Wolters Kluwer

When you have to be right

White Paper

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Biden victory signals abrupt U-turn in federal regulatory direction, priorities

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

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By Wolters Kluwer Editorial Staff and Authors

Out with the old, in with the new. Except this time, what's new is familiar territory: a return to more traditional policies, process, and personalities. The 2020 presidential election of Joe Biden is sure to usher in a revival of many Obama-era priorities — expanding health care access, environmental protections, worker rights, international trade alliances, anticorruption measures, disaster preparedness, corporate accountability, 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 restorative; a reversal of the reversal. Picking up where Obama left off, much less expanding on it, will take time and fortitude simply to reinstate the status quo ante. Building on those Obama-era achievements will be harder still, and in some respects aspirational, especially if control of the U.S. Senate does not change hands following the Georgia runoff elections.

Then there are the new, all-consuming challenges unique to this moment. Biden has made clear that his team's 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 incoming Biden Administration? This white paper 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 white paper, written by Wolters Kluwer editorial staff and authors, lays out those likely scenarios and outcomes across a range of key practice areas: health care, labor and employment, tax, 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.

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Tax

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

Following the most contentious election season in modern history, the Biden victory portends a dramatic shift on tax policy. Although sweeping tax reform such as the Tax Cuts and Jobs Act (TCJA) in 2017 is not anticipated, President-elect Joe 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 (ACA), extending the Social Security payroll tax to higher income levels, enhancing tax benefits for families, and expanding several renewable energy credits. Whether those proposals can be enacted depends upon the outcome of the January run-off elections in Georgia as well as the ability of the Biden Administration to work with lawmakers from both parties.

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 upon 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.

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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. Trump had promised to eliminate the deferred taxes if re-elected. Since Trump did not win a second term, these deferred taxes will come due at the beginning of 2021.

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 U.S. income tax on profits from offshore subsidiaries until those profits are repatriated.

Additionally, Biden has proposed a minimum tax on corporations with book profits of $100 million or more.

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 U.S. 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

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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 Affordable Care Act (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.*

Lame-duck legislation

Due to the ongoing COVID-19 crisis, there is a pressing need for another round of relief legislation. Lawmakers from both parties have acknowledged that some type of relief legislation is needed, however, they differ sharply on the legislation's scope and focus.

Prior to the election, House Democrats appeared content to wait until after the election when a predicted increase in their House majority and possible change in Senate control would provide additional leverage to dictate the terms of the legislation. However, the anticipated "blue wave" did not materialize and Democratic leadership was left with an uncertain negotiation stance. On the other hand, Senate GOP leadership indicated there would be no chance of lame-duck legislation in the event of a Biden win. This stance has softened, however, and there have been hints of openness to considering some Democratic priorities.

Regardless of the timing, it is widely expected that another round of relief legislation will be passed. While not significant from a tax standpoint, the likely provisions to be included are another round of economic stimulus payments (which enjoys broad bipartisan support), as well as some new tax credits to help businesses manage the increased costs of COVID-19 mitigation measures.

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 an as yet uncertain Senate result — which, following the Georgia runoff in January, will yield one party a razor-thin Senate majority — may force the incoming Biden Administration to focus on incremental regulatory policy choices over major financial legislation, at least until the next mid-term election. Moreover, the Congressional Review Act would be an unrealistic approach to rolling back Trump-era securities regulations absent Democratic control of both chambers. Thus, it is unlikely that Biden could use the CRA in the aggressive manner the Trump Administration did during its first two years in office, in which President Trump symbolically chose the SEC's resource-extraction issuers regulation as the first regulation his administration targeted under the CRA.

Despite the absence of large Democratic congressional majorities, the Biden Administration may still shape several key areas of securities regulation through appointment of SEC and DOJ officials, targeted bipartisan legislation, and SEC rulemakings and other guidance.

Transition team's priorities

The Biden transition team has established a website (buildbackbetter.com) to share news about the team's progress as inauguration day approaches. 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

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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 the likelihood of a narrow Senate majority for either Republicans or Democrats, 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 recently by President Trump to ban certain types of racial trainings in employment settings, such as trainings that emphasize critical race theory.

Climate change is another key goal stated by the Biden transition team. Here, the team has stated that Biden intends to recommit the U.S. to the Paris Agreement, which President 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 Advisory Board in Sally Yates, former Deputy Attorney General, whom President Trump fired when she refused to enforce the Trump Administration's 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.

With respect to securities enforcement, the DOJ could see its criminal securities enforcement powers strengthened or pared back if the Supreme Court decides to review the Second Circuit's interpretation of the differences between cases involving Title 15 (e.g., Exchange Act Section 10(b) and Rule 10b-5) and Title 18, in which the "personal benefit" requirement typical of Title 15 cases is not explicitly required under an amendment made by the Sarbanes-Oxley Act to the federal criminal laws.

The Biden transition team's agency review team for banking and securities will be headed by former CFTC Chairman Gary Gensler. Gensler was one of the first agency heads to begin to implement 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 subject matter also could suggest a potential opportunity for him to advise the Biden Administration more broadly on the appropriateness of existing federal regulations and guidance on digital assets.

Finally, the Biden Administration may face legislative roadblocks to a broader reorganization of federal financial regulators unless Democrats recapture the Senate. Even then, a narrow Senate majority could necessitate scaling back bolder plans 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

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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.

