

What Will a Biden Administration Mean for Business?

Sam Gandhi, Peter Roskam, Michael Borden, and Pattie DeLoatche
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Sam Gandhi:

The voters have spoken. A Biden administration waits in the wings. How will the new administration respond to COVID-19, and will it soon pursue an agenda that could change the way companies are regulated and the way they do business? Who should worry about being investigated? In today's podcast, we'll find out what Biden means for business.

Pattie DeLoatche:

A President-elect Biden is going to listen more to the mainstream scientists, and I believe also that he will provide more federal support and guidance to states on testing and contact tracing.

Peter Roskam:

The political left is going to continue to put pressure on the Biden administration, and what doesn't happen on Capitol Hill then moves through a regulatory agenda. So, I think the Biden team will be fairly aggressive.

Michael Borden:

I simply don't believe that President Biden is going to walk into the trap, that he's "soft on China" by reversing executive orders that have been issued by President Trump.

Sam Gandhi:

From the international law firm Sidley Austin, this is the Sidley Podcast, where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi. Hello, and welcome to this edition of the Sidley Podcast, episode number 14. Today, we focus on the impact of a new Biden administration, how its approach to transactions, regulations, and investigations could impact the business world.

This podcast is a follow-up to a recent discussion that Sidley hosted featuring Nikki Haley, former U.S. ambassador to the United Nations, and

Senator Max Baucus, former U.S. ambassador to the People's Republic of China. Today, we speak with Sidley partners Peter Roskam and Michael Borden, who hosted that webinar, and Patricia DeLoatche, a senior policy advisor with the firm.

Peter is a member of Sidley's Government Strategies practice. He provides strategic counsel to clients whose businesses involve law, government, media, and public policy, and he's a former six-term U.S. representative from Illinois, and held some of the most significant positions in the House during his tenure from 2007 to 2019. Peter's also a partner in the firm's Chicago and Washington, D.C. offices.

Michael is head of Sidley's Government Strategies group, and is a member of our White-Collar: Government Litigation and Investigations practice. He counsels clients facing complex and high-stake challenges involving congressional investigations, legislation, and federal government regulation, and he joined the firm after working for almost a decade on Capitol Hill, including as senior counsel of the House Financial Services Committee during the financial crisis and the enactment of the Dodd-Frank Act. Michael is a partner in our Washington, D.C. office.

And Pattie is a member of the firm's Government Strategies and Food, Drug, and Medical Device Compliance and Enforcement practices. She provides strategic advice on legislative and regulatory issues before the administration, the Congress, and federal and state agencies, and she joined the firm after more than 25 years as a leading health policy advisor to key members of Congress. She served on health-related committees and developed, negotiated, and implemented significant health legislation. Pattie is a senior policy advisor in the firm's Washington, D.C. office.

Peter, Michael, and Pattie, thank for joining us on the podcast today.

Peter Roskam:

Thanks, Sam. Good to be with you.

Michael Borden:

Thank you, Sam.

Pattie DeLoatch:

Thanks, Sam.

Sam Gandhi:

Peter, let me start with you. It just seems, as many observers are counting on a Republican Senate in the new year after the Georgia runoffs are decided, as of today, the Republicans are counting on at least 50 seats, and could have more. How much should companies count on this in trying to gauge what policies are going to be implemented in the new Biden administration?

Peter Roskam:

Sam, I think at this point, it's more likely true than not true that the GOP will maintain a majority. These two Georgia Senate seats are up on January 5, as we know, but I would say that the Republican Party has the advantage moving into these special elections, but that's going to be decided fairly quickly. Regardless of the outcome, though, Senator Joe Manchin from West Virginia, a Democrat who's in the center of his party, has basically said he will not be complicit in the abolition of the filibuster rule, which is interesting.

So, no matter what direction this goes, the Senate is going to be a closely-divided institution. As I said, I think the GOP has the edge.

Sam Gandhi:

And Michael, what do you think the top action item for the Biden administration will be, in terms of regulation?

Michael Borden:

So, President-elect Biden has made it pretty clear that COVID and managing the COVID crisis is going to be priority number one. It's demonstrated by the appointment of the COVID task force, and has really, in the past week since being declared the winner, has focused pretty specifically on COVID-related reforms. So, I believe that in the first year of a Biden administration, what you're going to see is almost a laser focus, both on COVID economic relief and hopefully also vaccine distribution.

Sam Gandhi:

And Pattie, we've talked about the progressive wing of the party having significant influence on the Democratic Party, and potentially making Joe Biden the president-elect. How much sway do you think the progressive wing of the party's going to have with President Biden, especially in regards to healthcare?

Pattie DeLoatche:

You know, Sam, it's interesting, because you have a narrow margin between the House within the Democrat and Republican parties. The GOP/Democrat ratio is closer, and it looks like the Democrats lost between ten and 15 seats. So, Speaker Pelosi is going to be in a very interesting position, where she's going to have to navigate between the progressive and centrist wings of her parties. And then, returning to the Senate, regardless of the turnout of the Georgia Senate races, the GOP will still be a force to be reckoned with.

The minority party in the Senate has much more power than the House of Representatives. It takes one senator to hold up a legislative policy. Where I do think that Vice President Biden will be able to get some potential progressive policies through by executive order, and I think he will be pressured a lot by the progressives to do so, because they believe that he owes them that.

Sam Gandhi:

Let me ask you a follow-up question to that, Pattie. Given the tight make-up of the Senate, given that President-elect Biden may be trying to move progressive goals by executive order, how much do you think the Senate will block his nominee to either HHS or other relevant health policy appointees?

