

THE NEW ADMINISTRATION: What Changes to White Collar Investigations and Prosecutions Should Businesses and Individuals Expect from the Biden Administration?

A new Administration and Congress bring new enforcement, regulatory, and legislative priorities. Murphy & McGonigle's team of experienced former federal prosecutors and regulatory enforcement attorneys share their predictions of the new administration's approach to financial crime enforcement and regulation in anti-bribery and corruption, anti-money laundering, securities and commodities fraud, healthcare fraud, the False Claims Act, and the FinTech sector.

Earlier this year, Murphy & McGonigle's White Collar Practice group led a CLE presentation featuring their predictions for the Biden Administration. The complete video and slides from the presentation can be viewed by clicking [here](#).

CFTC UPDATE

CFTC Chair

By unanimous vote of the CFTC commissioners, Commissioner Ross Benham will serve as acting Chair until a permanent Chair is named and confirmed.

Candidates for permanent Chair include acting Chair Benham; Current Commissioner Dan Berkovitz; and former North Dakota Senator Heidi Heitkamp. Commissioner Berkovitz served as the CFTC's General Counsel when Gensler was CFTC Chair. Gensler was the head of the Biden review team for financial services agencies. Acting Chair Benham initiated the CFTC's Climate-Related Market Risk Subcommittee, which would be in line with the Biden's administration's environmental priorities. Senator Heitkamp was briefly under consideration for the Secretary of Agriculture role in the previous administration. Commissioner Quintenz previously announced that he will be leaving the CFTC but will stay in his current role until a successor is appointed.

The new CFTC Chair will have the opportunity to fill a number of senior leadership roles across the agency, including its General Counsel, as well as new directors for the Enforcement Division; the newly created Division of Market Participants (previously named the Division of Swaps and Intermediary Oversight); and Office of Legislative and Intergovernmental Affairs. These offices will be led by experienced and established career employees until these roles are filled.

Enforcement

We expect that the trend of selecting an enforcement director with strong litigation credentials and federal prosecutorial experience is likely. Enforcement will continue to be aggressive and robust, with investigations and civil litigation to be further bolstered by the division's increasingly close relationship with the Department of Justice's Commodities Fraud Task Force within DOJ's Criminal Fraud section. The Foreign Corrupt Practices Act, Bank Secrecy Act and anti-money laundering requirements are areas likely to see more scrutiny

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and activity. Market manipulation will continue to be an area of focus, as well as increasing scrutiny of corporate compliance and market surveillance programs. To listen to the audio and view the slides for just this section, please click [here](#).

HEALTHCARE UPDATE

Health Care Fraud

We believe that under the Biden Administration, health care fraud will continue to be one of the most active sectors of the U.S. Department of Justice's overall fraud enforcement programs.

The DOJ, along with their partners, HHS-OIG, Medicaid Fraud Control Units, and other federal, state, and local law enforcement agencies will continue to aggressively pursue fraud and abuse by providers, especially in matters concerning "telefraud" and opioid schemes. False Claim Act, anti-kickback violations, and patient privacy issues will also be at the forefront of law enforcement priorities.

We anticipate that as a result of the COVID-19 pandemic, the DOJ and HHS will increase their focus on fraud and abuse in telehealth services, which have expanded greatly in response to the coronavirus crisis. Providers, individuals, and other entities who provide telehealth supplies and/or services are encouraged to review their current compliance policies and procedures to ensure that they will not trigger regulatory or law enforcement scrutiny.

The Biden DOJ and HHS will focus enforcement scrutiny on the healthcare and life sciences industry in the following key areas:

- Telemedicine and virtual care
- COVID-19 and Stimulus-Related Fraud and Misuse of Regulatory Waivers and billing irregularities
- Nursing Homes and Skilled Nursing Facilities will get enhanced civil and criminal efforts to hold nursing homes accountable for allegedly providing medically unnecessary or substandard care to their residents during the pandemic
- Data Privacy and HIPAA enforcement.