SEC leadership

Public attention will inevitably turn to who might become the next SEC chair. Although the Biden team could conduct a wider search for SEC chair candidates, some of whom may be less well known, the list of potential candidates garnering public attention is already growing and may include:

- ***Allison Herren Lee***—The current SEC commissioner has demonstrated on two fronts the potential to shift SEC policy. She recently argued forcefully for more fulsome climate change disclosures. Lee also has suggested how the SEC could pursue regulations with a greater mix of prescriptive and principles-based rules, an issue she debated in an extended colloquy with Republican Commissioner Hester Peirce at the Commission's open meeting to adopt further revisions to Regulation S-K in August 2020. Lee could be a candidate for acting SEC chair, for designation as chair on a temporary basis, or for full-time chair under the Biden Administration.
- ***Robert Jackson, Jr.***—The former SEC commissioner could be another potential candidate whose dissent to Regulation Best Interest might assuage progressives but whose data-driven approach to policymaking might appeal to the moderate wing of the Democratic party and, perhaps, to some Republicans. Jackson operated his own economic research shop that produced a number of speeches on key topics in which he grounded his views on his own data analysis. Before joining the Commission, Jackson signed a rulemaking petition seeking SEC regulations on disclosure of public companies' political donations. With respect to Jackson's potential willingness to reenter public office, an email he sent to reporters upon announcing his departure from the SEC included a quote from former Commissioner Kara Stein, herself a potential candidate for SEC Chair, that suggested he may be contemplating a return to public service: "Rob has been a relentless advocate for making sure our modern markets remain the fairest and most efficient in the world. I hope our country will be fortunate enough to have him engage in public service again in the future," said Stein. Jackson is an Independent and if he was selected as chairman he would continue a recent trend of Independents heading the SEC (Jay Clayton from the Trump Administration, and Mary Jo White and Mary Schapiro from the Obama Administration).
- ***Chris Brummer***—A member of the Biden transition team's agency review team for the Treasury Department, a Georgetown University law professor and a former nominee for a seat as a CFTC commissioner. Brummer also has written several books on Fintech and digital assets, which would allow him to advise the Biden Administration transition team on blockchain issues.
- ***Kara Stein***—A former SEC Commissioner who worked on drafting portions of the Dodd-Frank Act and who served as counsel to Sen. Jack Reed (D-RI) and as an aide to former Sen. Chris Dodd (D-Conn).
- ***Gary Gensler***—Leader of Biden's agency review team for banking and securities and a former CFTC chairman. There is precedent for appointing a former CFTC chief to head the SEC: Mary

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Schapiro led the CFTC before running the SEC, the first person to have held both roles.

- ***Leo Strine—***The former Delaware Supreme Court chief justice and former Delaware Chancellor has been widely rumored to eventually seek a new public office, although he currently has returned to a combination of private practice and academic work. Strine has at times been controversial but his judicial work is well regarded among corporate practitioners. Strine has recently written extensively about the influence of the four largest institutional investment funds and the need for "EESG" investing, a phrase he uses to expand upon ESG investing to include issues affecting employees, the environment, social matters, and corporate governance.
- ***Preet Bharara—***The former U.S. Attorney for the Southern District of New York was fired by President Trump in the early months of the Trump Administration. A Bharara chairmanship could herald an era of increased SEC enforcement, perhaps especially with respect to insider trading. Bharara and former Commissioner Jackson co-authored a New York Times op-ed in 2018 that called for a better legal definition of insider trading following the Second Circuit's *Newman* opinion. The op-ed also announced the formation of the Bharara Task Force on Insider Trading, which has since issued a report recommending that the definition of insider trading be clarified and calling for the elimination of the personal benefit requirement.

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 Biden 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. Chairman Clayton has already issued a warning about SPACs in the context of Regulation Best Interest and COVID-19 investments.

Regulatory action

The new SEC could significantly affect many other areas beyond enforcement. For example, if the Biden Administration were to pursue regulatory changes to Trump-era regulations, it would have to justify those changes via new notice and comment rulemaking, although it is conceivable that the new SEC 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.

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- ***Shareholders and proxies***—The Clayton SEC also adopted final rules imposing 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 especially unfair because of the new tiered structure, which favors wealthier investors.
- ***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, something former Commissioner Jackson argued in favor of as an academic before joining the Commission. However, in recent years, Congress has routinely blocked SEC rules on the subject via policy riders contained in appropriations legislation. Whether these policy riders will reappear in appropriations bills introduced in the incoming 117th Congress will depend on which party controls the Senate.

Staff guidance

Despite 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 Chairman Clayton has 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 Biden 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. The extent of its influence would largely depend, however, on whether Congress passes another COVID-19 aid package before Trump leaves office or after Biden becomes president.

Environmental, social, and governance issues

President-elect 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 issues. Despite increasing public pressure for more disclosure and corporate attention to ESG issues, the SEC under Chairman Jay 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.

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.

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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.

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. 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.

While the SEC cannot tell companies to be more diverse, simply requiring disclosure can drive corporate behavior because "what gets measured gets managed."

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."

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Democratic legislators share the priorities of their regulator counterparts, including attention to environmental and social issues. Recently, 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 even if the party does not secure a Senate majority, 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*.

Labor & Employment

By Joy Waltemath, J.D.

The new administration's labor and employment approach will likely mirror that of the Obama Administration. Already, 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). 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.

But 2020 is very different from 2008, 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. 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

A Republican-majority or even a 50-50 Senate means major legislation is unlikely, at least during the initial years of a Biden Administration. For example, 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 is a no-go without 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, nor will the Biden Administration be able to advance gig workers legislative protections or elimination of employer-imposed

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mandatory individual arbitration. Whether the federal minimum wage will be raised—last raised on July 24, 2009, to $7.25 per hour, the last step of a three-step increase approved by Congress in 2007—is an open question as well.

