

## Antitrust & Competition

- Shifting focus in merger control enforcement, towards more aggressive, non-traditional theories. At the very least, there will be uncertainty in clearance timing and substantive review of transactions.
- Continuing focus on high tech business, social media and life sciences/pharma sectors, and a greater likelihood in bringing Section 2 monopolization cases.
- Anticipating that a Republican Senate may slow nomination approval of the expected changes in DOJ Antitrust Division and Federal Trade Commission leadership.
- Legislative proposals to change the antitrust laws will also likely move forward with a new Congress.

## Energy

- Nuisance and other claims arising out of investments in new energy infrastructure spending, especially for projects involving renewables, decarbonization of the electric grid, and expansion of transmission lines.
- New regulations or executive actions focused on delaying or limiting permitting, leasing and drilling on federal lands and waters.
- Potential “takings” and other claims arising out of inability to develop oil and gas leases on federal land.
- Litigation over more stringent policies and regulations affecting coal-fired and other fossil fuel generation.
- Re-reviews and harder hurdles for fossil fuel infrastructure projects.
- More private, state, and federal “end-of-lifecycle” litigation as energy assets are decommissioned due to accelerated energy transition.
- More regulatory oversight at state and local levels on new energy projects.
- More class action, lease and royalty litigation as less drilling and lower prices cut into royalties expectations.
- More shareholder and other litigation risk related to public disclosures about carbon emissions and other green initiatives by traditional energy companies.
- Increased decarbonization and electrification in energy is likely to be a strong focus of a Biden administration. It seems unlikely that we will see significant changes in gas and LNG production in the near term. Easing of trade tensions with China would be beneficial to U.S. LNG exports and other U.S. energy exports, and we expect the Biden administration to support the replacement of coal generation in China with cleaner burning U.S. LNG.
- Development of interstate natural gas pipelines might be slowed by the relevant regulatory authorities under a Biden administration. The transportation system that is already permitted, existing or under development will be sufficient to support the export of LNG.
- Despite a strong focus on a transition to lower carbon fuels in the U.S., the rest of the world still depends on the export of gas, oil and other fuels from the U.S., even with renewables becoming an increasing share of the power generation assets abroad.

## Environmental, Safety and Incident Response

- New leaders at EPA and DOJ are expected to dedicate more resources toward enforcement.
- New support of agency budgets for more inspections and enforcement activities.
- Increased focus on reducing greenhouse gas emissions from energy and industrial sectors through regulation and other actions; climate and greenhouse gas emissions analysis to be incorporated into all permitting and licensing decisions.
- Expanding Environmental Justice programs and initiatives.
- Transparency initiatives including requirements for climate risks and greenhouse gas emissions disclosures.
- More frequent government information requests for facility compliance data and records.
- A potential increase in citizen enforcement as environmental groups redirect resources from fighting regulatory rollbacks to filing more citizen suits under the Clean Air Act, Clean Water Act, and other statutes.

