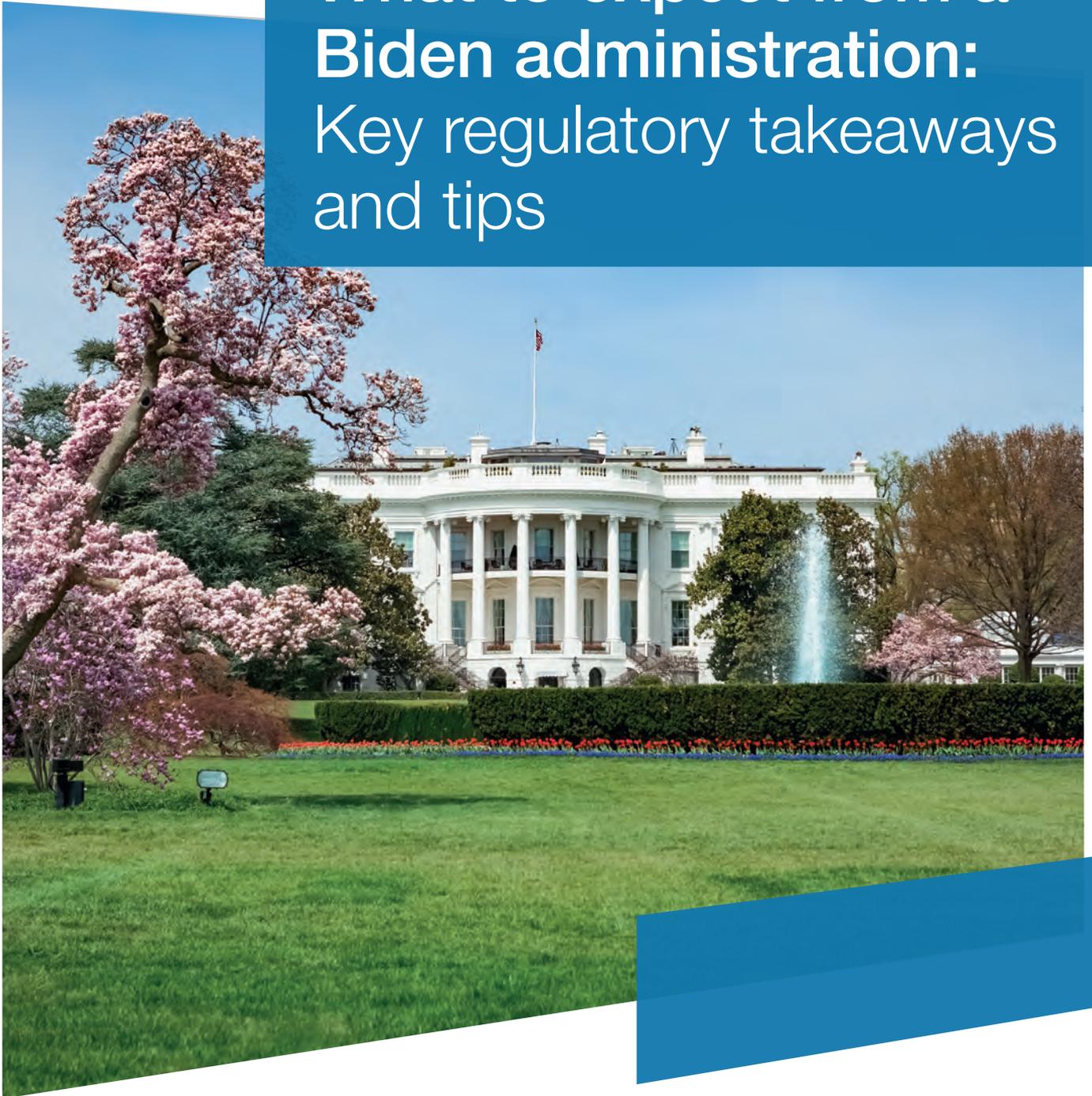


# What to expect from a Biden administration: Key regulatory takeaways and tips



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# Introduction

In the few short months since the inauguration, the Biden administration has demonstrated a desire to chart an aggressive course of industry regulation and enforcement, suggesting a potentially dramatic shift from the prior administration in how the federal government enforces our nation's business laws and regulations. Earlier this year, some of our U.S. regulatory and enforcement lawyers hosted a [webinar](#) to address the changes we expect will impact companies across a wide range of industries. In this report, we summarize the key points from our presentation and offer helpful tips for businesses to stay ahead of the regulatory enforcement curve.

