



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

Episode 7 - Insurance Needs in the Biden Administration

By [Michael D. Lichtenstein](#) and [Elie Honig](#)

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Michael Lichtenstein: Hi. This is Michael Lichtenstein and welcome to Lowenstein's Insurance Recovery Podcast: Don't take no for an answer. Today, we're talking with my colleague, Elie Honig. Elie is a graduate of Harvard Law School, is a Rutgers University scholar, and a CNN legal analyst who previously worked for 14 years as a federal and state prosecutor. Elie provides commentary and analysis for CNN, on air and in print, on breaking news relating to criminal justice, national security and other legal issues. He has also appeared on MSNBC, Fox News, BBC, PBS, and Bloomberg, and he is quoted regularly in the New York Times, Washington Post, Wall Street Journal and other news outlets. He also somehow finds time to serve as special counsel to Lowenstein's white collar practice. As you all know, President Biden was sworn in as our 46 president on January 20th. Today, Elie and I will discuss areas where the new administration may focus its white collar criminal enforcement, and where our listeners can look for insurance coverage to defend and indemnify against those claims. Hey Elie, thanks for joining me.

Elie Honig: Michael, thank you for having me. I have to say I've done a lot of podcasts in my life. I've never been on an insurance specific podcast. So, you know, let's make it sing.

Michael Lichtenstein: Well. And I promise to make it as painless as possible.

Elie Honig: No, it'll be better than painless. This'll be enlightening and fun.

Michael Lichtenstein: All right, so let's jump right in. Elie, What can you tell our listeners about some of the changes that we can expect in the leadership at DOJ?

Elie Honig: As normally happens, Michael, when you turn over from a president of one party to a president of the other party, you're going to see dramatic changes at the top of DOJ. And here we're already seeing that happen. The new leadership

of DOJ, and I'm talking about Merrick Garland, who has been nominated and likely to be confirmed as attorney general, Lisa Monaco in the number two position, deputy attorney general. Vanita Gupta who's who will be nominated for the number three position, associate attorney general. All of them have deep experience in DOJ, in enforcement, in criminal law, and really even on the front lines of prosecution.

Elie Honig: And that's really a market departure from the prior leadership of DOJ, Bill Barr and Jeffrey Rosen, and the other top brass there, were none of them had ever been a sort of frontline prosecutor before. Of course, Bill Barr had been attorney general back in the early 90s. But none of them had ever been on the front lines of prosecution or enforcement before they went to the top of DOJ. So I think we're going to see a very different approach, both to criminal prosecution and to civil and administrative enforcement under this new group. I know Lisa Monaco, I know Vanita Gupta professionally, and to an extent, personally. I know that they're both really to their job, to doing it right, to doing it aggressively.

Michael Lichtenstein: And do you think the 50-50 conditions in the Senate is going to have a major impact on President Biden's ability to get these folks confirmed?

Elie Honig: No question. That the fact that those two Georgia Senate races both went to the Democratic candidates flipped the Senate over from Republican control to Democratic control. As a practical matter that means it's going to be much easier for Joe Biden to get his nominees through Senate confirmation. For sure.

Michael Lichtenstein: Wonderful. So let's get into some of the substance Elie. Antitrust was not a priority for the Trump administration. I've been reading that there will be an uptick in enforcement activity in this space. What have you heard?

Elie Honig: That's virtually certain. I will say this though. Antitrust is one of the very few areas in public life where there really is broad by partisan agreement. It's an issue that's been popular with Republicans and Democrats alike. Even in the last couple of years, we've seen significant actions, congressional actions, DOJ, lawsuits, and other investigations, largely geared at big tech and social media, right? We've seen suits and investigations relating to Google, relating to Facebook. And I think that'll continue under this administration. I think the trend is clearly pointing upwards.

