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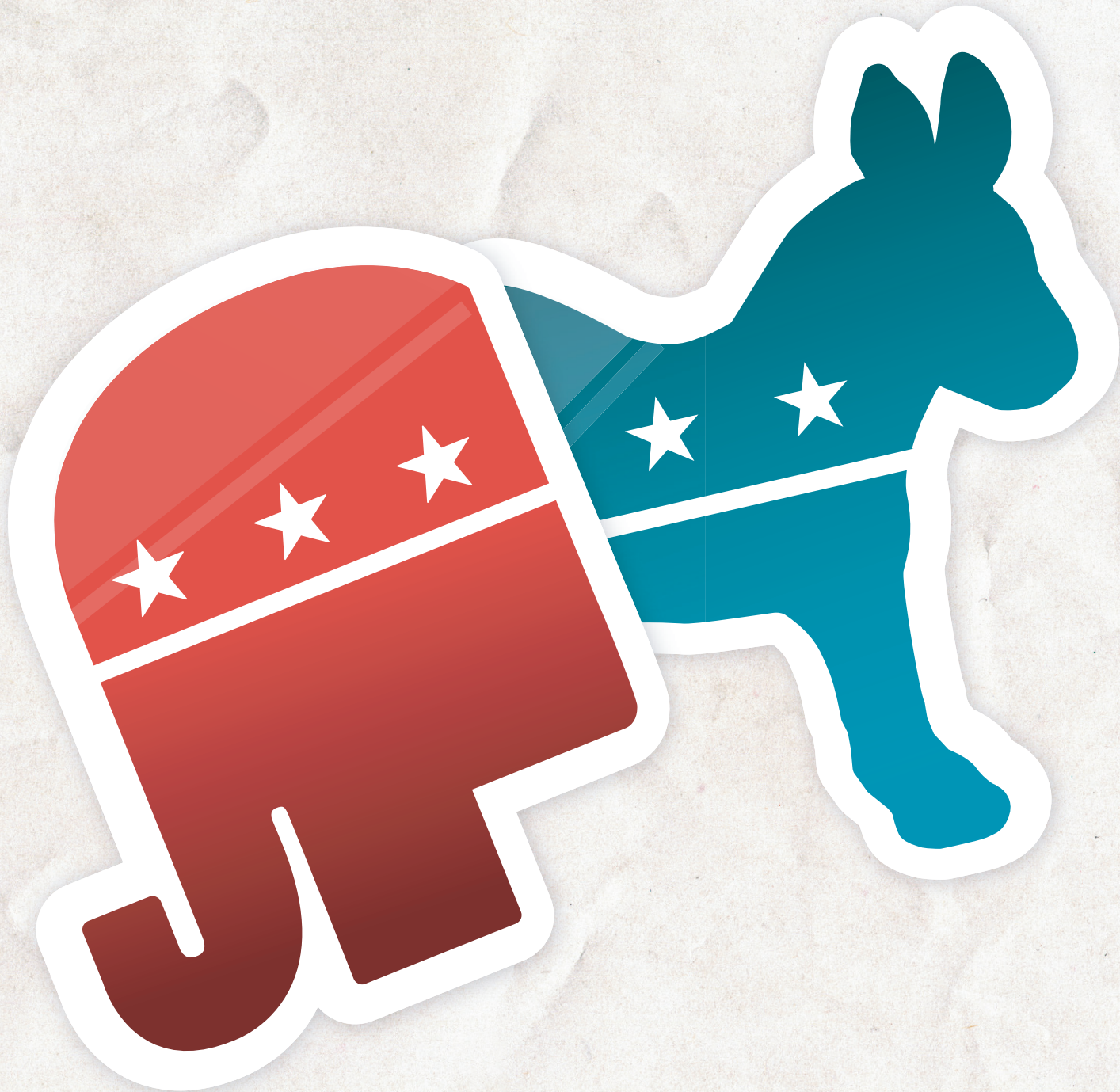
WHAT A NEW ADMINISTRATION WILL MEAN FOR U.S. BUSINESS

By Jamie Gorelick and Anja Manuel



THE TRADITIONAL DISTINCTIONS between laissez-faire Republicans and regulation-friendly Democrats are blurring in this presidential race. The policies of frontrunner Senators McCain, Obama and Clinton in six regulatory areas — antitrust, corporate governance, environment, financial institutions, government contracting, and pharmaceuticals and healthcare — are striking more





for their similarities than differences. Corporations likely will face increased scrutiny in each of these areas no matter who enters the White House in 2009. Nevertheless, there are some differences.