In **antitrust enforcement**, for example, we expect the administration to nominate and appoint more individuals who believe antitrust law needs to be significantly overhauled, and enforcement recharged, to address what they see as over-consolidation in a number of industries, widespread abuses of market power, and dominant digital platforms that need to be reined in, if not broken up.

We also foresee a significant increase in **white collar criminal enforcement**, with the U.S. Justice Department led by Attorney General Merrick Garland focusing on prosecutions related to the misuse of COVID-19-related assistance programs, violations of the Foreign Corrupt Practices Act and the False Claims Act, and investigations and prosecutions of banks for Bank Secrecy Act violations and money laundering lapses.

Similarly, we anticipate vigorous enforcement by the **Securities and Exchange Commission (SEC)** and the **Commodity Futures Trading Commission (CFTC)**. We may see the SEC use its regulatory and enforcement authority to promote the administration's policies in the areas of climate change and ecological diversity, while we expect the CFTC will continue to bring high-profile enforcement actions, as it expands its reach to promote administration policies such as climate change.

The substantial policy differences between the Trump and Biden administrations in the areas of foreign affairs and international relations are also certain to result in a change in policies in the areas of **export controls, sanctions, national security, and foreign investment**. New sanctions have already been applied against Russia and Saudi Arabia since the inauguration, and the United States under President Biden may change the way it deals with both Cuba and Iran, including with respect to the application of sanctions. The administration may also use new export controls to pressure countries deemed to be out of step with U.S. policies, including possibly, against China.

We are also certain to see changes in **trade policy**, including **customs and tariffs**. Those changes are likely to include efforts intended to strengthen the nation's COVID-19 response, including by boosting the domestic production of essential medical equipment and supplies; using trade policy to promote the administration's goals of supporting labor; and promoting climate policy through bilateral and multilateral agreements.

We hope you find this report helpful, and we are happy to discuss with you how these and other expected changes in federal regulation and enforcement can affect your business.

# Antitrust

Ed Schwartz

Several factors are likely to fuel a significant increase in antitrust enforcement under the Biden administration, including: (1) a desire to reverse the decline in enforcement under the Trump administration, particularly by the Department of Justice; (2) growing concern by Congress, policymakers, and the public about increased concentration and what is perceived as market power in a number of industries, particularly digital markets; and (3) a growing belief by antitrust enforcers and policy makers that the historic antitrust doctrines are insufficient to protect competition in today's economy and markets.

## Takeaways

- Biden's nomination of Lina Khan to fill one of the two empty seats at the Federal Trade Commission confirms that, as expected, the administration will be putting in place new leadership at the FTC and Department of Justice (DOJ) Antitrust Division who subscribe to the views of the former antitrust enforcers and others who authored the report quoted above. (Indeed, one of the authors, Tim Wu, is himself at work in the White House as a special assistant to the President for technology and competition matters.) Expect them to seek to substantially boost antitrust enforcement, and to shift antitrust law and enforcement policies to promote new theories of harm to competition (for example, "hipster antitrust"), and lower bars to successful enforcement actions.
- Both the FTC and the DOJ Antitrust Division are very likely to increase enforcement efforts in merger, civil non-merger, and criminal enforcement. We also expect them to attempt to push the current boundaries of antitrust law while they pursue emerging and largely dormant theories of antitrust law.
- Efforts to amend the antitrust laws to strengthen enforcement could gain traction. Senate Antitrust Subcommittee Chair Amy Klobuchar has already introduced legislation that would lower the standard of proof in merger cases (to "an appreciable risk of materially lessening competition"); lower the standard of proof of exclusionary conduct in Section 2 cases; and implement other reforms.
- Regardless of the fate of efforts to legislate substantive changes to the antitrust laws, Congress is expected to significantly increase funding for the antitrust agencies, enabling them to increase staffing to support their enhanced enforcement efforts.
- Expect both the FTC and the DOJ Antitrust Division to make great efforts to boost merger enforcement, including by **investigating more transactions including through Second Requests**, and suing more often to stop deals including with respect to:
  - Mergers of firms in the **healthcare, digital platform, and agriculture industries**;
  - Mergers involving **close competitors**;
  - Mergers of firms in **highly concentrated industries**;
  - Acquisitions of "**nascent**" competitors thought to potentially reduce innovation (for example e.g., the FTC's and state AG's complaints against Facebook); and
  - The acquisition of "**maverick**" firms (firms that disrupt markets and larger, entrenched firms through low pricing and other competition).



