# Securities Regulation Daily Wrap Up, STRATEGIC PERSPECTIVES—A look ahead at the Biden Administration, (Nov. 9, 2020)

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President-elect Joe Biden's call to heal the country's political divisions and to pursue a policy agenda that sharply contrasts with that of the Trump Administration may encounter political headwinds depending on the still-undecided composition of the Senate.

President-elect Joe Biden, who has been projected by major news organizations to be the winner of the 2020 presidential election, has called on Americans to heal the country's bitter political divisions as he begins his presidential transition process. But Biden's centrist campaign strategy, once it is translated into administration policy, may still encounter political headwinds that will be influenced by multiple factors: (1) the composition of the Senate, which is likely to remain undecided until a dual run-off election in Georgia in January; (2) the exact size of the Democratic majority in the House, also still unclear; and (3) the prospect of legal challenges to future Biden Administration regulations in federal courts that President Trump and Senate Majority Leader Mitch McConnell (R-Ky) have tilted heavily in favor of a conservative judicial philosophy.

With respect to securities regulation, these political realities may place greater emphasis on what the Biden Administration can achieve by way of incremental regulatory policy choices rather than via major financial legislation, at least until the next mid-term elections offer voters another chance to shape Congress. Moreover, the Congressional Review Act would be an unrealistic approach to rolling back Trump-era regulations absent a Democratic White House, House, and Senate. Thus, depending on the outcome of yet undecided Senate races, it is unlikely that the Biden Administration could use the CRA in the aggressive manner as did the Trump Administration during its first two years in office, in which President Trump symbolically chose the SEC's resource extraction issuers regulation as the first regulation his administration targeted under the CRA.

The following discussion suggests how the Biden Administration may impact several key areas of securities regulation.

**The Biden Transition.** The Biden transition team has established a website (buildbackbetter.com) to house news about the team's progress as inauguration day approaches. The website states as priorities the continued fight against the COVID-19 pandemic, economic recovery, racial equity, and measures to address climate change.

With respect to economic recovery, the Biden team has stated that, as president, Biden will seek to reverse at least "some" of the Trump tax reform provisions that became law in 2017, especially regarding corporations. While the transition team statement is short on details, it is possible to envision consideration of adjustments to corporate tax rates, business deductions and exemptions, taxation of dividends, and tighter restrictions on corporate inversions in which U.S. companies re-incorporate overseas to lower their U.S. tax bills.

The transition team also has made racial equity a key goal. Racial equity in the securities regulation context could mean reintroduction of the several corporate diversity and inclusion bills that were passed by the House during the 116th Congress and which target racial equity on corporate boards and in executive management roles. One also could foresee that federal agency Offices of Minority and Women Inclusion (OMWIs), such as those at the SEC and the CFTC, could take on even greater significance. Moreover, it seems plausible that the Biden Administration would reverse measures taken recently by President Trump to ban certain types of racial trainings in employment settings, such as trainings that emphasize critical race theory.

Climate change is another key goal stated by the Biden transition team. Here, the team has stated that Biden intends to recommit the U.S. to the Paris Agreement, which President Trump abandoned early in his presidency. The Biden Administration's recommitment to fighting climate change at the macro level likely would presage greater emphasis on climate change by agencies such as the SEC, although the details of how specifically that would be achieved, possibly through new public company disclosures, remains somewhat unclear.

In terms of criminal justice, securities practitioners will recognize a familiar name on the Biden transition team Advisory Board in Sally Yates, former Deputy Attorney General of the U.S. Department of Justice, whom President Trump fired when she refused to enforce the Trump Administration's travel ban. Yates is perhaps best known in corporate law circles, however, for the "Yates memo" in which she outlined then-DOJ policy on individual accountability and corporate wrongdoing.

