crowell moring

CLIENT ALERT

Biden’s First 100 Days: Developments to Date and What Lies Ahead

May.07.2021

A Crowell & Moring Overview of the Biden Administration’s First 100 Days in Office

After 100 days in office, President Joe Biden has made it clear that he is not afraid to go it alone to pursue policy to match his campaign rhetoric and promises. The first 100 days of the administration were marked by a significant number of executive orders, a historic economic stimulus package passed with only Democratic support in Congress, and sweeping proposals that – if enacted – could transform everyday life for a significant number of Americans.

To no surprise, President Biden came into office keenly focused on the COVID-19 pandemic, picking up where the Trump Administration left off in distributing and administering vaccines as they came to market, while simultaneously managing a surge in coronavirus cases that nearly matched early pandemic highs. As infection rates dropped and more Americans became protected, policy focus shifted to economic recovery, job creation, supply chain resiliency, and both academic and political debates around the future of American infrastructure and health care.

Out of the gate, President Biden vowed to get a handle on the pandemic, first adopting a broad mask mandate for the first 100 days, and then establishing a goal of 100 million vaccine shots administered in 100 days, which was exceeded by another 100 million doses. Following a swath of executive orders that went far beyond the pandemic, addressing issues such as racial equality, immigration, and more general coverage related health care, the President turned to the economy by laying out plans for another nearly $2 trillion in economic stimulus. Using the budget reconciliation process that required only Democratic votes in the Senate, the President signed into law on March 11 the American Rescue Plan Act of 2021, which included $1.9 trillion in new federal spending to provide stimulus checks for most Americans, renewed enhanced unemployment benefits, and featured provisions related to employment, tax, education, child benefits, and the COVID-19 pandemic.

After signing The American Rescue Plan into law, the President quickly turned his attention to an even larger spending package to address traditional infrastructure of road, bridges, and rail, as well as 21st Century infrastructure that includes broadband and clean drinking water systems. At a March 30 event in Pittsburgh, PA, President Biden announced his plan for creating jobs and growing the economy by investing more than $2 trillion in infrastructure, improving access to child care and educational opportunities, and reforming the corporate tax system. He later unveiled a second tranche of potential future spending focused on American families that would include an additional $1.8 trillion federal investment in education, child care, and paid family leave. The future of these packages, whether combined or pursued independently, remains unclear, though the President appears determined to bring them to fruition, even if through another party-line reconciliation vote.

Alongside his policy accomplishments, President Biden has also assembled a diverse cabinet that, according to the Brookings Institution, has outpaced the previous three presidents in appointments for women and nonwhite cabinet members and political appointees. Those diverse appointments include cabinet-level officials like Lloyd Austin, the first African American Defense

Secretary; Xavier Becerra, the first Latino Secretary of Health and Human Services; and Deb Haaland, the first Native American Secretary of the Interior.

To more thoroughly summarize actions taken by the Biden Administration, the team at Crowell & Moring has developed a series of high-level primers in the areas of:

- Antitrust
- Environment & Climate
- Government Contracts
- Health Care
- Infrastructure
- International Trade
- Labor & Employment
- National Security & Sanctions
- Tax
- Transportation
- White Collar & Regulatory Enforcement

We encourage you to explore those areas of greatest pertinence to your organization and to reach out to the relevant Crowell & Moring professionals with your questions on the issues that have been prioritized by the current administration.

Antitrust

By Alexis Gilman and Jeane Thomas

Leadership changes at the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) are still in process, but under interim leadership, antitrust enforcement activity is as high as, or higher than, ever. Meanwhile, several bills have been introduced in Congress that would make monumental changes to antitrust law in merger and conduct matters.

FTC

At the FTC, a permanent chair has not been named and the fifth Commissioner's seat remains open. Shortly after inauguration, Biden tapped Democratic Commissioner Rebecca Slaughter as Acting Chair of the FTC; nominated the other Democratic Commissioner, Rohit Chopra, to lead the Consumer Financial Protection Bureau (CFPB); and nominated Columbia Law School professor and critic of lax "big-tech" enforcement Lina Khan to the Commission. Khan has received a Senate Commerce Committee hearing and appears headed to confirmation, perhaps adding a third Democrat to the Commission soon (if Chopra's nomination to the CFPB continues its slow path), thus enabling a panel of three Democrats to push forward an aggressive enforcement agenda.

Already under Acting Chair Slaughter, the FTC has sued to block a vertical merger (Illumina/Grail) for the first time in over 40 years; caused two other mergers facing FTC objections to be abandoned pre-complaint (Tronoz/TiZir Titanium and Iron and Atrium Health Navicent/Houston Healthcare); indefinitely paused the grants of early termination of the Hart-Scott-Rodino Act waiting period; created a rulemaking group within the Office of General Counsel to pursue an unfair methods of competition rulemaking agenda; and announced an international working group of antitrust enforcers to revamp pharmaceutical merger enforcement. The first 100 days confirms that FTC is poised to be even more aggressive under President Biden than we saw the past four years, during which time the FTC was already very active in its antitrust enforcement.

DOJ Antitrust Division

As yet, no one has been nominated as Assistant Attorney General to lead the Antitrust Division. Leading candidates' names have been reported, with indications that the decision is being driven by which candidate has the least prior engagements with "big tech" companies and who is the best candidate to crack down on competition issues in digital markets.