Single-issue legislation

But, according to Jim Plunkett, 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 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 E.O. 13957, which created a new class of civil service employees who may be required to demonstrate political "loyalty."

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

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.

There is a potential for the Biden Administration to rescind or otherwise revise some of President Trump'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-elect 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 major labor agencies?

"It will take a while," Jim Plunkett of Ogletree Deakins notes, for the Biden Administration to remake the agencies in its image. Of course, the ultimate Senate composition and other priorities (COVID-19, the economy, climate change) will determine when and how Biden can begin to shape the agencies with his appointees, many of whom

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not only require Senate confirmation but also may require political gamesmanship and deal-making to accomplish. A lot will ride on the Senate's other priorities, as well as which nominees the Senate sees as both acceptable and a priority, Plunkett points out.

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 and its subagencies, including the Occupational Safety and Health Administration (OSHA) and the Office of Federal Contract Compliance Programs (OFCCP), some vacancies still exist, even as President Trump's first term is ending. 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. 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.

Enforcement priorities

One immediate change, however, 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 appears to have been less of a focus during the Trump Administration. 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-elect Joe 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. Biden also intends to address premium tax credits, surprise billing, and drug prices.

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Public option

While some Democrats are in favor of single-payer health care, known as “Medicare for All,” Biden does not fully support this plan. 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

President-elect Biden proposes to stop surprise billing, which could occur, for example, if a patient goes to an in-network hospital but doesn’t realize a specialist at that hospital is not part of his or her health plan. Biden will bar health care providers from charging patients out-of-network rates when the patient doesn’t have control over which provider the patient sees (for example, during a hospitalization).

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 the Trump Administration.

Private equity investments 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 position may enable plan participants to diversify their accounts and

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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) are selected for the collateral benefits they create, apart from the investment return provided to the employee benefit plan investor. Under the Obama Administration, the 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.

However, the Trump DOL reversed course, releasing final regulations, effective January 12, 2021, that stress that 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. Thus, the final regulations expressly bar fiduciaries 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.

Health & Life Sciences

By Sheila Lynch-Afryl, J.D., M.A. and Cathleen Calhoun, J.D.

Affordable Care Act

While President Donald 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, he would expand the tax credit for coverage in the marketplace and increase premium subsidies.

Kathy Poppitt, partner at King & Spalding LLP, noted that Biden's win is "likely to create a much needed sense of stability to the healthcare system after years of uncertainty around the ACA." However, much of what Biden can accomplish on the ACA front 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

One of the better known items on Biden's health agenda is his proposal 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." Employers would likely be eager for Medicare to cover the 60 to 64 population, but the chances of Biden accomplishing this proposal are up in the air for now, as a Georgia runoff in January will determine which party controls the Senate.

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In addition, the Biden plan includes expanding Medicare fee-for-service benefit coverage by adding vision, hearing, and dental benefits, allowing the HHS Secretary to negotiate and otherwise limit Medicare drug prices, and eliminating surprise medical billing. 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.

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

Drug costs

The Biden-Harris Administration stated in its plan that the Administration wants to ensure that "consumers are not price gouged as new drugs and therapies come to market." In addition to limiting Medicare drug prices, the Administration's goals include:

- 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
- Improving the supply of generics

Abortion and contraception

Amid what Biden called an "assault" by the Trump Administration on a woman's right to choose, Biden supports a repeal of the Hyde Amendment, which prohibits the use of federal funds to pay for abortions. He 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 has emphasized the need for changes to the government's COVID-19 response throughout 2020. In his first speech as President-Elect on November 7, 2020, Biden said, "[O]ur work begins with getting COVID under control. We cannot repair the economy...relish life's most precious moments...until we get it under control."

Recently, Biden created a 13-member team of scientists and doctors who will advise on control of the coronavirus, and he released information on how his planned policies and actions may improve health care.

Testing

Under Biden's plan, COVID-19 testing will expand and accelerate. Increases in testing and resources are involved, including: (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.

Masks and other PPE

On invoking the Defense Production Act (DPA) to get companies to manufacture protective gear, one of Biden's 13-member team of scientists and doctors, Dr. Célene Gounder, an infectious disease specialist at Bellevue Hospital Center and assistant professor at the New York University Grossman School of Medicine, told the New York Times on November 17, 2020, "I think that's going to be one of the very first executive actions that Mr. Biden would be taking." Specifically, according to the Biden-Harris transition plan, the DPA will be used to accelerate the production of masks, face shields, and other PPE. The goal of the planned acceleration is to have the national supply of PPE exceed demand, and to ensure that stores and stockpiles are fully replenished—most importantly in hard-hit areas that serve disproportionately vulnerable populations.

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This year, the Trump Administration has invoked the DPA in health care, most notably for the manufacture of ventilators. The intention of the Biden-Harris Administration is to make greater use of the DPA, immediately.

Eric Schillinger of Hall Benefits Law commented, "I expect that the Biden Administration's immediate actions to combat the pandemic will focus largely on systems outside of employer-sponsored health insurance (e.g., federal mask mandates, federally mandated COVID-19 protocols for businesses, dealing with supply chain issues for vaccine distribution, etc.)."

CDC's expanded role

Biden plans to expand the CDC's role when it comes to fighting the COVID-19 pandemic. He will instruct the CDC to create 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. The guidance will be based on the level of risk and degree of viral spread in a community. At the same time, Biden would like to provide a "restart package" that helps small businesses cover the costs of operating safely, including items like plexiglass and PPE.

