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Contemplating the Impact of the Bondi Memos on White Collar Defendants

It is not uncommon for a president to announce law enforcement priorities that he wants the Department of Justice to follow — either on the campaign trail or afterward. It is more unusual, however, for a sitting president to walk into the Justice Department's Great Hall and refer to himself — rather than the attorney general — as the "chief law enforcement officer for our country."[1] And that may explain why the Justice Department in the current administration may be more attached than usual to following these priorities — and making them part of or tying them to other, non-DOJ domestic and international policy priorities. In the case of the second term of President Donald Trump (Trump 2), one might conceptualize the Justice Department's start as overlaying the president's "America First" theme onto the Justice Manual.

Nowhere, perhaps, is this clearer than in the Department's early moves to advance the administration's broad goals on immigration — from removal to foreign enforcement — including reports on how it recently approached the *United States v. [NYC Mayor] Eric Adams* prosecution. The Department's early moves made a specific linkage between an agreement to move for dismissal without prejudice and the belief that the continued prosecution would interfere with Mayor Adams's ability to govern, "which poses unacceptable threats to public safety, national security and related federal immigration initiatives and policies."[2]

This is likely to be seen elsewhere. For example, in light of the president's Executive Order (EO) 14168, recognizing male and female as the only two sexes,[3] we may see an increase of investigations into any entity that advances gender-affirming care — be it a pharma company that markets its products "off-label" or a hospital that treats patients for gender dysphoria.

Further, one might expect a prioritization of investigations and actions brought when there is an identifiable victim of an actual harm as opposed to a theoretical one/offending a regulatory schema — such as more prosecutions for scams of elders on fixed incomes, and fewer involving kickback or self-referral schemes. In particular, there is an indication of prioritizing crimes when Americans are the victims of *foreign* actors — e.g., when an American is harmed by a foreign entity, person, or product. For instance, *United States v. Gree USA, Inc.*,[4] initiated in the first Trump administration (Trump 1), prosecuted the U.S. subsidiary of a Chinese company (with a DPA for the parent) for failing to notify the U.S. Consumer Product Safety Commission

BY JOEL D. SCHWARTZ, SCOTT A. SCHEELE, HILARY HOLT LOCICERO, AND LLOYD LIU

that millions of dehumidifiers made in China and sold to U.S. consumers were defective and could catch fire. Similarly, in Trump 1, the Justice Department charged five Chinese citizens and four Chinese companies for including illegal synthetic stimulants in their dietary supplements, which were sold in the United States.[5] Such cases as these may, for instance, take priority over matters when an unsafe product is domestically manufactured — as there are indications of a preference to draw the Justice Department away from crimes the prosecution of which may undermine American competitiveness.

To that end, enter Attorney General Pamela Bondi. Confirmed Feb. 4, 2025, in just a matter of days Bondi issued a spate of memoranda laying out both a process and substantive road map for what her Justice Department will be focusing on in the near-term — carrying President Trump's agenda into battle. This article discusses what impact a number of these memos might have on the white collar defendant.

SELECT PROCESS-RELATED MEMORANDA

MEMORANDUM: "GENERAL POLICY REGARDING ZEALOUS ADVOCACY ON BEHALF OF THE UNITED STATES"

With an explicit marrying of the president's agenda to DOJ's law enforcement substantive priorities, perhaps it should not have come as a surprise that the attorney general also announced an explicit marriage between the Department's lawyers and the administration. Specifically, the memo ascribes the responsibility of its lawyers to "zealously advance, protect, and defend their client's interests[,]" and the "client" here is President Trump. The memorandum makes clear that Department attorneys whose actions "deprive the president of the benefit of his lawyers" are subject to punishment up to termination for any of them who, "because of their personal political views or judgments": (1) decline to sign a brief or appear in court; (2) refuse to advance good-faith arguments on behalf of the administration; or (3) otherwise delay or impede the Department's mission.

Each places the emphasis on zealous lawyering and the notion that President Trump is the Justice Department's client, striking a marked departure from historical norms for the role of the Justice Department lawyer. While zealous advocacy finds common usage in practice, it is worth noting that rules committees and legal commentators have questioned the appropriateness of zealousness as part of the ethical firmament. ABA Model Rule of Professional Conduct 1.3 relegated "zeal" to its comments.[6] Arguments against the inclusion of zealousness in the ethical rules suggest that zeal is in tension with other ethical obligations, such as the duty of candor and the duty of diligence.[7]

Setting that aside, a separate question exists as to whether zealousness appropriately applies to prosecutors. Federal prosecutors, especially, have been viewed as occupying a different place in the legal system, as having some independence from the Executive.[8] Justice Robert Jackson articulated the role of the federal prosecutor as more than a mere advocate. In his 1940 address to a room full of United States Attorneys, he noted: "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."

