Wolters Kluwer

When you have to be right

Special Report

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Highlights

- Insights into regulatory priorities and realities
- Expected changes in agency leadership
- Consequences for employers, including immigration, taxes, and employee benefits
- Enforcement trends and course corrections
- Foreign policy shifts on trade, intellectual property, cybersecurity, and corrupt practices
- COVID-19 impact on multiple policymaking fronts

Inside

By Wolters Kluwer Editorial Staff and Authors

Biden inauguration heralds regulatory reset

On this tense, unprecedented, and highly militarized Inauguration Day, the nation exhaled. The normally predictable ceremony marking the orderly transfer of presidential power—this time catapulted by tragic circumstances into a red-zone spectacle with few actual spectators—signaled a new beginning like no other.

Except this time, what's new is familiar and reassuring territory: a return to more traditional policies, process, and personalities. Joe Biden's swearing-in as president is sure to usher in a revival of many Obama-era priorities—affordable health care, environmental protections, worker rights, international trade alliances, anticorruption measures, disaster preparedness, corporate accountability, immigration reform, etc.—all familiar Democratic themes in the pre-Trump White House. In short, what's old may well be new again.

Of course, much of what Obama achieved has since been weakened, if not reversed outright, by the Trump Administration. The Biden team's initial efforts will in many ways have to be remedial; a reversal of the reversal. Picking up where Obama left off, much less expanding on it, will take time and tenacity simply to restore the status quo ante. Building on those Obama-era achievements will be harder still, even with slim Democratic majorities in both chambers of Congress.

Then there are the new, all-consuming challenges unique to this moment. President Biden has made clear that his top priority will be to grapple with the COVID-19 emergency and resulting economic crisis.

What, then, to make of the regulatory priorities and realities of the new administration? This report examines the statements and proposals from Biden's campaign and his transition team. It looks at the people in key positions—many of them familiar faces with known track records—to discern what's expected in terms of policy goals, priorities, appointments, and regulatory approaches. This analysis also takes sober account of the current, tenuous political environment to temper its assessment of what's possible vs. what's likely from the new White House.

Still, there is much that Biden can accomplish, even in the near term. Using an array of available tools such as executive orders, agency appointments, targeted bipartisan legislation, rulemaking, enforcement, agency guidance, federal-state partnerships, and international agreements, the incoming administration has many pathways to achieving its policy ends.

This report, written by Wolters Kluwer editorial staff and authors, lays out those likely scenarios and outcomes across a range of key practice areas: tax, health care, labor and employment, securities and corporate governance, international trade, antitrust, intellectual property, cybersecurity and privacy, financial services, and others. Attention to how the changes will affect specific constituencies (e.g., employers, hospitals, insurers, banks, corporate boardrooms, taxpayers, and government contractors) will help the attorneys and other professionals who advise them to prepare for the next chapter in this nation's history.

Tax

By Linda O'Brien, J.D., LL.M.

Following the most contentious election season in modern history, the Biden victory and inauguration signals a dramatic shift on tax policy. Although sweeping tax reform such as the Tax Cuts and Jobs Act (TCJA) in 2017 is unlikely, Biden has offered several proposals that would roll back many provisions of the TCJA.

The Biden tax plan departs significantly from the policies of the Trump Administration and from the major tax revisions enacted by the TCJA. According to the tax plan he released before the election, Biden has proposed policies that would raise taxes on corporations and high-income individuals. Biden has also proposed strengthening the Affordable Care Act, extending the Social Security payroll tax to higher income levels, enhancing tax benefits for families, and expanding several renewable energy credits. With Democratic control of both the House and Senate, following the sweep in the January runoff elections in Georgia, Biden's tax plan has a much better chance of implementation.

Individual tax policy

Individual income tax rates

Currently, there are seven tax brackets: 10, 12, 22, 24, 32, 35, and 37 percent, which are applicable from 2018 through 2025 under the TCJA. During the campaign, Biden proposed increasing the top rate to 39.6 percent, which is where it was prior to the enactment of the TCJA.

Although it is not clear at what income level the new top rate would apply, Biden has stated repeatedly that only taxpayers with incomes over $400,000 would see a tax increase. For 2021, the current top rate of 37 percent applies to single taxpayer income exceeding $523,600.

Capital gains and dividends

Under current law, a capital gains rate of 0 percent, 15 percent, or 20 percent applies to capital gains and qualified dividends received by individuals, depending on the amount of the individual's taxable income. For 2021, the 20-percent rate applies to joint filers with taxable incomes over $501,600, $473,750 for heads of households, $445,850 for single filers, and $250,800 for married taxpayers filing separately.

Biden's proposal would increase the top tax rate on long-term capital gains for taxpayers earning more than $1 million annually and eliminate the step-up in basis that allows decedents to pass capital gains to heirs without tax. The top rate on long-term gains would nearly double from 23.8 percent to 43.4 percent.

Child tax incentives

The maximum Child Tax Credit is $2,000 through 2025 under the TCJA. Biden has proposed a refundable $8,000 childcare tax credit for a qualifying child or up to $16,000 for two or more children. He has also proposed expanding the earned income tax credit (EITC) and dependent care credit. Additionally, Biden proposes a new $5,000 tax credit for caregivers of individuals with certain physical and cognitive needs.

Limitation on itemized deductions

Prior to enactment of the TCJA, a limitation on itemized deductions (the "Pease limitation") took effect at higher income levels (in 2017, $318,700 for joint filers, $287,650 for heads of households, $261,500 for single filers, $156,900 for married taxpayers filing separately). The TCJA eliminated the limitation.

Biden has proposed restoring the Pease limitation on itemized deductions for taxable incomes above $400,000.

Carried interest

Carried interest is the share of a private equity or investment fund's profits that serve as compensation for the fund manager. Generally, income (carried interest) that flows to a partner from a private investment fund is taxed at the lower capital gains rates with a three-year holding period requirement for certain long-term capital gain and loss.

Biden has proposed eliminating carried interest.

Payroll taxes

Under the Federal Insurance Contributions Act (FICA), an employer must withhold an employee's share of Social Security and Medicare taxes from FICA wages paid to the employee during the year and pay a matching amount as the employer's share of these taxes. Currently, the FICA tax of 12.4 percent is split between employer and employee. Under an executive action issued by President Trump in August, employers are allowed to defer the collection and payment of the employee's share of the FICA tax during the September to December 2020 period to January of 2021. Although Trump did not win a second term, the due date for the deferred taxes has been extended. The Consolidated Appropriations Act, 2021, P.L. 116-260, which Trump signed on December 27, 2020, extends the payback period from January 1 through December 31, 2021, with penalties, interest, and additions to tax applying as of January 1, 2022.

Biden has proposed a Social Security payroll tax of 12.4 percent for earnings above $400,000.

Business tax policy

Corporate tax rates

Under current law, the corporate tax rate is 21 percent. Biden has proposed increasing the corporate tax rate to 28 percent. Additionally, Biden has proposed a minimum tax on corporations with book profits of $100 million or more.

Qualified business income deduction

The IRC §199A deduction allows eligible taxpayers to deduct up to 20 percent of their qualified business income (QBI), plus 20 percent of qualified real estate investment trust (REIT) dividends and qualified publicly traded partnership (PTP) income through. Under the TCJA, the deduction is scheduled to expire after 2025.

Biden has proposed phasing out the qualified business income deduction for incomes above $400,000.

Energy tax incentives

Current law provides various credits for oil production, electric vehicles, as well as for the production of solar, wind and other "green" energy.

Biden has proposed ending subsidies for fossil fuels, restoring the full electric vehicle tax credit, and various credits and deductions to incentivize both residential and commercial energy efficiency.

International tax policy

Business repatriation incentives

Under current law, U.S. corporations can defer payment of federal income tax on profits from offshore subsidiaries until those profits are repatriated.

Biden has proposed ending the incentives for multinationals under the TCJA. Additionally, he would establish a "claw-back" provision to force a return of public investments and tax benefits when businesses close in the United States to send jobs overseas. Biden also has proposed stronger anti-inversion laws and regulations.

Global intangible low tax income

Global Intangible Low Tax Income (GILTI) was enacted under the TCJA as an anti-base erosion provision. GILTI is a tax on earnings that exceed a 10-percent return on a company's invested foreign assets.

Biden has proposed doubling the tax rate on GILTI earned by foreign subsidiaries of U.S. firms from 10.5 percent to 21 percent.

Health care-related taxes

Since passage of the Affordable Care Act (ACA), which created several new taxes and fees, taxes and health care have become more intertwined than in previous years. Under the ACA, beginning in 2014, a federal penalty was imposed on applicable individuals for each month they failed to have minimum essential health coverage for themselves and their dependents. Under the TCJA, for months beginning after December 31, 2018, the penalty amount is zero.

Biden has proposed strengthening the ACA by eliminating the 400-percent income cap on tax credit eligibility and lowering the limit on the cost of overage from 9.86 percent of income to 8.5. Additionally, he proposed expanding a variety of family tax credits to increase coverage and lower premiums.

> CAUTION. *On November 10, the U.S. Supreme Court heard arguments in the case California v. Texas (Dkt. No. 19-840), a suit seeking to invalidate the entire ACA on constitutional grounds. The outcome of that case could dramatically affect any Biden plans on health care.*

Year-end legislation

On December 20, leaders in Congress announced that they had reached an agreement on a new round of relief for the ongoing COVID-19 pandemic and economic stimulus. The Consolidated Appropriations Act, 2021 finally took shape after several days of negotiations between both parties on Capitol Hill. After initially voicing displeasure with the bill, President Trump relented and signed the bill into law on December 27.

The act includes several extensions of popular provisions of earlier COVID relief and stimulus acts passed in 2020. This includes additional loans under the Paycheck Protection Program (including the allowance of a second round of loans for certain small businesses), relief for the hard-hit transportation industry, additional funding for programs related to vaccines and virus testing, and further expansion of federal unemployment assistance (providing $300 a week in unemployment payments, half of the amount received under the acts passed last spring).

Biden has described the agreement as a "down payment" on relief and stimulus he will seek after his inauguration.

Biden's "American Rescue Plan," includes tax proposals aimed at providing tax relief to families and small businesses.

American Rescue Plan

President Biden's "American Rescue Plan," announced shortly before his inauguration, includes tax proposals aimed at providing tax relief to families and small businesses.

To deliver immediate relief to individuals and families, the plan proposes to send $1,400 per-person checks to eligible individuals on top of the $600 sent out in the most recent stimulus package; expand paid sick and family and medical leave; expand child care tax credits for one year to allow working families to receive a refundable tax credit as much as half of their spending on child care for children under age 13, so that they can receive a total of up to $4,000 for one child or $8,000 for two or more children; and expand the earned income tax credit.

The proposal would reimburse employers with less than 500 employees for the cost of the expanded paid sick and family and medical leave as well as extend the emergency paid leave measures until September 30, 2021.

Securities & Corporate Governance

By Mark S. Nelson, J.D. and Anne Sherry, J.D.

With respect to securities regulation, the political realities of a narrower House Democratic majority and a razor-thin Democratic Senate majority may force the incoming Biden Administration to focus on incremental regulatory policy choices over major financial legislation. Congressional action under the Biden Administration likely will depend on a small group of Senate moderates. But despite these realities, the Biden Administration can still shape several key areas of securities regulation through appointment of SEC and DOJ officials, targeted bipartisan legislation, and SEC rulemaking and guidance. Specifically, the nomination of former CFTC Chair Gary Gensler to lead the SEC suggests a somewhat more active regulatory agenda with an increased emphasis on investor protection and enforcement as compared to the Clayton-era SEC. Gensler's Senate confirmation hearing could reveal more about the direction he intends to take the SEC, including whether he may pursue regulations mandating public company disclosures regarding climate change and political contributions.

Overarching Biden priorities

The Biden transition team established a website (buildbackbetter.gov) to share news about the team's progress leading up to inauguration day. The website states as general priorities the continued fight against the COVID-19 pandemic, economic recovery, racial equity, and measures to address climate change.

With respect to economic recovery, the Biden team has stated that, as president, Biden will seek to reverse at least "some" of the Trump tax reform provisions that became law in 2017, especially regarding corporations. Although short on details, this statement hints at potential adjustments to corporate tax rates, business deductions and exemptions, taxation of dividends, and tighter restrictions on corporate inversions in which U.S. companies re-incorporate overseas to lower their U.S. tax bills. Given Democrats' narrow Senate majority, a major rollback of corporate tax reforms seems less likely than a revision of applicable Treasury regulations to encourage or discourage certain corporate behaviors, such as corporate inversions.

The transition team also has made racial equity a key goal. Racial equity in the securities regulation context could mean reintroduction of the several corporate diversity and inclusion bills passed by the House during the 116th Congress that target racial equity on corporate boards and C-suites. One also could foresee that federal agency Offices of Minority and Women Inclusion (OMWIs), such as those at the SEC and the CFTC, could take on greater significance. The CFTC created an OMWI despite a Dodd-Frank Act omission that left out the CFTC from the formal creation of federal financial regulator OMWIs, although proposed legislation would correct that oversight. Moreover, it seems plausible that the Biden Administration would reverse measures taken by Trump to ban certain types of racial trainings in employment settings, such as trainings that emphasize critical race theory (Rep. Joyce Beatty (D-Ohio) has introduced a bill (H.R. 236) to nullify this executive order).

Climate change is another key goal. The transition team stated that Biden intends to recommit the United States to the Paris Agreement, which Trump abandoned early in his presidency. The Biden Administration's recommitment to fighting climate change at the macro level likely would presage greater emphasis on climate change by agencies such as the SEC, although the details of how specifically that would be achieved, possibly through new public company disclosures, remains somewhat unclear.

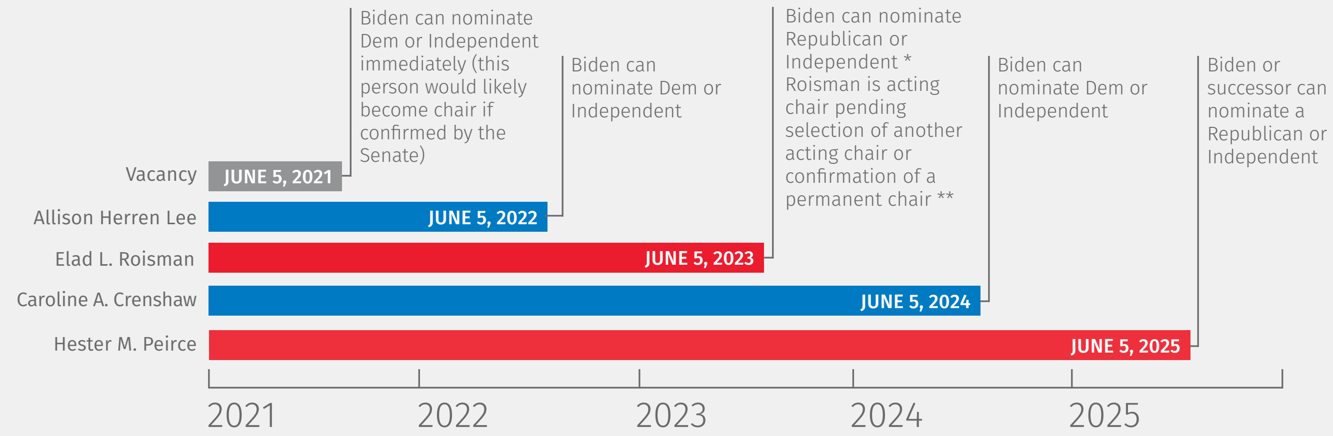
In terms of criminal justice, securities practitioners will recognize a familiar name on the Biden transition team's advisory board in Sally Yates, former deputy attorney general, whom President Trump fired when she refused to enforce the Trump travel ban. Yates is perhaps best known in corporate law circles, however, for the "Yates memo" in which she outlined then-DOJ policy on individual accountability and corporate wrongdoing. The selection of the next U.S. Attorney General could have significant ramifications for criminal securities enforcement and for Foreign Corrupt Practices Act (FCPA) cases. Although Yates was a possible contender for the role of attorney general, Biden has since nominated Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia for attorney general.

SEC leadership

President Biden announced that former CFTC Chair Gary Gensler will be nominated to lead the SEC. Gensler most recently has been leading the Biden transition's agency review team for banking and securities. As CFTC chair, Gensler was one of the first agency heads to begin implementation of the Dodd-Frank Act's derivatives reforms following the Great Recession. Gensler has recently been Professor of the Practice of Global Economics and Management at MIT Sloan School of Management, co-director of MIT's Fintech@CSAIL, and senior advisor to the MIT Media Lab Digital Currency Initiative. In the latter post, regarding digital currencies, Gensler has at times suggested virtual currencies such as Ripple may have been investment contracts and, thus, securities, but his background in the area also could suggest an opportunity for him as SEC chair to recalibrate existing SEC guidance on digital assets. In December 2020, the SEC brought a civil case against Ripple Labs, Inc. alleging that the company, its CEO, and its executive chairman conducted an unregistered offering of the virtual currency XRP.