- The agencies will likely aggressively pursue vertical theories of potential harm (foreclosing competition/refusals to deal and raising rivals costs), and look for opportunities to challenge vertical mergers such as a merger of a supplier and its customer or distributor (as took place in the 2010 merger of concert promoter LiveNation and Ticketmaster)
- The agencies are also likely to insist on stronger remedies as a condition of approving mergers.
- We expect antitrust enforcers to significantly increase enforcement of the antitrust laws against companies they believe are using their market or monopoly power to harm competition, and against parties to anticompetitive agreements. Expect them to:
  - Aggressively investigate and challenge **no-poach agreements** (including criminally) and **other agreements affecting labor markets**;
  - Aggressively investigate both potentially anticompetitive agreements and unilateral conduct in **health care, digital platforms and agriculture industries**, as well as in other **industries perceived to be heavily concentrated**;
  - Seek out **potential Section 2 (monopolization) cases**, and look for opportunities to shift the case law in its favor;
  - Attempt to reinvigorate largely dormant doctrines such as **predatory pricing** and **refusals to deal**; and
  - Closely scrutinize **standard-setting and agreements involving SEPs** (reversing policy of current DOJ).
- The DOJ will do what it can to boost lagging criminal antitrust enforcement trends. Expect the DOJ Antitrust Division to aggressively investigate potential cartel activity, potentially in coordination with non-U.S. enforcement agencies. The division may also work with the U.S. Congress to strengthen the antitrust leniency program under the Antitrust Criminal Penalty Enhancement and Reform Act.

## Tips

**Stay informed.** Changes are coming that could affect your business. Stay on top of those changes so your business can adapt if needed.

**Risk assessment.** Assess your company's risk in light of the expected changes. Consider an antitrust audit.

**Compliance.** Review and if needed, enhance your antitrust compliance program, and ensure it is effective and conforms to the agencies' latest guidance.

**M&A.** If your company is planning significant acquisitions this year, make sure you realistically assess antitrust risk and develop an effective merger clearance strategy early in the process.



# DOJ priorities - FCPA and fraud

Eric Sussman

After record-low levels of white collar investigations and prosecutions by the Trump DOJ, the Biden administration early on signaled its intent to take a more aggressive role in fraud and corruption prosecutions. The Biden administration has made a sharp break from the prior administration by emphasizing: 1) its intent to focus on foreign corruption; 2) prosecutions related to the misuse of COVID-19-related assistance programs – totaling \$5.3 trillion; and 3) collaboration with the Special Inspector General for Pandemic Recovery, which has opened up whistleblower programs and received and vetted new matters to refer to law enforcement.

## Takeaways

- Criminal fraud and antitrust prosecutions declined to an all-time low during the Trump administration – down roughly 26%-30%; while only 45% of “key positions” in the DOJ were filled as of November 2020.
- The Biden DOJ’s top priority will be prosecutions related to the misuse of COVID-19-related assistance programs (over \$5.3 trillion of relief funds to date). Specifically, DOJ will be investigating: 1) unemployment aid fraud; 2) CARES Act-related fraud; 3) price gouging and fraudulent PPE; 4) fraud in Paycheck Protection Program which funneled over \$525 billion through thousands of financial institutions; and 5) fraud and counterfeiting related to the COVID vaccine.
- A Special Inspector General for Pandemic Recovery (SIGPR) has actively engaged in numerous proactive investigations with a goal of referring these matters for prosecution by DOJ.
- Expect an increase in Foreign Corrupt Practices Act (FCPA) investigations. The economic downturn (due to COVID-19) created multiple incentives for fraud. Historically, Other FCPA case spikes occurred in 2001 and 2007-2009, correlating with recent recessions.
- Expect an increase in False Claims Act (FCA) enforcement relating to COVID-19 relief funds. Provider relief funds – **\$175 billion** from the Centers for Medicare & Medicaid Services **to hospitals and health care providers** during the height of the pandemic – provided a source of potential FCA cases in that providers must certify that they used the relief funds for COVID-19 related expenses.
- The Biden DOJ is also expected to increase investigations and prosecutions of banks for Bank Secrecy Act violations and money laundering lapses, particularly those involving China and Chinese entities, which have emerged as areas of anti-money laundering concern.