Nationwide pandemic dashboard

Under Biden's proposed Nationwide Pandemic Dashboard, Americans will be able to determine for themselves, in real-time, if COVID-19 transmission is actively occurring in their zip codes. The idea behind the dashboard is for Americans to be able to understand the level of risk and exercise precautions based on those risks. Currently, the CDC has a dashboard that contains COVID-19 cases and deaths by state. The Biden-Harris plan creates a dashboard at a more granular level.

Vaccines

Biden plans a $25 billion investment in vaccine manufacturing and distribution. The investment will ensure that every American receives the vaccine free of cost, according to the plan. Three principles will guide the Biden-Harris Administration regarding vaccines: (1) putting scientists in charge of all decisions on safety and efficacy; (2) publicly releasing clinical data for any vaccine that the FDA approves; and (3) authorizing career staff to write a written report for public review and then permit them to appear before Congress and speak publicly and uncensored.

Recently, two pharmaceutical companies reported that their COVID-19 vaccine candidates showed high rates of effectiveness. On November 18, 2020, the FDA released a notice on Emergency Use Authorization (EUA) for COVID-19 vaccines and included detailed industry guidance.

Biden also indicated that he would like the United States to remain part of the World Health Organization (WHO). The United States is set to withdraw from the organization effective July 6, 2021.

Antitrust & Competition Law

By Jeffrey May, J.D.

New leadership at the Federal Trade Commission and Department of Justice Antitrust Division will have to be prepared to hit the ground running when they arrive with ongoing antitrust investigations into the tech sector among the top priorities at both agencies. At this point, it is unclear who might take the helm at the FTC and the Antitrust Division; however, the actions set in motion by the Trump Administration targeting this sector will likely dominate the antitrust agenda for some time to come. Changes in leadership may very well result in each agency taking a new direction and reprioritizing. The conventional wisdom is that a Democratic administration will result in an uptick in antitrust enforcement. But change will not come overnight.

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FTC and Antitrust Division leadership

There has been no word on who Biden might nominate to serve as antitrust chief at the Justice Department and as commissioners at the FTC in the event of a resignation. Change at the FTC is likely to be gradual because of the agency's structure. Currently, there are three Republicans, including Chairman Joe Simons, and two Democrats on the five-member Commission. Only three commissioners can be from the same party, and a majority of votes is required to take action. The commissioners serve staggered, seven-year terms. The president designates the chair. Democrat Rohit Chopra's term expired in September 2019. He could be renominated by Biden but, in any event, will likely continue to serve until another commissioner joins the FTC. The next term to expire is the other Democrat—Rebecca Kelly Slaughter—in September 2022. This would seem to suggest that the FTC will remain controlled by the Republican majority in the coming years.

However, Chairman Simons could depart with the current administration. In January 2017, then FTC Chairman Edith Ramirez announced one week before President Trump was sworn in her plans to step down. A few days after President Trump took office, he named the lone-Republican on a partially-staffed, three-member Commission at that time—Maureen K. Ohlhausen—to serve as the acting chairman. The takeaway is that the balance of power could shift at the FTC, but the move is contingent on Republican commissioners leaving the agency.

At the Department of Justice, the future also remains unclear. Veterans of the Obama administration could return to fill posts at the Antitrust Division. Bill Baer, who served as head of Antitrust Division for 40 months during the Obama years (and in a number of FTC positions earlier in his career) is among the volunteers assisting the Biden transition team. Gene Kimmelman, a Senior Advisor at Public Knowledge and a former chief counsel at the Antitrust Division, is a volunteer member of the team reviewing the Justice Department. Some media outlets reported that Senator Amy Klobuchar (D-Minn), ranking member on the Senate Judiciary Committee's antitrust subcommittee, has been floated as possible attorney general. The former prosecutor would bring her significant antitrust experience to the post. It is worth noting that, like any FTC commissioner nominees, the assistant attorney general in charge of the Antitrust Division must be confirmed by the Senate.

As for other possible candidates to serve at the agencies, the left-leaning Progressive Change Institute has identified about 400 potential candidates for future administration posts. There were about two dozen with varying antitrust and/or consumer protection credentials. The list ranges from current FTC Commissioner Chopra to Lina Khan of Columbia Law School, who served as counsel to the House Judiciary Committee's antitrust subcommittee and has been labeled a member of the "hipster" antitrust movement.

Different priorities

In the Biden administration, the agencies will continue to move forward with their current investigations, most notably the FTC's probe of Facebook and the Antitrust Division's case (along with a number of Republican state attorneys general) against Google. The government's Google case could see some new plaintiffs if Democratic state attorneys general were to sign on in light of the new administration, but it is at least as likely that a separate suit will be filed. 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. However, eventually, there will be new priorities. Of course, the career staff at the agencies ensures a level of continuity as administrations come and go.

Generally, the FTC 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. In a recent speech, 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. But the Democratic commissioners

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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.

One area that could see a change is at the intersection of antitrust and intellectual property.

What might fall out of vogue at the Antitrust Division? One area that could see a change is at the intersection of antitrust and intellectual property. Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division, in 2018 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 recent push at the Antitrust Division to use arbitration procedures might also fall out of favor. Just recently, 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."

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, there were 60 or more new cases filed by the Antitrust Division. In calendar years 2017 through the present, the number of new case filings averaged in the low 30s.

As for the types of cases filed, the last four years did not see the announcement of new investigations into global price-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 recent 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 new Biden administration.

