowar, a Republican, are currently in those roles, but eventually will be replaced, as they were both appointed by President Obama. According to Paredes, filling seats at the SEC remains a big question mark.

Paredes acknowledged the Trump Administration’s focus on economic growth, and emphasized that “if you take economic growth and run it through the lens and mission of the SEC, what that means is a particular focus on facilitating capital formation.”

According to Paredes, this could be with respect to “private offerings, and also as to public offerings.” Paredes noted that “it is often the case that in commission speak, in SEC speak, you have these two competing forces”: (1) facilitating capital formation, or (2) protecting investors, “as if it is one or the other, [and] you can’t have both.”

Paredes looks forward to a “rethinking of the ways in which capital formation and facilitation of capital formation are actually good for investors too.” Paredes emphasized that “if you reform the regulatory environment in order to make it easier for companies to raise money, without question it is good for companies, but it turns out that in many ways, it is going to be good for investors as well.” Paredes is hopeful that this shift in the overall perspective of the SEC comes to the fore. Paredes believes that if it does, it will start to change the flavor, tone and politics around some of these debates.

Paredes also stated that he believes the SEC’s three-part mission of (1) investor protection, (2) maintaining fair and efficient markets, and (3) facilitating capital formation will continue to be a focus of the SEC. Paredes emphasized that despite the forces and outside influences that come to bear, the SEC takes its independence very seriously.
Paredes suggested that “there will be a renewed focus on what the [SEC] can do to facilitate capital formation.” According to Paredes, focusing on capital formation is entirely consistent with the SEC’s mission. Paredes also suggested that a focus on capital formation may translate into different changes when it comes to rules and guidance. Paredes was careful, however, not to describe these would-be changes as a “shift” in the SEC’s focus, and preferred to describe them as “differences.” Paredes suggests that the SEC would simply handle matters “in a different way than has been the case over the last [several] years.”

Paredes also advised that compliance must always be front and center, but acknowledged that sometimes business professionals do not know what the expectations are in order to effectively comply with SEC rules. Paredes suggested that the SEC should find ways to give market participants more insight, guidance and understanding, and noted that he could see the SEC providing more guidance as a potential pivot point.

**Perspective From Outside Counsel**

Marc Powers ultimately provided the outside counsel perspective on what industry professionals could expect from the SEC and its enforcement philosophy under the Trump Administration. Powers emphasized that although facilitating capital formation was not an SEC priority in previous years, this is one area where Trump’s impact could make the difference.

Powers is hopeful that given Jay Clayton’s background as a Wall Street lawyer, he may likely redirect the SEC’s focus as SEC Chairman. Indeed, Clayton has argued for scaling back financial regulations to encourage more companies to go public, and the Trump administration has made clear that it wants to roll back rules that hinder growth, including regulations under Dodd-Frank.

The SEC will likely “have a different [set of priorities],” which is consistent with the Trump Administration’s focus on economic considerations. – Marc Powers

Powers stressed that the SEC is not only a “civil enforcement agency,” and that with Clayton at the helm, the SEC will likely “have a different [set of priorities],” which is consistent with the Trump Administration’s focus on economic considerations. Powers is hopeful that the new SEC Chairman will “care about capital formation, economic considerations and the like.”

Powers also noted that in recent years, associate directors at the SEC have been given increased authority to open investigations and issue subpoenas, which has led to more litigation. According to Powers, this trend is likely to continue well into the next year or two, given the number of matters that are already in the pipeline.

Powers nonetheless believes that with the changes in SEC leadership, there will eventually be a shift in enforcement priorities.


Under 28 U.S.C. § 2462, a five-year statute of limitations applies to “any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture.” The Eleventh Circuit has held that under § 2462, “forfeiture and disgorgement are effectively synonyms,” and therefore “§ 2462’s statute of limitations applies to disgorgement.” *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). By contrast, however, the Tenth Circuit in *SEC v. Kokesh*, 834 F.3d 1158, 1164, 1165 (10th Cir. 2016), cert. granted, 137 S. Ct. 810 (2017).

Powers emphasized that *Kokesh* will be an important decision to watch. The Supreme Court heard oral argument in *Kokesh* on April 18, 2017.

**Closing Remarks and Bold Predictions**

Kornfeld eventually brought the panel to a close with an engaging discussion on the impact the Trump Administration may have on trade, foreign policy, and SEC enforcement.

