

## Predictions That The Biden Administration Would Increase Enforcement And Regulatory Actions Proven Accurate; More to Come

Before the 2020 election, many predicted that a Biden administration would take a more aggressive approach to enforcement and regulation than President Trump, particularly in the areas of financial crime and consumer and environmental protection. Those predictions have been borne out, as seen for example in the increased activity of the Department of Justice, the SEC, and other regulatory agencies. Based on the administration's most recent statements and actions, there is reason to believe this trend will accelerate.

### I. Predictions of Increased Enforcement and Regulatory Activity

Practitioners and observers in the field expected that the President-elect would prioritize a different set of issues than his predecessor<sup>1</sup>. Democratic administrations traditionally emphasize enforcement and regulation more than Republican administrations, especially in white-collar crime and consumer and environmental protection<sup>2</sup>. The Trump administration rolled back regulations in many areas of the law, and candidate Biden had promised to reinstate them if elected<sup>3</sup>. In addition, the COVID-19 pandemic and the related economic decline presented the new administration with new problems to tackle, including fraud and abuse in the COVID-19 stimulus and relief funding programs<sup>4</sup>.

This was not without precedent. Barack Obama reacted to his Republican predecessor's deregulatory policies and an economic crisis by expanding oversight and instituting aggressive enforcement policies. His Vice President was expected to follow in his footsteps<sup>5</sup>.

### II. President Biden and His Appointees Signaled A Surge In Regulatory Activity

President Biden's first actions in office bolstered the view that his administration would take an aggressive posture towards enforcement and regulation. His first budget proposal requested an 11% increase in funding for the DOJ—to \$35.2 billion<sup>6</sup>. The proposal emphasized “a wide range of departmental priorities, including strengthening civil rights enforcement and defending against domestic and international terrorism<sup>7</sup>.” His budget also included a request for \$191 million for the Financial Crimes Enforcement Network (FinCEN),

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<sup>1</sup> See, e.g., <https://www.law.com/corpocounsel/2021/02/02/looking-forward-regulatory-enforcement-expectations-in-a-biden-administration/>; <https://www.bizjournals.com/denver/news/2021/02/08/fcpa-enforcement-trends.html>; [https://news.bloomberglaw.com/white-collar-and-criminal-law/white-collar-crime-probes-likely-to-intensify-under-bidens-doj?utm\\_source=twitter&utm\\_medium=lawdesk&utm\\_campaign=00000175-b61b-df9f-ad7d-f73fa6d30004&campaign=BB940B02-2789-11EB-ACFB-F80750017A06](https://news.bloomberglaw.com/white-collar-and-criminal-law/white-collar-crime-probes-likely-to-intensify-under-bidens-doj?utm_source=twitter&utm_medium=lawdesk&utm_campaign=00000175-b61b-df9f-ad7d-f73fa6d30004&campaign=BB940B02-2789-11EB-ACFB-F80750017A06)

<sup>2</sup> See, e.g., <https://www.jdsupra.com/legalnews/predicting-white-collar-enforcement-18566/>; [https://news.bloomberglaw.com/white-collar-and-criminal-law/white-collar-crime-probes-likely-to-intensify-under-bidens-doj?utm\\_source=twitter&utm\\_medium=lawdesk&utm\\_campaign=00000175-b61b-df9f-ad7d-f73fa6d30004&campaign=BB940B02-2789-11EB-ACFB-F80750017A06](https://news.bloomberglaw.com/white-collar-and-criminal-law/white-collar-crime-probes-likely-to-intensify-under-bidens-doj?utm_source=twitter&utm_medium=lawdesk&utm_campaign=00000175-b61b-df9f-ad7d-f73fa6d30004&campaign=BB940B02-2789-11EB-ACFB-F80750017A06)

<sup>3</sup> See, e.g., <https://www.nytimes.com/2021/01/22/climate/biden-environment.html>; <https://www.politico.com/news/2022/04/19/biden-reverses-trump-rule-limiting-scrutiny-environmental-impacts-00026207>

<sup>4</sup> *Supra*, note 1.