Meanwhile, the Antitrust Division is working under interim leadership, which has continued the agency's increased focus on antitrust issues in labor markets, having recently filed *criminal* charges for alleged wage fixing and no-poach agreements in the health care industry; continued activity by the multi-agency Procurement Collusion Strike Force to tackle collusion in government contracting; and maintained the agency's typical levels of activity in criminal and merger enforcement.

Antitrust Legislation

Several bills to overhaul antitrust laws have been introduced and prospects appear high for at least some legislation to become law. On the Senate side, Antitrust Subcommittee Chair Amy Klobuchar has introduced a bill that is arguably the most sweeping antitrust legislation in a century. Among other things, the bill would lower the legal standard to challenge a merger in court, flip the burden of proof in certain merger cases to the merging parties, create a new standard for "exclusionary conduct" under Section 2 of the Sherman Act, and give the agencies more resources to bring enforcement actions.

On the House side, Antitrust Subcommittee Chair David Cicilline plans to introduce a series of bills by the end of the month in an attempt to prevent opposition lobbying from torpedoing a single, large piece of antitrust legislation. As part of this effort, Cicilline has introduced legislation, along with the ranking Republican member of the Subcommittee (Ken Buck), to prevent pharmaceutical "product hopping," which has raised concerns that the tactic hinders generic entry and enables branded products to maintain monopoly profits.

While Republicans have expressed a willingness to support some, but not all, of the Democrats' antitrust legislation efforts, the prospect for overhaul depends on how Senate and House members reconcile their respective bills and whether legislation goes so far that it triggers a filibuster. Moreover, the White House has not endorsed any legislation to date, so it is not clear what type of—and how extensive an—overhaul the administration supports.

Environment & Climate

By Byron Brown and Paul Freeman

Through a series of executive actions and policy announcements, the Biden Administration outlined a framework for combatting climate change, transforming the nation's electric generation and transportation sectors, and addressing environmental injustice. The actions included establishing a governmentwide Climate Change Task Force, appointing a domestic climate advisor (Gina McCarthy) and an international climate envoy (John Kerry) to coordinate the federal government's response, announcing a goal to transform the U.S. economy to net zero emissions by 2050, and rejoining the Paris climate accord.

In addition, under the Biden Administration, the Department of the Interior has halted new leases for oil and gas on federal lands and offshore waters while reviewing the department's permitting and leasing practices for fossil fuels and has announced plans to double energy production from offshore wind by the end of the decade.

The administration also announced plans to conserve at least 30% of federal lands and waters by 2030, to direct 40% of federal investments in climate and clean energy programs to disadvantaged communities, and to promote economic opportunity for communities that have historically been affected by environmental pollution.

The Biden administration is seeking to update federal procurement and workforce development policies to reflect the climate and environmental justice agenda, as well, including establishing a Civilian Climate Corps under the auspices of the Department of the Interior and the Department of Agriculture to promote career opportunities in conservation, mitigating the effects of climate change, and supporting biodiversity.

Government Contracts

By Robert Burton

During his first 100 days, President Biden issued a series of executive orders that will require changes to federal procurement regulations and contract clauses. Most recently, the President signed an Executive Order increasing the hourly minimum wage for certain government contractors (and subcontractors) to $15.00 per hour starting on January 30, 2022. Additional executive orders are expected which will result in the use of the federal acquisition system to address energy and environmental issues, labor and employment law compliance, and other priority social and economic policies.

Acquisition Priorities

The Biden Administration's current acquisition priorities are:

- COVID-19 Recovery
- Buy American Preference and Supply Chain Security
- Racial Equity and Small Business
- Climate Change and Clean Energy
- Cybersecurity
- Labor and Employment Law Compliance

Procurement Spending Increase

Federal procurement spending has increased steadily since 2015, but witnessed a dramatic growth in 2020. The steep increase in spending is certain to continue during the Biden Administration. Importantly, the budget caps, which were in place for the past 10 years, expired this year. Consequently, there is no ceiling for either defense or civilian agency appropriations. New federal contracting opportunities will be forthcoming from the trillions of dollars authorized and appropriated in the COVID-19 Relief and Omnibus Spending Bill and the American Rescue Plan Act. Additionally, the Biden Administration's Jobs Plan will afford contractors with a broad range of new infrastructure-related projects.

More Emphasis on Combating Fraud and Contract Oversight

With increased procurement spending will come more oversight, audits, and criminal and civil enforcement actions, similar to the increase in enforcement actions following the Obama economic relief programs. The Biden Administration has prioritized criminal and civil actions to combat COVID-19 fraud, including procurement-related fraud. As of March 26, the Department of Justice publicly charged 474 defendants with criminal offenses based on fraud schemes connected to the COVID-19 pandemic.

More Small Business Contracting Opportunities

In FY20, small businesses saw little growth in federal contracts, while large businesses enjoyed a 7% increase. For the past several years, the number of small business sole source and competitive contract awards have increased at about the same rate as the overall increase in government spending. But the Biden Administration is poised to significantly increase the number of small business set-aside competitions and sole source awards. Additionally, the Small Business Administration is focused on requiring prime contractors to increase subcontracting opportunities for small, disadvantaged businesses. In view of the administration's strong emphasis on assisting small businesses, large and mid-size companies should increase teaming arrangements and consider mentor-protégé and joint venture agreements with small businesses.

Preparing for New Opportunities and Increased Oversight

Current and prospective government contractors should ensure that their internal compliance programs are reviewed and updated. Also, contractors should have a plan for increasing their engagement and communications with federal agencies. Specifically, they should conduct capabilities briefings for operational and procurement decision-makers at the agencies in anticipation of the new contracting opportunities in 2021 and 2022.

