

A SEA CHANGE

Biden Administration Food & Beverage Industry

SUMMARY

The Biden administration brings new leadership and priorities which will impact the business operations of food & beverage and agricultural manufacturers and other companies along the food supply chain. In this piece, colleagues of King & Spalding's Government Matters practice group briefly describe the most relevant key areas to the food and agricultural sector where we expect to see the new administration place significant focus, including FDA regulatory priorities, the U.S. domestic supply chain, climate change policies, U.S.-EU (trade) relationships and imports into the U.S.

01 FDA Regulatory Priorities

In 2020, the U.S. Food and Drug Administration's ("FDA" or "agency") regulatory priorities were understandably focused on managing and responding to the effects of the global COVID-19 pandemic. In the food space, FDA's Center for Food Safety and Applied Nutrition ("CFSAN") issued a variety of guidance documents aimed at providing temporary labeling and other flexibility for the food industry, which was struggling with a disruption in supply chains, increased consumer demand for packaged food products, decreased consumer demand in the restaurant and food service space, a rapid rise in various food delivery platforms, and maintaining employee health and safety during an unprecedented time. Although FDA continued to investigate and respond to more typical food-related public health emergencies (e.g., foodborne illness outbreaks), the agency largely suspended routine food facility inspections and was more judicious with its enforcement actions. In the second half of 2021, as the pandemic becomes better controlled, industry should be prepared for President Biden's FDA to increase the pace of routine food facility inspections (starting with those establishments that produce or grow higher-risk food products) and can expect the agency to focus on the following food safety initiatives:

- A. **FSMA Implementation and Produce Safety.** FDA will continue its work in fully implementing and enforcing the bipartisan FDA Food Safety Modernization Act ("FSMA"). Key priority areas are expected to be produce safety and agricultural water quality

given that produce (e.g., leafy greens, bagged salad, peaches, etc.) have been responsible for some of the most significant foodborne illness outbreaks in recent years. FDA has been actively studying environmental factors that may impact the presence of foodborne pathogens in certain agricultural regions around the country and has been extensively sampling and testing leafy greens. Growers and others in the fresh produce supply chain should expect continued scrutiny of their food safety practices.

- B. Food Traceability and the New Era of Smarter Food Safety Blueprint.** Food traceability is the focus of a recently issued FSMA-mandated FDA proposed rule that would require the food industry to maintain additional traceability records for certain higher-risk foods, and is also a key element of FDA's "New Era of Smarter Food Safety" blueprint. This blueprint, which is a priority for FDA's current Deputy Commissioner for Food Policy and Response, builds on FSMA and focuses on the agency's goals to: (1) further enhance tech-enabled traceability; (2) utilize smarter tools and approaches for preventing and responding to foodborne illness outbreaks; (3)

better address new business models and retail modernization; and (4) encourage a more robust food safety culture throughout the supply chain.

- C. Heavy Metals in Food.** In response to a recent Congressional report on heavy metals in baby food, FDA recently announced that it is finalizing a comprehensive plan to further reduce levels of toxic heavy metals in such food, and that in the near term, the agency is committed to reviewing current action levels, developing additional action levels, targeted compliance and enforcement activities, and providing additional guidance to industry. Importantly, as part of its announcement, FDA recognized that heavy metals such as arsenic and lead are present in the environment and cannot be completely avoided in any food (whether packaged, fresh/raw produce, or made at home), and reassured parents that children are not at an immediate health risk from exposure to toxic elements in food at the levels found through the agency's testing. All companies in the food industry, however, will continue to face public, congressional, and regulatory pressure to help mitigate this challenging issue.

02 Strengthening the U.S. Domestic Supply Chain

On February 24, 2021, President Biden signed an [Executive Order](#) on America's Supply Chains that was directed at strengthening the U.S. domestic supply chain against the impact of "pandemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition." As a matter of policy, President Biden recognized that these threats "can reduce critical manufacturing capacity and the availability and integrity of critical and essential goods, products, and services," and accordingly that "close cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies."

Food and agricultural supply chains are one of the sectoral-specific areas of focus named in the Executive Order, which directs that by February 2022, the Secretary of Agriculture must prepare a sectoral-specific supply chain assessment on the Production of Agricultural Commodities and Food Production. Relatedly, the Secretary of Health and Human Services also has been charged with preparing an assessment of the Public Health and Biological Preparedness Industrial Base. Thus, the "reshoring" initiatives of the Trump administration have been reframed by the Biden Administration, which is now actively reviewing how U.S. food and agricultural production, bolstered by secure supply chains with allies of the United States, can and should be enhanced.

The federal reports related to food and agricultural supply chains that are scheduled for publication in February 2022, provide unique opportunities -- not previously available and that only will remain for the next few months -- to consult with the agencies to help them address (and to inform the federal agencies with respect to) the following topics required by the Executive Order: (1) steps to strengthen the resilience of U.S. supply chains; (2) reforms needed to make supply chain analyses and actions more effective, including regulatory, procedural, and institutional design changes; (3) the implementation of quadrennial supply chain reviews; (4) diplomatic, economic, security, informational, and other actions to engage allies; (5) the insulation of supply chain analysis and actions from conflicts of interest or corruption; (6) reforms to domestic and international trade rules and agreements that constrain supply chain resilience; (7) education and workforce reforms to strengthen the domestic supply chain base; (8) steps to ensure that the policies support small businesses, communities of color, poor areas, and all geographical regions of the United States; and (9) Federal incentives for investment in critical goods and materials.