On this core question of independence, identifying the Justice Department as President Trump's lawyers also represents a departure from historical practice. Nominees for attorney general since Watergate have endorsed the notion of prosecutorial independence from the Executive, and it has been a longstanding norm that DOJ officials assume prosecutorial decisions should not be influenced by partisan political considerations.[9] Returning to Justice Jackson's address to the Conference of United States Attorneys, he noted that "[p]articularly do we need to be dispassionate and courageous in those cases which deal with so called 'subversive activities.' […] Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration."

A clear early manifestation of the policies behind this memo has been a significant departure of Justice Department "career" attorneys — as well as very public demotions of others, apparently because of the roles they played in certain prosecutions during the Biden administration.[10] Losing high-level career prosecutors, many who had served under both Democratic and Republican administrations,[11] suggests a loss of a significant amount of institutional experience that comprised many of the norms that guided Justice Department decisions. While it may be easier for replacement prosecutors to adapt to the new job description the memo provides, there remains the question of how the courts will, and how the white collar defense bar should, respond. Does a new kind of prosecutor require a new kind of defense lawyer?

If the Justice Department and the president's priorities are the same, then perhaps defense lawyers may gain leverage by appealing to the president's policy agenda. The Eric Adams case may exemplify this new framework. When negotiating with the Department of Justice, one ought to consider whether the case has any broader political implications and whether or to what extent the further prosecution of the case either advances or hinders the president's objectives. While some may say this is a new tactic, others may point to the notion of "third-party settlements" — which Attorney General (AG) Bondi describes (and prohibits) in another of her memoranda as those that "require payments to non-governmental, third-party organizations that were neither victims nor parties to the lawsuits"[12] — as not too dissimilar and, those might argue, just as explicit.

The turnover of experienced prosecutors, the promotion of zealous advocacy, and the discouragement of individual judgment may suggest the Department of Justice will advance more novel and untested legal theories, along the lines of the expansion of executive power and promoting executive objectives. The turnover at the Justice Department may also suggest an opportunity to test these theories in litigation. Institutions and institutional policy are not inevitable. Their quality and their effectiveness are determined by the people that comprise them. The last two months have redirected decades-long norms in the professionalization and independence of the Justice Department and ushered in a new, untested force.

MEMORANDUM: "RESTORING THE INTEGRITY AND CREDIBILITY OF THE DEPARTMENT OF JUSTICE"

This memorandum can be considered, in some sense, an expansion on the Zealous Advocacy Memo. It follows from the Executive Order issued Jan. 20, 2025, "Ending the Weaponization of the Federal Government," in which President Trump accused the Biden ad-

ministration and "allies throughout the country" of engaging in "unprecedented, third-world weaponization of prosecutorial power to upend the democratic process." In the Integrity and Credibility Memo, AG Bondi initiates a Weaponization Working Group to "review the activities of all departments and agencies exercising civil or criminal enforcement authority of the United States over the last four years." This includes tasking the Weaponization Working Group with reviewing the investigations into President Trump and the breach of the United States Capitol on Jan. 6, 2021.

The memorandum also states "[n]one who has acted with a righteous spirit and just intentions has any cause for concern about efforts to root out corruption and weaponization." It remains to be seen what that will mean. In the near term though, this memorandum, coupled with the Zealous Advocacy Memo, has resulted in significant turnover at DOJ. As noted above, the departure or marginalization of experienced prosecutors has already taken place.

MEMORANDUM: "REINSTATING THE PROHIBITION ON IMPROPER GUIDANCE DOCUMENTS"

In this memorandum, AG Bondi states, "Guidance documents violate the law when they are issued without undergoing the rulemaking process established by law yet purport to have a direct effect on the rights and obligations of private parties governed by the agency or otherwise act as a substitute for rulemaking." This single sentence, especially in the context of recent Supreme Court statements, may have significant implications for clients operating in highly regulated industries — both before and during litigation.

"Guidance documents" historically have been memoranda that executive branch agencies issue to detail how they believe federal regulations should be interpreted and applied. This is important for clients operating in highly regulated industries because an agency's views and expectations can do more than simply tie a business's hands — they can spur a False Claims Act investigation. In its landmark decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, the U.S. Supreme Court held that when a party "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided."[13] Under this "implied false certification theory," an agency's views about what constitutes compliance can have enormous ramifications.