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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, including whether Biden would seek to replace the current U.S. Patent and Trademark Office Director, Andrei Iancu, a Trump appointee. 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.

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."

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, President-Elect Biden promises 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."

> *U.S. taxpayers should benefit from the upside of federal investments that result in profitable inventions underwritten by federal funds.*

This would represent a continuation of the current administration's focus on enforcement efforts along these lines, although the campaign site accuses President 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."

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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."

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.*

CDA 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 President-Elect

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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 wish to undo regulatory action being mulled currently by the Trump Administration's Federal Communications Commission. FCC Chairman Ajit Pai recently announced that he intended to "move forward with a rulemaking" to clarify Section 230. This announcement 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."

OUTLOOK. *Although the President-Elect shares the current administration's dissatisfaction with the Section 230 status quo, Biden 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.

During the run-up to the 2020 election, the Biden campaign did not focus on its plans regarding cybersecurity and privacy beyond outlining a few general parameters, but most experts believe that an incoming Biden Administration will try to place greater emphasis on these issues. Of particular concern to the new administration are potential federal privacy legislation, ongoing issues regarding international interference and cross-border transfers of personal information, and enforcement concerns, as outlined in more detail below.

Cybersecurity and the election

As election results slowly trickled down from swing states in what was, thanks to concerns related to Covid-19, the first U.S. election to feature widespread mail-in and absentee balloting, President Trump's campaign raised concerns about the potential for fraud in vote counting and in the security of various types of voting apparatus used across the country. While issues continue to be litigated in several states in which the election outcome was close, the Cybersecurity and Infrastructure Security Agency (CISA), the top cybersecurity agency within the Department of Homeland Security (DHS), issued a statement on November 12 asserting that "the November 3 election was the most secure in American history," adding that "[t]here is no evidence that any voting system deleted or lost votes, changed votes or was in any way compromised."

On November 17, President Trump announced on Twitter that he had terminated CISA Directory Christopher Krebs, effective immediately, citing what the President called "highly inaccurate" statements in the November 12 statement.

Likely administration priorities

While President-elect Biden has been short on specifics concerning his roadmap on cybersecurity and privacy, it bears noting that Vice President-elect 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. In 2014, then-attorney general Harris issued guidance for California businesses on making their privacy practice public, particularly through the use of privacy policy statements and notices, and offered recommendations on appropriate security safeguards and data collection and sharing practices. The vice president-elect's history of privacy advocacy is likely to be a substantial driver of the new administration's policies.

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The president-elect also is expected to reestablish a cybersecurity coordinator position similar to the Obama Administration's Office of Cybersecurity, which was established in 2009 but eliminated by the Trump Administration, with its functions largely subsumed by the CISA. The new administration has signaled that it would like to bring this function within the direct purview of the White House.

Federal 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 President-elect 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 privacy provisions enacted by the states, 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. The outcome of the two run-off Senate elections in Georgia slated for January 5, which will ultimately determine which party controls the Senate, also is expected to heavily influence the likelihood of the eventual enactment of federal privacy legislation.

International issues, cross-border transfers

According to the September 2020 ITIF report, President-elect 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." President-elect 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.

Ms. Kagan expects that the new administration is likely to bring a renewed emphasis to cyber-security issues. "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 U.S. 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.

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"It is likely that the U.S. will work towards a 'Privacy Shield 2.0,'" said Ms. 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."

Enhanced federal enforcement

While the Trump Administration has hardly been 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-elect 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 incoming administration contends that the lack of net neutrality rules creates artificial scarcity and higher prices related to the provision of Internet services.

International Trade

*By Jeffrey L. Snyder, J.D., LL.M**

President-elect Biden's victory has been met with relief by many in the international trade community. Despite expected 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." 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.

International business is accustomed to turbulence and uncertainty, but many welcome what is expected to be a more measured, deliberate, and policy-driven approach under Biden. 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.

Transition

The delay in the transition from the Trump Administration to the Biden Administration occasioned by the claims of election irregularities will have less of an impact in trade than it will in some other areas. During the transition period, it is clear that the Trump Administration, while on the way out the door, is planning to take actions that bind, constrain, or at best simply delay the Biden Administration, with actions that would need to be undone as part of a Biden agenda, such as new sanctions on Iran, expected new export controls on China, possible import action on auto parts, among others. Nonetheless, the Biden Transition Team is taking shape and based on early indications, they appear to be leaning on competent, experienced talent (including many Obama Administration alumni) to implement their Trade agenda.

Many welcome what is expected to be a more measured, deliberate, and policy-driven approach under Biden.

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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" to begin to recreate a collaborative relationship, particularly with European allies. Rebuilding will be a key effort as the Biden Administration tries to reestablish relationships of mutual respect not just with Europe, but with Canada and Mexico. What will Biden do with the tariffs on steel and aluminum? How will he address the important issues of the trade imbalance with China, the currency issues in Vietnam, and the ongoing threats from Russia? We will have to wait to see on some, but in some cases, we are getting a glimpse of what might happen.

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 President-elect 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.

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.

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, and others — but to address them using the tools of international trade, not bullying or star chamber-like duty hammers (such as section 301), which harm U.S. importers and consumers as much as they do China.

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.

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 Biden Administration to continue to manage the negative consequences of trade but to see liberalization as a good thing.

Export controls

In this Administration, export controls as policy tools have been 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,

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but the comprehensive 'clamp down' reducing the sharing of U.S. technology with China – from Huawei, to the military end use/user rule expansion, targeting PRC companies with Entity List bans – 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 a Biden Administration, 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.

