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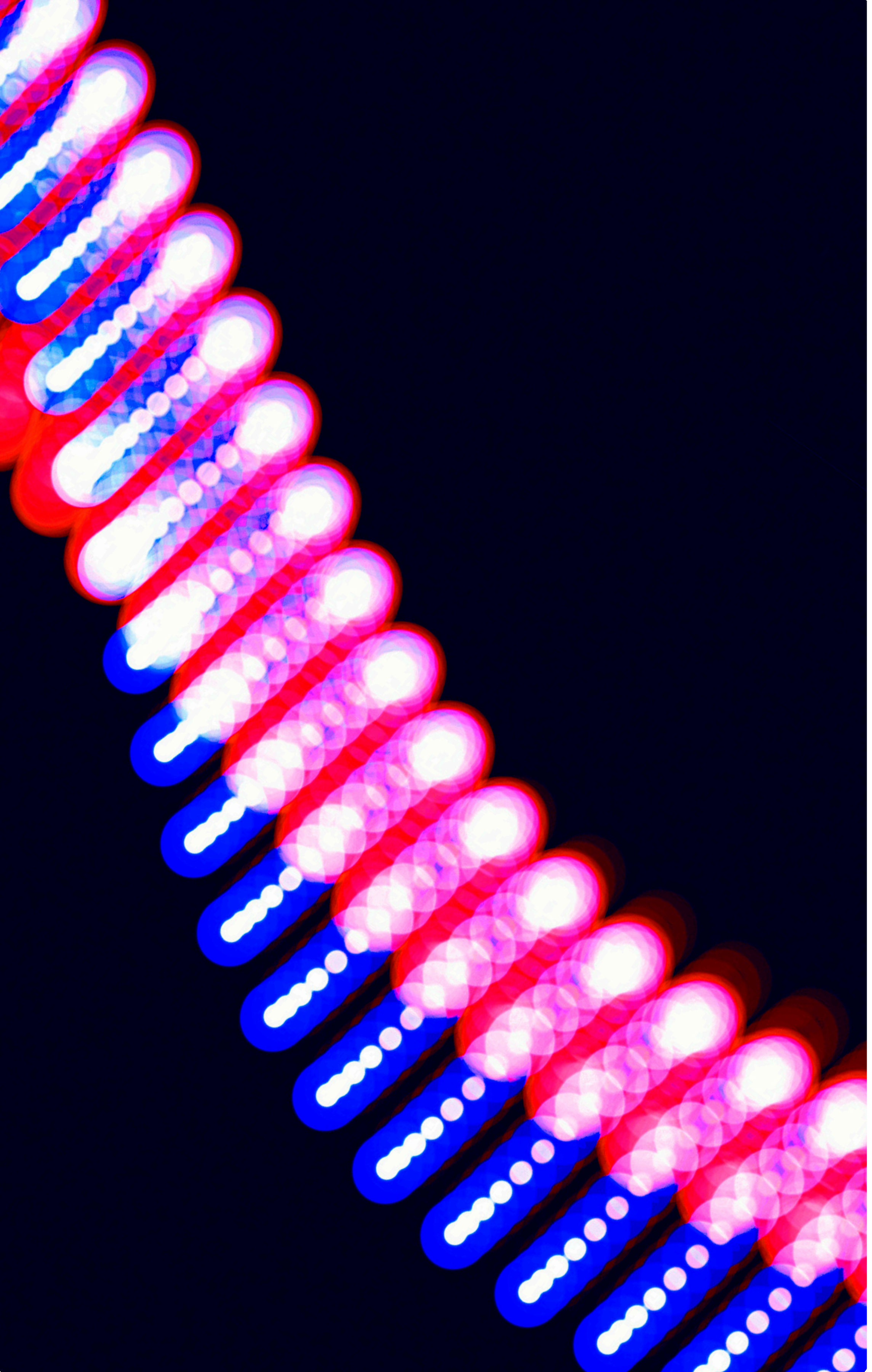
Looking Ahead: How Will US Law and Policy Change under the Biden Administration?



Introduction

As businesses and governments around the world prepare for a new US presidency, Baker McKenzie practitioners are taking a close look at the shifting legal and policy landscape. There are still many unknowns, and following the January 6 attack on the United States Capitol and the second impeachment of Donald Trump, 2021 has left many in Washington with a sense of uncertainty about the future. Yet in other respects, a clearer picture of the overall political environment has begun to emerge, with the two Senate run-off elections in Georgia going to Democrats and President-elect Biden having completed a substantial number of Cabinet appointments.

As a new US president and vice president enter office, this document offers insights from partners in the following areas, with commentary on key changes, areas of highest impact, as well as contacts for more information:

A Razor-Thin Majority but a Seismic Shift in Policymaking?

Insights from Rod Hunter and Miguel Noyola

"With a political track record exceeding 40 years, Joe Biden is an institutionalist who thrives on working with other politicians. He and his administration do not want to prioritize trade, but Trump is leaving behind the wreckage of four years of trade disputes and unattended problems to clean up. Under Biden's leadership, we are likely to see a return to a rules-based international trading system and efforts to coordinate with allies in addressing an assertive China. The razor-thin Democratic-majority in the Senate will not provide much room to pursue Democratic desiderata, but Democratic control will facilitate confirmations of Biden's preferred appointees to senior administration posts."

*– **Rod Hunter** (Partner, Washington DC)*

Despite everything that has happened since the election, with Biden taking office, there will be an immediate change of tone. That change of tone and change of approach will impact relations with Republicans as well as outreach to allies to find common ground. The new president has signalled this change of tone with his Cabinet picks and his focus on helping the country through the COVID-19 crisis.

On the legislative side, Biden will likely focus on COVID-19 stimulus first, but getting broader progressive priorities relating to tax, healthcare and sustainability across the line will be tough. That being said, his history as Obama's vice president and as a senator does put him in a good position to negotiate with the Senate. Biden made his career in Congress and was the person President Obama relied on for negotiations with the legislature. We are likely to see a lot more cooperation, even as Republicans and Democrats defend their own policy interests.

Spotlight on foreign policy

With an abundance of experience in foreign policy, Biden will likely prioritize engaging in multilateral or bilateral trade agreements, reconnecting and fortifying the North Atlantic Treaty Organization, and making a disciplined and thorough effort to connect with US allies. With regard to China, where growing geopolitical tensions have resulted in trade wars, Biden will look for opportunities for cooperation where possible, while recognizing there will be competition in other areas.

Despite the return to a more conventional approach, the next few months will be challenging for the new Biden team. There is now a profound understanding that the world is a more volatile place than it was a decade ago or even six years ago.

"As the incoming Biden administration tries to draw consensus from the business community to support a forward-looking agenda in the areas of health, sustainability, infrastructure, and trade, a Democratic-led Senate will mean that substantive initiatives can be brought before Congress for discussion. There are opportunities for bipartisan support in each of these areas, where the result could be a win for most stakeholders. If substantive progress is made, the US can re-establish itself as a prominent participant in the design of the new framework for global cooperation and international commerce."

*– **Miguel Noyola** (Partner, DC/Chicago)*

Throughout the COVID-19 pandemic, business leaders were forced to rethink their supply chains, and that will continue with the new administration and a changed trade outlook. Will companies look to in-source their manufacturing and distribution operations in the post-COVID-19 environment? Or, will the Biden administration's global framework impact their manufacturing and operational decisions?

We are confident that the Biden administration will want to reassert itself as an influential participant in the rulemaking process, as well as look to create a counterbalance to what might emerge from China as it takes a more prominent role on the global stage.

EMI & Sustainability

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We know that one of the Biden administration's immediate priorities is the environment and climate change. What will he focus on first?