A REPUBLICAN ADMINISTRATION

Corporate executives tend to prefer Republicans because of their history of supporting tax cuts and a hands-off approach to regulation, but Senator McCain has opposed tax cuts in the past and embraced many forms of regulation. He did vote against the 2001 and 2003 tax cuts, and a recession may undercut any argument that these tax cuts stimu-

lated growth. Judging by his campaign rhetoric, he would support strong regulation in several areas.

In antitrust, for example, a Republican administration may be concerned that the current lull in enforcement has encouraged international forum shopping by complainants, with foreign regulators filling the vacuum. A President McCain would likely appoint strong leaders at the Justice Department to step up enforcement.

On corporate governance the Bush Administration has overseen a significant increase in both securities and anti-corruption enforcement. There is good reason to believe that a McCain Administration would con-





CORPORATIONS LIKELY WILL FACE INCREASED SCRUTINY NO MATTER WHO ENTERS THE WHITE HOUSE IN 2009.



continue these policies. McCain also has a long history of supporting environmental regulations, including mandatory cuts in greenhouse gas emissions and a cap-and-trade system for carbon emissions. In this area, a Republican administration would hardly differ from a Democratic one.

Government contractors should expect a McCain Administration to rigorously investigate non-compliance and increase enforcement of conflict-of-interest rules. A McCain Administration would also be in sync with Democrats on pharmaceuticals regulation. McCain has supported proposals to import medicines from less expensive jurisdictions (like Canada) and he supports generics in battles with patent owners.

Only in financial services would a President McCain be more relaxed in his approach. Barring devastation to the economy, his administration likely would not do more to attempt to stem mortgage foreclosures or improve the economy than the Bush administration has already done.

A DEMOCRATIC ADMINISTRATION

With both Democratic frontrunners touting “change,” either an Obama or a Clinton administration would likely increase regulations in the six areas listed above.

We expect securities and anti-corruption enforcement would continue at its current intensity in a Democratic administration. Democrats would likely support giving shareholders a non-binding vote on executive pay and push for new rules allowing shareholders to nominate director candidates on the proxy materials.

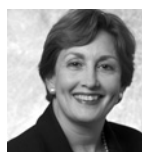
On corporate responsibility — including labor, human rights, and environmental standards — Democrats may seek to “legislate corporate behavior,” while Republicans are more likely to encourage companies to police their own behavior.

Both Democratic candidates have already highlighted their desire to renegotiate trade treaties to improve labor and environmental standards.

In government contracting, we would also expect some differences. As a President Obama or Clinton

began to extricate the United States from Iraq, there likely would be lower levels of defense procurement, although both a Democratic and Republican administration can be expected to police contractor behavior more zealously than the Bush Administration has.

In financial services, a Democratic administration is more likely to support legislation to reform mortgage lending, curb allegedly abusive practices by credit card companies and regulate hedge funds.



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ANTITRUST ENFORCEMENT

BY WILLIAM KOLASKY AND KEVIN STEMPEL



For a century, the Sherman Act has been the Magna Carta of our free-enterprise economy. There has been broad bipartisan consensus that strong antitrust enforcement is critical to assure consumers high quality products at low cost and stimulate innovation and economic growth.

This consensus has frayed over the past eight years. One Democratic candidate for president accuses the Bush Administration of having the weakest antitrust enforcement record in the last half century, while *The Wall Street Journal* and others accuse the Administration of being too aggressive. Regardless of which party prevails, we expect a new administration to seek a middle ground, with more enforcement activity and a renewed effort to explain why effective antitrust enforcement is necessary for a strong economy.

Senator McCain has stated publicly that he is “a vocal advocate of antitrust laws and ensuring that antitrust agencies have the resources they need to protect the competitiveness of the American economy.” Two of his economic advisors are respected former antitrust enforcers.

Republicans generally are concerned that the recent lull in U.S. antitrust enforcement is providing an opportunity for forum shopping by antitrust complainants, as foreign regulators step up their efforts. We expect a new Republican administration to strongly assert federal government authority to enforce antitrust laws. A Republican president would likely appoint strong leaders at both DOJ and the Federal Trade Commission — with both agencies stepping up antitrust enforcement — while emphasizing the importance of not interfering with efficient transactions and aggressive competition on the merits.