Kornfeld asked Paredes whether given the *Kokesh* disgorgement case before the Supreme Court and the possible adverse impact it may have on the SEC and given what appears to be a new focus on capital formation, he believes “the SEC’s enforcement power is under siege.” In response, Paredes made clear that he did not believe that the SEC was under siege, and predicted that the industry will likely continue to see an SEC that maintains its focus on enforcement and misconduct.
According to Paredes, the changes that generally come with the installation of a new SEC Chairman are with respect to how the SEC prioritized its resources between enforcement and examination. Paredes made clear that irrespective of whether there is a shift from a Democratic administration to a Republican administration, or vice versa, a new SEC Chairman will nonetheless be faced with the Division of Enforcement, which is the largest division at the SEC.

Paredes noted that the question would ultimately come down to the allocation of resources, and how best to do so between the divisions. Paredes expects there to be some changes, but believes that it is important not to overstate the impact the transition from a Democratic to a Republican administration may have on the SEC.

Paredes ultimately believes that we “will continue to see an active enforcement program at the SEC” and it “will take time to see how the priorities shake themselves out exactly.” According to Paredes, there are a lot of cases in the pipeline, so it will take time to see how the new SEC Chairman approaches enforcement. Paredes maintained that SEC regulators will likely continue to focus on data, analytics and artificial intelligence, among other things, which will have profound implications for compliance professionals.

Pivoting to Ferguson and Noble, Kornfeld asked for thoughts on the Trump Administration’s: (1) infrastructure plan, which Kornfeld noted should, “in theory,” be good for the hedge fund industry as a whole; (2) plan to repatriate $2.4 trillion in foreign capital; and (3) foreign and trade policy, which appears to be based on an “America isolationist” approach to trade.

In response, Ferguson noted that “Trump is less Republican than a lot of Republicans,” and that we must begin by recognizing that Trump is a nonideological president. According to Ferguson, Trump seems to be much more interested in bilateral trade than multilateral trade, and Trump will likely push for such agreements in future trade negotiations. Ferguson emphasized that Trump is much more comfortable going head-to-head in a negotiation than sitting at a round table, with respect to trade.

According to Ferguson, “[Trump] wants to feel like he won [on trade] and wants the other side to feel like they lost.” Ferguson acknowledged that this is not typically how diplomatic and trade negotiations are worked out, but noted that it is left to be seen how it works for the Trump Administration. Ferguson also noted that foreign leaders are testing Trump in an “almost coordinated way” to see if Trump can respond to multiple foreign challenges at the same time.

According to Ferguson, Trump will be judged on whether he can successfully pass healthcare and tax reform, whether he can build the wall, and what the economy looks like after four years. However, Ferguson predicts that we may see more of an activist policy from the Trump Administration on the foreign policy front.

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Ferguson believes that Trump is getting more comfortable with foreign policy challenges. Ferguson emphasized that domestic policy is usually messier and more complicated, and we are witnessing a President and Presidency that feels like it is hitting its stride on foreign policy. Ferguson also noted that there tends to be a unifying factor with foreign policy, as can be seen from the response to the Syria bombings.

Ferguson noted that he will not be surprised if both healthcare and tax reform get done in 12 months, but acknowledged that given the political dynamics in the country, it will be difficult to get any Democratic support for either initiative. Ferguson also predicts a significant change in Trump’s staff before the end of the year.

According to Noble, investors are looking forward to tax reform and a potential infrastructure deal, and corporate America is hoping that Trump can continue the economic cycle. Noble emphasized that “corporate America would not be happy with a trade war with China,” because it would be antigrowth.

“Corporate America would not be happy with a trade war with China.” – Marie Noble

Noble hopes that Trump could score some domestic points by building consensus and working with Democrats on infrastructure, and then finding common ground on tax reform. Noble noted that she is “not hoping for extreme success, but a moderate level of success.” Noble also believes 4 percent GDP growth is optimistic, but is hopeful nonetheless that if Trump can achieve some moderate success, he can continue to extend the economic cycle.
Powers predicts that given the current composition of the Supreme Court, the Court in Kokesh will ultimately find that § 2462’s statute of limitations applies to disgorgement actions. This would limit the ability of the SEC and other government agencies to impose certain fines after five years.

According to Powers, we may also see less novel legal theories being advanced by the SEC, given the current change in leadership. Using cases that have been brought against fund administrators as an example, Powers noted that although many of these cases involved third-party misconduct, the SEC used a “thin reading” of the Investment Company Act to hold fund administrators responsible for failure to observe and uncover red flags. Most of these cases ended with settlements, and Powers viewed this application of the law as novel.

Powers believes that with changes in SEC leadership, the SEC will likely take a more conservative view on the application of “novel and unique” legal theories.

Kornfeld concluded the panel with a prediction that cybersecurity may likely become Trump’s primary focus, given the threat of cyberattacks from foreign enemies. Kornfeld believes the next major cyberattack on the United States would make the alleged Russia hacking of the presidential election seem microscopic.

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