

Special Report

April 29, 2021

Highlights

- Analysis of American Rescue Plan impact
- Insights into regulatory priorities
- Changes in agency leadership, outlook
- Reversal of Trump-era executive actions and rules
- Consequences for employers, including worker rights, taxes, and employee benefits
- Enforcement trends and course corrections
- Foreign policy shifts on trade, intellectual property, cybersecurity, and corrupt practices
- COVID-19 response on multiple fronts

Sprinting to 100-day mark, White House shifts regulatory landscape

Faced with historic, national challenges on multiple fronts — public health, the economy, infrastructure, the environment, voting rights, trade, national security, corruption, etc. — the Biden Administration came flying out of the gate. One hundred days later, the pace has only intensified.

In that brief span, aided by a razor-thin majority in Congress, the new administration has achieved what seemed improbable at the outset. The sweeping American Rescue Plan Act and world-leading vaccine rollout are, by themselves, transformative. Add to that the tally of executive actions, regulatory initiatives, cabinet and agency appointments, and new legislation and programs in the pipeline. All told, the new president's debut has achieved a level of efficiency that arguably rivals any others since FDR.

Can Biden sustain this pace? Unlikely, given the many obstacles in his path, but the early results signal a winning formula for this moment. That formula includes a return to science-based policy, disciplined governance, transparency, compassion, and democratic values. It also reflects political lessons learned from past experience, *e.g.*, a recognition that solving problems faced by ordinary Americans is paramount.

Let's take stock of the early results, which include:

- The [American Rescue Plan Act](#), a \$1.9 trillion stimulus package signed into law March 11, which provides economic and tax relief to individuals, families, businesses, schools, and state and local governments, including stimulus payments, extended unemployment benefits, paid sick and family medical leave, child and dependent care assistance, expanded health care coverage, transportation industry support, and retirement plan relief
- Covid vaccine production and distribution, expanded testing, protective equipment production, research, guidance, and outreach
- Affordable Care Act coverage enrollment, premium subsidies, outreach, and Medicaid expansion
- The [American Jobs Plan](#), a \$2.3 trillion infrastructure bill that would revitalize manufacturing, secure U.S. supply chains, invest in research and development, and train Americans for the jobs of the future
- The [American Families Plan](#), a proposal to invest heavily in the foundations of middle-class prosperity — education, health care, and child care
- Environmental, social, and governance (ESG) disclosure initiatives of the Labor Department and Securities and Exchange Commission, as well as related legislation and industry trends
- Agency appointments, rulemaking, guidance, enforcement, and priorities
- Executive orders, actions, and programs on multiple fronts: labor rights, public health, climate change, regulatory reform, international trade, racial equity, gender discrimination, cybersecurity, etc.

Inside

Tax.....	2
Securities & Corporate Governance.....	5
Labor & Employment.....	13
Employee Benefits.....	20
Retirement Benefits.....	21
Health & Life Sciences.....	23
Antitrust & Competition Law.....	27
Intellectual Property & Technology.....	32
Cybersecurity & Privacy.....	36
International Trade.....	39
Banking & Financial Services.....	43
Commodities & Derivatives.....	47
Government Contracts.....	50
Conclusion.....	55

By Wolters Kluwer Editorial Staff
and Authors

This report, written by Wolters Kluwer editorial staff and authors, lays out these early achievements across a range of key domains: labor and employment, health care, tax, securities and corporate governance, international trade, anti-trust, intellectual property, cybersecurity, 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 100 days and beyond.

Tax

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

When President Biden took office in January, he pledged to enact new tax policies that would depart dramatically from those of the Trump administration and from the major tax changes enacted by the 2017 Tax Cuts and Jobs Act (TCJA). One hundred days in, the significance of Biden's proposed changes is emerging. Working closely with the Democrat-controlled Congress, the new president is moving quickly to execute his broad agenda, both through legislative and executive action, as well as the launch or rollback of agency rulemaking.

American workers and ensure that the country could offer well-paying jobs to workers in urban and rural areas. Yellen has stated her agreement with President Biden's proposed increase of the corporate tax rate to 28 percent but cautioned that higher corporate tax rates would be part of a broader plan to reverse portions of the TCJA when the economy is sufficiently strong.

Yellen also noted that Biden's proposal for a 15-percent minimum tax on booked income, rather than taxable income, would recapture tax revenue lost to tax avoidance by companies with low or zero tax liabilities. On international tax disputes, she stated her commitment to cooperate in multilateral efforts to address base erosion and profit shifting (BEPS) through the OECD/G20 process, and to support a global minimum corporate tax rate.

Additionally, Yellen has promised to work with Congress to protect households earnings less than \$400,000 a year from any federal tax increase in any reversal of the TCJA tax cuts and to develop tax proposals through the budget process.

The plan would make American business and workers more competitive by eliminating incentives to offshore investment.

Treasury leadership

On January 25, the Senate voted to overwhelmingly to confirm President Biden's nomination of Janet Yellen to be the Treasury Secretary. Yellen, who previously served as chair of the Federal Reserve System Board of Governors and chair of the Council of Economic Advisors, will be responsible for overseeing the U.S. economic recovery in the wake of the COVID-19 pandemic. Although she has long been at the forefront of shaping U.S. monetary policy, her views on fiscal policy are less well known.

During the [confirmation process](#), Yellen explained that she would prioritize the needs of

Legislative agenda

One of first items on the president's agenda was to address the economic impact of the ongoing COVID-19 pandemic. On March 11, President Biden signed into law the [American Rescue Plan Act](#) (P.L. 117-2), the Covid relief package aimed at providing tax relief to families and small businesses.

The act, which largely aligned with the framework that Biden put forth before his inauguration, includes extensions of enhanced unemployment relief, increased funding for COVID-19 testing and vaccination programs, aid to state and local governments, and assistance to schools to help

get students back into classrooms. The legislation also includes a number of tax provisions, including a third round of direct stimulus payments, enhancements of many personal credits meant to benefit people with lower incomes and children, extensions of highly popular payroll tax credits for employers first instituted at the beginning of the pandemic, and changes related to retirement plan funding.

Among the tax provisions included in the act:

- Exclusion of \$10,200 of unemployment compensation from income for tax year 2020 for households with incomes under \$150,000.
 - For tax years after December 31, 2026, public companies will be allowed to deduct as much as \$1 million in compensation for each of the next top-five paid employees after the CEO and CFO. The rule in current law applies to those two and the next three highest paid officers.
 - Exclusion of income taxes on partial and total forgiven student loan debt, for loans discharged between December 31, 2020, and January 1, 2026.
 - Economic Impact Payments of \$1,400 for individuals with adjusted gross incomes under \$75,000. Joint filers with adjusted gross income (AGI) below \$150,000 will receive double that. Each dependent in a household is eligible for \$1,400.
 - On payroll credits for paid sick and family leave, the act provides for reimbursement of pension plan and apprenticeship program contributions made by employers under collective bargaining agreements that are allocable to employee paid sick and family leave. Paid leave wages do not include wages taken into account as payroll costs under certain Small Business Administration programs.
- make the Child and Dependent Care Tax Credit permanent, providing up to \$4,000 to cover expenses related to care for a child under age 13 or a dependent with a disability needing care and up to \$8,000 to cover expenses for multiple children or dependents. Families making under \$125,000 can claim the full credit, and families earning up to \$438,000 can claim a partial credit. It will be fully refundable so low-income families can fully benefit;
 - make the Earned Income Tax Credit Expansion for Childless Workers permanent, benefitting 17 million low-wage workers, many of whom are essential workers including cashiers, cooks, delivery drivers, food preparation workers, and child care workers;
 - extend the Child Tax Credit increases in the American Rescue Plan for another five years — increasing tax credits for children under six from \$2,000 to \$3,600 and for children over six from \$2,000 to \$3,000; and
 - lower health care costs by making the American Rescue Plan's health insurance premium reductions permanent, saving families an average of \$50 per person per month.

Recently, in his first joint address to Congress on April 28, Biden announced the “[American Families Plan](#).” The plan is “a once-in-a-generation investment in the foundations of middle-class prosperity — education, health care, and child care.” It furthers the Biden agenda to make education more affordable and provide economic security to families. Tax professionals and practitioners should take note that the Families Plan extends or makes permanent a number of tax credits to families and workers. For example, the measure would:

President Biden also recently released the “[Made in America Tax Plan](#),” which focuses on corporate taxes and has a goal of making American business and workers more competitive by eliminating incentives to offshore investment. It also substantially reduces profit shifting and gives incentives for clean energy production. The Tax Plan is expected to generate new funding to pay for the increased investment in infrastructure, research and development, and manufacturing support.

More specifically, the Tax Plan:

- raises the corporate tax rate from 21 percent to 28 percent;
- enacts a 15-percent minimum tax on book income of large companies that report high profits but have little taxable income;
- coordinates with other countries to pursue a global minimum corporate tax rate;
- replaces incentives that reward excess profits from intangible assets with incentives for new research and development;
- replaces fossil fuel subsidies with incentives for clean energy production; and
- increase enforcement to address corporate tax avoidance.

Individual tax policy

President Biden has maintained his campaign pledge regarding individual income taxes that individuals who make less than \$400,000 will not see any additional federal income tax increases. In March, the administration clarified that the \$400,000 threshold applies to families and not to individuals. The White House statement did not indicate what the threshold would be for individuals, which remains unclear.

Regarding estate and gift taxes, the Biden Administration has not released any specific proposals. Two proposals that have been discussed are: (1) reducing the estate tax exemption to \$3.5 million (currently \$11,700,000 in 2021) and (2) eliminating the step-up basis at death, which would result in a capital gains tax being imposed at either the transfer of an asset at death or upon the subsequent sale of that asset.

Student loan debt relief continues to be critical issue. In his first action on student loan debt, President Biden [ordered](#) the pause of student loan payments to be extended through at least September 2021. The forbearance period on student loan payments and interest accrual began in March 2020 and was due to expire on January 31, 2021. It is expected that the administration will take further steps, including some form of debt forgiveness. In April, Biden requested that the Secretary of Education Miguel Cardona oversee a legal review of whether cancellation of student loan debt with congressional approval is constitutional. The results of this review could guide the administration on whether forgiveness is an option and on how much could be forgiven.

Business tax policy

Now that Biden's goal of achieving 200 million COVID-19 vaccine doses administered to Americans has been reached, tax credits for businesses have been deployed to encourage paid time off for their employees for any time off needed to get vaccinated. The new tax credit for businesses and nonprofits with fewer than 500 employees will offset the costs of paid leave, providing for up to

80 hours off at up to \$511 per day between April 1 and September 30, 2021.

A White House statement noted that, to ensure that the administration's policy of encouraging vaccinations comes at no cost to small and medium-sized businesses, the IRS will be posting instructions for how employers can be reimbursed for the cost of providing paid leave for their employees to get vaccinated and recover from any side effects.

IRS funding

In his [American Families Plan](#), President Biden has proposed giving the IRS an additional \$80 billion and authority over the next 10 years to pursue tax evasion by high income earners and large corporations. The additional funding and enforcement authority will accompany new disclosure requirements for businesses that are not organized as corporations and other high income individuals who could be using sophisticated methods to minimize or avoid taxation.

The tax enforcement efforts could raise \$700 billion over a decade, according to the administration. The new taxes proposed in the American Families Plan, along with the additional enforcement efforts, are described by the administration as a way to pay for the ambitious economic agenda set forth in the Plan.

Separately, in his [discretionary funding request](#) submitted to Congress for fiscal year 2022, Biden has asked for increased funding for the IRS. Specifically, the 2022 discretionary request provides \$13.2 billion for the agency, which is \$1.2 billion (10.4 percent) above the 2021 enacted level. The aim of this increased funding is to allow the IRS to: increase oversight of high-income and corporate tax returns to ensure compliance; provide new and improved online tools for taxpayers to communicate with the IRS easily and quickly; and improve telephone and in-person taxpayer customer service, including outreach and assistance to underserved communities. The 2022 discretionary request also provides an increase of \$417 million in funding for tax enforcement as part of a multiyear tax initiative that will increase tax compliance and increase revenues.

Securities & Corporate Governance

By [Mark S. Nelson, J.D.](#) and [Anne Sherry, J.D.](#)

Under the leadership of the newly confirmed Gary Gensler, the Securities and Exchange Commission's priorities will include improved shareholder engagement, a strong enforcement program focused on accountability for misconduct, and rules focused on investor education and protection. The agency is also preparing to shore up climate-related disclosures and will likely take other actions in the realm of environmental, social, and governance (ESG) over the objections of Commissioners Peirce and Roisman, who support principles-based disclosure with materiality as the touchstone. Anti-corruption efforts will also figure prominently, not just at the SEC but more broadly at the Department of Justice, given the Biden Administration's focus on tackling corruption as part of a strategy for national security and international relations.

Gensler's confirmation

The Senate has confirmed Gary Gensler to be the next chair of the SEC. Gensler, like former SEC Chair Mary Schapiro before him, once headed the CFTC, which is why few members of the Senate Banking Committee doubted his credentials to lead the SEC and instead voiced their support or opposition to him based on his perceived policy agenda. Gensler faces some immediately pressing issues regarding special purpose acquisition companies (SPACs) and a range of longer-term policy decisions that could move the SEC closer to issuing updated guidance on climate-risk disclosures and potentially adopting a fresh approach to digital-asset securities. More generally, Gensler is likely to pursue a more active regulatory agenda with increased emphasis on investor protection and enforcement as compared to the recently-completed Clayton-era SEC. Gensler was [sworn in](#) as chair on April 17.

The SEC's tripartite mission is to: (1) protect investors; (2) maintain fair, orderly, and efficient markets; and (3) facilitate capital formation. Historically, the SEC has focused on financial disclosures, with occasional forays into more specialized disclosure regimes under congressional mandates, such as those on conflict minerals and resource extraction issuers contained in the Dodd-Frank Act. Climate

change, for example, will likely test Gensler's ability to create new disclosure requirements around companies' climate risk metrics that are consistent with the SEC's mission. It is the debate about the boundaries of the SEC's mission that drove much of the Senate's consideration of Gensler for the role of SEC chair and that same debate will likely temper any efforts by the Biden Administration to push for major securities legislation in a Congress where Democrats hold a slim majority.

The Senate's separate votes to confirm Gensler for two terms were perhaps closer than is typical for most SEC chairs, evidencing recent increasingly partisan trends among Senators, but it was nevertheless bipartisan. The Senate on April 14 and again on April 20 confirmed Gensler to be SEC chair for terms ending June 5, 2021 and June 5, 2026 by votes of [53-45](#) and [54-45](#), respectively. The closeness of Gensler's confirmation votes likely presages the level of difficulty major securities legislation would have in clearing the Senate.

Gensler's qualifications for the role of SEC chair were never in doubt throughout the [confirmation process](#) and both the committee vote and final confirmation votes reflected at least some bipartisan support for Gensler. Gensler has followed a path familiar to many high-ranking federal officials in recent administrations that leads from Goldman Sachs, to the Treasury Department, to becoming an agency head or other close presidential adviser. In Gensler's last government job, he was a chair of the CFTC during the Obama Administration's effort to implement the Dodd-Frank Act's derivatives and swaps reforms. There is precedent for selecting a former CFTC chair to also lead the SEC. Mary Schapiro, for example, led the CFTC before becoming the first person to have led both the CFTC and the SEC. However, unlike Schapiro, Gensler does not have prior experience as an SEC commissioner.

Gensler recently was [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 Labs, Inc’s XRP may have been investment contracts and, thus, securities, but his background in the subject matter also could suggest a potential opportunity for him to recalibrate SEC guidance on digital asset securities.

SEC priorities

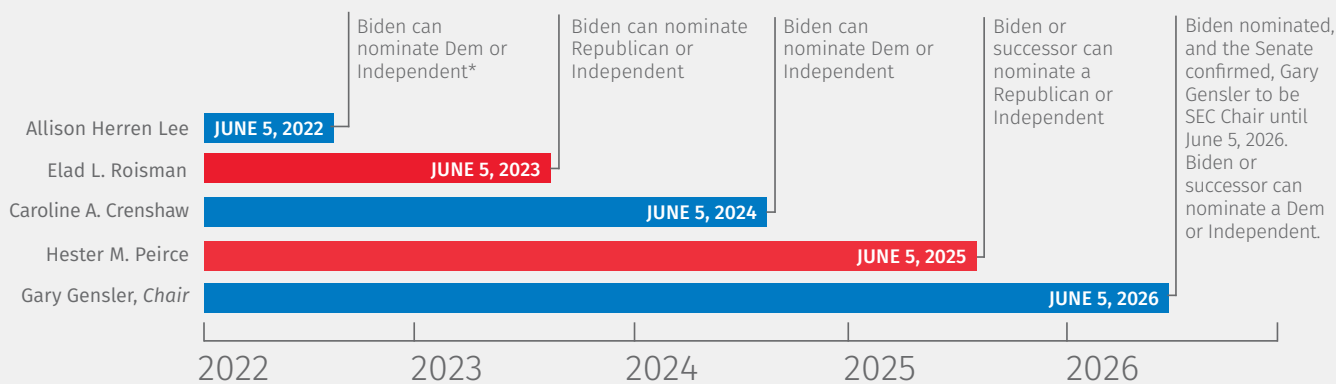
With Gensler’s swearing-in, the SEC will have the three-vote majority necessary to take regulatory action beyond the issuance of staff guidance and commissioners’ and other SEC staff making public statements on various topics. Gensler will be pressed almost immediately to deal with growing issues surrounding SPACs along with longer-range policy choices on climate risk disclosures, digital asset securities, and the recently re-opened comment period on a proposal to allow use of the universal proxy. Almost all of these issues have been teed up by Gensler’s immediate predecessor, Acting Chair Allison Herren Lee.

- **Climate-risk disclosure**—Climate risk disclosure may prove to be the signature success or failure for the Gensler-led SEC. The Biden Administration has begun to lay the groundwork for an all-of-government approach to climate change, including, presumably, new SEC climate risk disclosure requirements. Much of what the SEC does on climate change will conform to

broad goals stated by the White House and the Treasury department via its [tax plan](#) and from aspirational goals stated by Treasury Secretary Janet Yellen, who has [spoken](#) about international engagement on the topic by the SEC and the CFTC. Climate risk received significant attention from Lee who [announced](#) in February that she had directed the SEC’s Division of Corporation Finance (CorpFin) to review companies’ disclosures for compliance with the SEC’s 2010 guidance on climate risk disclosure. (See expanded discussion of ESG actions below.)

- **Key staff positions**—Gensler will need to decide whether he will retain the numerous acting staff leaders put in place by Lee. Among these key personnel is the former academic John Coates, whom Lee [appointed](#) acting CorpFin director to at least temporarily oversee an SEC division that will play a critical role in any climate-risk disclosure regulations. Coates has been an active speaker on a number of topics since becoming acting director, including SPACs. Shortly after being sworn in, Gensler [appointed](#) Alex Oh, most recently a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, where she also was co-chair of the firm’s anti-corruption & FCPA practice group, to be director of the Enforcement Division. However, less than one week later, Oh resigned for “personal reasons.” Melissa Hodgman, who

SEC Composition



* There can only be three commissioners from one party.

served as acting director from January to April 2021, will resume that role.

- **SPACs**—SPACs have drawn increased SEC scrutiny regarding their accounting methods and the investing public's misperceptions about SPACs' potential liability under federal securities laws. The latest [guidance](#) has come in the form of public statements by Coates and Acting Chief Accountant Paul Munter (See, e.g., Coates and Munter regarding [accounting treatment of warrants](#) and accounting restatements related to SPACs; Coates regarding [SPACs' liability](#); Munter regarding [auditing concerns](#); and Corp-Fin [guidance](#) on more general topics regarding SPACs). The Gensler-led SEC will be called upon to decide if SPACs should be subjected to additional disclosure requirements and/or greater enforcement under existing regulations.
- **Division subpoena authority**—With respect to enforcement, Lee first [announced](#) that senior division officers will once again be able to approve a formal order of investigation, which means that senior division officers will be able to subpoena documents and take sworn testimony. The authority had been curbed by former Acting Chair Michael Piwowar during the early months of the Trump Administration. Lee said the change in policy will allow staff to bring enforcement actions more quickly. An [inspector general report](#) previously explained that, before 2009, only the Commission could issue formal orders of investigation. The OIG report also stated that changes to the Commission's rules of practice had granted the chair power to expand or shrink the number of persons allowed to exercise such authority.
- **Contingent settlements**—Lee also [announced](#) that the Enforcement Division will cease recommending to the Commission any settlement offer that is conditioned on the granting of a bad actor or well-known seasoned issuer (WKSI) waiver. Former Chair Clayton had issued a [statement](#) urging SEC staff and companies subject to SEC enforcement actions to simultaneously address offers to settle and requests for waivers in order to speed the settlement process and to encourage companies to include key settlement terms in their offers of settlement (e.g. an independent compliance consultant) that they might otherwise omit without the security of a waiver. Commissioners Peirce and

Roisman jointly expressed their [objection](#) to Lee's alteration of the settlement/waiver process that had been in place for just two years since Clayton's statement in July 2019. Commissioner Caroline Crenshaw has since given a [speech](#) on enforcement in which she argued that the SEC has tended to overemphasize "factors beyond the actual misconduct" such as the benefits to shareholders from a company's misconduct and the harm to shareholders from any penalties imposed for a company's misconduct.

