SPECIAL EYE ON THE MARKET ELECTION UPDATE:
ABSENTEE BALLOTS, GOP JUDICIAL CHALLENGES AND MULTIPLE SLATES OF ELECTORS

During the President’s speech on Thursday, he made it clear that the next step in the process will be a wave of GOP litigation in an effort to invalidate votes, with a special focus on the treatment and counting of absentee ballots. There is a lot more precedent and clarity around this process than the President acknowledged; in an effort to keep everyone informed, I put together a brief note on some of the legal issues in play. I will try and keep this as simple as I can by focusing on 8 critical swing states. Here is the bottom line:

There is only one state that (a) changed its absentee ballot deadline rules this year, (b) looks like it will be awarded to Biden and thus a target for a GOP court challenge, (c) had its outcome hinge on the counting of absentee ballots¹, and (d) had its rule change subject to a Supreme Court ruling that showed substantial concerns about the legitimacy of the extension rule change. That state is PENNSYLVANIA. We are particularly focused on Pennsylvania since all practical Trump victory paths include this state.

IF the post-Election Day absentee ballot receipts turn out to be the determinant factor in the Pennsylvania election, and IF Pennsylvania turns out to be the swing state that decides the national election results², the Supreme Court might re-litigate the prior case which ended in a 4-4 tie since Barrett was not seated yet. We believe that while the Supreme Court might rule against the extension, they would be reluctant to invalidate the post-Election Day absentee ballot votes themselves. Lastly, there is a chance that the Pennsylvania state legislature decides to submit a competing slate of electors to the Electoral College, which the newly seated Congress would have to sort out on January 6th. Our understanding of the Electoral Count Act is that in the case of a split Congress (D-House, R-Senate), tie-breaking rules would allow the Democratic Governor of Pennsylvania to pick the final slate of electors for his state. While the Pennsylvania state legislature reportedly disavowed this option last night, this is not a binding decision and it is still important to understand the rules and the process, since it could occur in other states.

¹ Early this morning, the State of Pennsylvania reportedly announced that Biden is ahead, AND that this result does NOT YET INCLUDE any of the absentee ballots post-marked before Election Day and arriving afterwards. In other words, Biden’s lead in the state is based on absentee ballots received before Election Day in accordance with pre-existing Pennsylvania state rules.

² If Biden wins Georgia and Nevada, the Pennsylvania outcome would in theory not be determinant in the national outcome, even if Biden loses Arizona. However, there could be recounts in Georgia, Nevada, Wisconsin and Pennsylvania as well, so whether Pennsylvania ends up being determinant is not something we will know for several weeks.
Background on absentee ballot rules and court cases

- Five states require absentee ballots to be received on or before Election Day: Arizona, Georgia, Michigan, Minnesota and Wisconsin. In these states, there does not seem to be any legal standing for the GOP to object to the timing of absentee ballot counting since they’re only counting the ones received on or before November 3rd. To be clear, the GOP can object to other aspects of absentee ballots (signatures, affidavits, envelopes, Sharpies, etc; or that the state misapplied, misinterpreted or violated some other state law), but not the mere fact of them being counted after Election Day. In both Minnesota and Wisconsin, efforts to extend absentee ballot timeframes were rejected by the courts (see below).

- One state allows absentee ballots to be postmarked before Election Day and received afterwards, but did not change its rules this year: Nevada. As long as they are received within 7 days of Election Day, they are allowed to be counted, and we have not heard of legal disputes due to Nevada counting ballots after Election Day. However, there are unsubstantiated claims that absentee ballots were sent in by non-residents and the deceased, and that the state is not consistently requiring signature verification in Clark County.

- There are two states that changed their absentee ballot counting rules this year due to the pandemic, allowing ballots to be postmarked before Election Day and received afterwards: North Carolina and Pennsylvania. In North Carolina, the time frame was extended from 3 days after Election Day to 9 days, and in Pennsylvania, the rule changed from “no ballots after Election Day” to 3 days after Election Day. However, there is a critical distinction between the two states. In PA, a State Court mandated the rule change, while in NC, the state legislature did so indirectly by appointing a state election commission to make the necessary decisions (the commission decided to grant the extension).