## Tips

### Businesses should:

- Tighten corporate compliance and training relating to third-party vendors in high-risk locations – especially China.
- Audit and review any COVID-19 related assistance your business receives. Ensure that there is a robust audit trail for all COVID-related government funds.
- Create and monitor whistleblower hotlines to ensure that your business is aware of potential fraud and misconduct before any government involvement.
- Proactively examine claims relating to whether hospital admissions were improperly upcoded to take advantage of the higher reimbursement associated with the treatment of COVID-19 cases.
- Immediately escalate SIGPR inquiries to your legal department because they could be a precursor to DOJ intervention.
- Create a response program for government subpoenas and search warrants. Educate executives and employees about their rights and responsibilities during a government investigation.

# Export controls and sanctions

Lizbeth Rodriguez Johnson & Michael J. Lowell

The U.S. government has enacted U.S. export controls and trade sanctions laws and regulations for reasons of U.S. national security and foreign policy. We expect these controls to continue to be an important part of U.S. policy. The Biden administration will likely expand multilateral cooperation and coordination with U.S. allies. President Biden has appointed experienced professionals, many of whom are veterans of the Obama administration, to positions of leadership in the U.S. Departments of Commerce, State, and Treasury. Industry should expect a recalibration of foreign policy under the Biden administration that includes the roll back of certain Trump administration policies, and an increased reliance on sanctions and exports controls to address new foreign policy and national security challenges.



## Takeaways

- To lead the U.S. State Department, Biden nominated Anthony Blinken, a Deputy Secretary of State during the Obama administration. To lead the U.S. Department of Treasury, President Biden nominated Janet Yellen, former chair of the Federal Reserve Board. Yellen and Blinken were confirmed by the U.S. Senate on Jan. 25 and Jan. 26. For Secretary of Commerce, President Biden nominated Rhode Island Governor Gina Raimondo, who was confirmed by the U.S. Senate on March 2. Under their leadership, it is expected that the Departments of Commerce, State, and Treasury will use trade sanctions and export controls to advance the Biden administration's foreign policy priorities, such as national security issues related to China, Russia, and Iran.
- The Export Control Reform (ECR), initiated during the Obama administration, resulted in the transition of items and technology from the jurisdiction of the U.S. State Department to the jurisdiction of the U.S. Commerce Department, Bureau of Industry and Security (BIS). As a result, items and technology previously controlled for export by the International Traffic in Arms Regulations (ITAR) are now subject to the Export Administration Regulations (EAR). During ECR, certain items and technology transitioned from the U.S. Munitions List (USML) to the Commerce Control List (CCL). While most USML Categories transitioned during the Obama administration, the rule effectuating the transition of USML Categories I (Firearms), II (Artillery), and III (Ammunition) was effective on March 9, 2020 with a transition end date still to be determined. Under revised USML Categories I, II, and III, certain firearms transitioned from the ITAR to the EAR. Before his election, Biden opposed the transition of firearms to the EAR (see <https://joebiden.com/gunsafety/>). Therefore, there is a possibility that further revisions will take place to export controls of firearms.

