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White Collar, Government & Internal Investigations ADVISORY ■

FEBRUARY 9, 2021

New Administration, New Enforcement Priorities

by Meredith Kingsley, Jenny Kramer, Shifali Baliga, Gregg Fish, and Christopher Borchert

Big Tech

The focus on regulating and reining in so-called "big tech" companies has skyrocketed in the past few years, garnering bipartisan support in an otherwise polarized political climate. The Biden Administration has signaled an increased focus on issues related to technology companies, particularly in the context of marketplace dominance and workers' rights. In fact, the Biden Administration is reportedly considering adding an "antitrust czar" in the White House to elevate and coordinate competition policy across the federal government—a promising sign for those hoping for more robust antitrust enforcement. Some, on the other hand, are concerned that the Administration is considering potential candidates for the antitrust division and other deputy positions in the Department of Justice (DOJ) who have strong ties to big tech companies, which could portend a softer stance on competition issues, at least in the tech arena.

CARES Act

To date, there have been two primary bills that have provided for COVID 19 related stimulus funding for businesses. The first, the CARES Act, was signed into law on March 27, 2020 and established the Paycheck Protection Program (PPP) for qualifying small businesses. An additional round of funding for the PPP was passed through a smaller relief package known as the Coronavirus Response and Relief Supplemental Appropriations Act, which was signed into law on December 27, 2020.

Consistent with our April 2020 advisory on CARES Act oversight and enforcement, we continue to expect that the Biden Administration will prioritize enforcement actions related to the distribution and use of CARES Act and subsequent stimulus funds, likely via the False Claims Act (FCA) and related qui tam suits. This aligns with the expectation that the Biden Administration will continue the trend of the past several Administrations of actively pursuing FCA claims, particularly in the health care space.

The original CARES Act established a three-pronged enforcement and oversight scheme, including the establishment of: (1) the Office of the Special Inspector General for Pandemic Recovery; (2) the Congressional Oversight Commission; and (3) the Pandemic Response Accountability Committee. Democratic lawmakers, including Senator Elizabeth

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Warren, have called for increased oversight and even more robust enforcement mechanisms and have introduced the Coronavirus Oversight and Recovery Ethics (CORE) Act, which would establish additional requirements for oversight and accountability of COVID-19 relief funds. Significant provisions include: (1) additional protections for inspectors general; (2) subpoena authority for the Congressional Oversight Commission; (3) additional protections for whistleblowers and direct channels for whistleblowers to submit complaints to the government; and (4) a private right of action for any individual harmed by a recipient's misuse of funds. Although the bill has been stagnant for several months, the CORE Act or provisions of it could certainly be included in the next stimulus bill and will likely gain traction due to the Democrats' majority in the Senate. If passed, businesses that have received stimulus funds or intend to receive funds in the future, particularly larger companies, should expect not only greater scrutiny from the government, but increased attention from whistleblowers and other private litigants.

Civil Rights

The Biden Administration has stated that it is the responsibility of the whole government to affirmatively advance equity, civil rights, racial justice, and equal opportunity, and believes that the federal government should pursue a comprehensive approach to advancing equity for all.

The Biden Administration has begun to implement this policy through multiple Executive Orders and memoranda to executive agencies aimed at condemning and combating racism and various types of discrimination. Moving forward, we expect to see increased activity from the DOJ's Civil Rights Division, including revived pattern-and-practice investigations of law enforcement departments and associated consent decrees.

Environmental

President Biden wasted no time in signaling his intentions to depart from the Trump Administration's hands-off approach to environmental regulation and prosecutions, when there was a 70% and 50% decrease in criminal prosecutions under the Clean Water and Clean Air Acts, respectively. In fact, President Biden has pledged to direct the Environmental Protection Agency (EPA) and DOJ to pursue pollution cases to the fullest extent permitted by law and, when needed, seek additional legislation to hold corporate executives personally accountable.

On his first day in office, President Biden issued an Executive Order stating his Administration's plan to review at least 58 of the more than 100 environmental-regulation rollbacks from the Trump Administration. President Biden also froze all of President Trump's largely pro-business environmental rules that have not yet taken effect. In light of these measures, the EPA's acting general counsel, Melissa Hoffer, asked DOJ lawyers to pause pending cases involving challenges to Trump Administration rollbacks so that the incoming Administration can review the rules and issue new guidance.

> New Leadership: President Biden's pick to lead the EPA, Michael Regan, signifies a particular focus for the Administration: cracking down on the use and disposal of contaminants known as PFAS (per- and polyfluoroalkyl substances). Regan brings extensive experience overseeing PFAS regulation from his prior post as the head of the Department of Environmental Quality in North Carolina, a state with extensive PFAS activity. For more on Alston & Bird's PFAS expertise and offerings, please visit our web-based resource: PFAS Primer.

Financial Fraud / Securities

We expect an uptick in financial fraud and securities enforcement actions by the Securities and Exchange Commission (SEC) and DOJ, including in connection with reporting and fraud violations related to the COVID-19 pandemic and consistent with developments at the end of the Trump Administration.

