

What To Expect From DOJ Enforcement Under Biden

By **Sandra Moser and Kenneth Polite** (November 23, 2020, 2:43 PM EST)

There was a perception in 2017 when then President-elect Donald Trump took office that white collar enforcement actions under the U.S. Department of Justice might drop dramatically.

Many expected the Republican administration to effect policy changes or resourcing decisions that would keep corporations out of the spotlight when it came to major investigations and massive penalties.

But, in surveying the last four years, the opposite happened.

Although it is true that administration priorities — including emphases on immigration, violent crime and opioids — required an initial shift in resourcing, overall, there was not an identifiable de-emphasis on corporate enforcement, and the numbers of those tasked with white collar enforcement at the DOJ rose.

Indeed, there were steady or increasing numbers of corporations and individuals charged, especially in the Foreign Corrupt Practices Act and market manipulation spheres, by prosecutors at the main DOJ and some of the nation's largest U.S. attorneys offices.

Coming into a new Democratic administration of President-elect Joe Biden, there is every reason to expect that those selected to lead the DOJ will push for investigations to continue at or exceed pace, and for department leaders to support the DOJ's work in parallel with other enforcement and regulatory bodies — both domestic and foreign — in order to remain at the forefront of pursuing sophisticated financial and corruption offenses with international impact.

First, while the coronavirus pandemic might have slowed progress on some sprawling cross-border investigations, it also has provided the backdrop for a focused effort by the DOJ to step up with more investigations related to stimulus fund fraud — in terms of both procurement and oversight — and other pandemic-related misconduct like price gouging. Prosecutors are trained to — and embrace the mantra — follow the money. With nearly \$2.5 trillion of COVID-19 relief funds disseminated to date, that's a lot of dollars for prosecutors to work with.

Financial institutions, many of which are now working in close alignment with prosecutors working to identify and track fraudulent fund activity, very well could find themselves on the flip side of the coin as



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the government shifts its focus from relatively small-time efforts of individuals or small businesses trying to bilk the system to the role of major institutions in the integrity of the distribution process — and, significantly, a rise in bank actions attendant to a severe economic downturn, which are viewed as unpopular or unfair to consumers.

Moreover, given the impact that the pandemic has had on businesses, there is likely to be enhanced scrutiny by the U.S. Securities and Exchange Commission and DOJ on industries that have been hit hard in this environment, such as retail, hospitality and airlines, to name a few.

In the past, a stressed economic environment like this one has lent itself to problems in reporting, as well as business behaviors that pique the interest of securities fraud enforcers who will be eager to question accounting practices and accuracy in market statements.

Importantly, companies concerned that corporate enforcement will prove to be a top priority of the incoming Biden administration have cause to be optimistic in terms of consistency in approach from one administration to the next. The DOJ Criminal Division — out of which a majority of corporate enforcement actions emanate — has worked in recent years to develop policies aimed at transparency.

Formalized initiatives including the FCPA corporate enforcement policy, the evaluation of corporate compliance programs, and the "anti-piling on" policy largely have been received positively by relevant stakeholders and are understood to be earnestly aimed at promoting clarity of expectations in an area once thought to be notoriously opaque.

Such policies, along with revisions to the standards for cooperation eligibility and guidance arguably advancing a more conservative approach to corporate monitorships, are not likely to be rolled back and will continue to provide a degree of transparency and consistency to the investigation and negotiation process.

With that said, changes can be expected, for example, to the DOJ's approach to immigration enforcement. The Trump administration has prioritized immigration for enforcement actions, both in the main DOJ and across the country. There could be a rollback of that widespread enforcement to usher in a more tailored approach, where prosecutions are focused on the worst of the worst: individuals who have violent criminal histories and repeat offenders.

And a Biden administration is expected to revive a nearly dormant Civil Rights Division of the DOJ, which the Trump administration deprioritized. Under President Barack Obama, there were 23 to 24 consent decrees in place for big-city law enforcement departments, but the Trump administration quickly halted support for all of those consent decrees.

The incoming Biden administration will likely lean into this area of reform, which may result in more law enforcement pattern-and-practice investigations and resulting consent decrees. We will also likely see greater investment in proactive and collaborative law enforcement resources, such as the DOJ's Community Relations Service and Office of Community Oriented Policing Services.

Essentially, companies shouldn't fear a rapid uptick in overall corporate enforcement actions but rather expect the same level of transparency from the DOJ, a shift in focus to prosecuting COVID-19-related fraud and away from prosecuting all immigration cases, and more collaboration among federal agencies.

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