Pattie DeLoatche:

You know, here's the thing about President-elect Biden. He served in the Senate. He served with Mitch McConnell, and when he was in the Senate, Sam, he was bipartisan. When I worked for Senator Hatch, we did a lot of things together. So, my point being is Vice President Biden knows how to work, and negotiate, and make deals, even though you hear a lot about, you know, Mitch McConnell isn't going to be willing to work with a new

Biden administration. Behind the scenes, a lot of really positive things happen.

And I do think that they'll be able to. He will have to work with McConnell, but I do think that they will be able to come to agreement, and get these nominees through. But you know, he's going to have to get McConnell's signoff.

Sam Gandhi:

Fair enough. Let me take you all to probably the most important issue facing the nation, and based on polls was kind of a key issue in the election, and that's COVID-19 and the government's reaction to the pandemic. And President-elect Biden's transition team has announced members of his Coronavirus advisory board, which is going to be led by, among others, former surgeon general Dr. Vivek Murthy.

Pattie, you worked for so many years on Capitol Hill in health policy. How will the Biden administration differ from the Trump administration in its approach to the Coronavirus?

Pattie DeLoatch:

Well, you know what I think, Sam, the primary difference is going to be that a President-elect Biden is going to listen more to the mainstream scientists, and I believe also that he will provide more federal support and guidance to states on testing and contact tracing. He's already established a COVID task force, as you mentioned, that includes Dr. Anthony Fauci, who is a trusted scientist in the U.S.

Sam Gandhi:

And Peter, this week, we heard really amazing news from Pfizer about the availability of a vaccine that had an efficacy of about 90 percent, which rallied the markets, and that looks incredibly promising. How do you see that being rolled out, in what's probably going to be rolled out by a Biden administration?

Peter Roskam:

Right. So, there will be a lot of sort of hand-wringing from Trump officials, who will say, hey, we've laid a pathway here, and the timing came in in such a way that it didn't help the Trump team during the election. But that

said, moving forward, I think the Biden team will fully embrace the news from Pfizer, and will move forward on a cautious basis, you know, making sure that the vaccine meets the FDA goals and so forth, and then will work, and be subject to a lot of scrutiny, as it relates to distribution.

Remember, vaccines are not without their controversy, and there's a back story here in terms of minority communities and so forth. So, there will be a real effort on the part of the Biden administration to be mindful of an equitable distribution moving forward.

Sam Gandhi:

And just as a follow-up on that, where do you see a Biden administration differing from a Trump administration, in terms of the pricing of related vaccines and potential antiviral treatments?

Peter Roskam:

What's going to be interesting is how this fits into the entire drug-pricing conversation that the whole country is having, and there will be a lot of pressure on the Biden team to make sure that this comes in at a price point, and I think that there will be a bipartisan level of support for wanting to get this distributed as quickly as possible, because we all know the tension that a new administration is trying to deal with.

On the one hand, a pandemic, the likes of which we haven't dealt with before, and on the other hand, a notion that we've got to open this economy up, and get growth and expansion, and so forth, and none of that's going to happen until the virus is actually under control.

Sam Gandhi:

Michael, what's your view about what's going to be different for a Biden administration's approach to COVID, from what's going on now?

Michael Borden:

So, I think we have to look at what Dr. Murthy actually said today, which is that their plans are for targeted restrictions, not nationwide lockdowns, and the question about whether or not the country's going to have to lock down in the interim between the current 100,000-plus cases a day and a successful vaccine has been a politically-charged matter. And I think the fact that the Biden team is trying to show that a nationwide lockdown is not

inevitable, and they're trying to communicate much more clearly that it's just going to involve targeted restrictions and mask mandates.

That's another key point here, is that I think we should be expecting President Biden, on his first day in office, to impose a federal, nationwide mask mandate, and he said that his plan is to boost testing, but not to lock anything down. I think you're going to see more communicating with the public, testing, contact tracing—if at this point that's even still possible, given the huge outbreak. I think you're also going to see a re-elevation of the CDC and vaccine distribution, and the setting of policy.

The CDC has largely been sidelined over the last eight months. And as Peter mentioned, I think you're going to see a focus where the new administration is going to study and prioritize the effects of the virus and the eventual vaccine on communities of color.

Sam Gandhi:

Peter, I want to come back to you, in terms of legislative activity. As we speak today, right now, the odds are that we may not have a relief package, or if we have one, it's going to be still heavily negotiated and not in the multi-trillion-dollar nature that some of the Democrats want. What do you think the prospects are for another COVID economic relief package, either in the present Congress for the next 68 days, or the new one?

Peter Roskam:

I would dismiss the notion that it's going to happen in the present Congress, and here's why. Going up to the election, my perception is that Donald Trump was really chasing it, and Nancy Pelosi was in control, and I've likened it to, he was kind of like the guy that couldn't walk off the car lot, even though he said he didn't want to deal. He just kept hovering around the car lot.

Now that dynamic has shifted, and I don't think he's going to chase a deal, obviously, and you step into the next Congress, and I think a deal is likely. It won't be a multi-trillion deal. It'll probably be less than a trillion dollars, and the restraining influence here is, what will Senate Republicans allow to be put on the floor? So, in a nutshell, I predict no deal this year, and a smaller deal in the early part of next year.

Pattie DeLoatch:

Sam, the one thing to keep in mind is the fact that Congress still has to fund the government. There's a continuing resolution that expires on December 11, so Congress has to take action. All 12 fiscal '21 appropriations bills have not been finalized. That also presents opportunities for COVID relief measures to be included in that package. There's also expiring healthcare programs that need to be approved prior to December 11. So, there are two opportunities where there could be some smaller COVID-relief provisions that could be included and considered.

