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Looking Forward—Regulatory Enforcement Expectations in a Biden Administration

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By Richard Girgenti

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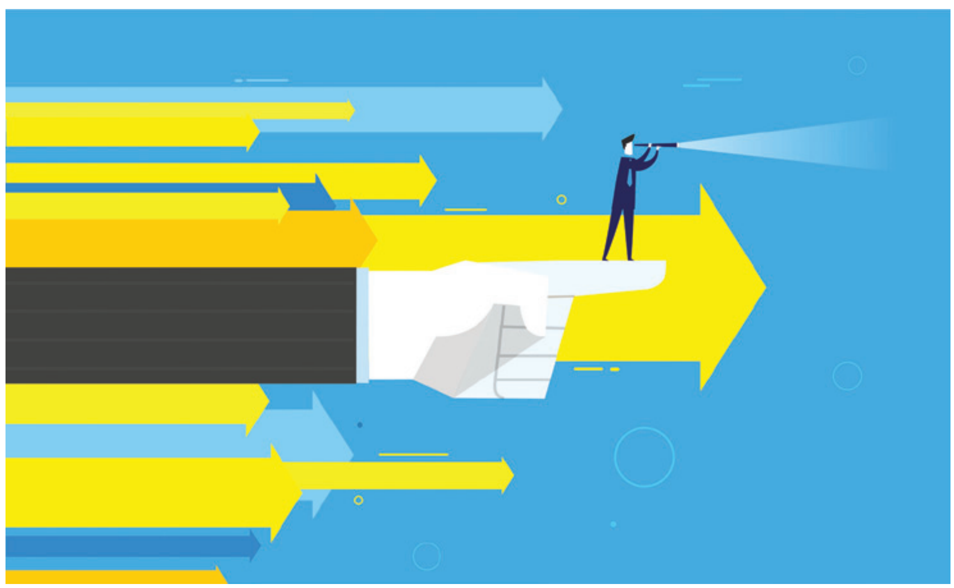
Overall a Biden administration will bring increased regulations and enforcement activity. Two policy priorities will drive the regulatory enforcement agenda in both the short and long term. First, there will be a laser focus on increased stimulus and relief funding with stricter accountability for fraud and abuse. Second, there will be a shift from a Main Street to a Wall Street focus with greater enforcement attention on larger institutions and public companies.

Stemming from these two policy priorities are eight areas where shifts large and small in enforcement and regulatory activity should be anticipated.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- **Increased Oversight and Enforcement of Stimulus and Relief Funding**

Despite the trillions of dollars of federal spending related to the COVID-19 pandemic, oversight to date has been controversial and enforcement spotty at best. The Biden administration will certainly make more aggressive efforts to hold those who received **Paycheck Protection Program** (PPP) loans accountable for compliance with the terms of these loans, particularly as recipients seek forgiveness. Recent Congressional reauthorization of the program tightened language pledging no enforcement against lenders if they acted in good faith and complied with relevant federal and state regulations. However, there will be increased scrutiny of borrowers.

The Small Business Administration's (SBA's) Inspector General, an arm of the agency that administers the PPP, **said in the fall** that there were "strong indicators of widespread potential fraud and abuse." To date, the Department of Justice (DOJ) has charged more than 80 individuals with more than $250 million in fraud stemming from the PPP program. In addition, the increase in medical scams, procurement and **unemployment insurance fraud**, and cyber crime will undoubtedly bring great pressure for increased enforcement and oversight efforts.

Companies should also expect stepped-up enforcement of procurement fraud under the False Claims Act and other federal statutes used to prosecute fraudulent government claims, hoarding, price gauging, counterfeit or defective PPE, COVID tests and vaccines.

- **Enhanced Anti-Money Laundering/Counter Terrorist Financing (AML/CFT) Regulation**

Perhaps the most significant development poised to impact the enforcement landscape during the Biden administration is the National Defense Authorization Act for Fiscal Year 2021 (NDAA), which became law on Jan. 1, 2021. This new law, which makes sweeping changes to the Bank Secrecy Act (BSA) and the current AML/CFT regulatory framework, represents the first major overhaul of U.S. AML laws in years and includes significantly enhanced tools to regulate, investigate, and ultimately punish AML violations.

While the implementation of regulations may take a year or more, some of the key changes include enhancements to the system for filing suspicious action reports (SARs) and currency transaction reports (CTRs); new beneficial ownership disclosure rules for corporate entities; granting the U.S. Treasury and DOJ the power to subpoena bank records held outside the United States; the creation of a whistleblower reward program for alleged BSA violations; and increased penalties for money laundering and related violations.

- **Continued Anti-Bribery and FCPA Enforcement**

In 2020, a record-breaking year for settlement amounts, the DOJ and the Securities and Exchange Commission (SEC) brought Foreign Corrupt Practices Act (FCPA) 32 combined enforcement actions against **12 companies** and imposed fines and penalties totaling a record **$2.78 billion** (60% of which was the result of one settlement). In comparison, in 2019, 14 companies paid a record $2.65 billion to resolve FCPA cases.