Elie Honig: Like I said, you have an aggressive group of regulators here, experienced prosecutors and regulators, but it also is the rare issue where there's really not an ideological divide. There's really sort of cross ideological and bi-partisan support here. I think one thing I would look for is for the new administration to be aggressive in what remedies they seek. I mean, look, there's always the possibility of fines. The more drastic remedy would be a breakup essentially. So I think it'll be interesting to see, and we need to watch, how are they going to go about not just pursuing these investigations and filing these lawsuits, but what types of remedies are they looking for?

Michael Lichtenstein: So, Elie, I know you're not an insurance guru, but if you're a Google, Facebook or any other company facing a DOJ antitrust lawsuit, you'll be looking to your DNO policy for coverage. Regardless of the type of remedies that DOJ is seeking. Most directors and officers will be entitled to a defense under their policy. And while no insurance policy can protect a company against a breakup, civil fines and penalties are typically covered. Note that some policies have antitrust exclusions that target claims for deceptive trade practices, unfair trade practices, or restraint a trade. So as we always say, read your policy carefully. So Elie, cyber related crimes have been in the news. I mean, some very large crimes like the alleged Russian hack of thousands of US companies. Do you think cyber enabled crime will be an important area for the new DOJ? And if so, what could that mean for directors and officer's individual liability?

Elie Honig: Yeah. So there's only one trend line on cyber related crime, and that's up. It's increasing just as we become more and more reliant on the cyber world to run businesses. It's increasing as criminals see more and more opportunities there. I believe we're going to see an uptick in enforcement under the Biden administration. There actually was a decline, not a major decline, but a significant decline in cyber enforcement between the Obama administration and the Trump administration. I fully expect to see that trend reverse back up. And so look, this could be a benefit to corporations who are potentially victimized by this. I think one thing that's really important and tricky to deal with as a prosecutor is getting corporations, getting private businesses to disclose, to come forward, to tell prosecutors and investigators, we were hacked. Because sometimes there's reluctance by businesses to come out with that because they fear that it will look bad. It may impact their share price. But prosecutors, I know have been prioritizing sort of making it more tenable for companies to come forward if they're in that situation.

Michael Lichtenstein: Well, you heard it from Elie. The declining trend in this type of prosecution will turn around under President Biden. Elie, if companies are going to be encouraged to self-disclose when they are victims of cyber crimes, there'll be looking to two types of policies for insurance coverage. First, a claim from the DOJ that a company and its management has failed to do enough to protect against a cyber crime can be made against a DNO policy. However, many DNO policies include broad exclusions for cyber related claims. So you'll have to read your policy carefully. For claims related to the loss created by the cyber crime, directors and officers will look to their cyber insurance policy. There they will find coverage for network security, privacy, business interruption, and social engineering. Note that even before the pandemic cyber, insurers were tightening their underwriting guidelines and asking for more details to better understand the risks they were insuring. Expect that underwriting will get tougher at renewal. So Elie, the consumer Financial Protection Bureau was pretty dead under the Trump administration. I've heard that consumer fraud will be a major priority for the Biden administration. What do you think about that?

Elie Honig: We're going to see a total turnaround when it comes to the CFPB. I mean the Trump administration had essentially contempt for that agency. They put Mick Mulvaney in charge of it. Mick Mulvaney, who had openly ridiculed the sort of image and purpose of the CFPB. And let's remember, the CFPB was formulated, was created under the Obama administration. It was really something that Senator Elizabeth Warren pushed hard for. So I think we're going to see a complete reversal, a major increase in CFPB's activity.

Elie Honig: I think there's a political aspect to this. You know, Joe Biden has to pay due respect to the people around him, and has taken some criticism for not offering certain positions to Elizabeth Warren. Well, this is a Senator Warren issue, if there ever was one. The CFPB. I mean, she essentially was the driving force behind creating it. The other thing is the person who's been nominated to lead or will be nominated to lead the CFPB, Rohit Chopra is another one of these experienced veteran regulators. He's not somebody who's being parachuted in from some other field. So again, I look for a significant increase in enforcement there.