A Republican administration would likely attempt to cooperate with foreign competition authorities (while trying to move those authorities in the U.S. direction) and seek adoption of the Antitrust Modernization Commission’s recommendations to moderate some of the more extreme pro-plaintiff features of current law. In particular, we would expect a McCain administration to consider pursuing the AMC’s recommendation that Congress overrule *Illinois Brick*, in order to permit direct and indirect purchaser actions to

be pursued in a single federal case, and to cap the total recovery at three times the actual damages incurred.

Democrats view the 1990s as a golden age of antitrust enforcement. Both DOJ and the Federal Trade Commission were extremely active in challenging anti-competitive mergers and safeguarding consumers from exclusionary conduct by dominant firms. Enforcement actions against companies including Microsoft and ADM received widespread attention.

A new Democratic administration, under either Obama or Clinton, would likely step up antitrust enforcement, not just against multinational cartels but also against mergers that may harm competition and single-firm conduct that’s alleged to stifle competition. We could expect more investigations to be opened and more cases to be filed. Therefore companies in some concentrated industries (such as airlines) are pushing hard to complete mergers in 2008, before a new administration can take office.

COMPANIES IN SOME CONCENTRATED INDUSTRIES (SUCH AS AIRLINES) ARE PUSHING HARD TO COMPLETE MERGERS IN 2008, BEFORE A NEW ADMINISTRATION CAN TAKE OFFICE.

A Democratic administration could be expected to move U.S. antitrust enforcement closer to the European model, intervening in markets to prevent anticompetitive conduct and mergers — in contrast to the current administration’s more laissez faire policies, with the assumption that markets generally work best without government interference.

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CORPORATE GOVERNANCE

BY ANJA MANUEL



With the corporate governance failures at Enron and WorldCom still fresh in many minds, we can expect strong enforcement of ethics and corporate governance rules to continue no matter who prevails in November. It was Governor Romney who argued that over-regulation of U.S. companies is hurting growth. Campaign rhetoric from Senator McCain and the Democratic candidates is strikingly similar.

The Bush Administration, at times prodded by a Democratic Congress, has already stepped up its efforts to regulate corporate behavior, especially in securities matters. In 2001, the SEC instituted 103 formal enforcement proceedings. That number greatly increased as Sarbanes-Oxley took effect and the agencies hired additional staff. In 2007 there were 656 enforcement proceedings covering a wide range of issues, including fraud by corporations and mutual funds, and abusive backdating of stock options.

Senator McCain voted for Sarbanes-Oxley. He also has spoken out about options expensing. Still, a McCain Administration could well seek to amend the law's most expensive and onerous provisions.

The Bush Administration also focused on anti-corruption enforcement, and a Republican president would likely do the same. The number of Foreign Corrupt Practices Act cases has increased from just seven new cases in 2002 to 38 in 2007. In 2006, the White House unveiled a "National Strategy to Internationalize Efforts Against Kleptocracy," an effort to mobilize the international community to address high-level public corruption, and in a March 2007 speech Attorney General Gonzales characterized FCPA enforcement as an essential tool in international economic development. There is no reason to believe that a future Republican administration would pursue FCPA cases with less zeal.

The Bush Administration has not pursued legislation or regulation to enforce fair labor standards and environmental protection. While Senator McCain has aggressively supported environmental regulation in the United States and sponsored several relevant bills in the Senate, he says that U.S. trade agreements should not include provisions to address environmental concerns or protect workers' rights.

In a Democratic administration, aggressive enforcement of Sarbanes-Oxley would likely continue. Neither Senator Clinton nor Senator Obama has come out for Sarbanes-Oxley reform, and both maintain that corporations must be held accountable for their actions. A Democratic administration may also push mandates that would give shareholders a non-binding vote on executive pay, and it could support new rules allowing shareholders to nominate director candidates on the proxy materials.

With regard to the FCPA, we could expect the Democrats to be even more aggressive than the Bush Administration. It's highly unlikely that the number of investigations and prosecutions under the FCPA would decline or fines would decrease.

On corporate responsibility, a Democratic White House likely would push mandatory requirements in lieu of voluntary codes favored by Republicans. Consider that in February, 2007, Senators Dorgan and Graham introduced the "Decent Working Conditions and Fair Competition Act," which allows plaintiffs to sue corporations that obtain goods from sweatshops that violate core labor or human rights standards.

That bill has languished, but a Democratic administration could well push through such a measure. Senator Clinton has highlighted work conditions as an area of concern, while Senator Obama has said he opposes "trade agreements that don't live up to labor and environmental standards." He has also stated that there should be "tax incentives for corporate responsibility," although as of this writing he has not specified how this would work in practice. In sum, a Democratic administration may well legislate new, stringent, environmental and labor and human rights standards for corporations.