Sam Gandhi:

Let me ask one more question on this before we move on to healthcare. Michael, we've heard reports in the news about issues relating to PPP fraud, and other pandemic and recession-related enforcement issues, such as accounting frauds, CAREERS Act-related, False Claims Act investigations. What are your thoughts on those trends as we get into a new administration?

Michael Borden:

So, I think that early on, and I think we have to look back to early April, early on, when PPP funds seemed to be insufficient or limited, and not enough to meet demand, you saw really heightened scrutiny, both formally and informally. You had, you know, among other things, the creation of a House subcommittee chaired by Jim Clyburn, a key member of the House Democratic leadership, to investigate and to provide oversight of the trillions of dollars that the government was spending on COVID relief.

And I think that what we're going to ... you've seen, I think, over the past few months, once PPP funds turned out to be sufficient, at least at the time, there has been less scrutiny, and you've seen fewer headlines about the use or misuse of COVID funds. Now, I think that, moving forward, what you're going to have is a heightened focus on vaccines, on the distribution. I think that it's important to say that PPP funds have become much less polarizing, and have become much less of a political hot-button.

And I think that what we will see over the next few months will be less attention on whether or not anyone received PPP funds, legitimately or

illegitimately, and the new questions are going to be about how vaccine funds and vaccine distribution has played out.

Sam Gandhi:

One of Biden's transition advisors on his Coronavirus task force had recently said that he could see the Congress approving funds to support businesses for a lockdown for a four- to six-week period. What's the odds of that happening Peter?

Peter Roskam:

I think it's low based on the current configuration. There'd have to be a lot of persuasion among Senate Republicans that it would be an existential issue for the U.S. economy.

Sam Gandhi:

Pattie, what do you think?

Pattie DeLoatch:

I agree with Peter, and the reason I feel that the answer is no is, look at the strong economic numbers and the stock market right now. I think that it would be more harmful than beneficial.

Sam Gandhi:

And Michael?

Michael Borden:

Nothing is ever zero, but this, I think, is pretty close to a zero-percent chance, and the example I would use takes us back to May, when we were all expecting another round of COVID relief. We expected Congress to have another COVID-related bill to pass around Memorial Day, but when we were speaking with senators and members of the House, both Republicans and Democrats, we actually heard them say, well, you know, we could maybe give another trillion dollars.

We could maybe go up to 3 trillion dollars, who knows? We don't know what the country's going to need, and we don't know what the right number actually is, and they were open to the possibility of either. What I think, as Pattie just mentioned, given the current macroeconomic numbers, I think you're going to find a lot of Republicans are reluctant to give and to

appropriate trillions of dollars to another stimulus, when now it seems like they're worried again about the amount of government spending and the national debt.

I think it's going to be a very, very steep climb, and it's going to require a massive catastrophe or a major shutdown before anything like that could ever pass again.

Peter Roskam:

Sam, I agree, that the level of scrutiny for PPP has dropped significantly, and that the vaccine discussion will largely push PPP out of that high level of scrutiny. But it's almost like a campfire, where you think the fire is out, but there's still some smoking embers underneath there, and you can imagine a scenario where if the economy doesn't recover at the rate at which people hope and expect it to recover, then there's going to be the Washington blame game, and one of those areas is going to be who got the money, how did they use the money, and why hasn't it produced the results.

So, I agree with Michael, that this has been put off to the side, but I don't think it's something that companies can completely walk away from, in terms of explaining themselves to policy-makers, if they took PPP money, how it was used, and all about their stewardship of it.

Sam Gandhi:

All right, let me get to another topic, which is healthcare, a big focus of the last two elections, particularly in 2018, and the pricing of drugs is a topic that touches on both the COVID pandemic and the fate of the Affordable Care Act in the new Congress. Before we get to that specifically, Pattie, what do you believe the likelihood that the Affordable Care Act now will be overturned by the Supreme Court next year, in the wake of arguments that were heard this year?

Pattie DeLoatch:

I believe the likelihood of the Affordable Care Act being overturned is very low. I listened to the oral arguments this past Tuesday, and to many, it appears that the ACA will not be overturned, and as you know, the future of the ACA law hinges on severability, or whether part of the law can be found unconstitutional while leaving the rest intact. And Chief Justice Roberts

noted that Congress did not try to repeal the law when the tax legislation passed, and I think his quote, where he said, “I think, frankly, they wanted,” they meaning Congress, “wanted the court to do that, but that’s not our job.”

And to me, that quote speaks volumes, that the Court is reluctant to overturn the ACA.

Sam Gandhi:

Peter, what’s your view on that?

Peter Roskam:

I think that’s right. When it all comes down to it, I know we’re lawyers and we’re discussing things in a legal context, but the Court is a political institution as well, and the notion that the Court is going to strike down this body of work, I find implausible. So, I agree with Pattie’s analysis, and I think the bottom line is, I think the ACA is here to stay. Even if it were to be struck down, the notion of preexisting conditions and that level of vulnerability, I think is, the public has made up its mind, and those protections would be left intact.

Pattie DeLoatch:

And I also think that we’ll even see Congress trying to move forward some reforms to the Affordable Care Act, which has been on the legislative agenda of the Democrats for the last ten years. You know, because that law was passed without the House and the Senate going to conference, so there were a lot of missing pieces, so to speak. When I worked for Senator Hatch, we passed an incomplete bill out of the Senate Finance Committee.

So, there are a lot of missing pieces, pieces of the provisions that need to be fixed, and they haven’t been fixed because the Republican Party has been saying for the last ten years, “we need to repeal the law.” I think we’re finally at a point now where some of those components of the law will be addressed by Congress.

