Public policy spotlight: insights on the Biden transition and key policy implications

2 December 2020
President-elect Biden is the first president since George H. W. Bush in 1989 to take office without his party controlling both houses of Congress. A divided government will add complexity to the presidential transition — from the mechanics of transition at the federal agencies, to appointing officials who require Senate confirmation and enacting policy.

A top priority for Biden will be building his cabinet and staffing other key positions necessary to run the federal government. A closely divided Congress could create challenges in securing the Senate votes needed to confirm his 15-member cabinet, 6 cabinet-level officials and the more than 1,000 executive branch positions that require Senate confirmation. Biden has stated a goal of having the most diverse cabinet in history; one that “looks like America.”

He will have to carefully balance his slate of nominees to appeal to the more progressive segment of the Democratic Party while also ensuring that nominees can be confirmed by a Republican majority Senate.

Biden transition teams are actively working to identify cabinet and agency nominees, pledging that he will not appoint regulators from the industries they would oversee, but policy and management experience will be key. Without a Democratic majority in both houses of Congress, Biden will need to consider what the administration can accomplish on a bipartisan basis through legislation, and what policy priorities will need to move through the executive powers or through the agencies.

While much attention has been paid to tax proposals Biden presented during the campaign, major changes to or a wholesale repeal of President Trump’s tax cuts would be extremely unlikely with a Republican-controlled Senate. For a look at what may be on Biden’s tax agenda in a divided government scenario, see the Ernst & Young LLP Tax practice’s recent publication examining what’s next for tax policy. When it comes to taxes or any other priority, Biden will have to balance his policy goals against what he can accomplish — and how he will do so.

From record-breaking voter turnout for both political parties amid a global pandemic to razor-thin margins of victory in several states, the 2020 election is one for the history books. We expect the outcome of the 2020 elections will be a Biden administration and divided Congress (with a Democratic-led House and Republican-controlled Senate) in 2021. Assuming this scenario, the pace and scope of legislative change likely will be more moderate and deliberate, with the new administration driving most change through the executive branch.

Following the inauguration, we expect the pace of change to be fast at the beginning with early activity in the form of presidential directives, executive orders and leadership turnover at most federal agencies, launching the Biden administration’s policy agenda. However, beyond this initial flurry of activity, the pace likely will slow as the due process of regulation, enforcement and supervision takes root and the administration negotiates legislative priorities with Congress. Longer-lasting change may be more difficult to enact; compromises will have to be made, including on some of President-elect Joseph Biden’s priorities.

This publication from the Ernst & Young LLP Office of Public Policy offers insights on the Biden transition and key public policy implications of the 2020 election.
Key public policy issues for the Biden administration and Congress

When he enters the Oval Office on 20 January 2021, Biden will be faced with two immediate and unprecedented crises — addressing the intensifying COVID-19 pandemic and repairing a US economy that has been severely affected by it. For these issues, and any other initiatives promoted by his administration, Biden must determine whether executive action or working with Congress to pass legislation would best effectuate his goals. Here, we examine how the Biden administration is likely to drive change on six key policy issues, whether through executive actions or by working with Congress.

1. COVID-19-related public health and economic recovery

President-elect Biden’s focus on the COVID-19 pandemic was central to his campaign. Controlling the pandemic and mitigating its accompanying economic fallout are the top priorities for the new administration, and the rest of Biden’s policy and governing agenda will ultimately depend on whether the country can successfully emerge from the health and economic impacts of the virus. On 9 November, President-elect Biden announced the formation of the transition’s COVID-19 advisory board, a “team of leading public health experts who will advise” and inform his administration’s response.3 President-elect Biden is expected to push swiftly for congressional action on additional stimulus, relief or other response legislation related to the COVID-19 pandemic.

The Biden administration will also have to contend with the second, intertwined crisis facing the country — the state of the economy. High levels of unemployment or underemployment, a potential round of new restrictions and closures, and other COVID-19-related challenges and disruptions continue as winter approaches. The president-elect’s economic plan has focused on jobs, infrastructure and shoring up the nation’s supply chains — both for purposes related to COVID-19 and for the broader economy. His “Build Back Better” plan includes $2 trillion in spending on clean energy and infrastructure — boosting the economy via clean energy and other infrastructure investments — alongside a “Buy American” manufacturing plan that would emphasize domestic purchases and spending that would serve the dual purpose of shoring up US supply chains while also rebuilding the economy. These proposals require legislation and bipartisan approval in the Senate to overcome the 60-vote filibuster threshold.