There is precedent for selecting a former CFTC chair to head the SEC. Mary Schapiro, for example,

SEC Composition



* There can only be three commissioners from one party.
** Pending Senate confirmation of Gary Gensler to fill the vacancy as permanent chair, Biden can select an existing commissioner other than Roisman, likely Lee or Crenshaw, to be acting chair.

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led the CFTC before becoming the first person to have led both the CFTC and the SEC. Gensler has followed a path familiar to many high-ranking federal officials in recent administrations that leads from Goldman Sachs, to the Treasury Department, to becoming an agency head or other close presidential adviser. If confirmed, Gensler could be expected to take a somewhat more aggressive approach to regulating Wall Street than his immediate predecessor. However, unlike Schapiro, Gensler does not have prior experience as an SEC commissioner.

According to the Biden team's press release, Gensler was a senior adviser who aided Sen. Paul Sarbanes (D-Md) in drafting the Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board (PCAOB) to set auditing standards for public companies. The act, whose sponsors have since passed away, will turn 20 years old next year and has largely withstood the test of time.

Gensler's nomination is consistent with Biden's overall approach to nominating agency heads with substantial prior government experience. Moreover, Gensler has navigated the Senate confirmation process before, although this time he could be subjected to renewed scrutiny by Republicans on the Senate Banking Committee for his recusal from the MF Global, Inc. matter as CFTC chair, which focused on a commodity trading firm whose CEO was Democrat Jon Corzine, a former U.S. Senator and former Governor of New Jersey. Gensler also could be questioned anew about his use of personal emails while serving as CFTC chair.

In December 2020, former President Trump designated Commissioner Elad Roisman as acting SEC chair, but this role is likely to end now that Biden is in office. Commissioner Allison Herron Lee, the most senior of the two Democratic commissioners, could replace Roisman in an acting chair role pending Gensler's Senate confirmation. Lee's husband, PCAOB member J. Robert Brown, Jr., has announced that he will depart the PCAOB by the end of January. That move could facilitate Lee's transition into the acting or designated SEC chair role by reducing the potential for conflicts of interest in her regulatory work.

Enforcement

The Biden Administration SEC could be expected to pursue more enforcement cases and to bring cases against some larger targets. That is not to say that the Clayton-era SEC did not have some big cases but, to some extent, the most recent enforcement statistics were the product of the agency's program to encourage self-reported violations.

The Clayton SEC also adopted revisions to the whistleblower program that many see as potentially weakening the program. Nevertheless, the Commission recently issued a record $114 million award to a single whistleblower. The Biden Administration could be expected to mull ways to strengthen the whistleblower program, which could come in the form of regulatory changes or legislation that would essentially reverse the Supreme Court's *Somers* opinion, holding that a whistleblower must report to the SEC in order to partake of the Dodd-Frank Act's anti-retaliatory provisions. The new administration also could pursue bills previously introduced in Congress to establish a PCAOB whistleblower program.

Moreover, the recent popularity of special purpose acquisition companies (SPACs) could move the SEC in the future to take a closer look at some of these transactions, through its filing review process, by issuing guidance, by adopting regulations, or through enforcement. Former Chairman Clayton had issued a warning about SPACs in the context of Regulation Best Interest and COVID-19 investments.

Regulatory agenda

The incoming Biden Administration's SEC could shape many other areas beyond enforcement. For example, if it were to pursue regulatory changes to Trump-era regulations, the Biden SEC would have to justify those changes via new notice and comment rulemaking, although it is conceivable that new SEC leaders also could use guidance to shape future compliance with Trump-era regulations. It is even possible that as yet unknown but novel topics, like the blockchain issues that dominated much of the Clayton-era SEC, could arise and demand regulatory attention. Nevertheless, several key topics seem likely to recur:

- ***Environmental, social, and governance disclosures—***The Biden transition team has already flagged climate change as a key regulatory objective. One could expect the future SEC to pursue additional ESG-related disclosures from public companies. (See expanded discussion of potential ESG actions below.)
- ***Retail investors—***The SEC adopted final Regulation Best Interest in mid-2019, but the regulation only came into force in mid-2020 when firms were required to comply with its requirements. The Second Circuit rebuffed a legal challenge to the regulation, but a future SEC could still seek to establish a uniform fiduciary standard, as the Dodd-Frank Act also allows. The Biden Administration would have the option of pursuing such a standard, tweaking Regulation Best Interest to enhance investor protections, or aggressively enforcing violations of Regulation Best Interest.
- ***Shareholders and proxies—***The Clayton SEC also adopted final rules that imposed new requirements on proxy advisers and raised the eligibility requirements for shareholder proposals. Many investor advocates view both as potentially harmful to investors, but they especially view the increased eligibility requirements for shareholder proposals as unfair because of the new tiered structure, which favors wealthier investors. Moreover, higher resubmission thresholds could make it harder for some shareholder proposals to remain viable over time. The shareholder proposal changes also were the subject of controversy arising from allegations by investor groups that the SEC's Division of Economic and Risk Analysis (DERA) withheld key data from the public.
- ***Volcker rule—***The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (S. 2155) heralded an era of looser restrictions on banks, including rollbacks regarding the Volcker rule. However, any further changes to the Volcker rule regulations to mute recent rollbacks would require coordination by the SEC and multiple other federal financial regulators, some of which still will have Trump-appointed leaders with terms of office that will not expire for some time.
- ***Political donations—***The Biden Administration's SEC may wish to mull disclosure rules for public company political donations. In recent years, Congress has routinely blocked SEC rules on the subject via a policy rider contained in appropriations legislation, despite Democrats' efforts to strip out the rider. With Democrats now controlling both chambers, it is possible that the SEC rider will be removed in future appropriations bills, although it remains in effect for FY21. Moreover, it is possible that the U.S. Capitol insurrection on January 6 will provide further impetus for Congress and the SEC to adopt political donation disclosure rules. Already, several companies have announced

they will suspend or reconsider political donations to certain members of Congress. Blue Cross Blue Shield Association, for example, said the following: "In light of this week's violent, shocking assault on the United States Capitol, and the votes of some members of Congress to subvert the results of November's election by challenging Electoral College results, BCSBA will suspend contributions to those lawmakers who voted to undermine our democracy."

Some of these potential regulatory topics also have been mentioned as areas of concern by the SEC's Investor Advocate, Rick Fleming. According to the Investor Advocate's FY20 activities report submitted to Congress on December 29, 2020, the incoming Biden Administration should consider invoking the Congressional Review Act (CRA) or conduct new rulemakings to overturn or reverse four Clayton-era rulemakings: (1) the shareholder proposals rulemaking (insufficient economic analysis); (2) proxy adviser regulations (companies could use the rules to suppress dissenting views); (3) regulations harmonizing the SEC's exempt offering requirements ("a further step toward making registration entirely voluntary"); and (4) investment company rules on the use of derivatives (set outer limit for value at risk (VaR) too high and lacks a designated reference index).

Staff guidance

Despite former Chairman Clayton's efforts to reign-in SEC guidance by admonishing securities practitioners that staff guidance is legally non-binding, the Commission has continued to issue lots of guidance. One potential target for the Biden Administration could be the withdrawal of guidance issued by Clayton's predecessor, Acting Chairman Michael Piwowar. That guidance (Piwowar statement; updated CorpFin statement) advised public companies that the SEC would not recommend enforcement if they did not comply with the conflict minerals due-diligence requirement contained in Form SD. Many companies have continued to report on their due diligence despite the guidance.

COVID-19

The SEC has issued extensive relief to companies and other filers regarding the COVID-19 pandemic. It has also pursued many COVID-19-related trading suspensions and former Chairman Clayton had called on public companies to practice good hygiene by telling executives to refrain from stock trades when companies may be publicly disclosing COVID-19 information. However, a recent rulemaking petition from the Chamber of Commerce calls for the SEC to use its exemptive authority to limit securities lawsuits over COVID-19. There is little to suggest the Biden Administration would entertain this petition.

The new administration could influence COVID-19 relief legislation by potentially seeking to further limit executive compensation at companies receiving aid. It also could seek to curb existing CARES Act provisions that allow the Treasury Secretary to waive limits on executive compensation. Although additional Covid-19 relief was enacted late in 2020, Biden has proposed a much larger relief package.

Legislative agenda

President Biden may face legislative roadblocks to a broader reorganization of federal financial regulators even though Democrats recaptured the Senate. Bolder plans may have to be scaled back in order to ensure passage of legislation that is more incremental in scope and, thus, would not risk alienating Democrats from more conservative states. For example, a financial regulator revamp and consolidation on the scale proposed by Joel Seligman in his new book, *Misalignment: The New Financial Order and the Failure of Financial Regulation* (Wolters Kluwer), might have to await a more favorable legislative environment after the next midterm elections or later. Such a sweeping reform may be difficult to sell when many current economic problems have arisen because of the COVID-19 pandemic rather than from specific financial system defects.

Similarly, legislation proposed by Sen. Elizabeth Warren (D-Mass), which focuses more narrowly on public corporations, will likely require a more favorable legislative environment. The senator's Accountable Capitalism Act would, among other things, require large companies to obtain a federal public benefit company-style corporate charter, give employees seats on company boards, limit executive compensation by imposing a holding period on sales of company stock, and require approval of any corporate political donations by a company's directors and shareholders. It is an open question whether the Biden Administration would actively pursue this legislation, although the progressive wing of the Democratic party will likely continue to call for action on corporate responsibility. However, the Accountable Capitalism Act, even if never enacted, may still have an aspirational impact on some companies and, in that sense, it may also help to push organizations like the Business Roundtable to make good on recent pledges to emphasize companies' wider collection of stakeholders beyond their shareholders.

The leadership in the 117th Congress of the House and Senate committees with oversight of the SEC will play a key role in whether the new administration's legislative goals for securities and commodities laws will advance. With the Georgia U.S. Senate runoff elections now decided, Democrats will narrowly control the Senate. Senator Sherrod Brown (D-Ohio) will become chairman of the Senate Banking Committee. Brown, who has been the committee's long-running ranking member, has said he will pursue an agenda that favors workers and families over Wall Street, including economic recovery from the COVID-19 pandemic and the effects of systemic racism in finance.

Although recent Senate Banking Committee Chairman Mike Crapo (R-Idaho) would likely not be term-limited under GOP rules, Sen. Patrick Toomey (R-Pa) will become ranking member of the committee, something he alluded to in a recent statement about reform of the government-sponsored enterprises (GSEs). If Toomey becomes ranking member of the Banking Committee, members will recall his recent attempt to curb the Fed's authority to establish special lending programs to combat the economic downturn resulting from the COVID-19 pandemic, a move that almost upended the recently enacted omnibus Consolidated Appropriations Act, 2021, until Democrats were able to get language inserted in the bill to limit the effect of Toomey's amendment.

Representative Maxine Waters (D-Calif) will remain chairwoman of the House FSC following her approval by the House Democratic Caucus. Waters said in a press release that she intends to broadly align congressional financial policy with the Biden Administration's goals, including goals regarding climate change. Representative Patrick McHenry (R-NC) will remain the House FSC's ranking member. McHenry said in a press release that Republicans will continue to pursue "pro-growth policies" and COVID-19 relief while offering "a clear alternative to Democrats' government-first agenda."

ESG disclosure

Biden's promise to rejoin the Paris Agreement as one of his first acts as president marked his commitment to action on the environment, not only from within the Environmental Protection Agency but throughout the executive branch. At the SEC, this will mean a renewed focus on environmental, social, and governance (ESG) issues. Despite increasing public pressure for more disclosure and corporate attention to ESG issues, the SEC under Chairman Clayton retained a largely principles-based approach to disclosure. Although recent amendments to Regulation S-K address environmental and human capital disclosures, they require companies to disclose only material information.

In contrast to the light regulatory hand of the outgoing chair, Biden nominee Gary Gensler demonstrated a tendency toward tighter regulation and robust disclosure during his 2009-2013 chairmanship of the Commodity Futures Trading Commission. Gensler's commitment to financial reform led to a near-complete implementation of the rules Dodd-Frank required of the agency, culminating in new rules requiring registration of swap execution facilities. The official considers bringing transparency to that market one of his crowning achievements as CFTC chair, consistent with his belief that "transparency and open access to markets benefits the broad public and the overall economy."

At the SEC, this commitment to regulation and transparency would extend to climate disclosure as well as social and governance issues, such as board diversity. The SEC's Democratic commissioners have urged the agency to require more disclosure of ESG issues by linking them to corporate wellbeing, citing a positive correlation between diversity and corporate performance, for example, or the risks that climate change presents to a company's business. Some legislators, perhaps most prominently Sen. Elizabeth Warren (D-Mass), also call for more prescriptive disclosure that permits investors to compare metrics between companies.

Environmental matters

As Mayer Brown's Andrew Olmem described in a recent presentation, environmental policy is an area that unifies Democrats, whether they identify as progressives or moderates. Recent comments from the Democratic commissioners suggest a preview of what action the SEC may take towards environmental disclosures when it attains a left-leaning majority under the Biden Administration. Notably, Commissioners Allison Herren Lee and Caroline Crenshaw dissented from the S-K amendments due to a failure to address several ESG factors, including their silence on climate-risk disclosure. Crenshaw called on the Commission to form an internal task force and an external advisory committee to consider ESG trends.

This new spotlight on political contributions could rekindle efforts to require public companies to disclose their political spending.

More recently, in a keynote address, Lee described ways in which the SEC could address the systemic risks posed by climate change through enhanced disclosure and oversight. While acknowledging that demand from market participants has encouraged voluntary disclosures by companies and financial institutions, Lee said that some regulatory involvement is necessary to make sure those disclosures are standardized, readable, and comparable. The commissioner also suggested that the SEC require mutual funds and their advisers to make standardized disclosures on ESG matters and to implement policies and procedures governing their approach to ESG investment. Olmem also foresees the SEC within the next two years requiring companies to disclose their support for carbon energies and what their expectations are about reducing their carbon footprint.

As Lee noted, corporations often voluntarily disclose information in response to stakeholder demand. Historically, shareholders have used the proxy process to focus attention on ESG concerns. The SEC recently raised the stock-ownership thresholds for submitting a shareholder proposal and tightened the standards for resubmitting an unsuccessful proposal. The proposed rule received thousands of comment letters, many in opposition, and the vote was again 3-2 with both Democratic commissioners opposed. The SEC's own Investor Advocate lambasted the agency for having "selectively abandoned its deregulatory posture by erecting higher barriers for shareholders' exercise of independent oversight" over management, while Commissioner Lee said that the amendments "will be most keenly felt in connection with ESG issues, which comprise the main subject matter of shareholder proposals, at a time when such proposals are garnering increasing levels of support." Specifically on climate change, she noted that climate-related proposals garnered 31-percent support on average in the prior proxy season, and four of the proposals passed. While the rulemaking process presents practical limits on the Commission's ability to revisit these thresholds, watch for the SEC to compensate in other ways, such as restricting companies' exclusion of proposals through the no-action process.

Commission staff may also revisit guidance on shareholder proposals in the context of remote meetings. While a corporation's authority to conduct shareholder meetings remotely is largely a function of state law, the SEC issued guidance on the federal proxy requirements during the COVID-19 pandemic when many states authorized remote meetings on an emergency basis. However, the 2020 proxy season gave rise to concerns about shareholder disenfranchisement when AT&T reportedly required shareholders to summarize their proposals in 100-word statements to be presented by AT&T representatives rather than by the shareholder proponent. The SEC is likely to support remote meetings because they carry the environmental benefit of reducing travel, analogous to electronic filing and other paperwork-reduction initiatives. If the practice continues, however, the agency can be expected to issue further guidance that more clearly addresses requirements for shareholder participation.

Social issues

The SEC will also likely focus on a hot topic at the intersection of the social and governance components of ESG: board diversity. Stakeholders both within and outside the agency have stressed the importance of diversity in corporations and the contributions diversity can make to corporate performance. Several states now have diversity laws that either impose diversity quotas or require disclosure, while institutional investors such as the New York City Comptroller have called on companies to improve diversity at the top. In remarks at a conference this past fall, Commissioner Lee said that diversity correlates with enhanced performance and innovation. While the SEC cannot tell companies to be more diverse, simply requiring disclosure can drive corporate behavior because "what gets measured gets managed."