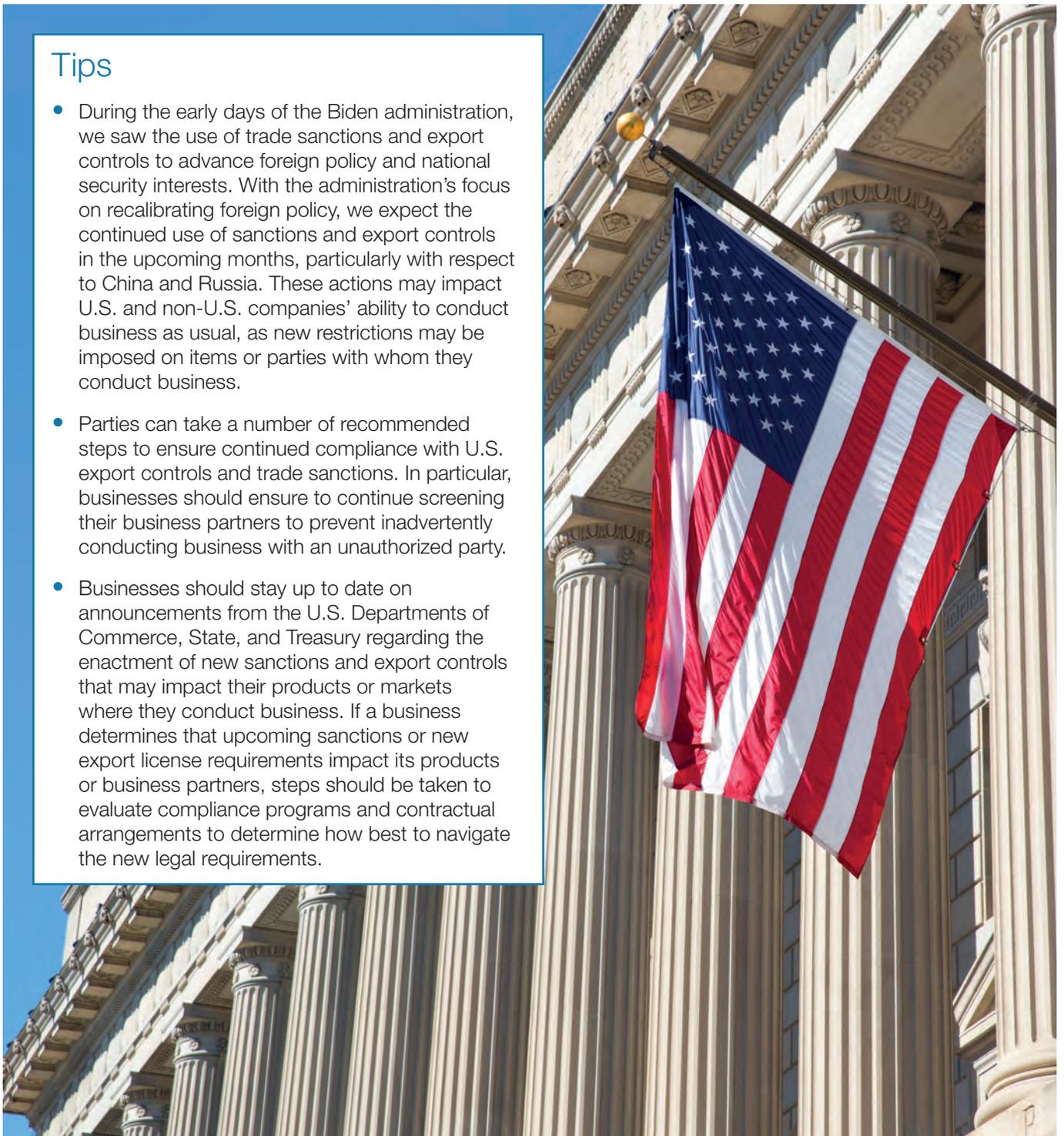


- The Export Control Reform Act (ECRA), originally introduced as a bipartisan legislation, was enacted into law in August 2018. A main objective of the ECRA is to identify and control the export of emerging and foundational technologies considered essential to the national security of the United States. Following a period of public comment and a multilateral approach, in June and October 2020, BIS published the final rules identifying the first technologies designated as “emerging technologies.” In August 2020, BIS published an advanced notice of proposed rulemaking seeking public comments as part of the agency’s effort to identify “foundational” technologies. We anticipate these efforts to continue under the Biden administration. Further, it is expected that the Biden administration will continue to use export controls to pressure countries that take acts that conflict with U.S. foreign policy and may impact U.S. national security. These efforts may include excluding parties from U.S. markets by, for example, listing them in the Entity List, or requiring export licenses. There is an expectation that the administration may put pressure on China for its actions on Hong Kong.
- Regarding trade sanctions, the main focus is currently on what steps the Biden administration will take with respect to Iran and Russia. During the presidential campaign, Biden signaled interest in revisiting the Joint Comprehensive Plan of Action (JCPOA) negotiated during the Obama administration. Currently, Iran is considered to be out of compliance with the JCPOA due to levels of uranium that exceed the limits established in the JCPOA. The U.S. will require Iran to get back in compliance with the terms of the JCPOA before agreeing to go back to the negotiating table. Iran, on the other hand, would like the U.S. to lift sanctions before re-engaging. While negotiations may happen in the future, we should not expect an immediate return of the U.S. to the JCPOA nor the lifting of sanctions. Also, there is no expected change to the non-nuclear related U.S. primary sanctions against Iran.
- The Biden administration has taken steps to sanction Russian and Saudi Arabian parties for acts that took place prior to President Biden’s inauguration. The U.S. State and Treasury Departments have imposed sanctions against Russian parties in response to the poisoning of Aleksey Navalny, the leader of the Russian political opposition. The Biden administration has also signaled its intent to respond to Russia’s action in relation with the Solar Winds cybersecurity breach, which may include the imposition of sanctions. With respect to Saudi Arabia, the Biden administration has imposed sanctions against Saudi Arabia Rapid Intervention Force and government officials over their roles in the killing of journalist Jamal Khashoggi’s in Istanbul in 2018.
- The Biden administration is also expected to take steps to pursue a new foreign policy plan with respect to Cuba, which may include re-adopting certain Obama-era policies that were rolled back by the Trump administration. It should be noted, however, that only Congress has the authority to lift the totality of the U.S. sanctions against Cuba. Finally, the expectation is that the current sanctions against Venezuela will remain in place during the Biden administration for the immediate future.