Potential executive branch actions

- Appoint a “supply commander” to oversee production and distribution of testing, vaccines (when ready) and other personal protective equipment (PPE)
- Broaden use of the Defense Production Act to increase production of PPE and materials needed for vaccine distribution
- Direct the Department of Housing and Urban Development to extend the eviction moratorium and federal mortgage forbearance
- Direct the Secretary of Education to forgive student loans up to a certain amount for certain borrowers
- Call on the Occupational Safety and Health Administration (OSHA) to issue emergency temporary standards as related to workplace safety during the COVID-19 pandemic (by OSHA), issue workplace guidelines
- Provide clear, consistent, evidence-based guidance for communities, schools and businesses, to navigate the pandemic
- Implement a mask mandate where possible (e.g., on federal property, public transit, airplanes); work with governors and mayors to implement mask protocols at the state and local level
- Expand public health surveillance programs conducted by the Centers for Disease Control and Prevention; create a national pandemic dashboard for real-time local transmission rates; provide daily public testing reports
- Restore relationship with the World Health Organization

Congressional action required

- Provide additional COVID-19-related relief and stimulus package via legislation (substance and size will depend on whether a package is passed before Biden takes office)
  (Biden priorities will include increased funding and capacity for testing and vaccine distribution; additional state, local and tribal aid; school funding; aid for small businesses; and enhanced unemployment and other aid for pandemic assistance.)
- Boost the economy and recovery with a broad infrastructure bill, potentially built on public-private partnerships focused on green investments in surface and water transportation, electric vehicles and batteries and climate resilience (Bipartisan consensus on how to pay for such a large bill has been elusive, even prior to the COVID-19 pandemic.)
- Fund a new public health job corps to assist with testing and contact tracing

2. Environment and sustainability

President-elect Biden believes that climate change is “the number one issue facing humanity”¹⁷ and has staked out an ambitious agenda to tackle the problem. Biden’s campaign called for a “clean energy revolution” that would reach a “100% clean energy economy and net-zero emissions no later than 2050.”¹⁸ Biden supports the pursuit of new technologies to benefit the environment and create American jobs, improve the nation’s infrastructure and allow the US to export technologies. Notably, Biden’s campaign also endorsed requiring public companies “to disclose climate risks and the greenhouse gas emissions in their operations and supply chain”²⁰ - a policy goal that could be addressed by either legislation or Securities and Exchange Commission (SEC) rulemaking. The two current Democratic SEC commissioners have expressed strong support for requiring public companies to provide climate-related disclosures. However, the most sweeping elements of the Biden plan would require congressional action, which will be difficult with a Republican-controlled Senate.

### Potential executive branch actions

- Rejoin the Paris climate accord and urge its signers to increase their domestic climate targets
- Call to move to 100% clean energy and zero-emission vehicles in the federal transportation fleet
- Roll back Trump executive orders, such as those permitting new coal leases on public lands, eliminating flood standards for federal infrastructure projects and permitting offshore Arctic leasing
- Encourage agency regulatory action to repeal Trump rules that:
  - Loosened controls on methane
  - Restructured National Environmental Policy Act review procedures
  - Limited carbon emissions, whether by mandated limits or an enforcement mechanism or through a carbon tax as proposed by some congressional Democrats; increase investment in green infrastructure such as electric vehicle charging stations; extend clean energy tax incentives; and modernize building energy efficiency
  - Revive the Civilian Conservation Corps program or create a civilian-climate corps

### Congressional action required

- Enact legislation based on Biden’s pledge to invest large amounts of funding in clean energy and research ~ $400 billion over 10 years²¹ - which would need to be appropriated by Congress
- Limit carbon emissions, whether by mandated limits or an enforcement mechanism or through a carbon tax as proposed by some congressional Democrats; increase investment in green infrastructure such as electric vehicle charging stations; extend clean energy tax incentives; and modernize building energy efficiency
- Revive the Civilian Conservation Corps program or create a civilian-climate corps