- **Social media and stock trading**—The social media-driven trading of GameStop Corp. stock in late January arose on Acting Chair Lee's watch but is unlikely to be fully addressed by the SEC until weeks or months after Gensler takes over as chair. Lee began to address the GameStop volatility by issuing a [public statement](#) joined by her three fellow commissioners reassuring investors that the agency was monitoring the situation. A [follow-up statement](#) by the commissioners issued two days later indicated the SEC was working with other government agencies and self-regulatory organizations and that the agency could bring enforcement actions if "facts demonstrate abusive or manipulative trading activity that is prohibited by the federal securities laws." The SEC also could issue a report under Exchange Act Section 21(a) in which it details the GameStop-related issues staff believe market participants should address. Here again, Gensler may be better positioned than many recent SEC chairs to address the intersection of modern technology and securities regulation because of his background in financial technology.
- **Proxies**—The SEC recently [re-opened](#) the comment period on a proposal to require universal proxies. In 2016, the Commission [proposed](#) to mandate the use of universal proxies that would allow shareholders to vote by proxy in a manner more akin to how shareholders vote in person at shareholders' meetings. As proposed, a universal proxy would include the names of both the registrant's and dissident's nominees and could be used for all non-exempt solicitations where directors' elections are contested, but not with respect to elections at registered investment companies or business development companies. Gensler also may face calls from investor groups to roll back the share-

holder proposal eligibility requirements that were [finalized](#) near the end of the Clayton-era SEC. The revised rules impose tiered eligibility requirements in which large shareholders can submit proposals after just one year, but smaller shareholders must wait up to three years. The revised rules also increased the resubmission thresholds. According to investor groups, the rulemaking process had been [tainted](#) by the SEC's Division of Economic and Risk Analysis's (DERA) withholding of key data from the public until shortly before the Commission adopted the rules.

- **Digital-asset securities**—The SEC has taken little policy action on digital-asset securities since the Biden Administration came into office. That may change under Gensler, who will inherit the SEC's enforcement action against Ripple Labs Inc. and who comes to the agency with a substantial background in digital assets. Gensler also is likely to be pressed to approve virtual currency-themed exchange-traded products. Panelists at securities conferences during the early part of 2021, however, have cautioned that Gensler's deep knowledge of the subject may not necessarily equate with more relaxed SEC policy. The one thing Gensler might do to the satisfaction of a large swath of participants in digital asset markets could be to restate and update existing SEC policy into a single integrated set of guidance or regulations that can bring clarity to the field.
- **Regulation Best Interest**—Compliance by broker-dealers with the SEC's [Regulation Best Interest](#) became mandatory as of June 30, 2020. In adopting the regulation, a majority of the Clayton-era Commission opted to invoke provisions in the Dodd-Frank Act authorizing the SEC to impose a duty on broker-dealers regarding retail investors that is greater than the suitability standard but less than a true fiduciary standard, the other option that was available under Dodd-Frank. Gensler will be called on by investor groups to undo Regulation Best Interest but, after more than a decade in development, including being upheld by the U.S. Court of Appeals for the Second Circuit, it is more likely that Gensler will begin to incrementally address Regulation Best Interest through staff studies of its effectiveness and through enforcement before seeking to significantly modify its terms.

- **Corporate political donations**—A 2011 [rulemaking petition](#) filed by a group of academics, including former SEC Commissioner Robert Jackson, produced thousands of public comments regarding the need for the SEC to mandate corporate political spending disclosures. In the years since, Republican-dominated Congresses have routinely added a policy rider to appropriations legislation that bars the SEC from finalizing political spending disclosure rules. Democrats have reintroduced legislation that would require public companies to disclose their political spending habits. According to Rep. Bill Foster (D-Ill), the sponsor of one such bill ([H.R. 1087](#)), companies' responses to the January 6 Capitol insurrection and to the recent passage in some states of restrictive voting laws have made it clear that many companies consider political spending to be a material disclosure item. The appropriations policy rider remains in place for FY21, but the Democrat-controlled Congress likely will seek to remove the rider from FY22 appropriations legislation, thus freeing the SEC to pursue political spending rules under a Gensler-led SEC.

ESG disclosure

Biden's promise to rejoin the Paris Agreement as one of his first acts as president marked his commitment to action on the environment, not only from within the Environmental Protection Agency but throughout the executive branch. On Earth Day, April 22, the president followed up with a pledge to cut the nation's greenhouse gas emissions in half by 2030. On the same day, he announced a [roadmap](#) for a previously announced [climate finance plan](#) that would increase funding to developing countries, mobilize private financing, scale back investments in fossil-fuel-based projects abroad, and redirect investments towards "climate-resilient pathways."

At the SEC, this commitment to climate health translates to a focus on environmental, social, and governance (ESG) issues. Despite increasing public pressure for more disclosure and corporate attention to ESG issues, the SEC under Chairman Clayton retained a largely principles-based approach to disclosure. Even the 2020 amendments to Regulation S-K, addressing environmental and human capital disclosures, require companies to disclose only material information.

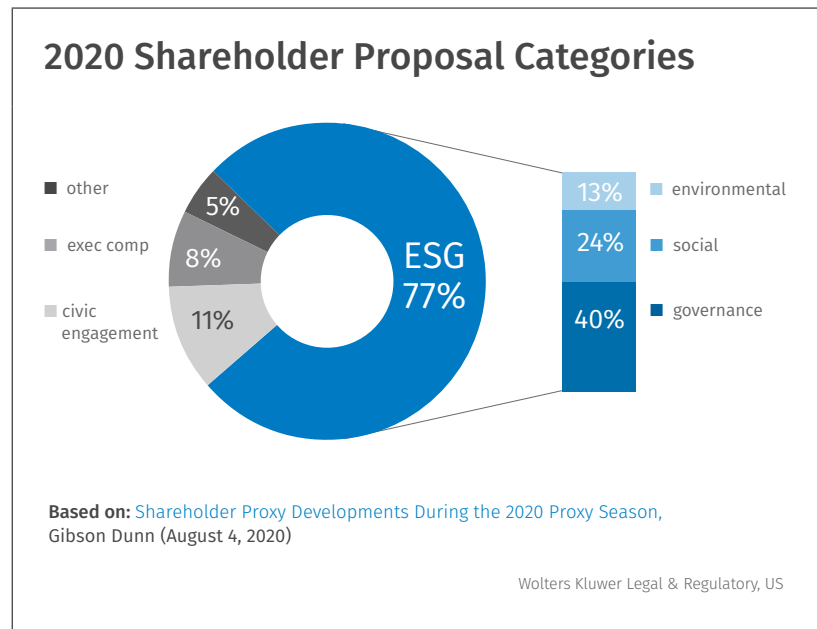
In contrast to the light regulatory hand of his predecessor, Chairman Gary Gensler demonstrated a tendency toward tighter regulation and robust disclosure during his 2009-2013 chairmanship of the Commodity Futures Trading Commission. Gensler's commitment to financial reform led to a near-complete implementation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

The agency cannot regulate corporations' action on ESG matters directly, but has some leeway to require companies to disclose related information to investors. Under the principle that "what gets measured gets managed," the SEC's Democratic commissioners have urged the agency to require more disclosure of ESG issues by linking them to corporate wellbeing, citing a positive correlation between diversity and corporate performance, for example, or the risks that climate change presents to a company's business. Some legislators, perhaps most prominently Sen. Elizabeth Warren (D-Mass), also call for more prescriptive disclosure that permits investors to compare metrics between companies.

In March 2021, the SEC under Acting Chair Allison Herren Lee established a [Climate and ESG Task Force](#) within the Division of Enforcement. The initial focus of the 22-member task force will be to identify gaps in disclosure of climate risks under existing rules, although it will also look at disclosure and compliance relating to ESG investment offerings. On that last point, the Division of Examinations issued a [risk alert](#) describing some misleading statements it had identified regarding ESG investing approaches and compliance with global frameworks. The Commission also created a new position of [Senior Policy Advisor for Climate and ESG](#). Satyam Khanna, who served on the Biden-Harris transition team, will advise the agency on ESG matters and advance related initiatives in this new role.

Environmental matters

As Mayer Brown's Andrew Olmem described in a recent presentation, environmental policy is an area that unifies Democrats, whether they identify as progressives or moderates. Under Clayton's



chairmanship, 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.

As acting chair during the interim between Clayton's departure and Gensler's confirmation, Lee implemented climate-focused actions at the agency. In a February 2021 [statement](#), Lee said that she was directing CorpFin to focus on climate-related disclosure in public filings, including issuers' discussion of topics identified in the SEC's 2010 climate disclosure [guidance](#). SEC staff will then use the insights from the review of disclosures and engagement with public companies to begin updating the 2010 guidance. Lee said that Commission staff "plays a critically important role in ensuring compliance with disclosure obligations, including those that implicate climate risk."

Lee followed this statement with a request for [public input](#) on climate-change disclosure. The statement requests feedback on 15 categories of questions including what information can be quantified and measured; whether disclosures should be scaled to the size of a registrant; the pros and cons of tailoring standards to different industries; whether requirements should be in the form of a new rule or incorporated into Regulations S-X and S-K; the possibility of using a comply-or-explain

framework; and how the SEC's climate-related priorities should consider information from private companies. Treasury is also on the case, working with the SEC on the guidance review, as noted by Secretary Janet Yellen in recent [remarks](#).

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

The then-acting chair also [advocated](#) for protecting shareholder rights, including proxy voting and shareholder proposals. Although this is ostensibly a broader topic than just ESG, Lee has noted that restrictions on shareholder rights, such as last year's rulemaking that made it more difficult for smaller shareholders to access the proposal process, "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." Indeed, as Gibson Dunn described, 77 percent of shareholder proposals in 2020 pertained to environmental, social, or governance issues. Lee recommended revisiting the 2020 shareholder proposal rule amendments, and CorpFin has already [denied no-action relief](#) to energy companies seeking to exclude climate-based proposals.

Lee's actions as acting chair created a foundation for climate-related efforts at the Commission that are bound to accelerate with the recent confirmation of Chairman Gensler. Notably, the SEC's chief of staff under Acting Chair Lee will [continue in that role](#) under Gensler, suggesting continuity of work and purpose. And Gensler's responses to questions during his confirmation hearing suggest that while he believes materiality is still the touchstone for disclosure, many investors have, via proxy votes, made it clear that information such as a corporation's spending on alternative energy is material. As an April 2021 [report](#) from the Congressional Research Service notes, "Pressure appears to be growing on the SEC to look more closely at its standards for disclosures to investors with regards to climate change risks, and related specificity and consistency."

Social issues

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

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

More recently, the passage of Georgia's elections law saw Major League Baseball announcing that it would pull the All-Star Game and MLB draft out of Atlanta and the CEO of Delta Airlines speaking out against the new law despite his initial support. Then, hundreds of corporate executives and other business leaders signed a statement, which ran as an ad in several major newspapers, declaring that "all should feel a responsibility to defend the right to vote and

to oppose any discriminatory legislation or measures that restrict or prevent any eligible voter from having an equal and fair opportunity to cast a ballot.”

While these statements were not the result of any regulatory requirement—and Republican lawmakers are doing what they can to push back—they reflect a rapidly increasing willingness of corporations to take sides in social matters and growing demand from the public to hold companies accountable for silence or complicity. In regulatory terms, this expands the scope of social matters that are likely to be seen as material to investors and thus under the umbrella of the SEC disclosure regime.

Corporate governance

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

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

Foreign corrupt practices

As a presidential candidate, Joe Biden emphasized the need to root out corruption as part of a strategy for national security and international relations. In an [op-ed](#) published in *Foreign Affairs* during his presidential candidacy, Biden characterized combating corruption as “a core national security interest and democratic responsibility.” Although he has not spoken directly about the Foreign Corrupt Practices Act, enforcement of the anti-bribery statute is consistent with his stance against corruption. In particular, Biden’s remarks suggest that he sees a hard line against corruption as not just a national security issue, but also a symbolic one.

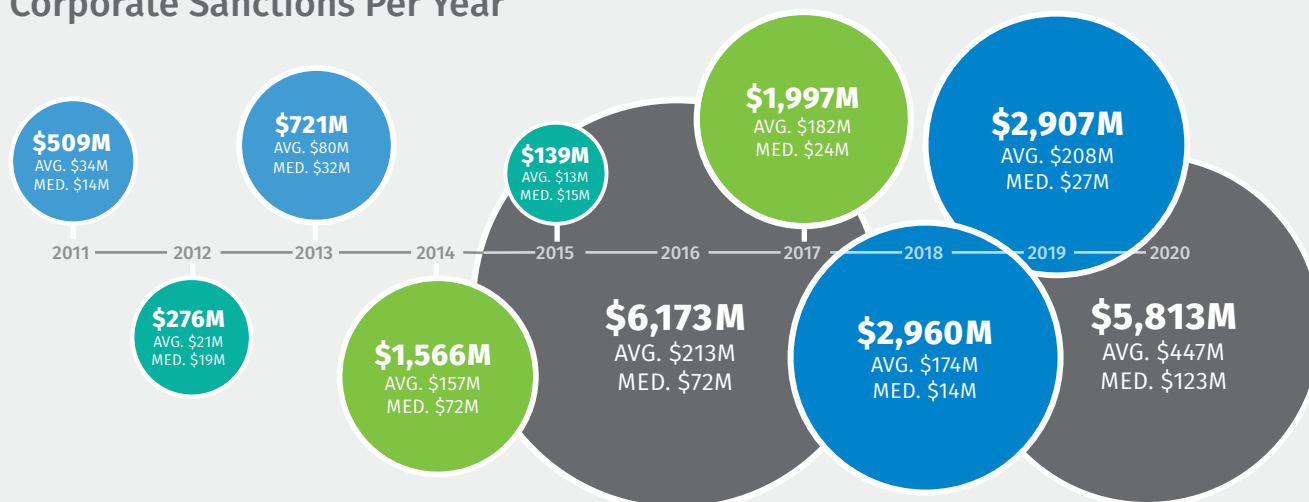
Describing the need to address corruption as part of his plan for relations with Central America, Biden’s campaign website [said](#), “As the most corrupt Administration in modern American history, Trump has undercut U.S. moral leadership on this issue, and his efforts to combat corruption anywhere in the world have been woefully

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

inadequate to nonexistent.” In *Foreign Affairs* he wrote, “Yet when the world’s democracies look to the United States to stand for the values that unite the country—to truly lead the free world—Trump seems to be on the other team, taking the word of autocrats while showing disdain for democrats. By presiding over the most corrupt administration in modern American history, he has given license to kleptocrats everywhere.” The President thus sees opposition to bribery and corruption as a tone-setting stance that can set an example for other leaders. As part of this, he [vowed](#) to institute policies against conflicts and corruption for every member of his own administration.

Biden’s remarks distinguish him sharply from his predecessor, who said of the FCPA in 2012, “It’s a horrible law and it should be changed.” Trump appointed an SEC chairman who had [expressed](#) skepticism about the “asymmetry of regulation”

Corporate Sanctions Per Year



Source: Stanford Foreign Corrupt Practices Act Clearinghouse. Republished with permission.

Wolters Kluwer Legal & Regulatory, U.S.

resulting from the FCPA. Notwithstanding these philosophical leanings, FCPA enforcement continued apace: there was no sacking of prosecutors, no shuttering of the DOJ's FCPA Unit, one of three units of the Criminal Division's Fraud Section. The first attorney general confirmed under Trump, Jeff Sessions, [vowed](#) early on to continue to enforce the FCPA. And the FCPA Unit had grown to a record [39 prosecutors](#) by February 2021, about double the headcount of [five years prior](#). As the accompanying graphic demonstrates, FCPA enforcement remained robust through the Trump Administration, [culminating](#) in 2020 with the resolution of an action against Airbus in January, which was the largest global foreign bribery matter ever brought by the DOJ until a resolution against Goldman Sachs smashed that record in October.

In short, the foundation is in place for the strong anti-corruption program envisioned by Biden. Attorney General Merrick Garland, who has deep prosecutorial experience, can be expected to implement President Biden's focus on weeding out corruption. Biden also recently [nominated](#) former prosecutor Kenneth Polite as the Assistant Attorney General for the DOJ's Criminal Division. Polite has strong anti-corruption and ethics [credentials](#): he prosecuted political corruption as the U.S. Attorney for the Eastern District of Louisiana and assistant U.S. Attorney in the

Southern District of New York before becoming chief compliance officer for Entergy Corporation, where he led the ethics and compliance department. As the counterpart to the DOJ, the SEC's Enforcement Division also has an FCPA unit, and the CFTC recently threw its hat in the ring by [filing](#) its first enforcement action for foreign corruption.

Furthermore, the SEC has new and improved enforcement tools at its disposal. Then-Acting Chair Allison Herren Lee in February [restored](#) subpoena power to senior officers of the enforcement division; throughout the Trump Administration, [only the Director\(s\) of Enforcement](#) could issue formal orders of investigation and subpoenas. Congress also [overrode](#) a Trump veto of the National Defense Authorization Act, approving the law with a provision that created a 10-year statute of limitations for disgorgement claims that involve scienter-based violations. Lawmakers elected to pursue legislation to solidify the SEC's ability to obtain disgorgement after a series of Supreme Court opinions in recent years had largely upheld the SEC's disgorgement authority but left certain questions unresolved.

The DOJ's, SEC's, and even CFTC's focus on FCPA will incorporate two pillars: the importance of cooperation to enforcement and the need to hold individual actors accountable. In a recent [speech](#), SEC Commissioner Caroline Crenshaw



stressed that “the Commission takes cooperation and self-reporting seriously,” while noting that cooperation must be meaningful and include “proactively identifying and remediating wrongdoing, as well as holding accountable those individuals responsible for misconduct.” While Crenshaw highlighted the benefits of cooperation for SEC staff in terms of shorter and more efficient resolutions, the data clearly shows a

benefit to issuers as well: in the prior decade, corporations that self-reported FCPA violations received sanctions averaging about \$70 million, while the average sanctions for non-disclosing corporations were nearly four times as high (see accompanying graphic). The desire to hold individuals accountable also dovetails with Biden’s emphasis on tone at the top in creating a moral culture within an organization.

Labor & Employment

By *Wayne D. Garris Jr., J.D., Kathleen Kapusta, J.D., and Pamela Wolf, J.D.*

With the vantage point of 100 days, it’s become clear that the Biden Administration intends to build a legacy separate from, yet fueled by, some of the former Obama Administration’s policies and policy makers. Biden has tapped some familiar faces from the Obama era to head up federal agencies and help advance changes in federal policy.

Already, Biden’s two expansive legislation proposals, the enacted but trimmed-down American Rescue Plan and the American Jobs Plan, underscore administration priorities. These include:

- Increased collective bargaining protections
- Minimum wage boost and strong wage protections
- Better workplace benefits
- Enforcement of worker protection laws

We already have witnessed Biden’s preliminary efforts to counter the Trump-era rollback of gains made by traditional labor during the Obama years, particularly at the National Labor Relations Board (NLRB) but also at the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC), through regulatory and related guidance rescissions, delays, and reviews. The Occupational Safety and Health Administration (OSHA), too, has updated its focus on COVID-19 workplace protections, often seen as ineffective during the Trump Administration.

Tackling the pandemic and the resulting economic crisis continues to be the priority. Biden also continues to face pent-up pressure from

progressives and his labor constituents, although he’s already delivered to some extent, including by appointing a former union leader and pro-worker advocate as secretary of labor.

Eye towards diversity

Prior to his inauguration, President Biden vowed to make his administration the most diverse in history. Just 100 days in, it appears the president has taken this pledge seriously. Of the 26 cabinet-level positions in the administration, including vice president, half of the nominees or appointees are people of color and 11 are women. Biden also made headlines for the historical significance of several nominees, including:

- Kamala Harris, the first woman, first Black, and first South Asian Vice President;
- Deb Haaland, the first Native American Secretary of the Interior and the first Native American Cabinet Secretary;

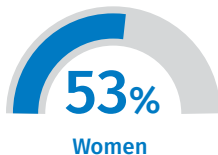
- Lloyd Austin, the first Black Secretary of Defense;
- Xavier Becerra, previously the first Latino Attorney General of California, as the first Latino Secretary of the Department of Health and Human Services;
- Pete Buttigieg, the first Senate-approved Cabinet Secretary (of Transportation) who publicly identifies as gay;
- Avril Haines, the first woman Director of National Intelligence;
- Janet Yellen, the first woman Treasury Secretary;
- Alejandro Mayorkas, the first Latino and first immigrant to lead the Department of Homeland Security;
- Michael Regan, the first Black man to lead the Environmental Protection Agency;
- Cecilia Rouse, the first woman of color to chair the Council of Economic Advisers; and
- Katherine Tai, the first woman of color to serve as U.S. Trade Representative

Emphasis on Diversity

Biden Administration nominees as of April 7, 2021:

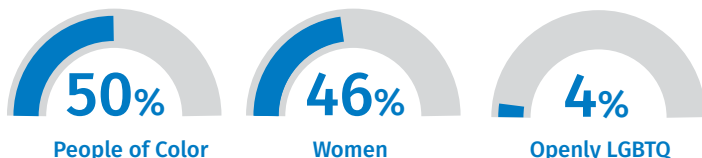
87 NOMINEES

- 21 awaiting nomination
- 37 under Senate consideration
- 29 confirmed
- of these, 46 are women (53%)



26 CABINET-LEVEL NOMINEES

- 13 people of color (50%)
- 12 women (46%)
- 1 openly LGBTQ individual (4%)



* Neera Tanden, whose nomination for OMB Director was withdrawn, is included in this data.

Wolters Kluwer Legal & Regulatory, U.S.

Despite these appointments, some Democrats have criticized the lack of individuals of Asian or Pacific Islander descent selected for high-level roles in the administration. Senators Tammy Duckworth (D-Ill) and Mazie Hirono (D-HI) vowed to withhold their support for further nominees until the administration addressed the lack of Asian-American representation in cabinet-level leadership positions. The senators withdrew their pledge after the White House announced that it would appoint an AAPI liaison.