## Tips

- During the early days of the Biden administration, we saw the use of trade sanctions and export controls to advance foreign policy and national security interests. With the administration's focus on recalibrating foreign policy, we expect the continued use of sanctions and export controls in the upcoming months, particularly with respect to China and Russia. These actions may impact U.S. and non-U.S. companies' ability to conduct business as usual, as new restrictions may be imposed on items or parties with whom they conduct business.
- Parties can take a number of recommended steps to ensure continued compliance with U.S. export controls and trade sanctions. In particular, businesses should ensure to continue screening their business partners to prevent inadvertently conducting business with an unauthorized party.
- Businesses should stay up to date on announcements from the U.S. Departments of Commerce, State, and Treasury regarding the enactment of new sanctions and export controls that may impact their products or markets where they conduct business. If a business determines that upcoming sanctions or new export license requirements impact its products or business partners, steps should be taken to evaluate compliance programs and contractual arrangements to determine how best to navigate the new legal requirements.



# National security and foreign investment

Liza Craig & Sarah Wronsky

The Committee on Foreign Investment in the United States is an interagency government committee authorized to review certain transactions involving foreign investment in the U.S. and certain real estate transactions by foreign persons in order to determine the effect of those transactions on U.S. national security. When CFIUS determines that a transaction poses a security risk, it can impose mitigating conditions or block or unwind the transaction in order to resolve its concerns. As CFIUS is a nonpolitical body with an objective derived from U.S. statute, no material changes to CFIUS practice are expected as a result of the change in administration. However, CFIUS will remain a critical force within U.S. national security strategy, and any party contemplating a cross-border transaction involving or reaching a U.S. business should consider the potential CFIUS implications as early as possible.

## Takeaways

- The Committee on Foreign Investment in the United States (CFIUS) will continue to review and investigate a steady stream of transactions, albeit in a quieter manner than the former administration (it's expected this administration will comment less frequently on CFIUS activity than the previous one).
- All anticipated major changes to CFIUS regulations were fully implemented in 2020 (including broadened CFIUS jurisdiction, filing fees, new mandatory filing rules, and more). Minor changes to CFIUS regulations are possible, such as additions to the list of excepted foreign states and additions to the scope of critical infrastructure subject to CFIUS jurisdiction. Other U.S. agencies (such as the Department of Agriculture) might be added as permanent members to CFIUS to facilitate the use of that agency's expertise during the Committee's review of transactions.
- The national security threat identified by the U.S. government arising from Chinese access to certain U.S. businesses long predated the Trump administration and will continue to be a priority under the Biden administration. CFIUS accordingly will continue to particularly scrutinize Chinese investment in the United States. It will also continue to scrutinize all investors' ties to China, such as partnerships or relationships with Chinese state-owned entities.
- CFIUS will continue its effort to identify and potentially investigate "non-notified" transactions that were completed months or even years ago without obtaining clearance from the Committee. CFIUS has resources dedicated to identifying and investigating such transactions, and the Committee is particularly focused on existing Chinese interests in U.S. businesses that could present a risk to U.S. national security.