Irrespective of which party wins in November, corporate governance and ethics will remain a priority, and companies that have not put comprehensive compliance policies in place and nominated chief ethics or corporate social responsibility officers would be well advised to do so.

Anja Manuel is a counsel at WilmerHale and former special assistant to Undersecretary of State Nicholas Burns.



ENVIRONMENTAL POLICY



BY JEFFREY DAVIDSON AND ROBERT MCKEEHAN

The private sector is now in a race to embrace “green” policies, and especially green marketing. All three major presidential candidates claim that environmental stewardship and combating climate change will be priorities. Details remain scarce.

On the Republican side, Senator McCain’s position contrasts more with the Bush Administration than it does with his Democratic opponents. McCain co-sponsored the first Senate bill seeking mandatory cuts to greenhouse-gas emissions. Reintroduced in 2005 and again in 2007, his Climate Stewardship and Innovation Act would establish a cap-and-trade system to lower greenhouse-gas emissions. The bill includes heavy subsidization of nuclear power, by proposing to take some of the more than \$3.7 billion that it’s estimated will be raised from auctioning emissions and make it available for loan guarantees for new nuclear power plants.

Unlike the Democrats, however, a McCain Administration would let the EPA decide how to distribute emissions credits. Senator McCain also opposes drilling in the Arctic National Wildlife Refuge.

Both Democratic frontrunners support a cap-and-trade system and, perhaps learning from Europe’s early mistakes, propose auctioning 100 percent of pollution permits prior to the institution of trading. The EU initiated its cap-and-trade system in 2005 by handing out the allocations freely to carbon emitters, many of whom nevertheless passed the cost of lowering emissions on to consumers. Both Democratic candidates assert that a 100 percent auction would negate this problem, along with many logistical ones, all while raising money to offset higher energy costs for consumers and funding alternative energy research. Both also vow to renew the industry tax that created the Superfund to pay for toxic waste site clean-ups when polluters can’t be identified or cannot afford the clean-up.

Senator Clinton proposes creation of a National Energy Council, modeled after the National Security Council, to coordinate climate change efforts across federal agencies. She supports a \$50 billion Strategic Energy Fund that would pay for research, development and deployment of renewable energy, energy efficiency, clean coal technology, ethanol and other “homegrown biofu-

els.” A Clinton Administration also would increase required fuel economy to 55 mpg by 2030 — a drastic increase, as Detroit sees it.

Clinton also would require chemical companies to prove the safety of chemicals before putting them on the market, and would create an “environmental health tracking network” that ties together information about pollution and chronic diseases.

Senator Obama also proposes a significant investment (\$150 billion, partially funded from the cap-and-trade auction) to boost clean energy and create green jobs. He supports the development of low-carbon coal technologies and proposes increased reliance on nuclear energy, although he opposes storage of nuclear waste at Yucca Mountain.

With respect to nuclear energy, Clinton has said only that she is “agnostic.”

Some developments are likely no matter who prevails in November. The nuclear industry likely will see a resurgence, but a more pronounced one in a McCain or Obama Administration. There will be increased scrutiny of a company’s “carbon footprint.” (The SEC is already under pressure from investor groups to issue guidelines on the disclosure of costs related to climate change.) No matter who is in the White House, climate change legislation is likely to pass, although Democratic initiatives are likely to be more stringent, with more demanding disclosure requirements.

Meanwhile, the cost of energy is likely to continue its increase, so that company energy audits and conservation initiatives will become increasingly prudent.

Finally, increased environmental enforcement is likely in both a Democratic and Republican administration. Comprehensive and preemptive audits in 2008 are likely to prove valuable.

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FINANCIAL SERVICES

BY ANN KAPPLER

The housing and foreclosure crisis will likely dominate the financial services regulatory agenda for the first part of the next administration. Other issues, including credit card practices and possibly hedge funds, may also become important.

A Republican administration is likely to continue to favor relative deregulation and support emphasis on market forces, while a Democrat would look to more government-based solutions, particularly in the consumer protection arena.

If mortgage foreclosures continue at their current high rate, or increase, we can expect a Republican administration to continue the Bush administration's HOPE NOW and Project Lifeline initiatives. A Republican administration also would likely continue working with loan servicing companies on loan modifications and other strategies to reduce foreclosures. But a Republican administration would be unlikely to intervene more aggressively in the market.