As the administration continues to fill lower-level appointed positions, Democratic politicians and civil rights groups will be looking to see if Biden maintains his commitment to diversity. Recently, the Mexican American Legal Defense and Educational Fund issued a [statement](#) criticizing President Biden for including only one Latina in his list of 11 judicial nominations announced on March 30.

Erasing the Trump legacy

Since taking office, President Biden has issued numerous executive orders. In the context of labor and employment, the president has largely used his executive authority to eliminate many Trump-era directives.

On January 22, Biden signed [Executive Order 14003](#), “Protecting the Federal Workforce.” Notably, the order revoked five of the Trump Administration’s executive actions, including:

- [Executive Order 13957](#), which created a new Schedule F-excepted service category, something the new administration called unnecessary to the conditions of good administration and, moreover, harmful to civil service and its merit-based principles central to the Pendleton Civil Service Reform Act of 1883’s repudiation of the spoils system;
- [Executive Order 13836](#), which established the Interagency Labor Relations Working Group but excluded labor groups from participation;
- [Executive Order 13837](#), which set limitations on taxpayer-funded union time;
- [Executive Order 13839](#), which expanded federal supervisors’ authority to discipline and remove employees.

President Biden also revoked President Trump’s controversial and polarizing [Executive Order 13950](#), “Combating Race and Sex Stereotyping,” which prohibited federal contractors and subcontractors from providing certain workplace diversity training and programs. Biden’s [Executive Order 13985](#), “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” revoked the Trump ban on diversity training, shut down the phone hotline and email operations for individuals to report noncompliance with EO 13950, and administratively closed all complaints of noncompliance.

On January 25, President Biden [revoked](#) Trump’s transgender military ban set forth in two Memoranda, “Military Service by Transgender Individuals” of [March 23, 2018](#) and [August 25, 2017](#). In the “[Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform](#),” Biden stated, “[t]he All-Volunteer Force thrives when it is composed of diverse Americans who can meet the rigorous standards for military service, and an inclusive military strengthens our national security. It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service.”

More recently, on April 26, Biden issued “[Executive Order on Worker Organizing and Empowerment](#).” Notably, the EO establishes

the Task Force on Worker Organizing and Empowerment, which will be made up of several cabinet secretaries, and chaired by Vice President Harris, to advise the president on enacting policies that promote “worker power, worker organizing, and collective bargaining.”

On April 27, Biden then signed “[Executive Order Increasing the Minimum Wage for Federal Contractors](#)” to require federal contractors to pay a \$15 minimum wage to workers on federal contracts. Under the EO, all agencies will have to incorporate the \$15 minimum wage in new contract solicitations by January 30, 2022; and by March 30, 2022, all agencies will need to implement the minimum wage into new contracts.

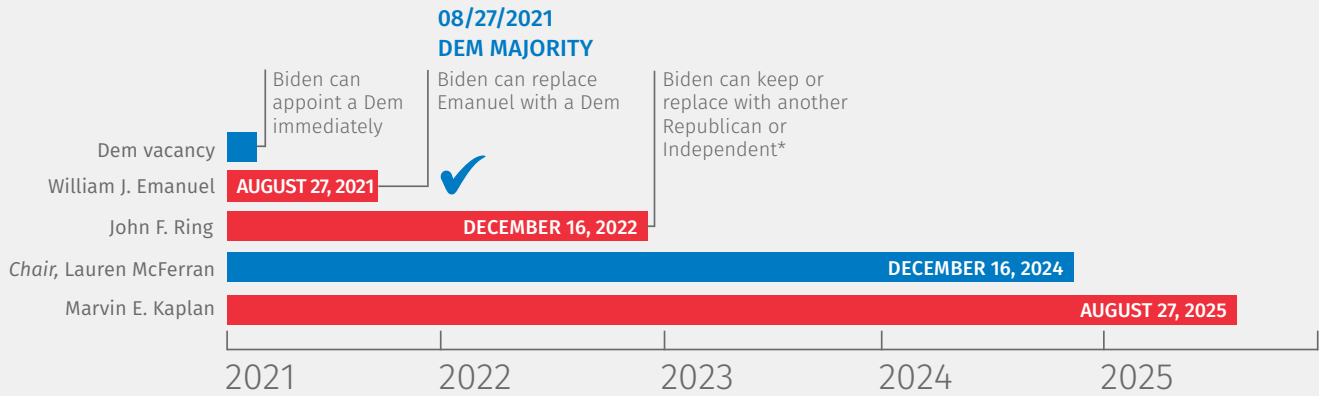
Agency revamp underway

Further progress will take time, but the Biden Administration has already begun to reshape the labor agencies. Although the new union-friendly labor secretary has a clear path for policy changes at the DOL, the shift likely will be more subtle and take longer to implement at the NLRB and EEOC. The shift in Senate composition to a narrow Democratic majority, however, will make it easier for Biden’s nominees to be confirmed.

At the five-member NLRB, there is currently one vacancy. Not until fall 2021 will another vacancy open up. Thus, it could be 2022 before the board’s composition has changed enough—and the appropriate cases get teed up—for a Biden NLRB to undo the Trump board’s significant activity, which itself reversed the Obama-board’s actions, a time-honored tradition of political ping-pong at the agency. This is true even though Biden has appointed the only Democrat as chair.

With respect to the EEOC, the first vacancy will open up in July 2021. Biden has renominated the Democratic commissioner currently filling the spot and appointed her as vice chair. He also has designated the only other Democratic commissioner to fill the chairmanship. The next vacancy will open in July 2022. Although it is unlikely that major changes will come quickly at the EEOC, we could see the game-changing conciliation rule clawed back by legislative action under the Congressional Review Act.

NLRB Composition



* There can only be three commissioners from one party.

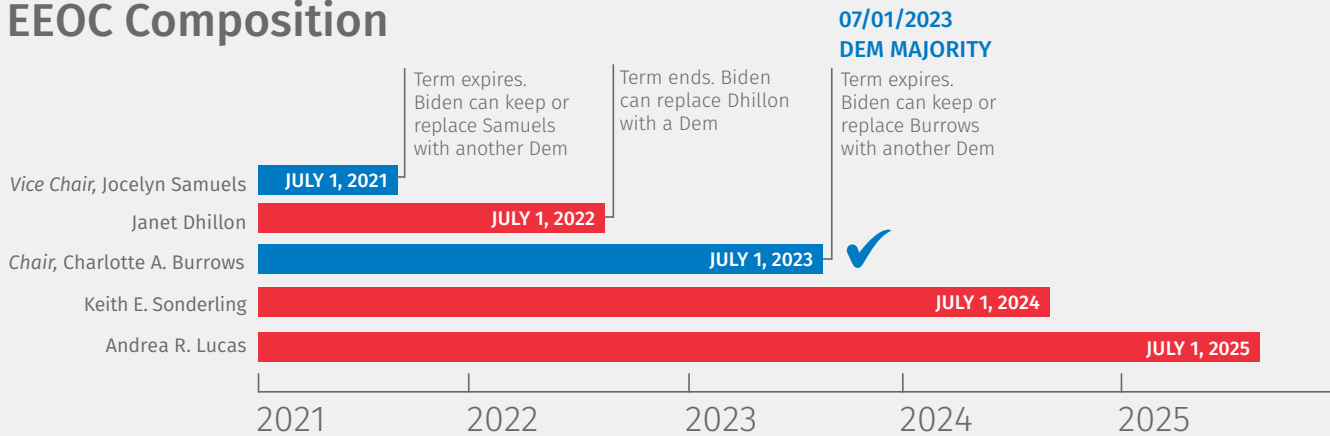
Wolters Kluwer Legal & Regulatory, US

Board and commission membership are not the only determinants of influence at the NLRB and the EEOC—the general counsel’s position determines litigation policy and the direction the agency will take on that front. Biden immediately replaced pro-employer NLRB GC Peter Robb before the end of his term, sparking substantial controversy, and installed a more worker-friendly Acting GC Peter Sung Ohr, who has already begun to change the arc of what Labor perceived as an overreaching, anti-union board. Biden has named Jennifer Abruzzo, a 23-year

NLRB career attorney currently working as a special counsel with the Communication Workers of America, to fill the spot; her nomination is still pending. And, like he did at the NLRB, Biden has removed EEOC GC Sharon Fast Gustafson. That spot remains vacant.

Meanwhile, at the DOL, pro-union, pro-worker Boston Mayor Marty Walsh has been confirmed as labor secretary. Biden has also installed new leadership teams at OSHA and the Office of Federal Contract Compliance Programs (OFCCP), although some vacancies still exist at the OFCCP.

EEOC Composition



Wolters Kluwer Legal & Regulatory, US

On the regulatory front

We are already seeing the preliminary steps for regulatory action, beginning with a quickly implemented regulatory “freeze” for additional review of rulemakings that were either in the pipeline or recently completed but not yet effective.

At the EEOC, proposed rules on employer wellness plans and a final rule on use of “official time” for union-related activity were withdrawn because they had not yet been published in the *Federal Register* by Inauguration Day. The Biden Administration will likely advance its own version of the much-anticipated wellness rules, which may not differ radically, but it seems unlikely the administration will proceed in the same vein on the “official time” rule.

Other regulations, such as DOL’s H-1B prevailing wage rule, have been delayed, while the agency’s final tip rule has been partly delayed and partly withdrawn and repropoed. The DOL has also delayed and proposed to rescind its Fair Labor Standards Act independent contractor and joint-employer rules.

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 may be on the way. In the American Rescue Plan, Biden signaled he wants Congress to authorize OSHA to issue a COVID-19 Protection Standard that covers a broad set of workers, so that workers not typically covered by OSHA—such as many of the public workers on the frontlines—also will receive protection from unsafe working conditions and retaliation.

At the EEOC, the Biden Administration may choose eventually to return the agency’s focus to pay equity, as had the Obama Administration, and attempt to revamp or reinstate the EEO-1 Component 2 pay data collection.

Notably, under the Congressional Review Act, Trump Administration rules may be revoked via congressional resolution of disapproval within 60 *legislative days* after they were promulgated. The catch, however, is that federal agencies are prohibited from later issuing a regulation that is “substantially the same” as the one rejected by Congress. Using this vehicle in late March, House and Senate Democrats filed resolutions of disapproval that would revoke the EEOC’s final rule updating conciliation procedures in a manner that

they believe unfairly tips the scales toward employers, to the detriment of aggrieved employees.

Enforcement priorities

We have already seen some shifting of enforcement priorities, for example, with the NLRB’s acting general counsel issuing a memorandum calling for vigorous enforcement of the “mutual aid or protection” and “inherently concerted” doctrines under the National Labor Relations Act. And Biden’s American Jobs Plan signals his administration’s priorities for a strong prevailing wage (tied to infrastructure and transportation projects), safe and healthy workplaces, and collective bargaining policies.

To what extent these policies will be reflected in successful legislation is unknown, but the Biden Administration is likely to robustly and broadly enforce existing laws and regulations to effectuate its favored policies. Already the DOL has returned to

Already the DOL has returned to its more stringent policy on liquidated damages in agency enforcement activities.

its more stringent policy on liquidated damages in agency enforcement activities, which were less of a focus during the Trump era. It is still unclear whether the new administration will rely less on voluntary compliance, such as the OFCCP Early Resolution Conciliation Agreements that allow contractors to avoid further compliance reviews for five years.

Biden signs American Rescue Plan

Fewer than 60 days into office, President Biden signed the [American Rescue Plan Act](#) (ARPA), P.L. No. 117-2, into law. He described the act—passed during the worst economic crisis since the Great Depression and the worst public health emergency in over 100 years—as “historic legislation” that was “about rebuilding the backbone of this country and giving people in this nation—working people and middle-class folks, the people who built the country—a fighting chance.” Legislators had

announced a goal of passing the bill by March 14, when many relief provisions would have expired; the president signed it on March 11.

In addition to providing a third round of direct stimulus payments, extensions of unemployment relief, and increased funding for COVID-19 testing and vaccinations, the law, which passed with no Republican support, largely aligns with the framework the president presented before his inauguration. The \$1.9 billion stimulus package also includes an extension and expansion of the paid sick and FMLA leave tax credits, an Emergency Federal Employee Leave Fund, health care coverage assistance (including payment of 100 percent of COBRA premiums for eligible individuals), enhancements of personal tax credits, broadband investments, changes related to retirement plan funding, and more.

Next up: American Jobs Plan

While the White House called the ARPA “ambitious, but achievable,” President Biden wasted no time in rolling out, on March 31, the even more ambitious \$2.3 trillion American Jobs Plan that he says will create millions of good jobs and rebuild the nation’s infrastructure. The plan, which at minimum has sparked a debate over the meaning of “infrastructure,” drew immediate Republican opposition, with Senate Minority Leader Mitch McConnell vowing “to fight them every step of the way.” Some progressive Democrats have also criticized the plan, but for not going far enough.

According to the White House, the [American Jobs Plan](#) would, among many other things:

- Solidify the infrastructure of the U.S. care economy by creating jobs and raising wages and benefits for essential home care workers, many of whom are women of color.
- Revitalize manufacturing, secure U.S. supply chains, invest in research and development, and train Americans for the jobs of the future.
- Create good-quality jobs that pay prevailing wages in safe and healthy workplaces while ensuring workers have a free and fair choice to organize, join a union, and bargain collectively with their employers.
- Ensure that Americans who have endured systemic discrimination and exclusion for generations finally have a fair shot at obtaining good paying jobs and being part of a union.

A major point of contention for Republicans, however, is Biden’s proposal to fund the plan by raising the corporate tax rate from the current 21 percent to 28 percent. But Republicans are not alone in opposing a higher corporate tax rate. West Virginia Senator Joe Manchin, a Democrat, has also resisted the increase, raising serious concerns about the administration’s ability to garner enough congressional support. Biden has, however, signaled a willingness to compromise, noting that he may be open to a lower corporate tax rate.

PRO Act included, too

The plan also calls on Congress to pass the Protecting the Right to Organize Act (PRO Act), [H.R. 842](#), a signature piece of legislation that Biden describes as central to his labor agenda. The act, passed by the House on March 9 on a 225-206 mostly party-line vote, would among other things strengthen collective bargaining rights by amending the National Labor Relations Act to require courts to consider, when determining potential joint employment of an employee, whether there is joint control over the employee’s essential terms and conditions of employment.

It would also codify the controversial “ABC test” to determine who is an “employee” as opposed to an “independent contractor,” potentially sweeping many gig workers under the federal labor law’s protections. In addition, the PRO Act would address the procedures for union representation elections, modify protections against unfair labor practices resulting in serious economic harm and establish penalties, and permit injunctive relief against entities that fail to comply with NLRB orders.

Filibuster looms large

The PRO Act had already faced uncertainty in the Senate as ten Republicans would have to join all 50 Democrats to ensure a filibuster-proof majority. Once a supporter of the filibuster, Biden has more recently stated that he believes the procedural rule is being abused. But because at least two Democratic Senators, including Kyrsten Sinema of Arizona and Manchin, have signaled their opposition to eliminating the filibuster, it remains a potential tool for Republicans in thwarting much of Biden’s agenda.

Although some Republicans potentially could support parts of the Jobs Plan regarding infrastructure improvement, it is unlikely any Republican

would endorse Biden's plan to increase the corporate income tax. A key question is whether the Biden Administration and Democratic congressional leaders can use the reconciliation process to bypass the filibuster and pass at least parts of the plan without any Republican support. Because they used the budget reconciliation process to pass the ARPA, it is unclear when and how they might be able to use it again this year, as well as whether any of the PRO Act would be included in that process.

And though the Senate parliamentarian indicated that Democrats may be able to use the budget reconciliation process again this year, giving them hope to pass at least parts of the plan, Senator Manchin, in a Washington Post op-ed, made clear the process won't be easy. "If the filibuster is eliminated or budget reconciliation becomes the norm, a new and dangerous precedent will be set to pass sweeping, partisan legislation that changes the direction of our nation every time there is a change in political control. The consequences will be profound—our nation may never see stable governing again," Manchin warned. One thing seems certain: the Jobs Plan faces a much more difficult road ahead than did the ARPA.

American Families Plan

A lack of family-friendly policies, such as paid family and medical leave for when a worker needs time to care for a new child, a seriously ill family member, or recover from their own serious illness, has been identified as a key reason for the U.S. decline in competitiveness. The COVID-19 pandemic has exacerbated this problem. President Biden's [American Families Plan](#) would create a national comprehensive paid family and medical leave program to ensure that workers receive partial wage replacement to:

- Bond with a new child;
- Care for a seriously ill loved one;
- Deal with a loved one's military deployment;
- Find safety from sexual assault, stalking, or domestic violence;
- Heal from their own serious illness; or
- Deal with the death of a loved one.

The program would guarantee 12 weeks of paid parental, family, and personal illness/safe leave by year 10 of the program. Workers would get three days of bereavement leave per year starting in year one. The program would provide workers up to

\$4,000 a month, with a minimum of two-thirds of average weekly wages replaced, rising to 80 percent for the lowest wage workers. This paid leave program would cost an estimated \$225 billion over a decade.

Other bills on the horizon

In March, the House passed the Farm Workforce Modernization Act ([H.R. 1603](#)) by a 247-174 vote in which 30 Republicans crossed the aisle to support the measure. The legislation would allow farmworkers and their spouses and children to earn legal status through continued employment in the agricultural sector, while at the same time streamline the H-2A agricultural guest worker program. President Biden has expressed support for the legislation, noting, "The Act will deliver the lawful status and better working conditions that this critical workforce deserves, as well as much needed stability for farmers, growers, and the entire agriculture industry."

Although the House, on March 18, also passed the American Dream and Promise Act ([H.R. 6](#)) to provide a pathway to citizenship for U.S.-raised immigrant youth known as "Dreamers," Temporary Protected Status (TPS) recipients, and Deferred Enforced Departure (DED) beneficiaries, comprehensive immigration reform is unlikely to gain any traction early in Biden's term. The bill passed by a mostly party-line vote. A similar version of the American Dream and Promise Act had passed in the last Congress in June 2019 by a vote of 237-187 with seven Republican lawmakers supporting it. It was read twice and put on the Senate calendar but stalled.

On April 15, the House passed the Paycheck Fairness Act with a 217-210 vote that fell along party lines. Introduced on January 28, the day before the 12th anniversary of the signing of the Lilly Ledbetter Fair Pay Act, [H.R. 7](#) is designed to strengthen the Equal Pay Act of 1963, help eliminate the gender wage gap, and guarantee that women can challenge pay discrimination and hold employers accountable, according to the bill's sponsors. Notably, similar legislation has been introduced in every Congress since the 107th (2001-2002) but has fallen short of the support necessary to become law. With an evenly divided Senate, though, and Vice President Kamala Harris available to tip the balance, many are hopeful that this will be the year that the Paycheck Fairness Act becomes law. Once again, the filibuster looms large as a means to block the bill.

Employee Benefits

By [Lauren Bikoff, MLS](#) and [Tulay Turan, J.D.](#)

In the employee benefits arena, one of President Biden's goals is to protect and build on the Affordable Care Act (ACA). In his first 100 days, he has taken significant steps toward that goal, creating a special enrollment period for marketplace health coverage and expanding eligibility and affordability for the ACA's premium tax credits.

His pick of [Xavier Becerra](#) as Secretary of Health and Human Services shows his commitment to the health care law. As attorney general in California, Becerra has been a staunch defender of the ACA, most recently leading 20 states and the District of Columbia in a campaign to protect it from being dismantled by Republican lawmakers. Becerra, whom the Senate narrowly confirmed on March 18, will have a major role in deciding how the Biden Administration will expand the ACA, such as adding a public option and increasing access to premium tax credits, and can implement policies that will aim to lower prescription drug prices.

Supreme Court challenge

The Supreme Court has not yet issued a decision in *California v. Texas*, which seeks to invalidate the ACA 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.

In early February, the Department of Justice sent a letter to the Supreme Court indicating it had changed its position in the ACA case, which is awaiting a decision by the High Court. "Following the change in Administration, the Department of Justice has reconsidered the government's position in these cases. The purpose of this letter is to notify the Court that the United States no longer adheres to the conclusions in the previously filed brief of the federal respondents," the letter states.

In November 2020, the DOJ under the Trump Administration had argued before the Supreme Court that the elimination of the shared responsibility payment in the ACA was unconstitutional and inseverable from the remainder of the ACA. Now, the DOJ under Biden has taken the position that the provision is constitutional and, even if found otherwise, it is severable from the remainder of the law. A ruling in the case is expected soon.

Premium tax credits

The Biden Administration met its goal with regards to revamping the ACA premium tax credits. The [American Rescue Plan Act of 2021](#), which President Biden signed on March 11, makes changes to the credits. For 2021 and 2022, the law modifies affordability percentages used in calculating the premium tax credit to make credits available for individuals with incomes below 400 percent of the federal poverty line and increases credit amounts for those already qualified.

"When I ran for President, I promised I would build on the foundation of the Affordable Care Act," Biden said at a [speech](#) in Columbus, Ohio on March 23. "And just 50 days into my Administration, we've delivered on that promise with the American Rescue Plan. It does that by making health care more affordable. It means better coverage and lower premiums for millions of Americans."

Special enrollment period

The Biden Administration opened up a special enrollment period (SEP) for ACA marketplace coverage to all Americans in response to the COVID-19 public health emergency. The SEP began on February 15. As of March 31, over 528,000 consumers made new plan selections, including approximately 322,000 sign-ups from March 1 to March 31, according to a [report](#) from the Centers for Medicare and Medicaid Services. The SEP was originally set to expire on May 15, but President Biden has extended the SEP through August 15.

