KEVIN CHAMBERS, MANDY REEVES, DOUG YATTER*

Aktuelle Entwicklungen in den USA – White Collar- und Enforcement-Trends unter der neuen Trump-Regierung

Dieser Beitrag der CCZ-Reihe „Aktuelle Entwicklungen in den USA“ behandelt die neuen White Collar- und Enforcement-Trends unter der neuen Trump-Regierung. Die Fragen wurden von Kevin Chambers, Mandy Reeves und Doug Yatter beantwortet.

The current landscape in the United States is characterized by increased enforcement actions in areas such as cryptocurrency, artificial intelligence, and cybersecurity. This reflects the Biden administration's proactive approach to white-collar crime, with a focus on corporate criminal enforcement. Could you elaborate on the most significant enforcement developments of the Biden administration?

Kevin Chambers: The Biden administration demonstrated a proactive approach to enforcement, particularly in the realms of cryptocurrency, artificial intelligence, and cybersecurity, marking significant developments in these areas. Under Biden, the Securities and Exchange Commission (SEC) pursued a very active enforcement agenda related to cryptocurrencies in an effort to assert its jurisdiction over large swaths of the industry,[1] while the Commodity Futures Trading Commission (CFTC) pursued its own enforcement actions on cryptocurrency derivatives and focused on addressing market manipulation and fraud in crypto spot markets. In the field of artificial intelligence, the

* *Kevin Chambers* ist Global Chair der White Collar Defense & Investigations Praxisgruppe der internationalen Rechtsanwaltssozietät Latham & Watkins LLP; *Mandy Reeves* ist Managing Partner des Washington, D. C. Office; *Doug Yatter* ist Global Vice Chair der White Collar Defense & Investigations Praxisgrupe von Latham & Watkins LLP.

1 Vgl. *von Laufenberg* CCZ 2023, 195 ff.

Biden administration issued executive orders aimed at regulating AI, with a strong emphasis on national security and consumer protection.[2] Cybersecurity has remained a bipartisan priority, with the Biden administration working to balance regulatory oversight and the need for robust cybersecurity measures, as evidenced by active enforcement actions from agencies like the Federal Trade Commission (FTC) and SEC. Additionally, the Department of Justice (DOJ) was vigorous in corporate criminal enforcement, emphasizing whistleblowing and voluntary self-disclosures, recidivism, and compliance programs, while also focusing on civil rights enforcement, particularly in diversity, equity, and inclusion initiatives. Across these areas, the Biden administration's approach was characterized by aggressive enforcement efforts.

With the conclusion of the United States presidential election, a new administration under President Trump has taken office. This will be the fifth change of parties in the presidency in the last 25 years. From your perspective, what are the top three enforcement priorities that the Trump administration is likely to focus on, and how might these priorities impact corporate law practices?

Kevin Chambers: We anticipate that the new Trump administration, like the first Trump administration, will prioritize deregulation across various sectors. This may have a particular impact on Environmental, Social, and Governance- (ESG) and Diversity, Equity, and Inclusion- (DEI) related policies, as well as broad sectors like energy and digital assets. This shift aims to reduce regulatory burdens, creating a more business-friendly environment. For corporate law practices, this will involve advising clients on navigating changes in compliance obligations and capitalizing on opportunities arising from a less restrictive regulatory landscape. We think there will likely be a strong continued emphasis on national security and trade, particularly concerning foreign investments into and out of the United States. This includes a continued focus on Committee on Foreign Investment in the United States (CFIUS)[3] reviews, export controls, and sanctions. Law practices will need to guide clients through the complexities of foreign investment regulations and ensure compliance with evolving trade and national security policies. We anticipate that the Trump administration will adopt a more pro-industry approach to technology, especially artificial intelligence and digital assets. Lawyers will play a crucial role in helping clients understand the implications of these policies on technology development and deployment, as well as ensuring compliance with new or revised regulatory frameworks. Additionally, civil rights enforcement is a priority for the new administration, though with greater focus on investigating and challenging DEI programs and initiatives. This could impact institutions receiving federal funds, such as universities and healthcare providers, as well as federal contractors. Corporate law practices will need to advise clients on compliance with non-discrimination obligations and prepare for potential investigations or litigation related to DEI initiatives and diversity goals.