<sup>5</sup> <https://fcpa.stanford.edu/statistics-analytics.html?tab=1>

<sup>6</sup> <https://www.nytimes.com/2021/05/04/us/politics/justice-department-budget.html>

<sup>7</sup> <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-president-s-fy22-discretionary-funding-request>

roughly 50% above the 2020 enacted level, “to create a database that tracks the ownership and control of certain companies and organizations and help combat the use of complex corporate structures to shield illegal activity<sup>8</sup>.”

The President’s key enforcement appointees also signaled a different approach and set of priorities. This was immediately noticeable with respect to white-collar crime. On October 28, 2021, newly-appointed Deputy Attorney General Lisa Monaco announced changes to the Department’s policies. These included elevating the level of scrutiny the DOJ would place on corporate adherence to deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), including a review of existing agreements the DOJ suspected were being violated; a greater openness to impose corporate monitorships; and a roll back at the Trump DOJ’s loosening of requirements for companies seeking to receive cooperation credit<sup>9</sup>. These changes were reiterated days later by senior DOJ official John Carlin, who warned corporate defendants that “if you violate the terms of an NPA or DPA or plea agreement, we are going to enforce.... companies need to understand that violating NPAs and DPAs may be worse than the original punishment<sup>10</sup>.”

The SEC quickly followed suit. On November 4, 2021, SEC Chair Gary Gensler announced at the Securities Enforcement Forum that the Commission would take a similarly aggressive approach to policing capital markets and corporate wrongdoing. He opened his remarks with a 1934 quote from Joseph Kennedy, the first Chairman of the Commission: “The Commission will make war without quarter on any who sell securities by fraud or misrepresentation.” Gensler also cited Monaco’s speech, summarizing her changes to the DOJ’s approach to corporate crime and emphasizing that the SEC shared her views: “While [the SEC and DOJ] are independent, and our enforcement tools, authorities, and missions are distinct, these changes [announced by the DOJ] are broadly consistent with my view of how to handle corporate offenders.” Significantly, Gensler observed that “cooperation” with the SEC means more than “meeting ... legal requirements, such as responding to lawful subpoenas or making witnesses available for lawfully-compelled testimony,” or “conducting a self-serving, independent investigation.”

### **III. Predictions Of Increased Enforcement Action Have Been Borne Out**

#### **A. White Collar Crime and the U.S. Department of Justice**

In 2021, the DOJ brought 5,500 new white-collar crime prosecutions, representing an increase of approximately 10% from the previous year. The Criminal Division’s Fraud Section was especially busy. As Attorney General Merrick Garland recently remarked to the ABA Institute on White Collar Crime, 2021 was one of the “busiest trial years on record” for the Fraud Section, convicting nearly 300 defendants via guilty plea and securing convictions of 30 individuals at trial<sup>11</sup>.

Two of the Fraud Section’s most significant corporate successes came on back-to-back days in December 2021 and reflected the DOJ’s new, aggressive policies towards white-collar criminal enforcement. On December 21, the global financial services firm NatWest Markets PLC pleaded guilty to wire and securities fraud stemming from market manipulation schemes and agreed to pay \$35 million in fines<sup>12</sup>. Notably, the plea agreement included the imposition of a three-year independent compliance monitor, in accordance with the new policies introduced by DAG Monaco. One day later, the DOJ announced that Balfour Beatty Communities LLC, a housing contractor, had agreed to a guilty plea for defrauding three branches of the U.S.