## Tips

- Parties contemplating cross-border transactions involving or reaching a U.S. business – such as the direct or indirect acquisition of a U.S. business or seed funding in a U.S. business – should plan for and address any potential CFIUS implications as early as possible in the transaction timeline.
- Any U.S. business that anticipates raising capital should determine now if it is a “TID U.S. Business” for CFIUS purposes. This analysis focuses on whether the U.S. business is engaged in critical technologies, critical infrastructure, or sensitive personal data and has great significance to foreign investors and within CFIUS practice.
- Foreign persons who previously acquired or invested in a U.S. business without notifying CFIUS should proactively prepare for potential CFIUS outreach and inquiry into the completed transaction. This is particularly true for Chinese investments in U.S. businesses, but such inquiries are not limited to investments originating from China.
- The use of a short-form declaration (as opposed to a formal written notice) is now available as a form of notice to CFIUS for all proposed transactions. However, while declarations afford an abbreviated review process (30 days) and help to avoid CFIUS filing fees, parties should understand that the use of declaration is not appropriate in every case and can result in the parties ultimately being required to file a formal written notice, causing longer periods of CFIUS review and investigation and potential delays to the completion of the transaction.

# Customs, tariffs, and trade policy

Manasi Venkatesh

The Biden administration's 2021 trade policy agenda articulates specific policies focused on tackling the COVID-19 pandemic and strengthening the economy. While Biden's policy agenda reflects a distinctly different approach to trade, we do not expect to see sudden, wholesale changes from the Trump administration's trade objectives. What we can expect, however, is a more multilateral rather than unilateral approach to developing trade policies and resolving trade disputes and renewed U.S. engagement with the World Trade Organization.

## Takeaways

The Biden administration's 2021 trade policy outlines a number of key priorities, which are outlined below.

- Biden's 2021 trade policy is in large part focused on tackling the COVID-19 pandemic and restoring the economy by strengthening domestic production of essential medical equipment and promoting long-term supply chain resiliency for equipment and supplies critical to protecting public health.
- He has indicated its plan to put workers at the center of its trade policy by including strong, enforceable labor standards into trade agreements.
- The administration's overarching goal of tackling climate change will be incorporated into its trade policy through its work with other countries, both bilaterally and multilaterally, towards environmental sustainability.

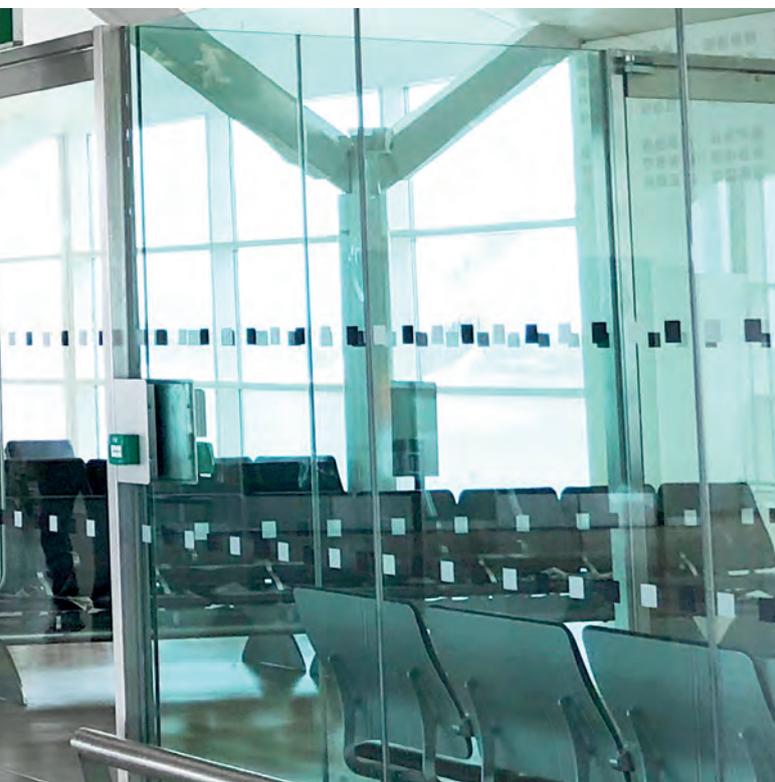




- Addressing China’s coercive and unfair economic trade practices will remain a focus of this administration, but will likely be addressed through a more comprehensive strategy that uses a variety of tools, not just tariffs, and involves coordination with friends and allies to pressure the Chinese government to end its unfair trade practices. The administration has made clear that one of its top priorities with respect to China will be to address the widespread human rights abuses of the Chinese government’s forced labor program that targets the Uyghurs/other religious minorities in the Xinjiang Uyghur Autonomous Region and elsewhere in the country.
- The new administration has indicated a strong desire to repair its partnerships and alliances and restore U.S. leadership around the world, including through re-engagement with leadership in international organizations like the World Trade Organization.
- Biden has expressed a strong commitment to trade enforcement, which is reflected by his appointment of Katherine Tai as the U.S. Trade Representative.