Sam Gandhi:

Let me pick up on that, Peter. In the Sidley webinar that you moderated, Ambassador Baucus said he thinks even with a Republican Senate,

President Biden will be able to push through at least some healthcare reform.

Max Baucus on recording:

So, this is going to really take a lot of persuasion by Joe Biden to get people to work together. He's inclined to want to work with people. He's going to have to work to give credit to the other side, so that he can get cooperation, but it's going to be difficult for any significant drug-pricing legislation to pass, I think, with a Republican Senate.

Sam Gandhi:

Peter, do you think that's right?

Peter Roskam:

I think, depending on how narrow it is, and how prescriptive it is, I think that this could be an area of compromise, because what's interesting about the healthcare debate right now, Sam, is nobody is particularly satisfied with the status quo. And this could be an area where the president-elect uses his relationships, and negotiates, and comes up with some level of satisfaction. Now, it's not going to be something big, like an expansion of Medicare.

It's not going to be something big like a public option, but some of these drug-pricing questions are areas where there is developing a bipartisan consensus, at least that the prices are too high, and then, how they approach that could be the subject of a lot of negotiation. So, I'd keep an eye on the Senate being more open on some healthcare subjects than others might think.

Sam Gandhi:

Pattie, let's specifically talk about pricing. Do you see prospects for drug-pricing reform in the new administration?

Pattie DeLoatch:

I do think we need to wait to see the outcome of the two Senate races in Georgia. If the Republicans have a 52-point margin in the Senate, I think that the drug-pricing agenda will be minimal. Again, I will say that I think that President-elect Biden will be able to address drug pricing through executive order, kind of like what President Trump did. However, the one

point, I think, that we need to keep in mind, as far as drug pricing is concerned, is the Democratic Party wants HHS to negotiate drug prices within Medicare.

And there was an oversight hearing in the House of Representatives in October, where many of the Democrats were calling for the fact that the reason our drug prices are so high in the United States is because the federal government does not allow for drug-pricing negotiations. So, that is something that I believe will not pass, should the Republicans retain control of the Senate.

And the other point I wanted to make is, I find it rather ironic that both the Trump and the Biden administration have talked about putting drug-pricing measures in place, when at the same time, we're pushing the pharma industry and others in the healthcare sector to come up with therapeutics for the Coronavirus. So, to me, I think that that's a very interesting dynamic, and it's contradictory, how you can expect these companies to accept drug-pricing reductions, but at the same time find cures and therapeutics for the Coronavirus and develop vaccines.

Sam Gandhi:

So, what do we glean from what some consider to be President-elect Biden's relatively moderate position on healthcare? How does that translate to what you think he is going to push for the Congress to pass or enact through executive order?

Pattie DeLoatch:

The one thing, and I mentioned this earlier, the one thing that I've heard President-elect Biden indicate is he wants to expand the Affordable Care Act. And I do think that that is going to be high on his agenda, and he has the support of the House of Representatives, and I do, again, think that there are areas of agreement with Republicans, where the Affordable Care Act needs to be fixed.

So, that's one area where I do think it's a high priority for a Biden administration, and I also think that he is going to get a lot of pressure, although I'm not sure that he will be successful, to perhaps reduce the age, the eligibility age, for Medicare. As you watched the Democratic debates earlier this year, there was a strong push to have Medicare for all by Bernie

Sanders. And President-elect Biden was more careful with that, but his vice-presidential running mate was very much in favor of Medicare-for-all platform.

Again, I think it will be very difficult to get through a GOP Senate. It's probably next to impossible, but I think there will be a lot of talk about how a Medicare-for-all platform could be helpful to the American people, especially those who don't have health insurance during the global pandemic.

Sam Gandhi:

Michael, I want to come back to you, in terms of investigations, and a lot of people, especially lawyers, are looking at a new administration as particularly kind of a return, potentially, to the Obama administration's activities on investigation, regulatory and otherwise. What do you see taking place in a new administration on that front?

Michael Borden:

So, before we really know, we have to go to the old adage of, you know, personnel is policy. And so, it will matter who Biden chooses to be the attorney general, and who Biden picks to head key government agencies, like the Department of Health and Human Services. So, I think that when we think about this, at least in the health space, we have to look at those places.

We also have to look at Congress, and when you look at Congress, and the investigations that are likely to appear, you have to also realize that in a closely-divided House and a closely-divided Senate, as Pattie and Peter have both described, enacting health-related legislation will be challenging. And so, what will often happen is that Congress, instead of legislating, will turn instead to investigating, and I think that you'll see, in particular, the House of Representatives look to investigate health-related health companies, and particularly on the drug-pricing issue.

This has been a priority topic for the chairman of the House Energy and Commerce Committee, Frank Pallone. It was something he initiated even before he became the chairman, while he was actually the senior Democratic member in the minority. And I think that those types of investigations are going to persist. There's simply no way around it, and

they'll be looking to demonstrate that health companies and drug companies are gouging consumers.

I think that remains an important issue to focus on, and I think that it's going to continue. And I think, in regards to other companies and other industries, I think they also are going to face much more heightened risks for punishment and investigations in virtually every sector—financial services, technology—and focus on issues like antitrust and consumer protection.

Sam Gandhi:

So, how are companies supposed to prepare for this administration, and does a more divided Congress than was particularly expected before the election make a difference?

Michael Borden:

I think it does make a difference. I think that the composition of the Congress here is going to be really important, and the question of who should be worried: everybody. And as I mentioned, in particular, technology companies, banks, healthcare/medical device companies, and vaccine manufacturers are the ones who need to, I think, probably spend the most time preparing. And what you have to expect is that you're going to be investigated based on the headlines and based on the news.

