

Impact of U.S. Congressional Shift in Control on the Biden Climate Change and Environmental Agenda

January 19, 2021



The Road Ahead: Democrats in Control

- After the victories of Raphael Warnock and Jon Ossoff in the January 5, 2021 U.S. Senate runoff elections in Georgia, **the Democrats will control the Senate, the House and the White House for at least the next two years.**
 - In our November 16, 2020 [client memo](#), we outlined President-elect Joe Biden’s plans for environmental and climate change policy assuming Republican control of the Senate.
 - Accordingly, that memo **focused on actions that President-elect Biden could take without Congressional support**, e.g., regulation, enforcement and other executive actions.
- This deck **supplements** that memo and highlights what further initiatives President-elect Biden, together with a Democratic Congress, might pursue **in addition to executive actions.**
- With unified control of the White House and Congress, we expect Democrats to push for an **ambitious environmental and climate change agenda.**
- However, given their slim majorities in both chambers of Congress, Democrats’ ambitions **will be tempered by Senate debate rules and the need to keep their politically diverse caucus unified.**

The Road Ahead: Democrats in Control (cont.)

- We expect a Democratic White House and Congress to try to achieve their environmental and climate change priorities through:



Legislation: While Congressional Democrats may push for legislation in support of their environmental and climate agenda, **these ambitions will be tempered by the narrowness of their majority**, particularly in the Senate.



Congressional Review Act (CRA): Congress may use the CRA to **void at least some environmental rules promulgated by the Trump administration.**



Approval of Biden nominees: Biden nominees – many of whom have deep experience with environmental, energy and climate change issues – as well as future nominees for judgeships and other key posts in government **have better chances of being confirmed.**

Environmental and Climate Change Legislation: Options and Challenges

- Control of both chambers will mean that the **Democrats will have control of the legislative machinery of Congress**. This includes chairing the committees where legislation originates and dictating the overall legislative agendas of each chamber.
- However, this control **does not automatically translate into the ability to pass legislation**, especially in the Senate, where **debate rules typically require 60 votes to move legislation forward**. Accordingly, Democrats' options would be to:
 - **Garner bipartisan support**. Gain sufficient support, **including support of Senate Republicans**, to defeat a potential filibuster.
 - **Change Senate debate rules**. Change Senate debate rules by eliminating or restricting the use of the filibuster. While these rules can be changed by a majority of the Senate, **it is unclear whether all the Democrats will agree to these changes**.
 - **Use the budget reconciliation process**. Budget reconciliation is a process by which legislative priorities can be enacted without being subject to regular Senate debate rules. However, **this process is generally limited to legislation that changes revenues or spending** and is subject to other restrictions.

Environmental and Climate Change Legislation: Options and Challenges (cont.)

- While it is impossible to predict how Congressional Democrats will proceed and whether they will succeed, we expect them to pursue the following legislative priorities:
 - **Climate Change and Clean Energy.** We expect Congressional Democrats to pursue legislation curbing greenhouse gas emissions, although the form of that legislation is unclear and will be shaped by the considerations outlined in the prior slide.
 - **Carbon tax.** Some experts on Congressional procedures have suggested that a **carbon tax can be enacted through the budget reconciliation process.**
 - **Clean energy standard.** Others have suggested that the **budget reconciliation process can be used to enact a clean energy standard.** This could take different forms, but as a general matter, it would entail a limit on the percentage of electricity that can be generated by carbon-emitting sources. These limits would decrease over time and be enforced through a fee imposed on generators that exceed that percentage. Notably, President-elect Biden proposed a clean energy standard during his presidential campaign.
 - **Narrowly focused clean energy legislation.** More focused clean energy legislation is also possible. Legislation promoting **low carbon energy, energy efficiency or green infrastructure** through stimulus spending or tax incentives has garnered bipartisan support in the past and may be pursued again by Congressional Democrats.

Environmental and Climate Change Legislation: Options and Challenges (cont.)

- **PFAS.** PFAS, or per- and polyfluoroalkyl substances, are a group of chemicals common in consumer products that were the subject of proposed bipartisan legislation in the prior Congress. Legislation regarding PFAS is likely to be proposed again. Proposed legislation may include:
 - **listing certain types of PFAS as hazardous substances** under federal environmental laws, or
 - implementing **standards with respect to PFAS-contaminated drinking water.**
- **Environmental Justice.** House Select Committee on the Climate Crisis Chairwoman Kathy Castor (D-Fla.) announced that she would introduce the Environmental Justice For All Act, broad legislation which would (among other things) **provide private parties with the ability to challenge governmental actions** that violate Title VI of the Civil Rights Act, which prohibits discrimination in federally funded programs. The proposed law would also **broaden the circumstances under which a program would be deemed discriminatory.**
 - Although it is unclear whether this legislation can garner enough bipartisan support to move forward in the Senate, President-elect Biden has endorsed many of the policies contained in this legislation and may seek to promote them via executive orders or regulation.