The Trump 1 Justice Department made it an express policy, on the heels of *Escobar*, that it would *not* base enforcement actions solely on guidance documents.[14] The 2018 Brand Memo stated that in Affirmative Civil Enforcement cases, the Department would not "use its enforcement authority to effectively convert agency guidance documents into binding rules" or "use noncompliance with guidance documents as a basis for proving violations of applicable law."[15] However, the Justice Department left room for the more nuanced use of such documents, explaining that "some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate." The Supreme Court's 2019 opinion in *Kisor v. Wilkie* formalized the restrictions on the use of guidance documents, explaining that agency guidance can "never form[] the basis for an enforcement action" because it cannot "impose any legally binding requirements on private parties."[16]

The Biden administration modified the Brand Memo in a 2021 Garland Memo that "revise[d] and clarifie[d] the principles that should govern the issuance and use of guidance documents by the Department of Justice."[17] This Garland Memo explained that while enforcement actions could not exclusively be based on guidance documents, Justice Department lawyers still could consider and use them as evidence in support of otherwise proper cases: "[t]o the extent guidance documents are relevant to claims or defenses in litigation, Department attorneys are free to cite or rely on such documents as appropriate," including when they may "carry persuasive weight with respect to the meaning of the applicable legal requirements." In other words, the government was free to cite guidance documents when arguing that a defendant organization must have known it was breaking the rules — and thus, acted with *scienter* — when it operated in a manner contrary to a relevant agency interpretation. In an implied false certification case in which the government believes a company has violated the FCA by misrepresenting its compliance with federal rules and regulations, this can be powerful evidence.

AG Bondi has rescinded the Garland Memo, but rather than reverting to the Trump 1 position, she appears to be taking a more aggressive approach. In "Reinstating the Prohibition on Improper Guidance Documents," Bondi states explicitly that "[g]uidance documents violate the law when they are issued without undergoing the rulemaking process established by law yet purport to have a direct effect on the rights and obligations of private parties governed by the agency or otherwise act as a substitute for rulemaking."[18] This decidedly pro-business stance is sure to be welcome news to companies operating in highly regulated industries such as health care and defense contracting. As many legal commentators have noted, other executive orders in the first two months of Trump 2 — announcing everything from a requirement that federally funded universities abolish DEI programs to increased tariffs on goods from Cananda, Mexico, and China — raise the specter of aggressive FCA enforcement. Yet the practical result of this new ban on "direct effect[s]" flowing from informal agency guidance remains to be seen. Given that the Brand Memo issued during Trump 1 permitted the use of such documents to establish intent, it is unclear how much this change will alter the landscape for government contractors.

We may know the answer to that question soon enough, as this memo also directs the associate attorney general to report within 30 days "concerning strategies and measures that can be utilized to eliminate the illegal or improper use of guidance documents." Given the administration's overarching efforts to align the Justice Department's goals with those of the president, it is not a stretch to imagine that agency interpretations at odds with the president's political and policy-based goals also could be viewed as improper.

This subtle but significant shift in power from executive agencies helmed by subject matter experts to the president himself is similar to the thinking behind the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, which greatly curtailed so-called *Chevron* deference, the judicial doctrine under which federal courts deferred to an agency's reasonable interpretation of an ambiguity in a law that the agency enforced.[19] Under *Loper*

Bright, an agency's interpretation of an ambiguous statute now commands no deference, even if that interpretation has been ensconced in the agency's implementing regulations. Given that regulations — the clearest expression of an agency's statutory interpretation — garner no deference, it follows that informal guidance documents, which are not subject to notice and comment rulemaking, should not be given such force, either. If an agency's formal statutory interpretation deserves no deference, then why should its informal interpretation be propped up to give the government an advantage in litigation, when proving *scienter* or otherwise?

At the same time, however, other actions by the Trump administration seem to contradict AG Bondi's goal to vitiate any legal import of guidance that has not undergone the notice and comment process. This goal is rooted in the idea that it would be unfair to hold parties to legal standards that have been put in place without congressional approval[20] and the widespread notice that accompanies it. Yet at least one agency, the U.S. Department of Health and Human Services, has recently taken steps to remove notice and comment rulemaking for some of its regulatory actions.[21] Government contractors working for HHS may find themselves back at square one, subject to regulations that have been enacted with little notice, regardless of the Trump administration's stance on guidance materials. If using a guidance document that has not undergone the rulemaking process as the basis for an FCA claim would violate the law, *see Kisor v. Wilkie*, would a regulation enacted without that procedural safeguard not run into the same problem? For now, the safest approach is for government contractors and their counsel to proactively monitor agencies' issuance of both regulations and guidance documents, and to expect further litigation about the reach of the FCA in connection with regulations enacted without public input.