Congress is going to chase headlines, and so is the administration. They're going to be particularly aggressive, and I think that what you have to look at, again, are the people in charge, and the House and the Senate, for example, will have different priorities in terms of investigations.

In the House, a Financial Committee chaired by Maxine Waters; as I mentioned, the Energy and Commerce Committee, the committee with jurisdiction, really, over healthcare, the energy and the environment, climate change; tax policy at Ways and Means with Richard Neal. Carolyn Maloney, who is the chair of the House Oversight and Reform Committee, which has broad jurisdiction to investigate truly anything; Jerry Nadler, the chairman of the Judiciary Committee, who's looked into antitrust issues in technology. I think that in all of these cases, you have to expect that the Democrats in the House are going to be investigating industry, and I think it's more likely than not that the Republicans in the Senate, if they're in

charge, are going to be investigating and looking into the new president's response to policy matters.

So, on the one hand, the House is going to be looking into companies, and on the Senate, they're going to be looking into the government, and investigating the government.

Pattie DeLoatch:

You know, Sam, one joke we always had when I was working in the Senate is, we'd always look at the *New York Times* headlines, and so, that's what's going to be investigated by, like, a Senate Judiciary Committee, or a Senate Finance Committee. And you know, sure enough, the next week, there would be these investigations launched. So, the one person who I would recommend keeping an eye on is Senator Chuck Grassley, who is a protector of whistleblowers.

He has always been somebody who is known for his strong investigative staff on Capitol Hill, and he prides himself in being a protector of the whistleblowers.

Peter Roskam:

I would add, there's the possibility of both very formal and less formal investigations. It can come in the form of a hearing request, in the formal sense that people usually imagine, where they see a CEO sitting in front of, you know, a dais of investigating members of Congress, under the bright lights and on live TV, the highest-profile matters. But investigations take on a lot of other forms as well. It can come from an individual member of the House or Senate who will shoot off a letter to a business, asking questions.

And you know, some of these are more serious than others, but each of these needs to be taken seriously, because each of these members are on critical committees, and are going to potentially have the opportunity to cause, when they're asking for information, they can usually and can often obtain a significant amount of data that can really set policy, because I think that what Congress will try to do is, they're going to try to use these investigations both to raise their individual profiles, to show that they're tough on corporate malfeasance.

But it also has the effect of driving policy and legislation over the long term, is that once they have the examples based on these investigations, once they have the examples of some sort of wrongdoing, it drives their legislative agenda moving forward. And so, that's the unpredictable piece of what's going to happen in the next Congress, is although we anticipate really significant numbers of investigations, and we expect it to be pretty robust, in terms of aggressive oversight by a number of committees, what we don't know is what they're going to find, and a lot of times what they do find will change the agenda for the next year or two.

Pattie DeLoatch:

Another point that I think is really important with the investigation issue is the fact that you can look at the primary committees that have legislative jurisdiction, like a Senate Finance or a House Judiciary Committee, but there are also committees that do not have legislative authority, that still can conduct investigations, and those investigations are taken seriously. And I'm thinking specifically about the Select Committee on Aging in the United States Senate.

That committee, because it doesn't have legislative authority, it has lots of time to examine issues. It launches investigations. The current chair, who just won her reelection, Senator Susan Collins, also had launched an investigation on the pharmaceutical industry a few years back, and you know, she may take it up again. She is a different-ranking Democrat member on the committee, but those are the kinds of committees that are kind of the sleeper committees, that you still need to keep an eye on as well.

Peter Roskam:

Sam, can I make a couple quick points? We at Sidley are going to be keeping a close eye on the confirmation process in the U.S. Senate. So, we've talked about a closely-divided Senate. What's interesting is, these Senate confirmations are going to be highly negotiated. We're also going to be closely monitoring, on our clients' behalf, what it is that these nominees are saying, what are the limitations, what are the things that they are making commitments to, and what are the things that they're avoiding. And we'll be able to put that into a context.

Another thing that's interesting is, look at where the overlap is between the two political parties. We've largely said that it's going to be Democrats that are going to investigate the private sector, and Republicans that are going to investigate the Biden administration. While that's true, there's also some overlap here, and this is where Big Tech has found itself in the crosshairs of both political parties.

On the one hand, conservatives have felt like Big Tech has been difficult, and is censoring, and so forth, speech. On the other hand, the political left looks at Big Tech, and says, "you've got too much power, and we've got to rein that in." So, look at where there's common ground.

Another area is that not everything is particularly controversial. So, I go back to work that I did when I chaired the oversight subcommittee of the Ways and Means Committee. We put together a bipartisan effort to pull back authority from the Internal Revenue Service that we found to be abusing small businesses, and got the IRS to repay money, got the IRS to apologize, and out of the House—a deeply-divided House of Representatives—passed a bill unanimously. So, there's things that are sort of happening underneath the surface that we're monitoring closely.

Pattie DeLoatch:

And Sam, one last point, just a point to consider regarding the cabinet officials, the nominees for the Biden administration. You know, there's lots of talk that the progressive arm is going to have prominent positions in the president-elect's cabinet, and two of the names being discussed are Senator Warren and Senator Sanders. And with the closely-divided Senate, both of those states have Republican governors.

And so, the fact that we have such a close Senate, I think the likelihood of those two senators going over to the Biden cabinet is pretty low.