Finally, according to multiple media reports, President-elect Biden will lean on former CFTC Chairman Gary Gensler for advice on oversight of the financial industry. Gensler was one of the first agency heads to begin to implement the Dodd-Frank Act's derivatives reforms following the Great Recession. Gensler has recently been Professor of the Practice of Global Economics and Management at MIT Sloan School of Management, Co-Director of MIT's Fintech@CSAIL and Senior Advisor to the MIT Media Lab Digital Currency Initiative. In the latter post, regarding digital currencies, Gensler has at times suggested virtual currencies such as Ripple may have been investment contracts and, thus, securities, but his background in the subject matter also could suggest a potential opportunity for him to advise the Biden Administration more broadly on the appropriateness of existing federal regulations and guidance on digital assets.

The Biden Administration, however, may face legislative roadblocks to a broader reorganization of federal financial regulators unless Democrats are able to achieve control of the Senate. Even then, a razor-thin majority could make it necessary to scale back larger plans in order to ensure passage of financial legislation that is more incremental in scope. For example, a financial regulator revamp and consolidation on the scale proposed by Wolters Kluwer outside expert Joel Seligman in his new book "Misalignment: The New Financial Order and the Failure of Financial Regulation" (published by Wolters Kluwer Incorporated) might have to await a more favorable legislative environment after the next midterm elections or even a second Biden Administration. Such a large-scale reform may be difficult to sell when many current economic problems have arisen because of the COVID-19 pandemic rather than from specific financial system defects, although authors like Seligman contend that such systemic financial defects still exist and must be addressed.

**SEC personnel.** Public attention will inevitably turn to who may become chair of the SEC in the Biden Administration. Current Commissioner Allison Herren Lee, a Democrat, has demonstrated on two fronts the potential to shift SEC policy. She recently argued forcefully for more fulsome disclosures regarding climate change. Lee also has suggested how the SEC could pursue regulations with a greater mix of prescriptive and principles-based requirements, an issue she debated in an extended colloquy with Republican Commissioner Hester Peirce at the end of the Commission's open meeting to adopt further revisions to Regulation S-K in August 2020.

Former Commissioner Robert Jackson, Jr. could be another potential candidate. As commissioner, Jackson operated his own economic research shop that produced a number of speeches on key topics in which he grounded his views on his own data analysis. In an email to reporters upon his departure from the SEC, he included a quote from former Commissioner Kara Stein that suggested he may be contemplating a return to public service: "Rob has been a relentless advocate for making sure our modern markets remain the fairest and most efficient in the world. I hope our country will be fortunate enough to have him engage in public service again in the future," said Stein. Jackson is an Independent and if he was selected as chairman he would continue a recent trend of Independents heading the SEC (Clayton from the Trump Administration, and Mary Jo White and Mary Schapiro from the Obama Administration).

At least one media outlet has speculated that current SEC Chairman Jay Clayton, who recently sought the Trump Administration's blessing to change to a different job nearer to his New York City home, could leave the SEC significantly before the Biden Administration takes office. That could open the door to a brief, but

potentially consequential, chairwomanship by Peirce, who has advocated for more aggressive action to promote blockchain-related interests, such as cryptocurrency-based exchange-traded funds and to protect the early distribution of tokens from being deemed securities transactions. A federal law allows the president to designate an SEC chair, a power that President Obama used to designate Elisse Walter as SEC chairwoman for a brief period before White become chairwoman. President Trump recently demoted Federal Energy Regulatory Commission (FERC) Chairman Neil Chatterjee after Chatterjee took policy positions perceived to be contrary to the Trump Administration, thus showing an inclination by President Trump to make such agency personnel changes even in the waning days of his administration. However, the more typical scenario is that a lame duck agency head will remain in their position until the incoming administration is about to begin, as did Chairwoman White until just days before President Trump was inaugurated in January 2017.

**Enforcement.** The Biden Administration SEC could be expected to pursue more enforcement cases and to bring cases against some larger targets. That is not to say that the Clayton-era SEC did not have some big cases but, to some extent, the most recent SEC enforcement statistics were the product of the agency's program to encourage self-reported violations.

The Clayton SEC also adopted revisions to the whistleblower program that many see as potentially weakening the program. Nevertheless, the SEC recently awarded a record $114 million award to a single whistleblower. The Biden Administration could be expected to mull ways to strengthen the whistleblower program, which could come in the form of regulatory changes or legislation that would essentially reverse the Supreme Court's *Somers* opinion, holding that a whistleblower must report to the SEC in order to partake of the Dodd-Frank Act's anti-retaliatory provisions. The Biden Administration also could pursue bills previously introduced in Congress to establish a PCAOB whistleblower program.

