

Post-election possibilities

ABA senior lobbyists look at what's likely to change-and what won't, no matter who wins next month

It may seem counterintuitive to predict anything past Nov. 6, given the high-stakes atmosphere surrounding this year's presidential elections. Yet the possible outcomes are relatively few. The principal one is obvious: Either President Obama wins reelection or Mitt Romney gains the White House. While it's possible the Senate could change hands, neither side is likely to have a 60-seat majority. No one is predicting a change of control in the House. Bottom line: "We'll still be dealing with a divided government," says Ken Clayton, ABA executive vice-president for legislative affairs.

ABA issues latest

election analysis Nov. 7

ABA members can read a post-election analysis by the association's government relations team that was published Nov. 7. The analysis reviews the election's likely impact on such key issues as Dodd-Frank Act implementation, Basel III, the Consumer Financial Protection Bureau, housing reform, the fiscal cliff, and tax reform. Read the analysis.

Attend ABA's 2013 Government

Relations Summit next April

Because the Obama administration and Congress will be making decisions that will influence banking's future, ABA is strongly encouraging bankers to plan to attend the 2013 ABA Government Relations Summit, April 15-17, in Washington, D.C. The conference will provide bankers with an opportunity to hear detailed briefings from Washington insiders and tell policymakers what they think about key issues. Registration is free. Read more and register

Though

the possible outcomes are few, the significance of a change in the White House would be major. "Bankers are very interested in this election," observes Jonathan Felts, senior vice-president of grassroots and political operations. "They recognize that their ability to serve their communities will be affected dramatically."

ABA's

government relations team is paid to think ahead about possible outcomes and, as much as possible, to prepare for any eventuality. So we put questions to several key players about what life could be like in 2013 and beyond.

Chief

Operating Officer Mike Hunter frames the question in a broad context before jumping into specifics.

"The

fiscal challenge this country faces is so profound," he says, "that it simply has to be addressed in a way that is both pragmatic and effective. We need not just a five-year plan or a ten-year plan. We need a meaningful 20-year plan for how we deal in a systematic way with the fact that this country is living beyond its means. Whether you're a family or a country that's not sustainable."

That

plan will require austerity and widespread recognition of the need for shared sacrifice, says Hunter. It also requires recognition of the need for economic growth and getting capital off the sidelines. "Banks are an important part of that," says Hunter, "because you're not going to be able to grow the economy without credit. And without this industry feeling like it has the confidence of this government as well as its customers there will be an element of this equation missing."

What

will build that mutual confidence? "Whoever populates the government we'd like to see a more sensible approach to how government is approaching the supervision and oversight of banks. We've got to get into a different trajectory that encourages the traditional role of banking."

What

follows is a series of questions looking at the prospects for several key banking issues with answers from Hunter; James Ballentine, executive vice-president for congressional relations and political affairs; Clayton, and Felts.

Financial Institutions Examination Fairness and Reform Act

The industry had high hopes for the Examination Fairness bill this year, but despite almost 200 cosponsors in the House and about a dozen in the Senate, it has not moved out of committee. What are the prospects next year?

"We developed a critical mass with this bill and in the near term sent a strong message to regulators that there needs to be a balance between their discretion with regard to examination and supervision and the opportunity for recourse on decisions made regarding a bank," says Hunter. Right now there's not a lot of meaningful recourse, he adds. The regulators point to their existing appeals processes, he notes, but they are not formal enough and inconsistent across regulators. The purpose of the bill is to make the process more formal and consistent by creating an opportunity for an independent party to review regulatory decisions about a bank.

"Long term," Hunter continues, "we're optimistic about this legislation becoming law regardless of who is President or who has the majority in Congress. This bill has no partisan elements in it and that is reflected by the bipartisan support it has."

Changes to the Dodd-Frank Act

If President Obama wins reelection, does that mean that there is no chance for getting changes to Dodd-Frank? And conversely, if Governor Romney wins the election, does that make repeal a possibility?

None of the ABA staff experts we spoke with held out any realistic possibility of wholesale repeal.

"I see no scenario, even with Governor Romney in the White House, of the law being repealed in its entirety," sums up James Ballentine. "For one thing, you would have to have something to replace it with."

Most bankers he's spoken with don't expect a 100% repeal under any election scenario, notes Felts.

But what about changes?