Peter Roskam:

And it also reduces the likelihood that Democratic members of the House, given the really close divide in the House, it decreases the likelihood that Joe Biden can select House members as well to cabinet slots, or to senior government positions, because you don't want special elections, and with a razor-thin margin, you're going to need every seat and every vote. You

don't want to either have empty seats or create uncertainty where you could lose some.

Sam Gandhi:

You're listening to the Sidley Podcast, and we're speaking with Sidley partners Peter Roskam and Michael Borden, and senior policy advisor Patricia DeLoatche, about policy implications arising out of the 2020 election. We're also sharing some comments former Ambassadors Haley and Baucus made in a recent webinar hosted by Sidley. So, let's talk about the regulation of financial services in a new administration and the new Congress.

Peter, as a former member of the House, what ability do you see the Biden administration having to make regulatory changes in the event of a split Congress, specifically when it comes to financial services?

Peter Roskam:

I think they are going to have a lot of authority. You remember Barack Obama's phrase, "I have a pen and I have a phone"? He used it, and he used it very, very effectively when he was frustrated with Congress. Similarly, Donald Trump took up that mantle, and had executive order after executive order. There's a lot of discretion that presidents have in this sphere.

There's a lot of discretion that regulatory bodies have, and you can imagine a Democratic Congress that will be putting pressure on the Securities and Exchange Commission and CFPB, any of these entities that come before them, both for their authorizing hearings, and also for their appropriations hearings. So, I think that a Biden administration will have a high level of scrutiny, and will use all of the tools at their disposal to make these inquiries, and I think it'll be a tighter regulatory environment.

Sam Gandhi:

And Michael, one of the focuses in the Obama administration, and then in the early parts of the Trump administration, was the Consumer Financial Protection Bureau, and that has been largely dormant under President Trump. What do you see as the consumer protection priorities of a Biden administration?

Michael Borden:

So, I think that what you're going to see in the new Biden administration is a restoration of a lot of the fights that Richard Cordray, the previous, or the Obama-era CFPB director, led. I think you're going to see a heightened scrutiny and a renewed focus on prepaid card fees, which they believe are exorbitant. I think you're going to see concentration from the CFPB on mandatory arbitration, and see them take those provisions out of consumer contracts.

And finally, I think you're going to see a focus again on payday lending. Those, I think, will be the top three regulatory-agenda items. I think you'll see more coordination with aggressive state attorneys general. A key element of Dodd-Frank was preventing federal preemption of state consumer laws. It was a long, drawn-out fight, and a key element of Dodd-Frank was that it didn't mute the state AGs.

Another issue, I think, though, that will play a critical role in everything from each of the financial regulators will be fair lending, and fair lending in particular with regard to race. The Democratic politicians and Democratic regulators have frequently said that there is not just actual discrimination and redlining but also the far-broader and more pernicious statistical discrimination, and I think that that'll be a concentration or focus of the CFPB, as it becomes a much more aggressive watchdog than it has been during the last four years.

Sam Gandhi:

Peter, some expect President-elect Biden to move away from the real rollbacks that we saw in the Trump administration, and they're going to push for stronger oversight of financial firms. What's your take on this?

Peter Roskam:

I think it's likely. You know, there's something known as the Congressional Review Act, which is a claw-back of congressional authority, and before the election, there was some thought that the new Biden administration would be able to reach back and claw back some of those provisions by revisiting them, pursuant to the Congressional Review Act. That's not going to happen.

So, what does that mean? What that means is that the political left is going to continue to put pressure on the Biden administration, and one of the areas where they're going to be able to deliver is to deliver a higher level of scrutiny from a regulatory point of view. So, what doesn't happen on Capitol Hill, that pressure doesn't go away, but it has to find a place, it needs to find an outlet, and what doesn't happen on Capitol Hill then moves through a regulatory agenda. So, I think the Biden team will be fairly aggressive, if I were to predict.

Sam Gandhi:

Does it make a difference now that, you know, ten years, 12 years after the financial crisis, that banks are kind of not in the state that they were just before and just after the financial crisis? Does that make a difference in terms of the amount of regulation we're expecting?

Peter Roskam:

I do think it makes a difference, Sam, but financial institutions are no less the boogeyman today than they were during the crisis. And so, they're a fairly easy target, and a fairly easy group to swing at in the public square. And so, I think that there will be a level of scrutiny that certainly is a shift from the Trump administration, and where it goes from there, beyond the investigatory side, really depends on what kind of shape the institutions are in.

Sam Gandhi:

I want to move to foreign policy before we wrap up the podcast. And so, yesterday, the Chinese government finally reached out and congratulated President-elect Biden, and that was a very major topic during the presidential election, and probably will continue to be for the foreseeable future. Peter, how do you see generally Biden's foreign policy will differ from Trump, particularly when it comes to China?

Peter Roskam:

This is fascinating. So, go back, Sam, to the 2016 presidential campaign, and you remember, there was a debate where both Donald Trump and Hillary Clinton each said that they wanted to get out of the Trans-Pacific Partnership. Now, set aside the trade implications of that, that was a very interesting observation of a bipartisan shift in this country as it relates to China.

So, you now find both political parties over the course of the past couple of years, who have been largely like-minded in sizing up China as, you know, choose your description: a strategic competitor, a strategic adversary, whatever. The bottom line is a recognition of a clash. So, what does President-elect Biden do? I think he largely has a continuation of many Trump-era policies.

Now, I think his rhetoric will change, number one. I think, number two, he's going to reach out more aggressively to Western allies, to get them to come along, but it's not as if the president-elect is in a situation where he can really fundamentally back off this conflict that we find ourselves in. He may try, and I think he's likely to try and get in on a different trajectory, but that's going to be much more difficult to accomplish for him in the short and medium run.

