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## Skadden Discusses Closer Scrutiny of Corporate Conduct Under Biden

*By Gary DiBianco, Andrew M. Lawrence, Jessie K. Liu, Colleen P. Mahoney and Jocelyn E. Strauber* May 6, 2021

**Comment**

The Biden administration is widely expected to be tougher on corporate wrongdoing than its predecessor. Although there have not yet been significant changes to existing policies, key nominations to date and early enforcement initiatives signal close scrutiny of corporate conduct to come.

**Personnel.** Beyond those already confirmed to lead the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), only a handful of senior leaders at these agencies are in place.

The Senate confirmed Merrick Garland as attorney general on March 10, 2021, followed by the confirmations of Lisa Monaco and Vanita Gupta as deputy attorney general and associate attorney general, respectively, six weeks later.

President Biden has said he will nominate Kenneth Polite for assistant attorney general for the Criminal Division. The administration has formally nominated only two other leaders of litigating divisions: Kristen Clarke as assistant attorney general for the Civil Rights Division and Todd Kim as assistant attorney general for the Environment and Natural Resources Division. The Senate Judiciary Committee held hearings on both on April 14, 2021. So far, no U.S. attorneys have been nominated, although senators in a number of states have recommended candidates.

At the SEC, with the confirmation of Gary Gensler as chair, the five-member commission now has three Democratic and two Republican members. Democratic commissioners have historically supported more aggressive settlements and enforcement actions.

**Securities enforcement.** Allison Herren Lee made two announcements as acting SEC chair that signal increased enforcement activity. First, she said senior officers in the Division of Enforcement would have the power to issue formal orders of investigation, without prior approval by the full commission, reverting to a policy in place during the Obama administration. While the delegation does not change the division's overall powers or authority, in Acting Chair Lee's words, it "will enable investigative staff to act more swiftly to detect and stop ongoing frauds, preserve assets and protect vulnerable investors."

Second, Acting Chair Lee stated that the Enforcement Division will no longer recommend to the commission settlement offers waiving automatic disqualifications arising from certain violations or sanctions. Some securities laws violations, for example, disqualify the issuer from using the statutory safe harbor for forward-looking statements under SEC Rule 10b-5. Acting Chair Lee stated that the "return to the division's long-standing practice" is intended to "reinforce the critical separation" between the commission's enforcement process and its consideration of waiver requests.

**CARES Act and Paycheck Protection Program fraud.** Large federal programs create the opportunity for large-scale fraud, and COVID-19 relief has been no exception. The DOJ's Civil and Criminal Divisions, as well as the U.S. Attorneys' Offices, have devoted significant efforts since last year and throughout the first 100 days of the Biden administration to detecting and prosecuting such schemes. Attorney General Garland has emphasized that the prosecution of fraud schemes related to COVID-19 will continue to be a DOJ priority.

**Criminal tax enforcement.** On April 8, 2021, as Americans were preparing their personal returns, the DOJ advertised in a press release that criminal tax enforcement is "already in gear. ... Our criminal prosecutors are prepared for tax filing season too." The release highlighted several recent criminal tax enforcement matters, including those against "white-collar professionals and individuals." (See "Increased Funding Would Support IRS Drive To Audit More Partnerships and Wealthy Individuals.")

**Cryptocurrency and anti-money laundering.** On the regulatory front, the Biden administration continued to seek comments on a controversial rule originally proposed by former Treasury Secretary Steven Mnuchin that would require cryptocurrency exchanges to collect and report data on transfers above

specified thresholds that are not hosted by a bank, exchange or other institution subject to the Bank Secrecy Act. That comment period closed in late March 2021. (See “Regulating Blockchain.”)

Additionally, the new administration has begun implementing the Anti-Money Laundering Act of 2020 (AMLA). On April 1, 2021, the Financial Crimes Enforcement Network (FinCEN) — the Treasury Department bureau responsible for administering and enforcing the Bank Secrecy Act (BSA) — solicited input by May 5, 2021, on draft rules relating to the AMLA’s beneficial ownership provisions. FinCEN also is expected to propose rules implementing the BSA whistleblower provisions enacted as part of the AMLA. (See “Sanctions Remain Key; Implementation of Sweeping Anti-Money Laundering Legislation Begins.”)

*This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “Closer Scrutiny Expected of Corporate Conduct,” dated April 30, 2021.*

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