- There have been 4 recent notable court cases on the issue of absentee ballot extensions in this election:
  - In an emergency ruling, the Supreme Court voted 5-3 to allow the North Carolina extension. The only written opinion was a short statement from the dissenters, who argued that the election commission was not the same thing as the legislature itself, and thus could not set or change election rules for Federal elections.
  - However, in Pennsylvania, Kavanaugh voted with the conservatives who voted to halt the Pennsylvania Supreme Court decision to extend the deadline for receiving absentee ballots by an additional 3 days. Since the Supreme Court was tied 4-4, the Pennsylvania Supreme Court ruling was permitted to stand.
  - In Wisconsin, a lower Federal court mandated an extension to absentee ballot counting rules. A Federal Appeals Court reversed that decision, and the Supreme Court allowed the Appellate ruling to remain in place on a 5-3 basis, terminating the effort to extend ballot receipt rules in the state. Some Supreme Court justices who supported the Appellate ruling wrote individual opinions to emphasize that federal courts should generally not override state election laws, change the rules of Federal elections near Election Day, or extend voting periods without exhausting other less extreme remedies.
  - In Minnesota, the Secretary of State entered into a consent decree to allow ballots to be accepted 7 days after Election Day, and the decree was agreed to by a lower state court. A Federal Appeals court ruled that the consent decree violated the US Constitution, since the legislature did not authorize the Secretary of State to modify/suspend state election code requirements under such circumstances, in which case the extension infringed on the state legislature's exclusive prerogative under the US Constitution to regulate federal elections. Thus, the federal court suspended the consent decree through which the Secretary attempted to change the statutory deadline for absentee ballots.

3 Many states have special rules for military and overseas voters that allow their ballots cast by Election Day to be returned afterwards - sometimes as much as two weeks later. In 2016, over 650,000 military and overseas citizens voted via the special federal law governing the issue, called UOCAVA (Uniformed and Overseas Citizen Absentee Voting Act).
Where might the GOP have the strongest legal standing in objecting to the counting of absentee ballots received after Election Day? As we understand it, the GOP’s strongest case would be in Pennsylvania, since in 5 states (AZ, GA, MI, MN, WI), no ballots were received and counted after election day; in 1 state, counting rules never changed (NV); and in 1 state, emergency pre-election litigation already showed 5 Supreme Court votes in favor of the extension, although this could change were it re-litigated (NC). The NC case is also moot since Trump appears to have won there. In PA, the ballots received and counted after Election Day have been segregated by the state in case they need to be treated differently should court rulings change.

What if PA gets re-litigated? Now that Barrett has been seated, there’s a chance that if the PA case were re-litigated, that the Supreme Court would rule 5-4 that the extension was invalid. What happens then? My constitutional law contacts believe that the Courts would be reluctant after the fact to invalidate the PA outcome. In other words, while they might rule that the extension was invalid, the Courts would be reluctant to require the state to invalidate absentee ballots that people had cast on, or shortly before, Election Day pursuant to the Pennsylvania Supreme Court’s order. Invalidating rules governing the electoral process after votes have been cast would raise due process concerns under the US Constitution. It would also seem inconsistent with the Court’s Purcell principle, which counsels against rule changes in the vicinity of an election. Lastly, the traditional equitable factors that courts consider – like the public interest – when deciding to grant an injunction would likely weigh against invalidating the votes.

Triple witching hour “multiple slate” scenarios, with the example of Pennsylvania

- In PA, the Governor is a Democrat, the Secretary of State is a Democrat and the legislature is Republican
- If Biden wins PA, the Governor or Secretary of State would submit a slate of electors for Biden to the Electoral College. However, in principle, the state legislature could ALSO decide to submit a separate slate of electors to the Electoral College on or before December 14th, if in fact the absentee ballots received and counted after Election Day are determinant with respect to the PA outcome (i.e., Trump wins without them and loses with them). The Pennsylvania legislature may be even more inclined to submit a competing Trump slate if the Supreme Court rules that the Pennsylvania Supreme Court’s order extending the deadline for absentee ballots was unconstitutional
- This multiple slate issue would have to be sorted out by the newly seated Congress on January 6th using a complex set of rules spelled out in the Electoral Count Act (ECA) of 1887. In the triple witching hour scenario, PA is the swing state that decides the entire Presidential election outcome, and this 130-year old rule would go into effect
- In the interest of brevity, I will not walk through all of the ECA rules right now, and just focus on how we believe it would be applied. In case of a split Congress (D-House, R-Senate), the decision would come down to a tie-breaker vote cast by the Governor of Pennsylvania, who is a Democrat; and if both chambers of Congress are controlled by Democrats on January 6th, the Biden slate would probably be picked as well. The bottom line is that the party affiliation of the Governor would be the tie-breaker in multiple slate scenarios when there is a split Congress (which is where we may be headed)