Michael Borden:

To amplify what Peter just said, that there is a bipartisan consensus in Congress that they need to be "tough" on China. In the last year, the House and Senate have unanimously passed legislation, some of which has been enacted into law and some of which is pending and could become law before the end of the year, legislation targeting human rights abuses in Xinjiang, legislation targeting the democracy movement in Hong Kong, legislation to require the delisting of Chinese companies from the U.S. securities exchanges, if the SEC and the PCAOB don't have complete access to their audit reports for three consecutive years.

This is very significant, and I think what often gets lost is that this has been a Trump initiative. It isn't at all. The Democrats are not taking a back seat to President Trump on being tough on China, or to the Republicans in being tough on China. As I think you heard during our webinar earlier this week with Nikki Haley and Max Baucus, their tones might have been a little different, but neither was ceding that their party would be weaker on China than the other.

And finally, I would point out that the House and Senate Democratic leaders are two of the most ardent China-hawks. Chuck Schumer has complained about Chinese currency manipulation for decades, and in the early '90s, Nancy Pelosi went to Tiananmen Square to protest the

democracy movement, and found herself directly in conflict with Chinese securities forces.

Sam Gandhi:

In the webinar you moderated, Ambassador Haley outlined the Trump administration's attitude towards increasingly-hardball tactics China's employing with foreign companies.

Nikki Haley on recording:

That is the China we're dealing with today. That is what we have to look at, as no longer treating China like we've done, Republican or Democrat, for decades, thinking that if we're nice to them, they will start to be like us, but treat them like the Communist country that they are. They want to be Communist. We need to acknowledge that. Now, I do want to add one last point, that doesn't mean we don't do business with China.

Sam Gandhi:

And Peter, earlier this year, Biden wrote, the United States does need to get tough with China in a Foreign Affairs article, and the article was titled "Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump." So, we talked a little bit about the alignment that Democrats and Republicans have in terms of the need to get tough with China. Is the difference the means to get tough with China? Is it rhetoric, and to what degree do you see tariffs as being kind of the weapon being used to get tough with China as the Trump administration used?

Peter Roskam:

The instinct of the vice president, or the president-elect, moving in and negotiating with China, is going to be to engage them, to see if he can get something if he gives them some level of tariff relief. That, I think, is going to be one of the first moves of the Biden administration, but I don't see a fundamental shift here, and it's going to be largely dependent on the Chinese.

If their attitude is, we've got something to give, then there's a level of negotiation and possibility moving forward, but there's strong support for the current tariffs in the Democratic Party in the House, on the Ways and Means Committee, on which I served. I had conversations with many Democrats that were very, very supportive of the increased tariffs, and they

wouldn't give public voice to it necessarily, because they were averse to Donald Trump on many issues.

But the point is that the Biden administration can use this as an opening, but it will largely depend, then, on how the Chinese respond.

Sam Gandhi:

Michael, despite Ambassador Haley's sharp views, we heard her say specifically that U.S. companies still need to do business with China. And so, what kind of realistic regulations do you think companies can expect to affect their transactions as they continue to do business with China in the Biden administration?

Michael Borden:

I think that what we are potentially seeing is a tit-for-tat between the U.S. and China, with an escalating series of penalties for businesses that operate in either country. For example, yesterday, the Trump administration issued an executive order targeting 31 Chinese companies that operate in the United States, that have ties to the Chinese Communist military. This was utilizing power that was granted to the president in 1999, but had never been used before.

The identification and penalizing these 31 companies is unprecedented. Now, the penalty itself was relatively limited, compared to what the president could have done. He could have imposed pretty harsh, pretty comprehensive sanctions on these 31 companies, that are some of China's most significant international businesses. They operate in technology, infrastructure, communications. And so, I think that you should expect to see retaliation for this step by the Chinese.

And then, I don't think you're going to see President Biden, early in his term, reversing the executive orders or the punitive steps that have been taken by President Trump. I think that it's really politically perilous for him to do so. One, even if he believed that it was the right thing to do, I simply don't believe that President Biden is going to walk into the trap that he's "soft" on China by reversing executive orders that have been issued by President Trump, whether or not President Biden believes that they were appropriate, sensible, or rational.

So, I think that for the near future, what you should expect is, you know, a continuing suspicion between the Chinese and the U.S. government.

Sam Gandhi:

Peter, obviously foreign policy's a lot more than China. What are the other parts of the world should companies be prepared for particular developments in the new administration?

Peter Roskam:

I think the Biden administration will reach out aggressively to Europe, and do quite a bit of reassuring to our NATO allies and those traditional alliances. I think they're also going to be reaching out, as it relates to China, to South Korea, and Japan, as a continuing bulwark. They'll also be reaching out within the South Asian alliance of countries, or relationships there, to keep the Chinese in check as it relates to naval aggression and keeping sea lanes open.

And I think the Biden administration, even though they may not be as forward-leaning as it relates to Israel as the Trump administration has been, they'll build on the level of rapprochement that has happened with a number of the former adversaries of Israel, and try and build on some of those relationships. It'll be interesting to see how President-elect Biden interacts with the Turkish president Erdogan, how he interacts with Vladimir Putin in Russia.

These are all things that the president-elect has a view on. I mean, he's got deep experience, and chaired the Senate Foreign Relations Committee, and was obviously vice president, but now he'll put his stamp and his relationship, imprimatur, on these interactions.

Sam Gandhi:

We've been talking on this podcast about what's going to happen in the new administration, but every administration has their plans, and then something else new and unexpected happens. What's your thought about the, to quote Donald Rumsfeld, the "potential known-unknowns" that could happen in a new administration?