"The

President has been pretty intractable in his view that Dodd-Frank is off the table," observes Hunter. "If he is reelected, I hope there would be a thaw around that. As we documented in the publication we produced earlier this year, *Dodd-Frank and Community Banks: Your Guide to 12 Critical Issues*, there are clearly elements of this bill that do great damage to banks least able to absorb the regulatory requirements imposed on them by Dodd-Frank." The issues described in the publication, he added, demonstrated that the \$10 billion threshold is meaningless in terms of regulatory burden.

"Like

any piece of legislation," Hunter continued, "there are mistakes, things that overstep, and provisions that just don't work, and you address those in subsequent years. We've identified a number of those. I'm hopeful the President's position will evolve if he's reelected. Governor Romney has stated publicly that there are problems with Dodd-Frank and they need to be addressed."

Clayton

sees this possible scenario for a second Obama administration, which up until now has positioned itself as a defender of Dodd-Frank: "With the election in the rear-view mirror, they may be willing to give a bit. It might be on the regulations rather than the actual law."

"With

the departure of members of Congress who are wedded to this bill, more inroads could be made," notes Ballentine. "It's difficult to alter a bill when one person whose name is on the bill is still in Congress, particularly someone like Democratic Rep. Barney Frank who is knowledgeable, prominent, and so strong a defender of this legislation." The respect for Congressman Frank, from both sides of the aisle, says Ballentine, has deflected any changes.

Banks

are indispensable to economic growth, says Hunter, but Congress with Dodd-Frank took a "belt and suspenders" approach to regulation-overkill-that has been continued by the regulators in implementation.

"There's

a difference between giving important entities balanced regulatory supervision and a laissez-faire approach," says Hunter. "The laissez-faire approach isn't on the table. What is on the table is that we can either have this belt-and-suspenders approach or we can have a balanced, thoughtful, effective supervisory regime that ensures careful decision making in banks and protects consumer rights, but which leaves banks with the ability to play the essential role they have played in the economy for decades."

Consumer Financial Protection Bureau

CFPB is one of the key elements of the Dodd-Frank Act, and has already shown that it is going to aggressively pursue its mission as it sees it. What is the future for this agency given various post-election scenarios? Will it get a new director?

"Whoever is director is beside the point," says Hunter. "The structure of this agency is antithetical to basic principles of checks and balances that are central to how this country's government is organized." He says that though it's "not a sin" for an agency to be funded by a dedicated revenue flow versus an appropriation, the issue is that the CFPB has no board or commission overseeing it. Also: "You cannot redress a rule promulgated by the CFPB without a supermajority of the Financial Supervision Oversight Committee," says Hunter.

The principles of how to reform CFPB's structure that have been laid out ought to be receptive whether you're a Republican or Democrat, says Hunter. There ought to be oversight; it ought to be an appropriated agency; and there ought to be a board or a commission that decentralizes the authority, "so you don't have one person making decisions about rules and policies that impact a \$14 trillion industry." (CFPB funding largely derives from Federal Reserve coffers, not Congress-plus financial penalties, such as in the recent Discover Card case.)

"Simply put, the governance of CFPB needs to be democratized," says Hunter.

ABA is not advocating the repeal of the CFPB. That fight is over. But it would like to see the agency restructured more along the lines of FDIC, with its bipartisan board governance, given the tremendous power and authority that it's able to wield.

As a practical matter, Ballentine notes that even with a Romney win, the impact on CFPB will depend on how far along the agency is with various projects. Director Richard Cordray's recess appointment will end this year no matter who is elected, says Ballentine. If President Obama is reelected, he could resubmit Cordray's name to the Senate for the post of director. Then, says Ballentine, it becomes a question as to whether the opposition is willing to sustain the fight for four more years.

Hunter believes, however, that Congress has to deal with CFPB's governance structure in order for there to be a director that is nominated and approved consistent with the statute. There are things that were put on the table in the House version of Dodd-Frank that are not that controversial that would resolve this, he adds.

The Federal Reserve

Would the Fed's role and reach be reined in under a Romney administration?

"The Federal Reserve's structure and authority have been a topic for debate in this country for a long time," says Hunter. "Sometimes louder than others. Clearly the Fed is on the intellectual radar screen of members of Congress and of the regulated entities.

My personal view is that another major restructuring of the regulatory fabric right now is probably unwise-I would hope that discussion is deferred to a later date after we get a better handle on our immediate fiscal challenges.

Fair lending

The application of disparate impact to fair-lending enforcement is largely driven by the Justice Department, so could there be a shift in this area if there is a change in the Administration?