In early December 2020, the SEC settled an action against The Cheesecake Factory Incorporated for reporting violations in what the SEC described as its first charging of "a public company for misleading investors about the financial effects of the pandemic." The SEC indicated at that time that the Enforcement Division "will continue to scrutinize COVID-related disclosures" and emphasized the importance of holding "issuers who make materially false or misleading statements regarding the pandemic's impact on their business and operations … accountable." There is no indication this approach will change under the Biden Administration. Companies in industries most affected by the pandemic such as retail, hospitality, and travel are likely to be the main focus of this scrutiny, including their end-of-year filings.

The SEC has also filed multiple COVID-19-related enforcement actions against companies and officers alleging violations of the antifraud provisions of the securities laws. The most recent of these is a December 2020 lawsuit against Decision Diagnostics Corp. and its CEO related to claims made about the development of a technology that could accurately detect COVID-19 through a quick blood test. The DOJ filed related criminal charges—securities fraud and making false statements—against the CEO. Such actions will likely remain a focus of the SEC and DOJ moving forward, as will the DOJ's broader focus on financial fraud in connection with pandemic-related relief, particularly if additional relief measures are passed. We expect to see more actions under the FCA, in addition to the charges of wire fraud, bank fraud, money laundering, and associated conspiracy charges that the DOJ has frequently used in prosecuting such conduct.

> New Leadership: President Biden's nominee to lead the SEC, Gary Gensler, is expected to turn the SEC's focus to pursuing high-profile cases involving Wall Street banks and large public companies (including higher fines), emphasizing individual accountability (especially for executives and upper management), and more aggressively pursuing violations related to insider trading and retaliation against whistleblowers. In addition, based on the Biden Administration's expressed priorities and actions to date, we may well see new rules promoting diversity in corporate governance, as well as disclosure requirements relating to workplace diversity and compensation, companies' impact on the environment, and the risks businesses may face due to climate change.

Foreign Corrupt Practices Act

While 2020 saw a decrease in the number of newly initiated Foreign Corrupt Practices Act (FCPA) enforcement actions relative to the prior year—a trend that was likely attributable in substantial part to the effects of the pandemic (including remote work and travel restrictions that made cross-border investigations more difficult and limited access to grand juries)—it nonetheless saw record penalties. FCPA investigations have been a growing focus over the last decade, including through increased and better-resourced involvement from the Federal Bureau of Investigation (FBI). *The Wall Street Journal* recently reported that, since 2010, the FBI's international corruption unit has nearly quadrupled in size to more than 50 staff members across four offices. We expect the Biden Administration to continue aggressive enforcement of the FCPA, although the pace and extent of new actions may depend on developments related to COVID-19, including when relevant travel restrictions are eased or lifted.

Health Care / FCA

We expect the Biden Administration to aggressively pursue FCA claims, especially in the health care space. The DOJ recently announced that it recovered more than $2.2 billion in settlements and judgments from FCA cases last year. Of that amount, over $1.8 billion stemmed from matters involving the health care industry, including drug and medical device manufacturers, managed-care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians. With Congress poised to pass more COVID-19-related relief this year, we expect a corresponding crackdown by the DOJ.

> New Leadership: President Biden's choice to lead the Department of Health and Human Services (HHS)—California's chief prosecutor, Attorney General Xavier Becerra—also suggests the Administration may ramp up health care fraud enforcement efforts. After all, HHS is responsible for administering Medicare and Medicaid, among other health-care-related programs, and the DOJ's health care fraud enforcement efforts restore funds to those programs. As an experienced prosecutor, Becerra will likely seek to leverage the DOJ's enforcement capabilities in an effort to replenish HHS's health-care-related programs.

Overall, early actions by the Biden Administration signal an enhanced enforcement environment in which there will be continued aggressive pursuit of fraud—including pandemic- and health-care-related fraud—and corruption cases, coupled with a renewed prioritization of enforcement actions in areas that were less of a focus under the prior Administration, including the environment and civil rights.

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If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

White Collar, Government & Internal Investigations

Edward T. Kang
202.239.3728
edward.kang@alston.com

R. Joseph Burby IV
404.881.7670
joey.burby@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

Brian D. Frey
202.239.3067
brian.frey@alston.com

Joanna C. Hendon
212.210.1244
joanna.hendon@alston.com

Michael R. Hoernlein
704.444.1041
michael.hoernlein@alston.com

Joseph H. Hunt
202.239.3278
404.881.7811
jody.hunt@alston.com

William H. Jordan
404.881.7850
202.756.3494
bill.jordan@alston.com

Meredith Jones Kingsley
404.881.4793
meredith.kingsley@alston.com

Jenny Kramer
212.210.9420
jenny.kramer@alston.com

Emily McGowan
704.444.1027
emily.mcgowan@alston.com

Paul N. Monnin
404.881.7394
paul.monnin@alston.com

Byung J. "BJay" Pak
404.881.7816
bjay.pak@alston.com

Jason D. Popp
404.881.4753
jason.popp@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Thomas G. Walker
704.444.1248
919.862.2212
thomas.walker@alston.com

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