False Claims Act

There was a decline in recoveries under the False Claims Act and other statutes from the healthcare and life sciences industries under the Trump administration. This trend will almost certainly be reversed under President Biden. We expect enforcement by the DOJ and private whistleblowers involving healthcare companies and life sciences manufacturers to intensify over the several years; similarly, civil administrative enforcement actions conducted by the HHS are also likely to increase. To listen to the audio and view the slides for this section, please click [here](#).

SECURITIES FRAUD

SEC Leadership

Gary Gensler, former head of the CFTC, has been confirmed as the new head of the Securities & Exchange Commission ("SEC"). Mr. Gensler comes equipped to quickly ramp up SEC enforcement. Alex Oh, a former federal prosecutor from the U.S. Attorney's Office in Manhattan, was selected by Mr. Gensler as the new head of enforcement, but resigned after less than one week in the role due to personal reasons.

Increasing the Enforcement Division's ability to act, SEC staff are now re-empowered to institute formal orders of investigation without Commission approval which allows staff to quickly ramp up investigations. A Biden SEC could more frequently seek corporate penalties and higher penalty amounts while also taking a different approach to bad actor waivers.

Senator Schumer recently advanced Damian Williams, the current Co-Chief the Office's Securities & Commodities Fraud Task Force, as the US Attorney for the Southern District of New York. This confirms that White Collar investigations and prosecutions will be a top priority under the new administration.

We expect to see policies pursued in the Obama Administrations advanced in the Biden Administration. Big banks and public companies are expected to be in the crosshairs. For example, we expect an increase in accounting fraud prosecutions and investigations targeting institutional wrongdoing. We also expect less willingness for the SEC to accept “neither admit nor deny” settlements in cases of more egregious conduct. Further, expect more robust use of Monitors as part of settlements or Deferred Prosecution Agreements (DPAs) with the DOJ. We also see growth of investigations and prosecutions in the cannabis and crypto realms, as “hot” subject areas generate increased scrutiny. Finally, we expect the SEC to expand upon the use of its newly expanded disgorgement authority.

Insider Trading

We predict an expansive approach to insider trading prosecutions, and continued growth of “Outsider” Trading cases. “Outsider” Trading involves cases where confidential information is obtained and used for trading, but not involving traditional insiders. We expect additional growth and scrutiny of the Government’s efforts to criminally prosecute securities fraud under Title 18 (the criminal code) instead of Title 15 (the securities laws). The Government has taken the position that Title 15 and Title 18 securities fraud statutes have different elements. This broadens the type of insider trading prosecutions the Government can bring, and it empowers the DOJ to bring insider trading cases under Title 18 that the SEC is not empowered to bring under Title 15. We also expect to see further scrutiny on how executives are using 10b5-1 plans. We can expect SEC inquiry and criminal inquiry into executives’ use of these plans to sell stock. To listen to the audio and view the slides for this section, please click [here](#).

FINTECH

Although digital innovators are hopeful that the new administration will be more open the industry, it is still early days for the new administration. Gary Gensler, the new chair of the SEC, reportedly more open-minded to the digital asset industry, was just sworn in on April 17, 2021 and is still making senior appointments. As mentioned above, there is still not a nominee for the CFTC’s Chair – which is not unusual: Chris Giancarlo was not sworn in as CFTC Chair until August 2017.

Some “crypto friendly” developments continue. On April 23, 2021, the Office of the Comptroller of the Currency announced that it had granted preliminary conditional approval of Paxos’s application for a national trust company license. Paxos has operated as a New York state chartered trust company since 2015. On April 20, 2021, the U.S. House of Representatives passed the “Eliminate Barriers to Innovation Act of 2021,” H.R. 1602, which would create a working group composed of SEC and CFTC staffers along with industry participants and investor protection advocates. The working group would be charged with generating a report on legal and regulatory frameworks related to primary and secondary markets for digital assets, custodial standards and combatting fraud and manipulation.