The recent rioting at the U.S. Capitol caused businesses to halt political contributions either to the specific legislators who voted against certifying the election results (Marriott, Morgan Stanley) or, more broadly, to any political candidates as a matter of policy (JPMorgan, Goldman Sachs). IBM, which has a longstanding policy of not contributing to candidates for office directly or through PACs (although it engages in lobbying), recently proposed a suite of governmental reforms aimed at preventing the type of breakdown that enabled the riots. This new spotlight on political contributions could rekindle efforts to require public companies to disclose their political spending. Provisions of recent congressional appropriations bills bar the SEC from requiring these disclosures directly, but this may change with Democratic control of both chambers. Businesses may even favor such disclosures as giving them cover to restrict political donations. As then-Delaware Supreme Court Chief Justice Leo Strine posited, "many businesses favored the pre-*Citizens United* world because it gave them a reason to say no to political pressures to use corporate money for political spending."

Corporate governance

Democratic legislators share the priorities of their regulator counterparts, including attention to environmental and social issues. At Chairman Clayton's final appearance before the Senate Banking Committee, Democratic senators including Sherrod Brown (D-Ohio) and Elizabeth Warren (D-Mass) criticized the official for failing to do more about ESG issues, particularly climate risk, during his tenure. A notable bill pending in the Senate Banking Committee is H.R. 5084, the Improving Corporate Governance Through Diversity Act of 2019, which would mandate issuer disclosure about boardroom and management diversity and inclusion efforts. And there has been bipartisan support for fixing Dodd-Frank's anti-retaliation provision to protect internal whistleblowers following the Supreme Court's decision in *Digital Realty Trust v. Somers*.

There is also currently a push to gain transparency into companies owned or operated overseas. Last month, Congress overrode a presidential veto to enact the National Defense Authorization Act, which includes a provision that will make it more difficult to use shell companies to conceal corporate ownership. Representative Carolyn Maloney (D-NY) had introduced a version of the Corporate Transparency Act in each Congress since 2009 and celebrated its passage even as she voted against the NDAA (she later voted to override the veto). The law will require private companies to report their beneficial owners to FinCEN. Congress also enacted the Holding Foreign Companies Accountable Act, which provides for the delisting from U.S. exchanges of foreign companies whose auditors are in jurisdictions that do not allow PCAOB inspections.

A provision will make it more difficult to use shell companies to conceal corporate ownership.

Labor & Employment

By Joy Waltemath, J.D. and Pamela Wolf, J.D.

It's a safe bet that the Biden Administration's labor and employment approach will resemble closely that of the Obama Administration. Biden has tapped familiar faces from the former Obama Administration for his agency review teams, including for the Department of Labor team, which also includes the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the National Labor Relations Board (among others). Moreover, about two-thirds of the Biden team's nominees and appointees to date share some ties with the eight-year Obama-Biden Administration.

The "Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions" on the campaign's website notes three priorities:

- Promote public/private sector unions and collective bargaining
- Protect workers' dignity, pay, benefits, and workplace protections
- Hold corporations accountable for violations of labor law

Conversely, in labor's eyes, the Trump Administration has done everything it could to dismantle any gains made by traditional labor during the Obama years and has largely succeeded, particularly at the NLRB, but also more subtly in recent activities of the Department of Labor and EEOC, and more dramatically in OSHA's failure to take new, enforceable action with respect to COVID-19 workplace protections.

Even so, 2021 is very different from the beginning of the Obama administration, and those differences will be apparent in what some have already characterized as a "cautious" Biden approach. Controlling the pandemic and addressing the resulting economic crisis must be the priority, and his actions since the election signal a focus on both. Biden also will face pent-up pressure from progressives and his labor constituents to go big on appointments, such as for the Secretary of Labor, as well as in his regulatory and enforcement agenda, noted James (Jim) Plunkett, in an interview with *Labor & Employment Law Daily*. Plunkett leads Ogletree Deakins' Governmental Affairs from the firm's Washington, D.C., office and was previously the Director for Labor Law Policy at the U.S. Chamber of Commerce, where he focused on legislation, regulations, and policy decisions that impact the workplace.

Comprehensive legislation doubtful

In the Senate runoff election in Georgia during the first week of January, the two Democratic candidates prevailed to give Democrats a fragile 50-50 majority tipped by Vice President Kamala Harris' tie-breaking vote. Major legislation may still be difficult, though, at least during the initial years of the Biden Administration.

On January 14, the president-elect laid out an aggressive, two-step rescue plan to get the country back on track—out of the COVID-19 pandemic and related economic crisis—and into a solid recovery. Among other things, the "American Rescue Plan" would increase paid leave benefits, boost the federal minimum wage to $15 an hour—last raised on July 24, 2009, to $7.25 per hour, the last step of a three-step increase approved by Congress in 2007—and authorize OSHA to give more workers greater protection against the coronavirus.

The incoming Biden Administration wants to provide emergency paid leave to 106 million more Americans in order to reduce the spread of COVID-19, according to the American Rescue Plan. The emergency paid leave program created through the Families First Coronavirus Response Act (FFCRA), as amended by the Consolidated Appropriations Act, 2021, which President Trump signed in late December, extended employer t*ax credits* for paid leave through March 2021, but the *requirement* that employers actually provide leave was *not* renewed.

Emergency paid leave plan

Biden is asking Congress to take several measures to expand pandemic-related leave benefits:

- Reinstate the FFCRA leave requirement and eliminate exemptions for employers with more than 500 and fewer than 50 employees; give healthcare workers and first responders these benefits, too; and close loopholes to extend emergency paid leave to up to 106 million additional workers.
- Provide expanded paid sick and family and medical leave to provide over 14 weeks of leave to help parents with additional caregiving responsibilities when a child or loved one's school or care center is closed, for people who have or are caring for people with COVID-19 symptoms or are quarantining due to exposure, and for people needing to take time to get the vaccine.
- Expand emergency paid leave to include federal employees, set a maximum paid leave benefit of $1,400 per week for eligible workers, and provide full wage replacement to workers earning up to $73,000 annually.
- Reimburse employers with less than 500 employees for the cost of this leave; extending the refundable tax credit will reimburse employers for 100 percent of the cost of this leave.
- Reimburse state and local government for the cost of this leave.
- Extend emergency paid leave measures until September 30, 2021.

Legislation will need GOP support

A signature piece of labor legislation, the Protecting the Right to Organize Act (PRO Act) passed by the House on February 6, 2020, in a 224-194 mostly party-line vote, is often cited by the Biden campaign as central to its labor agenda. However, any legislation likely needs Republican support, and while five House Republicans joined Democrats to favor the bill, seven Democrats joined Republicans to vote against it.

Similarly, neither the PRO Act nor comprehensive immigration reform is likely to gain any traction early in his term, nor will the Biden Administration be able to advance gig worker legislative protections or eliminate employer-imposed mandatory individual arbitration. However, Biden's Chief of Staff, Ron Klain, has said on day one Biden will propose immigration legislation to create a path for citizenship for DACA's Dreamers.

One unknown factor is the potentially greater appetite for bipartisan compromise in the wake of the violent insurrection mounted at the Capitol by Trump protesters on January 6, 2021, attempting to thwart the electoral vote certification that confirmed Joe Biden's election, and the fallout that continues to register, such as major corporations announcing their intention to cease political contributions to Republican lawmakers who voted against certification. The historic bipartisan vote in the House January 13 to impeach the president a second time may also shift the political winds—but whether towards compromise or deadlock remains unknown.

Single-issue legislation

According to Jim Plunkett, however, there is potential "rifle-shot" or single-issue legislation that may have bipartisan support and could advance, depending on other legislative priorities. Plunkett cited multiemployer pension reform; the Pregnant Workers Fairness Act (H.R. 2695), which passed the House 329-73 in September 2020; the Equality Act (H.R. 5), which passed the House 236-173 in May 2019; and the Fairness for High-Skilled Immigrants Act (H.R. 1044), which passed the House 365-65 in July 2019.

> *There is potential "rifle-shot" or single-issue legislation that may have bipartisan support and could advance.*

There is also some bipartisan support for federal action on non-compete and no-poach agreements (for example, in 2019, Republican Senator Marco Rubio introduced the Freedom to Compete Act that would prevent employers from using noncompete agreements in employment contracts for certain non-exempt employees).

Executive action the most likely, quickest tool

Immigration

President Trump's Executive Orders and Proclamations with respect to immigration number in the hundreds; some could be rescinded quickly. As vice president, Biden championed the creation and expansion of the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans (DAPA) program. According to his campaign website, some of the immigration-related executive actions the Biden Administration would consider include reinstating the DACA program, reversing Trump's public-charge rule, and rescinding the travel and refugee bans (among others).

Employment

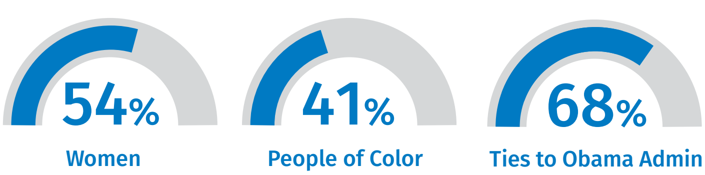
On the employment front, it is likely that Biden will seek to reinstate the Obama Administration's Fair Pay and Safe Workplaces EO (known by some government contractors as the "blacklisting" rule) and rescind President Trump's EOs (Nos. 13836, 13837, and 13839) that have limited the rights of federal employees to collectively bargain, made it easier to fire federal employees without just cause, and EO 13957, which created a new class of civil service employees who may be required to demonstrate political "loyalty."

The government contractor community and businesses overall may support the Biden Administration if it chooses to rescind President Trump's EO 13950 restricting diversity training by federal contractors and incentivizing complaints by employees against their employers.

Emphasis on diversity

Biden has promised a very diverse administration, more representative of women and people of color. His choices also include a substantial number of people with ties to the Obama Administration. As of January 15, 2021, of 44 named nominees and appointees:

- 54 % are women
- 41 % are people of color
- 68 % have Obama administration ties, primarily in his economy and national security sectors



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There is a potential for the Biden Administration to rescind or otherwise revise some of the former president's many executive actions that narrowed LGBTQ protections for employees and members of the military, too.

Court challenges expected

Many, if not most, actions that President Biden may take could immediately be challenged in the courts. It will be interesting to see whether those courts that have supported executive actions while President Trump is in office, citing the necessity of preserving executive authority, will be as open to Biden executive action.

Timeline for revamping labor agencies?

"It will take a while," Jim Plunkett of Ogletree Deakins notes, for the Biden Administration to remake the agencies in its image. The shift in Senate composition to a narrow Democratic majority and other demanding priorities (COVID-19, the economy, climate change) will determine when and how Biden can begin to shape the agencies with his appointees. The shift in Senate control will make it easier for Biden's nominees to be confirmed, though.

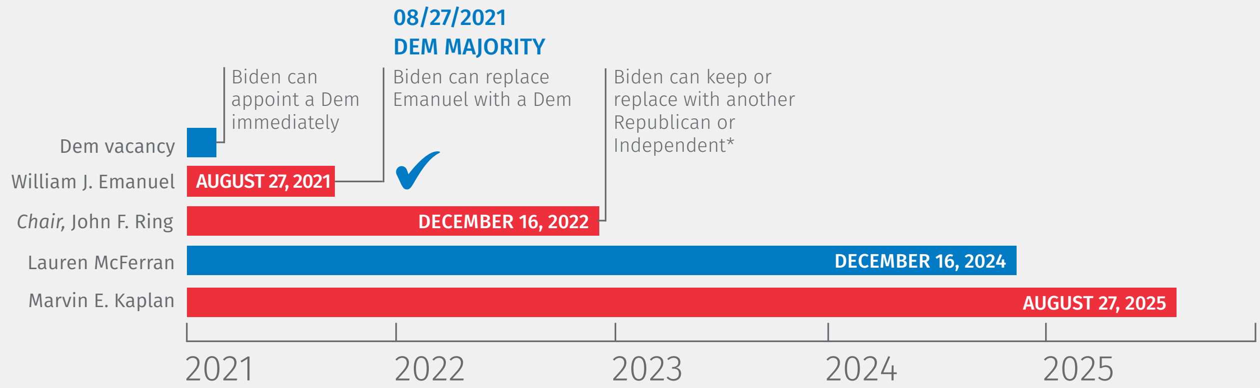
Where do the agencies stand?

At the five-Member NLRB, there is currently one vacancy; it will be Fall 2021 before another vacancy and the General Counsel position become open. This means that it could be 2022 before the Board composition and priorities have changed enough—and the appropriate cases get teed up—for a Biden Board to get enough traction to undo the Trump Board's significant activity, which itself undid the Obama Board's actions, a time-honored tradition of political ping-pong at the Board.

With respect to the EEOC, the first vacancy will open up in July 2021, while the Chairmanship opens in July 2022. Thus, it is unlikely to see major changes quickly at the Commission, although there might be some action towards rescinding of recently announced EEOC proposed conciliation changes favoring employers.

Meanwhile at the Department of Labor, Biden has nominated pro-union, pro-worker Boston

NLRB Composition



* There can only be three commissioners from one party.

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Mayor Marty Walsh. At Labor Department subagencies, including the Occupational Safety and Health Administration (OSHA) and the Office of Federal Contract Compliance Programs (OFCCP), some vacancies still exist, even after Trump's departure. For example, there is currently no Assistant Secretary for OSHA, as well as at a number of lesser-known subagencies.

Potential regulatory action

Once the dust settles, however, potential regulatory action, again depending on competing priorities, could include action on joint employment, both at the NLRB and DOL, or a redefinition of "independent contractor" and a revision of the white-collar overtime exemptions. Given COVID and criticisms of OSHA's failure to mandate, rather than merely provide unenforceable guidance, about workplace protections, an OSHA temporary emergency standard or infectious diseases standard is potentially in play. In the American Rescue Plan, Biden wants Congress to authorize OSHA to issue a COVID-19 Protection Standard that covers a broad set of workers, so that workers not typically covered by OSHA—such as many of the public workers on the frontlines—will also receive protection from unsafe working conditions and retaliation.

At the EEOC, the Biden Administration may choose eventually to return the EEOC's focus to pay equity, as had the Obama Administration, and attempt to revamp or reinstate the Component 2 pay data collection.

Notably, under the Congressional Review Act, Trump Administration rules may be revoked via congressional resolution of disapproval within 60 legislative days after they were promulgated. This process conceivably could snag some of the last-minute regulations the Trump Administration has pushed out—for example, over a dozen regulatory actions by employment-related agencies, some major, since December 1, 2020. The catch, however, is that federal agencies are prohibited from later issuing a regulation that is "substantially the same" as the one rejected by Congress.

Enforcement priorities

One immediate change is likely to be in the new administration's enforcement priorities. The Biden campaign signaled it would widely apply and strictly enforce prevailing wages, for example, covering every federal investment in infrastructure and transportation projects by prevailing wage protections. There may as well be a renewed emphasis on liquidated damages in agency enforcement activities, which were less of a focus during the Trump era. It remains to be seen whether a new administration will perhaps rely less on voluntary compliance, such as the OFCCP Early Resolution Conciliation Agreements that allow contractors to avoid further compliance reviews for five years.

Employee Benefits

By Lauren Bikoff, MLS and Tulay Turan, J.D.

In the employee benefits arena, one of President Biden's goals is to protect and build on the Affordable Care Act (ACA). On November 10, the Supreme Court heard arguments in *California v. Texas*, which seeks to invalidate the entire law on constitutional grounds. The outcome of that case could dramatically affect Biden's plans on health care. If the law is struck down, his focus could turn to addressing the possibility of millions of Americans losing health insurance coverage and protections, such as the prohibition on preexisting condition exclusions. If it's upheld, his main proposal would be adding a public health insurance option to the ACA.

Becerra will have a major role in deciding how the Biden Administration will expand the ACA.

Until the Supreme Court hands down its ruling, Biden will work with the Democratic majorities in both the House of Representatives and Senate to increase access to health care and build on the ACA. His pick of Xavier Becerra as Secretary of Health and Human Services shows his commitment to the health care law. As attorney general in California, Becerra has been a staunch defender of the ACA, most recently leading 20 states and the District of Columbia in a campaign to protect it from being dismantled by Republican lawmakers. If confirmed, Becerra will have a major role in deciding how the Biden Administration will expand the ACA, such as adding a public option and increasing access to premium tax credits, and can implement policies that will aim to lower prescription drug prices.

Public option

While some Democrats favor single-payer health care, known as "Medicare for All," Biden does not fully support that approach. His platform calls for expanding the ACA to provide coverage to more Americans, in addition to offering individuals the option of participating in a public plan similar to Medicare. The public option would be just one choice for those looking for coverage, along with employer-sponsored health plans and individually purchased coverage.

According to the campaign's website, the Biden public option would reduce costs by negotiating lower prices from hospitals and other health care providers and would cover primary care without any copayments. Biden has stated that offering a public option will help small businesses struggling to afford coverage for their employees. According to a recent poll of more than 530 employers by consultant Mercer, if a public option was introduced, 8 percent of companies would sponsor this type of coverage for their workers.