Health Care

By Troy Barsky, Jodi Daniel, and Stacie Heller

Health care issues—especially the pandemic—have, unsurprisingly, dominated President Biden's term thus far. During his first 100 days, President Biden issued several health care-focused executive orders, as well as signed The American Rescue Plan Act (ARPA) into law—which, notably, includes $8.5 billion in funding for health care providers and funds for COVID-19 vaccine distribution and also included historic expansions of the Affordable Care Act (ACA)—and prioritized coordination of a national response to the pandemic.

While his Department of Health and Human Services (HHS) team is only partially complete (the President has yet to nominate a Food and Drug Administration (FDA) commissioner and his nominee for Centers for Medicare & Medicaid Services (CMS) Administrator remains held up in confirmation proceedings), his administration has also responded to pending litigation, has begun to implement ARPA, revoked state waivers, and issued new guidance and regulations. And as noted previously, on March

31 unveiled the sweeping American Jobs Plan which includes $18 billion for upgrading veterans' hospitals and clinics and $400 billion to expand access to home- or community-based care for older Americans and disabled people under Medicaid. Somewhat surprisingly, the American Jobs Plan does not include drug pricing reform or Medicare expansion measures. We highlight below what we expect will be among President Biden's health care priorities going forward.

Health Care Data

While HHS will continue to be focused on the COVID-19 response, we expect that it will continue to lead while deferring to state and local public health departments rather than creating a fully centralized approach. We have seen interest in supporting technology for all aspects of the COVID-19 response, but we do not anticipate the federal government having a heavy hand in these efforts for a number of reasons, including concerns related to federal government-developed technology and privacy.

Perhaps accelerated by the pandemic, treatment of health data will be a significant priority for the Biden Administration as it was for the Trump Administration. HHS released a proposed rule that would modify the Health Insurance Portability and Accountability Act (HIPAA) to enable greater data sharing and to relax privacy protections with the intention of supporting greater care coordination and improved patient access to their health data. We expect that HHS will consider comments and finalize changes in the next year, after a Director of the Office for Civil Rights is appointed. We also anticipate proposed changes to the Confidentiality of Substance Use Disorder Patient Records Regulations (Part 2 Regulations) under the CARES Act, which will relax these requirements to more closely align with HIPAA.

Additionally, new health data interoperability requirements have taken effect, flipping the paradigm of privacy protections under HIPAA by *requiring* certain health care organizations to share health data. In short, under the Office of the National Coordinator for Health Information Technology (ONC) interoperability and information blocking rule, health care providers, certain health IT developers, and health information networks can be fined for not sharing electronic health information or establishing practices that interfere with access to health data when such data is requested and the disclosure is legally permissible. Furthermore, the ONC interoperability and information blocking rule and the companion CMS interoperability rule, which imposes obligations on health plans, require easy, timely, electronic access to health information by the patient or plan member through internet-based applications. We anticipate that the HHS Office of Inspector General (OIG) will finalize enforcement regulations regarding the new "information blocking" rules this year. We also anticipate additional guidance from HHS to help health care entities understand these complicated rules and the intersection with HIPAA.

We anticipate continued expansion of telehealth and remote patient monitoring (RPM) services and reimbursement. Multiple proposed bills, both on federal and state levels, have been introduced to remove barriers from providers treating patients via telecommunications, including originating site requirements, type of modality, and limitations on establishing a physician-patient relationship without an in-person visit. We anticipate a significant increase and focus on using such technology for the provision of mental health services. We also anticipate additional reimbursement for RPM services, including with regard to the type of patient data that is collected using RPM and the type of services that can be automated.

Hospital price transparency rules, issued by the Trump Administration, took effect on January 1, and we have seen a push from Congress to encourage HHS enforcement. Likewise, the Transparency in Coverage rule, which imposes price transparency requirements on health plans, will be effective on January 1, 2022. We do not expect the Biden Administration to roll back these transparency rules.

FDA continues to be interested in advancing its policies for oversight of Software as a Medical Device (SaMD) and new technologies, such as AI. FDA recently issued new rules on SaMD, that build on prior guidance and provide more clarity. Last September FDA launched the Digital Health Center of Excellence within the Center for Devices and Radiological Health (CDRH), focused on digital health innovation, and this January it released its Artificial Intelligence/Machine (AI/ML) Learning Action Plan that describes its approach to increase oversight of AI/ML medical software. The FDA also seems interested in focusing on devices that may collect patient-generated health data. It is holding a workshop on this topic and we would anticipate some follow up by the FDA in this area.

Center for Medicaid & Medicare Services

Regarding oversight of the federal health programs, President Biden nominated Chiquita Brooks-LaSure to lead CMS in February, but her nomination continues to be held up in the Senate in protest over the Biden Administration's revocation of Medicaid waivers that would impact states like Texas. In spite of this confirmation delay we are still able to see the contours of the Biden Administration's CMS agenda.

We can expect significant efforts to expand and support the health care exchanges under the Biden Administration. In his first days in office President Biden directed CMS create a special enrollment period from February 15 to May 31, and the agency CMS has announced a significant expansion of funding for health care navigators to assist individuals in signing up for the health care exchanges. Moreover, as noted previously, ARPA includes historic expansions of the ACA, such as enhanced premium tax credits middle-income people who did not previously qualify (for 2021 and 2022); increases ACA premium tax credits for lower-income people who already qualify (for 2021 and 2022); and maximal subsidies to those who receive unemployment benefits (for 2021). ARPA also subsidizes COBRA continuation coverage for laid-off workers (from April 1 to September 30) and includes new incentives for states that have not yet expanded their Medicaid programs (for two years). We can expect to see a number of Medicaid changes under the Biden Administration. For example, CMS revoked state plan amendments that allow states to impose Medicaid work requirements. The Biden Administration has also announced that it will continue to apply pressure to those states that have resisted Medicaid expansion under the ACA.