Peter Roskam:

There's a lot of them. You know, you can imagine this growing illiberalism around the world, in other words, the downward pressure on democracy as a system, and the increased emergence of so-called strongmen. Those are going to be people that Joe Biden is going to have to deal with, or countries that continually are looking increasingly inward, in their own institutional bias. That's going to be significant.

Will the Islamic State have a resurgence of some kind? Will they try and do something, and not to belabor the point about China, but will China test, in some way, in a military way, the relationship with Taiwan, for example? Will they do something as it relates to the Straits of Taiwan, and put pressure on those treaty relationships? So, there's a lot of factors that a new administration has to come in with, and I think this administration comes in with a deeply-divided America that they've got to sort out, and also a continuingly, increasingly complicated world to face.

Pattie DeLoatch:

I also think that what's scary as far as the unknown is concerned is North Korea, and what happens with the U.S. relationship in a post-Trump era with North Korea. You know, and the answer is unclear.

Michael Borden:

Sam, you're much more sophisticated than I am, in that you quoted Donald Rumsfeld. I usually quote the noted philosopher Mike Tyson, which is, "Everybody has a plan, until you get punched in the face."

Sam Gandhi:

No less wise words, though.

Michael Borden:

I think maybe the most interesting development could be with the U.S. relationship with Russia. I think for the past four years, Russia has taken on an outsized sense of importance in the United States, because of allegations that they somehow interfered in the election in 2016. And in the last couple of weeks, we've heard that perhaps the U.S. election was the cleanest election in U.S. history, with less interference than ever before.

That creates, in my mind, the potential, or an opportunity for a reset between the U.S. and Russia. First of all, the Russian economy is smaller than the size of Italy's. And so, as a major global player in the economic realm, it's far less significant than we give them credit for, and I think that had Trump been reelected for another four years, you would've continued to see a significant distrust of Russia, and a continued vilification of Russia. I actually think with Joe Biden, in spite of the fact that he's taken a very hard line historically against Russia, I think that there's an opportunity here, because I think that now that the election is over, cooler heads, frankly, have an opportunity to prevail. And the U.S. has imposed a series of sanctions on Russia for aggressions in Crimea, the Ukraine, some of which have also been codified into law.

I think that there are opportunities for a normalization of those ties, and perhaps over time, even a ratcheting back of the sanctions.

Sam Gandhi:

Let me use that as a jumping-off point for a final question for each of you. You're a general counsel, you're a CEO, and you're getting your company ready to enter into a new administration. What steps should they be doing to prepare for a new political landscape? Maybe it hasn't changed very much, or maybe it has. I'll start with you, Peter.

Peter Roskam:

John Boehner, when he was speaker of the House, had a line that really resonates with me, and Boehner used to say, "Washington is the slowest place until it's the fastest place." So, it can seem like nothing is going on, it's all quiet, nothing's happening, and there's a number of these issues that we've talked about over this past little bit, Sam, on the podcast, where it seems like they can just be sleepy, and then, boom, all of a sudden, something changes. Something emerges.

So, the notion of interpreting this election as largely a status quo election, I think, is naïve. I think there's going to be a regulatory agenda that's going to be moving forward, an enforcement agenda, a possible investigation agenda, and a legislative agenda, and that's all to say to be mindful of opportunities, to make sure that you've got a clear view of everything that's happening, not just on the surface, but below the surface, too.

And that's where we've been very, very active, monitoring these situations, and then figuring out ways, as things are happening, to advocate on people's behalf, to make sure that our client's interests are included in this. So, now is the time to be reflective, but forward-leaning.

Michael Borden:

I think what Peter's just said was extremely important, which is if it wasn't clear before, what we've seen over the past many years is that Washington, and decisions that are made in Washington, have a disproportionate and extraordinary impact on a company's bottom line, and a company has to understand what's happening in Washington. It's not enough to just run your business, and assume that the government's not going to get involved.

I think that it's actually really important for companies to monitor developments in Washington, and to engage with policy-makers, that you never know what's around the corner. And as Peter described, things can move very, very quickly. If you've developed relationships, and if you've worked and understand what's happening in Washington, you really do have a far better chance of reaching a positive outcome, and I think that engagement with policy-makers, typically, has a substantial positive effect.

Sam Gandhi:

Pattie, I'm going to give you the last word.

Pattie DeLoatch:

So, I think it's extremely important, as Peter and Michael said, to pay attention to Washington, and not just the White House, but the legislative and judicial branches as well. Monitoring proposed regulations, congressional hearings, particularly with the confirmation hearings of President-elect Biden's nominees, you gain a lot of knowledge just by listening to them and understanding more clearly what the agenda will be for the administration.

And looking at legislation introduced in the Congress, and even listening to House and Senate floor speeches, you just learn so much by paying attention to those activities. I watch the House and Senate floor every day, and do that because I've gained valuable insight just by listening to hearings, listening to floor speeches, that, you know, are very beneficial for

my clients, and alerting them that these issues are coming down the pike, and Congressman XYZ just gave a floor speech on this issue, and we need to go and engage with him as a result of that. That's what I typically think is so important.

Sam Gandhi:

We've been speaking with Sidley partners Peter Roskam and Michael Borden, and senior policy advisor Patricia DeLoatche, about policy implications arising out of the 2020 election. Peter, Michael, Pattie, the post-election landscape is a complicated one, but pretty exciting. So, thanks for sharing your insights on the podcast today.

Peter Roskam:

Thanks, Sam.

Michael Borden:

Thanks, Sam.

Pattie DeLoatche:

Thanks, Sam.

Sam Gandhi:

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