Premium tax credits

Currently, families that make between 100 and 400 percent of the federal poverty level may receive a tax credit to reduce how much they have to pay for health insurance in the individual marketplace. The dollar amount of the financial assistance is calculated to ensure each family does not have to pay more than a certain percentage of their income on a silver plan. Biden proposes to eliminate the 400-percent income cap on tax credit eligibility and lower the limit on the cost of coverage from 9.86 percent of income to 8.5 percent. He also proposes to increase the size of tax credits by calculating them based on the cost of a more generous gold plan, rather than a silver plan.

Surprise billing

Addressing surprise billing was included in Biden's health care-related proposals. On December 27, 2020, President Trump signed The Consolidated Appropriations Act, 2021, which included the No Surprises Act. The law prohibits surprise medical bills, where a patient receives a separate, and sizable, medical bill from an out-of-network health provider while receiving treatment at an in-network facility. The law also establishes an independent dispute resolution process for providers and payers to settle payment disputes. The Departments of the Treasury, Labor, and Health and Human Services will need to adopt many rules to implement these provisions, which generally take effect in 2022.

Drug prices

With regard to controlling rising drug prices, Biden proposes to repeal the existing law explicitly barring Medicare from negotiating lower prices with drug corporations. In addition, to create more competition for U.S. drug corporations, Biden will allow consumers to import prescription drugs from other countries, as long as the U.S. Department of Health and Human Services has certified that those drugs are safe.

Retirement Benefits

By Glenn Sulzer, J.D.

The incoming Biden Administration may be focused on legislation designed to provide continuing relief from the economic impacts of the COVID-19. The Departments of Labor and Treasury will also continue to provide guidance implementing the retirement plan provisions of the SECURE Act and the CARES Act. However, a Biden Administration can be expected to address, if not reverse, certain high-profile regulatory initiatives of its predecessor.

Private equity funds in 401(k) plans

The DOL issued an information letter on June 3, 2020 authorizing the inclusion of private equity investments within professionally managed asset allocation funds that are designated investment alternatives for participant-directed individual account plans. The DOL further advised that a plan fiduciary would not violate its duties under ERISA solely because the plan offers a professionally managed asset allocation fund with a private equity component as a designated investment alternative for an ERISA covered individual account plan.

The DOL views allowing private equity funds to be made available as an allocation option may enable plan participants to diversify their accounts and increase assets, while also providing private equity funds access to the estimated $6-$8 trillion invested in 401(k), 403(b), and 457(b) plans. However, private equity funds have been criticized as being too high-risk and costly to be included in retirement funds. The DOL view could be modified or reversed in a Biden Administration.

Economically targeted investments

Economically targeted investments (ETIs) that are selected for the collateral benefits they create, apart from the investment return provided to the employee benefit plan investor, were not viewed under the Obama Administration as incompatible with ERISA's fiduciary standards. In a reversal of a position maintained during the Bush Administration, the Obama DOL held that if a fiduciary properly determined that an investment was appropriate based solely on economic considerations, including those that may derive from environmental, social, and governance (ESG) factors, the fiduciary could make the investment without regard to any collateral benefits the investment may also promote.

The Trump DOL unsurprisingly reversed course with respect to ESG investments. In final regulations, effective January 12, 2021, the DOL stresses that ERISA fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors—financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy. The final regulations expressly apply these principles not just to investments and investment courses of action, but also to the selection of available investment options for plan participants in individual account plans.

Significantly, the final regulations expressly state that compliance with ERISA's duty of loyalty prohibits fiduciaries from subordinating the interests of participants to unrelated objectives. Accordingly, fiduciaries are barred from sacrificing investment returns or taking on additional investment risk to promote non-pecuniary goals.

The rules restricting ESG investments would be a prime candidate for revision by the incoming Biden Administration. The rules conflict with the promised environmental agenda of the incoming administration, which focuses on promotion of sustainable energy rather than fossil fuels. In addition, fiduciaries can argue that ESG-focused funds have been consistent performers.

Fiduciary rule

The DOL, during the Obama Administration, issued final rules that would have expanded the definition of a fiduciary to include any individual receiving compensation for providing advice (whether or not provided on a regular basis or as the primary basis for an investment decision) that was individualized or specifically directed to a particular plan sponsor (e.g., an employer maintaining a retirement plan), plan participant, or IRA owner for consideration in making a retirement investment decision. Under the amended rules, any investment recommendation would have been subject to ERISA's fiduciary requirements even if it was not the product of a mutual understanding or provided on a regular basis (i.e., more than once) as the primary basis for an investment decision. The rules were subsequently vacated by the Fifth Circuit Court of Appeals (with the Trump Administration's acquiescence), effectively reinstating ERISA's five-part test for determining fiduciary status.

The DOL recently released a proposed exemption that would allow financial institutions (registered investment advisers, broker-dealers, banks, and insurance companies) and investment professionals (their individual employees, agents, and representatives) to receive a wide variety of payments that would otherwise violate the prohibited transaction rules, including, but not limited to, commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue sharing payments from investment providers or third parties. The proposed exemption's relief would extend to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, and would allow financial institutions to engage in principal transactions with plans and IRAs in which the financial institution purchases or sells certain investments from its own account. However, the proposed exemptive relief would be conditioned on compliance with impartial conduct standards that generally align with a SEC best interest rule that applies to broker-dealers and investment advisers.

The DOL proposed rules would allow financial professionals to avoid fiduciary obligations in executing certain transactions. However, studies have indicated that financial service companies have modified sales and marketing practices to accommodate many of the requirements under the proposed rules. The Biden Administration may not want to incur the heavy lift of going through the long process of reinstating the prior rules. However, it would be reasonable for a Labor Department under new management to revisit the proposed rules to make them tougher on, for example, insurance agents and other financial service professionals who advise plan participants on the rollover of 401(k) assets to certain annuity products.

Legislation

In addition to pandemic relief legislation passed late in 2020, The Securing a Strong Retirement Act of 2020 contains many provisions that could be included in future legislation promoted under the Biden Administration. Among such provisions are: an expansion of automatic enrollment in 401(k) and other retirement plans; an increased credit for small employer pension plan startup costs; an increase in the required minimum distribution age from 72 to 75; an exemption from the RMD rules for 75-year-old participants with account balances of not more than $100,000; an increase in the maximum catch-up contribution by 60-year-old employees (to $10,000 from $5,000); treatment of student loan payments as elective deferrals for purposes of matching contributions; and a one-year reduction in the period of service requirement for long-term, part-time employees.

Health & Life Sciences

By Bryant Storm, J.D. and Sheila Lynch-Afryl, J.D., M.A.

Affordable Care Act

While President Trump attempted to undermine the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) during his term, Joe Biden, who was vice president when the ACA passed in 2010, has vowed to protect the law. Citing that the number of uninsured Americans has increased by 1.4 million since 2016, Biden intends to build on the ACA by providing a public health insurance option similar to Medicare, which he said would increase care coordination among doctors. In addition, during his campaign and in the American Rescue Plan he unveiled January 14, he proposed to "expand and increase the value of the Premium Tax Credit to lower or eliminate health insurance premiums and ensure enrollees … will not pay more than 8.5 percent of their income for coverage."

Biden's nominee for HHS Secretary, Xavier Becerra, has led the defense of the ACA in the U.S. Supreme Court and other courts as California Attorney General. Even with Democratic control in both the House and Senate, however, it is unclear whether Biden can accomplish his public option. In addition, much of what Biden can achieve regarding the ACA depends on the Supreme Court's decision in *California v. Texas*, in which the Trump Administration argued that the entire ACA is invalid after Congress eliminated only the shared responsibility payment of the individual mandate—though the Court's questioning at oral argument suggested that it was unlikely to invalidate the law.

Medicare and Medicaid

Biden proposed to lower the age of Medicare eligibility from 65 to 60, which Robert L. Roth, partner at Hooper, Lundy, & Bookman, P.C., called "the biggest expansion of Medicare eligibility since the program started in 1965." In addition, the Biden plan includes expanding Medicare fee-for-service benefit coverage by adding vision, hearing, and dental benefits.

Biden is also focused on expanding health coverage to low-income individuals, which entails offering premium-free access to the public option and providing Medicaid coverage for people with incomes under 138 percent of the poverty level. As part of his American Rescue Plan, to ensure that all Medicaid enrollees receive the COVID-19 vaccination, Biden plans to work with Congress to expand the federal Medicaid assistance percentage (FMAP) to 100 percent for the administration of vaccines.

While eliminating surprise medical billing is on Biden's health agenda, at the end of December Congress included extensive provisions prohibiting surprise billing in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Despite their different approaches to health policy, President Biden will likely pick up where Trump left off in expanding telehealth, encouraging value-based care, and continuing various flexibilities for providers during the COVID-10 public health emergency.

> *Biden proposed to lower the age of Medicare eligibility from 65 to 60, the biggest expansion of Medicare eligibility since the program started in 1965.*

Drug costs

Biden stated that he wants to "stop runaway drug prices" and "profiteering of the drug industry" by allowing the HHS Secretary to negotiate and otherwise limit Medicare drug prices; limiting launch prices for drugs that face no competition; limiting price increases for all brand, biotech, and generic drugs to inflation; allowing consumers to buy prescription drugs from other countries; ending pharmaceutical corporation tax breaks for advertising spending; and improving the supply of generics. But with the pharmaceutical companies' quick release of a COVID-19 vaccine—potentially bringing an end to the pandemic that has brought the world to its knees—public perception of the drug industry could shift.

At the end of 2020, the Trump Administration released two final rules aimed at controlling drug prices—the "most favored nation" final rule and another excluding rebates on prescription drugs paid by manufacturers to pharmacy benefit managers and Part D plans from safe harbor protection under the Anti-Kickback Statute. In December, a federal court in California granted an injunction prohibiting CMS from implementing the "most favored nation" rule. Even if this rule survives the court case, it remains to be seen whether Biden will allow either of Trump's final rules to take effect.

Abortion and contraception

Biden supports a repeal of the Hyde Amendment, which prohibits the use of federal funds to pay for abortions, amid what he called an "assault" by the Trump Administration on a woman's right to choose. Biden plans to codify *Roe v. Wade* and eliminate state laws that stand in the way of an abortion, including ultrasound and parental notification requirements, and restore funding to Planned Parenthood by reversing Trump's rule preventing Planned Parenthood and other agencies from obtaining Title X funds. Biden also plans to rescind the "Mexico City Policy," which prohibits the use of federal funding on global health efforts in developing countries because the organization providing the aid also offers information on abortion.

COVID-19

Biden, who has been critical of the current government's COVID-19 response, has created a 13-member team of scientists and doctors who are advising the new administration on control of the coronavirus. Biden has also formed a COVID-19 Response Team, focusing on quick implementation of the administration's response strategy. Biden's teams plan to improve the governmental approach to COVID-19 by increasing testing, shoring up personal protective equipment (PPE) supply shortages, and ensuring access to the COVID-19 vaccines.

American Rescue Plan

The incoming administration has announced some of its planned COVID-19 measures as part of Biden's American Rescue Plan. Under the plan, Biden proposes to: invest $20 billion in a national vaccination program; increase testing while making tests more widely available; ensure that schools can safely reopen; address health disparities and disproportionate impacts of the pandemic on underserved communities; scale-up funding for long-term care facilities; increase funding for sequencing, surveillance, and oversight of emerging COVID-19 strains; create a $30 billion Disaster Relief Fund to mitigate persistent supply shortages; fund treatment research to identify potential COVID-19 therapies; and increase worker protections by ordering the Occupational Safety and Health Administration to issue a COVID-19 Protection Standard.

Testing

Biden plans to expand access to COVID-19 testing by: (1) doubling the number of drive-through test sites; (2) investing in more types of testing—home tests and instant tests; (3) creating a Pandemic Testing Board to produce and distribute tens of millions of tests; and (4) establishing a U.S. Public Health Jobs Corps to mobilize at least 100,000 people to support communities most at risk by performing contact tracing.

CDC's expanded role

Biden plans to expand the CDC's role to provide more evidence-based guidance on: (1) when to open or close certain businesses, bars, restaurants, and other spaces; (2) when to open or close schools, and what steps they need to take to make classrooms and facilities safe; (3) appropriate restrictions on size of gatherings; and (4) when to issue stay-at-home restrictions. To help small businesses adhere to the guidance, Biden is proposing a "restart package," which would cover the costs of operating safely, including items like plexiglass and PPE. Biden has also proposed a Nationwide Pandemic Dashboard, which would go beyond the current CDC dashboard to provide real-time data regarding COVID-19 transmission at a more granular (zip-code, rather than state) level.

Defense Production Act

The former administration invoked the Defense Production Act (DPA) to force the production of ventilators. The Biden Administration, however, wants to go further and use the DPA to compel the production of masks, face shields, and other PPE. President Biden may also invoke the DPA to help manufacturers of the COVID-19 vaccine obtain necessary supplies.

Vaccine distribution

Biden has vowed to administer 100 million vaccines in his first 100 days in office. As of January 15, 2021, the United States had distributed over 30 million doses of the vaccine and administered over 11 million of those doses; however, just over one million people have received two doses—the full vaccine. Initially, the Trump Administration held back half of its vaccine supply, to ensure that those who received one dose would be able to get their second dose. However, Biden announced his intention to reverse that policy as a means to accelerate vaccine distribution. Subsequently, the Trump Administration adopted the Biden approach and announced plans to release reserved second doses immediately. The Biden Administration also has plans to create federally run mass vaccination sites to help the incoming president meet his pledge to provide every American with the vaccine at no cost to the individual. Biden has chosen Dr. David Kessler—former FDA Chief—to lead the incoming administration's vaccine development and distribution efforts.

Antitrust & Competition Law

By Jeffrey May, J.D.

The tech sector will remain an important priority for the Federal Trade Commission and Department of Justice Antitrust Division during the Biden Administration. Actions set in motion by the Trump Administration against Google at the Antitrust Division and Facebook at the FTC will continue into the foreseeable future. And other challenges to tech industry practices are possible, as the Justice Department is reportedly continuing its investigation into anticompetitive practices by other tech giants. Thus, while the changes in leadership may result in each agency taking a new direction and reprioritizing, monopolization claims against tech giants could dominate the Biden antitrust agenda over the next four years. Some types of mergers and conduct that did not get challenged during the Trump years could face closer scrutiny now, if the conventional wisdom that Democratic administrations are tougher on antitrust enforcement holds true. However, the right deals and cases will need to come along to change policy.

Antitrust Division, FTC leadership

The Biden team announced Justice Department leadership on January 7. Judge Merrick Garland was named as the intended nominee for attorney general, Lisa Monaco for deputy attorney general, and Vanita Gupta for associate attorney general. However, an assistant attorney general in charge of the Antitrust Division was not identified at that time to replace the outgoing antitrust chief—Makan Delrahim.

There is not a lot of information about the antitrust views of the already-named Justice Department intended appointees. However, Senator Amy Klobuchar (D-Minn.), a member of the Senate Judiciary Committee, expressed her view that "Garland will counter the increasing monopolization that is hurting consumers."

During his time on the U.S. Court of Appeals in Washington, D.C., Garland has not authored an antitrust opinion that would shed light on the subject. Yet, there are writings by Garland that do offer some clues. While a partner at Arnold & Porter, Garland wrote an article for the Yale Law Review (96 Yale L.J. 486, 507 (1987), entitled *Antitrust and State Action: Economic Efficiency and the Political Process,* contending that the judiciary should not employ antitrust law to interfere with state political decisions. He later reiterated that position in *Antitrust and Federalism: A Response to Professor Wiley,* 96 Yale L.J. (1987).

But it will be the front office the Antitrust Division, with guidance from staff, making the calls on what deals to challenge and what cases to pursue. If Biden follows President Obama's lead, he could nominate an assistant for attorney general for antitrust not long after taking office. On January 22, 2009, Obama announced Christine Varney, a Washington lawyer and former FTC Commissioner during the Clinton Administration, as his intended nominee. Varney was confirmed by the Senate just three months later.

The nomination of Delrahim—Trump's pick—did not move as quickly. The nomination was not received by the Senate until early April after Trump's inauguration. Delays and holds held up Delrahim's confirmation until September 27, 2017.

There will be changes at the FTC as well. Only three commissioners can be from the same party on the five-member Commission, and a majority of votes is required to take action. The commissioners serve staggered, seven-year terms.

There are currently three Republicans, including Chairman Joseph J. Simons, on the Commission. The two other Republicans are Christine S. Wilson and Noah Joshua Phillips, whose terms expire in September 2025 and September 2023, respectively. There also are two Democrats: Rohit Chopra whose terms expired in 2019 but who continues to serve, and Rebecca Kelly Slaughter, whose term expires in September 2022.