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<sup>8</sup> <https://www.whitehouse.gov/wp-content/uploads/2021/04/FY2022-Discretionary-Request.pdf>

<sup>9</sup> <https://www.quinnemanuel.com/the-firm/publications/sec-and-doj-signal-aggressive-stance-to-corporate-america/>

<sup>10</sup> <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>

<sup>11</sup> <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>

<sup>12</sup> <https://www.justice.gov/opa/pr/natwest-markets-pleads-guilty-fraud-us-treasury-markets>

military and had agreed to pay over \$65 million in fines and restitution<sup>13</sup>. As with NatWest, the plea agreement included the imposition of a three year monitor. As the press noted, these cases “provid[ed] the first tangible signs of how the Justice Department plans to approach corporate crime by pressing for more guilty pleas and imposing outside monitors<sup>14</sup>.”

This trend continued in the new year. On April 20, 2022, the DOJ and Stericycle, Inc., an international waste management company, entered into a DPA requiring the company to retain an independent corporate monitor for two years and to pay over \$84 million in penalties to resolve the government’s investigation into the company’s alleged bribery of foreign officials<sup>15</sup>. And on May 24, Glencore International, a Swiss multinational commodity trading and mining firm, pleaded guilty to violations of the FCPA and market manipulation, agreed to pay over \$1.1 billion in penalties, and agreed to retain a monitor for three years<sup>16</sup>.

These plea agreements weren’t the only examples of the Biden DOJ fulfilling its promises to take a stricter approach towards corporate crime. On December 8, 2021, the DOJ notified Deutsche Bank that it may have violated its DPA by failing to tell prosecutors about an internal complaint in its asset management arm’s sustainable investing business<sup>17</sup>. And on March 2, 2022, the DOJ told Ericsson, the multinational telecommunications company, that it had broken a 2019 DPA by failing to properly disclose misconduct and compliance failures<sup>18</sup>.

AG Garland’s remarks to the ABA highlighted the administration’s efforts to crack down on pandemic-related fraud. These efforts have been coordinated by the COVID-19 Fraud Enforcement Task Force, which Garland established immediately after his confirmation<sup>19</sup>. The Task Force has succeeded in bringing numerous criminal charges. On May 26, 2021, it announced charges against 14 defendants in seven federal districts for their alleged participation in health care fraud schemes resulting in over \$143 million in false billings related to the COVID-19 pandemic<sup>20</sup>. On September 17, 2021, the Task Force announced criminal charges against 138 defendants, including 42 doctors, nurses, and other medical professionals, in 31 federal districts for their alleged participation in health care fraud schemes that resulted in approximately \$1.4 billion in alleged losses<sup>21</sup>. Most recently, on April 20, 2022, the Task Force announced criminal charges against 21 defendants in nine federal districts which allegedly resulted in over \$149 million in COVID-19-related false billings to federal programs and theft from federally-funded pandemic assistance programs<sup>22</sup>.

The DOJ also elevated its scrutiny of the cryptocurrency markets. On October 6, 2021, it announced the creation of the National Cryptocurrency Enforcement Team, or NCET, “to tackle complex investigations and prosecutions of criminal misuses of cryptocurrency, particularly crimes committed by virtual currency

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<sup>13</sup> <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-privatized>

<sup>14</sup> <https://news.bloomberglaw.com/us-law-week/u-s-signals-corporate-crime-shifts-in-pair-of-fraud-settlements>

<sup>15</sup> <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>

<sup>16</sup> <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>

<sup>17</sup> <https://www.wsj.com/articles/justice-department-told-deutsche-bank-lender-may-have-violated-criminal-settlement-11638993595>

<sup>18</sup> <https://www.ericsson.com/en/press-releases/2022/3/update-on-deferred-prosecution-agreement>;  
<https://www.reuters.com/business/media-telecom/ericsson-says-us-doj-deems-investigation-disclosure-insufficient-2022-03-02/>

<sup>19</sup> <https://www.justice.gov/opa/pr/attorney-general-announces-task-force-combat-covid-19-fraud>

<sup>20</sup> <https://www.justice.gov/opa/pr/doj-announces-coordinated-law-enforcement-action-combat-health-care-fraud-related-covid-19>

<sup>21</sup> <https://www.justice.gov/opa/pr/national-health-care-fraud-enforcement-action-results-charges-involving-over-14-billion>

<sup>22</sup> <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-coordinated-law-enforcement-action-combat-health-care>

exchanges, mixing and tumbling services, and money laundering infrastructure actors<sup>23</sup>.” Not long after, the DOJ announced it had arrested two individuals for an alleged conspiracy to launder cryptocurrency valued at approximately \$4.5 billion, \$3.6 billion of which law enforcement has seized<sup>24</sup>.