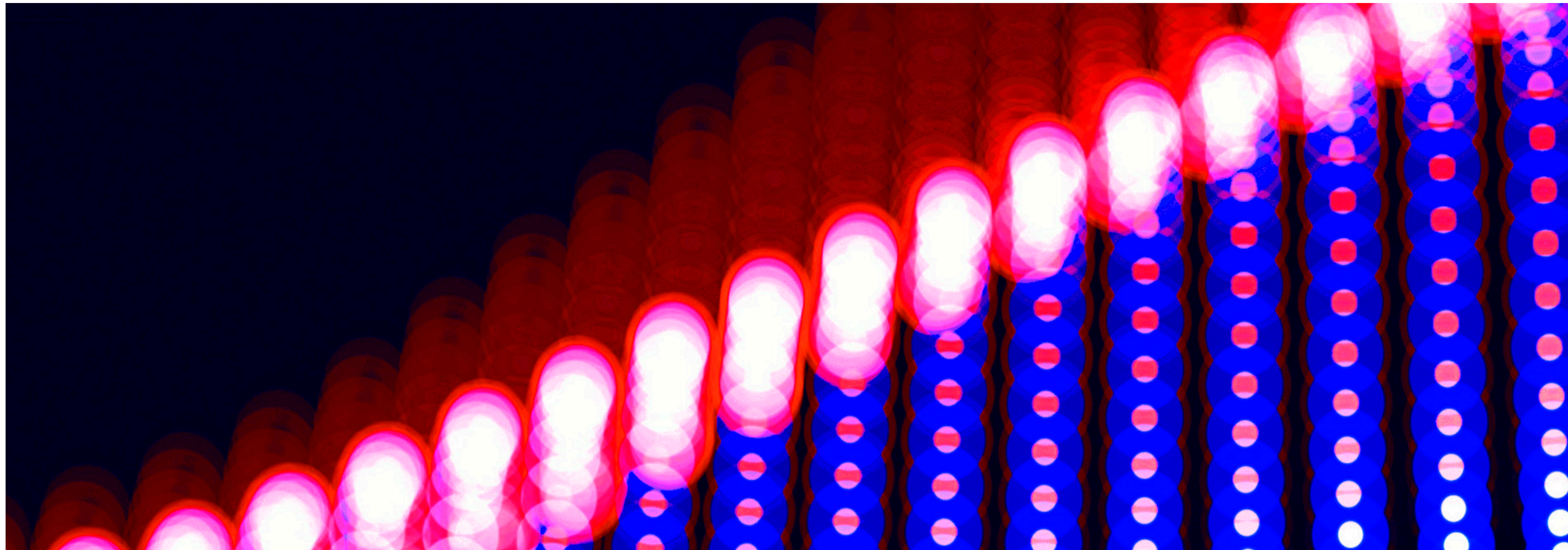
Biden has indicated that prioritizing climate change is also about creating new jobs and spurring economic growth. He has plans to push through major infrastructure projects, boost the auto industry in its quest to build low-emissions vehicles, help move the power sector toward renewables, and encourage innovation in energy technologies. Although it's unclear whether Congress will go along with funding these efforts, we can be certain that a new energy and sustainability agenda is coming, with profound implications for the future of the planet.

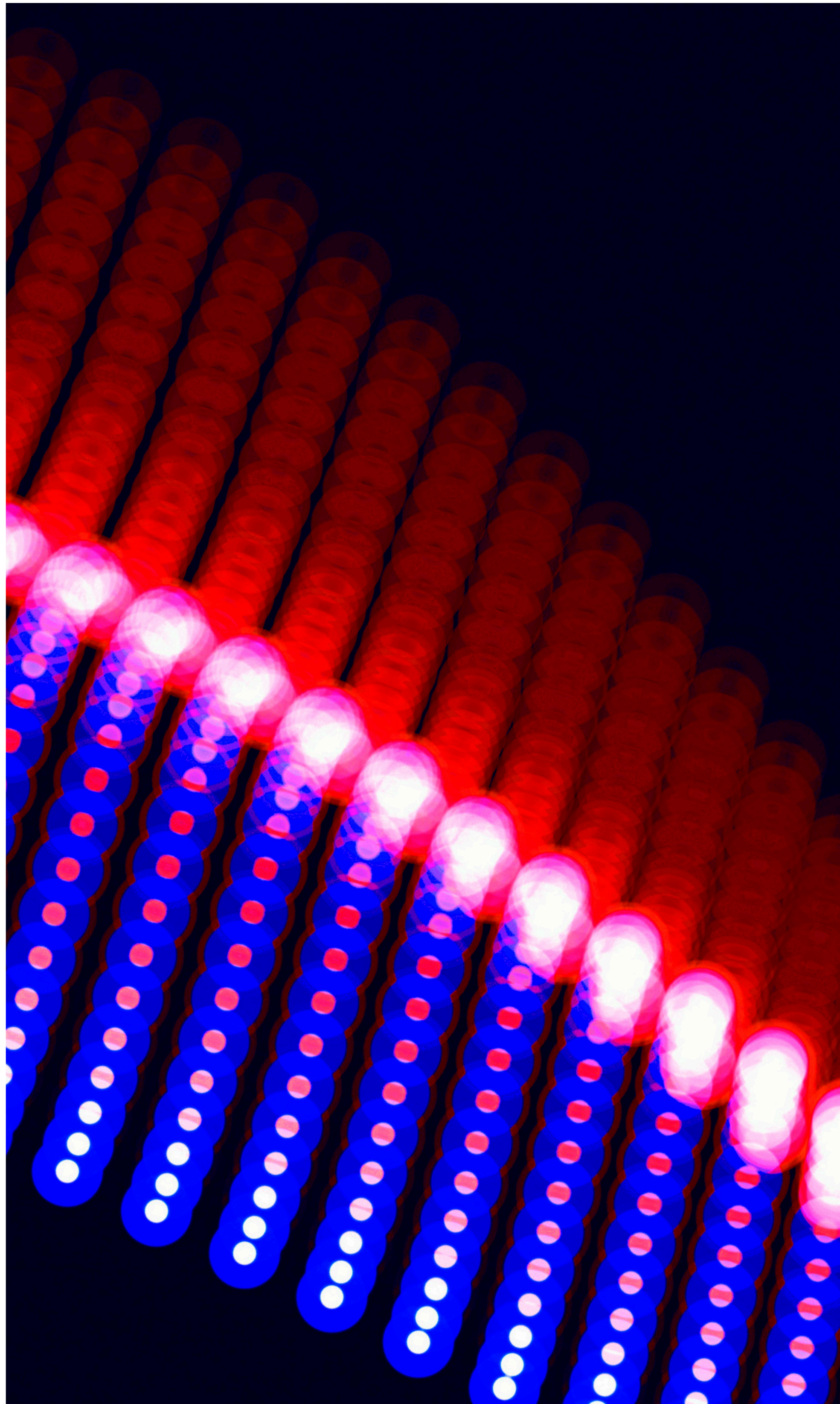
- The Biden administration is likely to take executive action to reverse Trump-era energy policy and pursue a more comprehensive legislative agenda aimed at putting the US on a path toward economy-wide net-zero emissions by 2050.
- We can expect to see climate change regulatory initiatives and expanded ESG reporting and disclosure efforts that may affect the direction and pace of the US energy transition.
- We can also expect that the new administration will promote growth in the renewables sector through the extension of renewable tax credits in response to the industry's COVID-19 challenges.
- In addition, there is a noticeable shift in oil & gas companies becoming true renewable energy generation power companies, with continued investments in wind and solar, particularly from the six "super-majors" companies.

The Bottom Line:

We expect the Biden administration's shift on environmental policy to be swift and profound, a course-reversal from the Trump-era deregulation agenda. Early actions by the new administration will for sure include re-joining the Paris Climate Accord and advancing other climate-change policy initiatives, as well as addressing a host of clean-air act and clean-water act priorities. Industries should also expect sweeping changes on the enforcement front, with EPA inspectors returning to the field with new and broader mandates, and states being pressed to justify their enforcement records over the past four years.

– **John Watson**, Partner, Chicago





> *In the US, we expect the adoption of emergency relief measures for the renewable sector, including temporary refundability for renewable tax credits so projects can be completed in spite of a COVID-constrained tax equity market and a delay in the scheduled phasedown of existing credits in recognition of the adverse nationwide impact the pandemic has had on the renewable sector this year. Such relief could possibly be secured through an ongoing resolution/omnibus spending bill, tax extenders legislation or a new COVID relief package.*
>
> *We also expect that Biden's administration could revoke President Trump's Executive Orders (14 issued during his term), memoranda, and proclamations, as well as certain types of departmental or agency directives and orders, immediately. For example, through Executive Orders we expect the Biden administration will use its procurement policies to seek to increase biofuels purchases quickly. The US military has pushed to move dramatically from oil to biofuels as a national security matter but has been rebuffed by Trump. The oil companies are all experimenting with biofuels and will likely increase their attention including buying up biofuels companies.*
>
> – **Jose Moran**, Partner, Chicago

Key EMI & Sustainability Contacts

David Hackett
Partner, Chicago
david.hackett@bakermckenzie.com

Jose Moran
Partner, Chicago
jose.moran@bakermckenzie.com

John Watson
Partner, Chicago
john.watson@bakermckenzie.com

Tax

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How likely are we to see an increase in the corporate tax rate or the GILTI tax rate during the Biden Presidency?