While many parts of HHS, including the Centers for Disease Control and Prevention (CDC), National Institutes of Health (NIH), and FDA have significant roles to play in battling the pandemic, CMS under the Trump Administration issued a large number of Medicare and other programmatic waivers due to the health emergency. For the most part, the Biden Administration has kept those waivers in place, and will likely do so through 2021. Over the past year CMS issued several regulations and guidance documents covering Medicare reimbursement for COVID-19 testing and vaccination. We do not anticipate a noticeable departure from any of those prior policy determinations.

CMS has installed Liz Fowler, an Obama Administration veteran, as the permanent head of the Center for Medicare and Medicaid Innovation (CMMI). She has made public statements regarding the direction she foresees for the Center, including a reevaluation of a number of models that are being tested. Since the beginning of the Biden Administration we have seen the delay or cancellation of certain models, including the Geographic Direct Contracting Model and a delay in phase 2 of the Direct Contracting Model. At recent industry meetings, Fowler has indicated a pause in some of the Center's pilots will allow it to refocus on broader health transformation goals; however, "the innovation center will work with HHS Secretary Becerra and the Biden health team on issues they've identified as key priorities, and that includes prescription drug pricing."

Drug Pricing Reform

Related to drug pricing reform proposals, though absent from his infrastructure proposal, at his first address to a Joint Session of Congress last week, President Biden called on Congress to enact legislation to allow Medicare to negotiate prescription drug prices. "The money we save (from drug pricing reform) can go to strengthen the Affordable Care Act — expand Medicare coverage and benefits — without costing taxpayers one additional penny," he said. He further noted, "We've talked about it long enough — Democrats and Republicans. Let's get it done this year." While Democratic House leaders have taken up the mantle to pass legislation to lower prescription drug prices, it is unclear if Congress will be able to break the gridlock that has long stymied drug pricing reform efforts.

Infrastructure

By Scott Winkelman and Byron Brown

On March 31, President Biden unveiled a $2.3 trillion infrastructure plan intended to transition the country to net-zero emissions by 2050, address historic environmental injustice, and invest in child care, job training, and educational opportunities. Dubbed the American Jobs Plan, the proposal would be paid for by increasing the corporate tax rate to 28%, ending tax benefits for the fossil fuel industry, and providing tax credits to support onshoring jobs.

President Biden's plan includes a combination of direct federal spending over eight years as well as new tax credits, government procurement policies, and other financial incentives to attract public and private investment. Among other things, the American Jobs Plan proposes:

- $174 billion for development and deployment of electric vehicle infrastructure, including building 500,000 EV charging stations by 2030, replacing 50,000 diesel engines from the transit fleet, and electrifying 20 percent of school buses.
- $111 billion for water infrastructure, including $45 billion in the Drinking Water State Revolving Loan Fund and the Water Infrastructure Improvements for the Nation Act grants, and $56 billion in grants and low-cost loans for modernize drinking water, wastewater, and stormwater systems.
- $100 billion for high-speed broadband infrastructure with a goal of achieving 100% nationwide coverage.
- $213 billion to produce, preserve, and retrofit more than two million affordable and sustainable places to live.
- $100 billion to upgrade and build new public schools.
- $400 billion to expand access to affordable home- or community-based care for aging populations and people with disabilities.
- $40 billion for a new displaced workers program to support the transition to a clean economy.

Congressional Republicans have objected to cost of the Biden plan, including the inclusion of funding for social programs, and have offered a $600 billion alternative plan that focuses on funding for surface transportation, water infrastructure, and broadband.

International Trade

By Robert Holleyman and Shelley Su

Under the Biden Administration, trade policy has been re-cast to delve into issues not previously considered to fall under trade. In its 2021 Trade Policy Agenda, the U.S. Trade Representative (USTR) outlined its set of priorities, which included tackling the pandemic and restoring the economy, putting workers at the center of trade policy, putting the world on a track toward a sustainable environment and climate path, and advancing racial equity and supporting underserved communities. Trade practitioners are wondering what these policies will look like in practice. Combatting climate change with trade policy could mean the exploration of carbon import tariffs or border adjustment mechanisms. These non-traditional objectives were listed as priorities above the more traditional trade objectives of opening markets, reducing trade barriers, addressing China's unfair economic trade practices, and enforcement of trade rules.

Expect trade decisions to be carried out in a more measured, deliberate, and policy-driven way compared to the previous administration, but for decisions to take longer to make. The deliberative nature of how this administration has approached trade in its first 100 days suggests that there is no rush to take action on the range of trade issues on its plate. Its focus has instead been on pressing domestic and climate priorities. Trade officials have not indicated that they will prioritize negotiation of bilateral or multilateral trade agreements. Although U.S. Trade Representative Katherine Tai has expressed the importance of implementation and enforcement of the U.S.-Mexico-Canada Agreement and ensuring that China abides by the U.S.-China Phase One Trade Agreement agreed to in January 2020, the administration has not signaled that it intends to negotiate the next phase with China. This is also true for phase two of the U.S.-Japan Trade Agreement, and the trade negotiations initiated with the United Kingdom and Kenya under the Trump Administration. Any concerted effort to negotiate a comprehensive trade agreement would likely require obtaining Trade Promotion Authority from Congress, which expires on July 1. Thus far, the administration has not expressed interest in seeking its renewal before the authority lapses.

