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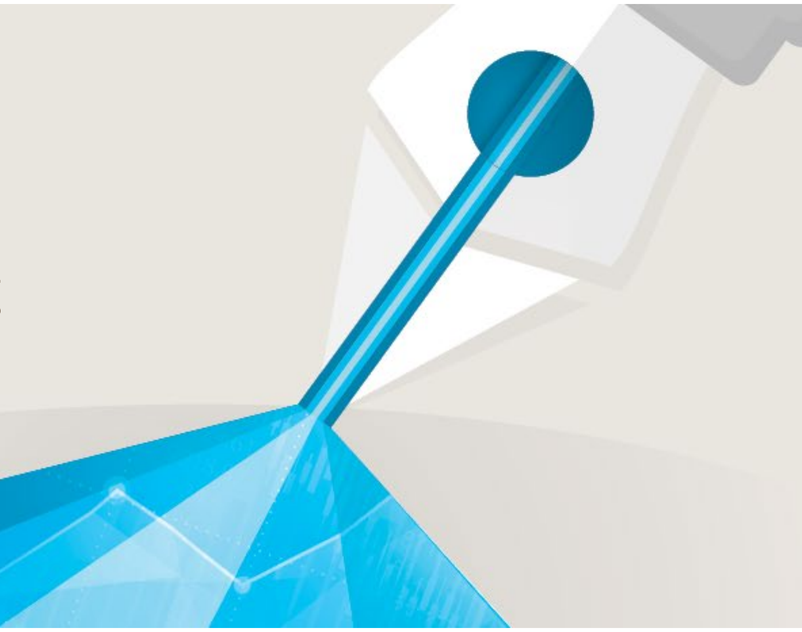
A SEA CHANGE

Biden Administration and What It Means for Banking and Capital Markets



SUMMARY

The Biden administration will bring new leadership, new policies and new priorities to the federal agencies charged with overseeing the financial services industry, which almost certainly will lead to a period of aggressive enforcement.

In this piece, we briefly describe five areas where we expect to see the DOJ and other regulators place significant focus, including market manipulation, the activities of Wall Street banks and private funds, AML, congressional oversight, and consumer protection.

01 Market Manipulation

With a new administration, new leadership at the DOJ, SEC, and CFTC, and continued uncertainty caused by the pandemic and the recent GameStop trading episode, we expect DOJ and other regulators will increasingly focus on market manipulation investigations.

The market volatility and uncertainty from the pandemic and political events in 2020/early 2021 created the opportunity for fraud; DOJ, the SEC, and CFTC will investigate insider trading, spoofing, and other manipulative activity aimed at profiting from the pandemic.

The GameStop incident also has drawn enormous scrutiny on the financial markets and the potential for manipulation—both by investors seeking to drive stocks higher and funds that may have large short sale positions. DOJ, the SEC, and CFTC already have announced investigations relating to the GameStop event, and we expect other, similar investigations in the coming years as app-based trading becomes an increasingly important market force.

And while the prosecution of anti-competitive market manipulation is nothing new (e.g., SSA Bonds, FX, Precious Metals), the confluence of remote trading during the pandemic and the Antitrust Division's clear signal that it is increasing its focus on the financial services sector leaves no doubt that aggressive antitrust enforcement of trading markets is around the bend.

02 SEC Shift in Focus – From Main Street to Wall Street

While changes in administration typically do not produce drastic changes in the SEC's enforcement program, we expect to see a change in priorities and areas of emphasis as new leadership takes over. The major shift will be towards more aggressive enforcement against Wall Street, and away from the focus on protecting "Main Street" investors under Former Chair Clayton.

- President Biden's nominee to be SEC Chair, former investment banker and CFTC Chair Gary Gensler, was once quoted saying, "Wall Street's interest is not always the same as the public's interest." At the CFTC, he was known as a tough regulator and a Wall Street adversary, and we expect that under his leadership the Commission will take a more aggressive stance on everything from the charges it brings to the remedies it seeks in enforcement actions. Generally speaking, this likely will mean more resources being directed at investigating potential misconduct by investment banks, broker-dealers and other regulated entities, rather than a focus on offering frauds and other types of violations affecting retail investors.

- More specifically, we anticipate renewed attention on private funds and the private equity industry. A June 2020 Risk Alert issued by the SEC exam staff described a number of compliance issues in this space, and SEC examiners and enforcement attorneys are expected to focus their efforts on these issues.