Anecdotal evidence suggests that our clients are most concerned with the Biden Tax Plan's proposed increases in the corporate tax rate from 21 percent to 28 percent and the global intangible low-taxed income (GILTI) effective tax rate from 10.5 percent to 21 percent. These proposals drive the biggest revenue impact under the plan. Uncertainty on how high the rates will rise impeded tax planning in the months leading up to the election. With Biden's first priorities being improving the COVID-19 vaccine deployment and restarting the economy, other than stimulus payments, business tax legislation is expected to be delayed.

Key Takeaways:

- With the Senate flipping to Democratic control, businesses are bracing for a Congress that might reverse some of the taxpayer-friendly provisions of the Tax Cuts and Jobs Act (TCJA) while also raising tax rates. While we expect some changes to the TCJA, Biden may not be able to garner enough support from moderate Democrats and Independents for sweeping changes or rate increases until the economy improves.
- Congress will likely use the budgeting tool of reconciliation to pass tax legislation. Since Congress did not pass a budget for fiscal year 2021, this Congress will have two opportunities in calendar year 2021 to use budget reconciliation to pass tax legislation with a simple majority in each chamber.
- While the Biden Tax Plan made no specific reference to foreign-derived intangible income (FDII), we could expect a corresponding increase to the FDII effective tax rate with any GILTI effective tax rate increase to retain symmetry.
- Regardless of the passage of new legislation, we anticipate the Biden administration will review regulations published during the Trump administration that are viewed as "giveaways" to high net worth individuals and businesses, with the goal of reversing these regulations through the notice and comment process. For example, the Biden administration could withdraw the expanded GILTI high-tax exception regulations, which the press has characterized as benefiting multinational enterprises. The withdrawal of the regulations could lead to an increase in the amount of tax paid on GILTI.

The Bottom Line:

"*The results of the two January 5 Senate elections in Georgia mean that President Biden's much-discussed proposed changes to corporate tax laws and taxpayer-friendly provisions have an increased chance of success. However, taxpayers should be aware that Democrats will need to use the budget reconciliation process to pass major tax legislation, and that will require the moderates and progressives to reach agreement on key proposals, such as the corporate tax rate. In the near term, it is likely that the Biden administration will focus on what it can achieve through the regulatory process, such as reviewing (and withdrawing or modifying) regulations published during the Trump administration that are viewed as "giveaways" to high net worth individuals and businesses."*"

– **Alexandra Minkovich**, Partner, Washington, DC

Key Tax Contacts

Christopher Hanna
Of Counsel, Dallas
christopher.hanna@bakermckenzie.com

Alexandra Minkovich
Partner, Washington, DC
alexandra.minkovich@bakermckenzie.com

Labor & Employment

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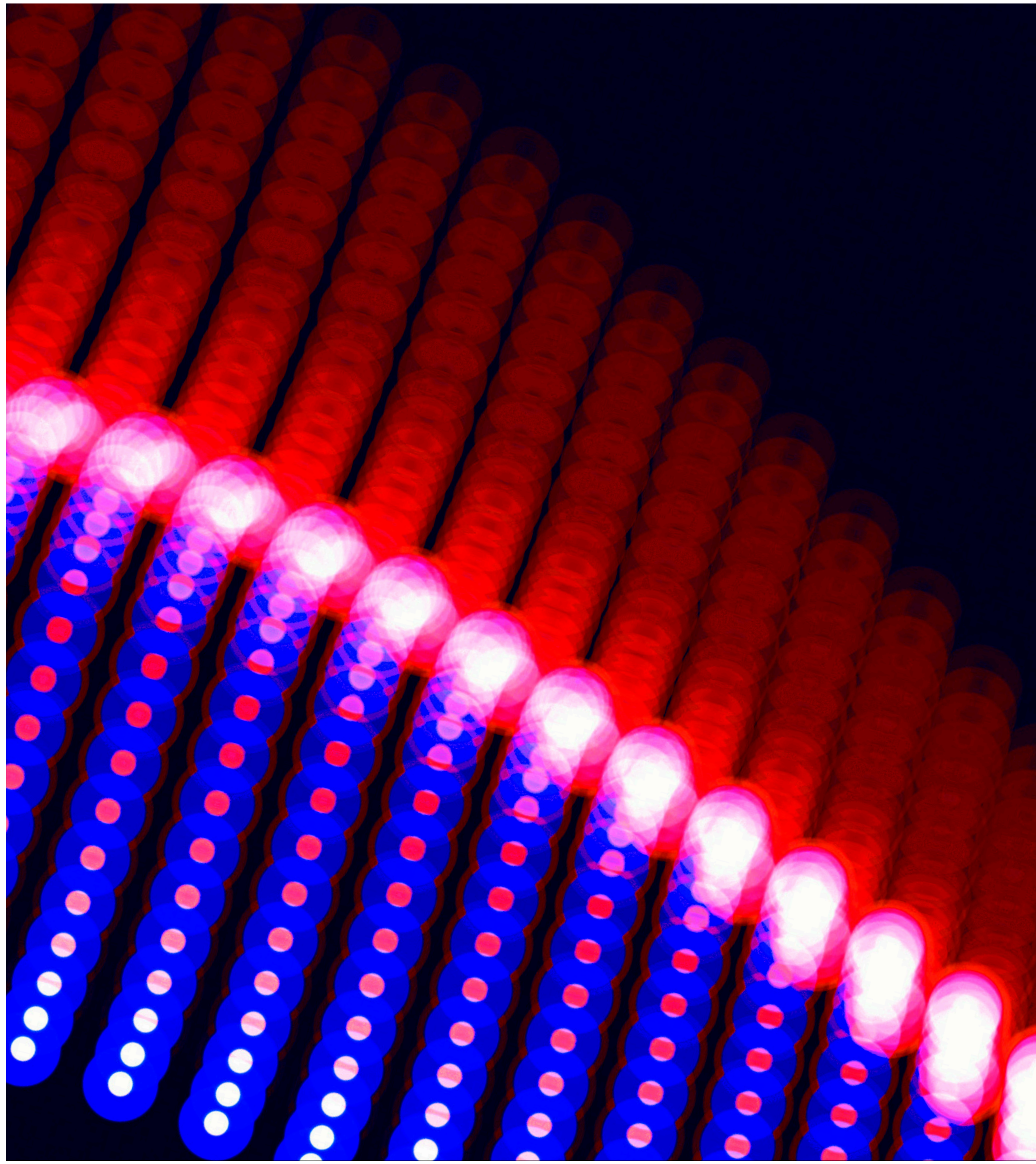
How will the Biden administration change companies' obligations to employees?

President Biden's campaign promised to strengthen workers' rights and organizing efforts, including pledged support for "provisions in" the Protecting the Right to Organize Act (PRO Act), which contains punitive financial penalties for companies that interfere with workers' organizing efforts. President Biden's nomination of Boston Mayor Marty Walsh (a former construction union leader) for labor secretary — i.e. to run the Department of Labor — is a definitive step in what we expect to be an administration that will mandate employers to adopt employee-friendly policies, and tip the scales to favor union organizing and collective bargaining. The Labor Department's aggressive enforcement of workers' rights, and increases in companies' obligations to their employees, is now a near certainty.

Key Takeaways:

- **Return of Top-Down Union Organizing.** Candidate Biden promised to enable unionization and collective bargaining by mandating that government contractors post notices regarding the right to organize, prohibiting employers from campaigning against union organizing efforts, refusing to reimburse costs of opposing organizing, and barring contractors who fail to comply with these mandates. Additionally, President Biden promised to create a cabinet-level working group to deliver a plan to increase union density and address economic inequality in the first 100 days of the administration, so more initiatives are coming.
- **Revitalization of OSHA protection for workers.** President Biden's campaign promised the Department of Labor's Occupational Safety and Health Administration would double the number of field investigators, and would enact emergency temporary standards for workplace safety related to the COVID-19 pandemic.
- **Expanded definition of joint employer.** The Biden administration is likely to adopt a broad definition of "joint employer," increasing the likelihood that companies will be liable for conduct of subcontractors and suppliers.
- **More risks for independent contractor classifications.** The Biden administration is likely to freeze the Trump administration's rule expanding the definition of independent contractor before it becomes effective, and adopt new regulations that narrow the definition of independent contractor, thus expanding the interpretation of employee status under the Fair Labor Standards Act (FLSA), which the DOL enforces.
- **Increased national minimum wage.** President Biden has been vocal in supporting a $15 federal minimum wage. The Biden administration will also likely seek to eliminate the reduced minimum wage for tipped employees (i.e., the tip credit), and will likely increase the minimum salary to qualify as an exempt employee under the FLSA.
- **Paid leave benefits for employees.** President Biden supports making FMLA leave a paid leave, thus mandating all workers receive 12 weeks of paid leave. To date, the funds for payment has not been determined.
- **Limitations on mandatory arbitration agreements.** President Biden promised he would enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration, i.e., waiving their right to participate in class action lawsuits or collective litigation (as called for in the PRO Act).
- **Biden to Focus on Workplace Diversity.** It seems likely that the Biden administration will initiate the return of the revised EEO-1 form collecting compensation data, a federal initiative spearheaded during the Obama years but shut down by the Trump administration, and will focus on pay equity, including the possibility of pay equity legislation passed at the federal level.