Moreover, the recent popularity of SPACs could move the SEC in the future to take a closer look at some of these transactions. Chairman Clayton has already issued a warning about SPACs in the context of Regulation Best Interest and COVID-19 investments.

**ESG disclosures.** The Biden transition team has already flagged climate change as a key regulatory objective. One could expect the Biden Administration SEC to pursue additional ESG-related disclosures from public companies. There are potentially a range of regulatory options from traditional regulations, to executive orders, to legislation. With respect to legislation, bills in the 116th Congress would have required the SEC to establish ESG metrics (See, e.g., H.R. 4329).

**Retail investors, shareholders, proxies, and the Volcker rule.** The SEC adopted Final Regulation Best Interest in mid-2019 but the regulation only came into force in mid-2020 when firms were required to comply with its requirements. The Second Circuit rebuffed a legal challenge to the regulation, but a future SEC could still seek to establish a uniform fiduciary standard, as the Dodd-Frank Act also allows in addition to the approach taken by the Clayton SEC. The Biden Administration would have the option of pursuing such standard, tweaking Regulation Best Interest to enhance investor protections, or by aggressively enforcing violations of Regulation Best Interest.

The Clayton SEC also adopted final rules imposing new requirements on proxy advisers and raised the eligibility requirements for shareholder proposals. Many investor advocates view both as potentially harmful to investors, but they especially view the increased eligibility requirements for shareholder proposals as especially unfair because of the new tiered structure, which favors wealthier investors.

The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (S. 2155) heralded an era of looser restrictions on banks, including roll backs regarding the Volcker rule. Any changes to the Volcker rule regulations would require coordination by the SEC and multiple other federal financial regulators.

If the Biden Administration were to pursue regulatory changes to Trump-era regulation, it would have to justify those changes via new notice and comment rulemakings.

**SEC guidance.** Despite Chairman Clayton's efforts to reign-in SEC guidance by admonishing securities practitioners that staff guidance is legally non-binding, the SEC has continued to issue quite a lot of guidance.

One potential target for the Biden Administration could be the withdrawal of guidance issued by Clayton's predecessor, Acting Chairman Michael Piwowar. Piwowar had issued guidance (Piwowar statement; updated statement) that instructed public companies that the SEC would not recommend enforcement if they did not comply with the conflict minerals due diligence requirement contained in Form SD. Many companies have continued to report on their due diligence despite the guidance.

**COVID-19.** The SEC has issued extensive relief to companies and other filers regarding the COVID-19 pandemic. The SEC has pursued numerous COVID-19-related trading suspensions and Chairman Clayton has called on public companies to practice good hygiene by telling executives to refrain from stock trades when companies may be disclosing COVID-19 information. However, a recent rulemaking petition from the Chamber of Commerce calls for the SEC to use its exemptive authority to limit securities law suits over COVID-19. Conventional wisdom might suggest that the Biden Administration would be cool to such proposals.

The Biden Administration also could impact COVID-19 relief legislation by potentially seeking to further limit executive compensation at companies receiving aid. The Biden Administration also could seek to curb existing CARES Act provisions that allow the Treasury Secretary to waive limits on executive compensation. The impact of the Biden Administration would likely depend on whether another COVID-19 aid package was enacted before the Trump Administration leaves office or after Biden becomes president.

**Blockchain.** The presence of Gary Gensler among those advising President-elect Biden on financial oversight matters suggests that the incoming administration could reconsider federal policy regarding blockchain and digital assets. However, it seems unlikely that the Biden Administration would overturn one Trump-era executive order barring the trading of Venezuelan virtual currency. In March 2018, President Trump issued an executive order that states: "[a]ll transactions related to, provision of financing for, and other dealings in, by a United States person or within the United States, any digital currency, digital coin, or digital token, that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018, are prohibited as of the effective date of this order [the order states that it became effective on March 19, 2018]."

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