Sanctions

President-elect Biden faces an arguably over-leveraged U.S. sanctions policy, with the Trump Administration having resorted to unilateral sanctions as their solution to every foreign policy challenge. Biden is, however, expected to maintain many of these approaches, including potential expansion in some areas, most prominently the use 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. The United States remains uniquely isolated in the world community when it comes to Cuba.

President-elect 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-elect 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. Facing likely opposition in the Senate will slow and even divert some of his objectives, but a return to respect for the rule of law and the tools of international trade will in fact go a long way toward building back America's standing in the global economy and the important institutions of international trade.

Banking & Financial Services

By John M. Pachkowski, J.D.

President-elect Biden faces many challenges and opportunities in shaping how the banking and financial services industry operates. These fall into two broad areas: agency leadership and regulatory priorities.

Agency leadership changes

One issue that the Biden-Harris Transition Team is addressing is the naming of individuals to head up a cabinet department or agency. To accomplish this, agency review teams were created to evaluate the operations of the federal agencies "so that the incoming Biden-Harris administration is prepared to lead our country on Day One."

In the realm of banking and financial services, agency review teams have been created to evaluate Consumer Financial Protection Bureau; Department of Housing and Urban Development; Department of the Treasury; Federal Reserve, and other banking and securities regulators.

The CFPB agency review team is led by Leandra English, who is a special policy advisor to the New York Superintendent of Financial Services. English had served as the CFPB's deputy director following

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the departure of the Bureau's first director, Richard Cordray.

The agency review team for HUD is also reviewing the Federal Housing Finance Agency and is led by Erika Poethig, who is vice president and chief innovation officer and institute fellow at the Urban Institute.

The Treasury Department agency review team is led by Don Graves, director of corporate responsibility at KeyBank. Graves had served in the Obama Administration as executive director of the President's Council on Jobs and Competitiveness.

Finally, the Federal Reserve, Banking and Securities Regulators agency review team is evaluating the Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, Federal Reserve Board, National Credit Union Administration, and the Securities and Exchange Commission. This review team is led by Gary Gensler, who is currently is Professor of the Practice of Global Economics and Management, Massachusetts Institute of Technology Sloan School of Management and had served as CFTC chairman during the Obama Administration.

Although the agency review teams are currently evaluating their respective areas, speculation as to who would fill various cabinet and agency posts in the Biden Administration began to swirl well before Election Day.

Treasury Secretary

Early on, there was chatter in the business news circles that Sen. Elizabeth Warren (D-Mass) was eyeing to be Secretary of the Treasury. Some observers found that a Warren nomination, which would delight progressives, is probably a nonstarter for several reasons. Probably, the overriding factor that precludes a Warren nomination is control of the U.S. Senate. If Warren were to leave the Senate, Massachusetts Republican governor, Charlie Baker, would name her successor in the Senate. It was noted, however, that Democrats have a supermajority in the Massachusetts legislature and could force Governor Baker to select a Democratic replacement.

The name most associated with getting the Treasury Secretary nomination is Federal Reserve Board Governor Lael Brainard. It has been noted that Brainard, being the sole Democrat left at the Fed's Board of Governors has "opposed the Fed's regulatory changes 20 times since 2018" and has "used her position to draw attention to efforts to chisel away at bank rules, creating a rare public disagreement at the consensus-driven central bank." It was further noted, that a Treasury Secretary Brainard "would keep both Wall Street and progressives in line."

One other name mentioned for the Treasury Secretary nomination is former Fed Chair Janet Yellen.

Federal Reserve Board

Currently, there are two vacant seats on the seven-member Federal Reserve Board, although two nominations are pending Senate confirmation. One of those nominations, that of Judith Shelton, suffered a setback in the current lame-duck session. A cloture vote failed on November 17 due to the absence of some Republican Senators because of COVID-19 and to the opposition by a few other Senate Republicans. The Shelton nomination may be voted on again before the Senate tentatively adjourns on Dec. 18, 2020. The second pending nomination, that of Christopher Waller, is less controversial and still may be voted on.

If neither the Shelton nor Waller nominations are confirmed, nominations to fill those seats likely would be among the first personnel moves under the new Biden Administration.

Comptroller of the Currency

The Office of the Comptroller of the Currency is being led by acting comptroller Brian P. Brooks. President Trump announced, on November 17, 2020, his intention to nominate Brooks to be Comptroller of the Currency for a five-year term. Brooks has been acting head since former Comptroller Joseph M. Otting stepped down from the office on May 29, 2020. If the Senate does not act on the Brooks nomination, it is expected that incoming-President Biden would replace Brooks.

Consumer Financial Protection Bureau

With the U.S. Supreme Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, holding that the CFPB's current structure impedes on the president's removal powers under Article II of the

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U.S. Constitution, the agency's director can now be removed at will. Ballard Spahr's Consumer Finance Monitor noted, "Whether President-elect Biden will be able to get his preferred nominee confirmed by the Senate, however, remains uncertain" and that "[n]ames are beginning to percolate around the industry about who that nominee may be."

Whoever is nominated to replace the current CFPB director, Kathy Kraninger, will undoubtedly abandon the Bureau's current philosophy. In November 2019, Kraninger noted to audience of bankers about how much she's been meeting with industry, saying "you are really helping drive the agenda" on what policies need to be made more efficient.

Potential regulatory priorities

Once the presidential election was called in Biden's favor, several individuals and organizations released opinion pieces and analyses setting forth what the Biden Administration should accomplish in supervising the banking and financial services industries.