Michael Lichtenstein: So Elie, the CFPB and Senator Warren are coming for you. Where do you look for insurance coverage? I'm just kidding. Elie, there are many policies that may provide coverage for consumer fraud, DNO and ENO, general liability, and even employment policies. Further, some privacy claims may be covered under cyber policies. Consulting with experienced coverage counsel before characterizing a claim will help you determine your best strategy for maximizing coverage. And I just want to add that Senator Warren was my contracts professor in law school and she was awesome.

Elie Honig: I did not have her class, but I remember others, my friends had her and raved about her at the time.

Michael Lichtenstein: She picked on me mercilessly. And the most important thing I learned is you only know you have a contract when you hear zat. Whatever that means.

Elie Honig: What does that mean?

Michael Lichtenstein: Exactly. Take away from that what you will.

Elie Honig: Being picked on by a Senator.

Michael Lichtenstein: So Elie, I'm hearing that anti-corruption enforcement under the FCPA will be a DOJ priority. What does that mean for public companies? And more importantly for the individual liability of their management? And this may also get into the Yates memo and maybe you can tell our listeners what that means.

Elie Honig: Yeah. So the FCPA is another area where I think we are, without question, going to see an uptick in enforcement. President Trump was openly critical of the FCPA. He talked several times about how he thought it was really hampering the

ability of American businesses to survive and thrive in foreign markets. Even towards the end of his term, he even toyed with the idea of trying to legislate out the FCPA, or take the teeth out of FCPA. He said it's a huge disadvantage for American businesses. Now, I think we're going to see a stark reversal in that from the Biden administration. The Yates Memo. So the Yates Memo, of course, was the creation of Sally Yates, who was deputy attorney general under Barack Obama. Really, there was two major provisions in the Yates Memo. The first one is that in order for a corporation to be considered cooperative, they had to fully cooperate. They have to make available whatever documents and witnesses and evidence DOJ asked for.

Elie Honig: And second of all, the Yates Memo instructed prosecutors to focus on charging individuals, and not just corporations wherever possible. Now I think the Yates Memo that was not completely discarded under the Trump administration, but I think it will be given more credence and more priority under the Biden administration. I do want to say there are aspects of the Yates Memo that, you know, easier said than done, right? I mean, easy for... Sally Yates is obviously a deeply respected person in the DOJ world. I don't know her personally, but I have nothing but respect for her. But easy to throw your name on a memo that says, Hey, prosecutors, make sure you go after individuals, not corporations. I mean, I can tell you as a former prosecutor, prosecutors always have, and will try to do that. Easier said than done. But look, there will be, I think, an increased focus on the liability of individuals, not just corporations.

Michael Lichtenstein: So Elie, it appears that enforcement under the FCPA is going to go way up. And the Yates Memo guarantees that individual directors and officers will be in DOJ's cross hairs. The good news for our listeners is that typically, DNO policies cover civil, criminal, or regulatory investigations of insured persons, where they are targets of the investigation. DNO policies will commonly pay for civil fines or penalties assessed against insured persons, and we'll just about always pay for defending against the investigation. As Elie knows, FCPA investigations may be followed by shareholder lawsuits, especially if the company's share price has taken a hit. This type of claims should be covered under most DNO policies. Elie, President Biden has indicated a desire to establish an environmental and climate justice division within the department of justice. So first, do you think he's going to succeed in creating that division? And second, what does that mean for environmental enforcement during the next four years?

Elie Honig: Well, he'll certainly succeed in creating that new operation if he wants to. I mean, it's one of the nice things about being president and doing things within DOJ. It's within the executive branch, so there's very little anyone can do to stop you from that kind of prioritization. Again, I expect to see a turnaround here. Already, we've seen just in his first few days in office President Biden has reentered or made clear that we will be reentering the Paris climate agreement. He's already stopped the Keystone pipeline because primarily of environmental concerns. So I think we're going to see a real turnaround within DOJ in its environmental enforcement groups. And one thing I would look for in particular is an emphasis on going after polluters and environmental violators in urban

areas, in areas that tend to disproportionately impact minorities. I think President Biden himself and his platform have made clear that that's going to be a priority.