> *We expect the Biden administration's policies to cause a sea change in how companies deal with employees on several levels — from how they respond to union organization and engage in collective bargaining to how they classify employees and conceptualize employee agreements. Employers need to start now to review independent contractor agreements, to evaluate the continued use of subcontractors and suppliers, and evaluate whether government contracts should be extended or sought. With expected changes in so many aspects of labor and employment, employers will need to pay close attention and remain agile as they navigate through a myriad of developments.*
>
> – **William (Bill) F. Dugan**, Partner, Chicago and New York



Key Labor & Employment Contacts

Michael Brewer
Partner, San Francisco
michael.brewer@bakermckenzie.com

Bill Dugan
Partner, Chicago/New York
william.dugan@bakermckenzie.com

Susan Eandi
Partner, Palo Alto
susan.eandi@bakermckenzie.com

Immigration

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Which immigration policies will the Biden administration focus on first?

There is no area more likely to see immediate changes under the Biden administration than immigration. The Trump administration enacted many controversial policies that Biden has promised to reverse, including policies regarding H-1B visas impacting multinational companies.

Key Takeaways:

- Biden's campaign promises on immigration included several measures that would make it easier for multinational companies to secure talent outside of the US, including streamlining both high-skilled and seasonal employment-based visa programs, calling for foreign PhD graduates to receive a green card along with their diploma, and for STEM graduates to be exempted from caps on employment-based visas.
- The H-1B visa program remained the primary immigration target during the final days of the Trump administration. Final rules announced in January would link selection in the H-1B lottery to prevailing wage levels, and would, over time, increase the prevailing wage levels for the H-1B and PERM (permanent residence) programs. A third rule was expected before January 20 that would attempt to impose certain restrictions on the H-1B visa program that were struck down by the courts last fall. The US Chamber of Commerce has been active in lawsuits against Trump's visa orders, and recently noted that the Biden team has reportedly indicated they would reverse some of these policies.
- The Biden administration's success in immigration reform will largely depend on Congress and the courts. If the administration has the support of a workable Democratic majority in the Senate, he may be able to push through legislative immigration priorities over Republican resistance. Even if the administration obtains congressional support, we expect new laws or executive orders will face immediate legal challenges, and Trump's appointees in circuit courts and in the Supreme Court could decelerate the administration's immigration reforms.

The Bottom Line:

> *We expect that the Biden administration will seek to reverse most of the immigration policies of the Trump administration, and return to a more pro-immigration approach. While some changes may not happen immediately, we expect that right away, the Biden administration will reverse the most troubling executive orders and will issue a memo to halt or otherwise delay all "midnight regulations," including those that were drafted by the Trump administration to place new restrictions on the H-1B visa program, including selection criteria, prevailing wage rates, and eligibility. Further, while the Biden platform calls for comprehensive immigration reform—and comprehensive reform is long overdue—it is not clear where immigration reform will rank in the long list of Congressional priorities.*

– **David Serwer**, Partner, Chicago

Key Immigration Contacts

Melissa Allchin
Partner, Chicago
melissa.allchin
@bakermckenzie.com

Betsy Morgan
Partner, Chicago
betsy.morgan
@bakermckenzie.com

Ginger Partee
Partner, Chicago
ginger.partee
@bakermckenzie.com

David Serwer
Partner, Chicago
david.serwer
@bakermckenzie.com

Healthcare and Life Sciences

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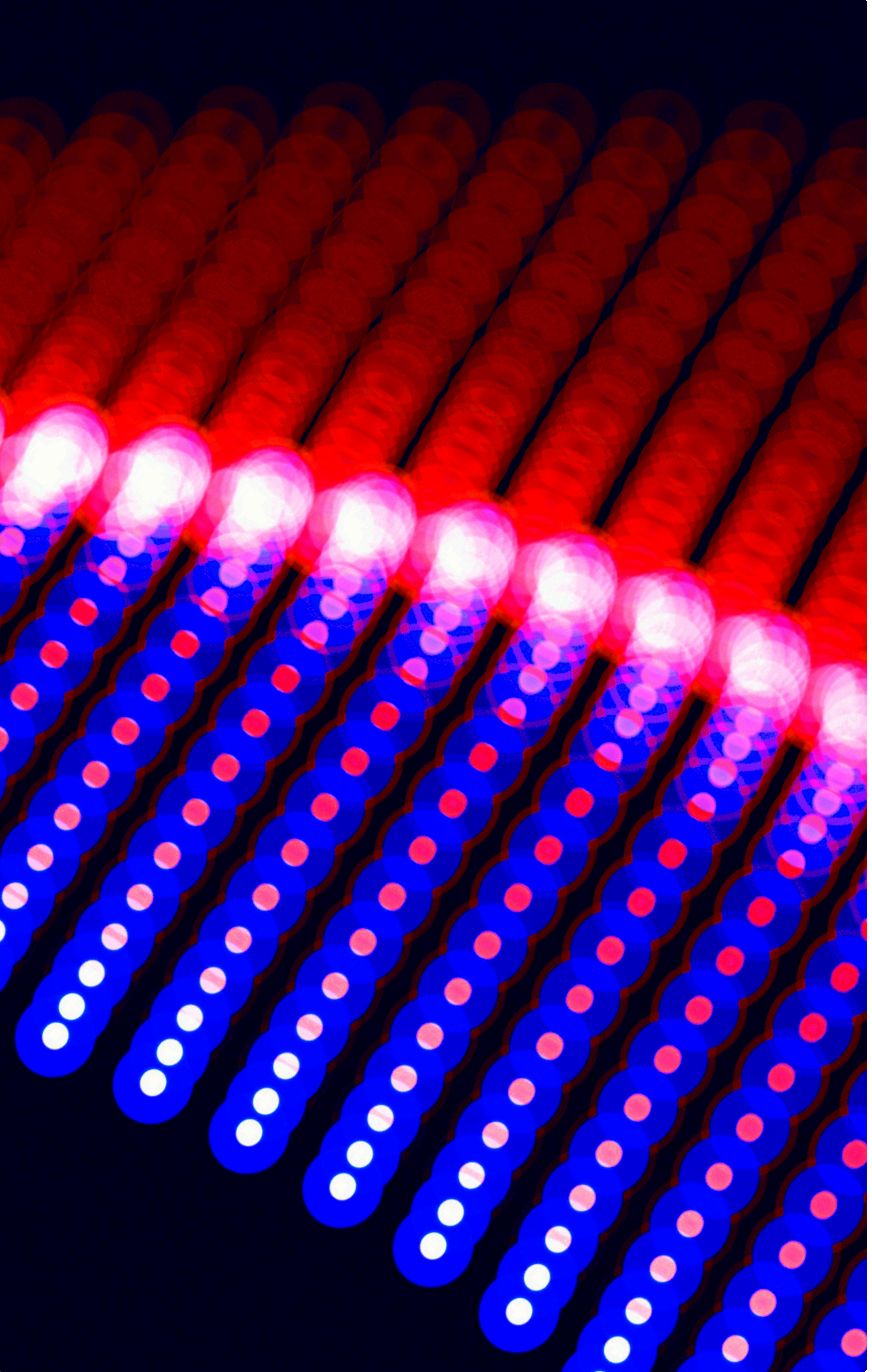

What are the big changes coming in the healthcare sector both related to the pandemic and otherwise?

Healthcare dominated Biden's campaign messaging, and it continues to loom large due to the global pandemic and the legal challenges related to the Affordable Care Act. Access to COVID-19 vaccines and care will be one of the Biden administration's first priorities, and he has vowed to increase funding for public health and fighting future pandemics.