## Intellectual Property

- A Biden administration will likely replace the current United States Patent and Trademark Office Director, Andrei Iancu, with someone who may be less pro-patent and more accommodating to patent challenges before the Patent Trial and Appeal Board, particularly as it relates to discretionary denials and patent eligibility.
- Policy at the non-partisan U.S. International Trade Commission is not likely to be affected by a change in administration. If the new Congress or Biden administration take an increased interest in the effect of imports on domestic industries, the USITC could be requested to conduct more 332 studies.
- Advising on the revisit of President Trump's trade and IP relationship and dealings with other countries including China – and potential for a more consistent approach to worldwide exchange of intellectual property enforcement.
- U.S. policy on IP protection and regulation of Artificial Intelligence may change under a new administration; see the U.S. Office of Management and Budget ("OMB") *Draft Guidance for Regulation of Artificial Intelligence Applications*, Jan. 8, 2020 ("OMB Guidance") outlining principles which agencies should consider and implement when developing regulations of AI invention.
- U.S. policy (per USPTO/DOJ/NIST) on the treatment of Standard Essential patents, e.g., recent DOJ business review letters to the IEEE and Avanci, and the December 2019 joint policy statement issued concerning standard essential patents ("SEPs"). The current trend in treating SEPs as any other patent for purposes of remedies may change under new leadership.
- Counseling in preparation for a potential impact on DOJ/FTC enforcement actions regarding patent-antitrust issues, e.g., standard essential patent issues and reverse payment settlements in ANDA litigation.
- U.S. treatment and restrictions on interactions with certain foreign companies and governments deemed to be harmful to U.S. interests – the Department of Commerce, Bureau of Industry and Security, "BI&S Entity List." Interim Final Rule (IFR) issued in June 2020 may be reversed or modified under a new administration.
- On Tuesday, November 10<sup>th</sup>, the Supreme Court heard arguments concerning the Trump Administration's effort to strike down the Affordable Care Act ("ACA") in its entirety. If the administration is successful, the current biosimilar approval pathway as the Biologics Price Competition and Innovation Act ("BPCIA") would be eliminated as it was passed as a part of the ACA. While a replacement approval pathway would likely be passed under a Biden Administration with bipartisan support, it is quite possible that a Biden Administration would desire to modify certain features of the BPCIA, leading to significant implications for life science companies. For example, modification of the 12-year exclusivity period for newly approved biologics would disturb settled expectations concerning the economic value of current and future biologic medicines.
- A Biden Administration may return to and expand on the National Cancer Moonshot Initiative to drive innovation and investment in life sciences given the significant social and economic impact of the COVID pandemic.

## SEC Enforcement and Securities Litigation

- Focus on the implementation and ultimately the aggressive enforcement of Regulation Best Interest, further defining the best interest standard.
- Renewed focus on broken windows matters in which the Division of Enforcement intentionally pursue smaller, non-fraud cases.

- Increased focus on and enforcement around environmental, social and governance (ESG) disclosures and litigation concerning ESG-related corporate disclosures.

### **White Collar & Corporate Investigations**

- Renewed focus on corporate criminal enforcement – e.g., financial crimes, environmental crimes, health care fraud, international corruption; this shift in focus would likely draw resources back from the focus on certain immigration enforcement matters.
- Continued rise in opioid-focused matters, including against distributors, manufacturers and prescribers, to remain a bipartisan issue. DOJ has secured recent high-profile criminal and civil resolutions in this industry that will likely serve as a blueprint for additional investigations and prosecutions.
- With trillions injected into the U.S. economy in response to the COVID-19 pandemic, we expect to see an increase in federal criminal investigations and congressional oversight focused on how funds were used and whether any false representations were made in the application process.

### **Trade**

- Renewed commitment to international trade agreements with China, including relating to energy trade. Tariffs and quotas may still be used to address environmental issues, such as a “carbon adjustment fee.” Trade agreements also likely to be more multilateral.
- Continued, and perhaps increased, interest in foreign investments by countries with national security concerns (e.g. China, Russia) into critical infrastructure involving energy assets, including transportation systems.
- Increased implementation of new export controls on foundational and emerging technologies (including relating to energy) that passed Congress in 2018.

### **FERC**

- Approval of new rules to incorporate carbon pricing into wholesale markets.
- Heightened scrutiny of proposed pipelines regarding greenhouse gas impacts.
- Review of capacity market rules that mandate offer floors for state-subsidized zero-emission resources.
- Uptick in investigations pursued by the Office of Enforcement regarding tariff compliance, anticompetitive behavior, and market manipulation.

### **Tax**

- Democratic control of both the House and the Senate will likely be necessary to enact fully Biden’s campaign proposals to increase corporate and certain individual tax rates and to reduce the estate and gift tax exemption.
- If the Republicans retain control of the Senate, the Biden administration will likely need to work with the Republican leadership of the Senate as well as the Democratic leadership of the House on tax proposals that include elements of Biden’s campaign tax proposals and Republican tax priorities.
- A Biden administration is expected to pursue extending and increasing tax incentives for renewable energy projects such as wind and solar, as well as for the development of carbon capture technology.
- Executive compensation will likely also draw continued scrutiny, consistent with Biden’s campaign proposal to increase tax rates on high income earners.
- We expect continued major developments at the state and local tax level in light of the election and COVID-19, including nexus, apportionment, and withholding issues due to employees working from home in various states.