

## Trump's First 100 Days: Business Litigation

Analysis of New Administration

12.09.2024

Banks and other regulated entities have frequently challenged Biden-era rulemakings in court. The incoming administration may change the trajectory of these cases, as Trump has promised to stop agency overreach.

### AT A GLANCE

- The crypto market has experienced a bump since the election, partly on the expectation that the new administration will lay out a clearer, more industry-friendly regulatory structure and will rely less on ad-hoc enforcement actions that are costly to defend and resolve.
- We anticipate a decrease in federal enforcement actions and regulatory restrictions applicable to consumer products regulated by the federal agencies. However, states like California will continue to introduce and enforce their own regulations.
- President-elect Trump has a history of nominating judges who are conservative and apply an originalism interpretation theory, and we expect this to continue.

### SECURITIES AND EXCHANGE COMMISSION

- **Cryptocurrency:** The current Securities and Exchange Commission (SEC) has been criticized for "regulation by enforcement" of the crypto market, refusing to adopt specific rules but pursuing enforcement actions for registration failures where the SEC contends the token at issue is a "security." The crypto market has experienced a bump since the election, partly on the expectation that the new administration will lay out a clearer, more industry-friendly regulatory structure and will rely less on ad-hoc enforcement actions that are costly to defend and resolve.
- **Moderated enforcement:** In recent years, enforcement staff has sought to apply the internal accounting and disclosure controls requirements of the securities laws to alleged shortcomings that might not be

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considered "accounting" or "disclosure" issues. For example, cases like the following are likely to be pared back under the new administration, [February 2023 matter of Activision Blizzard Inc.](#), the October 2023 matter involving [SolarWinds Corporation](#) and the November 2023 [matter involving Charter Communications](#).

- **Broker-dealer off-channel communications:** Since 2021, the SEC has recovered billions in penalties from regulated financial firms that failed to retain all business communications, including texts and chats, without showing any investor harm and, according to some, without any clear definition of what constitutes a "business" record that is required to be retained. We expect a return to an enforcement regime that focuses on addressing traditional securities fraud and the protection of retail investors, which was the philosophy expressed by former SEC chair Jay Clayton during the first Trump administration. We also expect greater sensitivity to the size of penalties imposed on issuers in cases where no investor harm is shown, given that it is the shareholders that bear the brunt of such penalties.

## CONSUMER PRODUCTS

- We expect ambiguity regarding changes in leadership and direction of the U.S. Consumer Product Safety Commission (CPSC) at the outset of 2025, which will also likely be true with respect to other federal agencies like the Food and Drug Administration and Federal Trade Commission. The ability of several of these agencies to promulgate rulemaking significantly decreased during Trump's first term. Rulemaking then increased under Biden. We expect that rulemaking authority of these agencies will be in a state of flux during the transition.
- We anticipate a decrease in federal enforcement actions and regulatory restrictions applicable to consumer products. Children's products are likely to be the most dominant category of consumer products for which we will see the most federal regulatory enforcement action under the Trump administration, but even the CPSC's enforcement of regulations related to children's products may decrease. We also expect to see an overall decrease in enforcement actions, and potentially a decrease in recalls for general use consumer products that are not specifically designed for children.
- Even with decreased federal enforcement of consumer product regulations, manufacturers and sellers will still need to comply with various state regulations that affect their products, including California Prop 65. Compliance with these state regulations is particularly important for product suppliers operating on a national scale. We expect Prop 65 actions to continue in 2025, potentially in greater magnitude as federal regulatory enforcement actions may decrease.
- Many states recently passed regulations either banning or requiring mandatory reporting and warning language on products that contain PFAS chemicals. Some of the state regulations are already in effect, with many others effective in 2025 and 2026. Any consumer product supplier who sells products containing PFAS should be very careful with these regulations, as many of them impose a strict ban on the sale of certain types of PFAS-containing products, while others impose reporting and warning requirements on suppliers of these products.

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## JUDICIAL NOMINATIONS AND VACANCIES

Currently, there are 47 judicial vacancies and 20 future vacancies in the federal courts. Of these vacancies, six are on the U.S. Court of Appeals. President Biden has nominated 28 judges to fill these vacancies, but they have yet to be confirmed. It is reasonable to expect the Senate to attempt to block confirmation of these nominations. If these nominees are not confirmed before President-elect Trump takes office, the nominations will likely be pulled and he will make new nominations. President-elect Trump has a history of nominating judges who are conservative and apply an originalism interpretation theory, and we expect this to be the case for the new administration.

*This article is part of a broader analysis examining the anticipated challenges and opportunities created by an administration change. Attorneys from several different practice areas contributed to this series of articles across multiple legal areas.*

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