- Healthcare has been a pillar of the Biden administration's and the Democratic Party's campaign; however, there will be hurdles. The fact that a conservative justice has been appointed to the Supreme Court means that Obamacare may continue to be diminished.
- Telemedicine has been used more broadly because of the pandemic, and Biden has expressly stated that he will increase its use even once the pandemic has passed.
- Big pharma faces challenges with respect to drug pricing in the near future. Although Biden has traditionally supported big pharma, the Democratic Party's platform professing access to healthcare, including access to medicines and innovative drugs demands that the administration act to lower drug prices. Under a Biden administration, there will most likely be more funds available for medical research and innovative drugs.
- The Biden administration will inherit tremendous logistical challenges with respect to the production, distribution, storage and administration of COVID-19 vaccines.

The Bottom Line:

Since the declaration of a pandemic by the Secretary of DHHS in February 2020, the FDA has devoted much of its focus to providing guidance in the development and availability of in vitro diagnostics, personal protective equipment and related devices, ventilators and other medical devices and drug and biological products. The FDA's efforts include not only detailed EUAs, guidance documents and participation in Operation Warp Speed in conjunction with other agencies but also daily updates and information on its websites to help keep the public informed. In December 2020, the FDA authorized two vaccines intended to prevent COVID-19. Developing vaccines that meet the EUA criteria remains critical in the evolution of the coronavirus pandemic, particularly in light of the almost daily increase in the number of cases and deaths as well as possible mutations of the SARS-CoV-2 virus, which causes COVID-19. We expect that the FDA will continue to prioritize vaccines, therapeutics, diagnostics and PPE to address the continued need and expected increased need, particularly as to PPE, as cases continue to rise. The FDA Commissioner, Dr. Stephen Hahn, has been outspoken both in taking actions to underscore FDA's ongoing commitment to the development of therapeutics and diagnostics and looking at alternatives for safe and effective PPE while also working to assure the public that the vaccines being studied and for which authorization has or may be granted are subject to and will be subject to rigorous testing. As the FDA's role is expansive, Dr. Hahn has also reiterated the FDA's commitment to ensuring that the food supply is protected, among other priorities of the Agency for the various products subject to FDA regulation. COVID-19 will remain the top priority for the US and the world, and we expect that world governments will continue to work diligently on the pandemic response.

– **Veleka R. Peeples-Dyer**, Partner, Washington, DC

Key Healthcare and Life Sciences Contacts

Randall Sunberg
Partner, New York
randall.sunberg@bakermckenzie.com

Oren Livne
Partner, New York
oren.livne@bakermckenzie.com

Veleka Peeples-Dyer
Partner, Washington, DC
veleka.peeples-dyer@bakermckenzie.com

M&A

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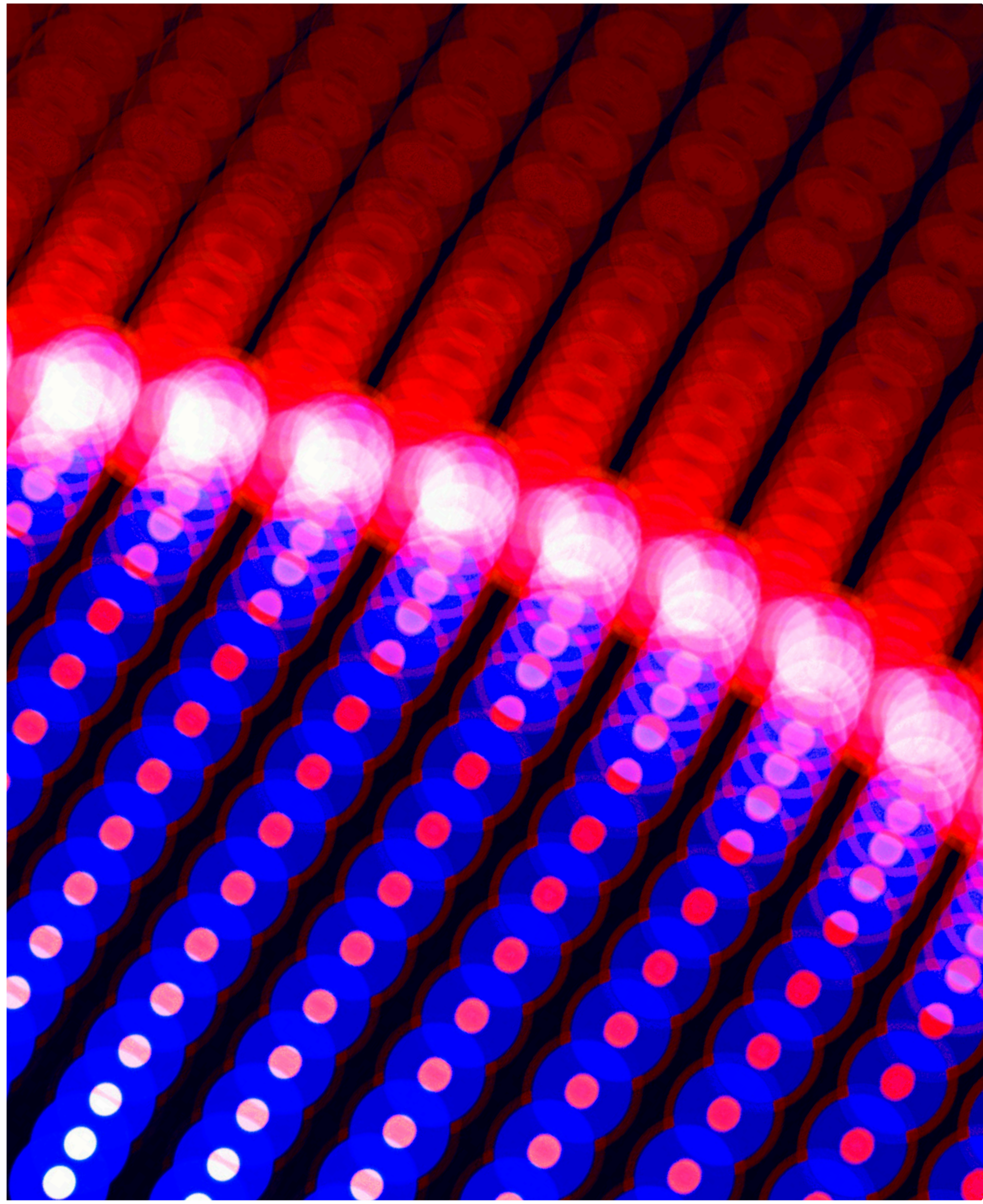
Will the Biden administration lead to a slower M&A market?

Experts are unsure if the Biden presidency will dampen deal flow overall. While increased regulation and antitrust scrutiny could decrease deal flow, there is also likely to be a less protectionist stance than that taken by the Trump administration, which could usher in more cross-border deals.

Key Takeaways:

- The Biden administration will bring a return of greater predictability for M&A, particularly for foreign investors. However, the increased scrutiny of foreign investment, which has broad bipartisan support and reflects a trend across advanced markets, will continue.
- The biggest change in recent years was the fourfold staffing increase for the Committee on Foreign Investment in the United States (CFIUS), and that staff continue to do their work. However, we expect that CFIUS will take a more balanced approach in reviewing investments as the economic agencies in a Biden-led CFIUS pressure test concerns raised by security agencies, much as in previous administrations. While CFIUS won't return to being an esoteric procedure largely for defense and telecom companies, we do expect more predictable decision making, which will facilitate international transactions.
- Given that Democratic administrations have been historically characterized by more vigorous antitrust enforcement, we would expect that the Biden administration's approach will lead to greater scrutiny of M&A transactions using both traditional and novel investigatory theories. This is particularly true in the technology industry, where President Biden has expressed concerns over acquisitions between companies in that industry that could lead to market dominance, as well as the healthcare industry. However, a highly aggressive approach should be expected with respect to transactions in any sector.
- The Trump administration rolled back many of the extensive regulations implemented during President Obama's term, presumably contributing to the robust M&A levels we had seen over the last few years (pre-COVID-19). The Biden administration may increase its regulatory activity. Given the razor-thin Democratic majority in Congress, the ambitious Democratic legislative and tax agenda will need to be tempered. However, the Biden administration will be able pursue an executive branch regulatory agenda that undoes many Trump policies and increases operating costs for businesses.



The Bottom Line:

I don't see the Biden administration enacting policies that would result in a significant limitation of the M&A activity that we expect once we get past the limitations and uncertainties caused by COVID-19. We've tended to have more of a dampening of cross-border transactions under Trump. I don't expect the Biden administration to roll back all protectionism, but I do think people would feel it's a friendlier environment to invest in the US. That being said, the regulatory regime under the Biden administration will be tighter than what we have today. Enforcement will likely be stepped up across a variety of agencies, including DOJ and FTC scrutiny of transactions from an antitrust standpoint. The SEC, for example, has been pretty quiet under Trump. It would probably get a little louder under the Biden administration.

