

New year, New White House: Considerations for lawyers as we enter the Biden Administration

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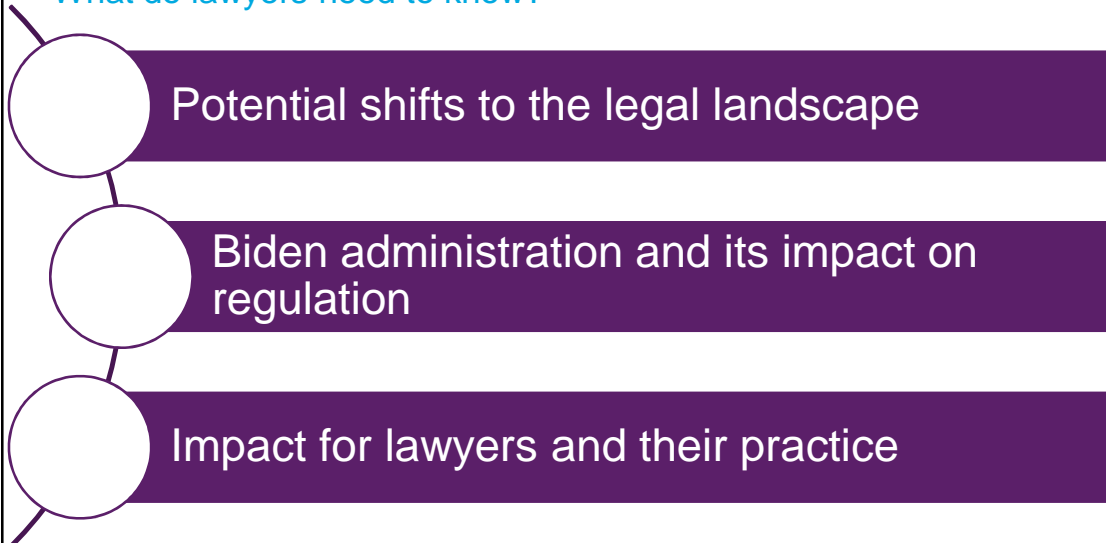
Agenda

- Biden Administration
- Industry Perspectives
 - Health Care
 - Telecom and Privacy
 - Energy and Environmental

Biden Administration

Preparing for the new administration

What do lawyers need to know?



Industry Perspectives - Health Care



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Health Care Regulation under President Biden

- Overarching Policy Objectives:
 - Relentless focus on the COVID Pandemic
 - Expand coverage
 - Address Social and Racial Inequities
 - Improve quality
 - Control Costs

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Administration's Health Policy Leaders

- Secretary-designate Xavier Becerra
 - CMS Administration - not yet named
 - CDC - Rochelle Walensky, MD
 - FDA Commissioner - not yet named
 - Indian Health Service Director - not yet named

Expanding Access to Care

- Repairing and building on the Affordable Care Act and expanding Medicaid
- On January 28, 2021, the President issued an Executive Order (EO) for agencies to reconsider rules and take actions as necessary to address:
 - Policies that undermine protections for people with pre-existing conditions, including complications related to COVID-19;
 - Demonstrations and waivers under Medicaid and the ACA that may reduce coverage or undermine the programs, including work requirements;
 - Policies that undermine the Health Insurance Marketplace or other markets for health insurance;
 - Policies that make it more difficult to enroll in Medicaid and the ACA; and
 - Policies that reduce affordability of coverage or financial assistance, including for dependents.

Expanding Access

- Following on the President's EO, HHS has announced it will open a "Special Election Period" for Health Exchange enrollment from February 15-May 15, 2021.
- Likewise, it is expected that HHS will
 - Remove limitation on ACA Navigators and provide additional funding to assist consumer in selecting ACA plans
 - Remove the prior Administration's Medicaid "work requirement" for eligibility
 - Extend a range of Medicare and Medicaid waivers to respond to the COVID pandemic.

Putting a stop, or at least a brake, on "Midnight Rules"

- The Trump Administration finalized a number of health care regulations during its final days.
- On January 20th, the President's Chief of Staff, Ron Klain, issued a memorandum: "Regulatory Freeze Pending Review". The memorandum can be found at:
https://cdn.govexec.com/media/gbc/docs/pdfs_edit/012021cb2.pdf
- The memorandum directs all department and agency heads to:
 - "propose or issue no rule in any manner" until its has been reviewed;
 - Rules which have been sent to the Federal Register, but have not been published are to be immediately withdrawn for review, and
 - For rules which have been published and which have not taken effect, consideration should be given to extending the effective date for 60 days after January 20 and opening a new 30-day comment period.

One rule which may be stopped is the "HHS Transparency and Fairness in Civil Administrative Enforcement Actions." That rule was published on January 14, 2021 with no opportunity for public comment.

New President, new policies, new rules

- With the confirmation of the HHS Secretary and the appointment of agencies heads, expect a range of initiatives to advance the President's health care policy objectives.
- Many will require legislation.
- Others can advance under existing law.
- Bottom line, stay tuned...