3. Technology

Big tech has been the subject of growing scrutiny by policymakers and regulators at all levels and from both sides of the aisle, and there is unlikely to be a reprieve under the Biden administration. Biden is expected to focus on greater tech-sector regulation, continue and expand antitrust enforcement, and boost cyber resiliency for US government systems. As he staffs his administration, Biden’s tech agenda is expected to be influenced by Vice President-elect Kamala Harris, who represented prominent tech hubs located in her home state of California and has called for tech-sector regulation that prioritizes consumer data privacy.²⁶ Though broader tech policy may not be the first priority in the wake of the COVID-19 pandemic, addressing tech-related concerns, such as broadband accessibility in underserved communities to support telehealth, distance learning and other pandemic-related needs, will be. Beyond the pandemic, the Biden administration is expected to encourage the Federal Communications Commission (FCC) to restore net neutrality rules, request additional congressional funding for research and development of emerging technologies focused on maintaining global competitiveness and continue Trump administration actions to further limit China’s access to US data and certain technologies.

Congressional and regulatory scrutiny of big tech will continue to be bipartisan in an otherwise divided Washington; however, divided government would make consensus less likely on legislative proposals around data privacy, online competition and other issues where partisan differences exist.

### Potential executive branch actions

- Instruct the Department of Justice (DOJ) to continue or even expand its antitrust lawsuit involving Google’s search engine
- Petition the FCC to restore Obama-era net neutrality rules repealed by Republicans in 2017
- Redirect funding to the Department of Homeland Security’s Cybersecurity Division to strengthen smart grids to prevent cyber attacks and foreign election interference

### Congressional action required

- Amend Section 230 of the Communications Decency Act to hold platforms accountable for hosting misinformation
- Appropriate money to expand broadband access to bridge the digital divide
- Increase federal investments in research and development for “breakthrough technologies,” including priorities such as 5G, artificial intelligence, biotechnology and electric vehicle technology
- Enact a national privacy law (similar to Europe’s General Data Protection Regulation) to thwart a patchwork of state legislation

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4. US-China relations

The scrutiny of China by Washington policymakers in recent years, especially with the advent of the pandemic, is bipartisan, and the incoming Biden administration is likely to continue a “tough on China” policy. It is possible that President-elect Biden could seek a more multilateral approach to confronting China, but the overall tone and direction of China policy is not expected to change. Tariffs, nearshoring and strict limitations on outbound and inbound investments, particularly around critical supply chains and technology, will likely continue for the near term. President-elect Biden is expected to assess the effectiveness of the tariffs he will inherit, which could ultimately lead to modifications. We expect continued advancement of policies that focus on US capital market access and investor protection. This includes scrutiny of Chinese companies listed in the US and the financing of US economic activity domestically in addition to the technology and data controls mentioned above.

Potential executive branch actions
- Continue policy on tariffs
- Support onshoring production and supply chains
- Maintain and increase scrutiny of foreign direct investment (e.g., Committee on Foreign Investment in the United States)
- Continue and heighten scrutiny of outbound investment that includes critical technologies and intellectual property

Congressional action required
- Limit access to US capital markets
- Impose further sanctions on individuals and Chinese companies in sensitive sectors

5. Financial services

While financial services issues are not likely to top the Biden agenda early on, appointments to the Treasury, relevant departments and federal financial regulatory agencies likely will bring a shift in policy and oversight. A reversal of the deregulatory trend promoted under the Trump administration is also expected. Moreover, leaders in the broader Democratic Party have several priorities in the financial services space that are likely to influence the incoming administration agenda. These issues include climate-related risk; environmental, social and corporate governance matters; consumer protection; racial equity and financial inclusion; and executive accountability and conduct.

Under the Biden administration, large banks and financial institutions should expect increased supervisory scrutiny for global systemically important banks and certain bank holding companies, including with regard to M&A activity. There remains a significant amount of uncertainty around financial technology (FinTech), which raises issues of inclusion, fairness and data. The Biden administration may limit the ability of the Office of the Comptroller of the Currency’s ability to license new FinTech and conduct additional oversight and regulation of digital assets and emerging FinTech.

President-elect Biden has pledged to “promote diverse leadership,” including at the financial regulatory agencies; push the Federal Reserve to strengthen its focus on economic wealth gaps by race (which it has begun to discuss);10 and bolster fair lending regulations under the Community Reinvestment Act.