As a result of limitations placed on normal government activities during the pandemic, the DOJ only filed new enforcement actions in 2020 against 11 individuals in four separate cases; the SEC only filed one complaint. Without knowing which cases are already in the pipeline, it is hard to predict whether FCPA enforcement actions brought to conclusion in 2021 will increase or not. However, it is likely that the DOJ and SEC will continue to vigorously enforce the FCPA. The next four years will no doubt see a sustained effort to prosecute anti-bribery and corruption violations.

Despite the record settlement amounts, none of the penalized companies in 2020 were required to take on a monitor as a condition of the settlement. This was a departure from the practice in prior administrations. It's unclear whether this decline in monitorships is the result of the views of top DOJ officials in a more "pro-business" administration, the **2018 Benczkowski memo** outlining how to avoid a monitor, or the quality of remediation and the efforts made by companies settling enforcement actions to invest and improve their compliance programs earlier in the investigative process. Perhaps the more interesting and consequential question over the next four years will be whether the Biden DOJ will make greater use of monitorships as part of settlement agreements.

- **Stepped Up SEC Enforcement**

Under the leadership of Jay Clayton, the Trump SEC took a softer, more "pro-growth" approach to Wall Street regulation, with an emphasis on retail-oriented offering frauds over other types of misconduct. In 2020, likely due to the pandemic, there was a 25% decrease in enforcement matters, continuing a downward trend that predated the pandemic. Even so, in 2020, the SEC collected record amounts in enforcement actions, with $3.6 billion in disgorgement and over $1 billion in penalties.

Over the next four years, with the appointment of Gary Gensler, a veteran regulator with a welldeveloped enforcement philosophy from his days at the CFTC, we can expect more aggressive enforcement along with incremental changes in the way the Enforcement Division conducts business.

One area that saw an upward tick in 2020 was the SEC's Whistleblower Program. In 2020, the program broke records in both the number of tips received and the money awarded. This was to be expected in a time of market disruption and volatility related to the pandemic and a remote and less connected workforce. Expect that the whistleblower program will continue to reach or break records again in 2021 as many of the same conditions will continue.

- **Greater Focus on Cyber Fraud and Security**

Data privacy breaches and the recent hacking of government agencies has justifiably caused alarm and increased scrutiny over the adequacy of cybersecurity in both the public and private sector. **Cyber fraud** ranging from account takeovers to ID theft continues to be a major fraud risk. Regulators at both the state and federal level have raised expectations that firms will report cybercrime and ransomware payments and will put in place effective controls for prevention and detection. Expect increased regulation and enforcement in the area of cybersecurity.

- **Nuanced Changes in Sanctions Enforcement**

The imposition of unilateral sanctions by the United States under a Biden administration will undoubtedly continue as a critical foreign policy tool. However, we can expect that there will be notable differences from the Trump administration.

To begin, expect the new administration to promote greater multilateral sanctions coordination; show continued toughness towards China, particularly on technology controls, trade, and other areas important to national security and U.S. interests; and make at least some effort to liberalize Cuba sanctions. It is likely that the Biden administration will take a more aggressive sanction approach against Russia and a more nuanced approach to Iran in hopes of returning to the nuclear deal reached under the Obama administration.

- **Revitalization of the Consumer Financial Protection Bureau and Increased Focus on Consumer Fraud**

Consumer protection initiatives will be a major focus of the Biden administration. Throughout his campaign, Biden called for expanded access to banking services and financial products and stronger protections for consumers. With Democratic control of the Senate and the appointment of Rohit Chopra, who in a previous stint with the Consumer Financial Protection Bureau (CFPB) served as the first student loan ombudsman, the financial services industry is preparing **for increased regulatory supervision and enforcement** with potentially tougher penalties, and a revitalization and expansion of the CFPB's authority which was largely defanged under Trump. Expect particular focus on fair lending and unfair, deceptive, and abusive practices and monitoring of student loan services.

- **Continued Scrutiny of Foreign Investments**

Several factors suggest that **foreign investment scrutiny** through the Committee on Foreign Investment in the United States (CFIUS) will continue to receive close attention. Since the passage of **the 2018 CFIUS reforms**, government focus on the national security implications of foreign investments has resulted in increased attention to transactions with foreign acquirors or investors, particularly with China. The COVID-19 pandemic has exposed serious supply chain vulnerabilities, resulting in a bipartisan consensus that more rigorous government review of foreign investment into critical technologies will be required.

Conclusion

Given the anticipated increase in regulations and enforcement activity over the next four years, organizations, particularly larger institutions, public companies, and those in industries already heavily regulated such as financial services, life sciences and health care, would do well to reassess risk exposures and the effectiveness of current compliance programs and protocols.

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