On the legislative front, we could expect Federal Housing Administration (FHA) reform legislation, to enable FHA insurance to serve more borrowers, including on loan refinancings. A Republican administration may also continue the Bush administration's push to regulate Government Sponsored Enterprises (the "GSEs"): Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.

Republican regulators and lawmakers likely would not support restrictions on credit card practices or new requirements for hedge funds. A Republican administration probably would prefer voluntary industry efforts, such as codes of best practices, combined with some regulation or oversight of hedge funds.

Outside the housing finance market, expect a Republican administration to emphasize making U.S. financial institutions more competitive abroad.

A Democratic administration likewise could be expected to encourage mortgage holders to voluntarily work out delinquent loans, although perhaps more aggressively, and to push for FHA reform. Such reform is most likely to take the form of greater authority, for example by increasing the size and expanding the types of loans that FHA can insure and broadening the permissible qualifications for FHA borrowers. This initia-

tive will be aimed not only at providing some relief for the subprime crisis, but also at long-term reinvigoration of FHA as a supporter of affordable housing financing for low-income homeowners.

We would expect the Democrats, unlike the Republicans, to encourage the GSEs to aid troubled borrowers and to be less interested in GSE regulatory reform (except for the special housing fund).

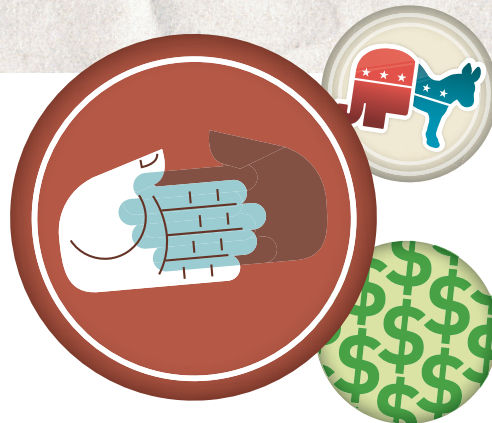
If the Democrats hold both houses of Congress, they may legislate to reform mortgage lending, possibly providing for assignee liability, along the lines that House Financial Services Committee Chair Barney Frank and Senator Christopher J. Dodd supported this year.

Regulators under a Democratic administration are likely to more actively pursue consumer protection. A Democratic administration may support legislation—and encourage regulators to act—to curb abusive practices by credit card companies. Senator Clinton has proposed capping credit card interest rates, the creation of an independent consumer protection commission on credit cards, and prohibiting certain common billing practices. Senator Obama has suggested a public rating system for credit cards and a credit card bill of rights for consumers.

A Democratic administration could also endorse legislation that would curb expansion of industrial loan companies— institutions that have broad banking powers but are owned by commercial entities and thus are not subject to regulation that applies to financial institutions. Democrats also may consider additional regulation of hedge funds and the secondary mortgage market.

Finally, we think a Democratic administration would favor increased oversight of sovereign wealth funds. Although actual regulation is unlikely in the current and near-term foreseeable financial climate, increased transparency will likely be demanded as well as assurances that investments will be passive and business-based, and not for political purposes.

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GOVERNMENT CONTRACTING

BY JAY URWITZ



Any new administration will affect government contractors in three ways: the amount of government contract spending it engenders and where it takes place; the flexibility that it demonstrates in reaching agreements with contractors; and in how aggressively it attempts to insure that contractors abide by the law and contractual terms. A Republican administration would likely continue the government contractor-friendly policies of the past eight years, while a Democratic administration would place more restrictions on the contractors.

The Bush Administration has been good to government contractors. Procurements have gone way up. In fiscal year 2002, the first initiated by this administration, the government procured about \$250 billion through contracts alone (excluding grants, cooperative agreements and other transactions). In fiscal 2008, the figure was \$368 billion. Meanwhile the government has become more flexible in its contract terms. It has vested intellectual property rights with contractors and been more flexible about cost-sharing.

Finally, while contract oversight is now picking up — mostly spurred by the Democratic Congress — the Administration has taken a moderate approach to investigations.

MCCAIN, WHO HAS LAUNCHED SEVERAL NOTABLE INVESTIGATIONS INTO GOVERNMENT CONTRACTS DURING HIS TIME IN THE SENATE, WOULD LIKELY BE AS AGGRESSIVE AS DEMOCRATS IN ROOTING OUT CONTRACTOR NONCOMPLIANCE.

Procurement likely would remain steady in a Republican administration, especially in defense. Senator McCain has been a principal supporter of the surge in Iraq and has criticized the notion of a timetable for withdrawal. Otherwise, government contracting in a Republican administration would not be substantially different than under a Democratic one.