Retirement Benefits

By *Glenn Sulzer, J.D.*

The major developments under the Biden Administration in the area of retirement benefits have been the adoption of the American Rescue Plan Act, which includes funding for multiemployer plans, and the Department of Labor's decision to not enforce recently published final regulations governing ESG investments and proxy voting.

Multiemployer plan funding

The [American Rescue Plan Act of 2021](#) included measures designed to address the multiemployer plan funding crisis and modify the funding rules applicable to single employer plans. Among other things, the Act: creates a special financial assistance program under which cash payments will be made by the Pension Benefit Guaranty Corporation (PBGC) to financially troubled multiemployer plans to ensure that these plans can continue paying retiree benefits through the 2051 plan year; authorizes a temporary delay in the designation of a multiemployer plan as being in endangered, critical, or critical and declining status; increases the multiemployer plan premium rate to \$52, per participant (beginning in 2031); and extends amortization periods and pension stabilization percentages (i.e., interest rate smoothing) for single employer plans. In addition, effective for tax years beginning after 2026, the Act expands the number of covered employees subject to a \$1 million limit on deductible compensation.

NOTE: For more detailed coverage of the Act, see [Special Report: President Signs American Rescue Plan Act to Aid Americans, Boost Economy \(March 2021\)](#) and a series of [Benefit Practice Portfolios \(American Rescue Plan Act Addresses Multiemployer Plan Funding Issues; American Rescue Plan Act Provides Special Financial Assistance for Financially Troubled Multiemployer Plans; American Rescue Plan Act Provides Single Employer Plan Funding Relief\)](#).

The most significant feature of the act's retirement plan provisions creates a special financial

assistance program, within the PBGC, under which cash payments, financed from the Treasury's General Fund, will be made by the PBGC to financially troubled multiemployer pension plans to ensure that the plans can continue paying retiree benefits through the 2051 plan year. The assistance will not need to be repaid.

Multiemployer pension plans eligible for the program will include plans in critical and declining status and plans with significant underfunding with more retirees than active workers in any plan year beginning in 2020 through 2022. Plans that have suspended benefits and certain plans that have already become insolvent will also be eligible to participate in the program. The financial assistance provided will be the amount required for the plan to pay all benefits due during the period beginning on the date of enactment and ending on the last day of the plan year ending in 2051, with generally no reduction in a participant's or beneficiary's accrued benefit. Significantly, the amount of the financial assistance will not be capped by the PBGC's multiemployer plan benefit guarantee.

The assistance program represents the first time general Treasury funds have been used to support private pension plans.

The financial assistance will be conditioned on compliance with stipulated conditions, including the reinstatement of suspended benefits. In addition, no financial assistance payments may be made to a plan after September 30, 2030.

The assistance program represents the first time general Treasury funds have been used to support private pension plans. The relief has drawn opposition for being included in

legislation intended in large measure to redress the financial impact of the Covid-19 pandemic, with critics noting that problems in certain multiemployer plans have long preceded the pandemic. However, the relief certainly is consistent with the Act’s design to “rescue” Americans in difficult financial constraints.

The measure should also significantly extend the life of the PBGC multiemployer program. Simulations conducted by the Congressional Budget Office indicate that an average of 185 plans will receive \$86 billion in special finance assistance. Thus, the relief will effectively allow the PBGC multiemployer program to remain solvent through the mid-2040s.

In addition, because the special financial assistance will allow plans to delay or prevent insolvency, CBO estimates that the PBGC will spend \$2 billion less on financial assistance to these plans. Moreover, retirees would pay \$1.7 billion in federal income taxes on benefits that would not have been received absent the financial assistance.

ESG investments

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

The Trump DOL unsurprisingly reversed course with respect to ESG investments. In [final regulations](#), effective January 12, 2021, the DOL stresses that ERISA fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors—financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and funding policy. The

final regulations expressly apply these principles not just to investments and investment courses of action, but also to the selection of available investment options for plan participants in individual account plans.

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

The DOL [announced](#) on March 10 that it will not enforce the final rules on “Financial Factors in Selecting Plan Investments.” The [enforcement policy](#) follows an executive order issued by the Biden Administration that directed federal agencies to review existing regulations promulgated, issued, or adopted between January 20, 2017 and January 20, 2021 that are or may be inconsistent with, or present obstacles to, the policies set forth in Section 1 of the order ([86 FR 7037](#) (January 25, 2021)). The policies listed in the order include the promotion and protection of public health and the environment and ensuring that agency activities are guided by the best science and protected by processes that ensure the integrity of federal decision-making. Section 2 of the order further provides that, for any such regulatory actions identified by the agencies, the heads of agencies must, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.

Under the enforcement policy, DOL will not, until it issues further guidance, enforce the final ESG rules or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with the final rules with respect to an investment, including a Qualified Default Investment Alternative, or investment course of action. The enforcement statement, however, does not preclude DOL from enforcing any statutory requirement under ERISA, including the statutory duties of prudence and loyalty.

Proxy voting

The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies attributable to those shares. The power to vote a proxy, the DOL explains, is a plan asset

and, in managing plan assets that include shares of company stock, a fiduciary is subject to the fiduciary responsibility rules in voting proxies attributable to those shares. Accordingly, a plan trustee or other fiduciary will be liable for losses that are attributable to the proxy vote.

Final regulations, generally effective January 15, 2021, state that the fiduciary duty to manage plan assets includes the “management of shareholder rights appurtenant to those shares, such as the right to vote proxies.” The DOL has expressly rejected the suggestion to distinguish proxy voting from the exercise of shareholder rights, such as inspecting an issuer’s corporate record books and participating in corporate actions taken by an

issuer. According to DOL, the exercise of shareholder rights to monitor or influence management, which may occur in lieu of or in connection, with formal proxy proposals, is as much an issue of fiduciary management of the investment asset as proxy voting.

The Labor Department [announced](#) on March 10 that it will not enforce the final rules on “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights. Under the [enforcement policy](#), DOL will not, until it issues further guidance, enforce the final proxy voting rules rule or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with the final rules with respect to an exercise of shareholder rights.

Health & Life Sciences

By [Cathleen Calhoun, J.D.](#) and [Anthony H. Nguyen, J.D.](#)

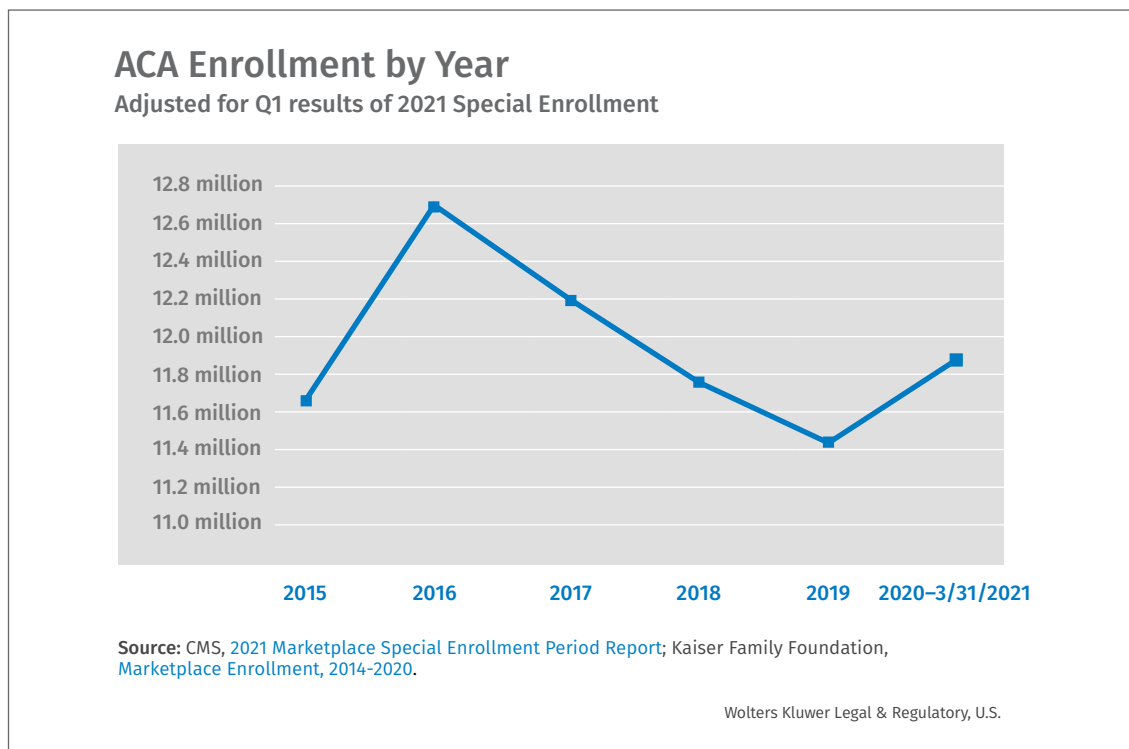
Affordable Care Act

Only nine days after taking the oath of office, President Biden opened a new door to health insurance coverage by signing an [Executive Order on Strengthening Medicaid and the Affordable Care Act](#) that directed a special enrollment period for marketplace health insurance exchanges under the Affordable Care Act (ACA) ([P.L. 111-148](#)). The enrollment period began on February 15 and was originally scheduled to end in May, but has been extended until August 15. More extensions may follow. The success of the special enrollment period is reflected in the increased participation in marketplace health insurance exchanges. From the beginning of the special enrollment period on February 15 through March 31 (the latest data), more than 500,000 new individuals signed on for insurance, and that number is expected to rise.

On February 10, President Biden’s Deputy Solicitor General Edwin Kneedler wrote a [two-page letter](#) to the U.S. Supreme Court about the ACA case [California v. Texas](#) (known as *Texas v. U.S.* in the lower courts) that the High Court heard last November. In that letter, Kneedler stated that “the Department of Justice has reconsidered the government’s position” and “no longer adheres to the conclusions in” the brief that former President Donald Trump’s solicitor general, Noel

Francisco, filed in 2020. The letter goes on to say that the government now takes the position that the individual mandate, the portion of the ACA requiring virtually all Americans to buy health insurance, or pay a penalty, is constitutional and that if the “Court nevertheless concludes that Section 5000A(a) is unconstitutional, that provision is severable from the remainder of the ACA.”

President Biden also made health insurance under the marketplace exchanges less expensive for many, effective April 1, by signing the [American Rescue Plan Act \(ARPA\)](#) ([P.L. 117-2](#)), on March 11. [The American Families Plan](#), announced by Biden on April 28, would make permanent lower health insurance premiums for those who buy coverage on their own. Under the ACA, premium tax credits (subsidies) are available to mitigate the cost of health insurance for individuals whose incomes fall between 100 and 400 percent of the federal poverty level. But, for individuals making just over 400 percent of the federal poverty level (\$51,040) and not qualifying for the subsidy, premiums are doubled and much less affordable. Under the ARPA, subsidies are expanded to those who fall just over the 400-percent poverty level. On top of that, the subsidies are increased for those whose incomes fall between 100 percent of poverty (the limit for Medicaid eligibility) and \$51,040. A study has [estimated](#) that these changes will impact



29 million people—14 million people who are insured on the individual market and nearly 15 million people who are uninsured and eligible to purchase marketplace coverage. Individuals can find out about enrolling in health insurance coverage, and the costs (if there are costs) by going to [healthcare.gov](https://www.healthcare.gov).

Medicare and Medicaid

Both Medicare and Medicaid have received significant attention during the first 100 days of the Biden presidency. On April 5, the U.S. Supreme Court put cases on Medicaid work requirements on temporary hold as a result of the Biden Administration's efforts. The Court had previously granted and consolidated petitions on the legality of the approval of Medicaid work requirements in Arkansas and New Hampshire. The high court [stated](#), in a one sentence docket entry, that on "consideration of the motion to vacate the judgments of the court of appeals and remand, to remove the cases from the March 2021 argument calendar, and to hold further briefing in abeyance, these cases are held in abeyance pending further order of the Court."

President Biden also signed [legislation](#) on April 14, delaying through the end of 2021 the return of Medicare sequestration—which is an automatic

two-percent cut for all health care providers paid through Medicare. The Coronavirus Aid, Relief and Economic Security (CARES) Act that became law in 2020 stopped the automatic two-percent cut to all Medicare providers, and that moratorium had been extended through March 2021. Knowing that the April 2021 legislation was coming, CMS had not been enforcing the two-percent cut to health care providers.

Medicaid expansion is now more appealing to the eleven states that have not chosen to expand Medicaid through the ACA. The [American Rescue Plan Act of 2021](#) offers increased federal dollars over two years to states that adopt expansion for the first time. Wyoming passed Medicaid expansion at the end of March after the COVID relief package had been signed by President Biden. Other states may follow.

President Biden focused on Medicaid along with the ACA early on in his first 100 days through the [Executive Order on Strengthening Medicaid and the Affordable Care Act](#). The order calls for agencies to review regulations that relate to Medicaid and the ACA. Agencies must review demonstrations and waivers under Medicaid and the ACA that may reduce coverage or undermine the programs, including work requirements. Agencies are directed to reexamine policies that:

- undermine protections for people with pre-existing conditions, including complications related to COVID-19
- undermine the health insurance marketplace or other markets for health insurance
- make it more difficult to enroll in Medicaid and the ACA; and
- reduce affordability of coverage or financial assistance, including for dependents

Michael Clark, of Counsel at Baker Donelson, commented, “While President Biden directs key executive branch agency administrators to review and identify agency actions that can be revised or removed so that his policies can be implemented more efficiently, the new administration faces greater challenges when it comes to regulations already promulgated pursuant to the Administrative Procedures Act.” According to Clark, those that have not been fully implemented will be easier to cancel or modify.

And what about the Medicare eligibility age? What would be considered the most significant change in Medicare since its passage—expanding eligibility from age 65 to age 60—has not yet happened. For President Biden, the goal continues to be a part of his plan for healthcare reform and he has not wavered.

Drug costs

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

Biden began his focus on drug pricing by reversing a set of [Trump Administration-era regulations](#)—rules that would have relaxed existing Part D plan requirements to cover all drugs in six protected drug classes. Two final rules issued by the Trump Administration in late 2020 remain

for the time being—the “most favored nation” [final rule](#) and [another](#) excluding rebates on prescription drugs paid by manufacturers to pharmacy benefit managers and Part D plans from safe harbor protection under the Anti-Kickback Statute.

In December, a federal court in California granted an injunction prohibiting CMS from implementing the “most favored nation” rule. Even if this rule survives the court case, it remains to be seen whether Biden will allow either of Trump’s final rules to take effect, as in March, HHS [delayed](#) until January 1, 2023, following separate [litigation](#), the effective date of the prescription drug rebate rule under the auspices of studying the entire rule’s impact on Part D and its enrollees.

Abortion and contraception

Biden supports a repeal of the Hyde Amendment, which prohibits the use of federal funds to pay for abortions. He also continues to support codification of *Roe v. Wade* and eliminating state laws that hinder access to abortion, including ultrasound and parental notification requirements. In addition, Biden rescinded 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, via [executive order](#).

Biden also directed HHS to consider reversing Trump’s rule preventing Planned Parenthood and other agencies from obtaining Title X funds. In following his directive, HHS [issued](#) a proposed rule on April 15 to revise the Trump-era 2019 rules by readopting the 2000 regulations, with several modifications needed to strengthen the program and ensure access to equitable, affordable, client-centered, quality family planning services.

On April 16, the National Institutes of Health (NIH) [reversed](#) 2019 Trump-era [requirements](#) that blocked awarding NIH research grants and contracts to medical researchers proposing to use human fetal tissue from elective abortions. The Trump requirements included an intention to [convene](#) a new NIH Human Fetal Tissue Research Ethics Advisory Board that would [review](#) any such grant requests, effectively eliminating the use of fetal tissue from elective abortions in medical research. Under Biden’s direction, the NIH will once again allow for fetal tissue from elective

abortions to be included in medical research grant applications and the ethics advisory board will not be convened. Previous guidelines regarding proposed human fetal tissue research under the Obama administration have not changed.

COVID-19

Biden, who had been critical of the previous administration's response to COVID-19, caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), created a [13-member team](#) of scientists and doctors who are advising the new administration on control of the coronavirus. One of Biden's first presidential executive orders was [creating](#) the position of a COVID-19 Response Coordinator, along with a pandemic testing board, [reporting](#) directly to the president and managing efforts to produce and distribute vaccines and personal protective equipment. The Biden team's [plan](#) to improve the governmental approach to COVID-19 by increasing testing, shoring up PPE supply shortages, and ensuring access to vaccines, was [included](#) in Biden's National Strategy for the COVID-19 Response and Pandemic Preparedness report.

American Rescue Plan

The [American Rescue Plan](#) included sweeping relief measures to address the COVID-19 pandemic. Under the plan, the administration will invest \$20 billion in a national vaccination program; increase testing while making tests more widely available; ensure that schools can safely reopen; address health disparities and disproportionate impacts of the pandemic on underserved communities; scale-up funding for long-term care facilities; increase funding for sequencing, surveillance, and oversight of emerging strains; create a \$30 billion Disaster Relief Fund to mitigate persistent supply shortages; fund treatment research to identify potential therapies; and increase worker protections by [ordering](#) the Occupational Safety and Health Administration to issue a COVID-19 Protection Standard.

Testing and treatments

Biden [signed](#) an executive order to expand access to COVID-19 testing by: (1) doubling the number

of drive-through test sites; (2) investing in more types of testing—home tests and instant tests; (3) creating a pandemic testing board to produce and distribute tens of millions of tests; and (4) establishing a U.S. Public Health Jobs Corps to mobilize at least 100,000 people to support communities most at risk by performing contact tracing.

Biden also [signed](#) an executive order to expand access to COVID-19 treatments by: (1) accelerating the development of novel therapies; (2) improving the capacity of the nation's healthcare systems to address COVID-19; and (3) improving access to quality and affordable healthcare. The Food and Drug Administration's emergency use authorization (EUA) is an obscure, expedited approval pathway that facilitates the availability and use of medical countermeasures, including vaccines, during a public health emergency. The FDA may grant expedited market access to unapproved products or for unapproved indications of approved products where evidence suggests that it is "reasonable to believe" that the product "may be effective" in treating the disease or condition identified in an emergency declaration by HHS. Access to these novel therapies during the pandemic would fall under an EUA approval.

On April 16, the FDA [revoked](#) the EUA that allowed for investigational monoclonal antibody therapy bamlanivimab, when administered alone, to be used for the treatment of mild-to-moderate COVID-19 in adults and certain pediatric patients. The FDA determined that COVID-19 variants were increasingly resistant to bamlanivimab treatment alone and resulted in an increased risk for treatment failure. The agency determined that the known and potential benefits of bamlanivimab, when administered alone, no longer outweigh the known and potential risks for its authorized use.

Vaccine approval

Following the FDA's [emergency use authorization](#) of the Johnson & Johnson COVID-19 vaccine on February 27, the Centers for Disease Control and Prevention (CDC) quickly followed suit the next day and [recommended](#) the vaccine for the prevention of COVID-19 for individuals 18 and older in the United States. The Johnson & Johnson vaccine follows recently emergency use approved vaccines developed by Pfizer/Biotech and Moderna. With over 200 million doses administered

in the United States, the FDA and CDC actions were paramount to the Biden Administration's efforts in containing the pandemic. The Johnson & Johnson vaccine is notable not only because it is the first COVID-19 vaccine to be administered in a single dose, but it has less arduous transportation and storage requirements.

On April 13, the Johnson & Johnson vaccine was [paused](#) in the United States after the CDC and FDA identified six cases of rare, severe blood clots during the administration of nearly 8 million doses, but the pause was [lifted](#) on April 23.

Defense Production Act

The Biden Administration invoked the [Defense Production Act](#) to [support](#) measures to accelerate vaccine development, including a manufacturing collaboration between Merck and Johnson & Johnson to expand Johnson & Johnson's COVID-19 vaccine production. Merck will repurpose some of its existing facilities for rapid large-scale manufacturing of vaccines and therapeutics for use in public health emergencies, making those facilities available to other private sector partners working with the federal government on the pandemic response. Johnson & Johnson is the first federal partner to use repurposed Merck facilities to make its vaccine. The collaboration will increase manufacture of vaccine drug substance, as well as its fill-finish capacity—two of the biggest bottlenecks facing Johnson & Johnson in the production of its vaccine.

Unrelated to the pause on administering the Johnson & Johnson vaccine, the FDA continued to halt production of the vaccine, itself, at the Emergent BioSolutions facility in Baltimore, Maryland, where 15 million potential doses were contaminated. In a joint [statement](#), the FDA and

CDC noted that vaccines already manufactured at the Baltimore facility will undergo additional testing and evaluation to ensure quality before any potential distribution.

Vaccine distribution

Biden set a goal of having 100 million COVID-19 vaccines administered in his first 100 days in office. Within 58 days, the administration announced that it had achieved the goal, and targeted a new number of 200 million vaccines administered in his first 100 days in office. On April 21, Biden [announced](#) that the United States [met](#) the new goal of 200 million vaccines administered on his 92nd day in office. In [percentages](#), more than 50 percent of adult Americans now have had at least one dose of a COVID-19 vaccine (Pfizer, Moderna, or Johnson & Johnson) and 80 percent of those over 65 have had one dose.