Simons announced his resignation, effective January 29. This move gives President Biden an opportunity to nominate a Democrat to serve out Simons' term ending September 2024. As a result, the president will not need to wait until the September 2023 expiration of Phillips' term in order to have a Democratic-controlled Commission.

Biden also will have to fill the vacancy expected to come from the departure of Democratic Commissioner Rohit Chopra. Chopra is Biden's pick to head the Consumer Financial Protection Bureau, according to a January 18 announcement.

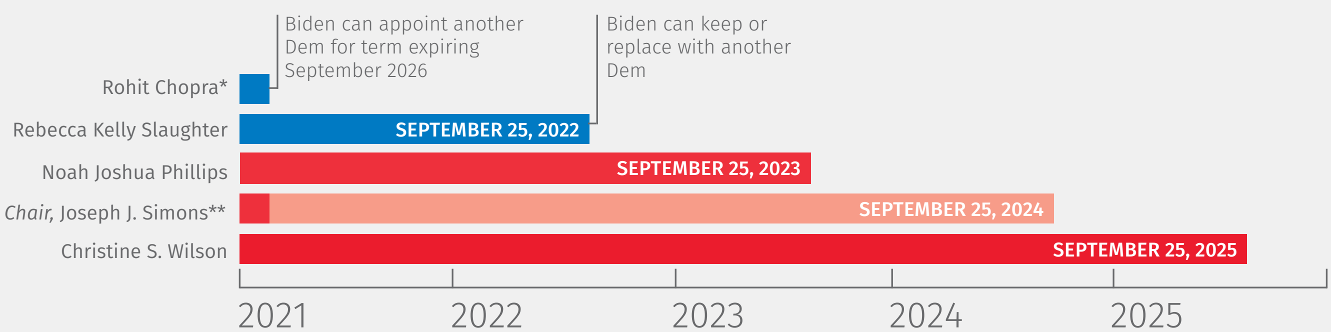
The president also has the authority to designate a new agency chair. Four years ago, shortly after taking office, Trump named a Republican—Maureen K. Ohlhausen—as acting chairman of the FTC in place of Democrat Edith Ramirez. Ramirez had already announced her intention to resign before Trump took office.

Once a new chair is in place, there will be a need to replace much of the senior leadership of the agency. Announced departures include: General Counsel Alden F. Abbott; Bureau of Competition Director Ian Conner; Bureau of Competition Deputy Directors Gail Levine and Daniel Francis; Bureau of Consumer Protection Director Andrew Smith; Bureau of Economics Director Andrew Sweeting; Office of Public Affairs Director Cathy MacFarlane; and Office of Policy Planning Director Bilal Sayyed.

Shift in priorities?

In the Biden administration, the agencies will continue to move forward with their current investigations, most notably the FTC's probe of

FTC Composition



* Term expired in September 2019, but Chopra continued serving as commissioner. Anticipated nominee for CFPB director.

** Simons will resign on January 29, 2021. Biden can replace with a Dem to serve out the term.

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Facebook and the Antitrust Division's case (along with a number of state attorneys general) against Google. As both Republicans and Democrats have argued for reining in tech giants, there might be some differences in the future approach to the cases or the ultimate remedies sought. But the matters will remain priorities and potentially for years. For instance, a trial in the Justice Department-led action against Google might not come until September 2023.

Other continuing antitrust priorities will be the health care sector and labor markets. Despite a tough loss in a hospital merger challenge in Philadelphia involving Thomas Jefferson University and Albert Einstein Healthcare Network, the FTC is continuing to pursue a challenge to a hospital merger in New Jersey. An agency challenge to another hospital acquisition in the Memphis area led the parties to abandon the transaction. The striking number of merger challenges by the FTC in the last year was not limited to health care. In November 2020, Chairman Simons said that the Bureau of Competition had more merger enforcement actions in Fiscal Year 2020 than any other year in the past 20 years. It is unlikely that the pace will subside substantially during the Biden administration if merger activity continues at its current pace.

At the Antitrust Division, the agency made good on a promise made during the Obama Administration to criminally prosecute "naked" agreements in labor markets. Late in 2020, a former owner of a therapist staffing company was indicted for wage fixing. Earlier this year, a second indictment was filed in a separate investigation. A health care company was charged with agreeing with competitors not to solicit senior-level employees. These criminal cases are continuing, and more could follow.

Eventually, however, there will be new priorities. At the FTC, the commissioners have demonstrated a fairly unified front in the agency's antitrust enforcement efforts. However, recent dissenting opinions from the two Democratic commissioners could signal changes in merger enforcement when the majority ultimately shifts.

But the Democratic commissioners have questioned whether the agency's merger enforcement efforts have adequately protected competition. Over the last year or so, Chopra and Slaughter issued dissenting votes in approval of settlements resolving challenges to the combinations in the pharmaceuticals sector, including the mergers of Pfizer's Upjohn Inc. and Mylan N.V., AbbVie Inc. and Allergan plc., and Bristol-Myers Squibb Company and Celgene Corporation. Chopra has questioned the adequacy of divestiture buyers and also has voiced "concerns regarding the lack of adequate protections against independent monitor conflicts of interest in FTC orders." Thus, one could foresee greater scrutiny of mergers and process in a Democratic-controlled Commission.

At the Antitrust Division, there could be a departure from Delrahim's "New Madison" approach at the intersection of antitrust and intellectual property. In 2018, Delrahim outlined his New Madison approach, which cautions against the misapplication of antitrust theories to licensing disputes that involve a patent holder's unilateral exercise of its exclusive rights. The approach was in response to an Obama administration view that apparently favored patent implementers over patent holders. In addition, Delrahim withdrew the Antitrust Division's assent to the 2013 joint "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments." In December 2019, the Justice Department, along with the U.S. Patent and Trademark Office and National Institute of Standards and Technology, issued a joint policy statement to take its place, addressing the treatment of standard-essential patents or SEPs where the patent holder has agreed to license its patents on FRAND terms. The pendulum could swing back.

A push at the Antitrust Division to use arbitration procedures might also fall out of favor.

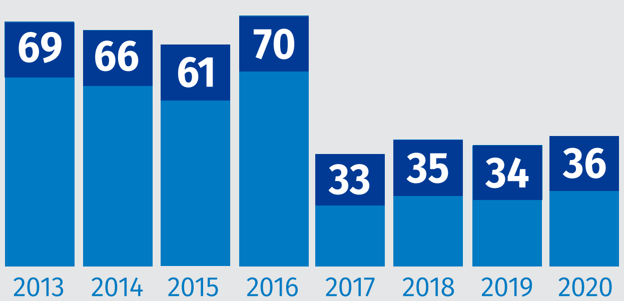
A push at the Antitrust Division to use arbitration procedures might also fall out of favor. In November 2020, the Antitrust Division issued updated guidance, which is said to reflect the agency's experience "using arbitration for the first time in *United States v. Novelis Inc. and Aleris Corporation,* to streamline the adjudication of a dispositive issue in a merger challenge."

Among the agency's major accomplishments noted by the former antitrust chief was the judgment-termination initiative. In recent years, hundreds of legacy consent decrees and judgments dating back more than a century were terminated. The termination of the so-called *Paramount* consent decrees that for 70 years regulated how certain movie studios distribute films to theaters was considered a highlight of the project, which is apparently wrapped up. Consent decrees with the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)—the country's two largest performing rights organizations—were not terminated. Delrahim has called for the continued periodic review of the two decrees every five years. Unlike the Paramount decrees, there was no consensus among the stakeholders over whether the ASCAP and BMI decrees should be terminated following a two-year review that recently concluded.

Potential legislation

The Biden team could push for legislative changes to amend the federal antitrust laws. With Democratic control in the House and Senate, legislative proposals advanced by a staff report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law could get consideration. The report, titled *Investigation of Competition in Digital Markets*, detailed the findings of the 16-month long investigation. According to the report, there is a clear and compelling need to strengthen antitrust enforcement and to consider a range of forceful options, including "structural separations" and prohibitions on anticompetitive conduct. The report calls for legislative proposals to "(1) address anticompetitive conduct in digital markets; (2) strengthen merger and monopolization enforcement; and (3) improve the sound administration of the antitrust laws through other reforms." The report notes the need for "overriding problematic precedents in the case law" that the federal antitrust agencies and antitrust plaintiffs face in pursuing their cases.

New Antitrust Division Cases Filed 2013-2020



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Uptick in enforcement

The conventional wisdom is that Democratic administrations pursue antitrust enforcement more aggressively. The raw numbers of new case filings over the Trump administration compared to the last four years of the Obama administration seem to substantiate that theory. While there are many variables to consider when making such a comparison and numbers do not tell the whole story, new cases filed annually over the latest four-year period were about half of what they were over the earlier four-year period. In calendar years 2013 through 2016, the number of new cases filed by the Antitrust Division each year was between 61 and 70. In calendar years 2017 through 2020, the number of new case filings averaged in the 30s. There were 36 new cases in 2020.

As for the types of cases filed, the last four years did not see the announcement of new investigations into global pric e fixing conspiracies, such as the probe of the automotive parts sector earlier in the last decade. Perhaps, that could be attributed to an "America First" strategy that could change. In a November 2020 speech, Delrahim said on the topic of criminal enforcement that, during the past three years, the Justice Department has among other accomplishments obtained "the four highest fines or penalties ever imposed for *domestic* cartels." He also noted the Procurement Collusion Strike Force (PCSF), which is an interagency partnership intended to bolster efforts "to protect the public purse from collusion." According to Delrahim, the PCSF has opened over two dozen grand jury investigations across the United States involving possible domestic and international collusion and fraud. These probes could lead to antitrust enforcement actions to be filed in the Biden administration.

Intellectual Property & Technology

By Thomas Long, J.D.

The Biden-Harris transition team has offered few hints as to the new president's overall approach to intellectual property law. President Biden is expected to replace the current U.S. Patent and Trademark Office Director, Andrei Iancu, a Trump appointee, but it is unclear whether Biden would choose a director who would share Iancu's pro-patentee viewpoint or one who would take the stance of the Obama administration, which many commentators considered relatively hostile to rights owners. Also unclear is what positions the incoming administration will take on such controversial issues as subject-matter eligibility under Section 101 of the Patent Act, potential reforms to the Digital Millennium Copyright Act's safe harbor protections, and legislation pending in the current Congress to give the president more say over the appointment of the Register of Copyrights. Biden's team has, however, put forth a few specific proposals and promises relating to patent royalties, trade secrets protection, and the Internet.

Patent

The USPTO as currently configured has taken a relatively patentee-friendly approach and has set policies that somewhat cushion the effects of Supreme Court decisions on patent-eligibility, which are widely regarded as disruptive by stakeholders. It remains to be seen whether the Biden Administration will continue this approach or change course.

Biden has nominated Rhode Island Governor Gina Raimondo to lead the Commerce Department. Numerous commentators have predicted that current Under Secretary of Commerce For Intellectual Property and USPTO Director Andrei Iancu—renowned for his strong pro-patent-rights stance—will step down. It remains unclear whether Biden's choice for the post will share Iancu's views or whether the new Director will return to what some analysts considered a less patent-friendly environment under the Obama administration.

The Biden-Harris campaign website does provide insight into a possible change to patent law, however, in the area of patents that grow out of government-funded research and development projects. According to the website, Biden promises to ensure that taxpayers benefit from profitable inventions created by means of federal research dollars. "U.S. taxpayers should benefit from the upside of federal investments that result in profitable inventions underwritten by federal funds," the site says. "Biden will strengthen existing federal rights to ensure that the U.S. government captures a share of the royalties of high-profitable products developed with federal R&D funding."

The U.S. government should capture a share of the royalties of high-profitable products developed with federal R&D funding.

CAUTION. *Following through on the proposal for sharing royalties could require possibly contentious changes to the Bayh-Dole Act (also known as the Patent and Trademark Law Amendments Act, Pub. L. 96-517, December 12, 1980), and its implementing regulations, which generally provide that the legal title to an invention developed through federal funding is owned by the inventing contractor, although the statute allows for transfer of the invention to the government under limited circumstances.*

Trade Secrets

On his campaign website, Biden promised to confront foreign efforts to steal American intellectual property, particularly with respect to the misappropriation of trade secrets by China. According to the Biden campaign site, "China's government and other state-led actors have engaged in an assault on American creativity. From cyberattacks to forced technology transfer to talent acquisition, American ingenuity and taxpayer investments are too often fueling the advances in other nations."

Biden will work with Congress to eliminate [nearly] all non-compete agreements and ban outright all no-poaching agreements.

This would represent a continuation of the Trump Administration's focus on enforcement efforts along these lines, although the campaign site accuses Trump of weakness in this area. "And when it comes to China, under Trump's 'phase one' deal all those practices continue," the site states. "The piecemeal and ineffective approach of the Trump Administration will be replaced with a coordinated and effective strategy."

Biden also pledges to address state-sponsored cyber espionage against American companies, which would encompass protection of trade secret information. According to the campaign website, "Biden will set forth clear demands and specific consequences if China's government does not cease cyber espionage against U.S. businesses, and will develop new sanctions authorities against Chinese firms that steal U.S. technology that cut them off from accessing the U.S. market and financial system."

Biden has named Katherine Tai, Chief Trade Counsel for the U.S. House Committee on Ways and Means, as the nominee for United States Trade Representative (USTR), replacing current USTR Robert Lighthizer. She previously served in the Office of the USTR as Chief Counsel for China Trade Enforcement, in which capacity she litigated U.S. disputes against China at the World Trade Organization. Tai has a reputation for taking tough stances against China on international trade issues.

Association of Equipment Manufacturers (AEM) President Dennis Slater applauded the choice, remarking that "USTR-designate Tai has built a reputation as a tough and effective negotiator with a proven track record of advancing U.S. trade interests and countering unfair trade practices, making her an excellent choice for U.S. Trade Representative." Recording Industry Association of America CEO Mitch Glazier echoed the praise, saying "We look forward to working with [Tai] to promote strong protections for America's music community through U.S. trade engagement."

On December 28, Biden called for cooperation between the United States and "like-minded partners and allies" on China, stating, "On any issue that matters to the U.S.-China relationship—from pursuing a foreign policy for the middle class, including a trade and economic agenda that protects American workers, our intellectual property, and the environment—to ensuring security and prosperity in the Indo-Pacific region, to championing human rights—we are stronger and more effective when we are flanked by nations that share our vision."

However, on the domestic front, Biden has espoused a policy that could weaken or complicate businesses' efforts to safeguard their confidential proprietary information. On the Biden-Harris campaign website, the section on "empowering workers" proposes the elimination of non-compete clauses and no-poaching agreements. "As president," the site says, "Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements."

IMPACT. *The proposal does not specify how "narrowly defined" trade secrets would have to be, or what category or categories of information would be permitted or prohibited in agreements with employees. Significant changes in this area could require businesses to revisit or revise their approach to setting forth trade-secret protection policies via employee agreements.*

Section 230 reform

One of the hottest and most contentious topics in Internet technology law for the past few years, Section 230 of the Communications Decency Act

(47 U.S.C. § 230) provides protections for social media platforms and other Internet intermediaries from liability for third-party content and for attempting to police this content. The law shields online platforms from liability in connection with user-posted content, for instance, from defamation suits. In essence, Section 230 prohibits treating these Internet entities as publishers or speakers of information provided by third parties. Also among the provisions of Section 230 is "Good Samaritan" protection from civil liability when an interactive computer service provider or user voluntarily acts in good faith to restrict access or availability to material it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

In a January 2020 interview with the New York Times, Biden said that "Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms." Specifically calling out Facebook and its CEO, Mark Zuckerberg, for criticism, Biden explained that "[traditional media outlets] can't write something you know to be false and be exempt from being sued. But [Zuckerberg] can." He went on to say, "It [Section 230] should be revoked because it [Facebook] is not merely an internet company. It is propagating falsehoods they know to be false."

Some in the private sector and government—including officials in both the Republican and Democratic parties—have criticized interactive computer services of misusing Section 230 to facilitate the willful distribution of illegal material. In addition, Republicans have accused tech giants, such as Alphabet, Facebook, Squarespace, and Twitter, of moderating content in bad faith in order to exclude conservative viewpoints from the platforms. The Department of Justice issued a set of recommendations in June 2020 after a yearlong review of Section 230, as well as draft legislation in September, which would implement an executive order by President Trump aimed at limiting companies' ability to claim Section 230's liability shield for third-party content if they remove or limit access to content.

However, unlike the Republicans, Biden's objections to Section 230 appear to be related to objectionable content—including misinformation allegedly spread by social media providers, such as Facebook—rather than to the restriction of content. Biden might be likely to revoke or substantially revise Trump's executive order on the controversial provision, since that order was directed to the purported suppression of conservative speech.