– **Michael Fieweger**, Partner, Chicago

Key M&A Contacts

Michael DeFranco
Partner, Chicago
michael.defranco@bakermckenzie.com

Darcy Down
Partner, Los Angeles
darcy.down@bakermckenzie.com

Michael Fieweger
Partner, Chicago
michael.fieweger@bakermckenzie.com

Derek Liu
Partner, San Francisco
derek.liu@bakermckenzie.com

Alan Zoccolillo
Partner, New York
alan.zoccolillo@bakermckenzie.com

International Trade

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How will the Biden administration change trade policies in the short term?

One of the key goals of the Biden administration’s trade policy will be to reassert the United States as a leader in global trade, rather than continuing down the current protectionist path that has been unwinding the global trade framework that was the result of many years of US and multilateral efforts. We expect that the Biden administration will feature stability and certainty, as well as a pragmatic, rules-based approach to enforcement. These are hallmarks of any effective trade policy, enabling all players at the local, national and international levels to be able to plan strategically and operate effectively.

Key Takeaways:

- While it's unlikely that the new president will completely change course in the US trade war with China, we expect he will take a more measured approach. Biden has talked about finding common ground with China on the climate and the pandemic, which probably means a reboot, or at least an attempt, with China. The ability of the Biden administration to move away from the Trump administration's actions to lock in its escalating posture vis-a-vis China will depend importantly on Beijing's actions concerning issues such as Hong Kong, human rights issues arising out of the Xinjiang region, and the South China Sea. It may be easier for the Biden team to unwind some of the recent flurry, but the 301 tariffs will be difficult to undo in the near term. The Biden team will likely seek actions from China in exchange for lifting the tariffs, but the Chinese may not feel much need to do so because they consider the tariffs illegitimate. Security issues will remain a concern for the Biden administration, and human rights concerns will loom larger.

- Biden has consistently emphasized the importance of working with allies and of showing respect for other countries. While it would be fairly straightforward to roll back the 232 tariffs, though with some cost to labor interests, other trade issues will be harder to smooth over. Longstanding issues such as large civil aircraft and chlorinated chicken disputes aren't going away, nor are newer issues like digital services taxes. Trade relations with allies will be messy (as normal), but not combustible.

- While the Trump administration continued to levy sanctions against Iran, the Biden administration has indicated interest in returning to the negotiating table with Iran to resurrect some version of the Iran nuclear deal (the Joint Comprehensive Plan of Action, or JCPOA).

  But resurrecting the deal is much easier said than done. The situation now is very different from when Trump withdrew the United States from the JCPOA in 2018. Iran has been stockpiling uranium beyond the limits allowed under the JCPOA and has recently begun enriching it to 20% purity, far exceeding the 3.67% cap set out in the JCPOA. There is a presidential election in Iran in 2021 and Iranian President Rouhani, who has taken a hit politically since Trump's withdrawal from the JCPOA, will be leaving office. The hard-liners are expected to replace him, and they are showing no appetite to negotiate.

  On the US side, the Trump administration spent the past two years significantly expanding US sanctions beyond their pre-JCPOA limits. The Biden administration will need, at a minimum, to coax the Iranian Government back into compliance with the JCPOA, perhaps in exchange for some reduction in US sanctions, before the parties are likely to negotiate again in earnest about a new (and maybe broader) deal. The Biden team will also need to regain the confidence of the other countries involved in the JCPOA, and all parties are likely going to want an agreement that is harder to unwind in the future.

  The JCPOA was an executive agreement that was not approved by Congress, which proved to be its Achilles heel. Congress will demand to be more involved the next time around, and this may present challenges to the Biden administration to reach a new deal.

- The shift in the Committee on Foreign Investment in the United States (CFIUS) policy predates the Trump administration and was the result of legislative changes driven by Congress, the biggest of which was the expansion of CFIUS staff to four times its size. We expect committee practices under a Biden administration to remain largely consistent with the current administration but without the Presidential interventions. We also anticipate more moderation in mitigation agreements as the economic agencies within CFIUS return to form.

The Bottom Line:

Though we're not expecting a seismic shift in global trade policy under the Biden presidency, we do expect the approach to policy-making to revert back to more established norms and hopefully restore more certainty for business. Under the Trump administration and partly fueled by the COVID-19 pandemic response, trade policy and global relations were driven increasingly by economic security and protectionist interests often targeted at individual companies, which often missed the mark. Singling out individual companies is like playing a game of 'whack-a-mole' with the global supply chain. These rules have broad-reaching commercial implications; they often come with little to no warning, complying with them often requires immediate action by law, but is chronically disruptive, expensive, time consuming and there are often no ready alternative sources. Companies simply can't completely reconfigure their supply chains at the drop of a hat, particularly when they don't know if the rules will change back again. They also need to manage their exposure and reputation in the other countries if they suddenly pull out.

– **Alison Stafford Powell**, Partner, Palo Alto

The Biden administration's suggestion that it will work with allies to persuade China to change its policies is a welcome approach because that's when countries have been most successful in persuading China to change its policies. But it will be difficult to persuade the Chinese Communist Party to give up the economic model that has been, from its perspective, a raging success.

– **Rod Hunter**, Partner, Washington, DC

Key International Trade Contacts

Kerry Contini
Partner, Washington, DC
kerry.contini@bakermckenzie.com

Rod Hunter
Partner, Washington, DC
rod.hunter@bakermckenzie.com

Alexandre Lamy
Partner, Washington, DC
alexander.lamy@bakermckenzie.com

Sylwia Lis
Partner, Washington, DC
sylwia.lis@bakermckenzie.com

Alison Stafford Powell
Partner, Palo Alto
alison.stafford-powell@bakermckenzie.com

Christine Streatfeild
Partner, Washington, DC
christine.streatfeild@bakermckenzie.com

Janet Kim
Partner, Washington, DC
janet.k.kim@bakermckenzie.com

Government Enforcement

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Will there be new focal points for enforcement under the Biden administration?

The Biden administration will likely embolden regulatory agencies to take a stronger stance related to financial institutions, and it's likely that the private investment sector will see regulation revved up. In addition, the impact of technology continues to grow, and agencies will begin to get their arms around what that means from a regulatory perspective.

Key Takeaways:

- Uncertain times usually bring fraud to the forefront. Prosecutors will be bringing more fraud cases, including those related to COVID-19 relief. Cybercrime is expected to rise and so that will be a focus of the upcoming administration.
- Under the Biden administration, we also expect that anti-corruption enforcement will increase and will converge with national security, money laundering investigations and prosecutions.
- We also expect increased focus on the activities of foreign businesses, particularly state owned entities, in the US and aggressive enforcement of the Foreign Agents Registration Act (FARA).
- We anticipate that regulated industries will be most affected, such as financial services, oil & gas, pharma, and the tech industry.
- One of the most important early decisions that the Biden administration will have to make is whether to pursue criminal charges against President Trump. While it is unclear what the decision will be, it seems clear that we will see new legislation focused on ethics in government. Congress recently introduced the Protecting Our Democracy Act, which would create mechanisms to prevent abuse of the pardon power, suspend the statute of limitations for crimes committed by a sitting president, enhance protections for federal whistleblowers and require reporting on improper attempts by the White House to influence the Department of Justice. We anticipate that the administration will support this and/or similar legislation.
- Incoming Attorney General Garland is one of the most distinguished jurists in the United States. Because he has served as a federal judge for almost 25 years, he has not spoken widely on policy issues and it is difficult to predict with any precision what policies he is likely to pursue. However, all who know him agree that he will attempt to restore independence to the Department of Justice, eschewing the more political approach which Attorney General Barr openly advocated and pursued.

The Bottom Line:

“*I could see an enforcement focus on fighting corruption in Central and South America based on the Biden administration website, and more focus on foreign corruption overall. Corporate and government victimization in cyber incidents, including those arising from abroad, will no doubt continue, which will result in increased government investigations, which counsels in favor of revisiting incident response plans in light of new and emerging threats. We are likely to see a continued focus of corporate disclosures and corporate misconduct and a continued use of artificial intelligence to assist enforcement in ferreting out improper conduct with government agencies issuing targeted subpoenas to companies based on AI findings. COVID-related fraud and misconduct impacting retail investors will for sure be an area of enforcement as well as an uptick in consumer protection enforcement by the Consumer Financial Protection Bureau. This is all in addition to new laws and regulations to curb corporate misconduct.*”

– **Jerome Tomas**, Partner, Chicago

Key Government Enforcement Contacts

Thomas Firestone
Partner, Washington, DC
thomas.firestone@bakermckenzie.com

Jerome Tomas
Partner, Chicago
jerome.tomas@bakermckenzie.com

Peter Tomczak
Partner, Chicago
peter.tomczak@bakermckenzie.com

SEC Regulation and Enforcement

What will change in the regulation and enforcement landscape for financial institutions?