In addition to announcing the 200-million doses goal, Biden discussed the next phase of the vaccination effort—as it is projected that supply will outstrip demand in four to six weeks. With the support of all 50 state governors, Biden touted that as of April 19, at the administration's direction, everyone over age 16 in the United States is eligible for a COVID-19 vaccine.

Related to encouraging vaccine uptake, Biden also [announced](#) a new tax credit, funded by the [American Rescue Plan](#) that will reimburse small businesses that give workers paid time off to get vaccinated against COVID-19. The [tax credit](#) will be available to businesses with fewer than 500 employees, allowing up to \$511 per day for each employee. Biden called on all companies, regardless of size, to offer paid time off and other incentives, such as gift cards or bonuses, to encourage employees to get vaccinated.

Antitrust & Competition Law

By [Jeffrey May, J.D.](#)

Change is coming to antitrust. Federal lawmakers on both sides of the aisle are calling for adjustments to toughen the statutes and enforcement. New leadership at the Federal Trade Commission and Department of Justice to be installed by President Joe Biden is expected to facilitate

reforms. However, the administration has not visibly contributed to the momentum changing the trajectory of antitrust law during its first 100 days. As of April 28, the administration had yet to offer nominees to take charge of the FTC and the DOJ's Antitrust Division.

Antitrust Division and FTC leadership

Top leadership in Biden's Justice Department has started taking shape. And the president has named Lina Khan to fill a vacancy at the FTC. However, as of April 28, the administration had yet to nominate heads of the FTC and DOJ Antitrust Division. The delay has prompted speculation as to why Biden has not prioritized antitrust.

At the Justice Department, Merrick B. Garland was officially sworn in as attorney general on March 11. The number two and three spots are also now filled. Justice Department veterans Lisa Monaco and Vanita Gupta returned, now as deputy attorney general and associate attorney general, respectively. All three committed to vigorously enforcing the antitrust laws in their new posts during their nomination hearings. But the yet-to-be-named assistant attorney general in charge of the Antitrust Division will be the person leading the charge.

AAGs for other posts at the Justice Department have been identified. On April 12, Biden [announced](#) his intention to nominate Kenneth Polite for Assistant Attorney General for the Criminal Division and Christopher Schroeder for Assistant Attorney General for the Office of Legal Counsel. On April 23, Helaine Greenfeld was [disclosed](#) as the intended nominee for Assistant Attorney General for Legislative Affairs. And, on April 27, Javier Guzman was [named](#) as the nominee for Assistant Attorney General for the Civil Division.

An announcement for antitrust chief had been expected sooner. Both President Donald Trump and President Barack Obama had already announced their picks by this point in their administrations.

Biden's former boss, Obama, named Christine Varney as his intended nominee just days after taking office in January 2009. Varney was confirmed by the Senate just three months later.

The nomination of Makan Delrahim—Trump's pick—was received by the Senate in early April 2017 after Trump's inauguration. However, Delrahim was not confirmed until September 27, 2017, due to delays and holds by Senate lawmakers.

Biden's delay in announcing a pick for antitrust chief has been attributed to differences of opinion within the administration over the direction of antitrust. There also is concern about top

contenders for the post who have ties to the embattled tech sector. *Politico* has [identified](#) Jon Sallet, Deputy Assistant Attorney General for Litigation at the Antitrust Division (2016-2017) and Federal Communications Commission General Counsel (2014-2016) during the Obama years, as a possible contender. Sallet and others under consideration who have either represented or sued tech giants face ethics obstacles that might, at the least, necessitate recusal. Sallet [joined](#) the Colorado attorney general's office in January 2020. As special assistant attorney general there, he signed his name to the multi-state antitrust [complaint](#) against Google filed in December of that year. Delrahim recused himself from the Antitrust Division's Google investigation that was started during the Trump administration. The case continues to be a major focus for the current Antitrust Division.

At the FTC, Biden has [nominated](#) Khan to fill a vacancy created by the departure of FTC Chairman Joseph Simons and has [designated](#) Commissioner Rebecca Kelly Slaughter acting chair of the agency. However, a permanent chair has not been identified as of April 28. There will be another opening on the five-member commission when, and if, Rohit Chopra is confirmed to serve as director of the Consumer Financial Protection Bureau. That nominee would likely serve as the chairman of the agency, if confirmed.

The nomination of Khan may provide the clearest indication of the direction that the Biden administration is headed with antitrust and consumer protection enforcement. Khan is a known critic of "big tech." A member of the so-called "hipster antitrust movement," Khan first came onto the antitrust stage with her 2017 Yale Law Journal article, "Amazon's Antitrust Paradox." Khan is a 2017 graduate of Yale Law School. She currently teaches antitrust as an associate law professor at Columbia. Prior to joining Columbia Law, Khan served as counsel to the House antitrust subcommittee where she worked on the committee report on competition in digital markets. She also served as legal adviser to Commissioner Chopra.

At her April 21 nomination hearing before the Senate Committee on Commerce, Science, and Transportation, Khan was introduced by Senators Amy Klobuchar (D-Minn) and Richard Blumenthal (D-Conn), with high praise. "We need Lina Khan at the FTC," said Klobuchar. We are in a competition crisis, and no one has described it better than

you have,” Blumenthal added. Comments from Republican senators have not been as glowing. Both Senator Marsha Blackburn (R-Tenn.) and Senator Mike Lee (R-Utah) expressed concern about Khan’s limited experience. At 32, she would be the youngest person to ever serve as an FTC commissioner.

It is expected that once Khan is confirmed, the Senate will likely move forward with Chopra’s nomination for CFPB director. This would avoid a three-member commission with a Republican majority.

As with Khan (and Gupta), Republican senators have expressed concern with the Chopra nomination. Banking Committee Ranking Member Pat Toomey (R-Pa) [opposed](#) Chopra’s confirmation, saying that he was concerned that Chopra would “return the CFPB to the hyper-active, law breaking, anti-business, unaccountable agency it was under Obama Administration.” Despite a 12-12 tie vote in the banking committee, Chopra’s nomination can advance to a full Senate vote. It is unlikely that the Republicans will be able to block these nominations.

There also have been rumors about possible picks to head the FTC. Among the names floated was Karl Racine, attorney general of the District of Columbia.

Another indication of the Biden administration’s antitrust policy is the announcement of Tim Wu, another Columbia antitrust professor and “big tech” critic, as a special assistant to the president on technology and competition policy matters. That [announcement](#) came out on March 5.

In short, the picks so far suggest that the Biden team intends to be aggressive on anti-competitive conduct in the tech sector. While the administration has not yet had an opportunity to demonstrate that tough stance with new antitrust enforcement actions, there are some indications of enforcement agenda priorities.

Enforcement agenda

Biden’s Justice Department and FTC have been moving forward with the [Google](#) and [Facebook](#) enforcement actions that were kicked off during the Trump Administration. These matters will remain priorities and could potentially go on for years. For instance, a trial in the DOJ-led action against Google (with state attorneys general) is not anticipated until September 2023. In addition

to the tech sector, enforcement efforts will likely continue to focus on labor markets and the health care sector.

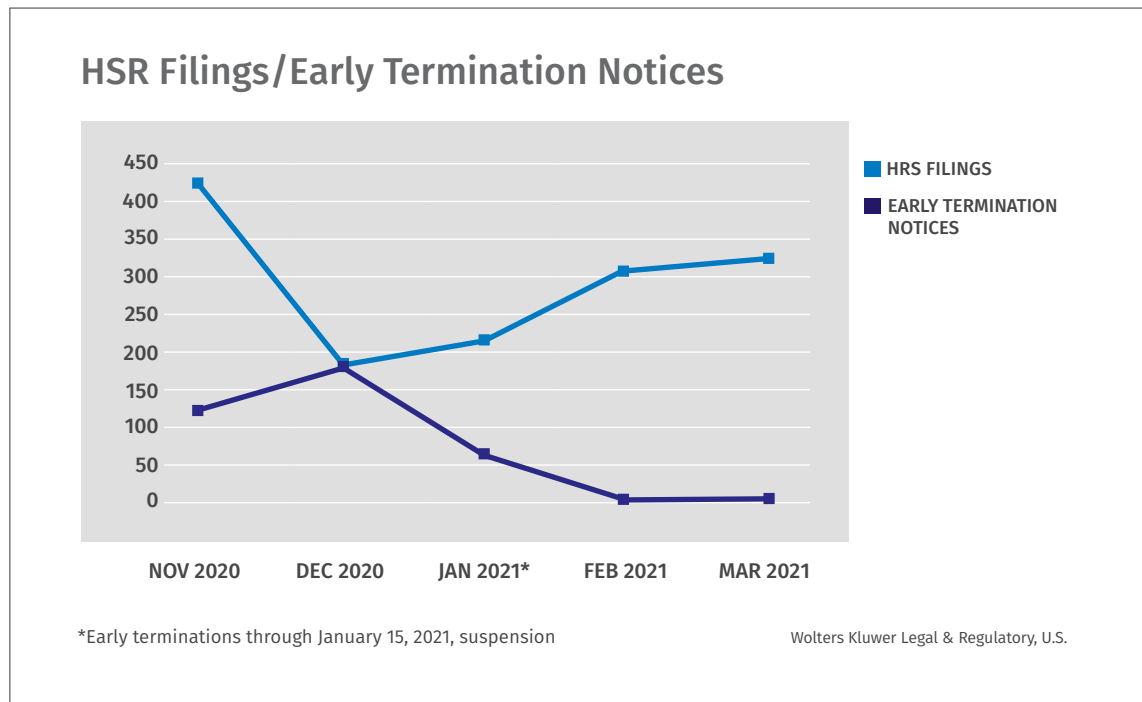
At the Justice Department, the Antitrust Division continues to take a tough stand on wage fixing. In December 2020, the division filed its first criminal [action](#) against a former owner of a Texas therapist staffing company for conspiring to fix rates paid to physical therapists. Just shy of three months into the Biden administration, a [superseding indictment](#) has been handed down that adds a second defendant—the clinical director of the company—to the case. The move is an indication that the Biden administration will likely adhere to [guidance](#) issued during the Obama that “naked” agreements among employers not to “poach” employees or not to compete on employee compensation would be treated as *per se* illegal and subject to criminal prosecution under appropriate circumstances.

In the health care sector, one sign that the Biden administration may be looking to crack down on pharmaceutical mergers is the FTC’s [announcement](#) of an international working group

Khan’s nomination may provide the clearest indication of the administration’s direction with antitrust and consumer protection enforcement.

to investigate ways to update the approach to analyzing the effects of pharmaceutical industry mergers on pricing and competition. The group will include representatives from the United States, Canada, and Europe. In announcing the group, Slaughter said that the working group intends to take an aggressive approach in dealing with future anticompetitive pharmaceutical mergers. Among other things, the group will look into how current theories of harm can be expanded and refreshed.

In addition, the FTC in March [moved](#) to block biotechnology firm Illumina, Inc.’s acquisition of the remaining 85.5 percent of GRAIL, Inc.’s shares that it did not already own. The agency alleges that



the deal will harm competition in the U.S. market for life-saving multi-cancer early detection tests.

The FTC also will continue to aggressively challenge proposed hospital mergers that lessen competition. Despite its decision to [drop](#) a challenge to the merger of Philadelphia hospital operators Jefferson Health and Albert Einstein Healthcare Network after an appellate court [loss](#), the FTC is continuing a [challenge](#) started during the Trump Administration to Hackensack Meridian Health's proposed acquisition of Englewood Healthcare Foundation in New Jersey.

Another indication of a tough approach to merger enforcement came from the federal antitrust agencies' [move](#) in February to temporarily suspend early terminations under the Hart-Scott-Rodino Act (HSR) premerger notification program. Under the HSR program, companies report larger proposed mergers and acquisitions to the government before they occur, and the agencies identify and challenge those transactions that may substantially lessen competition. Based on what the agency finds, it can terminate the 30-day waiting period and allow the parties to consummate their transaction (early termination). Due to the transition to the new administration and given the volume of HSR filings, the agencies stopped granting

early terminations. At the time, the agencies anticipated that the temporary suspension would be brief. In March, [clarification](#) was provided on two particular scenarios in which the suspension did not apply. However, the suspension remains in effect.

One rationale for the suspension was the increase in HSR filings. In November, the number of filings reached 424, according to the FTC's [preliminary numbers](#). This figure is significantly higher than the count for most months. Prior to that, the numbers had been steadily rising from lows around in the months that followed the start of the COVID-19 pandemic. The number of transactions reported since November has been lower. At the same time, the number of early terminations has dropped to near zero.

The number of early terminations varies based on the number of filings. As a result, it is unclear how many deals would have been granted early termination since the suspension. However, some deals that did not raise competition concerns could not be closed before the waiting period expired. The FTC granted 124 early terminations in November 2020 ([86 Federal Register 10075](#)); 190 in December 2020 ([86 Federal Register 10077](#)); and 66 for the period January 1, 2021 through January 15, 2021 ([86 Federal Register 11294](#)). According to

the FTC website, there was one early termination notice in February and two in March.

Uptick in enforcement

It is early days in the Biden administration. The cases being filed now result from investigations into conduct and transactions that have been going on for months or longer. For instance, one of the most recent Antitrust Division case filings involved Stone Canyon Industry Holdings LLC's proposed acquisition of Morton Salt Inc.—a deal that was announced in October 2020. However, the conventional wisdom is that Democratic administrations pursue antitrust enforcement more aggressively. Thus, there is an expectation of an upswing in enforcement over the next four years. And the administration's appointments of Khan and Wu seem to support that expectation of increased enforcement.

The antitrust agencies are also getting more money to fund greater enforcement. Both the FTC and the DOJ received increased funding support in for fiscal year 2021. Funding for the FTC was \$351 million, up \$20 million over fiscal year 2020. For the Antitrust Division, funding was set at \$184.5 million, almost \$18 million more than the previous year. Senator Amy Klobuchar (D-Minn), chair of the Senate Judiciary Committee's antitrust subcommittee, is pushing for additional increases

The raw numbers of new case filings from the division over the Trump administration compared to the last four years of the Obama administration seem to support the theory of upticks during a Democratic presidency. There are many variables to consider when making such a comparison and numbers do not tell the whole story. Also, the types of cases vary as global cartels targeted during the Obama years were seemingly replaced by challenges to domestic conspiracies.

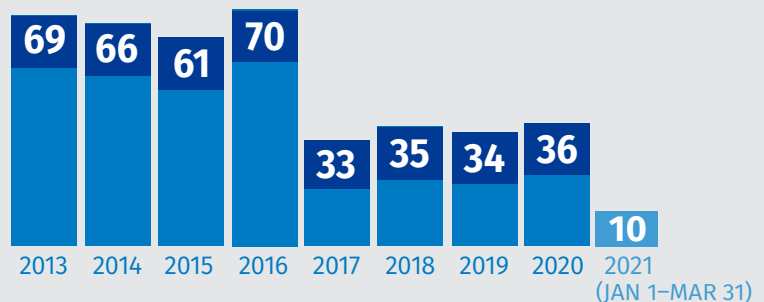
The accompanying chart indicates that new cases filed annually over the latest four-year period were about half of what they were over the earlier four-year period. In calendar years 2013 through 2016, the tally of new cases filed by the Antitrust Division each year was between 61 and 70. In calendar years 2017 through 2020,

new case filings averaged in the 30s. There were 36 new cases in 2020. Through March 31 of this year, there were ten new filings in calendar year 2021. If the past is any indication of the future, expect the numbers to rise over the next four years.

On the FTC side, enforcement has remained steadier. One possible stumbling block for non-merger enforcement at the agency is the U.S. Supreme Court's recent unanimous decision, holding that Section 13(b) of the FTC Act does not authorize the agency directly to obtain court-ordered equitable monetary relief such as restitution or disgorgement. While the underlying action was a consumer protection case, the holding applies equally to the FTC's efforts in antitrust cases to seek the return of ill-gotten profits extracted from consumers.

A legislative fix could be on the horizon, however, former antitrust enforcer Bill Baer told Wolters Kluwer. "Congress should embrace the Commission's unanimous support for legislation that provides the necessary authorization to the courts to award consumer redress and command disgorgement of ill-gotten gain," said Baer, who is the only person to have led antitrust enforcement at both U.S. antitrust agencies. Baer, who served as assistant attorney general in charge of the Antitrust Division from 2013 to 2016, and as FTC Bureau of Competition Director from 1995 to 1999, said: "This is ripe, low-hanging fruit. Congress should pick it."

New Antitrust Division Cases Filed Since 2013



Wolters Kluwer Legal & Regulatory, U.S.

Intellectual Property & Technology

By Thomas Long, J.D.

At the 100-day mark, the Biden Administration has left unanswered many questions as to the new president's overall approach to intellectual property law. President Biden has not yet named a successor to former U.S. Patent and Trademark Office Director, Andrei Iancu, a Trump appointee who left the post on Inauguration Day. It remains unclear whether Biden will choose a director who shares Iancu's pro-patentee viewpoint or one who would take the stance of the Obama administration, which many commentators considered relatively hard on rights owners.

In its first high-profile brush with IP-related controversy, the Biden Administration seems to be resisting calls by advocacy organizations to push for waivers of the IP terms of certain international trade agreements in order to allow developing nations to skirt patent protections for COVID-19 vaccines, while expressing the general desire to use trade agreements to help combat the pandemic. It also remains unclear what positions the 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 legislative proposals that would give the president more say over the appointment of the Register of Copyrights.

theft and other IP infractions by Chinese state enterprises will be carried forward.

Patent

The USPTO as configured under President Trump took a relatively patentee-friendly approach and set policies that somewhat cushioned the effects of Supreme Court decisions on patent-eligibility, which many commentators and stakeholders have considered disruptive. It remains to be seen whether the Biden Administration will continue this approach or change course.

Biden's choice to head the Commerce Department, former Rhode Island Governor Gina Raimondo, was confirmed by the Senate on March 2. Raimondo's purview includes the USPTO, but she has not indicated her plans for the Office, other than vowing to "empower entrepreneurs to innovate and grow." During her tenure as Governor of Rhode Island, that state enacted a measure targeting "patent trolls." The legislation (H. 7425), which Raimondo signed in June 2016, authorizes the attorney general or aggrieved persons to seek equitable and monetary relief from plaintiffs that file frivolous or bad-faith patent infringement claims. Raimondo also co-founded a venture capital fund (Point Judith Capital) that reportedly had close ties to large players in the tech industry, which could suggest an inclination toward tighter scrutiny of patent validity and scope.

Trump-appointed Under Secretary of Commerce for Intellectual Property and USPTO Director Andrei Iancu—renowned for his strong pro-patent-rights stance—stepped down on January 20. A successor to Iancu has not been named, and the office is currently being helmed by Drew Hirshfeld, whose permanent position is Commissioner for Patents. Also vacant at the USPTO are the posts of Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director; Chief of Staff; and Communications Officer. It remains unknown whether Biden's eventual choice for the director post will share Iancu's views or whether the new director will return to what some analysts

If confirmed, Cunningham will be the first Black judge to serve on the Federal Circuit since the court was established in 1982.

Biden's team has, however, put forth a few specific proposals and promises relating to patent royalties, trade secrets protection, and the Internet, and it has sent strong signals that the previous administration's focus on trade secret

considered a less patent-friendly environment under the Obama administration.

Biden already has been given the opportunity to make a mark on the nation's primary venue for patent cases, the U.S. Court of Appeals for the Federal Circuit, as a result of Circuit Judge Evan Wallach's decision to retire from active service and to assume senior status on May 31. Biden has tapped patent attorney Tiffany P. Cunningham to fill an upcoming vacancy on the Federal Circuit, according to a March 30 White House [announcement](#). If confirmed by the Senate, Cunningham will be the first Black judge to serve on the Federal Circuit since the court was established in 1982. Her appointment also would bring the roster of judges on that court to gender parity.

During the transition phase, the Biden-Harris campaign website provided some insight into a possible change to patent law, 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."

As the world struggles to emerge from the COVID-19 pandemic crisis, many advocacy organizations—including Public Citizen, Doctors without Borders, Oxfam America, and Human Rights Watch—have urged the administration to support a proposed waiver of certain provisions of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The waiver would allow developing nations to produce and distribute general versions of vaccines to combat the virus. Newly appointed U.S. Trade Representative Katherine Tai met with waiver advocates on April 13, but to date, the administration has not taken a definite stance on this matter. According to a [media release](#), Tai "conveyed the Biden Administration's commitment to saving lives and ending the pandemic in the United States and around the world by increasing COVID-19 vaccine production and distribution, including investing in COVAX and working with

global partners," but she stopped short of expressing support for relaxing protections for vaccine patents.

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

Trade Secrets

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

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

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

Biden's nominee for United States Trade Representative (USTR), former Chief Trade Counsel for the U.S. House Committee on Ways and Means, Katherine Tai, was confirmed by the Senate and was sworn in on March 18. Tai replaced former USTR Robert Lighthizer. She previously served in the Office of the USTR as Chief Counsel for China Trade Enforcement, in which capacity she litigated U.S. disputes against China at the World Trade Organization. Tai has a reputation for taking tough stances against China on international trade issues.

Biden will work to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.

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

On December 28, 2020, Biden called for cooperation between the United States and “like-minded partners and allies” on China, stating, “On any issue that matters to the U.S.-China relationship—from pursuing a foreign policy for the middle class, including a trade and economic agenda that protects American workers, our intellectual property, and the environment—to ensuring security and prosperity in the Indo-Pacific region, to championing human rights—we are stronger and more effective when we are flanked by nations that share our vision.”