SELECT SUBSTANCE-RELATED MEMORANDA

MEMORANDUM: "TOTAL ELIMINATION OF CARTELS AND TRANSNATIONAL CRIMINAL ORGANIZATIONS"

As noted in this Total Elimination … Memo, on January 20, President Trump issued an executive order announcing that "it is the policy of the United States to ensure the total elimination of these organizations' presence in the United States." To do that, AG Bondi said, "requires a fundamental change in mindset and approach[,]" including "removing bureaucratic impediments to aggressive prosecutions." To that end, prior requirements for approval by the National Security Division within "Main Justice" for filing most terrorism and IEEPA charges and corresponding warrant approvals have been suspended — meaning that any U.S. Attorney's Office can file such charges without prior clearance by NSD. The same goes for filing racketeering charges and violent crimes in aid of racketeering targeting all cartels and transnational criminal organizations (TCOs). It also disbands Task Force Kleptocapture, which was designed to pursue the "ill-gotten gains" of Russian oligarchs in response to the Russian invasion of Ukraine[22] — indicating that the Money Laundering and Asset Forfeiture unit of DOJ will not have this as a focus.

Foreign Corrupt Practices Act — One substantive area of the law directly affected by this memo is the government's approach to the FCPA — which

criminalizes payments or the like to foreign officials for the purpose of gaining an advantage that helps one get or retain business.[23] The memo says that for at least 90 days, there is to be a prioritization of FCPA investigations related to foreign bribery that facilitates the criminal operations of cartels and TCOs, and a shift in focus away from those that do not. Indeed, this memo was followed up just days later by the president's executive order instituting a 180-day pause on new FCPA investigations and enforcement actions because the "[c]urrent FCPA enforcement impedes the United States' foreign policy objectives and therefore implicates the president's Article II authority over foreign affairs[, as t]he president's foreign policy authority is inextricably linked with the global economic competitiveness of American companies."[24]

Despite these contractions in FCPA enforcement, there is some room to find expansions. For example, the memo suspends the requirement that FCPA matters only be brought by the DOJ Fraud Section for cartel/TCO FCPA actions, opening their use up to the various USAOs to initiate independently.

Nor is all general corruption enforcement curtailed. Consistent with administration goals, there may be an expansion of the use of the Federal Extortion Prevention Act.[25] FEPA is the other side of the FCPA coin, involving foreign actors imposing "pay-to-play" or similar conditions on Americans seeking to do business abroad. Unlike with the FCPA, these actions make Americans the *victims*. Among other implications, this should lower the risk (and therefore the barrier) for American companies who report such crimes — further inducing them to do so knowing that the Administration may reply with retaliatory economic policies (e.g., tariffs) as the entire punishment and/or as a method of compelling extradition of the accused.

Indeed, (some) select environmental and consumer protection (FDA, FTC, ATF) enforcement may be an unexpected beneficiary of fitting within the general mandate of the Cartels/TCOs Memo. For instance, weeks before President Biden left office, he signed the Destruction Initiative for Stored Precursors Overseas and Safe Enforcement (DISPOSE) Act — criminalizing efforts to bring opioid precursors into the United States, and for those that are seized on this side of the border, criminalizing disposing of them in an environmentally unsafe manner. There may be some enforcement action on that front.

Actions Involving Chinese Vape Products — A 2024 government report identifies three Chinese e-cigarette manufacturers as responsible for over 70% of middle- and high-school vape use.[26] None of these brands is FDA-approved — and therefore may not be lawfully marketed or sold in the United States. A former ATF official described it like this to a reporter: "Right now, in the underbelly of organized crime, the Chinese are making close to $300 billion a year on the backs of our kids[.]"[27] DOJ already has in place a multi-agency task force "to curb distribution and sale of illegal e-cigarettes," so this could make a clear jump-off point for further enforcement actions against both the Chinese manufacturers and U.S.-based facilitators.

Transnational Elder Fraud Schemes — Early in Trump 1, the president signed the Elder Abuse Prevention and Protection Act of 2017 (EAPPA). This led, in part, to the 2019 establishment of the Transnational Elder Fraud Task Force. One resulting investigation was into a series of Peruvian-based call centers that would target elderly Spanish speaking consumers in the United States, scaring them, e.g., into paying off supposedly pre-existing debts and contractual obligations. The Peruvians were extradited, prosecuted and convicted — with the government asserting that the Department "will pursue and prosecute transnational criminals who defraud U.S. consumers, wherever they are" — as part of "the department's extensive and broad-based efforts to combat elder fraud [by] seek[ing] to halt the billions of dollars seniors lose to fraud schemes, including those perpetrated by transnational criminal organizations."[28] Other such cases are continuing today and there may be more of them — as they involve real U.S. victims of foreign organized crime.