Acknowledgments. Many thanks to Michael Morley at Florida State University for his assistance on this section. Professor Morley teaches and writes in the areas of election law, constitutional law, remedies, and the federal courts. He is best known for his work on election emergencies and post-election litigation, nationwide and other defendant-oriented injunctions, the jurisdiction of the federal courts and their equitable powers more generally. He has testified before congressional committees, made presentations to election officials for the U.S. Election Assistance Commission and participated in bipartisan blue-ribbon groups to develop election reforms.

There may be 2 Senate runoff elections on January 5th, the day before the joint session in which Congress resolves any multiple slate disputes. If one or both of these Senate races were not resolved by January 6th, the prevailing balance in the Senate (which looks like 50-R, 48-D) would determine which party controls the chamber when resolving any disputes over electoral votes.
Purpose of This Material: This material is for information purposes only. The views, opinions, estimates and strategies expressed herein constitutes Michael Cembalest’s judgment based on current market conditions and are subject to change without notice, and may differ from those expressed by other areas of J.P. Morgan. This information in no way constitutes J.P. Morgan Research and should not be treated as such.

GENERAL RISKS & CONSIDERATIONS
Any views, strategies or products discussed in this material may not be appropriate for all individuals and are subject to risks. Investors may get back less than they invested, and past performance is not a reliable indicator of future results. Asset allocation / diversification does not guarantee a profit or protect against loss. Nothing in this material should be relied upon in isolation for the purpose of making an investment decision. You are urged to consider carefully whether the services, products, asset classes (e.g. equities, fixed income, alternative investments, commodities, etc.) or strategies discussed are suitable to your needs. You must also consider the objectives, risks, charges, and expenses associated with an investment service, product or strategy prior to making an investment decision. For this and more complete information, including discussion of your goals/situation, contact your J.P. Morgan team.

NON-RELIANCE
Certain information contained in this material is believed to be reliable; however, JPM does not represent or warrant its accuracy, reliability or completeness, or accept any liability for any loss or damage (whether direct or indirect) arising out of the use of all or any part of this material. No representation or warranty should be made with regard to any computations, graphs, tables, diagrams or commentary in this material, which are provided for illustration/reference purposes only. The views, opinions, estimates and strategies expressed in this material constitute our judgment based on current market conditions and are subject to change without notice. JPM assumes no duty to update any information in this material in the event that such information changes. Views, opinions, estimates and strategies expressed herein may differ from those expressed by other areas of JPM, views expressed for other purposes or in other contexts, and this material should not be regarded as a research report. Any projected results and risks are based solely on hypothetical examples cited, and actual results and risks will vary depending on specific circumstances. Forward-looking statements should not be considered as guarantees or predictions of future events.

Nothing in this document shall be construed as giving rise to any duty of care owed to, or advisory relationship with, you or any third party. Nothing in this document shall be regarded as an offer, solicitation, recommendation or advice (whether financial, accounting, legal, tax or other) given by J.P. Morgan and/or its officers or employees, irrespective of whether or not such communication was given at your request.

J.P. Morgan and its affiliates do not provide tax, legal or accounting advice. You should consult your own tax, legal and accounting advisors before engaging in any financial transactions.

LEGAL ENTITY, BRAND & REGULATORY INFORMATION
In the United States, bank deposit accounts and related services, such as checking, savings and bank lending, are offered by JPMorgan Chase Bank, N.A. Member FDIC. JPMorgan Chase Bank, N.A. and its affiliates (collectively “JPMCB”) offer investment products, which may include bank managed investment accounts and custody, as part of its trust and fiduciary services. Other investment products and services, such as brokerage and advisory accounts, are offered through J.P. Morgan Securities LLC (“JPMPS”), a member of FINRA and SIPC. Annuities are made available through Chase Insurance Agency, Inc. (CIA), a licensed insurance agency, doing business as Chase Insurance Agency Services, Inc. in Florida. JPMCB, JPMPS and CIA are affiliated companies under the common control of JPM. Products not available in all states.