To date, many trade policies of the previous administration have remained in place 100 days into Biden's tenure. The Biden Administration is undergoing a whole-of-government review on China policy, and China trade policy may remain under review for some time before any concrete directional policy actions are taken. However, it is clear that tariffs are a tool that the administration intends to continue to utilize. The Section 301 tariffs imposed on China, worth $370 billion annually, remain in place. On the digital services tax issue, Tai has said that the United States remained committed to reaching an international consensus through the Organisation for Economic Co-operation and Development process, but that until a consensus was reached, USTR would maintain its option to impose tariffs under the Section 301 process. The administration has expressed commitment to working with allies, but it has also kept Section 232 national security steel and aluminum tariffs on European trading partners in an effort to use the tariffs as leverage to address the problem of global excess production capacity. In early March, the United States agreed to drop retaliatory tariffs on U.K. products in the Airbus/Boeing subsidies dispute for four months while the two countries worked together at the World Trade Organization to find a resolution.

Labor & Employment

By Tom Gies and Christine Hawes

In the first 100 days of the Biden Administration, we have already seen a number of changes and proposed shifts that will impact the labor and employment landscape. The developments include progress on proposed legislation, changes in key leadership at the federal employment agencies, and shifting enforcement priorities.

Proposed Legislation

The Equality Act (H.R. 5). On February 25, the House passed the Equality Act, which would amend federal law to codify the Supreme Court's 2020 decision in *Bostock v. Clayton County* and expressly prohibit discrimination on the basis of sexual orientation and gender identity. We expect this priority to stay high on the legislative agenda, but it faces opposition from key Republican senators in its current form.

The Paycheck Fairness Act (H.R. 7). This bill, passed by the House on April 15, would, among other things, prohibit employers from asking candidates about their salary history during the hiring process, require employers to demonstrate that pay disparities are job related and consistent with business necessity, and bar retaliation for discussing salary with coworkers. The business community is critical of the bill and we anticipate continued challenges in the Senate.

The Protecting the Right to Organize (PRO) Act (H.R. 842). If enacted, the PRO Act would, among other things, eliminate state right-to-work law protections, change union election rules, prohibit mandatory arbitration agreements containing class action waivers, and expand the definition of employees covered by the National Labor Relations Act. While the PRO Act passed the House on March 9, we anticipate that it will not get any Republican support and is unlikely to pass the Senate.

Agency Developments and Priorities

Department of Labor (DOL). President Biden's appointment of Boston Mayor Marty Walsh as Secretary of Labor was confirmed by the Senate on March 22. Secretary Walsh is the first former union leader to run the DOL in over four decades. The DOL has already delayed regulations issued under the Trump Administration regarding classification of independent contractors and application of the minimum wage for workers who earn tips, and it rescinded prior DOL guidance regarding joint employers. We also expect that the DOL will propose an increase to the minimum salary threshold for exempt employees.

Office of Federal Contract Compliance Programs (OFCCP). On January 21, President Biden appointed former Equal Employment Opportunity Commission (EEOC) Commissioner Jenny Yang as the new OFCCP director. We understand the OFCCP will be focusing its priorities on pay equity and gender discrimination issues in this administration. The OFCCP has revised its Corporate Scheduling Announcement List, removing all "focused reviews" on particular practices related to veterans, disabilities, and employment promotions, likely indicating a greater emphasis on full establishment audits. We also anticipate the OFCCP to require establishments to submit information, in a yet-unknown form, about their affirmative action plans each year.

Occupational Health and Safety Administration (OSHA). On January 21, President Biden issued an Executive Order that required OSHA to consider and, if appropriate, issue an Emergency Temporary Standard (ETS) related to COVID-19 by March 15. Quickly, OSHA issued guidance on its website that sets forth protective workplace COVID-19 safety recommendations. While an ETS still has not been issued, a draft has been finalized for review and approval, and we expect to see a formal ETS issued in the near future. In addition to focusing on the ETS, OSHA has indicated that it will increase enforcement efforts in "higher hazard" industries and has provided enforcement guidance about recordkeeping and reporting requirements related to COVID-19 illnesses and workplace mandatory vaccine programs.

National Labor Relations Board (NLRB). As is typical at the NLRB with changes in administrations, we expect that the pendulum on labor law and Board decisions will swing back to the left under the Biden presidency. President Biden named Peter Ohr, a longtime NLRB employee, as acting General Counsel. Ohr quickly revoked a dozen General Counsel memos from his predecessor, which provided guidance that aligned with the Trump Board's philosophy. Jennifer Abruzzo, a Communications Workers of America official, has been nominated to take over the General Counsel role. We expect that the Board will reverse precedent in a number of key areas, including expanding the definition of "protected concerted activity," allowing unions to organize small subsets of employees in a workplace as "micro units," and revising the structure for evaluating neutral employment policies.

Equal Employment Opportunity Commission. President Biden has designated two Commissioners to the EEOC, Charlotte Burrows as Chair and Jocelyn Samuels as Vice Chair, and named Gwendolyn Young Reams, a veteran EEOC lawyer, as the agency's acting general counsel. So far in this administration, the EEOC has concluded two conciliation and mediation pilot programs but will incorporate certain practices from those programs (such as virtual mediations). The EEOC has also withdrawn rules proposed under the Trump Administration regarding voluntary wellness programs under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act. We expect that the EEOC will shift focus toward reinstatement of collection of pay data as part of the EEO-1 form's "Component 2."