## **B. Regulatory Enforcement and the U.S. Securities and Exchange Commission**

In 2021, the Securities and Exchange Commission filed 434 new enforcement actions, representing a 7% increase over the prior year<sup>25</sup>. In addition, the Commission ordered a total of \$1.45 billion in fines, a 33% increase over the prior year.

According to the Commission, these actions “spanned the entire securities waterfront.” While continuing to act within its traditional area of securities enforcement against public companies, broker-dealers and investment advisers, the Commission expanded its attention to the emerging crypto and SPAC markets. In the last year, the SEC brought charges against: (1) a company for operating an unregistered online digital asset exchange, (2) a crypto lending platform and top executives, alleging a \$2 billion fraud, and (3) a special purpose acquisition company, its merger target, top executives, and others for alleged misconduct in a SPAC transaction<sup>26</sup>. Recognizing the growth of these markets, the SEC announced on May 3, 2022 that it is doubling the size of its Crypto Assets and Cyber Unit<sup>27</sup>. One week later, President Biden issued an executive order on “Ensuring Responsible Development of Digital Assets,” outlining a “whole-of-government approach to addressing the risks and harnessing the potential benefits of digital assets and their underlying technology.” To do so, he called on enforcement and regulatory agencies to assess and develop specific policies related to the growing crypto sector<sup>28</sup>.

The Commission also brought so-called “first-of-their-kind” actions, including actions: (1) involving securities using decentralized finance, or “DeFi,” technology, (2) charging securities law violations on the “dark web,” (3) enforcing a key rule on the duties of municipal advisors, (4) involving a scheme to sell unregistered securities through a crowdfunding portal, (5) charging a mobile app data provider with securities fraud stemming from the misuse of confidential data, (6) involving failures to timely file and deliver Forms CRS, and (7) against an order and execution management system provider that facilitated electronic trading for failing to register as a broker-dealer<sup>29</sup>.

The recent ESG (Environment, Social, Governance) trend did not escape the SEC’s attention either<sup>30</sup>. On March 3, 2021, the Commission’s Division of Examinations announced that its 2021 examination priorities would include registered investment advisors “offering investment strategies that focus on ESG factors<sup>31</sup>.” The

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<sup>23</sup> <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team>

<sup>24</sup> <https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launders-45-billion-stolen-cryptocurrency>

<sup>25</sup> <https://www.sec.gov/news/press-release/2021-238>

<sup>26</sup> <https://www.sec.gov/news/press-release/2021-147>; <https://www.sec.gov/news/press-release/2021-172>; <https://www.sec.gov/news/press-release/2021-124>

<sup>27</sup> <https://www.sec.gov/news/press-release/2022-78>

<sup>28</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/>

<sup>29</sup> (1) <https://www.sec.gov/news/press-release/2021-145>; (2) <https://www.sec.gov/news/press-release/2021-51>; (3) <https://www.sec.gov/news/press-release/2021-188>; (4) <https://www.sec.gov/news/press-release/2021-182>; (5) <https://www.sec.gov/news/press-release/2021-176>; (6) <https://www.sec.gov/news/press-release/2021-139>; (7) <https://www.sec.gov/news/press-release/2021-113>

<sup>30</sup> For a more detailed discussion on the SEC’s actions regarding ESG issues, please review our client alerts specific to this topic: <https://www.quinnemanuel.com/the-firm/publications/the-name-game-sorting-through-the-esg-frenzy/>; <https://www.quinnemanuel.com/the-firm/publications/client-alert-the-esg-name-game-continues-sorting-through-the-new-sec-proposals/>