In March, the Office of the USTR released the “2021 Trade Policy Agenda and 2020 Annual Report

of the President of the United States on the Trade Agreements Program.” In the [report](#), the administration reiterated its commitment to keeping pressure on China. “The Biden Administration recognizes that China’s coercive and unfair trade practices harm American workers, threaten our technological edge, weaken our supply chain resiliency, and undermine our national interests,” a USTR [fact sheet](#) notes. “The Biden Administration is committed to using all available tools to take on the range of China’s unfair trade practices that continue to harm U.S. workers and businesses.”

On March 31, Tai released the “2021 National Trade Estimate Report on Foreign Trade Barriers” (NTE Report), which provides a detailed inventory of significant foreign barriers to U.S. exports of goods and services, investment, and electronic commerce, including difficulties posed to IP rights holders. The [NTE Report](#) assesses the adequacy (or lack) of IP protections in the largest export markets for the United States, comprising 61 countries, the European Union, Taiwan, Hong Kong, and the Arab League, although it does not make policy or practical recommendations. The Office of the USTR said that it plans to release its annual Special 301 Report on the adequacy and effectiveness of trading partners’ protection of IP rights by April 30.

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

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

Section 230 reform

One of the hottest and most contentious topics in Internet technology law for the past few years, Section 230 of the Communications Decency Act (47 U.S.C. § 230), protects 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. It also provides “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, “[Section 230] should be revoked because [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 2020, which would implement an [executive order](#) by President Trump aimed at limiting companies’ ability to claim Section 230’s liability shield for third-party content if they remove or limit access to content.

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

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

In addition, once in office, Biden might be unwilling to resume regulatory action undertaken by the Federal Communications Commission under Trump. Trump-appointed FCC Chairman Ajit Pai left the post as of January 20, creating another vacancy for Biden to fill. In an interview recorded on January 8 for C-SPAN’s “The Communicators” series, Pai said he was abandoning a notice of proposed rulemaking to clarify Section 230, explaining that “given the results of the elections, there [is] simply not sufficient time left to complete the administrative steps necessary in order to resolve that rulemaking.” Pai’s previous [announcement](#) that he intended to “move forward with a rulemaking” to clarify Section 230 was met with mixed reactions among commission members, who were split along party lines. Although the FCC’s authority to interpret Section 230 is a matter of dispute, the FCC’s then-general counsel said in a statement that this authority is “straightforward.” Biden has not explicitly indicated whether he would pursue FCC regulatory action as a route for Section 230 reform, but his pick for FCC Commissioner has made statements rejecting the idea.

Biden has nominated FCC member Jessica Rosenworcel for the post of commissioner,

but the Senate has not yet confirmed her. In a [statement](#) released on July 27, 2020, Rosenworcel expressed disagreement with asking the agency to develop rules to moderate online content under Section 230, saying “turning this agency into the President’s speech police is not the answer.” In [remarks](#) made the same day at RightsCon Online 2020, a leading summit on human rights in the digital age, Rosenworcel said, in reference to the Trump Administration’s push for Section 230 reform, “The FCC needs to reject this effort to deploy the federal government against free expression online.”

At his Senate confirmation hearing, Attorney General Merrick Garland declined to answer questions about Section 230 in detail, stating “I have relatively limited information about Section 230 beyond the statutory text and the D.C. Circuit case I decided. If confirmed, I look forward to studying

the issue more closely.” In the case referred to by Garland, the D.C. Circuit, in an opinion penned by Garland, held that Google and other search engine operators were entitled to Section 230 immunity from a lawsuit by 14 locksmith companies seeking to hold them liable for publishing false location information for “fake locksmiths” (*Marshall’s Locksmith Service Inc. v. Google, LLC*, No. 18-7018, June 7, 2019).

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

Cybersecurity & Privacy

By [Tony Foley, J.D.](#)

The Biden Administration has adopted an aggressive stance on cybersecurity and privacy issues during its first 100 days. President Biden has built a team both within his office and in the existing administrative infrastructure to implement his national cybersecurity strategy, which includes restoring and strengthening the country’s cybersecurity defenses following the SolarWinds software hack that compromised networks across the federal government and private industry. The White House also has successfully appropriated funds for cybersecurity efforts and has taken a variety of actions to address its priorities, as outlined in more detail below.

Key appointments

In the first few months of 2021, President Biden made appointments to key privacy and cybersecurity positions in his administration, principle among them the following:

- Anne Neuberger as deputy national security adviser for cyber and emerging technology in the National Security Council;

- Chris Inglis as White House National Cyber Director (NCD);
- Jen Easterly as director of the Cybersecurity and Infrastructure Security Agency (CISA);
- Eric Goldstein as CISA executive assistant director for cybersecurity; and
- Rob Joyce as chief of the cybersecurity directorate at the National Security Agency

In addition, Biden appointees expected to play a significant role in implementing the administration’s cyber strategy include Alejandro Mayorkas as Secretary of the Department of Homeland Security, Rebecca Kelly Slaughter as acting FTC chair, and Gina Raimondo as Commerce Secretary. President Biden also has tabbed Christopher Hoff to serve as deputy assistant secretary for services at the Department of Commerce’s International Trade Administration (ITA), a role in which he will be the primary point of contact for negotiating a replacement mechanism for the EU-U.S. Privacy Shield framework for cross-border transfers of personal information, which was invalidated by the Court

of Justice of the European Union in the *Schrems II* decision in July 2020.

The White House also has indicated that Vice President Harris intends to prioritize cybersecurity and technology in her role, particularly with respect to 5G technology and broadband access.

SolarWinds hack response

The Biden Administration has offered an aggressive response to the massive hack of government and private industry data controllers using the SolarWinds Orion software system that was discovered in December 2020. Secretary Mayorkas signaled the administration's resolve at his confirmation hearing in January, pledging to conduct a thorough investigation into the design of cybersecurity defense systems currently in place and pledging to work with lawmakers to find ways to help government entities to defend themselves in cyberspace. "I can assure you that the cybersecurity of our nation will be one of my highest priorities because I concur with you that the threat is real, and the threat is every day, and we have to do a much better job than we are doing now," he told senators at the hearing.

In mid-April, the Treasury Department formally announced that the SolarWinds hack was directly attributable to the Russian government and [imposed new economic sanctions in response](#). "The scope and scale of this compromise combined with Russia's history of carrying out reckless and disruptive cyber operations makes it a national security concern," Treasury said in its announcement. "Victims of the compromise include the financial sector, critical infrastructure, government networks, and many others. Further, this incident will cost businesses and consumers in the United States and worldwide millions of dollars to fully address."

DHS roadmap

On March 31, Secretary Mayorkas outlined the [DHS roadmap](#) for the Department's cybersecurity efforts in a virtual address, noting that DHS will initiate a series of six 60-day "sprints" mobilizing government stakeholders to improve network security, focused on areas such as ransomware, education and workforce development, and the

resilience of industrial control systems, citing a cybersecurity incident at a Florida water treatment facility in February.

Tough talk on China

From the outset, the White House signaled its intention to counter China's behavior in the technology area with an emphasis on protecting the data of U.S. companies and citizens. "China has been willing to do whatever it takes to gain a technological advantage—stealing intellectual property, engaging in industrial espionage, and forcing technology transfers," White House press secretary Jen Psaki said in a January 25 press conference. "Our view—the president's view—is that we need to play a better defense, which must include holding China accountable for its unfair and illegal practices and making sure that American technologies aren't facilitating China's military buildup."

Issues involving China also heavily impacted the Senate confirmation hearings on Ms. Raimondo's nomination as Commerce Secretary. Sen. Ted Cruz (R-Tex.) placed a hold on the nomination in early February, citing concerns that Ms. Raimondo was considering removing Chinese telecom giant

The White House signaled its intention to counter China's behavior with an emphasis on protecting the data of U.S. companies and citizens

Huawei from the Commerce Department "entity list." In response, she indicated that she did not expect to remove Huawei from the list, a position she reiterated after her confirmation in an April White House briefing. "A lot of people have said, 'Is Huawei going to stay on the entity list?' I have no reason to believe that they won't, but we're kind of in the middle of the overall review of the China policy," she told reporters.

In separate announcements in March and April, the Commerce Department announced

that it had issued subpoenas to unnamed Chinese tech companies as part of its review of the national security implications of their business dealings in the U.S. market for information and communications technology and services (ICTS). “[W]e are taking an important step in collecting information that will allow us to make a determination for

the House on April 22. A Congressional Budget Office estimate put the cost of the legislation at \$110 million from 2021 to 2026.

While there has been less-than expected activity in Congress regarding data privacy, in March, Rep. Suzan DelBene (D-Wash) introduced a bill, the [Information Transparency and Personal Data Control Act](#), that would require “opt-in” consent for use of individuals’ sensitive, personal information, such as financial, health, genetic, biometric, geolocation, and sexual orientation information; information on citizenship and immigration status; Social Security numbers; information on religious beliefs; and information pertaining to children under 13 years of age. The tech sector has welcomed the bill as a step toward creating a federal privacy policy to replace a patchwork of state laws. The bill was referred to the House Energy and Commerce Committee’s Subcommittee on Consumer Protection and Commerce on April 2.

DoE launched a 100-day plan to improve the security of electric utilities’ control systems and secure the energy sector supply chain

possible action that best protects the security of American companies, American workers, and U.S. national security,” Secretary Raimondo said after issuing the first set of subpoenas. “We hope to work cooperatively with these companies and conclude a thorough review.”

Budget priorities and legislation

The [American Rescue Plan Act](#), the Biden administration’s COVID-19 relief bill, included \$650 million for CISA cybersecurity risk mitigation efforts, as well as \$50 million in funding for the Consumer Product Safety Commission for purposes including enhanced monitoring of e-commerce consumer websites, particularly those dealing in COVID-19 products. The administration’s [fiscal year 2022 discretionary budget request](#), released on April 9, includes a request for \$2.1 billion in funding for CISA, an increase of \$110 million above FY 2021 budget levels. The formal budget proposal from the administration is expected to be sent to Congress later this spring.

In addition, the “Cyber Diplomacy Act” ([HR 1251](#)), a bill sponsored by Rep. Michael McCaul (R-Tex.) that would elevate international cyber issues at the State Department and establish a Bureau of International Cyberspace Policy at State, passed

Infrastructure security, investment

The Department of Energy [announced](#) on April 20 that it has launched a 100-day plan designed to improve the security of electric utilities’ industrial control systems and secure the energy sector supply chain. The DoE and CISA will collaborate with the private sector “to advance technologies and systems that will provide cyber visibility, detection, and response capabilities for industrial control systems of electric utilities,” DoE said.

The White House also conducted a summit on April 12 in which top national security and economic advisers met with industry leaders to receive input and generate support for the \$50 billion in additional funding earmarked for domestic support in the administration’s infrastructure plan. The effort, which has bipartisan support, is a response to a shortage of chips and a decline in U.S. chip manufacturing. “I’ve been saying for some time now: China and the rest of the world is not waiting. And there’s no reason why Americans should wait. We’re investing aggressively in areas like semiconductors and batteries. That’s what they’re doing and others. So must we,” President Biden said.

International Trade

By Jeffrey L. Snyder, J.D., LL.M.,* Shelley Su, M.A.,** and Dj Wolff, J.D., M.Sc.***

President Biden's first 100 days were marked by the challenges of staffing up his administration, initiating the rebuilding of relationships with allies, reversing some, but not many, policies of the previous guy, and confronting new and old challenges in China, Russia, Iran, and Burma (Myanmar). Despite the full agenda and the incomplete team, his first 100 days have been met with relief by many in the international trade community. Biden is conducting U.S. international trade policy in a different, but comfortingly familiar, way; international trade observers welcome the return of the rule of law, not the daily [government by tweet](#). For those focused on the substance and not the hype, boring is better.

We are seeing a more measured, deliberate, and policy-driven approach under Biden. His advisors across the economic and security posts have staked out a "rebuilding" of relationships that will allow the development of coordinated trade policy initiatives. Biden is digging out of some of his predecessor's very deep trenches. Despite success, the global pandemic crisis continues to drag on the U.S. economy and globalization. Biden is setting the stage with a focus on a renewed vision of U.S. national security, and the national interest, driven more by embracing America's role in the world, not withdrawing from it.

The success of this agenda will depend on how effectively the global relationships can be reestablished and, despite the Democrats' majority in both houses, on the administration's relationship with Congress.

First 100 days: old wine in new bottles?

In some cases, Biden has reversed or taken a very different approach. Rejoining the Paris Accords, which is a hallmark of domestic and international

trade policy, was followed by efforts to work with Europe and to bring Iran back to the negotiating table to discuss a return to the Joint Comprehensive Plan of Action (JCPOA), from which "the former guy" had unilaterally withdrawn. This has put on display the effort to recreate a collaborative relationship, particularly with European allies. Biden has shown that he is not afraid to confront allies on some trade issues — such as digital services taxation — but nonetheless it is a more balanced, mutual relationship taking shape, not one of threats and brinksmanship.

In its [2021 Trade Policy Agenda](#), the administration announced a clear set of priorities:

- Tackling the COVID-19 Pandemic and Restoring the Economy
- Putting Workers at the Center of Trade Policy
- Putting the World on a Sustainable Environment and Climate Path
- Advancing Racial Equity and Supporting Underserved Communities
- Addressing China's Coercive and Unfair Economic Trade Practices Through a Comprehensive Strategy
- Partnering with Friends and Allies
- Standing Up for American Farmers, Ranchers, Food Manufacturers, and Fishers
- Promoting Equitable Economic Growth Around the World
- Making the Rules Count

Biden has begun to address a newly independent United Kingdom and America's geographically closest allies in Canada and Mexico. Keeping the tariffs on steel and aluminum suggests an effort to use them as leverage in addressing the economy through trade management. He has taken steps to keep up the pressure on China, and to address the past conduct and ongoing threats from Russia.

* Partner, [Crowell & Moring LLP](#) (Washington, DC) and general editor of Kluwer Law International's [Global Trade and Customs Journal](#).

** Senior Consultant, ssu@crowell.com, C&M International (Washington, DC).

*** Partner, [Crowell & Moring LLP](#) (Washington, DC).

Key team members are in place, from Janet Yellen at Treasury, Antony Blinken at State, and Katherine Tai at USTR. This seasoned, competent, and collaborative team is perhaps one of the best reflections of the real change in the White House, and of actions to come. Articulating Biden's policy priorities, Secretary Blinken laid out Biden's eight most urgent foreign policy priorities, which align quite closely to the aforementioned trade priorities itemized above, in an early March speech:

- Ending the COVID-19 pandemic
- Reviving the economy at home and abroad
- Renewing democracy
- Reforming immigration
- Rebuilding alliances
- Tackling climate change
- Securing U.S. leadership in technology
- Confronting China

Recognizing that under Biden domestic policy is inevitably intertwined with international — including trade — this administration sees the world very differently. Wasting no time, Biden is fitting action into a coherent strategy. Below are glimpses of what is in store in the following key areas.

China

Biden's new approach to China had a dramatic showcasing at the summit in Alaska in late May, which began a day after the announcement of sanctions imposed in concert by the United States, European Union, and Canada on China over the human rights abuses in Xinji-

talks. The United States raised China's mass internment of Uyghur Muslims, its crackdown on democracy activists in Hong Kong, its escalating aggression toward Taiwan and its trade coercion against Australia, as well as China's actions in cyberspace. Blinken said there are a number of areas where United States and China are "fundamentally at odds," but that the two delegations were able to have "a very candid conversation" on issues including regional challenges in Iran, North Korea, and Afghanistan as well as climate, trade, and technology.

We can therefore expect the trade debate to take place within this context, as we wait for action to maintain focus on the issues that exist — trade imbalance, technology competition, trade-secret protection, fair trade, industrial subsidies, and others — and to address them using the tools of international trade, including multilateral tools and relationships.

Although the Biden White House was expected to take six months to do a comprehensive review of China policy, it beat that deadline, in another example (as with COVID) of everything at once. The whole-of-government approach to the China challenge, including the continuation of the ICTS rule and the supply chain initiatives, shows that Biden is in many ways doubling down on a top-to-bottom effort to contain and manage the China threat. At the same time, multiple bipartisan and comprehensive pieces of legislation on meeting the China risk are percolating in Congress. Standing up to an ever-emboldened China that has begun to retaliate against private entities will challenge Biden throughout his first term and continue to be a strong area of focus for the U.S. Congress.

Trade agreements

The Biden Administration will not prioritize negotiation of bilateral or multilateral trade agreements. Although USTR Tai has expressed the importance of making sure China abides by the U.S.-China phase one trade agreement agreed to in January 2020, the administration has not signaled that it intends to negotiate the next phase. This is also true for phase two of the U.S.-Japan agreement, and the trade negotiations with the United Kingdom and Kenya, which began under the last administration. Biden's administration will

Biden is in many ways doubling down on a top-to-bottom effort to contain and manage the China threat.

ang. Confronting China with a series of policy objectives, Biden's team, including Secretary of State Blinken and National Security Advisor Jake Sullivan candidly addressed China, in what China called "direct, frank and constructive"

not embrace the RCEP, but purports to be more open to trade agreements that operate multilaterally, not unilaterally.

China's recent signal of interest in joining the successor to the TPP—the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—if serious, could force the Biden Administration to reconsider comprehensive multilateral trade agreements sooner than it would like in order to head off any effort by China to establish itself as the preeminent superpower in the West Pacific and a world leader in free trade, multilateralism, and economic integration. However, any concerted effort to re-join the CPTPP (or any other comprehensive trade agreement) would likely require obtaining Trade Promotion Authority (TPA) from Congress, which expires on July 1. USTR Tai is uniquely well positioned to know how challenging that negotiation would be and, thus far, the administration has not expressed interest in seeking its renewal before the authority lapses.

World Trade Organization

White House officials have been critical of the WTO, but are supportive of multilateral institutions in principle. The administration is expected to engage the WTO where it sees value, rather than offering blanket U.S. support for the institution.

USTR Tai has maintained that the WTO needs tough and constructive conversations about reforming the institution. In her Senate confirmation hearing, she asked rhetorically, “What is the value of the WTO to its members? Is it accomplishing the goals that its founders and members expect of it? How does the WTO rise to the challenges of today's world?” In her first major speech, Tai further criticized the WTO, saying it was considered by many as an institution that “not only has no solutions to offer on environmental concerns but is part of the problem.” Tai has expressed support for the WTO's actions on fisheries subsidies but has not offered similar support for renewed efforts to conclude the Environmental Goods Agreement.

Notably, the Biden Administration has yet to announce a nominee for the Deputy U.S. trade representative who would become the U.S. representative to the WTO.

Export controls

Biden is benefitting from the Trump Administration's activist export control policy. Elevated to their highest level since the fall of the Soviet Union, export controls will continue to drive U.S. policy to separate the civil from the military in China. Biden has done nothing to reverse the comprehensive “clamp down” aimed at denying U.S. technology to China — from Huawei, to the military end use/user rule expansion, to the targeting of PRC companies with Entity List bans, most recently the PRC supercomputer industry — it is clear that the Export Administration Regulations (EAR) will remain central in U.S. economic and security policy. With key positions at the Bureau of Industry and Security (BIS) still open, the so-called “tool box” of controls under the EAR does not yet have a face — will it be an accomplished expert who sees value in multilateral solutions and reducing the collateral damage to US and allies, or a new “cold warrior” who is driven less by the commercial realities and more by scoring political points — and is an important piece of the China policy puzzle.

Biden is benefitting from the Trump Administration's activist export control policy.

The “third rail” issue of what to do with Huawei was very apparent in the contentious confirmation hearings for now Secretary Raimondo to lead the Commerce Department. When she failed to immediately confirm that she would keep Huawei on the Entity List (saying that was a matter of review for the new administration), she was immediately labeled as “soft on China,” just one example of how explosive the issue of China and export controls is today.

Many see the current export-control policy process as a “black box” with little rule-based support, and very little guidance for industry affected by the measures and realization of the long-term damage caused by excluding U.S. companies from cutting-edge, global supply

chains. Perhaps Biden, through the build-out of BIS, can bring this area back to one that supports U.S. industry and national security.

Sanctions

On his inauguration, Biden inherited an arguably over-leveraged U.S. sanctions policy, with the Trump Administration having resorted to unilateral sanctions as their preferred solution to every foreign policy challenge. Biden has yet to sharply shift course in many of these areas—even ones where he might be expected to unwind his predecessor’s posture in the near future, except the repeal of the morally suspect sanctions targeting the International Criminal Court—and is expected to maintain pressure on other areas, most prominently the use of sanctions on those engaged in human rights violations, via the Global Magnitsky Sanctions, including the targeting of those involved in fostering or supporting forced labor practices, or undermining democracy.

Despite the end of the Castro era, Biden has not yet taken action on Cuba, including whether to roll back some of the restrictions that Trump created to slow President Obama’s path to normalization and to reverse the reinstatement of Cuba’s designation as a State Sponsor of Terrorism—which likely requires a new congressional notification and waiting period—re-imposed by the Trump Administration in its final weeks. The United States remains uniquely isolated in the world community when it comes to its relationship with Cuba. Biden has also made few moves to change or dial up the treatment of North Korea. Neither will wait very long.

The most significant sanctions-related actions of the first 100 days involve Iran, Russia, and Burma:

- **Iran**—Biden has begun the very difficult process of engaging with Iran, in collaboration with allies, to rejoin the JCPOA and bring both Iran and the United States back into compliance with the Agreement. Despite trust-building measures, the road remains steep and success may not be possible for both substantive and political reasons. The effort, however, is seen as one of Biden’s most significant reversals of policy.
- **Russia**—Consistent with Biden’s campaign promises and policy announcements, it did not take long for Biden to address the variety of conduct that Putin undertook with impunity under Trump. Within the first 100 days, Presi-

dent Biden took a series of coordinated actions, leveraging not only sanctions, but public diplomacy (refreshingly justifying policy with a corresponding disclosure of substantial actual, not dis, information), and cyber tools, aimed at pressuring Putin for promoting the Solarwinds attack and deterring enhanced aggression on the Ukrainian border. It is clear that Russia’s “business as usual” will be met with a different response than it has in the last four years.