Will Anyone Fill the Gap? — White collar defendants connected to business in the UK may see more robust enforcement coming from across the pond. In addition to the UK Bribery Act [of] 2010, the Economic Crime & Corporate Transparency Act [of] 2023 (ECCTA) has been passed. This statute broadly expands corruption enforcement, thereby creating a new corporate offense for large organizations *that fail to prevent fraud*. Additionally, it extends corporate liability for the criminal acts of "senior managers" — those who make decisions about how the activities of the company are to be managed, as well as those who do the actual managing of the whole or a substantial part of those activities. It also adds an extra-territorial element under certain circumstances. Hence, American interests with significant UK links may need to follow the agenda of the Serious Fraud Office more closely.

MEMORANDUM: "ENDING ILLEGAL DEI AND DEIA DISCRIMINATION AND PREFERENCES"

Before she was confirmed, AG Bondi had her target list from the White House regarding Diversity, Equity, Inclusion and Accessibility (DEIA):

- Publicly traded corporations;
- Large non-profit corporations or associations;
- Foundations with assets of 500 million dollars or more;
- State and local bar and medical associations; and
- Institutions of higher education with endowments over 1 billion dollars.

This list came from President Trump's Jan. 21, 2025 executive order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, wherein he instructed the attorney general to put forward a "plan of specific steps or measures to deter DEI programs or principles … that constitute illegal discrimination or preferences" and, to accomplish that, directed "each relevant agency" to work with the Justice Department to "identify up to nine potential civil compliance investigations" coming from the above list of entities.[29]

Relying on this executive order, as well as on the 2023 Supreme Court opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[30] Bondi's memo directs the Justice Department's Civil Rights Division and its Office of Legal Policy to make "recommendations for enforcing federal civil rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA[,]" and proposals for criminal investigations, as

well as up to nine potential civil compliance investigations of the sort the president identified.

The question remains: What makes a DEI or DEIA program "illegal"? If the Civil Rights Division is going to lead the charge, a major tool it uses to prosecute criminal acts by private entities and individuals is 18 U.S.C. § 241 — Conspiracy Against Rights — which makes it a specific intent crime "for two or more persons to conspire to injure, oppress, threaten, or intimidate any person of any state, territory or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States[.]" If the *Students* decision is a guide, this would potentially criminalize conduct that advances the interests of members of one group at a cost to members of another group because, simply by virtue of membership (e.g., race, gender), the person "can bring something [to the table]" that a member of the other group cannot.[31] Or, as the Department of Education summarized it in a recent "Dear Colleague" letter, "[i]f an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law."[32] Again following *Students*, however, it may be a defense to such charges if the DEI program or policy allows for preferring *one person* over another based on that person's experiences *as an individual* — not on the basis of the group the person is in but as a result of the individual effects on the person because of the person's membership in that group ("be it through discrimination, inspiration, or otherwise").[33]

The EEOC has started to flush this out even further. On March 17, it initiated investigations of 20 law firms regarding concerns that their respective DEI practices may be running afoul of Title VII of the Civil Rights Act by including hiring practices that may discriminate against individuals because of race, color, religion, sex, or national origin.[34] Acting Chair Andrea Lucas sent letters to each of these firms seeking documents and answers to questions, with an April 15 deadline for responding.[35]

These investigations come on the heels of the president's March 6 executive order singling out the Perkins Coie law firm, alleging "dishonest and dangerous activity" that "has affected this country for decades." Among the "activity" at issue is that the firm allegedly "racially discriminates against its own attorneys and staff, and against applicants. Perkins Coie publicly announced percentage quotas in 2019 for hiring and promotion on the basis of race and other categories prohibited by civil rights laws." As a result of the EO, Perkins lawyers were subject to revocation of security clearances, the firm could not benefit from government contracts or otherwise be recipients of "taxpayer dollars," and their access to federal buildings was limited. Perkins has pushed back and is suing to enjoin the EO in the district court — prevailing at the TRO stage.[36] It seems likely that the question of what is and is not "legal" DEI will be addressed in that matter.

No matter how that term ultimately is defined, False Claims Act and parallel criminal investigations in this realm also may be expected. Indeed, the president's executive order requires recipients of federal contracts or grant awards "to certify" that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[37] Whether a certification of that ilk that is proven fraudulent is deemed material/actionable could be impacted by or measured against the anticipated Supreme Court opinion in *Kousisis v. United States*. *Kousisis* examines the strength of a wire fraud conviction when a government contractor falsely represented that a "Disadvantaged Business Enterprise" was its paint supplier for painting and repair contracts, notwithstanding that the fraudulent inducement resulted in no economic harm to the government.[38] This case should further elucidate the importance of special-group preferences in such a setting. That is, whether the goal of giving special preference to certain groups is considered a standalone "property interest" for the purpose of the Act — such that a false representation on that question creates a loss that is actionable.[39] (Or, from the president's perspective, whether a false representation about *not giving* such preferences is something that is actionable.)