Michael Lichtenstein: And I think from my experience, that means a lot of landfills, a lot of waste transfer facilities are going to be a major focus, because those tend to have been cited in places where you had lower socioeconomic folks living. Folks, it is clear that the environment is a major priority for President Biden and the DOJ, especially for cleanups in disadvantaged areas. Elie, it sounds like the concept of the polluter pays is going to have real teeth over the next four years. The good news is that there are over 50 insurance companies selling environmental insurance products that cover the cost of cleanup, bodily injury and business interruption. The policies can be tailored for specific industry sectors like healthcare, education, real estate and others. These are highly manuscripted policies, and you should consult a broker and coverage counsel that specialize in environmental coverage when purchasing. Elie, do you think we'll see any serious investigations relating to the PPP loans that were made during the height of the pandemic?

Elie Honig: For sure. First of all, we've already started to see a few cases trickling in. But one thing I can tell you from my prosecutorial experience is anytime there is a pot of money, even for the best possible causes, there will be people putting their hands in it who shouldn't be. When I started out as a federal prosecutor in SDNY in 2004, we were still doing 9/11 fraud cases. And you would think who would ever steal from a 9/11 fund, plenty of people. And we prosecuted them. And then later when I was with the AG's office in New Jersey, we did the same thing for hurricane center. Superstorm, Sandy relief funds. Again, you wonder who would steal that? Who would commit fraud to get money intended for victims of Superstorm Sandy? Well again, plenty of people did. I think we ended up with over a hundred of those prosecutions in New Jersey alone. So rest assured, there will be people who have violated or will try to violate the PPPs guidelines. And I think DOJ absolutely will make it a priority to investigate those people, and if appropriate, bring charges.

Michael Lichtenstein: And Elie, when we're talking about companies, do you think this would be one of those good applications of the Yates Memo where DOJ will be looking at directors and officers of large companies that took... I remember hearing in the news that some companies took \$10 million loans, and if those funds were not used appropriately, do you think this is one of those areas where the DOJ will actually target people, not just trying to get the company itself, to plead guilty and perhaps pay a fine or something?

Elie Honig: I do think so. And I think as a prosecutor, you're going to want to know who made what representations on this application? Who knew if they were false or not false, and then what was done with the money? But sure that area seems ripe for application of the Yates Memo.

Michael Lichtenstein: Elie, it sounds like there may be a serious effort to root out fraud in this area, focusing on people and not just companies. If DOJ comes after you, you will be looking to your DNO policy. Although any complaint will likely sound in fraud, a good policy holder lawyer should be able to get you full defense of these claims. And since most claims resolved through settlement, there is a strong likelihood that some or all of the damages will be covered by the policy. Keeping in mind that most policies do exclude coverage for ill gotten gains. So the return of PPP money, that you should not have received in the first place, may not be covered at all. All right, Elie, these are all the prepared questions I had. I always like to give my guests the last word. Is there any words of advice or wisdom you want to give to our listeners about what they can expect in general on white collar enforcement during the next four years?

Elie Honig: I think it's pretty clear that we're going to have a sharp uptick in enforcement activities, both investigatively in terms of regulatory actions, potentially civil actions, all the way on up to criminal actions. I think we are looking at a new DOJ with new leaders and a new ethic. And so I think the general trend is going to be pretty strongly towards more enforcement.

Michael Lichtenstein: Fabulous. Well, Elie, thank you so much for taking time to speak with me and our listeners today. This has been very enlightening for me and I'm sure for everyone else, and I wish you a great day, and I'll see you around the office sometime.

Elie Honig: My pleasure. Thanks, Michael.

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