Aaron Klein, a fellow at the Brookings Institute, noted that for financial regulation, President-elect Biden will need to prioritize a regulatory agenda over a legislative one because he "may arrive in office with a Senate held by the opposing party—the first newly-elected president to see that scenario in over forty years." Given the possible circumstances, Klein suggests that President-elect Biden and his team should prioritize five top financial regulation actions:

- COVID-19 is the top priority for financial regulation with the Biden administration focusing on the root cause of the problem: getting COVID under control.
- Restoring the CFPB is the next priority with Biden naming a new director on day one that has a "strong pro-consumer vision," but also find bipartisan support. In addition, the new CFPB leader "should set about aggressively reviving the Bureau though new supervision and enforcement actions as well as revisiting important consumer regulations."
- Embracing fintech's potential while protecting against bias is the third priority that the Biden Administration should pursue. Klein noted, "Establishing the right set of rules will enable new technologies to flourish, providing benefits to millions." However, he cautioned, "New regulators should resist the temptation to go back to what was on their desks four, eight, or twenty years ago. Instead, focus on new potential solutions to problems."
- Observing that the U.S. financial system "has become a reverse Robin Hood, taking money from those with less and giving to those who already have," Klein advised that the "most impactful change financial regulators could make on day one of the Biden Administration is to give people access to their money immediately." He noted that the Fed could use its authority under the Expedited Funds Availability Act to allow people to have faster access to their own money, reducing demand for expensive payday loans and overdrafts.
- The final priority is to quickly appoint strong financial regulators with sound judgment and strong will to act. Klein noted, "This may require greater consultation with the Republican controlled Senate than the Biden Administration had wished, but plenty of quality potential regulators with bipartisan appeal exist."

Klein cautioned, however, that during Biden's first 100 days, financial regulation will likely take a back seat to the more pressing issues of fighting COVID and directly helping those harmed by this recession.

In an analysis, the Independent Community Bankers Association found that an ambitious COVID relief package is the overarching policy agenda item for 2021. The ICBA also expects "robust oversight and scrutiny of large banks and Wall Street institutions as well as non-bank competitors." The analysis added, "The new Congress, regardless of party control, should be favorable to a legal safe harbor for cannabis banking; Bank Secrecy Act reform including a more favorable beneficial ownership rule; closure of the industrial loan company (ILC) loophole; legislation to support minority depository institutions (MDIs) and more favorable government sponsored enterprise (GSE) reform legislation that could restructure the GSEs as quasi-utilities."

Finally, the nonprofit consumer advocacy organization, Public Citizen, released a Financial Reform Transition Memo outlining items that the Biden Administration should immediately

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tackle. On Day One, President Biden should create a panel to draft model legislation that reinstates the Glass-Steagall Act separation of commercial and investment banking and thereby addresses systemic risk caused by financial companies that are "too big to fail." In addition, the new administration should issue a memorandum that asks the Treasury Secretary, as chair of the Financial Stability Oversight Council, or a committee of experts that reports to FSOC, to consider major firms for designation as systemically important financial institutions. The memorandum should specifically name Blackrock, Blackstone, Vanguard, Fidelity, Prudential, and MetLife as corporations deserving special attention.

Commodities & Derivatives

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

The Biden transition team has played its financial services agenda fairly close to the vest overall, and it has not signaled specific plans in the area of commodities and derivatives. Even so, there are factors and trends that point to several possible outcomes.

Leadership changes

The Biden team has a strong financial reform orientation in general and several members have deep derivatives expertise. Gary Gensler, the leader of the financial policy transition team, served as CFTC Chairman of the CFTC for nearly five years starting in May 2009. In the shadow of the 2008 financial crisis and guided by long experience at Goldman Sachs and the Treasury Department, Gensler's CFTC stood up most of the agency's Dodd-Frank regulatory regime. Working alongside him will be Dennis Kelleher, president and CEO of Better Markets and a former Skadden partner, a similarly fierce advocate for strong systemic stability and consumer protection in the derivatives markets.

As to leadership at the CFTC itself, current Chairman Heath Tarbert has not yet announced plans to step down, as his counterpart SEC Chairman Jay Clayton has. Under the Commodity Exchange Act, Biden will have the opportunity to appoint a new chair, subject to Senate confirmation. Biden will also have the chance to replace outgoing Commissioner Brian Quintenz (R), whose term expired in April 2020. Current commissioners include Rostin Behnam (D; term ends June 2021); Dawn Stump (R; term ends April 2022); and Dan Berkovitz (D; term ends April 2023).

Rulemaking

On the short-term horizon, there are few active CFTC rulemaking proposals. The agency had an extremely busy rulemaking year in 2020, with 30 rules finalized, including major rulemakings like a new position limits regime and capital requirements for swap dealers. These rule adoptions concluded the Dodd-Frank required rulemakings. In addition, Chairman Tarbert recently said he expects to finalize major rules on bankruptcy and electronic trading in December. As a result, the CFTC does not have many outstanding rule proposals.

One new area where the CFTC may act is climate change in the context of the derivatives markets. Environmental issues generally are expected to be a strong area of focus for the Biden Administration, and the CFTC has already put wheels in motion on climate change. In September 2020, the CFTC's Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee (MRAC) released a groundbreaking report, Managing Climate Risk in the U.S. Financial System. The Climate Subcommittee voted unanimously 34-0 to adopt the report.

The report, a first-of-its-kind effort from a U.S. government entity, provides a roadmap to the Biden administration with 53 actionable recommendations to mitigate the risks to financial markets posed by climate change. Specifically, the report calls for greater reliance on disclosures, stress testing, regulatory harmonization, and data utilization in the effort to mitigate climate-related risks. The report also urges the government to work closely with the private sector. The report

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has since been discussed at several major events, including a Bipartisan Policy Center event, an FIA Expo panel discussion, and a hearing held by the House Select Committee on the Climate Crisis.