With the recent appointment of Gary Gensler to lead the transition team's review of financial regulatory agencies, Biden has already indicated that there will be a more active enforcement and regulation environment for the Federal Reserve, SEC and CFTC. While Gensler is a Washington and Wall Street veteran, he is also viewed as a progressive. During his time with the Obama administration, he led the way with regulation of the trading of financial derivatives and swaps. Further, the Biden transition has put an entire team to work examining the CFPB, which portends significant change and renewed enforcement and regulation at that agency.

Key Takeaways:

- We anticipate a more active SEC, though not a reversion to the "broken windows" strategy – when in 2013 the Commission vowed to pursue all violations of securities laws regardless of size – since that is largely considered a failed approach.
- We also do not expect a wholesale undoing of the SEC regulation that occurred during the Trump administration, though we anticipate that some "headscratchers," like, for example, retail investor access to private investments, may not survive.
- We also anticipate a shift toward real substantive regulation of crypto currency/digital assets and disclosure in the ESG space.

The Bottom Line:

In terms of ESG, the SEC might finally join the rest of the world and meet investor need and the demand to regulate around ESG, instead of just continuing to require the disclosure of 'material items.'

Financial regulators will want to promote investor confidence, which translates into more retail investor protection. On the enforcement side, while I do expect there will be more enforcement, I don't expect a return to the "broken windows" strategy. But I do expect that the enforcement division will continue its highly successful strategy of using data of all different kinds to develop and bring cases. That, in combination with anticipated increased budgets and personnel, and my long-predicted additional self-reporting initiative, will increase the number of enforcement cases going forward and thus increase investor confidence.

– **Amy Greer**, Partner, Washington, DC/New York

SEC Regulation and Enforcement Contacts

Amy Greer
Partner, Washington, DC/New York
amy.greer@bakermckenzie.com

Jennifer Klass
Partner, New York
jennifer.klass@bakermckenzie.com

Antitrust & Competition

How will antitrust enforcement change and how will it impact merger activity?

Most observers believe that the Biden administration will step up antitrust enforcement, echoing the stance of the Obama administration. Scrutiny of the technology industry, a bipartisan enforcement priority, is likely to continue under Biden. While there will also be increased scrutiny of the pharmaceutical sector, more vigorous antitrust enforcement across all sectors should be expected.

Key Takeaways:

- Big Tech scrutiny has increased significantly in recent years, and it is likely these efforts will continue under a Biden administration. This could mean continuation of — and perhaps an expansion of — the Trump administration's recent high-profile antitrust actions.
- However, during the last administration there was a decline in certain types of enforcement, specifically relating to mergers. The frequency of in-depth “second request” merger reviews decreased during the Trump administration. The Biden administration is expected to conduct more in-depth review of mergers, and to pursue merger enforcement challenges in court more frequently.
- There is bipartisan support to increase the resources dedicated to antitrust enforcement. If more budget resources are devoted to the Federal Trade Commission and the DOJ Antitrust Division, we can expect more enforcement generally.
- There is potential for new antitrust legislation, which has been circulating in the House during the current Congress. Any new meaningful antitrust legislation appears remote at the current moment. However, because the Biden administration will be reinforced with same-party control of the Senate as well as the House, antitrust legislation may get serious consideration in 2021.
- In the US system, federal courts are the ultimate gatekeepers interpreting antitrust law. A substantial part of the justification offered for new federal antitrust legislation is the perception by some observers that federal courts have interpreted antitrust law too narrowly, adhering too strictly to a consumer welfare standard. If the new Biden administration pursues aggressive theories of competitive harm, the role of the courts will be crucial. Will trial courts accept the theories? How will appellate courts handle such theories? It is possible during the next few years that aggressive antitrust theories will be tested in the Supreme Court, which now is expected to align more with the defense position in antitrust cases.

The Bottom Line:

“*Antitrust enforcement under the Biden administration should be expected to be vigorous, and marked by enforcers who are trying to work through complex antitrust issues in both traditional and innovative ways.*”

– **Creighton Macy**, Partner, Washington, DC

“*In comparison to either the Bush or the Trump administrations, the Obama administration built a reputation for highly active antitrust enforcement, with a string of successful antitrust courtroom challenges over eight years. The Biden administration can be expected to renew that aggressive antitrust enforcement approach, particularly for mergers.*”

– **Mark Hamer**, Partner, Washington, DC

Key Antitrust & Competition Contacts

Mark Hamer
Partner, Washington, DC
mark.hamer@bakermckenzie.com

Creighton Macy
Partner, Washington, DC
creighton.macy@bakermckenzie.com

Privacy & Data Security

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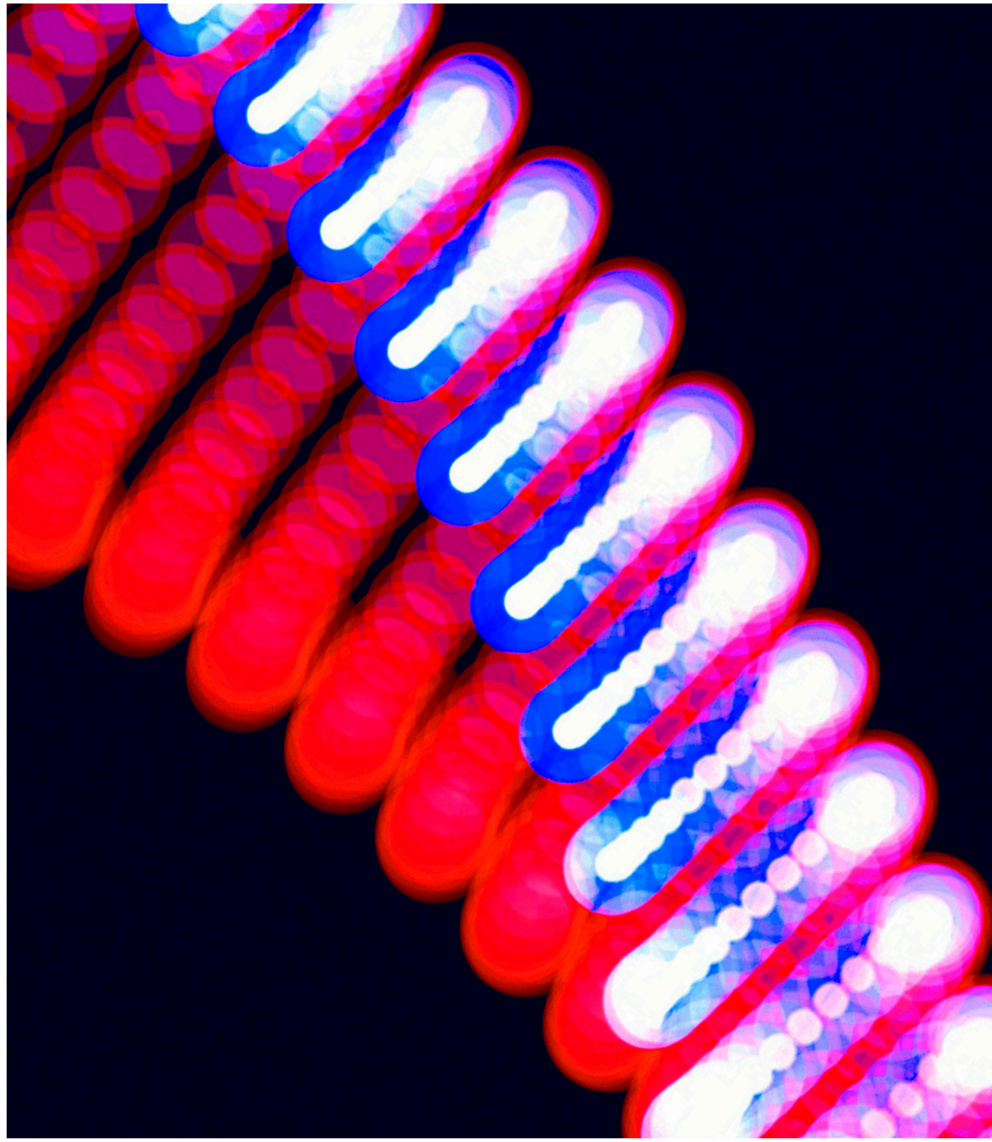
How will the Biden administration address the ongoing privacy regulation at the state level, and will he prioritize federal legislation?