- **Burma (Myanmar)**—In one of the first challenges to Biden’s sanctions policy, the military coup in Burma drew a quick but measured and coordinated response. Aiming the sanctions at the military, and not the people, the ongoing effort is aimed to change behavior, not to punish the Burmese people. Successfully coordinating that action with not only the United Kingdom, but shortly thereafter with the European Union, is an early reward for the policy of re-engagement.

The “what will Biden do” question is now being answered with the “here’s how Biden will do it.” Sanctions will remain a key tool for Biden in fighting back, and signaling how US policy is shifting under the new Administration. This will be advanced by recently confirmed U.S. Treasury Deputy Secretary Adeyemo who is [overseeing a study](#) to “weigh the costs and benefits of financial sanctions to ensure that they remain a strong and viable foreign policy tool,” with an eye towards ensuring they remain a strong, viable option for policymakers in the years and decades to come.”

The more things change, the more they stay the same?

Not at all. We are seeing real change, despite the similarity of the challenge. By any measure, Biden’s first 100 days have been extremely productive, driving important trade initiatives, and handling international crises with aplomb, all while managing the most severe domestic and international health crisis confronted by a new president in a century. As demonstrated thus far, and by leveraging his experienced foreign policy team, Biden is paving the way to a return to respect for the rule of law and will aim to use, rather than undermine, the tools of international trade as a means of “building back better.”

With control of Congress and the White House, the trade policy debate will no longer be the brinksmanship of the last president, but will instead be characterized by the more traditional debate within the Democratic Party. Will traditional approaches — protectionism and a labor focus balanced with the pursuit of a global liberal order — prevail or will the new progressives in ascendance carry the day? Many questions still remain. How will

business, which is looking for more “buy America” but reengagement with the world through a bold trade agenda, influence the Biden trade agenda? Can Biden bring stability back to tech policy? Will he have more success with curbing China’s threat? The road ahead is no less challenging than it was in the past, but with new tools and a mandate to rebuild the carnage of the Trump years, optimism and hope give Biden a fighting chance.

Banking & Financial Services

By *John M. Pachkowski, J.D.*

Since Inauguration Day, the Biden Administration has seen two cabinet posts—the Treasury Secretary and the Secretary of Housing and Urban Development—filled that will have an impact on the banking and financial services industries.

Treasury Secretary Yellen

Janet Yellen, former Federal Reserve Chair, was confirmed by the U.S. Senate on January 25 to lead the Treasury Department. By a vote of 84-15, Secretary Yellen **became** the first woman to head the Treasury Department in its 231-year history, and the first person to have served as Treasury Secretary, Chair of the Council of Economic Advisers, and Chair of the Federal Reserve.

Although actions taken by the Biden Administration in its first 100 days have been focused on the COVID-19 pandemic and setting forth the administration’s agenda through a series of executive actions, the Yellen-led Treasury has begun having an impact on the banking and financial services industries. In her new role, Yellen has stated that a key objective of the Treasury Department is “modernizing our financial system with new technologies.” In remarks at the inaugural “U.S. Financial Sector Innovation Policy Roundtable,” Yellen **emphasized** that the Treasury Department is committed to “help scale and leverage” responsible technological innovation.

Anti-money laundering

Also during the forum, Secretary Yellen noted that the Anti-Money Laundering Act of 2020

(AML Act), enacted in early January 2021, directs the Treasury Department to “renovate the framework for combating illicit finance.” Yellen stated that the directive is especially timely, not only because “we’re living amidst an explosion of risk related to fraud, money laundering, terrorist financing, and data privacy,” but also because, as the global pandemic has “moved more of life online, crime has moved with it.” Recognizing that the “misuse of cryptocurrencies and virtual assets is a growing problem too,” Yellen said that the public sector and private sector should work together so that “we can better stem the flow of dark money from organized crime and terrorist financiers.”

A key objective of the Treasury Department is “modernizing our financial system with new technologies.”

To implement the AML Act, the Financial Crimes Enforcement Network issued an **Advanced Notice of Proposed Rulemaking** seeking input on the Act’s beneficial ownership reporting requirement. According to FinCEN, the new reporting requirement will strengthen U.S. national security “by making it more difficult for malign actors to exploit opaque legal structures to launder

money, finance terrorism, proliferate weapons of mass destruction, traffic humans and drugs, and commit serious tax fraud and other crimes that harm the American people.”

Access to financial services

Secretary Yellen’s forum remarks also addressed the persistent problem of the country’s digital divide, which leaves millions of people disconnected from the financial system and results in the existence of “financial services deserts.” To address this problem, the Treasury Department launched the [Emergency Capital Investment Program](#) (ECIP), a program that will provide \$9 billion for Community Development Financial Institutions and minority depository institution investments. In announcing the ECIP’s launch, Treasury Secretary Janet L. Yellen [said](#), “America has always had financial services deserts, places where it’s very difficult for people to get their hands on capital so they can, for example, start a business. But the pandemic has made these deserts even more inhospitable. The Emergency Capital Investment Program will help these places that the financial sector hasn’t typically served well. It will allow people to access capital, especially in communities of color and rural areas.”

Financial system stability

As Treasury Secretary, Yellen also serves as chair of the Financial Stability Oversight Council (FSOC), a collaborative body composed of the federal

Research; repeal the 2019 “systemically important financial institution (SIFI) designation guidance”; coordinate efforts to mitigate climate-related financial risks; address “long-standing shadow banking fragilities” that have resurfaced during the pandemic; and develop and implement a comprehensive financial data strategy.

Climate change

At Secretary Yellen’s first FSOC meeting, Fed staff discussed climate change and its potential impact on financial stability. The staff’s presentation highlighted the channels through which climate change could pose risks to the financial system and work the Fed is undertaking to monitor and better understand climate-related risks to financial stability. A [readout](#) of the March 31 meeting noted, “After the presentation, council members shared actions their agencies are taking or planning to take to address the risks posed by climate change.”

In [remarks](#) made by Yellen at the FSOC meeting, she called climate change “an existential threat” and the biggest emerging risk to the U.S. financial system, making it one of her top priorities. To address this threat, the Treasury Department [announced](#) a coordinated climate policy strategy on domestic and international policymaking, which will focus on the broad range of its climate-related policy work connected to climate transition finance, economic and tax policy, and financial risks.

As part of this strategy, Treasury is also creating a new Climate Hub and appointing a climate counselor to coordinate and lead many of its efforts to address climate change. These actions are intended to “position the economy for strong and sustainable growth consistent with a net-zero emissions future,” according to Treasury. John E. Morton was named the department’s first climate counselor. Morton was most recently a partner at Pollination, a specialist climate change advisory and investment firm. Previously Morton was a presidential appointee in the Obama Administration and served as White House senior director for energy and climate change at the National Security Council.

Finally, in remarks to the Institute of International Finance, Yellen addressed the difficulty in financial institutions assessing climate related

Yellen called climate change the biggest emerging risk to the U.S. financial system

financial regulators, an independent insurance expert appointed by the president, and state regulators. The Center for American Progress issued a report recommending five key priorities for the FSOC. The organization’s March 2021 report [urged](#) the council to: restore budgeting and staffing at the FSOC and the Office of Financial

risks, attributing it to “data gaps” on climate risks. To combat this, she noted that Treasury is working with a host of other regulators as well as global partners, eschewing arguments that climate change’s unpredictable impact on risk instead requires the U.S. to move slowly. “This is completely wrong in my view,” Yellen said. “This is a major problem, and it needs to be tackled now.”

HUD Secretary Fudge

The Senate confirmed former-representative Marcia Fudge as Secretary of Housing and Urban Development on March 10. Once sworn in, Fudge [said](#), “A good home shapes nearly every part of our lives. It’s where we start and end each day. It’s where we raise our families and come together in times of joy. It’s where we find shelter and comfort during times of hardship. The past year has reminded us just how important it is to have a safe and stable place to call home. But, right now—for millions of Americans—that sense of security and peace of mind is out of reach. Our country has an immense responsibility—and profound opportunity—to address the housing crisis facing so many people.”

HUD has quietly begun the process to undo two controversial regulatory actions taken during the Trump Administration. In a [filing](#) with the Office of Information and Regulatory Affairs, HUD is seeking to reinstate two Obama-era rules—the 2013 Discriminatory Effects Rule and 2015 Affirmatively Furthering Fair Housing Rule. In 2020, HUD revised the Fair Housing Act’s disparate-impact rule and raised the bar for establishing disparate-impact claims. Also in 2020, HUD finalized a rule effectively ending efforts at fair housing, broadly referred to as “affirmatively furthering fair housing,” or AFFH. The agency is taking this action in accordance with the Biden Administration’s [Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies](#), which reasserted the federal government’s commitment to fair housing.

CFPB leadership

Prior to his inauguration, then President-elect Biden [announced](#) that Rohit Chopra will be his nominee as the next director of the Consumer

Financial Protection Bureau. Chopra previously served as assistant director of the bureau, as well as the agency’s student loan ombudsman.

On the Inauguration Day, Kathy Kraninger, as requested, resigned as CFPB director. The move was entirely anticipated due to the U.S. Supreme Court’s decision in [Seila Law v. Consumer Financial Protection Bureau](#), which held that the agency’s structure impedes on the president’s removal powers under Article II of the U.S. Constitution and that the CFPB director can be removed at will. In her resignation letter, Kraninger [said](#) it had been an “honor to serve the American people for over 20 years” and highlighted accomplishments at the bureau during her tenure.

Following Kraninger’s resignation, David Uejio was named the CFPB’s acting director. His acting appointment was [announced](#) in a statement from the White House that also named 33 other temporary selections throughout the administration.

Uejio will serve as acting director until Chopra is confirmed by the Senate. Currently, Chopra’s nomination is pending before the full Senate. Although Chopra’s nomination received a tied vote in the evenly-divided Senate Banking Committee, his nomination will now be considered by the full Senate in accordance with [Senate Resolution 27](#).

Speaking at the committee vote, Chair Sherrod Brown (D-Ohio) [said](#) that at Chopra’s testimony before the committee, he demonstrated a passion to serve as well as a deep knowledge of the marketplace and “the reality of the economy that most families live in.” Brown noted that Chopra’s nomination comes at a time when more families are struggling to endure the economic fallout of the coronavirus pandemic. Brown also noted that Chopra was confirmed by a unanimous, bipartisan vote to serve as a Federal Trade Commissioner in 2018 and has pledged to “have an open mind and to work with and be responsive to members of both parties of Congress.”

Ranking Member Pat Toomey (R-Pa) struck a different tone, [remarking](#) that he would not support Chopra’s nomination due to concerns that he would use the regulatory powers of the Bureau to “impose burdensome regulations and advance a liberal social agenda.” He added, “Based on Commissioner Chopra’s record, I’m deeply concerned that he’d return the CFPB to the hyper-active, law breaking, anti-business, unaccountable agency it was under [the] Obama Administration.”

Although Chopra's nomination is held up in the Senate, the CFPB's acting leader has been busy. In a series of statements and "Director's notebook" blog posts, Acting Director Uejio has outlined his vision for the CFPB. Uejio has [called](#) for the agency to take aggressive action to ensure that regulated companies follow the law and meet their obligations to assist consumers during the COVID-19 pandemic. He also directed the supervision and enforcement staff (SEFL) to "always determine the full scope of issues found in its exams, systemically remediate all of those who are harmed, and change policies, procedures, and practices to address the root causes of harms." Penalties might be necessary in some cases, and SEFL must expedite enforcement investigations relating to COVID-19, he noted.

Uejio has also [outlined](#) the steps planned for the CFPB's Division of Research, Markets, and Regulation (RMR) in the upcoming months. He expects the RMR to take action to alleviate the dual crises of COVID-19-related hardship and racial inequality "with urgency and immediacy." To do so, he believes the bureau needs to "sharpen" its "focus on the consumer experience." He refers to the slow response to the mortgage market over a decade ago and notes that the agency "now faces a test on whether we can, using all the tools Dodd-Frank gave us, forestall further similar economic and social catastrophes." The goal is to "prevent further lasting harm" from the current crisis. Uejio will also be authorizing use of the bureau's Dodd-Frank Act section 1022(c) (4) data-collection authority and will ask RMR to take on certain tasks, including analyses of housing insecurity, mortgage foreclosures, landlord-tenant evictions, and mobile home repossessions. He expects an analysis of the consumer finance barriers to racial equality and to include in any policy the racial equality impacts of the policy.

The acting director has also [discussed](#) how the CFPB's Division of Consumer Education and External Affairs (CEEA) can work to advance the goals of racial equality and relief for consumers hard-hit by COVID-19. Uejio suggested that CEEA seek out and integrate consumer perspectives into bureau actions. One way to accomplish this is to make sure that consumers who submit complaints to the agency "get the response and the relief they deserve." In particular, with respect to consumer

complaints, Uejio stressed that it is unacceptable that consumer advocates have found disparities in some companies' responses to Black, Brown, and Indigenous communities. Further, Uejio noted that he has tasked Consumer Response to prepare a report highlighting companies with a poor track record on these issues; a resulting analysis is expected to be published.

OCC leadership

Blake Paulson became the acting head of the Office of the Comptroller of the Currency following the January 14 departure of Brian P. Brooks. Since then, there has been speculation as to whom the Biden Administration would nominate to lead the OCC.

Early on, University of Michigan professor [Michael Barr](#) seemed to be the frontrunner for the job. However, Barr, who had served in the Clinton and Obama administrations, has faced opposition from progressives within the Democratic party. His ties to former Treasury Secretary Tim Geithner, viewed as friendly to Wall Street, and his consulting work for fintech firms, disqualify him for progressives. Shortly after Barr's name was floated for the role, Ron Brownstein of *The Atlantic* [noted](#) that Barr's likely nomination "has become an unexpected flash point in the ongoing tussle between progressives and centrists over the direction of Biden's presidency.... Barr is facing unexpectedly intense resistance from a younger generation of progressives."

With Barr's prospects waning, the new name being floated was [Mehrsa Baradaran](#), a professor at the University of California, Irvine School of Law. She has also written extensively on inequality in the banking system. Politico's *Morning Money* [noted](#) Baradaran "would face a significant task in moving the OCC, which has extensive power over bank charters and other matters, closer to par with traditionally tougher regulators like the FDIC and the Fed." In addition, 34 members of the Congressional Black Caucus sent [a letter](#) to President Biden in late March urging him to nominate Baradaran. The CBC letter noted that Baradaran would be a "transformative" appointee and, given the "existing economic and racial injustices have been exacerbated by the pandemic, ... we need an OCC leader whose values are fully aligned with the needs of working people."

Although the nomination of a new comptroller of currency has languished for weeks, there may be new impetus for the Biden Administration to act. It was recently reported that Acting Comptroller Blake Paulson wrote to the leadership of the Senate Banking Committee seeking to preserve the OCC's Trump-era [True Lender Rule](#). The rule provides that when a bank makes a loan it is the "true lender" if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan. The rule also clarifies that as the true lender of a loan, the bank retains the compliance obligations associated with the origination of that loan.

At the time of its adoption, the True Lender Rule was criticized as allowing predatory lenders to evade state usury limits by laundering money through banks able to charge exorbitant interest rates. Once the Democrats assumed control of both the House and Senate, consumer advocacy groups urged Congress to use the Congressional Review Act to repeal the rule. Representative Jesus

G. "Chuy" Garcia (D-Ill) and Sen. Chris Van Hollen (D-Md) have introduced [H.J.Res. 35](#) and [S.J. Res. 15](#) to do just that.

In his [letter](#), Paulson said that the True Lender Rule "makes clear banks' responsibility and accountability for the loans they make and facilitates the OCC's supervision of this core banking activity." Repealing the rule, he argued, "would return bank lending relationships to the previous state of legal and regulatory uncertainty, which ... adversely affects the function of secondary markets and restricts the availability of credit."

Zachary Warmbrodt of Politico [noted](#) that Paulson's action and the response by members of Congress—who deem the letter highly irregular and inappropriate—underscores "long-running tensions between Wall Street watchdogs and the agency, which has previously been accused of being cozy with financial firms it oversees. The conflict is escalating in part because Biden has not named an official to run the agency, amid a political fight among Democrats over potential nominees."

Commodities & Derivatives

By [Lene Powell, J.D.](#) and [Brad Rosen, J.D.](#)

As the Biden Administration reaches its 100-day mark, a vague sense of limbo hangs over the CFTC. Biden has not yet nominated his choice for permanent chairman and the agency has said little about where its policy agenda or future focus may be heading. Unlike at the SEC, a number of key leadership positions across the organization remain occupied by political appointments made under former President Trump. These include the directors at the agency's Division of Market Oversight, Division of Risk and Clearing and Office of Public Affairs. Career staffers are serving as acting directors at the Division of Enforcement and the Markets Participants Division.

CFTC leadership

While the nomination of a permanent chair, key leadership appointments, and agency's overall direction remain in a holding pattern, individual commissioners have spoken out forcefully about

various policy matters during the Biden Administration's first 100 days. As a result, some clues about the issues and controversies the agency will likely be grappling with can be gleaned through the lens of these various commissioner statements and pronouncements as the new administration moves forward.

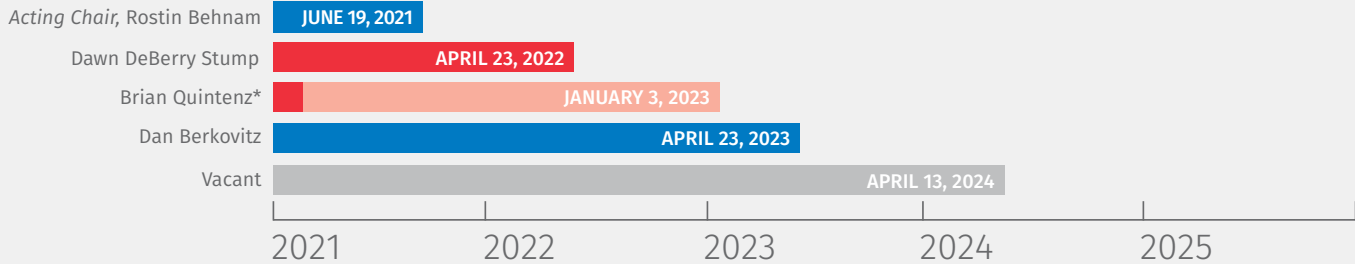
Acting Chairman Behnam on climate, precious metals

Rostin Behnam was [unanimously voted in](#) as acting chairman by his fellow commissioners on the day following President Biden's inauguration. Since then, however, the acting chairman has kept a low profile, making few public comments. With the departure of former Chairman Heath Tarbert in January, a vacancy now exists. There has been no indication regarding a replacement.

In the climate change realm, where Behnam has been a leading voice among regulators, the acting

CFTC Composition

As terms expire, Biden can replace commissioners with a Democrat, Republican or Independent. No more than three commissioners can be members of the same political party.



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

Wolters Kluwer Legal & Regulatory, U.S.

chairman described a change in the agency's future direction at a virtual version of the FIA's Boca conference. Behnam explained that the CFTC's recently created [Climate Risk Unit](#) would mark the agency's pivot away from the agency's broad financial market scope to one that focuses more on the role of derivatives in addressing climate-related risks and transitioning to a low-carbon economy. Additionally, during a volatile period in the precious metal markets, Behnam indicated the agency was [closely monitoring activity](#) in the silver markets and would remain vigilant in surveilling these venues for fraud and manipulation.

Commissioner Stump on cryptocurrencies

The CFTC's role with respect to its regulatory oversight and enforcement authority for digital assets have been on Commissioner Dawn Stump's mind and she has not hesitated to make her strong views known. In remarks before the Texas A&M Bitcoin Conference, [Stump called for](#) the need for clarity regarding the CFTC's day-to-day oversight of cryptocurrency derivatives and swaps markets compared to its more limited enforcement role in connection with cash Bitcoin and digital asset markets.

The commissioner has also stated her worries that the CFTC's exercise of that enforcement authority might leave the public with the

impression that the agency is the frontline regulator of cash digital asset markets. Stump declared, "This is simply not the case, nor in my opinion is this what the CFTC is best tasked to do." Stump expressed similar sentiments in a [sharply worded concurrence](#) involving Coinbase's settlement of an administrative action where the company agreed to a \$65 million penalty. Coinbase has never been registered with the Commission, nor did it ever deal in derivative instruments. Looking ahead, the Commission's role in the digital assets realm will likely garner further examination as these markets continue to expand and evolve.

Commissioner Berkovitz on market meltdowns, position limits

Commissioner Dan Berkovitz has been outspoken on several fronts since Biden's inauguration. Regarding the spectacular collapse of Archegos Capital Management, [Berkovitz urged](#) the CFTC to revisit regulatory requirements for family offices, warning that recent regulatory rollbacks hamper the agency's ability to protect the integrity of the commodity markets.

The commissioner also [spoke out](#) against the use of Trading at Settlement (TAS) contracts to manipulate the price of NYMEX's West Texas Intermediate crude oil futures. Berkovitz, who opposed the CFTC's position limits final rules that recently took effect, declared that the agency failed to address

the absence of numerical limits on the speculative use of TAS contracts during the spot month of the contract. He also noted that NYMEX itself missed the opportunity to close that vulnerability when it implemented the position limits rules.