The Biden administration would have some support from the private sector for its focus on Section 230 reform, although most likely for changing the provision rather than repealing it outright. For example, in a letter to Biden dated November 9, 2020, IBM CEO Arvind Krishna pledged the company's cooperation with efforts by the incoming administration to promote trust in technology. "IBM was among the first technology companies to advocate that Section 230 of the Communications Decency Act be updated," Krishna said, "with a proposal for a 'reasonable care' requirement to curb harmful and illegal online content."

In addition, once in office, Biden might be unwilling to resume regulatory action undertaken by the Federal Communications Commission under Trump. FCC Chairman Ajit Pai has announced that he is leaving the post as of January 20, creating another vacancy for Biden to fill. In an interview recorded on January 8 for C-SPAN's "The Communicators" series, Pai said he would not "move forward with a notice of proposed rulemaking" to clarify Section 230, explaining that "given the results of the elections, there [is] simply not sufficient time left to complete the administrative steps necessary in order to resolve that rulemaking." Pai's previous announcement that he intended to "move forward with a rulemaking" to clarify Section 230 was met with mixed reactions among Commissioners, who were split along party lines. Although the FCC's authority to interpret Section 230 is a matter of dispute, the FCC's general counsel said in a statement that this authority is "straightforward." Biden has given no indication as to whether he would pursue FCC regulatory action as a route for Section 230 reform.

OUTLOOK. *Although Biden shares the former administration's dissatisfaction with the Section 230 status quo, the new president seems unlikely to continue focusing on "censorship" of right-wing voices in social media. In addition, Biden will probably be hindered by partisan politics in achieving legislative reform of the provision and might find more success in the regulatory realm.*

Cybersecurity & Privacy

By Tony Foley, J.D.

The Biden campaign said little about cybersecurity and privacy beyond outlining a few general parameters prior to the November election, but since then the transition team has issued more detailed guidance on Biden's priorities. Of particular concern to the new administration is the need to restore and strengthen the country's cybersecurity defenses following the SolarWinds software hack that compromised networks across the federal government and private industry. Other areas of focus include potential federal privacy legislation, the ongoing threat of foreign interference, issues related to cross-border transfers of personal information, and enforcement matters, as outlined in more detail below.

Defense readiness, funding

In announcing its American Rescue Plan on January 14, the incoming administration called on Congress to launch an effort to underscore the importance of strengthening the country's cybersecurity capabilities. Specifically, the new president is seeking to expand and improve the Technology Modernization Fund, calling for a $9 billion investment to launch major IT and cybersecurity shared services at CISA and the General Services Administration. The plan also asks for a surge in expert hiring, investments to drive transformational IT projects, and additional investments in security monitoring and incident response activities.

The vice president's history of privacy advocacy will likely be a substantial driver of the new administration's policies.

The new administration also announced on January 13 that Biden will tap Ann Neuberger, currently the director of cybersecurity for the National Security Agency, to serve as deputy national security adviser for cyber and emerging technology in the incoming National Security Council.

On December 17, in light of the massive hack of government and private industry data controllers using the SolarWinds Orion software system discovered in mid-December, Biden issued a statement strongly condemning the foreign adversaries behind the attack and pledging to take swift and decisive action. "[W]e will make dealing with this breach a top priority from the moment we take office," the statement said. "We will elevate cybersecurity as an imperative across the government, further strengthen partnerships with the private sector, and expand our investment in the infrastructure and people we need to defend against malicious cyberattacks." The statement added that "[A] good defense isn't enough; we need to disrupt and deter our adversaries from undertaking significant cyberattacks in the first place. We will do that by, among other things, imposing substantial costs on those responsible for such malicious attacks, including in coordination with our allies and partners. Our adversaries should know that, as President, I will not stand idly by in the face of cyber assaults on our nation."

Privacy legislation

Many observers believe that the Biden Administration will take a closer look at enacting federal privacy legislation as a lynchpin of its cybersecurity and privacy agenda. A report issued by the nonpartisan Information Technology & Innovation Foundation (ITIF) in September 2020 quotes Biden saying that "[w]e should be worried about the lack of privacy [on tech platforms]" and that "we should be setting standards not unlike the Europeans are doing relative to privacy." In addition, the Democratic Party platform calls for passing federal data privacy legislation, in particular expanding student data privacy protections. It is likely that any federal legislation will contain at least some of the elements of the EU's General Data Protection Regulation (GDPR), which has been in effect since 2018.

There are currently a variety of competing proposals for federal privacy legislation in the U.S. Senate, including the Republican-backed SAFE DATA Act and the Consumer Online Privacy Rights Act introduced by Democrats. According to Odia Kagan, partner and chair of GDPR compliance and international privacy at Fox Rothschild LLC, the primary stumbling blocks to the enactment of federal legislation appear to be the provision of a private right of action for consumers, as well as deciding to what extent federal legislation will preempt state privacy laws, most notably the California Consumer Privacy Act (CCPA), as amended by Proposition 24, the voter initiative approved in the November election and commonly referred to as the California Privacy Rights Act (CPRA).

"It is difficult to be optimistic regarding the enactment of a federal law in the near term, considering that the parties were unable to reach a compromise on these issues even for a very limited privacy law regarding information on Covid-19," Kagan said. Democrats gained two Senate seats, and control of the chamber, in two runoff elections in Georgia on January 5, which could greatly influence the chances for federal privacy legislation.

It bears noting that Vice President Harris has a long history of pursuing privacy issues, particularly in her role as California Attorney General before winning her Senate seat in that state. The vice president's history of privacy advocacy will likely be a substantial driver of the new administration's policies.

International relations, cross-border transfers

According to the September 2020 ITIF report, Biden has expressed a desire to implement cybersecurity improvements to make smart grids more resilient to attacks from foreign adversaries. In addition, the Democratic party platform calls for the new administration to "maintain capabilities that can deter cyber threats" and to "work with other countries—and the private sector—to protect individuals' data and defend critical infrastructure." Biden also signaled his willingness to call out foreign adversaries for cyberattacks, particularly in the context of election interference, in a July 2020 blog post.

Kagan expects that the new administration will bring a renewed emphasis to a host of cybersecurity issues in addition to those announced in the American Rescue Plan. "U.S. players are continuously under cyberattack from foreign nation states, for corporate espionage or in an attempt to sway politics and public opinion," she said. "These attacks are a considerable national security threat. A focus on cybersecurity policies will help address this. In addition, what a Biden administration will do with respect to U.S./China relations could also impact data issues."

Data transfers between the EU and United States were upended in July with the decision of the Court of Justice of the European Union (CJEU) in *Data Protection Commissioner v. Facebook Ireland Ltd. and Maximillian Schrems* ("Schrems II), which invalidated the EU-U.S. Privacy Shield mechanism for facilitating these transfers. In its decision, the CJEU cited concerns with the breadth of U.S. surveillance activities related to EU individuals' personal data without appropriate GDPR protections. Experts have suggested that the incoming administration is more likely to work cooperatively with European data protection agencies to assuage their concerns and facilitate the free flow of data across jurisdictions.

"It is likely that the U.S. will work towards a 'Privacy Shield 2.0,'" said Kagan. "There is an urgent need to find a solution for the cross border transfers and the existing mechanisms (standard clauses) have been made difficult to use. The U.S. Department of State has already said that it is pursuing talks, and this will likely be picked up and accelerated."

Enforcement

While the Trump Administration was not shy about pursuing privacy and data security enforcement through federal agencies, including a $5 billion fine levied against Facebook by the FTC for violations of its users' privacy, the Biden Administration is expected to step up federal enforcement actions, particularly by the FTC. The blueprint for increased enforcement will likely be guided by the Obama Administration's white paper on a "bill of rights" for consumer privacy, which emphasizes FTC enforcement as a mechanism for providing greater consumer protections.

Finally, President Biden is expected to restore the FCC's authority to enforce violations of Obama-era net-neutrality principles that were repealed by the Trump Administration in 2017.

The new administration contends that the lack of net neutrality rules creates artificial scarcity and higher prices related to the provision of Internet services.

CCPA

It also bears noting that with the expected appointment of current California Attorney General Xavier Becerra to serve as Biden's Secretary of Health and Human Services, and the appointment of former California Secretary of State Alex Padilla to fill out the remainder of Vice President Harris' Senate term, different players will be involved in enforcement efforts regarding the California Consumer Privacy Act (CCPA). The Attorney General's Office historically has been primarily responsible for CCPA enforcement activities, but with the passage of the California Privacy Rights Act (CPRA) initiative in the November election, the state now will have an independent body, the California Privacy Protection Agency (CPPA), effective from the election's certification on December 16. As yet, no members of the CPPA have been appointed. Most of the amendments to the CCPA made by the CPRA do not take effect until 2023.

International Trade

*By Jeffrey L. Snyder, J.D., LL.M * and Shelley Su***

President Biden's inauguration has been met with relief by many in the international trade community. Despite a plethora of obstacles he faces, Biden is expected to conduct U.S. international trade policy in a different way, including the use of multilateral approaches rather than "going it alone," diplomacy instead of taunts and insults, collaboration not flying "solo," and working on common global goals, not just "America First." Jake Sullivan, Biden's choice for National Security Advisor, called it a "go it alone strategy." The current landscape is "the wages of four years of alienating our allies and refusing to work them. . . ."[1] Most of all, international trade observers look forward to a return of the rule of law, not the daily government by tweet that has too often surprised or even blindsided international business.

Despite COVID, there is a very healthy agenda. Globalization fell ill, but has not perished.

International business is accustomed to turbulence and uncertainty, but many will welcome what is expected to be a more measured, deliberate, and policy-driven approach under Biden. His advisors across the economic and security posts have staked out an early "rebuilding" of relationships that will allow the development of coordinated trade policy initiatives. There is no doubt Biden must dig out of some of the very deep trenches Trump has dug, and this will inevitably slow change. How quickly the United States and the world emerge from the COVID-19 crisis will influence the speed and effectiveness of much of the Biden agenda. In the meantime, despite COVID, there is a very healthy agenda. Globalization fell ill, but has not perished.

Transition

During the transition period, the Trump Administration took several actions that sought to bind, constrain, or at best simply delay the Biden Administration. Media reports suggested that Trump political appointees at the U.S. Trade Representative (and other agencies) refused to allow the agency's career staff to schedule meetings with Biden's transition landing team. Or,

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1 Fareed Zakaria interview, January 4.

in some cases insisted on joining meetings with career staff, chilling the briefings. Thus, the Biden administration may be coming into office without the latest information on the agency's pending tariff investigations or ongoing negotiations with foreign countries like the U.K. and Kenya. The Trump Administration also took policy actions that Biden may feel the need to undo before he can start on his agenda, including new sanctions on Iran, new export controls and sanctions on China, possible tariffs on Vietnam, possible import action on auto parts, among others.

Nonetheless, the Biden Transition Team is taking shape, marked by reliance on officials with a long history of engagement with their agencies and issues. For example, the announcement of Katherine Tai as Biden's nominee for U.S. Trade Representative. Tai is the chief trade lawyer for the House Ways and Means Committee and she is credited for shepherding the U.S.-Mexico-Canada Agreement through Congress and into law. A former Chief Counsel at USTR for China Trade Enforcement, Tai has deep knowledge of U.S.-China trade issues, and strong relationships in Congress to implement Biden's trade agenda.

First 100 days

Apart from the marquee announcements (such as rejoining the Paris Accords, which is likely to also find its way into any Biden trade agreements), we can expect the Biden Administration, in line with the theme of "building back better," to begin to recreate a collaborative relationship, particularly with European allies. However, a number of challenges have already appeared as potential stumbling blocks on the path to deeper U.S.-European cooperation as a result of disagreements over digital services taxation and the EU's rush to agree to an EU-China investment agreement weeks before the Biden Administration is set to begin. Nevertheless, rebuilding will be a key effort as the new administration tries to reestablish relationships of mutual respect not just with Europe and a newly independent UK, but also with its geographically closest allies in Canada and Mexico.

What will Biden do with the tariffs on steel and aluminum?[2] How will he address the important issues of the trade imbalance with China and the ongoing threats from Russia? For some of these issues, we will be forced to wait and see, but nothing is expected immediately. Biden has pledged to be more inclusive of labor interests and to be more collaborative with Congress. These take time, as does fitting action into a coherent strategy. Nonetheless, we have early glimpses of what may be in store in the following key areas.

China

China is perhaps the primary trade-related issue on which we may not expect much substantive change right away but will see a change in process. While Biden has also maintained a tough on China stance, the differences between his likely approach and that of the Trump Administration on China remain substantial.

Biden aims to release a comprehensive China policy review by mid-2021.

The Trump Administration's brinksmanship has not produced what Trump promised, in fact some worry that it has strengthened China. We can therefore expect the Biden Administration to maintain focus on the issues that exist—imbalance, technology competition, trade-secret protection, fair trade, industrial subsidies, and others—but to address them using the tools of international trade, not bullying or secret, arbitrary, and unaccountable proceedings producing duty hammers (such as section 301), which harm U.S. importers and consumers as much (or more) as they do China.

Analysts suggest a Biden White House will take the first six months to do a comprehensive review on every China-related action the previous

2 There are in fact many trade actions, both offensive and defensive, that Biden will inherit: https://www.cmtradelaw.com/2018/10/latest-u-s-trade-actions-tariffs-and-other-countries-retaliatory-measures/. Some have called for lifting, others for maintaining, these restrictions. Expect a measured evaluation, not immediate change. A fair administration of the restrictions, including the exclusion process, would be welcome.

administration took, and decide what should remain and what should be changed. The Biden Administration is aiming to release a comprehensive China policy review by mid-2021.

Trade agreements

The recent announcement of the Regional Comprehensive Economic Partnership (RCEP) in Asia has echoes of the work the Obama-Biden Administration undertook with Trans-Pacific Partnership (TPP) and provides stark evidence to underpin the worry that by withdrawing from TPP the United States is now being left behind in the region. Although it is unlikely that the Biden Administration will embrace the RCEP, it is expected to be more open to trade agreements that operate multilaterally, not unilaterally.

However, China's recent signal of interest in joining the successor to the TPP—the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—if serious, could force the Biden Administration to reconsider comprehensive multilateral trade agreements sooner than it would like in order to head off any effort by China to establish itself as the pre-eminent superpower in the West Pacific and a world leader in free trade, multilateralism, and economic integration. Any concerted effort to re-join the CPTPP (or any other comprehensive trade agreement) would likely require obtaining Trade Promotion Authority (TPA) from Congress which expires on July 1, 2021. It is unclear whether the Biden will seek its renewal before the authority lapses.

World Trade Organization

In the topsy-turvy world of 2020, where Republicans are no longer the party of "free trade" and in many ways have adopted trade policies that look like the Democrats of the 1980s, the parties may be closer on some goals, but are miles apart on process. A Biden Administration will look to multilateral institutions, such as the WTO, as tools for finding common ground and for addressing disputes through process, not tit-for-tat tariff battles.

Given the damage done to the WTO by the Trump Administration, repairs will not be quick or easy, but will provide a signal that there is a different way to do things, based on the rule of law, not unilateralism. Deglobalization, which has been a prime Trump objective, will slow and the beneficial, wealth generating, poverty reducing benefit of international trade can operate again. Expect the new administration to continue to manage the negative consequences of trade but to see liberalization as a good thing.

Export controls

In the Trump Administration, export controls as policy tools were elevated to their highest level since the fall of the Soviet Union. Export controls have served as the thin edge of the wedge to drive U.S. policy separating the civil from the military in China; many other tools have followed, but the comprehensive "clamp down" reducing the sharing of U.S. technology with China—from Huawei, to the military end use/user rule expansion, to the targeting of PRC companies with Entity List bans, all of which continued to be actively expanded through the last day of the Trump Administration—the Export Administration Regulations have rarely been so central in U.S. economic and security policy.

Although we expect the elevated role of export controls to remain under President Biden, we do expect changes: (1) greater appreciation for the self-inflicted harm certain of these measures have caused to part of the U.S. economy and that of our allies; and (2) a more transparent and process-driven system. Many see the current export control policy process as a "black box" with little rule-based support, and very little guidance for industry affected by the measures and realization of the long-term damage caused by excluding U.S. companies from cutting-edge, global supply chains.

Sanctions

President Biden faces an arguably over-leveraged U.S. sanctions policy, with the Trump Administration having resorted to unilateral sanctions as their preferred solution to every foreign policy challenge.[3] Biden is, however, expected to maintain

3 According to a recent report, https://www.cnas.org/publications/reports/sanctions-by-the-numbers-2020, "the United States significantly increased its use of sanctions" in 2020. "The total number of new sanctions designations in 2020 was only slightly lower than in 2019, with 777 designations compared to 785 in 2019.... Over 22 percent of 2020 sanctions designations came after the U.S. presidential election in November."

many of these approaches, including potential expansion in some areas, most prominently the use of sanctions on those engaged in human rights violations, via the Global Magnitsky Sanctions, including the targeting of those involved in fostering or supporting forced labor practices, or undermining democracy.