Regarding revisions to existing rules, there may be pressure from industry to revisit certain areas. For example, Eileen Flaherty, former director of the CFTC Division of Swap Dealer and Intermediary Oversight and founder of The Global Capital Group Ltd, a regulatory and compliance consulting firm, believes that the risk management requirements for swap dealers and futures commission merchants are too prescriptive and should be more principles-based. She also believes the pre-trade mid-market mark for swap dealers prior to a trade should be eliminated, because it involves an institutional market and in her view is not needed. Flaherty sees these as two of many Dodd-Frank regulations that were rushed due to the rapid implementation timeframe and need to be removed or clarified.

However, Flaherty does not hold out much hope that these areas will see action. "I don't think they will revisit either and that is unfortunate ... I don't see that happening with a new administration. I think it will be another missed opportunity," she said.

Staff guidance

An unusual wrinkle that may affect the CFTC rulemaking agenda is a recent directive issued by Chairman Tarbert that restricts the staff's ability to issue no-action relief and other guidance, with the result that more actions must be taken using the formal notice-and-comment rulemaking process. Among other restrictions, the directive specifies that no-action relief must fall into one of three enumerated categories and cannot make new policy.

The directive specifically states that the new guidelines will remain in effect until augmented, amended, or withdrawn by the chairman himself, the Commission, or any future chairman or Commission. Whether the directive will hold under a new chair remains to be seen.

Enforcement

The CFTC has actually been one of the few agencies that has become more active and aggressive in enforcement during the Trump Administration, says Michael Levy, a partner in Mayer Brown's Washington DC office. Levy expects this trend to continue.

In particular, the CFTC has aggressively pursued spoofing cases, said Levy, who is a member of the firm's global White Collar Defense & Compliance, Congressional Investigations & Crisis Management and Regulatory & Investigations practices. He expects strong spoofing enforcement to continue as part of a general focus on actions against abuses that create an unfair playing field, like tax evasion and insider trading.

Levy predicts stronger foreign corrupt practices enforcement overall if international relationships and engagement improve under the Biden Administration.

Levy also noted that the CFTC has for the first time asserted jurisdiction in the area of foreign corrupt practices, which until now has only been enforced by the SEC and DOJ under the FCPA. Although the CFTC has not yet announced an enforcement action in this area, Levy predicts stronger foreign corrupt practices enforcement overall if international relationships and engagement improve under the Biden Administration.

Turning to the DOJ, Levy foresees the following trends:

- More aggressive enforcement of white collar crime in general, as the Biden Administration is expected to come under strong pressure from progressives. This outcome becomes even more likely if the Democrats fail to retake the Senate in the Georgia runoffs.
- 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.

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- A stronger focus on individual accountability as a condition for cooperation credit—especially if Sally Yates becomes the next U.S. Attorney General.
- Increased use of DPAs, NPAs, and post-resolution monitors.
- Strong support for whistleblowers.
- A continuation of the policy against "piling on" by multiple agencies over the same conduct, which can result in double or triple penalties.

Government Contracts

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

The Biden administration is likely to make sweeping changes in the area of federal government contracting. President-elect Biden's campaign platform addressed using the government's purchasing power to reinstate and expand Obama/Biden-era labor policy reforms and implement environmentally-friendly policies and ethics reforms. On the other hand, Biden has signaled a commitment to continue current administration policies in areas such as the Buy American statute.

The new administration can implement its policy preferences by issuing and revoking executive orders, changing agency guidance and regulations, and reallocating resources. Executive orders can be issued—and revoked—almost instantly, with few, if any, restrictions. President Trump and former President Obama relied heavily on executive actions to implement many policy changes—and to undo policies implemented by their predecessors. President Biden is expected to do the same.

Government spending for contracted goods and services ballooned to record levels under Trump, but it is unclear whether that trajectory will continue. Going forward, budget appropriators must focus on major funding for COVID-19 pandemic stimulus and relief, which could cut into funding for other government programs and related contracts. Economic and political changes make the outlook for contract spending even more unclear.

Labor

As a candidate, President-elect Biden signaled he would restore and expand Obama Administration 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 that illegally oppose unions and ensure federal contracts only go to contractors that 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

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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 [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-elect 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.

Buy American

President-elect Biden has vowed "No government contracts will be given to companies that don't make their products here in America." The new administration is expected to continue to encourage domestic production and sourcing, as did 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. Although fostering domestic production will likely inform the Biden administration's approach to international trade agreements, the U.S. 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.

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

Export controls and cybersecurity

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.

Climate and environment

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

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- 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 have been good for government contractors. In March of 2018, 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 has 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-elect Biden so far 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 and political. Biden has made additional COVID-19 pandemic stimulus and relief a priority, and stimulus and relief funding 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. In the months leading to the election, some Republicans called for new austerity measures, and if Republicans retain control of the Senate, the Senate could scuttle White House spending plans in the name of austerity. Finally, 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.

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Conclusion

As discussed throughout this white paper, 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, and public-health challenges that lie ahead. And yet, through appointments, executive action, targeted legislation, rulemaking, enforcement, and other means, the incoming administration will have many chances to exert its policy will.

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

To receive in-depth legal analysis of all breaking news as the Biden Administration implements its regulatory agenda, subscribe to the Wolters Kluwer Daily Reporting Suite.

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