Using the CRA to Undo Prior Administration Regulations

- **The CRA may be used to void regulations delivered to Congress after August 21, 2020.***
 - President-elect Biden and Congressional Democrats can use the CRA to challenge final environmental regulations delivered to Congress within the several months prior to him taking office.
 - Under the CRA, **Congress can void final regulations by a joint congressional resolution passed by a majority of each of the House of Representatives and Senate and signed by the President**, if the regulations were delivered to Congress within 60 legislative days of the end of the prior session.
 - According to analysis by the George Washington University Regulatory Studies Center, final regulations delivered to Congress after **August 21, 2020** could be subject to CRA review under a Biden administration.
 - CRA is **not** subject to regular Senate debate rules and can therefore be passed with a bare majority.

* The CRA cut-off date requires a complicated analysis of Congressional calendars. August 21, 2020 was the cut-off date calculated by the George Washington University Regulatory Studies Center. However, the definitive arbiters of the cut-off date are the House and Senate Parliamentarians.

Using the CRA to Undo Prior Administration Regulations (cont.)

- **Key Trump-Era environmental rules subject to CRA include the following:**
 - [Two rules](#) revising Obama-era standards for methane and volatile organic compound emissions from new oil and gas facilities
 - [Rule](#) on considering benefits and costs in the Clean Air Act rulemaking process
 - [Rule](#) weakening certain requirements for coal ash disposal
 - [Rule](#) restricting EPA’s reliance on scientific data that is not public
 - [Rule](#) restricting EPA’s ability to develop new source performance standards for greenhouse gas emissions
 - [Rule](#) interpreting the Migratory Bird Treaty Act to permit actions that result in an “incidental” taking or killing of migratory birds
 - [Rule](#) undoing a policy requiring that refineries and other large industrial plants maintain “maximum achievable” pollution controls even after their emissions fell below the thresholds that put them in the category of “major” sources of mercury, benzene and other hazardous pollutants subject to those controls
 - [Rule](#) loosening effluent limitation guidelines and standards for steam electric power generating point sources
 - Using the CRA has its risks – the statute provides that **agencies are barred from promulgating rules that are “substantially similar” to a rule voided under the CRA.**
 - Although the meaning of this phrase has not been litigated, **we expect Congressional Democrats to be judicious in their use of the CRA.** Congress may be hesitant to use the CRA on rules that the Biden administration might wish to replace with rules with more stringent standards.
-

Confirmation of Biden Nominees

- Biden’s Cabinet and other senior nominees’ **significant experience and expertise in climate change and energy issues** – including nominees in non-environmental or energy posts – reflect his “whole-of-the-government” approach to addressing these issues



Commerce - Gina Raimondo: As governor of Rhode Island, Raimondo helped bring online the nation’s first commercial offshore wind farm, the Block Island Wind Farm.



Council on Environmental Quality (CEQ) - Brenda Mallory: Mallory has long experience at EPA, CEQ and environmental non-profits and is known for her deep legal expertise in climate change and environmental justice issues.



Energy - Jennifer Granholm: Granholm is known as an advocate of clean energy and electric vehicles as governor of Michigan.



Environmental Protection Agency (EPA) - Michael Regan: Regan played a key role in developing North Carolina’s climate change plan.



Interior - Deb Haaland: As a congressmember, Haaland is known as an advocate for incorporating environmental justice considerations in managing federal and tribal land and promoting conservation legislation.



Justice - Merrick Garland: As Chief Judge for the Court of Appeals for the District of Columbia Circuit, he played a key role in ruling on the validity of numerous regulations relating to environmental and energy matters, and tended to rule in favor of more restrictive regulation.



Securities and Exchange Commission - Gary Gensler: Gensler has been an advocate of strict regulation of financial markets and it has been reported that he’s likely to address climate change disclosure requirements as part of the financial system.



Transportation - Pete Buttigieg: Buttigieg was a proponent of climate change policies as mayor of South Bend, creating a sustainability office and committing the city to the goals of the Paris Climate Agreement.



Treasury - Janet Yellen: Yellen has been an advocate for financial institutions accounting for climate change risks.

Confirmation of Biden Nominees (cont.)

- A Republican Senate would have meant a long and contentious confirmation process, including the risk that one or more of the nominees would be rejected. **Democratic control of the Senate assures a smoother confirmation.**
- Democrats may also seek to **extract policy concessions** from nominees during hearings.
- **Biden will also have a freer hand in choosing nominees** to fill the remaining open deputy, assistant and other secondary positions at EPA and other agencies.
 - Some observers have focused on an open seat at the Federal Electricity Regulatory Commission, which is currently considering carbon pricing in regional power markets. **Once Biden fills the open seat, the panel will be controlled by Democrats, which opens up another potential market-based policy channel to regulate carbon emissions.**
- Democratic Senate control also allows Biden to **appoint judges that may tend to be more sympathetic to environmental regulation.** Although the makeup of the Supreme Court is unlikely to change in the near term, Biden will have the ability to fill key appeal and district court judgeships with lower likelihood of opposition in the Senate for the next two years.

If you have any questions regarding the matters covered in this deck, please contact any of the lawyers listed below or your usual Davis Polk contact.

Loyti Cheng	+1 212 450 4022	loyti.cheng@davispolk.com
Michael Comstock	+1 212 450 4374	michael.comstock@davispolk.com
Cristina Harshman	+1 212 450 4166	cristina.harshman@davispolk.com
Betty Moy Huber	+1 212 450 4764	betty.huber@davispolk.com
David A. Zilberberg	+1 212 450 4688	david.zilberberg@davispolk.com