<sup>31</sup> <https://www.sec.gov/news/press-release/2021-39>

next day, the Commission announced the creation of a Climate and ESG Task Force in the Division of Enforcement to “develop initiatives to proactively identify ESG-related misconduct” and “identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules<sup>32</sup>.” Speaking before the Future of Asset Management North America Conference on September 29, 2021, SEC Chair Gary Gensler noted that one of the Staff’s current projects relates to ESG disclosures, particularly focusing on funds’ promoting themselves using terms like “green,” “sustainable,” or “low carbon<sup>33</sup>.” Following through on Gensler’s comments, the Commission announced on May 25, 2022 proposed rule amendments related to how companies use the term ESG in fund names and marketing materials, as well as disclosure requirements that would require certain registered investment advisers, advisers exempt from registration, registered investment companies, and business development companies to provide more specific ESG disclosures. In a statement supporting the proposed rules, SEC Commissioner Allison Herren Lee remarked that they would “help protect investors from ‘greenwashing,’ or exaggerated or false claims about ESG practices<sup>34</sup>.”

The Commission also brought charges in connection with ESG disclosures. On April 28, it charged Vale S.A., a publicly traded Brazilian mining company and one of the world’s largest iron ore producers, with making false and misleading claims about the safety of its dams prior to the collapse of its Brumadinho dam<sup>35</sup>. The Director of the Commission’s Division of Enforcement, Gurbir S. Grewal, noted that “[m]any investors rely on ESG disclosures like those contained in Vale’s annual Sustainability Reports and other public filings to make informed investment decisions.... By allegedly manipulating those disclosures, Vale compounded the social and environmental harm caused by the Brumadinho dam’s tragic collapse and undermined investors’ ability to evaluate the risks posed by Vale’s securities.” A few weeks later, on May 23, the Commission charged BNY Mellon for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed<sup>36</sup>. BNY Mellon agreed to pay a \$1.5 million penalty to settle the charges.

### **C. Other U.S. Enforcement and Regulatory Activity**

The Biden administration also took steps in other enforcement arenas. After repeatedly emphasizing antitrust enforcement as a key priority, on July 9, 2021 the President issued an executive order “Promoting Competition in the American Economy<sup>37</sup>.” The order includes 72 proposed initiatives by several federal agencies, including initiatives that call for the FTC and DOJ “to enforce the antitrust laws vigorously.”

On February 17, 2022 the DOJ announced an initiative to “deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct<sup>38</sup>.” As part of the initiative, the Antitrust Division formed a working group, focused on global supply chain collusion, with its international partners the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission, and the United Kingdom Competition and Markets Authority. Together, the group is tasked with developing and sharing intelligence to detect and combat collusive schemes.

As to environmental regulation, in addition to the SEC’s ESG Task Force (discussed above), President Biden also signed an executive order on “Tackling the Climate Crisis at Home and Abroad” on January 27, 2021<sup>39</sup>. The order directed the attorney general to: (1) consider renaming the Environment and Natural Resources Division as the Environmental Justice and Natural Resources Division, (2) develop “a

<sup>32</sup> <https://www.sec.gov/news/press-release/2021-42>

<sup>33</sup> [https://www.sec.gov/news/speech/gensler-famnac-2021-09-29?utm\\_medium=email&utm\\_source=govdelivery](https://www.sec.gov/news/speech/gensler-famnac-2021-09-29?utm_medium=email&utm_source=govdelivery)

<sup>34</sup> [https://www.sec.gov/news/statement/lee-statement-esg-052522?utm\\_medium=email&utm\\_source=govdelivery](https://www.sec.gov/news/statement/lee-statement-esg-052522?utm_medium=email&utm_source=govdelivery)