Importantly, the findings in the reports ultimately will guide and be used to direct food and agricultural policy in the years that will follow.

The Biden Administration has climate change at the top of its priorities. Its new senior leadership is filled with climate change experts, many from the Obama Administration. Their comprehensive climate change agenda reaches broadly through almost every federal agency, promising dramatic shifts in the nation's agricultural, energy, transportation and facilities, and securities regulatory sectors. In this rapidly changing regulatory environment, food and beverage companies face a host of challenges, but will also find opportunities by "seeing around corners" to understand and capitalize on these major trends:

- A. The agriculture sector and its critical role in the food supply chain will see increased regulation to force reductions of methane and other emissions, to foster alternatives from livestock meat to lower carbon-intensity foods, and to encourage carbon capture technology, preservation of forests and other sustainable carbon-mitigating farming practices. Climate disruption from drought, hurricanes and flooding will require F&B companies to take a hard look at their supply chain engagement, hedge their risks and to have sophisticated incident response and contingency plans.
- B. The energy sector is transitioning to low- and zero-carbon and renewable energy solutions. F&B companies will want to audit their energy supply chain to ensure a future reliable supply, but also to seek investment opportunities in carbon capture and sequestration, supplying feedstocks for biofuels and generating low carbon fuel credits as an income source.
- C. In the transportation and facilities sectors, major vehicle manufacturers are changing their product mix toward electric vehicles with the associated need for a new network of recharging stations and other infrastructure. F&B companies will be under pressure to adopt environmental and carbon emission goals, reduce their direct and indirect emissions, and change their packaging and sourcing choices.
- D. The Securities and Exchange Commission will push for greater self-auditing and environmental, social and governance disclosures. F&B companies will need to audit and report on their environmental impacts and consider a range of possible mitigation measures.

The negotiations regarding the Free Trade Agreement "TTIP" (Transatlantic Trade and Investment Partnership) between the U.S. and the European Union ceased during the Trump Administration. These negotiations were supported by former Vice President Biden and are expected to resume under his new presidential administration. Although Free Trade Agreements between the U.S. and Europe may be negotiated in the near future, it is important to note that the situation in Europe has changed.

The United Kingdom left the European Union on January 31, 2020, and the transition period ended on December 31, 2020. As of January 1, 2021, the United Kingdom is no longer a Member of the EU. This means that manufacturers outside of the EU must either establish operational entities within the EU, or appoint third parties as responsible persons within the EU. U.S. manufacturers who previously used entities in the United Kingdom as their European hubs will now need to establish new entities or responsible persons in the EU.

As of January 1, 2021, the United Kingdom (except Northern Ireland to some extent) is no longer bound by EU laws. Even though the EU and the United Kingdom entered into a Free Trade Agreement that has been in effect since the beginning of 2021, Britain can adopt food and agriculture laws that differ from those of the EU. The British government has announced that it will allow food and agricultural products to be placed on the British market that do not meet EU requirements. Food and agricultural manufacturers in the U.S. may actually find it easier to enter the British market than the EU market.

If the U.S. enters into a Free Trade Agreement with the EU and/or the United Kingdom, and if such agreement is negotiated along the lines of TTIP and the Free Trade Agreement between Britain and the EU, U.S. manufacturers will likely face two separate markets in Europe: the EU market and the British market. These political changes and challenges will impact any food manufacturer or agricultural producer looking to enter these markets.

The U.S. food and beverage industry is increasingly facing pressure from high volumes of cheap, low-priced imports from foreign sources. In many cases, imports are priced below U.S. domestic producers' costs. These foreign countries are often enabling this low pricing through the provision of low-cost labor or through lack of enforcement of any applicable environmental, health, and safety standards. Foreign producers are also often benefiting from extensive government subsidies or are engaged in the dumping of their exports into the U.S. market.

Like the Trump Administration, the Biden Administration is expected to continue aggressive enforcement of U.S. trade laws to ensure that domestic producers and workers have an effective remedy in response to other countries cheating by dumping and subsidizing their exports into the U.S. market. The Biden Administration, however, is expected to increase the focus on trade-related tools and other policy instruments to ensure that U.S. consumption is not incentivizing low labor, environment, and food safety standards in foreign countries, particularly where such measures also undermine the competitiveness of the U.S. food and beverage industry. The Biden Administration's focus on supply chain resiliency and security in the food and agriculture sector mutually reinforces this emphasis on ensuring that imports are not used as a means

to cause injury or vulnerability to U.S. industry. The Biden Administration is also expected to face considerable pressure to address the significant threat to family farmers caused by integrated multinational ag interests that are leveraging subsidies, lax environmental standards, and cheap labor in foreign countries to increase foreign capacity targeting critical U.S. growing seasons.

Finally, the Biden Administration is also expected to use legal and regulatory tools to address other imports that are benefiting from cheating, such as through intellectual property or trade secret theft or other unfair practices. Such tools could result in the exclusion of imports from the U.S. market when they benefit from these practices.

Given the high political profile of trade issues and the importance of the rural and middle American agricultural and food and beverage manufacturing industries, the Biden Administration will be soliciting ways that it can use the available trade tools and other instruments to remedy those practices that are giving imports a competitive advantage and that are undermining the U.S. industry's ability to preserve (and potentially increase) its domestic operations and profitability.

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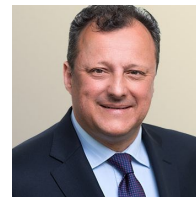
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