Cuba will be an important issue, including whether to roll back some of the restrictions that Trump created to slow President Obama's path to normalization and to reverse the reinstatement of Cuba's designation as a State Sponsor of Terrorism, re-imposed by the Trump Administration in its final weeks in office. The United States remains uniquely isolated in the world community when it comes to its relationship with Cuba.

President Biden will also confront the question of whether to maintain a "maximum-pressure" policy on everywhere from Iran, to Cuba, to North Korea, or whether he uses the change in administration as an opportunity to step back and engage diplomatically before resorting to economic coercion. Nowhere will this question be more pressing than with Iran, and whether and how Biden can return to the JCPOA that his former boss Obama established, will be one of the first-year tests of President Biden's foreign policy approach and potential re-engagement with European allies.

Even though the "what will Biden do" question cannot be answered with precision, the "how will Biden do it" question can be answered. Biden, as demonstrated in his rhetoric since his election and in the experienced foreign policy team he has announced during the transition, will pave the way to a return to respect for the rule of law and will aim to use, rather than undermine, the tools of international trade as a means of "building back better" with respect to America's standing in the global economy.

Winds of change

With control of Congress and the White House, the trade policy debate will no longer be the brinksmanship of the last president but will instead be characterized by the more traditional debate within the Democratic Party. Will traditional approaches—protectionismand a labor focus balanced with the pursuit of a global liberal order—prevail or will thenew progressives in ascendance carry theday? How will business, which is looking for more "buy America" but reengagement withthe world through a bold trade agenda,influence the Biden trade agenda? Can Biden bring stability back to tech policy? Will he have more success with curbing China's threat? The road ahead is no less challenging than it was in the past, but with new tools and a mandate to rebuild the carnage of the past four years, optimism and hope give Biden a fighting chance.

Banking & Financial Services

By John M. Pachkowski, J.D.

Upon assuming the presidency, the Biden Administration's approach to regulating the financial services industry, particularly banking, will be modeled on the elements of the July 2020 Biden-Sanders Unity Plan. A 110-page policy wish list, the Unity Plan was created by six joint task forces appointed by then-candidate Biden and Sen. Bernie Sanders (I-Vt) in May 2020 as means of the uniting the moderate and progressive wings of the Democratic Party.

Unity Plan elements

Access to banking services

One key element of the Unity Plan called for Ensuring Equitable Access to Banking and Financial Services since "[o]ne in four American households are either unbanked or underbanked, putting them at risk of losing money due to exorbitant fees or usurious interest rates."

To address this problem, the plan notes that Democrats will support and encourage congressional efforts to guarantee affordable, transparent, trustworthy banking services for low- and middle-income families, including bank accounts and real-time payment systems through the Federal Reserve Board and easily accessible service locations, including postal banking.

Access to credit

The Unity plan also seeks to expand access to credit by creating the Public Credit Reporting Agency within the Consumer Financial Protection Bureau to provide consumers with a government option that seeks to minimize racial disparities. All federal lending will accept this credit agency and require that this agency be used. This includes, but would not be limited to federal home lending, PLUS loans—parent loans backed by the U.S. government, other loans that are guaranteed by the U.S. government, as well as any employment through federal agencies or for federal contracts. The Public Credit Reporting Agency would also ensure the algorithms used for credit scoring do not have discriminatory impacts, including accepting non-traditional sources of data like rental history and utility bills to ensure credit.

Consumer protections

To protect consumers from usurious interest rates, the Unity Plan would strengthen oversight of consumer lending, including credit cards, as required by Dodd-Frank Act, through the CFPB and enforce remedies for abusive or deceptive practices. The Unity Plan also calls for transparency on rates charged by ZIP code; and legislative options to limit predatory interest rates on non-residential consumer lending.

Further, the Unity Plan seeks to reinvigorate the Bureau to ensure that banks and lenders cannot prey on consumers. This was reiterated by Aaron Klein, a fellow at the Brookings Institute, who suggested following the general election, that Biden name a new CFPB director on day one that has a "strong pro-consumer vision."

Financial system reforms

Noting that "The scars of the financial crisis that triggered the Great Recession are still present in our economy and our society," the Unity Plan provided, "Banks should never be 'too big to fail' [and that Democrats] will work to reverse the over-financialization of the American economy by maintaining and expanding safeguards that separate retail banking institutions from more risky investment operations."

The Unity Plan further provided, "We will strengthen and enforce the Obama-Biden Administration's Dodd-Frank financial reform law to protect American workers from the impacts of future financial crises. And when justified by the law, we will back criminal penalties for reckless executives who illegally gamble with the savings and economic security of their clients and American communities." This may also signal an appetite for reexamining the easing of banking regulations undertaken by the Trump-era banking agencies.

Student debt

Finally, the Unity Plan would address the mounting levels of debt carried by students. "The COVID-19 pandemic and President Trump's recession are making it harder for those with student loans to make ends meet right now." Specifically, the Unity Plan calls for steps to ease the burden of high monthly student loan payments by pausing monthly billing and stopping interest from accruing on federal student loans for people earning less than $25,000, and by capping payments at five percent of discretionary income for those earning more than $25,000.

Stakeholder wish lists

Although the Unity Plan may serve a roadmap for the Biden Administration, once it was ascertained that Biden was president-elect, several leaders and organizations set forth their wish lists for how the incoming administration should address regulation of the financial services industry.

Chairwoman Waters

For example, in early December 2020, Rep. Maxine Waters (D-Calif), chairwoman of the House Committee on Financial Services, sent a letter to President-elect Biden, providing recommendations on areas where the Biden Administration should immediately reverse the actions of the Trump Administration, and several actions that Biden can immediately take to coordinate the federal response to COVID-19, keep people safely housed, protect consumers and small businesses, support the broader economy and ensure a global recovery.

Waters called for the firing of the CFPB Director Kathleen Kraninger and directing new leadership at the CFPB to aggressively protect consumers by enforcing the law, including protections provided under the CARES Act, as well as other consumer financial protection laws, such as the prohibition on unfair, deceptive, or abusive acts or practices In addition, the CFPB should immediately begin work to replace the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule—Payday Rule—with a rule that protects consumers from predatory lenders. Finally, the CFPB should rescind its November 2020 debt collection rule that "would allow debt collectors to harass consumers over email or text, and instead bolster consumer protections against abusive debt collection practices."

Waters' letter urged "leadership at the Department of the Treasury and [Biden's] regulatory appointees to immediately take action to restore and enhance regulatory safeguards that put consumers, investors and taxpayers first, and ensures the financial system is better prepared for unexpected events."

Finally, Waters addressed the Office of the Comptroller of the Currency by stating, "Your appointed officials at the Office of the Comptroller of the Currency (OCC) must also not assume, as their predecessors have, that a law Congress passed over 150 years ago somehow gives them authority to provide a national bank charter to non-bank fintech or payment companies."

Americans for Financial Reform

A nonpartisan, nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, civic, and community groups, Americans for Financial Reform (AFR) provided a list of actions that "agencies can take immediately upon President-elect Biden's inauguration or shortly after to reorient financial regulation towards serving as a tool for economic and racial justice." AFR added, "Bold action in the first days can help lay out the priorities for the administration's first 4 years, clear away immediately harmful policies implemented by the Trump Administration and set the wheels in motion for bigger efforts to come. A clean break with the previous administration will create momentum for aggressive action in numerous facets of financial reform."

AFR called on the federal banking regulators—OCC, Fed, and Federal Deposit Insurance Corporation—to limit the power and size of the largest banks and the risk they pose to the economy. In the area of the Volcker Rule, AFR seeks improved disclosures on Volcker Rule compliance from regulators and banks and increased enforcement against bank trading that runs afoul of Volcker restrictions.

Finally, the OCC and FDIC should address the regulatory arbitrage employed by non-banks, such as high cost lenders and financial technical companies, in providing financial services while avoiding the laws designed to protect the public.

Chamber of Commerce

On the other side of the spectrum, the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness provided a report titled "The Growth Engine." The report provides over 100 recommendations to modernize financial regulation and spur growth on main street; and details collaborative opportunities the incoming Biden Administration and the 117th Congress have in enacting forward-looking policies. The report noted, "Issues left untended for years, such as structural regulatory reform, should be tackled expeditiously. New issues that can provide a generational leap, such as digital assets, need to be addressed with dispatch and speed."

Top recommendations in the Chamber's report include, among other things:

- increase oversight over the Financial Stability Board and other international standard setting bodies;
- transform the consumer experience by expanding access to digital channels for financial services;
- review and update liquidity and capital requirements for banks;

- reform supervision of banks so it is tailored for individual institutions and improves communication with regulators;
- expand consumer choice and access to credit; and
- enact legislation that makes structural reforms to financial regulators and the rulemaking process.

Cabinet appointments

Only two cabinet posts, the Treasury Secretary and the Secretary of Housing and Urban Development, would have an impact on the banking and financial services industries. Most of the Biden Administration's policies would be carried out by the three banking prudential regulators—OCC, Fed, and FDIC—as well as by the CFPB.

On November 30, 2020, Biden announced former Fed Chair Janet Yellen as his pick to be Secretary of the Treasury. It should be noted that Yellen has received Senate confirmation on four separate occasions and her confirmation hearing for Treasury Secretary was scheduled for January 19 before the Senate Finance Committee.

In her role as Treasury Secretary, Yellen will chair the Financial Stability Oversight Council (FSOC), which is tasked with identifying risks and responding to emerging threats to financial stability. FSOC also has authority to designate a nonbank financial firm for enhanced supervision to help minimize the risk of such a firm from threatening the stability of the financial system.

Rep. Marcia Fudge (D-Ohio) was nominated by President-elect Biden to be HUD Secretary on December 10, 2020. If confirmed, Fudge will be the first woman to lead HUD in more than 40 years and the second Black woman in history to lead the department. Fudge is expected to restore Obama-era fair lending and fair housing laws gutted by the Trump Administration and will be a key player in carrying out Biden's campaign promises to expand affordable housing, increase the availability of Section 8 vouchers and tackle racial bias in housing.

Agency leadership

Turning to the various banking agencies, any changes that President Biden makes to the agencies will require Senate confirmation.

CFPB

As previously noted, Biden has been called on to remove CFPB Director Kathleen Kraninger. This would be Biden's prerogative given the U.S. Supreme Court's decision in *Seila Law v. Consumer Financial Protection Bureau*, which held that the CFPB's structure impedes on the president's removal powers under Article II of the U.S. Constitution and that the agency's director can be removed at will.

President-Elect Biden announced on January 18 that Rohit Chopra will be his nominee as the next CFPB director. Chopra is currently a commissioner on the Federal Trade Commission. He previously served as assistant director of the CFPB, as well as the agency's Student Loan Ombudsman.

Federal Reserve Board

Currently, there is vacant seat on the seven-member Federal Reserve Board. A nomination to fill the seat likely would be among the first personnel moves under the new administration.

Comptroller of the Currency

Until January 14, 2021, the Office of the Comptroller of the Currency was led by acting comptroller Brian P. Brooks. Under a succession plan, Chief Operating Officer Blake Paulson began serving as the acting comptroller upon Brooks' departure. As with the CFPB and the Fed, nomination of a new Comptroller of the Currency is another personnel move to be made early in the new administration.

FDIC

President Biden will also get to reshape the composition of the five-member FDIC board of directors. Under the Federal Deposit Insurance Deposit Act, the board is composed of five members, three appointed by the president with the consent of the Senate and two *ex officio* members. No more than three members may be of the same political affiliation. The president, with the consent of the Senate, also designates one of the appointed members as chairman of the board, to serve a five-year term, and one of the appointed members as vice chairman. The two *ex officio* members are the Comptroller of the Currency and the CFPB director.

Currently, Jelena McWilliams, who was nominated by President Trump in 2018, serves as the FDIC's chairman. Her five-year chairmanship expires in 2023 and her board term expires in 2024. The only other appointed director is Martin J. Gruenberg. He was appointed by President Obama, with his term ending in 2018 and his successor never appointed. Finally, the vice chairman has been vacant since Thomas M. Hoenig departed in April 2018.

Given the requirement that no more than three members of the board may be of the same political affiliation, at a minimum, if President Biden were to nominate any new board member, either to fill the vice chairman vacancy or a successor to Gruenberg, one of those nominees must be a Republican. It is also highly likely that President Biden would use one of those nominations as a means to replace McWilliams as the chairman.

Commodities & Derivatives

By Lene Powell, J.D. and Brad Rosen, J.D.

The regulatory agenda at the CFTC came into sharper focus as a result of the Democratic victories in the Georgia senatorial runoff races on January 5th. Senators-elect Jon Ossoff and Raphael Warnock will soon be seated, resulting in the Democrats taking majority control of the U.S. Senate. This will smooth the way for President Biden to timely select a CFTC chair and move forward with what are expected to be an ambitious undertakings, especially in the area of climate change and ESG-related matters.

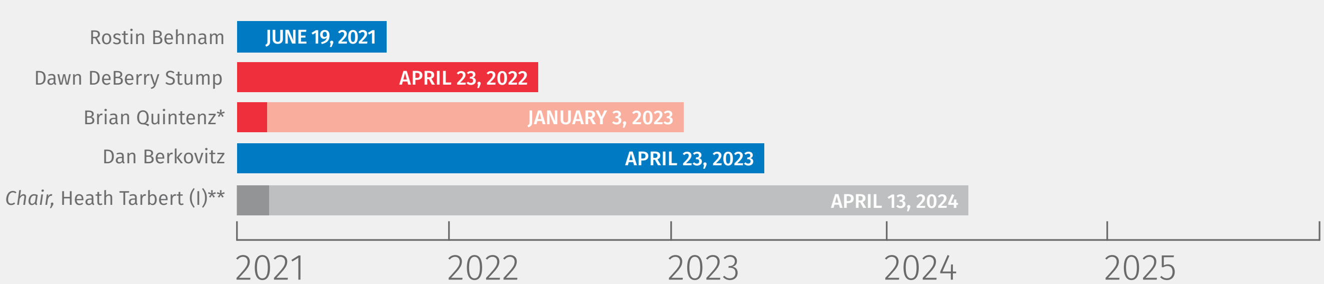
CFTC leadership

The big open question remains who President Biden will nominate as the permanent CFTC chairman, an unknown as of press time. However, with the inauguration, a Democrat will be named acting chairman by a vote of the five commissioners, according to Justin Slaughter, a Washington D.C.-based attorney with Mercury Strategies, a legislative and regulatory consulting firm. Slaughter thinks a permanent chair will be nominated and Senate confirmed no later than June 2021.

Based on seniority, Katten's Gary DeWaal would not be surprised if Commissioner Rostin Behnam was appointed acting chair, but notes that Dan Berkovitz could also be selected for that role. "The wild card is who might be nominated as the permanent chair. If an existing commissioner was to be nominated as the permanent chair, it would be expected that person would also be appointed

CFTC Composition

As terms expire, Biden can replace any commissioner with a Dem, Republican, or Independent, depending on the Commission composition at the time.



* Commissioner Quintenz was sworn in August 15, 2017, for a five-year term that expired April 13, 2020. He may remain until the end of the 117th Congress, but is generally expected to depart sooner.

** Chair Tarbert took office on July 15, 2019, for a term expiring on April 13, 2024. He has announced he will depart in early 2021.

Wolters Kluwer Legal & Regulatory, U.S.

as acting chair during the interim period", said DeWaal, Katten's chair for Financial Markets and Regulation Financial Markets and Funds.

Meanwhile, Chairman Heath Tarbert's term expires in April 2024. It is possible Tarbert may stand down from the chairmanship and continue to serve as commissioner, at least for a brief period of time. Commissioner Brian Quintenz's term expired in April 2020, and he previously announced he would leave the agency by October of last year. Still, under the applicable "timing out" provisions, Quintenz could remain as a commissioner until the end of the 117th Congress in January 2023. Nonetheless, Slaughter notes that either Tarbert or Quintenz is expected to leave the Commission in the near future.

Shift in priorities

According to DeWaal, ESG increasingly and enforcement matters will continue to drive activity at the agency. He also sees developments in Fintech, including DeFi (decentralized finance), having an important place on the CFTC's agenda. DeWaal observed, "No matter who the next CFTC Chairperson is, ESG will be front and center. Watch for futures and swaps trading facilities to offer more ESG-related products that will be eagerly supported by the Commission."