Industry Perspectives - Telecom and Privacy



Tech, Telecom, and Privacy Regulation under the Biden Administration

- **Digital Divide:** Focus on increasing access and affordability during the COVID pandemic and beyond
- **Net Neutrality:** Restore open-Internet protections and the FCC's authority to regulate broadband
- **Telecom Supply Chain Security:** Safeguard US networks from foreign threats
- **Federal Privacy Regulation:** Resolve patchwork of state regulations and confront challenges posed by new technologies

Tech, Telecom, and Privacy Policy Leaders

- **FCC:** Acting Chairwoman Jessica Rosenworcel
- **FTC:** Acting Chairwoman Rebecca Slaughter
- **OSTP:** Director Dr. Eric Lander
- **NTIA:** Not yet named
- **DOJ (Antitrust):** Interim Acting AAG Gene Kimmelman (Permanent AAG not yet named)

Bridging the Digital Divide

- COVID has highlighted a need to increase access to unserved and underserved communities and affordability for workers and students
- President Biden's "Build Back Better" plan calls for the creation of "universal broadband" for every American
 - Federal funding for broadband, like the \$7B included in December's COVID relief package, would require legislation
 - Increasing rural connectivity is of particular significance to the President and FCC leadership
 - Pledged \$20B for digital infrastructure to support historically Black colleges and universities
- Proactive FCC agenda to expand access
 - Public comments due February 16 on proposals to expand E-Rate to allow schools and libraries to use funds to buy internet devices for use off campus and to extend connectivity to students who lack access at home
 - Implementation of new Emergency Broadband Benefit Program, to which Congress allocated \$3.2B to enable eligible households to receive a discount on the cost of broadband service and certain connected devices during the COVID-19 pandemic
- USF Reform to address dwindling funding
 - FCC expansion of contribution base by adding more services
 - Congressional appropriation

Net Neutrality

- Biden Administration facing immense pressure to restore the FCC's authority to regulate broadband and implement strong open internet protections
- SCOTUS precedent in *Mozilla* suggests the FCC is afforded deference to reverse the last administration's repeal of open internet rules
- Any FCC action would likely occur after confirmation of a 5th Commissioner
- Biden administration has other levers to promote net neutrality:
 - Withdraw DOJ challenge to California rules, inviting rulemakings by other states
 - Change FCC's position on pending litigation

Telecom Supply Chain Security

- Build on the last administration's policies by emphasizing enforcement and defining targeted rules for implementing existing policies
- Jan. 2021 rule requires advanced communications providers to review equipment/services within their networks and: (1) certify that they do not include any covered equipment; **OR** (2) file an annual report that identifies covered communications equipment or services, describes the equipment/service and a removal or replacement plan, and justify the use of the equipment/service
- Congress has allocated \$1.9B to the FCC's "Rip-and-Replace" Communications Security Program, which will reimburse providers for replacement of Huawei and ZTE equipment
 - The FCC will seek comment on which providers and equipment should be eligible for reimbursement and the prioritization scheme for disbursing funds
 - Acting Chairwoman Rosenworcel has also expressed support for Open Radio Access Networks to diversify the supply chain by providing affordable alternatives to low-cost Chinese manufacturers

Federal Privacy Regulation

- Requires Congressional action
- Bipartisan consensus on long-debated issues:
 - Access
 - Deletion
 - Portability
- Emerging issues to address:
 - COVID-related data
 - Facial recognition
 - Preemption of state laws
- Companies asking for legislation to provide predictability and address crossborder data flows

Industry Perspectives - Energy and Environmental

Biden Administration - Energy and Environmental Law and Policy

- All energy and environmental actions by the federal government will be viewed through a “climate change” lens
- President Biden has stated that climate change is one of the four “historic crises” facing the US
- President Biden has unveiled a “whole of government” approach to address climate change
 - Appointed Sec. John Kerry as Special Presidential Envoy for Climate, a new Cabinet-level position, and Gina McCarthy, former EPA Administrator, as National Climate Advisor to lead “whole of government” strategy
 - Released a slew of executive orders on climate change and environmental policy
 - Planning to release a “Building Back Better” clean infrastructure bill

President Biden's Climate Change Executive Orders

- Since his Inauguration, President Biden has signed five climate/environmental-specific executive orders. These sweeping orders can be put into the following buckets:
 - *Leveraging the Purchasing Power of the Federal Government*: directing federal agencies to purchase clean electricity and non-emitting vehicles
 - *Repealing and Replacing Trump-era Environmental Rules*: Biden's executive order specifically targets Clean Air Act methane rules on oil and gas sources and fuel efficiency standards for cars
 - *Reforming Rulemaking Process*: enhancing the role that environmental justice considerations play in rulemaking; increasing the social cost of carbon in guiding federal actions; and bolstering scientific integrity processes
 - *Restrictions on the Oil and Gas Industry*: rescinding Presidential Permit for KXL; blocking ANWR leasing; and imposing a temporary moratorium on new oil and gas leasing

FERC - Bright Lights on the Independent Commission

- FERC has increasingly become a forum for high-profile debates on climate change
- New FERC Chairman Rich Glick's priorities may include:
 - New transmission incentives
 - Implementation of a new distributed energy resources rule
 - Reconsideration of new market rules
 - Adopting ISO/RTO carbon pricing rules
- FERC is also expected to bolster the consideration of indirect GHG impacts associated with interstate natural gas pipelines and LNG export facilities

Prospects for President Biden's Climate Change's Objectives

- Executive actions bolstering market forces transitioning the energy industry to a low-carbon future
- Can Congress provide a durable solution on climate change?
- Absent Congressional action, can Biden energy and environmental actions withstand judicial scrutiny?

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Thank you





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