- We anticipate a focus on ESG, including rulemaking and investigations focused on the accuracy of ESG disclosures.

- Finally, while we expect a continued enforcement focus on blockchain and issuers of cryptocurrencies, Gensler's background and expertise in this area may offer a pathway toward greater regulatory certainty.

03 The Bank Secrecy Act and Anti-Money Laundering

On December 11, 2020, the U.S. Senate passed the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA") by wide margins. The NDAA is the most significant update to anti-money laundering law since the USA PATRIOT Act, and we expect it will require banks to significantly expand the resources they devote to complying with the law and responding to regulators' requests.

The NDAA introduces beneficial ownership reporting requirements with the aim to curtail the use of anonymous shell companies. Now, reporting companies are required to provide FinCEN with information about their beneficial owners. There are, however, several exceptions to the disclosure requirements that could apply to large institutions.

The legislation also expands the federal government's reach and strengthens tools used in anti-money laundering enforcement.

The NDAA, for example, bolsters the FinCEN's whistleblower program by raising the maximum award whistleblowers can receive and creating a private right of action for whistleblowers who faced retaliation. The U.S. Treasury Department will now have the authority to subpoena overseas banking records to any foreign bank that maintains a U.S. correspondent account, even if the records sought are unrelated to the U.S.-based account.

Additionally, the legislation enhances penalties for noncompliance, especially for egregious and repeat offenders. Repeat offenders, for example, can now be assessed an additional civil penalty for violations of the Bank Secrecy Act. The legislation also creates a ban on egregious violators from serving as a director for any U.S. financial institution for ten years.

04 Congressional Oversight

With a Democratic majority in both chambers this term, the 117th Congress is expected to launch aggressive investigations into the financial services industry, and banks in particular.

In the Senate, Committee on Banking, Housing and Urban Affairs Chairman Sen. Sherrod Brown (D-OH) has already indicated he will seek public hearings with Wall Street CEOs. The Committee on Finance and the Permanent Subcommittee on Investigations will also be active in scrutinizing banks.

In the House, Committee on Financial Services Chairwoman Maxine Waters (D-CA) has made a practice of investigating banks and calling high-profile CEO hearings. And Committee on Oversight and Reform Chairwoman Carolyn Maloney (D-NY) has focused on financial services issues for many years.

Congressional committees wield a significant amount of oversight power, able to issue subpoenas, hold public hearings, and compel witness testimony and document production in order to investigate issues within the private sector. Congressional investigations also differ from civil litigation in that they can result in the publication of sensitive company documents, while attorney-client and other privileges are not guaranteed. The information made public from hearings and investigation reports can have significant knock-on effects for related regulatory investigations and private litigation.

This term, we expect Congress to focus oversight on consumer finance, private equity, fintech, diversity, other "ESG" issues, and the financial scandals of the day. That will also include housing, credit, student loans, and other impacts of the pandemic.

05 Consumer Protection

In addition to what will likely be a dramatic uptick in enforcement activity by the CFPB, we expect a new unfair or deceptive acts or practices framework for preventing and remedying discrimination, and an increased focus on consumer privacy and cybersecurity.

During the Trump years, the CFPB was restrained, and enforcement activity focused primarily on small companies. In contrast, we expect Biden's CFPB to target large financial institutions and bring enforcement actions premised on aggressive theories of liability. Banks, lenders, and providers of consumer financial products will likely feel the effects of this shift.

A number of changes will affect banking and capital markets in the context of consumer protection. First, we expect the CFPB will revive the disparate impact doctrine and seek to bring ECOA enforcement actions where a company's facially neutral lending practices result in unfavorable loan terms for protected classes. Second, Biden's CFPB likely will pursue lending practices it deems "predatory" or "unfair" under the CFPA. Third, we envision the CFPB and other regulators will aggressively pursue enforcement actions where credit was provided to consumers affected by the COVID pandemic on terms that the CFPB deems to be "unfair" or "abusive," even if the terms were accurately disclosed. Lastly, we anticipate potentially greater collaboration between federal and state agencies (such as state attorney generals) on consumer protection issues.

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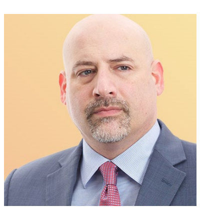

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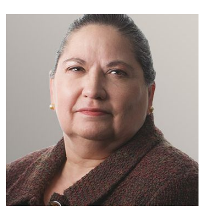

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