National Security & Sanctions

By Michael Atkinson and Caroline Brown

We expect the overall direction of national security investigations under the Biden Administration to remain relatively unchanged from the prior administration, with a continuation of the "all tools" approach, but re-emphasizing some old tools and introducing new ones. For instance, we expect to see a re-emphasis on cross-border investigations in national security matters, which will coincide with the global proliferation of whistleblower laws and give rise to new challenges for corporations managing the cross-border flow of discovery in the midst of conflicting and changing data protection, privacy, and privilege rules. The administration's focus on strengthening critical supply chains will likely result in a need for new internal risk assessments as shifting supply chains lead to reliance on new vendors, new third-party intermediaries, and new businesses in new countries.

Recent enforcement actions coupled with the continued tough stance that the Biden Administration is taking towards China signal that the DOJ's China Initiative will likely remain a strategic priority. Announced in 2018, the China Initiative, led by the DOJ's National Security Division, seeks to counter national security threats presented by the government of China by investigating and prosecuting economic espionage, trade secret theft, hacking, and other economic crimes. The China Initiative also focuses on protecting the nation's critical infrastructure against external threats through foreign direct investment and supply chain compromises, as well as combatting covert efforts to influence the American public and policymakers without proper transparency. These investigations and prosecutions will run the gamut of cyber-enabled threats, insider threats from non-traditional collectors of information, particularly researchers and scientists in labs, universities, and the U.S. private sector, failures to disclose financial conflicts of interest by federally-funded researchers, and scrutinizing visiting Chinese scholars for suspected ties to the People's Liberation Army. Increasingly, federally-funded organizations will be expected to conduct their own due diligence, and continuously evaluate potential threats, to determine whether foreign resources or other potential conflicts of interest have been properly vetted, monitored, and disclosed.

As was the case with the previous administration, economic sanctions will continue to remain a primary national security tool used by the Biden Administration. Venezuela and North Korea will continue to be subject to sanctions but the focus will likely be on Russia and China. Last month, the administration issued a sweeping series of additional sanctions on Russia, marking the first major Russia-related sanctions development of the Biden Administration and the most material such U.S. action in several years. The actions were spearheaded by President Biden's issuance of Executive Order 14024 that grants the Department of Treasury a wide-ranging set of new designation authorities, including to designate persons "operating in" the "technology" and "defense and related material" sectors of the Russian economy, and the concurrent designation of dozens of individuals and entities in connection with election interference, the SolarWinds cyber intrusion, and the occupation of Crimea.

Similarly, the Biden administration has signaled that it will continue to take a tough stance on human rights abuses in China, and we can expect the Xinjiang and Hong Kong sanctions to remain in place. Similarly, while there may be forthcoming guidance to further tailor the Chinese Communist Military Companies prohibitions, that Executive Order will likely remain intact.

The next year is also likely to see an uptick in sanctions enforcement actions, as Treasury's Office of Foreign Assets Controls (OFAC) continues to emphasize the importance of its 2019 Sanctions Compliance Guidance and related guidance regarding ransomware, the use of high-valued art to evade sanctions, and sufficient screening mechanisms. Accordingly, businesses should routinely evaluate the effectiveness of their sanctions compliance programs, including updating risk assessments, conducting testing and audits of their programs, and evaluating prevention and detection policies.

Tax

By Starling Marshall and Carina Federico

The Biden Administration has made several recent proposals to fulfill its campaign promise to make corporations and high net worth individuals pay their fair share of tax.

First, President Biden's American Jobs Plan proposes several changes in the tax code in order to pay for the proposal. The Biden Administration proposes to increase the corporate tax rate to 28%, rolling back from of the Trump Administration tax cuts. The American Jobs Plan also includes changes such as a 15% minimum tax on the "book income" of large corporations and the elimination of the tax preferences for the fossil fuel industry.

Several of the proposals in the American Jobs Plan are aimed at reforming the international tax regime. The plan would increase the tax rate on global intangible low-taxed income (GILTI) to 21%, require GILTI to be calculated on a country-by-country basis, and eliminate the GILTI exception for the first 10% return on certain foreign assets. The American Jobs Plan also seeks global agreement on a corporate minimum tax. Other proposals to seek to create obstacles for U.S. corporations to invert to avoid taxes, eliminate tax deductions for offshoring jobs and provide tax credits to support onshoring jobs, and eliminate the tax incentives for foreign derived intangible income (FDII) and provide more effective incentives for research and development investment.

Second, the Biden Administration also recently announced the American Families Plan, which is a $1.8 trillion proposal that includes initiatives to provide access to community college, preschool, affordable child care, and paid leave for all Americans. The Biden Administration plans to pay for these initiatives with increased taxes for wealthy individuals. The American Families Plan would increase the top income tax bracket from 37% to 39.6% and raise taxes on capital gains. The plan also proposes to eliminate step-up basis on inherited property, which currently provides that if you inherit a capital asset that has increased in value when the person who died owned it, the asset's basis is increased to the property's fair market value at the date of the previous owner's death.

Lastly, in addition to these announced policy changes, the Biden Administration has requested over $80 billion over the next decade in proposed funding for the Internal Revenue Service (IRS) to support increased tax enforcement focused on high-earning individuals and corporations. The IRS has also recently announced new offices and programs to boost enforcement, including a new Office of Promoter Investigations aimed at enforcement against promoters of abusive tax schemes, "Operation Hidden Treasure" focused on cryptocurrency and virtual currency tracking, the "Wealth Squad" targeted towards high net worth individuals and their related entities, and the creation of a new Fraud Enforcement Office.