During President Trump's previous term, the DOJ took significant actions against major consolidations, such as blocking mergers among health insurers, and the FTC pursued cases against companies like Meta for alleged monopolistic practices. How has the DOJ's approach to antitrust enforcement evolved under the Biden administration, and what changes do you anticipate with the return of the Trump administration?

Mandy Reeves: Under the Biden administration, the DOJ and the FTC adopted a more aggressive approach to antitrust enforcement, particularly in the context of mergers and acquisitions. The focus was on scrutinizing labor impacts, private equity, and roll-ups, with a reluctance to accept divestitures as a remedy for antitrust issues, leading to increased litigation. This resulted in a climate where even deals with potential remedies faced significant uncertainty. The return of the Trump administration is expected to bring a shift towards more predictability in antitrust enforcement, and is likely to allow divestitures as a means to resolve antitrust concerns. This does not imply a reduction in all antitrust enforcement. We expect continued scrutiny on mergers in consolidated spaces, for example in deals involving five merging to four, four merging to three, and vertical deals where there is a dominant firm acquiring another company that might lead to vertical foreclosure. These are all areas that the Trump administration examined in the past, and continued scrutiny is anticipated. While attention on mergers in consolidated spaces and the technology sector will continue, the administration is expected to avoid the more aggressive and unusual theories seen under the outgoing administration. Additionally, there may be structural changes aimed at consolidating more of antitrust enforcement into a single agency to enhance efficiency and predictability.

We expect to see a return to the former remedies for M&A deals, implemented by the previous Trump administration. These particularly allowed divestitures to clear a deal. Such divestitures have not been allowed under the Biden administration. What impact will that have on the DOJ's direction and enforcement?

Mandy Reeves: The Biden administration's policy, especially at the DOJ, was not to accept divestitures as a way of resolving antitrust issues. Looking ahead, we expect that the Trump administration may return to past practice of allowing divestitures as a means of solving antitrust issues in deals. This approach would enable parties to have more confidence in predicting that their deals, even if they raise antitrust issues, will close due to the ability to anticipate what a remedy might look like in the M&A negotiating process. Companies could then execute on that remedy by the outside date without having to go through litigation, which could lead to an increase in strategic mergers and acquisitions and allow the DOJ to rely more on structural remedies to resolve antitrust issues, rather than behavioral remedies or litigation. With divestitures as an available remedy, there may be a reduction in the number of cases that go to litigation.

In August 2024, the DOJ's Criminal Division launched the Corporate Whistleblower Awards Pilot Program to uncover and prosecute corporate crime. How does the new administration, which may have different priorities regarding whistleblower protections and incentives, impact the program's implementation?

2 Vgl. *Latham* & *Watkins*, Client Alert, President Biden's Executive Order on Artificial Intelligence – Initial Analysis of Private Sector Implications, abrufbar unter https://www.lw.com/admin/upload/SiteAttachments/President-Bidens-Executive-Order-on-AI-Initial-Analysis-of-Private-Sector-Implications.pdf (zuletzt abgerufen am 26.1. 2025).

3 Vgl. *Latham* & *Watkins*, Committee on Foreign Investment in the United States, abrufbar unter https://www.lw.com/admin/upload/SiteAttachments/CFIUS-QA-2023.pdf (zuletzt abgerufen am 26.1. 2025).

Kevin Chambers: The Biden administration was marked by an active use of the policy process, which included extensive guidance to companies on how the DOJ views voluntary self-disclosures, issues like recidivism, whistleblowers and whistleblower policies, and compliance programs as a whole.[4] We expect that the new administration may examine policies like the Corporate Whistleblower Awards Pilot Program and assess whether those policies reflect their views. As the new team focuses on more immediate issues, gets up to speed, and gathers input from a variety of stakeholders within their new administration, we anticipate that they will take the time to review the policies and, if they do not align with their goals, begin to implement changes. It is very likely that, over time, there will be shifts in emphasis regarding where the priorities lie.

There is an expectation that the Trump administration may seek to reduce regulations in the energy and environmental sectors. How do you foresee this affecting the burgeoning field of ESG litigation and enforcement in the United States?