Meanwhile, the SEC’s enforcement action against Ripple Labs filed under the previous administration, asserting that the digital currency that Ripple launched some eight years ago, XRP, is a “security” has faced some early headwinds. The court has ruled against some of the SEC’s discovery requests and for the requests of the defendants. In another development, a putative class of XRP holders have moved to intervene as third-party defendants. The intervenors argue that the SEC’s enforcement action has undermined the value of their XRP holdings, and, because XRP is so decentralized, the Ripple defendants do not represent their interests.

While it seems that the trend towards greater acceptance for digital assets by institutional investors will continue, both civil and criminal cases will also likely continue to be brought by both federal and state authorities where fraud and manipulation are suspected. To listen to the audio and view the slides for this section, please click [here](#).

ANTI-BRIBERY & CORRUPTION (“ABC”)

Practitioners must be increasingly attuned to the foreign bribery laws of other countries in which their clients transact business. The DOJ and the FCPA remain the driver of much of the ABC investigative landscape, but many more nations are becoming increasingly aggressive in their pursuit of corporate and individual malfeasance.

There are now 44 member nations in the OECD's anti-bribery convention, and the scope of potential investigative interest continues to increase exponentially. This presents the challenging specter of copycat investigations in which one resolution is reached, and almost immediately another nation's competent authority contacts the company using the evidence and information previously provided by the company. The onus is on counsel, internal and external, to anticipate all potential countries which may have an interest in company misconduct, and to do so as part of ongoing risk assessment and compliance and legal resourcing.

The new administration will almost certainly continue the vigorous DOJ enforcement regime over the FCPA. Any downturn ascribed to the prior administration or the pandemic is temporary and somewhat illusory. FCPA investigations are cyclical, and the number of active investigations with the DOJ has remained quite steady. The new administration is likely to reinforce DOJ's interest in pursuing foreign bribery investigations and with a renewed engagement on the world stage will increase collaboration and cooperation among investigative and enforcement authorities internationally. This may not necessarily result in a dramatic increase in US-based enforcement activity, but it will increase multilateral interest and continue the upward trajectory of ABC investigations on other parts of the world stage. To listen to the audio and view the slides for this section, please click [here](#).

ANTI-MONEY LAUNDERING

On January 1, 2021, the Anti-Money Laundering Act of 2020 (AML Act) was passed into law as part of the defense appropriation bill. The most significant AML law of the last 20 years, it provides substantial updates to the Bank Secrecy Act and other existing AML rules. Many of its significant provisions will be implemented through new regulations, giving financial institutions an opportunity to participate in the rulemaking process. Significant features of the AML Act include:

- **EXPANDED WHISTLEBLOWER INCENTIVES.** Provides whistleblower protections and a bounty of up to 30% of any enforcement recovery over \$1 million.
- **INCREASED ENFORCEMENT.** The new law augments the government's enforcement authority, giving regulators expanded civil and criminal powers to deter non-compliance. These include increased civil penalties, debarment for individuals from serving as directors at financial institutions, and increased criminal financial penalties.
- **FOCUS ON SHELL COMPANIES.** Requires FinCEN to create a national registry that details the beneficial ownership of shell companies.
- **VIRTUAL CURRENCIES.** Recognizing the growing importance and legitimacy of virtual currencies in the financial marketplace, as well as their potential use in money laundering, the AML Act amends the BSA to include virtual currencies within the BSA's scope and further, makes clear that virtual currency businesses qualify as money transmitting businesses under the BSA as well.
- **NEW APPROACH TO COMPLIANCE.** The AML Act endorses a risk-based approach to compliance, with an emphasis on the use of new AML technology by firms.
- **INFORMATION SHARING.** The AML Act also provides for expanded information sharing between and among financial institutions, regulators, and law enforcement. The AML Act requires the establishment of a pilot program to require financial institutions to share information with their overseas affiliates.
- **INCREASED SUBPOENA POWER.** The Act also expands the scope of foreign financial account records that may be subpoenaed by U.S. authorities for any financial institution that has an account in the U.S.

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