The final position-limit rule was approved along partisan lines by a 3-2 vote under a Republican administration after many years of contentious debate. While the CFTC under the Biden Administration is not expected to discard the rule, some observers believe some modifications and refinements may be in the offing.

Berkovitz also weighed in on the Eris Exchange, LLC (ErisX) self-certification of RSBIX NFL futures contracts, which are based on various aspects of NFL games. [Berkovitz believed](#) that these instruments, as proposed, had fatal flaws and explained that the ErisX would have to show that these contracts had a legitimate economic purpose. It would also have to make the contracts available to the public, rather than limit them to institutional users.

Commissioner Quintenz on NFL futures

Commissioner Brian Quintenz also expressed his strong views surrounding the Eris X NFL contracts that were withdrawn by the exchange before the Commission made a final determination regarding their validity. Reacting to an unissued Commission order, Quintenz [expressed his significant concerns](#) around the constitutionality of a Commodity Exchange Act provision at issue, the validity of the applicable CFTC regulation, and the unissued order's arbitrariness. Quintenz's statement sets forth what his dissent would have stated in the event ErisX had not withdrawn its self-certification, and the CFTC had issued an order rejecting the certification. In any event, the CFTC may well revisit issue surrounding the results of NFL games and other professional sporting events as the gaming industry continues to grow. Moreover, ErisX has indicated that it may again attempt to self-certify contracts in this area.

It's also worth noting that Quintenz's statutory term expired in April 2020. He had previously indicated that he would be leaving the CFTC no later than October 31, 2020. At a meeting of Market Risk Advisory Meeting on February 23, Quintenz indicated that his tenure at the CFTC was coming

to an end in the very near future. Since that time, the commissioner has not made any further public statements regarding the timing of his departure from the agency. Under applicable "timing out" provisions, Quintenz could conceivably remain as a CFTC commissioner until the end of the 117th congressional session, which will occur in January 2023.

Enforcement priorities

The Division of Enforcement has continued to explore the boundaries of its remit with new crackdowns in areas the agency has recently entered, as well as areas in which it has decisively expanded its footprint.

Foreign corrupt practices

According to Cleary Gottlieb partner Colin Lloyd in a recent [FIA webinar](#), the CFTC's foray into foreign corrupt practices with [Vitol Inc.](#), its first settled action in this area, is important because the agency's scope may be broader than the FCPA. The agency's anti-fraud authority covers both CFTC registrants and non-registrants, and potentially some firms are in scope that are not in scope for the FCPA. Further, the agency's whistleblower statute has entered the mix, and the CFTC's civil standard may ensnare some conduct that does not rise to a criminal level or raise the interest of the DOJ, said Lloyd.

The CFTC's foray into foreign corrupt practices is important because the agency's scope may be broader than the FCPA.

Fellow Cleary partner Lisa Vicens highlighted best practices to avoid running afoul of the CFTC. Companies revamping their internal controls should look to benchmark measures to DOJ guidance on effective compliance programs. Also, companies should pay special attention to the activities of third parties and agents, said Vicens. Two-thirds of all FCPA resolutions involve payments of bribes by these actors.

A third Cleary partner, Jonathan Kolodny, said he “certainly expects” the CFTC to continue pursuing foreign corrupt practices cases. According to Kolodny, these cases are most likely to arise as the result of overlapping FCPA actions with the SEC and DOJ, self-reporting, and whistleblower tips. He added that with reports of investigations of Glencore Commodities Ltd. and Trafigura, there may be more cases in the pipeline, particularly involving natural resources and the energy sector.

Insider trading

The CFTC further expanded its footprint in the area of misuse of material nonpublic information with a settlement against [Ron Eibschutz](#), a former energy broker who obtained illegal disclosures of material nonpublic information from two former employees of the New York Mercantile Exchange (NYMEX). The CFTC’s order imposed a permanent registration and trading ban and a \$75,000 penalty. The order concludes the NYMEX matter, which kicked off in August 2020 when the exchange itself was ordered to pay \$4 million, in the CFTC’s first action against an exchange involving material nonpublic information.

Notably, the NYMEX action was only the CFTC’s fourth enforcement action involving insider trading since its first settlement in this area in 2015 ([Motazed](#)). Given the slow but steady pace and a lack of recent guidance, commissioner statements, or increase in cases, it seems the CFTC remains interested in this area but there are no indications of a newly heightened focus for the immediate future.

Cryptocurrency and digital assets

CFTC enforcement in the digital asset space has spiked upward, with five actions involving cryptocurrency fraud announced just since Inauguration Day. The agency demonstrated its ability to pursue massive operations ([Benjamin Reynolds](#), \$571 million) while also keeping its eye on small schemes ([J Squared](#), \$397,000), as well as matters in between ([Circle Society](#), \$32 million and [Spence](#), \$5 million). In an action against tech tycoon [John McAfee](#), the CFTC showed a willingness to team up with the SEC and to go after well-known public figures in the pursuit of market manipulation in the digital asset realm.

For institutional entities, as noted above, the CFTC has shown that it will pursue misconduct by cryptocurrency spot exchanges ([Coinbase](#)). The issue of the regulator’s authority over spot markets has arisen before in the context of forex markets and was addressed legislatively in the 2008 CFTC reauthorization act. With Commissioner Stump’s dissent delineating sharp limitations in the agency’s jurisdiction in the cryptocurrency spot markets, the boundaries of the agency’s authority in this area will no doubt continue to be hashed out.

All in all, given the Biden Administration’s emphasis on strong consumer protection, anti-corruption, and leveling the playing field, the CFTC will likely continue flexing its authority and looking to expand its influence in the areas of foreign corrupt practices, insider trading, and cryptocurrency and digital assets.

Government Contracts

By [William A. Van Huis, J.D.](#), [Marilynn Helt, J.D.](#) and [George M. Gullo, J.D.](#)

The unprecedented number of executive orders President Biden issued during the early days of his administration include many that impact the government contracting community. After signing orders implementing a mask mandate for government contractors working on federal property ([E.O. 13991](#)), revoking a controversial contract clause on race and sex stereotyping ([E.O. 13985](#)), revoking Trump regulatory policies ([E.O. 13992](#)), and creating a new set of ethics guidelines

for executive appointees ([E.O. 13989](#)), President Biden followed up with additional orders addressing Buy American policies ([E.O. 14005](#)), government purchases of COVID-19 vaccines ([E.O. 14001](#)), contracts for privately operated criminal detention facilities ([E.O. 14006](#)), supply chain security ([E.O. 14017](#)), and the federal contractor minimum wage ([E.O. 14026](#)).

The new president also issued an executive proclamation terminating the southern border

emergency declared by former President Trump ([Proclamation 10142](#)) and executive memoranda implementing a regulatory freeze and outlining new procedures for reviewing regulations.

Buy American

[E.O. 14005](#), Ensuring the Future Is Made in All of America by All of America's Workers, announces the new administration's policy for federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the U.S. The order instructs agency heads to consider suspending, revising, or rescinding agency actions that conflict with this policy and consider proposing any additional agency actions necessary to enforce the policy. Further, to promote an accountable and transparent procurement policy, the order directs agencies to vest waiver authority in senior agency leadership, where appropriate.

To update and centralize the waiver process, the order establishes the Made in America Office within the Office of Management and Budget. Before granting a waiver, an agency must provide the Made in America Director with a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States. The OMB Director, through the Made in America Director, must review each proposed waiver. In addition, before granting a waiver in the public interest, the granting agency must assess whether a significant portion of the cost advantage of a foreign-sourced product results from the use of dumped or injuriously subsidized steel, iron, or manufactured goods.

The order also requests the Federal Acquisition Regulatory Council to consider replacing the [FAR Part 25](#) "component test" used to identify domestic end products and construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity; increasing the numerical threshold for domestic content requirements for end products and construction materials; and increasing the price preferences for domestic end products and domestic construction materials.

The order revokes [E.O. 13788](#) (Buy American and Hire American), section 5 of [E.O. 13858](#) (Strengthening Buy-American Preferences for Infrastructure

Projects), and [E.O. 13975](#) (Encouraging Buy American Policies for the United States Postal Service). The order supersedes [E.O. 10582](#) (Prescribing Uniform Procedures for Certain Determinations Under the Buy-America Act) and [E.O. 13881](#) (Maximizing Use of American-Made Goods, Products, and Materials), to the extent they are inconsistent with the new order.

Mask order

[E.O. 13991](#), Protecting the Federal Workforce and Requiring Mask-Wearing, sets forth the Biden Administration's policy to halt the spread of the SARS-CoV-2 virus by relying on the best available data and science-based public health measures. These measures include wearing masks when around others and physical distancing. Accordingly, all on-duty or on-site federal employees, onsite federal contractors, and other individuals in federal buildings and on federal lands must wear masks, maintain physical distance, and adhere to other public health measures as provided in guidelines recommended by the Centers for Disease Control and Prevention.

The order announces the new administration's policy for federal procurements to maximize the use of U.S. goods, products, and services.

The E.O. tasks the heads of executive departments and agencies to require compliance with CDC guidelines and establishes the Safer Federal Workforce Task Force to provide ongoing guidance to agency heads on the operation of the federal government, the safety of its employees, and the continuity of government functions during the COVID-19 pandemic.

Diversity and inclusion

Shortly before the election, former President Trump issued [E.O. 13950](#), Combating Race and Sex Stereotyping, which set forth a policy "not to promote race or sex stereotyping or scapegoating" in the federal workforce and the uniformed

services, and to prevent grant funds from being used contrary to this policy. [E.O. 13950](#) also provided that contractors “will not be permitted to inculcate such views in their employees.” Section 4 of the order prescribed a new contract clause that prohibited a contractor from using “any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts” specifically identified in [E.O. 13950](#) as “divisive.”

However, on the day he took office, President Biden issued [E.O. 13985](#), Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which revoked [E.O. 13950](#). [E.O. 13985](#) instructs agency heads to review and identify proposed and existing actions related to [E.O. 13950](#) and to consider suspending, revising, or rescinding the actions, as appropriate and consistent with applicable law. [E.O. 13985](#) also instructs agency heads to conduct an equity assessment and prepare a report and plan addressing potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities.

In response to [E.O. 13985](#), the Department of Defense [rescinded Class Deviation 2021-00001](#), Combating Race and Sex Stereotyping, and directed contracting officers to remove deviation clauses 252.222-7999 (DEVIATION 2021-00001, NOV 2020 and JAN 2021) from existing contracts.

Public health supply chain

In [E.O. 14001](#), A Sustainable Public Health Supply Chain, President Biden directs immediate actions to secure supplies necessary for responding to the COVID-19 pandemic for federal, state, local, tribal, and territorial authorities, as well as for American health care workers, health systems, and patients. The order instructs agency heads to conduct an immediate inventory of response supplies and identify emergency needs in coordination with the COVID-19 Response Coordinator. If an agency head identifies shortfalls in the provision of pandemic response supplies, the agency head must promptly revise the agency’s operational assumptions and planning factors for determining the scope and prioritization, acquisition, and distribution of the supplies, and take appropriate action using all available legal authorities, including the Defense Production Act ([50 USC 4501, et seq.](#)), to fill those shortfalls as soon as practicable.

Regarding the pricing of pandemic response supplies, the order instructs the Secretary of Health and Human Services to recommend to the authorities delegated in [E.O. 13910](#), Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, any price changes for scarce materials or supplies that would be threatened by accumulation for the purpose of hoarding or price gouging. Also, specified officials must provide recommendations to address the pricing of pandemic response supplies through reasonable pricing clauses and whether to use GSA supply schedules to facilitate purchases by state, local, tribal, and territorial government buyers.

Private prisons

[E.O. 14006](#), Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, seeks to reduce profit-based incentives to incarcerate by phasing out the government’s reliance on these detention facilities. According to the order, POCDFs consistently underperform federal facilities with respect to correctional services, programs, and resources, and do not maintain the same levels of safety and security for people in the federal criminal justice system or for correctional staff. Seeking to decrease incarceration levels, prioritize rehabilitation and redemption, and provide safe working and living conditions, the order instructs the attorney general not to renew Department of Justice contracts with POCDFs, as consistent with applicable law.

Supply chains

[E.O. 14017](#), America’s Supply Chains, focuses on the importance of resilient, diverse, and secure supply chains in ensuring economic prosperity and national security. According to the order, resilient American supply chains will revitalize and rebuild domestic manufacturing capacity, maintain America’s competitive edge in research and development, and create well-paying jobs. They will also support small businesses, promote prosperity, advance the fight against climate change, and encourage economic growth in communities of color and economically distressed areas. To advance resilient supply chains, the order directs the Assistant to the President for National Security Affairs and the AP for Economic Policy to review

supply chain risks, and the Secretaries of Defense, Commerce, Energy, and HHS to prepare reports for the APNSA and the APEP within 100 days.

For the DoD report, the Secretary of Defense, as the National Defense Stockpile Manager, must identify supply chain risks for critical minerals and other identified strategic materials, including rare earth elements. The report must also provide an update for the work completed under [E.O. 13953](#), Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries and Supporting the Domestic Mining and Processing Industries. The order further directs specified agency heads to prepare a second round of reports within one year of the date of the order. The DoD report must address supply chains for the defense industrial base, update the report provided under [E.O. 13806](#), Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States, and build on the Annual Industrial Capabilities Report mandated by Congress pursuant to [10 USC 2504](#). The DoD report must also identify areas where civilian supply chains depend on competitor nations.

After the reports are completed, the APNSA and the APEP must provide a report to the president reviewing the actions taken over the previous year and make recommendations.

Contractor minimum wage

President Biden's [Executive Order on Increasing the Minimum Wage for Federal Contractors](#) requires federal contractors to pay an hourly \$15 minimum wage to certain individuals who work on federal contracts, starting in 2022. [E.O. 13658](#), issued by the Obama administration in 2014, requires federal contractors to pay employees working on federal contracts \$10.10 per hour, indexed to inflation. The current minimum wage for workers performing work on covered federal contracts is \$10.95 per hour and \$7.65 per hour for tipped employees.

The new order states that raising the minimum wage enhances worker productivity and generates higher-quality work, and that ensuring that federal contractors pay their workers an hourly wage of at least \$15 will bolster the economy and efficiency in federal procurement. Starting January 30, 2022, agencies must incorporate a \$15 minimum wage in new contract solicitations. By March 30, 2022, agencies

must include the higher minimum wage in new contracts. Agencies must also implement the higher wage rate in existing contracts when exercising options to extend covered contracts. The requirement will be implemented through a new contract clause, and it will extend to subcontracts pursuant to regulations to be issued by the Secretary of Labor later this year. The new contractor minimum wage will be indexed to inflation and adjusted annually to reflect changes in the cost of living.

The order also increases the tipped minimum wage for federal contractors to \$10.50 per hour, beginning January 30, 2022, and it eventually eliminates this minimum wage. As a result, beginning January 1, 2024, tipped employees working on federal contracts will earn the same minimum wage as other employees on federal contracts. Finally, the new order extends the \$15 minimum wage to federal contract workers with disabilities, and it restores minimum wage protections for

“Building a massive wall that spans the entire southern border is not a serious policy solution.”

outfitters and guides operating on federal lands. The new order revokes [E.O. 13838](#), Exemption from [Executive Order 13658](#) for Recreational Services on Federal Lands, and supersedes [E.O. 13658](#) to the extent it conflicts with the new order.

Ethics

[E.O. 13989](#), Ethics Commitments by Executive Branch Personnel, emphasizes President Biden's commitment to ethical practices in the federal government. The E.O. requires every executive appointee to sign and abide by the pledge stated in Section 1 of the order. The pledge is part of a broader ethics plan designed to restore and maintain public trust in government. The pledge requires every appointee to “commit to conduct that upholds the independence of law enforcement and precludes improper interference with investigative or prosecutorial decisions of the Department of Justice.” The order's ethical guidelines

include a lobbyist gift ban, multiple “revolving door” bans impacting appointees and lobbyists, a golden parachute ban, an employment qualification commitment, and an assent to enforcement.

The order requires the head of every executive agency, in consultation with the Director of the Office of Government Ethics, to establish rules or procedures requiring every agency appointee to sign the pledge and a written ethics agreement addressing the pledge, spousal employment issues, and other conflicts. The order further requires the director to ensure that the pledge and a copy of the order are available for agencies to use in fulfilling their duties. In terms of enforcement, any former appointee who is determined, after notice and hearing, to have violated the pledge may be barred from lobbying any officer or employee of that agency for a period of up to five years plus the time period covered by the pledge.

Border wall construction

[Proclamation 10142](#), Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, states that the United States has a right and a duty to secure its borders and protect its people against threats. However, “building a massive wall that spans the entire southern border is not a serious policy solution” and “is a waste of money that diverts attention from genuine threats to our homeland security.” Accordingly, no more American taxpayer dollars will be diverted to construct a border wall, and the government will undertake “a careful review of all resources appropriated or redirected to construct a southern border wall.”

The proclamation instructs the Secretaries of Defense and Homeland Security to pause work on each southern border wall construction project, to the extent permitted by law, within seven days of the date of the proclamation, and to assess the legality of the funding and contracting methods used to construct the wall and the administrative and contractual consequences of ceasing each wall construction project. The secretaries, along with other officials, must also develop a plan for the redirection of southern border wall funds. The plan must include consideration of terminating or repurposing contracts with contractors engaged in wall construction and provide for the expenditure of any funds appropriated by Congress.

Revocation of executive orders

Another order, [E.O. 13992](#), Revocation of Certain Executive Orders Concerning Federal Regulation, rescinds policies and directives that threaten to frustrate the government’s ability to address the COVID-19 pandemic, economic recovery, racial justice, and climate change. It revokes six E.O.s, including [E.O. 13771](#), Reducing Regulation and Controlling Regulatory Costs, and [E.O. 13777](#), Enforcing the Regulatory Reform Agenda. [E.O. 13771](#) required agency regulatory plans to identify regulations that offset regulations that increased incremental costs and the OMB Director to specify the amount of incremental costs allocated to each agency for issuing and repealing regulations for the following fiscal year. [E.O. 13777](#) required agencies to designate regulatory reform officers to oversee the implementation of regulatory reform initiatives and policies and to establish regulatory reform task forces to evaluate existing regulations and make recommendations regarding repeal, replacement, or modification. The new order specifically abolishes the RRO positions and RRTFs established by [E.O. 13777](#).

Modernizing regulatory review

A memorandum for heads of executive departments and agencies, [Modernizing Regulatory Review](#), states that our nation currently faces serious challenges and that it is the new administration’s policy to mobilize the power of the government to rebuild our nation and address these and other challenges. The memorandum further states that “it is important that we evaluate the processes and principles that govern regulatory review to ensure swift and effective Federal action” and that regulations that “promote the public interest are vital for tackling national priorities.”

Accordingly, the memorandum orders the OMB Director, in consultation with executive departments and agencies, to produce a set of recommendations for improving and modernizing regulatory review. The recommendations should “provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations” and “include proposals that would ensure that regulatory review serves as a tool to affirmatively

promote regulations that advance these values.” The recommendations should be informed by public engagement with relevant stakeholders.

Regulatory freeze

Another memorandum to the heads of executive departments and agencies, [Regulatory Freeze Pending Review](#), contains President Biden’s plan for managing the regulatory process at the outset of his administration. The memorandum instructs agency heads to refrain from proposing or issuing rules until an agency head appointed or designated by Biden after noon on January 20, 2021, reviews and approves the rule. The OMB Director may make exceptions for emergency situations or certain urgent circumstances, and the agency head may delegate the power of review and approval under certain conditions.

For rules already sent to the Office of the Federal Register but not yet published in the FR, agency heads must immediately withdraw the rules and submit them for review and approval as described above. Further, with respect to rules that have been published in the FR or issued in any manner, but have not taken effect, agency heads should

consider postponing the effective dates for 60 days to review any questions of fact, law, or policy raised by the rules. Agency heads should also consider opening a 30-day comment period on postponed rules to allow interested parties to provide comments. Following the 60-day effective date delay, if there are rules that raise substantial questions of fact, law, or policy, agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director.

Looking ahead

Consistent with the above memoranda invoking a regulatory freeze and review process, the Biden Administration has made no material changes to the Federal Acquisition Regulation, the Defense FAR Supplement, or other acquisition regulations. In the first 100 days, the new administration has issued one FAR final rule ([Federal Acquisition Circular 2021-05](#)), which makes only technical changes to FAR sections, and it has issued no rules amending the DFARS. Nevertheless, as 2021 continues, we expect to see substantial rulemaking activity implementing the new administration’s priorities and policies for the federal government acquisition process.

Conclusion

As discussed throughout this white paper, the Biden regulatory agenda is taking shape, with several signature wins against tough odds already in the books. What, then, comes next? Having addressed the two most pressing challenges facing Americans — the pandemic and resulting economic crisis — with high marks from most voters, even Republicans, Biden must now turn to his other agenda items that will surely face stiffer resistance: immigration, infrastructure, voting rights, climate change, gun safety, tax reform, domestic terrorism, the federal minimum wage, and police

accountability. Whether he achieves those more progressive, politically fraught goals will ultimately determine Biden’s standing in presidential history.

For now, though, we have 100 days of concrete policy results and new personalities in place to help us plan for the next 100 days and beyond.

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](#). Follow us on [Twitter](#) and [LinkedIn](#).

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Serving customers worldwide, our portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, fwilliam.com and MediRegs names.

This publication is designed to provide accurate and authoritative information in regard to its subject matter. The publication is provided with the understanding that Wolters Kluwer Legal & Regulatory U.S. and the author(s) are not engaged in rendering legal or other professional services. If legal advice or other professional assistance is required, the services of a professional should be engaged.