NO MEMORANDUM: ANTITRUST ENFORCEMENT

The attorney general has not issued a specific memorandum about antitrust, but her overall policies and those of the administration nonetheless might impact how this area will be handled. Indeed, there are a few question marks about whether criminal antitrust enforcement will follow its usual pattern of not changing significantly from one administration to another or if it will be another place where there is an intentional break from the immediate past.

Gail Slater, the recently confirmed assistant attorney general for antitrust, does not have a career background in criminal work. Nonetheless, she is an experienced antitrust practitioner whose career has touched government service at the FTC, private practice, and working directly for industry, including as general counsel at the Internet Association trade group. She served on the White House's National Economic Council in 2018, where she worked on Trump's executive order on national security concerns over Chinese telecommunications equipment — and more recently was an economic advisor to then-Sen. J.D. Vance.

Slater's background suggests that on the civil side, there will be a reversion to a more traditional approach to civil enforcement based on the well-established consumer harm standard. (The same can be said for Andrew Ferguson, the new chairman of the FTC.) During her confirmation hearing, Slater highlighted the importance of clear rules in the enforcement process. This suggests that she will revise and/or reinstate at least some of the Guidelines that the Biden administration revoked in order to provide more guidance and certainty to the business community.

In the area of merger enforcement, both Slater and Ferguson indicated they intend to maintain the recently revised substantive Merger Guidelines from the Biden administration. And (pending the outcome of litigation), it appears the recently revised (and burdensome) Hart Scott Rodino Act (HSR) notification form will remain in place. That said, the FTC is indicating that early termination of HSR notifications will also be reinstated.

Labor is expected to remain a focus, including DOJ continuing to prosecute naked wage-fixing and no-poach agreements criminally. Several existing enforcement initiatives — such as the Procurement Collusion Strike Force, which works to root out corrupt antitrust crimes and fraud in government contracting — also are expected to stay in place.

Other areas may see cuts. For example, Slater reportedly has indicated that, in accordance with the administration's efficiency initiatives, she will examine

whether to reduce or eliminate the retention of economic consulting firms in favor of using the Division's in-house economists. Such an approach could result in less experienced expert witness testimony in contested cases.[40] More generally, resources could be a constraining factor. Several senior prosecutors at the Antitrust Division have reportedly taken recent buyout offers, and the FTC reportedly terminated some probationary personnel. Exacerbating this drain is that the Antitrust Division already is in the middle of litigating almost a dozen cases, including several against well-funded Big Tech companies. Each of these cases requires a significant allocation of resources. As a result, it is doubtful that, in the short term, the Antitrust Division will be able to do much more than maintain the status quo. Indeed, during her confirmation hearing, Slater noted the Antitrust Division's resource constraints and signaled a more open approach to settling cases than during the prior administration. Resolution by settlement is a potentially efficient way to mitigate these resource constraints.

Finally, the extent to which the DOJ will pursue monopolization claims criminally remains to be seen. Criminal claims require a heightened burden of proof relative to civil claims. Therefore, to the extent criminal conduct results in monopolization, we expect DOJ will continue to include those criminal claims (though we have no specific information indicating how the DOJ will ultimately come down on this policy). On the other hand, we do not expect civil monopolization investigations to ultimately lead to criminal prosecutions.

CONCLUSION

It is a safe bet that the Trump 2 administration will continue to direct AG Bondi to reshape the prosecutorial landscape. For example, on March 22, President Trump issued a new "Memorandum *for* the Attorney General [and] the Secretary of Homeland Security," titled "Preventing Abuses of the Legal System and the Federal Court."[41] Among other things, it encourages the attorney general to seek sanctions and make bar referrals against lawyers litigating against the government in manners the Department deems "frivolous, unreasonable and vexatious." Such lawyers are to be referred to the president for "additional steps" such as "reassessment of security clearances" and the like. Actions like these already have taken place.

Faced with these actions, the defense bar must decide whether and how to represent clients whose cases may draw the ire of the administration. Otherwise, we risk looking back on this pivotal time and being reminded of Martin Luther King Jr.'s admonishment:

> It may well be that we will have to repent in this generation. Not merely for the vitriolic words and … actions of the bad people, but for the appalling silence and indifference of the good people.[42]

Notes

1. Donald J. Trump, remarks at the Department of Justice, March 14, 2025.

2. United States v. Eric Adams, 24 Cr. 556 (DEH) (SDNY); D.E. 122 (*Nolle Prosequi*), at 2 (Feb. 14, 2025).

3. https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/.