Transportation

By Scott Winkelman and Matt Cohen

In his first 100 days, President Biden made clear, through word and deed, that transportation will be a key focal point of the new administration. As the President stated upon nominating Pete Buttigieg to be Secretary of Transportation, "jobs, infrastructure, equity, and climate all come together at the DOT, the site of some of our most ambitious plans to build back better." Transportation projects form the backbone of President Biden's $2.3 trillion infrastructure proposal—initiatives such as electrifying vehicles and school buses, repairing roads and bridges, and providing communities, particularly those of color, with increased access to bus and rail service and other additional funding. The new administration will also seek to further the development of autonomous technologies. The next 100 days promises to be busy, and C&M's Transportation practice is monitoring developments intently, with particular focus on:

Electric Vehicles (EV)

- In an Executive Order signed on January 27 addressing climate change, President Biden directed the federal government to devise a plan for converting federal, state, local, and Tribal government vehicle fleets, including Postal Service vehicles, to "clean and zero-emission vehicles." Such an initiative would provide a significant boost to the nascent EV industry.
- With respect to EV safety, the National Highway Traffic Safety Administration (NHTSA) has already announced a lithium-ion battery safety initiative to address safety risks related to batteries in EVs and plug-in hybrid electric vehicles (PHEVs). The initiative has four elements: (1) data collection; (2) research; (3) enforcement; and (4) the development of safety standards. Notably, although NHTSA has yet to promulgate specific battery safety rules, it plans to develop a proposal to incorporate phases 1 and 2 of Global Technical Regulation (GTR) No. 20 for Electric Vehicle Safety into the Federal Motor Vehicle Safety Standards, which contain requirements for in-use operational safety, post-crash electrical safety, and battery fire safety.
- President Biden's recently introduced infrastructure proposal would provide billions of dollars in rebates, subsidies, and other incentives to Americans who purchase EVs. It also proposes to add 500,000 new EV charging stations across the country by 2030, and orders a review of the supply chain that affects EV in order to increase self-sufficiency for certain materials.

Autonomous Vehicles (AV)

- DOT recently released its Regulatory and Deregulatory Agenda, which is its semiannual summary of all current and projected rulemakings, reviews of existing regulations, and completed actions of the Department. For AV, NHTSA is working on reducing regulatory barriers to technology innovation, including the integration of automated vehicles, while continuing to focus on safety. Automated vehicles are expected to increase safety by reducing the likelihood of human error when driving, which today accounts for the overwhelming majority of crashes on our nation's roadways.

Aviation

- On March 13, President Biden unveiled the American Jobs Plan, a $2 trillion investment to modernize and provide U.S. infrastructure. Among other features, the plan calls on Congress to invest $25 billion to upgrade airports, including funding for the Airport Improvement Program (AIP), Federal Aviation Administration assets, and a new program to support terminal renovations. The increase in AIP funding is consistent with President Biden's infrastructure plan that touts doubling the AIP, which provides grants to public airport agencies and, in some cases, the owners and entities for the planning and development of certain public use airports.

White Collar & Regulatory Enforcement

By Kelly Currie and Tiffany Wynn

The Senate confirmations of Attorney General Merrick Garland and his top deputies have come relatively late in the Biden Administration's first 100 days. Garland was confirmed as the 86th Attorney General by a vote of 70-30 on March 10, 48 days after the inauguration. But 40 more days passed until the Senate confirmed Lisa Monaco as the Deputy Attorney General, the No. 2 role at the DOJ, on April 20 by a 98-2 vote. The following day, the Senate confirmed Vanita Gupta by a 51-49 vote as the Associate Attorney General, filling the Department's No. 3 position. Both Monaco and Gupta held top DOJ posts in the Obama Administration—Monaco as head of the National Security Division and Gupta as head of the Civil Rights Division—so both will hit the ground running in their new roles.

Nevertheless, several other top posts are still held by officials in an acting capacity. The President has sent nominations to the Senate for the assistant attorneys general to head most of the Department's divisions and key posts:

- Criminal Division: Kenneth Polite, a former U.S. Attorney in New Orleans and Assistant United States Attorney for the Southern District of New York under President Obama
- Civil Division: Javier Guzman, most recently deputy general counsel at Harvard and a former DOJ attorney
- Office of Legal Counsel (OLC): Christopher Schroeder, who held the acting head and deputy role at OLC under President Clinton
- Civil Rights Division: Kristin Clarke, the president of the Lawyers' Committee for Civil Rights Under Law and a former head of the New York Attorney General's Civil Rights Bureau

- Environment and Natural Resources Division: Todd Kim, currently a deputy general counsel at the Department of Energy and previously an appellate attorney at DOJ's Environment and Natural Resources Division
- Office of Legislative Affairs: Helaine Greenfeld, who held numerous senior DOJ positions and served as Chief Counsel for Senator Mazie Hirono, and chief nominations counsel for Senator Patrick Leahy

In addition, Anne Milgram, a former New Jersey attorney general and federal and state prosecutor, has been nominated to be Administrator of the Drug Enforcement Administration. But the White House has yet to pick nominees for some pivotal roles, including head of the Antitrust Division and head of the National Security Division.

With much of the incoming DOJ leadership only now in harness or awaiting confirmation, no major policy initiatives or new enforcement priorities emerged from DOJ, and we will look for more evidence suggesting adjustment of resources in the coming months. That said, we expect some long-time priority areas such as enforcement of the Foreign Corrupt Practices Act (FCPA) to continue apace.

