

5 LEGAL AND BUSINESS ISSUES TO KEEP WATCHING POST-ELECTION 2020

After the 2016 Presidential election, MassPoint PLLC published [five issues to watch in 2017](#) (and beyond). We revisit our predictions on the five issues, which we expect to remain watch-worthy under the Biden Administration.

POST-ELECTION 2016 (WHAT WE SAID)	POST-ELECTION 2020 (WHAT WE EXPECT)
Administrative law and (De)regulation	Administrative law and Re-Regulation
The Trump Administration and Republican Congress members were poised to dismantle Obama regulations, and did so with success. However, as we stated, undoing administrative actions with more administrative actions—particularly executive orders—is not as straightforward and lasting as it might seem. President Biden’s flurry of executive orders reversing Trump executive actions in the first week of his presidency illustrates this point.	Rather than deregulation, look for re-regulation in response to Trump era deregulation measures, in addition to new regulations stemming both from entirely executive action and executive action mandated by legislation. In some areas, reversing Trump Administration actions, including economic sanctions and export controls, will require more than executive orders to undo or modify rulemaking.
Increased U.S. State & Local Activism	State and Local Activism Will continue, With Changes
State and local governments were expected to be more activist after the 2016 election, to protect and effectuate preferred policies that were divergent from those of the Trump Administration. This prediction proved accurate both on the policy front and as to specific challenges to President Trump and his campaign (e.g., Emoluments Clause cases).	We will likely see continuing state and local activism, some from attorneys general and others in opposition to Biden Admin measures (e.g., immigration), and some acting in concert with or in furtherance of Biden Admin policies. California remains a lodestar on environmental/sustainability issues, and the Golden State’s experience and positions on environmental and sustainability issues will likely inform or be concordant with those of the Biden Administration. We might also see California’s influence on data privacy.
Private Sector Role in ESG/Business Ethics	Private Sector Role Will Remain Active on ESG
We indicated that the private sector would likely play a greater role in Environmental, Social, and Governance (ESG) matters, particularly in contrast to a Trump Administration that espoused policies that undermined or opposed ESG efforts domestically and internationally. This expectation was realized.	The private sector’s role on the ESG front has increased, by choice and necessity. This will continue in 2021 and beyond. We expect that the private sector will act largely concordantly with Biden Administration ESG policies and stances as to both global and domestic issues, particularly social and civil rights issues (e.g., racial and gender equity). In 2021 and beyond, we expect the private sector to come under greater pressure from consumers, employees (e.g., millennials), and other constituencies to talk the talk and walk the walk on ESG, social justice, and civil rights.
Multilateralism, and Sanctions	Resumption of Multilateralism
We expected that in 2017 the Trump Administration’s unilateralist outlook would inform sanctions and financial regulation policies, but it was not clear how. The Trump Administration enthusiastically embraced sanctions. However, the Administration did so unilaterally and transactionally in instances, and by this approach diminished the reach and durability, and credibility of sanctions measures, including in the eyes of traditional allies.	The Biden Administration in key areas will embrace and bolster multilateralism, reversing its predecessor’s isolationist, “America First” posture. One question, post-Trump, is how willing traditional allies will be to cooperate and/or take a back seat to the United States. On sanctions, watch for greater efforts to coordinate with foreign partners, particularly as to Iran. We expect to see forceful use of cyber sanctions and sanctions targeting Russia. An open question is how the Biden Administration will deal with the Nord Stream 2 pipeline, related to which sanctions were authorized by the Protecting Europe’s Energy Security Act of 2019 . Additionally, there is a question as to how the Biden Administration will utilize Global Magnitsky Sanctions that the Trump Administration deployed liberally and, in some cases, transactionally . It is unlikely that the Biden Administration will utilize sanctions <i>transactionally</i> to advance traditional trade objectives (e.g., as a “ trade war weapon ”). As noted below, the Biden Administration’s efforts to build an alliance to counter China on technology—in 5G and other areas—may be met with some resistance, from developing nations that have integrated and rely on Chinese technology, and from developed nations that may be looking to maintain trade and technology ties to China without significant disruption.
Foreign Investment in the United States	Foreign Investment Will Remain Under Scrutiny
As expected, scrutiny of foreign investment in the United States, particularly by China and related entities, was beefed up in the prior four years. We expected this, as we should have. In the years preceding Trump’s election in 2016, concern about foreign investment in the United States, particularly from China and even more particularly in strategic assets, such as technology, was on the rise.	U.S. scrutiny of foreign investment will continue for the foreseeable future, and the focuses on China and/or foreign investment in emerging technology will remain. There remains strong bipartisan support for FDI national security-based regulation, as evidenced by, e.g., the enactment in 2018 of the Foreign Investment Risk Review Modernization Act (FIRRMA), the related Export Control Reform Act of 2018 (ECRA), and more recent legislative proposals, including the America LEADS Act. We expect additional regulation and enforcement in 2021 and beyond, as well as the adoption or effective implementation of legislative and policy proposals, including those spelled out in the America LEADS Act. Importantly, the Biden Administration is likely (as it has indicated) to add to its toolbox affirmative actions to bolster U.S. competitiveness in science and technology, including by increasing targeted funding and resources for the U.S. S&T enterprise across the academic and public and private spheres. Importantly, under FIRRMA and ECRA, multilateralism is encouraged and required, with the objective being to harmonize the U.S. approach to foreign investment in technology, and access to and influence on technology and the technology ecosystem generally, with those of allied nations. This multilateralism has been advanced by FIRRMA regulations adopted by the U.S. Department of the Treasury (CFIUS), as illustrated, for example, by “excepted investor” regulations that on an interim basis treat the UK, Australia, and Canada as states excepted from certain CFIUS regulations. We expect that the United States will more proactively seek international coordination on foreign investment and export controls as to emerging and important technologies like 5G, Artificial Intelligence, and semiconductor fabrication.