4. United States v. Gree USA, Inc., 2021cr498 (C.D. Cal.).

5. *See, e.g.,* United States v. Shanghai Waseta International Trade Co. Ltd, 3:17-cr-00547-L-1 (N.D. Tex.).

6. ABA Model Rule 1.3, Cmt. 1.

7. *See* Brad Rudin & Betsy Hutchings, *Zealous Advocacy: A Doctrine Whose Time Has Passed?* NYSBA (Aug. 20, 2024), https://nysba.org/zealous-advocacy-a-doctrine-whose-time-has-passed/?srsltid=AfmBOooADmz4o1IPBqbg2XzOGVrHCWWBPp_52LegzGscztvhXHLuzLxe ("[L]awyers often feel torn by the tension between the duty of zealous advocacy and the duty to the larger system of justice." (internal citations and quotations omitted)).

8. *See* Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?* Ala. L. Rev. (Feb. 20, 2018).

9. Green, at 22.

10. Coupling this memorandum with the significant turnover in the Justice Department, one commentator has noted that the "politicization of the Justice Department seems like it's complete." Carrie Johnson, NPR, https://whyy.org/articles/justice-department-trumps-allies-cases/.

11. Sadie Gurman, *How Trump's Sweeping Expulsions Have Thrown the FBI Into Chaos*, https://www.wsj.com/politics/policy/trump-fbi-firings-immigration-crime-ad7d6b44/.

12. *See* "Reinstating the Prohibition on Improper Third-Party Settlements" (Feb. 5, 2025).

13. Universal Health Servs., Inc. v. United States ex rel. Escobar, 579 U.S. 176, 187 (2016).

14. *Prohibition on Informal Guidance Documents* (Nov. 16, 2017).

15. *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (Jan. 25, 2018).

16. Kisor v. Wilkie, 588 U.S. 558, 584 (2019) (internal citations omitted).

17. *Issuance and Use of Guidance Documents by the Department of Justice* (July 1, 2021).

18. *Reinstating the Prohibition on Improper Guidance Documents* (Feb. 5, 2025).

19. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

20. It is worth noting that during Trump 1, Congress used the Congressional Review Act to repeal 16 rules — far more than during any prior administration since the law's enactment in 1996. *See* Federal Agency Rules Repealed Under the Congressional Review Act, https://ballotpedia.org/Federal_agency_rules_repealed_under_the_Congressional_Review_Act.

21. Reversing a policy in place for more than 50 years, HHS has announced it will no longer use notice and comment procedures for regulatory actions related to public property, loans, grants, benefits, or contracts (the Administrative Procedure Act exempts regulations in these areas from notice and comment requirements, but HHS previously engaged in the process in those areas voluntarily) and will more frequently invoke the APA's "good cause" exception to the notice and comment rulemaking requirement.

22. *President Biden's State of the Union Address* (March 1, 2022).

23. *See* 15 U.S.C. § 78dd-1.

24. The EO does not directly instruct the SEC to pause its enforcement of the "accounting" sections of the FCPA that come under its purview.

25. 18 U.S.C. § 1352.

26. *See* https://www.cdc.gov/mmwr/volumes/73/wr/mm7335a3.htm (identifying Elf Bar, Breeze and Mr. Fog).

27. https://fox11online.com/news/nation-world/law-enforcement-experts-sound-alarm-over-illegal-chinese-vapes-flooding-us-schools-vaping-e-cigarette-tobacco-smoking-atf-fda-crisis-in-the-classroom-china-ccp-food-and-drug-administration-us-bureau-of-alcohol-tobacco-firearms.

28. https://www.justice.gov/archives/

opa/pr/five-peruvians-extradited-overseeing-call-centers-threatened-and-defrauded-spanish-speaking.

29. Executive Order 14173, § (4)(b)(iii). There is no explanation as to why "nine" rather than having the facts on the ground determine whether there are nine or nine hundred events meriting investigation.

30. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 189 (2023).

31. *Id.* at 215-16.

32. *Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard* (Feb. 14, 2025). Note that the Department of Education describes this Letter as "provid[ing] significant guidance under the [2007] Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices[, and] does not have the force and effect of law[.]" Yet at the same time, the Letter "provides notice of the Department's existing interpretation of federal law [… and t]he Department intends to take appropriate measures … based on the understanding embodied in this letter." *Compare* p. 1 n.3 *with* p. 3, https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

33. 600 U.S. at 230-31.