It is clear that an ongoing priority for the DOJ will be to bring both criminal and civil actions pursuing fraud schemes related to the stimulus programs passed by Congress to blunt the COVID-19 pandemic. A central focus of this effort will certainly involve sustained, if not escalated, investigative and enforcement efforts concerning loans issued pursuant to the Paycheck Protection Program (PPP). As of March of this year, DOJ had charged over 120 defendants in criminal fraud actions, implicating upwards of $445 million in PPP loan funding. On the civil front, DOJ has already used the False Claims Act (FCA) to address PPP-related fraud schemes. The two FCA settlements notched to date likely portend more civil enforcement and more focus on corporate defendants. And notably, they also indicate that the DOJ is not waiting for companies to submit forgiveness applications before pursuing colorable cases of fraud. We expect the DOJ to continue to deploy the FCA and other available tools in this manner, with a focus on false representations regarding eligibility (e.g., required self-certifications related to size and economic necessity), misuse of program funds, and false certifications related to loan forgiveness.

What's Ahead

By Jim Flood, Scott Douglas, Tim Shadyac, Kate Beale, Byron Brown, and Stacie Heller

The first 100 days made clear that the Biden Administration is off to a fast start and still moving. The passage of $1.9 trillion in new stimulus to respond to the COVID-19 pandemic, the increasingly widespread vaccination of Americans, and the willingness to thoroughly review the U.S. relationship with China and the global supply chain is just the beginning. The Biden Administration has proposed massive new spending, legislation, potential foreign policy changes, and additional stimulus measures which will play out in the second 100 days period – between now and the August recess. The American Jobs Plan, President Biden's $2.3 trillion infrastructure proposal, is focused on modernizing America's transportation and electric power systems to transition the economy to net-zero emissions by 2050, setting the foundation for the next 100 years through investments in electric vehicles, home, and office infrastructure, services for the elderly, rural broadband all across America, and drinking water systems. The American Families Plan, the twin of the American Jobs Plan, will create new developments in child care, work-life, and education with levels of financial support that have not been seen since the Great Society. Despite the lack of consensus among lawmakers, these potential sweeping policy changes, if adopted, would expand social safety net programs in a fashion that would be difficult to undo by a future Congress or Administration. Social welfare programs, once enacted, are nearly impossible to rescind, as evidenced by the Affordable Care Act's resilience in the last decade. While there may be political turmoil between Republicans and Democrats and debates about the role, scope, and reach of the federal government, there are major legislative changes coming, probably through Democrat-only votes or limited bipartisan support, that will transform our lives for years to come and affect every business in America. Stay tuned …

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

James G. Flood
Partner – Washington, D.C.
Phone: +1 202.624.2716
Email: jflood@crowell.com

Michael K. Atkinson
Partner – Washington, D.C.
Phone: 202.624.2540
Email: matkinson@crowell.com

Tim Shadyac
Director, Government Affairs – Washington, D.C.
Phone: +1 202.624.2958
Email: tshadyac@crowell.com

Troy A. Barsky
Partner – Washington, D.C.
Phone: +1 202.624.2890
Email: tbarsky@crowell.com

Byron R. Brown
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2546
Email: bbrown@crowell.com

Caroline E. Brown
Partner – Washington, D.C.
Phone: +1 202.624.2509
Email: cbrown@crowell.com

Robert A. Burton
Partner – Washington, D.C.
Phone: +1 202.624.2982
Email: rburton@crowell.com

Matthew Cohen
Counsel – Washington, D.C.
Phone: +1 202.624.2831
Email: mcohen@crowell.com

Kelly T. Currie
Partner – New York
Phone: +1 212.895.4257
Email: kcurrie@crowell.com

Jodi G. Daniel
Partner – Washington, D.C.
Phone: +1 202.624.2908
Email: jdaniel@crowell.com

W. Scott Douglas
Senior Policy Director – Washington, D.C.
Phone: +1 202.508.8944
Email: sdouglas@crowell.com

Carina C. Federico
Counsel – Washington, D.C.
Phone: +1 202.654.6712
Email: cfederico@crowell.com

Paul Freeman
Senior Counsel – New York
Phone: +1 212.895.4251
Email: pfreeman@crowell.com

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Alexis J. Gilman
Partner – Washington, D.C.
Phone: +1 202.624.2570
Email: agilman@crowell.com

Christine B. Hawes
Counsel – Washington, D.C.
Phone: +1 202.624.2968
Email: chawes@crowell.com

Robert Holleyman
Partner and C&M International President & CEO – Washington, D.C.
Phone: +1 202.624.2505
Email: rholleyman@crowell.com

Stacie Heller
Senior Policy Director – Washington, D.C.

Email: sheller@crowell.com

S. Starling Marshall
Partner – New York
Phone: +1 212.895.4263
Email: smarshall@crowell.com

Shelley Su
C&M International Senior Consultant – Washington, D.C.
Phone: +1 202.688.3512
Email: ssu@crowell.com

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1 202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com

Scott L. Winkelman
Partner – Washington, D.C.
Phone: +1 202.624.2972
Email: swinkelman@crowell.com

Tiffany Wynn
Counsel – Washington, D.C.
Phone: +1 202.624.2986
Email: twynn@crowell.com

Kate Beale
Senior Policy Director – Washington, D.C.(CMI)
Phone: 202.508.8997
Email: KBeale@crowell.com