A Republican administration is unlikely to make current flexible contracting rules more flexible. McCain, who has launched several notable investigations into government contracts during his time in the Senate, would likely be as aggressive as Democrats in rooting

out contractor noncompliance with contracts, regulations and statutes. He might be especially tough on conflict-of-interest rules, and with regard to the False Claims Act.

Under Democrats — if a Democratic administration begins to extricate the U.S. from Iraq — there could over time be lower levels of defense procurement, although we would continue to face military challenges and the procurement backlog is substantial.

A Democratic administration might be somewhat less flexible about contractor rights vis a vis jointly developed products or in joint research agreements, but it is unlikely that the recent gains for contractors would be reversed.

Perhaps the biggest change would be in the oversight of government contractors. It's likely there would be far more effort directed at getting contractors to live by procurement rules, by way of more enforcement of the Buy American Act and the Trade Agreements Act to protect U.S. manufacturing; increased enforcement of requirements such as the price reduction clause in Federal Supply Schedule contracts, to insure that the government is truly getting the best deal; and by careful enforcement of conflict of interest rules.

Given current compliance efforts, any new conflict-of-interest investigations may not expose much in the way of impermissible activities. Nonetheless, there is a view among Democrats that relations between contractors and the government have been too cozy.

Regarding private military contractors in Iraq, under any of the three potential presidents we can expect the rules of engagement to be tightened significantly. There will be stricter rules on what these contractors can do when engaged directly by the government, and there will be similarly stricter rules for government contractors who, in turn, engage private security services.

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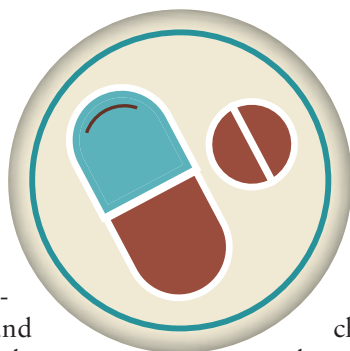
PHARMACEUTICALS

BY SCOTT LASSMAN

The pharmaceutical industry is facing strong political headwinds, and that's not likely to change with the next administration, regardless of who prevails. On major issues ranging from importation to follow-on biological products, the leading Democratic and Republican presidential contenders have staked out very similar positions. Meanwhile, politicians from both sides of the aisle continue to call for legislation permitting importation of prescription drugs from, among others, Canada, Australia and the European Union.

John McCain is a longstanding proponent of importation. Support from the next administration could be enough to make importation a reality, despite recent concerns about drug safety and the safety of imported products, particularly from China.

Senator McCain also is in sync with his Democratic colleagues in supporting a biologics path-



support the creation of a pathway for approval of FOBs. Senator Clinton spearheaded efforts last year to pass a bipartisan FOB bill in the Senate (the Biologics Price Competition and Innovation Act of 2007) that included 12 years of data exclusivity and allowed for interchangeability. Senator Obama's position is less well developed, but he also reportedly supports a regulatory pathway for approval of biologics.

Senator Clinton has long made comparative effectiveness a centerpiece of her healthcare agenda and proposes to create a "Best Practices Institute" to conduct and publish research comparing different treatments, including drugs, devices and surgical interventions. Senator Obama likewise supports the creation of an "independent institute to guide reviews and research on comparative effectiveness."

All current presidential contenders are aligned on many important regulatory issues affecting the pharmaceutical industry. There may be a difference, however, on the views regarding enforcement. The Food and Drug Administration was granted extensive new powers in 2007, including the ability to levy multi-million dollar civil fines against pharmaceutical companies. A Democratic administration would likely look for opportunities to use this new authority. A Republican administration is likely to exercise more restraint.

McCain is a longstanding proponent of importation.

way. Although his position is less well developed than Senator Clinton's (who recently co-sponsored a leading bill in the Senate), he calls for developing a route for the approval of "safe, cheaper generic versions of ... biologic pharmaceuticals."

The creation of a pathway for approval of so called follow-on biologicals, or "FOBs," thus appears to be all but certain. The details of any such pathway, however, would be critical, particularly regarding data exclusivity, interchangeability and approval standards. Those details are still very much in play.

The candidates agree on the need for more information on the comparative effectiveness of pharmaceutical and other treatments. While less outspoken than his Democratic opponents, Senator McCain has promised to facilitate "the development of national standards for measuring and recording treatments and outcomes."

Both Senators Clinton and Obama support importation, although their plans are short on details. They also

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