Although federal privacy legislation has bi-partisan support, there isn't agreement on the best way forward, and there haven't been any clear-cut policy statements from Biden and his team. Many believe that the Biden administration would like to move on federal privacy legislation, but at the same time, he may not prioritize legislation right away with many other competing legislative priorities on the table.

Key Takeaways:

- In recent years, many state legislatures have proposed or enacted statutes to govern privacy and the use of personal data. The enforcement mechanisms and substantive rights established by these laws vary considerably and have resulted in a patchwork of differing, and often inconsistent, privacy regimes. Of these state laws the California Consumer Privacy Act (CCPA), which came into force at the start of 2020, is often considered the de facto standard, but the landscape is complex and constantly changing. In the general election, California voters passed Proposition 24, calling for a new California Privacy Rights Act to expand CCPA and to appoint a California Privacy Protection Agency, the first data protection authority on US territory (for further information on the new California Privacy Rights Act please see here and here).
- In the past year, congressional Republicans and Democrats have introduced competing federal privacy bills — the Democrat-backed Consumer Online Privacy Rights Act (COPRA) and the Setting an American Framework to Ensure Data Access, Transparency, and Accountability (SAFE DATA) Act, sponsored by Senate Republicans. Among the key objectives of federal privacy legislation would be to impose much-needed consistency and predictability to the national privacy landscape, including potentially by pre-empting state legislation in this field. Democratic majorities in both legislative chambers afford the new administration a clearer path for progressing federal privacy legislation.
- In July, the Court of Justice for the European Union (CJEU) invalidated the EU-US Privacy Shield Framework in its Schrems II decision. The Privacy Shield was negotiated as an "adequacy" mechanism to facilitate data flows from the EU to the US. The CJEU found that the ability of US intelligence agencies to gather data transferred under the Privacy Shield, without providing sufficient privacy protections for EU residents, was inconsistent with EU law. Companies may nonetheless rely on several alternative mechanisms to transfer personal data from the EU. The Schrems II decision specifically declined to invalidate one such mechanism — standard contractual clauses (SCCs) — though it did suggest that companies would need to evaluate whether their use of SCCs is sufficient to safeguard personal data from access by public authorities. Although there is no clear legislative or administrative remedy suggested by the decision, the Biden administration will likely initiate dialogue with EU officials in order to develop potential solutions.



The Bottom Line:

> *The United States urgently needs a broad federal privacy law that preempts state laws. Given the legislative vacuum at the federal level, California privacy law is creating a de facto federal standard and is moving closer to EU-style data processing regulations. This will crush innovation, as it has in Europe. To make matters worse, California has not repealed any of its myriad existing privacy laws and other U.S. states, including New York and Washington state, are pushing different privacy legislation. Businesses are overwhelmed. Consumers are as confused as privacy advocates. Reaching consensus on federal privacy legislation is difficult, because Americans do not agree on privacy. Many Americans prioritize nationalsecurity, technological innovation, economic freedoms, and freedom of information over rigid data regulation.*
>
> – **Lothar Determann**, Partner, Palo Alto

> *With the Democrats now in the majority in the US Senate, we have an incrementally greater likelihood of federal legislation on privacy, or data breach, or both. Here, given the developments in California and across the US, preemption would be key for businesses and consumers looking for greater clarity and understanding. Having federal law preempt state law when the laws conflict, as has been the case with spam and e-signature legislation, would promote certainty and trust and prevent privacy legislation from becoming a wet blanket that unnecessarily slows the growth of commerce and innovation. My expectation is also that the Biden administration will pick up negotiations with the European Commission on a revitalized Privacy Shield 2.0 program, although the timeline of that is not clear at this stage.*
>
> – **Brian Hengesbaugh**, Partner, Chicago

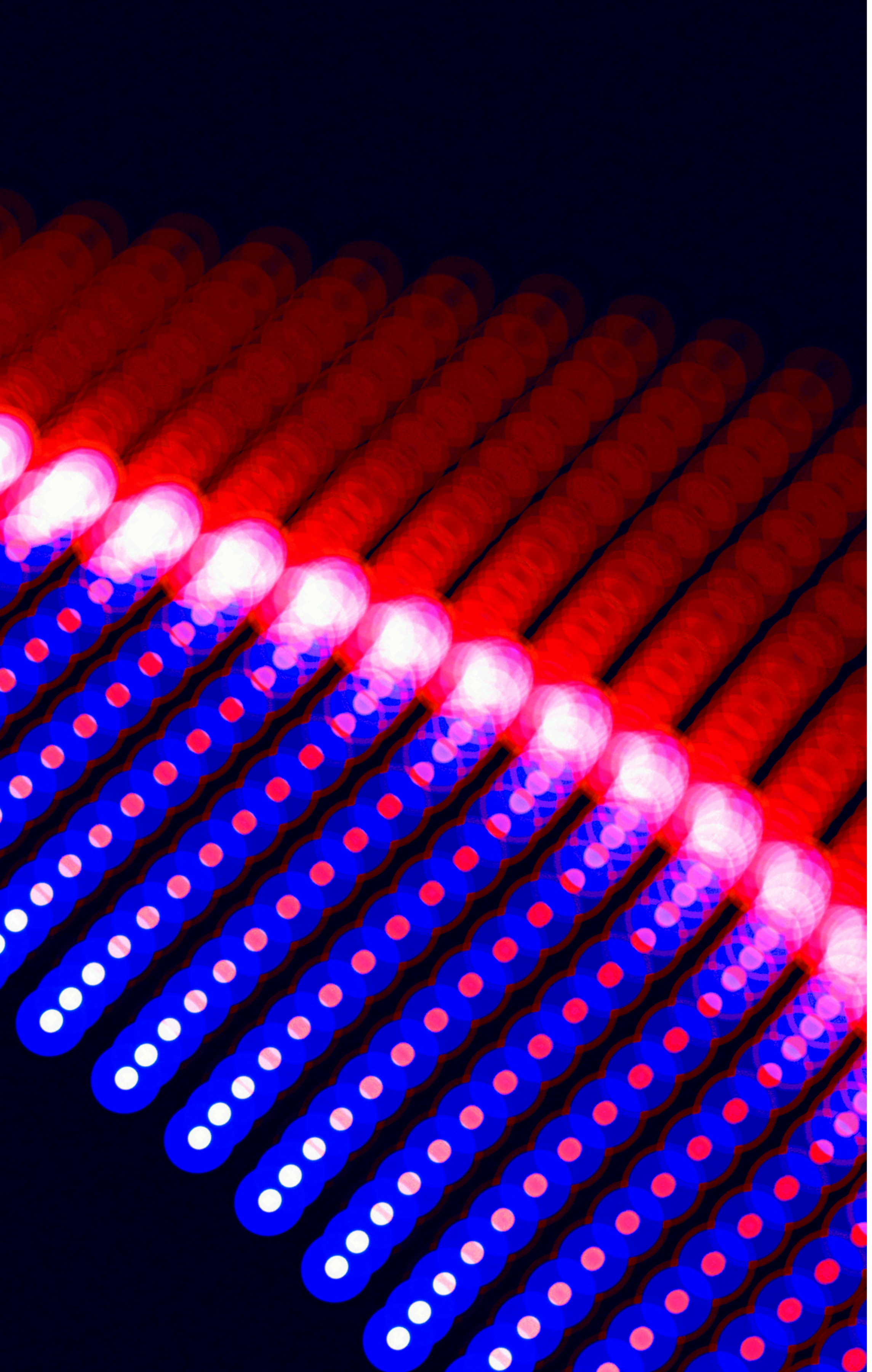
Key Privacy & Data Security Contacts

Lothar Determann
Partner, Palo Alto
lothar.determann@bakermckenzie.com

Michael Egan
Partner, Washington, DC
michael.egan@bakermckenzie.com

Brian Hengesbaugh
Partner, Chicago
brian.hengesbaugh@bakermckenzie.com

Harry Valetk
Partner, New York
harry.valetk@bakermckenzie.com



Resources

Baker McKenzie Biden Administration Hub

Additional Firm Resources

- 3R Podcast Series
- InsightPlus

Public Resources

- President-Elect Biden Transition Website
- Democratic Party Platform
- Branches of US Government

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