<sup>35</sup> <https://www.sec.gov/news/press-release/2022-72>

<sup>36</sup> <https://www.sec.gov/news/press-release/2022-86>

<sup>37</sup> Exec. Order No. 14,036, Fed. Reg. 36,987 (July 9, 2021)

<sup>38</sup> <https://www.justice.gov/opa/pr/departments-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain>

<sup>39</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

comprehensive environmental justice enforcement strategy” in coordination with the EPA, and (3) “ensure comprehensive attention to environmental justice throughout the Department of Justice, including by considering creating an Office of Environmental Justice within the Department to coordinate environmental justice activities among DOJ components and United States Attorneys’ Offices nationwide.” Following through on the President’s order, the DOJ and EPA launched the Office of Environmental Justice on May 5, 2022; designed an environmental justice enforcement strategy to guide the DOJ’s work; and issued a policy restoring the use of supplemental environmental projects subject to guidelines and limitations set forth by the Attorney General<sup>40</sup>.

On the financial regulation front, FinCen took advantage of its increased funding under the Biden administration to propose regulations expanding beneficial ownership reporting pursuant to the Corporate Transparency Act (CTA)<sup>41</sup>. The CTA is designed to enhance beneficial ownership transparency in the U.S. to “protect the U.S. financial system from illicit use and impede malign actors from abusing legal entities, like shell companies, to conceal proceeds of corrupt and criminal acts.”

#### **IV. Increased Enforcement and Regulatory Activities Are Likely To Continue**

On March 28, 2022, President Biden submitted to Congress his proposed budget for 2023. Among other things, the proposal requests \$37.65 billion in resources for the Department of Justice, an increase of \$2.63 billion over 2022<sup>42</sup>. The proposed budget requests \$20 billion for the DOJ’s law enforcement components and U.S. Attorneys’ Offices, including 120 additional attorneys dedicated to pandemic-related fraud; \$273 million for the DOJ Antitrust Division, representing a “historic increase” of \$88 million from the last fiscal year; \$6.5 million to support its existing Environment and Natural Resources Division; and \$1.4 million to establish the Office of Environmental Justice (discussed above); and over \$1.2 billion to protect department systems from cyber threats and to identify and prosecute perpetrators of cybercrimes; and a 30% funding increase of FinCEN.

The President’s budget highlights the administration’s enforcement priorities for the coming year and signals that the ramp-up in enforcement and regulatory action will continue. In addition to the enforcement actions described above, the DOJ is likely to step up civil rights enforcement actions and continue to roll back the Trump DOJ’s loosening of requirements for companies seeking to receive cooperation credit. Also, the increased investment in FinCEN should lead to enforcement actions aimed at complex corporate structures that the DOJ believes have previously shielded illegal activity.

At the same time, the SEC will likely finalize proposed rules related to private fund disclosures, climate change disclosures, refining the definition of insider trading, cybersecurity governance rules, and short sale disclosures. The SEC has also announced it intends to pursue additional rulemakings on ESG disclosures, proxy access rules, and digital engagement practices for broker-dealers and investment advisers.

Finally, the FTC is likely to enact extensive new rules governing competition and revive enforcement of laws such as the Robinson-Patman Act of 1936, which bars manufacturers from charging retailers different prices for the same products. Finally, many observers expect the FTC to launch an antitrust suit against Amazon based on an investigation first begun in 2019 as well as possibly an action against the MGM acquisition.

In short, the administration’s dramatic increase in enforcement and regulatory activities is likely to continue for the foreseeable future.

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<sup>40</sup> <https://www.justice.gov/opa/pr/justice-department-launches-comprehensive-environmental-justice-strategy>

<sup>41</sup> <https://www.federalregister.gov/documents/2021/12/08/2021-26549/anti-money-laundering-regulations-for-real-estate-transactions>

<sup>42</sup> <https://www.justice.gov/opa/pr/department-justice-fiscal-year-2023-funding-request>

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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