In Luxembourg, this material is issued by J.P. Morgan Bank Luxembourg S.A. (JPMBL), with registered office at European Bank and Business Centre, 6 route de Treves, L-2633, Senningerberg, Luxembourg. R.C.S Luxembourg B10.958. Authorised and regulated by Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF. J.P. Morgan Bank Luxembourg S.A. is authorized as a credit institution in accordance with the Law of 5th April 1993. In the United Kingdom, this material is issued by J.P. Morgan Bank Luxembourg S.A– London Branch. Prior to Brexit, Brexit meaning that the UK leaves the European Union under Article 50 of the Treaty on European Union, or, if later, loses its ability to passport financial services between the UK and the remainder of the EEA, J.P. Morgan Bank Luxembourg S.A– London Branch is subject to limited regulation by the Financial Conduct Authority and the Prudential Regulation Authority. Details about the extent of our regulation by the Financial Conduct Authority and the Prudential Regulation Authority are available from us on request. In the event of Brexit, in the UK, J.P. Morgan Bank Luxembourg S.A.– London Branch is authorised by the Prudential Regulation Authority, subject to regulation by the Financial Conduct Authority and limited regulation by the Prudential Regulation Authority. Details about the extent of our regulation by the Prudential Regulation Authority are available from us on request. In Spain, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Sucursal en España, with registered office at Paseo de la Castellana, 31, 28046 Madrid, Spain. J.P. Morgan Bank Luxembourg S.A., Sucursal en España is registered under number 1516 within the administrative registry of the Bank of Spain and supervised by the Spanish Securities Market Commission (CNMV). In Germany, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Frankfurt Branch, registered office at Taunustor 1 (TaunusTurm), 60310 Frankfurt, Germany, jointly supervised by the Commission de Surveillance du Secteur Financier (CSSF) and the European Central Bank (ECB), and in certain areas also supervised by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). In Italy, this material is distributed by J.P. Morgan Bank Luxembourg S.A– Milan Branch, registered office at Via Catena Adalberto 4, Milan 20121, Italy and regulated by Bank of Italy and the Commissione Nazionale per le Società e la Borsa (CONSOB). In the Netherlands, this material is distributed by J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch, with registered office at World Trade Centre, Tower B, Strooksestraat 1047, Amsterdam, The Netherlands. J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch is authorised and regulated by the Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF in Luxembourg; J.P. Morgan Bank Luxembourg S.A., Amsterdam Branch is also authorised and supervised by De Nederlandsche Bank (DNB) and the Autoriteit Financiële Markten (AFM) in the Netherlands. Registered with the Kamer van Koophandel as a branch of J.P. Morgan Bank Luxembourg S.A. under registration number 71651845. In Denmark, this material is distributed by J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A. with registered office at Kalvebod Brygge 39-41, 1560 København V, Denmark. J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A.is authorised and regulated by Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF. J.P. Morgan Bank Luxembourg, Copenhagen Br, filial af J.P. Morgan Bank Luxembourg S.A.is also subject to the supervision of Finanstilsynet (Danish FSA) and registered with Finanstilsynet as a branch of J.P. Morgan Bank Luxembourg S.A. under code 29009. In Sweden, this material is distributed by J.P. Morgan Bank Luxembourg S.A. - Stockholm Bankfilial, with registered office at Hamngatan 15, Stockholm, 11147, Sweden. J.P. Morgan Bank Luxembourg S.A. - Stockholm Bankfilial is authorised and regulated by Commission de Surveillance du Secteur Financier (CSSF) and jointly supervised by the European Central Bank (ECB) and the CSSF. J.P. Morgan Bank Luxembourg S.A. (ECB) and the CSSF in Stockholm Branch is also subject to the supervision of Finansinspektionen (Swedish FSA). Registered with Finansinspektionen as a branch of J.P. Morgan Bank Luxembourg S.A. In France, this material is distributed by JPMorgan Chase Bank, N.A. (“JPMCB”), Paris branch, which is regulated by the French banking authorities Autorité de Contrôle Prudential
et de Résolution and Autorité des Marchés Financiers. In Switzerland, this material is distributed by J.P. Morgan (Suisse) SA, which is regulated in Switzerland by the Swiss Financial Market Supervisory Authority (FINMA).