Doug Yatter: The expectation that the Trump administration may seek to reduce regulations in the energy and environmental sectors, which could significantly impact the field of ESG litigation and enforcement in the United States, is starting to take shape. With a focus on energy independence and fossil fuel development, the administration has begun to roll back policies that sought to decrease greenhouse gas emissions and to reduce emphasis on certain renewable energy projects.

In fact, on Day 1 of his administration, President Trump signed various executive orders (written instruments directing the operations of federal government) rolling back climate policies and emphasizing a renewed focus on U. S. conventional energy.[5] For example, he declared a national energy emergency to facilitate the production of domestic fossil fuels and to reduce reliance on foreign energy. He also initiated plans to further oil drilling and mining in federal lands and waters, including Alaska. On the international stage, Trump withdrew the U. S. from the Paris Agreement, with that withdrawal becoming effective in one year under United Nations rules. Moreover, he announced that the U. S. will withdraw from any "agreement, pact, accord, or similar commitment" made under the United Nations Framework Convention on Climate Change (UNFCC), revoke any financial commitments made under the UNFCC, and rescind the U. S. International Climate Finance Plan. These executive orders indicate that, from Day 1, the new administration is pursuing a clear shift in U. S. energy and climate priorities.

This shift could lead to a decrease in federal regulatory pressure on companies, potentially resulting in fewer government-initiated ESG-related enforcement actions against companies. We expect that governmental authorities may focus on asset managers and investors with regard to their climate/ESG memberships through the lens of antitrust laws and fiduciary duty obligations. Any reduction in federal oversight might prompt states to enact more stringent environmental regulations. Additionally, a de-emphasis on ESG-related disclosures at the SEC could result in increased activism and private litigation as stakeholders seek to fill a perceived gap in combatting environmental and social impacts. Companies may need to navigate varying state regulations and increased scrutiny from investors and consumers.

With President Trump's re-election, there has been a notable increase in cryptocurrency assets. Could you provide insights into the current regulatory and enforcement landscape for cryptocurrencies, and do you anticipate any major changes under the new administration?

Doug Yatter: The Biden administration took a robust stance on regulating digital assets using enforcement actions based on traditional financial regulations. The SEC, under the Biden administration, pursued a broad enforcement agenda with actions against a range of major players in this nascent industry.[6] The CFTC pursued its own enforcement actions to promote regulatory compliance in the cryptocurrency derivatives sector and to combat fraud and manipulation involving digital assets. The DOJ and the Department of the Treasury, through its Financial Crimes Enforcement Network and Office of Foreign Assets Control, also pursued aggressive enforcement agendas focused on anti-money laundering and sanctions compliance. The result has been multiple years of intensive litigation between industry participants and government agencies. The Trump administration has indicated that it will revisit this enforcement-first focus and devote greater resources to new legislation or regulations that will provide a clearer path for the digital asset industry to grow in the United States.

The 2024 election results have highlighted distinct political preferences across various U. S. states. Do you foresee more aggressive state legislation, particularly from states like California? How can foreign companies operating in the U. S. navigate and mitigate the risks associated with a potentially more fragmented legal landscape?

Kevin Chambers: The 2024 election results may lead to more aggressive state legislation, particularly from states like California. Known for its proactive stance on regulatory issues, California may respond to potential federal deregulation under the Trump administration by enacting stricter laws in areas such as environmental protection, data privacy, and corporate governance. This could result in a more fragmented legal landscape as states seek to maintain or enhance protections independently of federal policies. For foreign companies operating in the U. S., navigating this complexity will require close monitoring of state legislative developments, especially in states with a history of more ambitious regulation. Companies should take the potentially greater or divergent expectations of state programs in mind as their business initiatives and compliance programs continue to evolve.

KONTAKT:

Dr. Christoph P. von Laufenberg
Latham & Watkins LLP
Maximilianstraße 13
80539 München
Tel.: 089/208038177
christoph.vonlaufenberg@lw.com

4 Vgl. *von Laufenberg/Pfad* CCZ 2023, 111.

5 Vgl. *Latham* & *Watkins*, Client Alert, Navigating Change: President Trump's Day 1 Executive Orders Set New Course on Energy and the Environment, abrufbar unter: https://www.lw.com/en/insights/navigating-change-president-trump-day-1-executive-orders-set-new-course-on-energy-environment (zuletzt abgerufen am 26.1.2025).

6 Vgl. *von Laufenberg* CCZ 2023, 195.