Slaughter echoes some of DeWaal's observations noting that, "Addressing climate change will be a top priority in the Biden Administration. It will likely be a top priority at the CFTC as well given reports of Gary Gensler's appointment to be SEC Chair, a staunch advocate of climate issues." Slaughter also noted that the CFTC chair is also a member of the Financial Stability Oversight Council (FSOC), where climate disclosure and reporting issues will be high-profile matters. He also anticipates that the Market Risk Advisory Committee's recently issued climate risk report will be adopted by the full Commission.

In Slaughter's view, there will be a high level of activity at the CFTC but not at the same pace as during the Dodd-Frank years or during Tarbert's time where there was a concerted push to complete Dodd-Frank rulemaking. Still, Slaughter declares, "people are not coming into the Biden Administration to sit on their hands. They will look to effect significant changes in all matters of public policy including financial and securities regulation."

On the enforcement front, DeWaal similarly predicts that the "CFTC enforcement division will not be taking a holiday under the next Chairperson and will likely continue to pursue its recent aggressive posture." In a similar vein, Slaughter anticipates an uptick in enforcement activity and believes there will be efforts to find major cases to pursue.

Rulemaking

Slaughter observes that most of the rules passed under Chairman Tarbert's reign were passed on a bipartisan basis and thus will likely remain untouched. However, he thinks we could see some changes in connection with rules where there was partisan disagreement. This includes the position limit rule, electronic trading risk principles and the Volcker Rule. He believes we might may also see changes in connection with the cross-border rules.

Slaughter does not see the Congressional Review Act (CRA) as coming into play to upset any recently enacted CFTC final rules. If changes are made to these rules, he thinks they will happen through regular order and rulemaking. DeWaal also believes a newly constituted Commission could tweak, if it wanted, both the position limit rule and the electronic trading risk principles. In his view, this would be preferable.

Enforcement

CFTC and DOJ enforcement is expected to continue strong in the Biden administration. According to Michael Levy, a partner in Mayer Brown's Washington, D.C. office, the CFTC has pursued spoofing cases especially aggressively and will likely continue to do so.

The CFTC also announced its first enforcement action involving foreign corrupt practices last November. The agency previously issued guidance on this topic, an area that had previously only been enforced by the DOJ and SEC under the Foreign Corrupt Practices Act. Levy predicts stronger foreign corrupt practices enforcement overall if international relationships and engagement improve under the Biden Administration.

For the DOJ, Levy foresees the following trends in the new administration:

- More aggressive enforcement of white collar crime in general, as the Biden Administration is expected to come under strong pressure from progressives.
- An influx of new resources to investigations, which will lead to more investigations being conducted, which in turn will lead to more enforcement actions.
- "Significantly higher" monetary penalty amounts.
- A stronger focus on individual accountability as a condition for cooperation credit.
- Increased use of DPAs, NPAs, and post-resolution monitors.
- Strong support for whistleblowers.
- Continuation of the policy against "piling on" by multiple agencies over the same conduct, which can result in double or triple penalties.

With the center likely to be pushed by progressives to take aggressive action to combat not just overt misconduct but also perceived unfairness, there could be fireworks for enforcement efforts.

Legislation, CFTC reauthorization

Slaughter does not anticipate any major financial legislation coming down the pike from Congress. He believes that the Senate filibuster will remain in place in the Senate thereby requiring 60 votes to pass legislation. In his view, most financial regulation cannot pass by the reconciliation process where only 51 votes are required.

DeWaal thinks the Digital Commodity Exchange Act (DCEA) will likely be re-introduced in the current Congress. This legislation would potentially set up a voluntary framework for virtual currency trading platforms to register with the CFTC and be subject to its exclusive jurisdiction. DeWaal envisions the new administration supporting this initiative which, if adopted, would make it substantially easier for virtual currency trading platforms to form and conduct ongoing business subject to one federal and not multiple state regulators and be more effectively overseen.

Another potentially active area is insider trading by legislators. Last year this area leapt into the spotlight when a number of legislators including former Sens. Kelly Loeffler and Perdue received scrutiny over whether they had traded securities on the basis of official briefings they received about the coronavirus. Sen. Mark Warner introduced a bill in the previous Congress to broadly prohibit financial investments by legislators unless the investments are held in a blind trust. Although so far the pandemic-related insider trading investigations have involved securities, the Warner bill also includes commodity futures and other derivatives.

The new Congress could also potentially see legislation involving whistleblowers. In the previous Congress, companion bills were introduced by Sen. Chuck Grassley (R-Iowa) and Rep. Cynthia Axne (D-Iowa) to expand existing commodities and securities whistleblower protections to whistleblowers who do not report violations to the CFTC or SEC as long as they meet certain conditions. Protections would apply for whistleblowers who report the violations to internal supervisors, assist in a CFTC or SEC investigation, or make disclosures that are required or protected under any law subject to the CFTC's or the SEC's jurisdiction. If reintroduced, the measure will likely generate discussion, whether or not it ultimately passes.

> *"I think President Biden, unlike his predecessor, truly understands the Art of the Deal."*

Both DeWaal and Slaughter believe CFTC reauthorization is likely. Slaughter also sees the possibility for a push for additional agency funding from a Democrat-controlled Congress.

Justin Slaughter is cautiously optimistic that there will be bipartisan cooperation under the Biden Administration, noting that financial legislation will require bipartisan cooperation. He believes we may see progress on cracking the regulatory rubric in connection with FinTech, and also potentially sees meaningful support for the agricultural sector.

For his part, DeWaal observes, "One of the few benefits of the travesty of January 6, is that it evidenced to me that there are moderate Republicans and Democrats who share a common view of America. If President Biden can leverage this constructive center of political thought, I think he will have a good majority to implement many important legislative initiatives." DeWaal concluded, "I think President Biden, unlike his predecessor, truly understands the Art of the Deal."

Government Contracts

By George M. Gullo, J.D., Marilynn Helt, J.D., and William A. Van Huis, J.D.

The Biden Administration is set to take significant steps to implement policy objectives through government contracting. President Biden's campaign platform focused on improving supply-chain efficiency, including more rigorous enforcement of the Buy American statute. In addition, the new president will look to use the government's purchasing power to reinstate and expand Obama-era labor policy reforms, and to implement environmentally-friendly policies and ethics reforms.

Government spending for contracted goods and services ballooned to record levels under Trump. It is unclear whether that trajectory will continue, although President Biden has proposed a nearly $2 trillion relief bill to address the COVID crisis. Going forward, budget appropriations that focus on major funding for COVID-19 pandemic stimulus and relief could cut into funding for other government programs and related contracts.

Supply chains

As President Biden takes office, the COVID-19 pandemic continues to ravage the country. The Biden administration will focus on supply chains to ensure the government does not face future shortages of critical products and equipment to combat the pandemic. Biden intends to marshal the government's resources to secure sufficient supplies and treatments, and to improve the distribution process for vaccines. The administration will implement fundamental reforms that shift production of a range of critical products back to the United States to create new jobs and protect U.S. supply chains against national security threats.

While medical supplies and equipment are the most pressing needs, U.S. supply-chain vulnerabilities exist across a range of critical products for which the country depends on foreign suppliers. These products include energy and grid resilience technologies, semiconductors, key electronics and related technologies, telecommunications infrastructure, and key raw materials. President Biden intends to institute an ongoing, comprehensive government-wide process to monitor supply-chain vulnerabilities, designate vital products where the government needs to address supply-chain vulnerabilities, and immediately close identified gaps.

President Biden has identified several goals for improving the government's procurement practices. These include:

- using the full power of the federal government to rebuild domestic manufacturing capacity in critical supply chains;
- implementing the Defense Production Act to increase domestic manufacturing of critical products, including those immediately needed to respond to the COVID-19 pandemic;
- employing federal purchasing power to bolster domestic manufacturing capacity for designated critical products;
- building long-term supply chain resilience for pharmaceuticals; and
- implementing a comprehensive approach to ensuring that the United States has the critical supplies it needs.

To address any future crisis or national need for vital goods, Biden's plan includes increased domestic production, strategic stockpiles, cracking down on anti-competitive practices that threaten supply chains, implementing smart plans to surge capacity in a time of crisis, and working closely with allies.

Buy American

President Biden has vowed his administration will mobilize "the full power of the federal government to bolster American industrial and technological strength and ensure the future is 'made in all of America' by all of America's workers." The new administration is expected to continue to encourage domestic production and sourcing, as did former President Trump in several executive orders, including E.O. 13858, Strengthening Buy-American Preferences for Infrastructure Projects, and E.O. 13881, Maximizing Use of American-Made Goods, Products, and Materials. However, Biden plans to work through legislative and regulatory processes rather than issue executive orders.

As part of this effort, the administration will work to tighten domestic content rules, crack down on waivers to the Buy American requirement, and extend Buy American to other forms of government assistance. In addition, Biden intends to include in the economic recovery legislation he sends to Congress a series of policies to build worker power to raise wages and secure stronger benefits. Although fostering domestic production will likely inform the Biden administration's approach to international trade agreements, the United States is expected to strengthen ties with trading partners, while also emphasizing the corollary issues of climate change and human rights. FAR Part 25 and DFARS Part 225 implement the Buy American statute's policy preference for the acquisition of domestic end products.

Labor

As a candidate, Biden signaled he would restore and expand Obama-era policies that support workers and unions. These specific campaign website proposals would affect government contractors:

- Restore and expand E.O. 13673, Fair Pay and Safe Workplaces, which required consideration of employers' compliance with labor and employment laws in determining whether they are sufficiently responsible to perform federal contracts;
- Institute multi-year federal debarment for all contractors who illegally oppose unions and ensure federal contracts only go to contractors who sign neutrality agreements committing not to run anti-union campaigns;
- Award contracts only to contractors that pay a $15 per hour minimum wage and family sustaining benefits; and
- Strictly enforce Davis-Bacon Act and Service Contract Act standards to ensure the prevailing wage is paid to construction and service workers and expand prevailing wage protections to all federal investment in infrastructure and transportation projects or service jobs.

The restoration of pro-labor regulations will likely include revocation of E.O. 13897, Improving Federal Contractor Operations, and the FAR Case 2020-001 rule, which implemented E.O. 13897 by removing FAR Subpart 22.12, Nondisplacement of Qualified Workers Under Service Contracts, and the related contract clause at FAR 52.222-17. The removed FAR sections in turn implemented E.O. 13495, Nondisplacement of Qualified Workers Under Service Contracts, which required service contractors and their subcontractors to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

Finally, Biden will likely revoke E.O. 13950, Combating Race and Sex Stereotyping. Commentators have questioned the constitutionality of the executive order, which requires contracts to include a prohibition against using "any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating."

Ethics reform

In October 2019, the Department of Defense announced the award of a $10 billion Joint Enterprise Defense Infrastructure contract to the Microsoft Corporation. In the "JEDI" contract, Microsoft agreed to provide enterprise level, commercial infrastructure as a service and platform as a service to support DoD business and mission operations. Amazon Web Services, a competing bidder, subsequently protested the award and successfully persuaded the Court of Federal Claims to enjoin the government from proceeding with the contract. Amazon's complaint alleged that evaluation errors "were not merely the result of arbitrary and capricious decision-making" but "were the result of improper pressure from [former President Trump], who launched repeated public and behind-the-scenes attacks to steer the JEDI Contract away from [Amazon] to harm his perceived political enemy—Jeffrey P. Bezos."

President Biden promised on his campaign website that agency decisions on specific matters, like awarding contracts or granting permits, would be based on merit and expertise, not on political preferences. He also pledged to issue an executive order prohibiting anyone in the White House from interfering with federal agencies on these matters and requiring the administration to disclose publicly if any corporation, individual, or other entity tries to solicit White House help. This information would be aggregated and made public by the Commission on Federal Ethics. Biden also promised to close the "federal contractor loophole," which allows officers and directors of contractors to contribute to federal candidates.

Agency decisions on awarding contracts or granting permits, would be based on merit and expertise, not on political preferences.

Export controls, cybersecurity, and climate

U.S. export policies of defense-related articles and services are regulated by the Export Administration Regulations and International Traffic in Arms Regulations. As with trade matters, the Biden Administration will not change direction on cybersecurity and export controls. However, the emphasis will likely shift from a unilateral approach to working closer with multilateral organizations and frameworks, such as the Wassenaar Arrangement. The focus of security measures directed at China will continue. In particular, the FAR interim rules prohibiting contractor use of telecommunications equipment and services produced or provided by Chinese companies will remain in effect or be reinforced. Expect to see similar prohibitions for Russian entities.

President Biden is making climate change a top priority. In the context of government contracting, the Biden campaign proposed to:

- Use the federal government procurement system to achieve 100-percent clean energy and zero-emissions vehicles; and
- Ensure all U.S. government installations, buildings, and facilities are more efficient and climate-ready by harnessing federal purchasing power and supply chains to drive innovation.

Regulatory reform

Early in the Trump administration, E.O. 13771 and E.O. 13777 called for a reduction of regulations. As a result of those orders, agencies issued only two acquisition rules in 2017. However, because the FAR and DFARS implement mandatory provisions of national defense authorization acts, the pace of regulatory action increased later in Trump's term.

Under the Biden administration, rules amending the acquisition regulations in 48 CFR are expected to go through a more stringent process through issuance of advanced notice of rules, proposed rules, and interim/final rules, which will create more transparency and accountability. The Department of Defense established a Regulatory Reform Task Force pursuant to E.O. 13777 and implemented a three-phase effort to review, implement, and sustain DoD regulations. DoD subsequently modified or repealed a number of DFARS regulations pursuant to task force recommendations. The task force issued its most recent report in February, 2020. The task force's mandate is uncertain under the new administration.

Government spending

The federal government uses about 40 percent of its discretionary spending on contracts for goods and services, and the Trump years were good for government contractors. In March of 2018, former President Trump signed a $1.3 trillion spending bill that included a $160 billion boost in defense spending over two years, reversing years of decline. In Fiscal Year 2019, the federal government spent more than $586 billion on contracts, an increase of over $20 billion from FY 2018. This increase was largely driven by spending on services for national defense, which accounts for the majority of federal contract spending. Contract spending totals for FY 2020 should exceed $600 billion, especially in light of the additional costs associated with responding to the COVID-19 pandemic.

Further, according to the Brookings Institute, "the Trump administration … presided over a massive increase in the federal government's hidden workforce of contractors and grantees." The government's "blended workforce hit a near-record mark in 2019 and showed no signs of cresting." Brookings also says Trump added "more than 2 million jobs to the blended federal workforce, including 1 million in the Departments of Defense, Transportation, and Health and Human Services alone."

It is unclear whether procurement spending will continue at current levels under the Biden administration. Some Democratic members of Congress have called for cuts to the defense budget, but President Biden has been relatively quiet regarding his spending plans. Further, in its first defense budget request, the Obama/Biden administration asked Congress to approve what was then a record $708 billion in defense spending for FY 2011.

Larger obstacles for continued contract spending increases are economic. President Biden's American Rescue Plan, which would create a national vaccine program and provide additional stimulus and relief funding, carries a price tag of $1.9 trillion. Passage of the plan would potentially make less money available for other government programs and related contracts. Although some predict economic conditions will improve in 2021, due in part to the availability of COVID-19 vaccines, the federal budget deficit now totals $3.1 trillion—more than triple the shortfall recorded in FY 2019—and the deficit is now equal to 14.9 percent of gross domestic product, up from 4.6 percent in 2019 and 3.8 percent in 2018.

The political climate should be favorable for the Biden administration's spending preferences. In the months leading to the election, some Republicans started calling for new austerity measures. However, Democrats won the two Senate seats that were up for grabs in the January Georgia runoff races. Although this results in a 50-50 Senate split between the parties, the President of the Senate—Vice President Harris—will be responsible for casting any tie-breaking vote, meaning that Senate voting among purely party lines will likely be resolved in favor of Democrats. Further, Senate control allows Democrats to take advantage of the reconciliation process for passing budget bills. With budget reconciliation, only a simple majority in the Senate is required, and filibusters cannot be used to stall the budget.

Finally, as part of more labor-friendly reforms, Biden may look to reduce the "hidden workforce of contractors and grantees" by insourcing functions currently performed by contractors and shifting the work to government employees, resulting in a reduced need for some contracts.

Conclusion

As discussed throughout this report, there are clear signs of what to expect in the Biden regulatory agenda. Although the particulars have only begun to take shape, the fundamental goals and priorities of Biden's team are known and they largely mirror or expand on what we saw in the Obama Administration. Implementing those goals will be a big question mark, however, given all the political, economic, national-security, and public-health challenges that lie ahead. And yet, through appointments, executive action, targeted legislation, rulemaking, enforcement, international alliances, and other means, the new White House will have many chances to chart a new course.

Look for an updated version of this white paper as we approach the 100-Day mark.

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