## Tips

- Businesses should continue to exercise diligence regarding classification, customs valuation, and country of origin, areas where the U.S. Customs and Border Protection (CBP) is expected to continue enforcement efforts.
- Given the numerous Executive Orders recently put in place that may impact global supply chains, businesses – particularly those involved in sectors considered critical to U.S. public health and national security – should evaluate their supply chains and consider potential diversification options, to the extent necessary.
- In light of statements by the Biden administration, U.S. importers are unlikely to see a widespread rollback of Section 301 tariffs on products of China and should continue evaluating all possible tariff mitigation options. Companies should also continue to monitor the outcome of Section 301 litigation pending in the Court of International Trade.
- U.S. importers should be on heightened alert regarding supply chain risks stemming from imports from the Xinjiang Uyghur Autonomous Region and should monitor Withhold Release Orders issued by CBP related to a number of products from this region.
- Given the administration’s focus on restoring relationships with its allies, companies should continue to track changes to the Section 232 process, particularly with respect to any exclusions applicable to products imported from countries that are U.S. allies.



# SEC and CFTC enforcement

Jennifer Achilles & Francisca Mok

All signs indicate that the SEC and CFTC under the Biden administration will be more aggressive in enforcement and regulation. This means more enforcement actions to protect investor interests, and the likelihood of new regulations, for instance, the adoption of more disclosure requirements and guidance.

## Takeaways

- The Biden administration's nomination of Gary Gensler to be chairman of the SEC signals bold enforcement and new regulation. Gensler, during his tenure as CFTC chairman, did not hesitate to take on the establishment notwithstanding his many years at a major investment bank and financial services company.
- There will be continued emphasis on addressing retail fraud and protecting investors (a focus during the prior administration), plus renewed emphasis on regulation of and enforcement actions against financial institutions and public companies.
- Additionally, both the SEC and CFTC are expected to react to and address cutting edge, headline-grabbing issues such as the aftermath of GameStop and other meme trading, digital assets and cryptocurrency, and climate change risk.
- The SEC may implement environmental, social, and governance (ESG) prescriptive disclosure requirements or at a minimum provide additional guidance in this area. Disclosure topics will likely include: (1) a company's carbon footprint, greenhouse gas emissions, and risks to the business related to environmental issues and threats; (2) diversity on board and in the workforce; and (3) objective criteria for labeling investments socially conscious/environmental. In March 2021, the SEC announced the creation of a climate and ESG task force in its Division of Enforcement.
- The CFTC will continue to focus on making a name for itself whether in high-profile enforcement actions – in such areas as manipulation, spoofing, bank secrecy, and areas where it is not traditionally the lead agency, like foreign bribery – or regulation. In March, the CFTC announced the creation of a Climate Risk Unit to assess the risks posed by climate change on futures and options markets.



## Tips

- Now more than ever, regulated entities should be well prepared for examinations and other interactions with regulators. Those events should be taken seriously, and clients and their counsel will help themselves by anticipating SEC and CFTC staff areas of inquiry and possible skepticism.
- Issuers and regulated entities would be well advised to invest in and enhance their compliance departments and programs now. Doing so will cost a small fraction of potential attorney's fees compared to disgorgement and penalties from a lengthy investigation or enforcement action.
- More ESG disclosure requirements are coming, whether prescriptive or because of competitive or market pressures. If your truthful disclosures might put you at a competitive disadvantage – whether on issues of climate change risk, your company's carbon footprint, or the diversity of your board or workforce – now is the time to make changes that will have a positive impact on your future narrative.
- If you make your living in a non-traditional area – like digital assets or cryptocurrency – stay tuned and be prepared to weigh in. The SEC and CFTC under the Biden administration will not be shy about bringing more oversight and restrictions to your playing field.

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