Potential executive branch actions
- Focus on consumer protection and financial inclusion (as they relate to racial equity) via regulatory changes and supervisory priorities
- Replace leadership of Consumer Financial Protection Bureau and restore the Office of Fair Lending, while leading and coordinating enforcement of consumer-based priorities across government entities
- Emphasize enforcement focus on unfair and deceptive practices standard
- Encourage supervisory scrutiny of Coronavirus Aid, Relief, and Economic Security Act (more commonly known as the CARES Act) implementation, particularly at large financial institutions (including focus on fraud and disparity in access to relief for minority populations)
- Call on financial regulatory agencies to focus on disclosure requirements and risk management standards related to sustainability and climate-related issues

Congressional action required
- Implement housing finance reform, including but not limited to government-sponsored enterprise (i.e., Fannie Mae and Freddie Mac) reform, with focus on affordable housing and equity
- Establish a government-run credit-reporting agency (public credit reporting agency) to address racial disparities found in credit scoring and reports that contain data on hundreds of millions of Americans

6. Racial Justice

Both parties continue to grapple with the handling of racial justice issues in the wake of sustained demonstrations and protests across the nation, but partisan differences in competing proposals have thwarted action.

The Biden administration is expected to make racial justice and police reform a priority. President-elect Biden’s Build Back Better plan calls for an increase in affordable housing for people of color, public-private investment for minority-owned businesses, infrastructure and clean energy investments in minority communities, funding for management training and higher education opportunities, opportunity zone reform and an increased emphasis on addressing wealth disparities. Biden also has called on Congress to address police reform, supporting the House of Representatives-passed Justice in Policing Act, while pushing for more funding for community policing efforts and mental health assistance.

In addition, the incoming administration is expected to make it easier for workers to pursue claims for discrimination, track and limit federal wage inequities, and more vigorously enforce affirmative action requirements. President Trump’s recent executive order prohibiting federal contractors and other entities from conducting diversity trainings at federal agencies on the basis of race and sex has been condemned by Biden and is ripe for repeal under his administration.

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<th>Potential executive branch actions</th>
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<td>• Expand use of DOJ consent decrees to address misconduct in police departments and prosecutors’ offices</td>
<td>• Implement police reform that includes a nationwide ban on chokeholds, prohibits transfer of military-grade weaponry to police forces and creates a model use-of-force standard and a national police oversight commission</td>
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<td>• Encourage the Federal Reserve to aggressively study and report regularly on “persistent” racial differentials in jobs, wages and wealth</td>
<td>• Reform the federal prison system by concentrating prison resources on violent and career criminals and reducing recidivism</td>
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<td>• Call on financial regulators to increase supervisory and enforcement use of the disparate impact standard in evaluating financial institutions’ lending practices</td>
<td>• Revitalize and expand opportunity zones to increase disclosure and incentivize partnerships with community-oriented organizations</td>
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<td>• Reinstatate Obama-era efforts to collect data on earnings gaps by race and gender</td>
<td>• Increase funding for the Equal Employment Opportunity Commission</td>
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<td>• Establish a grant program that would provide money to states to set up alternatives to incarceration, such as mentorship, counseling and job programs</td>
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Potential dates:

- **8 December 2020**: The states appoint their electors. Under federal law, each state must certify a winner in the presidential election and appoint its electors six days before the electors are to meet (“safe harbor”). If they are not appointed by this date, Congress may intervene and decide which electors to count from a state without deference to the state’s voters or legislature.

- **14 December 2020**: The states certify the winners. The electors in each state meet on the Monday after the second Wednesday in December to vote. The electors count the results and sign “Certificates of Votes,” which contain two lists, one for electoral votes for the president, and the second for electoral votes for the vice president.

- **5 January 2021**: Runoff elections for Georgia’s US Senate seats: Control of the Senate will be decided.

- **6 January 2021**: Congress counts the votes: On this date as prescribed by law, Congress meets at 1:00 p.m. ET in a joint session to count the electoral votes. This is typically a formality unless there is a contingent election.

- **20 January 2021**: The president-elect is inaugurated: The 20th Amendment to the US Constitution requires that the winner be sworn into office on 20 January at 12:00 p.m. ET.

Conclusion

The public policy issues contemplated in this publication will present significant opportunities and challenges for the White House and Congress in 2021. How and when policymakers address these issues will leave lasting impacts on consumers, investors, workers, businesses and markets. While President-elect Biden’s agenda and his ability to effectively lead a divided electorate through the current crisis environment will be a significant factor, party control of the Senate, state governments’ responses to COVID-19 and the efforts of the business community will also be important in shaping the contours of the public policy landscape for 2021 and beyond.
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