In Hong Kong, this material is distributed by JPMCB, Hong Kong branch. JPMCB, Hong Kong branch is regulated by the Hong Kong Monetary Authority and the Securities and Futures Commission of Hong Kong. In Hong Kong, we will cease to use your personal data for our marketing purposes without charge if you so request. In Singapore, this material is distributed by JPMCB, Singapore branch. JPMCB, Singapore branch is regulated by the Monetary Authority of Singapore. Dealing and advisory services and discretionary investment management services are provided to you by JPMCB, Hong Kong/Singapore branch (as notified to you). Banking and custody services are provided to you by JPMCB Singapore Branch. The contents of this document have not been reviewed by any regulatory authority in Hong Kong, Singapore or any other jurisdictions. This advertisement has not been reviewed by the Monetary Authority of Singapore. JPMorgan Chase Bank, N.A., a national banking association chartered under the laws of the United States, and as a body corporate, its shareholder’s liability is limited.

JPMorgan Chase Bank, N.A. (JPMCBNA) (ABN 43 074 112 011/AFS Licence No: 238367) is regulated by the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority. Material provided by JPMCBNA in Australia is to “wholesale clients” only. For the purposes of this paragraph the term “wholesale client” has the meaning given in section 761G of the Corporations Act 2001 (Cth). Please inform us if you are not a Wholesale Client now or if you cease to be a Wholesale Client at any time in the future.

JPM is a registered foreign company (overseas) (ARBN 109293610) incorporated in Delaware, U.S.A. Under Australian financial services licensing requirements, carrying on a financial services business in Australia requires a financial service provider, such as J.P. Morgan Securities LLC (JPMS), to hold an Australian Financial Services Licence (AFSL), unless an exemption applies. JPMS is exempt from the requirement to hold an AFSL under the Corporations Act 2001 (Cth) (Act) in respect of financial services it provides to you, and is regulated by the SEC, FINRA and CFTC under US laws, which differ from Australian laws. Material provided by JPMS in Australia is to “wholesale clients” only. The information provided in this material is not intended to be, and must not be, distributed or passed on, directly or indirectly, to any other class of persons in Australia. For the purposes of this paragraph the term “wholesale client” has the meaning given in section 761G of the Act. Please inform us immediately if you are not a Wholesale Client now or if you cease to be a Wholesale Client at any time in the future.

This material has not been prepared specifically for Australian investors. It:
• may contain references to dollar amounts which are not Australian dollars;
• may contain financial information which is not prepared in accordance with Australian law or practices;
• may not address risks associated with investment in foreign currency denominated investments; and
• does not address Australian tax issues.

With respect to countries in Latin America, the distribution of this material may be restricted in certain jurisdictions. We may offer and/or sell to you securities or other financial instruments which may not be registered under, and are not the subject of a public offering under, the securities or other financial regulatory laws of your home country. Such securities or instruments are offered and/or sold to you on a private basis only. Any communication by us to you regarding such securities or instruments, including without limitation the delivery of a prospectus, term sheet or other offering document, is not intended by us as an offer to sell or a solicitation of an offer to buy any securities or instruments in any jurisdiction in which such an offer or a solicitation is unlawful. Furthermore, such securities or instruments may be subject to certain regulatory and/or contractual restrictions on subsequent transfer by you, and you are solely responsible for ascertaining and complying with such restrictions. To the extent this content makes reference to a fund, the Fund may not be publicly offered in any Latin American country, without previous registration of such fund’s securities in compliance with the laws of the corresponding jurisdiction. Public offering of any security, including the shares of the Fund, without previous registration at Brazilian Securities and Exchange Commission–CVM is completely prohibited. Some products or services contained in the materials might not be currently provided by the Brazilian and Mexican platforms.

References to “J.P. Morgan” are to JPM, its subsidiaries and affiliates worldwide. “J.P. Morgan Private Bank” is the brand name for the private banking business conducted by JPM.

This material is intended for your personal use and should not be circulated to or used by any other person, or duplicated for non-personal use, without our permission. If you have any questions or no longer wish to receive these communications, please contact your J.P. Morgan team.

© 2020 JPMorgan Chase & Co. All rights reserved.