34. These firms are A&O Shearman; Debevoise & Plimpton LLP; Cooley LLP; Freshfields Bruckhaus Deringer LLP; Goodwin Procter LLP; Hogan Lovells LLP; Kirkland & Ellis LLP; Latham & Watkins LLP; McDermott Will & Emery; Milbank LLP; Morgan, Lewis & Bockius LLP; Morrison & Foerster LLP; Perkins Coie; Reed Smith; Ropes & Gray LLP; Sidley Austin LLP; Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP; White & Case LLP; and WilmerHale.

35. The letters can be reviewed at https://www.eeoc.gov/sites/default/files/2025-03/Law_Firm_Letters_-_03.17.2025.pdf.

36. Perkins Coie LLP v. U.S. Department of Justice et al., 25-cv-716 (USDC-DC March 11, 2025).

37. Executive Order 14173, § (4)(b)(iv).

38. 82 F.4th 230 (3d Cir. 2023), *cert. granted,* 144 S. Ct. 2655 (2024).

39. It also raises an important question about calculating loss amount for the purpose of sentencing when the final product is, in all other respects, up to snuff. *See* 82 F.4th at 244-246.

40. *See* Jody Godoy, *DOJ Antitrust Head Targets Pricey Consultants Amid DOGE Cost Cutting* (March 17, 2025), https://www.reuters.com/world/us/doj-antitrust-head-targets-pricey-consultants-amid-doge-cost-cutting-2025-03-16.

41. Emphasis added.

42. "Remaining Awake Through a Great Revolution," sermon delivered at the National Cathedral (1968). ■

About the Authors

NACDL MEMBER Joel D. Schwartz is a former federal prosecutor and public defender who advises clients on white collar criminal defense, civil enforcement, and congressional and special investigations.

Joel D. Schwartz
Parker Poe LLP
Washington, DC
202-434-9100
EMAIL joelschwartz@parkerpoe.com

Scott Scheele, a former DOJ Antitrust Division attorney, helps clients navigate federal and state government review of mergers and acquisitions, civil litigation, government investigations, and compliance.

Scott A. Scheele
Parker Poe LLP
Washington, DC
202-434-9100
EMAIL scottscheele@parkerpoe.com

NACDL MEMBER Hilary Holt LoCicero specializes in white collar criminal defense and government and internal investigations. She represents clients in connection with actions by DOJ, U.S. Attorney's Offices throughout the country, and the SEC.

Hilary Holt LoCicero
BLL LLP
Washington, DC
703-473-1476
EMAIL hhlocicero@bllfirm.com

Lloyd Liu focuses his practice on white collar criminal defense, government investigations, and complex civil litigation. He is an adjunct professor at the George Mason Antonin Scalia Law School.

Lloyd Liu
BLL LLP
Washington, DC
202-860-6543
EMAIL lliu@bllfirm.com

From the President

(Continued from page 5)

Constitution, we must remain vigilant. When the government opposes the Constitution as a governing principle, we must remain doubly vigilant. This is the slip, as put by Jamelle Bouie, "From Unconstitutional to Anti-Constitutional."[6]

The question remains: Who will defend the defenders? The obvious answer is that we shall. Thus far, no one else has seen fit to stand up for us, the criminal defense bar. NACDL will be there, but we will need help. More than ever, we need everyone, regardless of political affiliations or beliefs, to recognize the nonpartisan but existential threat to a viable defense function in our beloved country. As never before, we need everyone to recruit others to join NACDL and help protect our Constitution. Now, more than ever, we must push our state, local, and specialty bars to take a stand.

I look forward to all of us working together to accomplish this goal. Finally, like all of us, I did not expect to live in a time when we would have to fight for and reinforce the Bill of Rights that was ratified 233 years ago. I am, however, incredibly proud to do so with all of you.

Notes

1. 473 U.S. 305, 371 n.24 (1985).

2. Editorial, *Who Will Defend the Constitution's Defenders?* N.Y. TIMES, March 23, 2025.

3. 50 U.S.C.A. Sec. 21. Also, read NACDL's press releases on these issues at https://www.nacdl.org/Landing/2025-News-Release-Archive.

4. *Id.*

5. Our government would later acknowledge that the primary motive for this executive order and the internment of the Japanese Americans was racial prejudice and not military necessity. President Gerald Ford signed a proclamation to this effect on Feb. 19, 1976. Notably, there was no removal of the Japanese population in the Hawaiian Islands, where the war began for the United States on Dec. 7, 1941, when the Japanese Navy attacked Pearl Harbor. The author attended junior high school and high school with the children and grandchildren of Japanese Americans who were forcibly removed and interned during the war.

6. Opinion, Jamelle Bouie, *From Unconstitutional to Anti-Constitutional*, N.Y. TIMES, March 23, 2025. ■