ABA has taken a very strong position on this issue, says Hunter, including commissioning a white paper this summer by a noted fair-lending authority. "The idea that you can do a statistical regression and decide that somebody had discriminated against a group when there is no intent and no design should have no application in a fair-lending review," he says. "I would hope that whoever is President, there is a recognition that all this does is inevitably restrict the availability of credit for everybody. There are no internal controls that you can create, in our opinion, that would avoid the possibility that a gerrymandered disparate impact analysis could be applied to your lending, and then all of sudden you're dealing with Department of Justice lawyers."

"ABA would never argue that discrimination is right," says Ballentine. However, he points out that a group of activist lawyers currently at Justice has significantly advanced the application of the disparate impact concept to fair lending. The more active lawyers among this group are appointed positions, says Ballentine, rather than career lawyers, so that a change in regime could have an impact.

Even if that doesn't happen, DOJ is already coming under fire for its alleged involvement in the withdrawal by the City of St. Paul of its disparate impact case before the Supreme Court.

Lame duck session

Will there be a lame-duck session of Congress and will any banking bills be considered?

There

will definitely be a lame-duck session following the election, says Clayton, because the so-called fiscal cliff has to be resolved before the end of the year. Ballentine adds that there could be hearings on bank capital issues in November, specifically about the impact on smaller banks of the proposed Basel III rules.

In addition, ABA will be working to have several other issues addressed, including extension of the FDIC's Transaction Account Guarantee (TAG) program for another year, and passage of the bill that would exempt banks from liability if a fee notification plaque is missing from an ATM.

Credit unions

Will credit unions' agenda to increase their business lending cap be affected by the results of the election?

"I don't think so," says Hunter, adding that the fiscal challenge this country faces is so great that there will have to be shared sacrifice.

"Everybody who is looking at the [federal budget] numbers who is fair-thinking is envisioning that there will be tax reform that results in a code that is fairer and will generate more revenue," says Hunter. "So there will be a wide swath of decisions made about tax breaks, and the more credit unions move into the space of tax-paying entities-act like banks-the less argument they have to be tax exempt."

"However the government is composed," he continues, "it will be very, very difficult for credit unions to stay out of a tax-reform process that removes exemptions."

Changes in the Congress

What possible changes do you see in the post-election leadership of the banking committees?

Even if the Republicans remain in the Senate minority, says Clayton, there will be a change in leadership of the Banking Committee. Sen. Richard Shelby of Alabama will have to give up his position as ranking member because the Republicans have term limits for such posts now. It is expected that Sen. Mike Crapo of Idaho would step up to the ranking member post. On the other hand, says Clayton, if the Republicans gain control of the Senate, then Shelby will chair Senate Banking.

"In that case," says Clayton, "there will be a significant shift in the agenda, at least of the Banking Committee." There will be a greater focus on job creation.

In the House, as mentioned earlier, the Republicans are expected to retain control, although they may lose some of their 25-seat majority, making it even more important to work both sides of the aisle, says Ballentine. Jeb Hensarling of Texas is the presumptive chairman of the House Financial Services Committee replacing Spencer Bacchus of Alabama, says Ballentine, and it looks as if California Representative Maxine Waters will be the ranking minority member of the committee.

The post-election congressional scenario points to continued gridlock, Ballentine agrees, but he points out that it is important who controls the committee gavels. The chairmen set the hearing schedules, he says, meaning that in a Republican-controlled committee the impact of Dodd-Frank may get a more intensive hearing.

ABA's new education and advocacy initiative and grassroots

In late August, ABA announced the formation of the Financial Education and Advocacy Initiative (FEIA), a 501(c)(4) organization governed by its own board. How will that be used going forward?

The initiative has a two-fold purpose, explains Hunter. "Half of the funds it raises [51%] is to be used for things we already do to help educate policymakers about our positions," he says, "such as advocacy ads, only more so. FEIA also has the capability to make independent expenditures as part of the electoral process."

Advocacy campaigns are expensive, notes Ballentine, so this will allow ABA to do more of them and for longer periods. For example, instead of running a credit union or Dodd-Frank campaign for a day or two, "we can run it for two weeks or two months."

Repetition is needed, he points out, because people have become so used to hearing only the negative about banks. So part of what FEIA will do- along with other ABA communications efforts and banks' grassroots communications-is to help point out the important role banks play in the economy. "As folks start feeling better about the industry," says Ballentine, "that will help our lobbying efforts."

Jonathan
Felts

James
Ballentine

Ken
Clayton

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