KIRKLAND & ELLIS

Blog Post

The Prospect of a Biden Administration: What Does it Mean for Oil and Gas?

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Oil and gas industry companies and investors should give careful consideration over the next several months to the possibility of not only a Joe Biden presidency, but also a Democratic-controlled Congress — and the resulting impact to their business outlook and strategies. Over the course of the 2020 Democratic presidential primary season, candidates and party leaders have shaped what seems to be an emerging party consensus on oil and natural gas regulation and the approach to be taken to energy policy more generally.

This new consensus is reflected in: (i) the House of Representatives' Select Committee on the Climate Crisis Action Plan issued on June 30, 2020; (ii) the recommendations of the Biden/Sanders Unity Task Force; and (iii) the Biden Energy Plan issued on July 14, 2020 (collectively, the "Plans"), and represents a significant paradigm shift on energy policy within the Democratic Party, transitioning from demand-side regulation (such as energy-efficiency standards for automobiles, power plants and home appliances) to regulating fossil fuels on both the supply and demand sides as part of a broader climate change strategy to reduce and limit greenhouse gas ("GHG") emissions.

Potential Policies and Actions

Below we set out the most material policies and actions impacting the oil and gas sector that we expect under a Biden administration:

1. **New Federal Lands Leasing and Permitting.** A Biden administration is likely to limit availability of new oil and gas leases on public lands in comparison to the traditional leasing process. The President can establish at least a temporary moratorium on new federal leasing with fairly limited process or opportunities for resistance (e.g., the Obama administration was able to, quickly and unilaterally,

halt federal coal leasing during its final year). Most likely, this limit would not affect existing federal leases, but could significantly curtail the availability of new leases on public lands. Notably, any significant change to federal lands leasing policy would disproportionately impact Western states (e.g., New Mexico and Colorado) and Gulf of Mexico states (e.g., Louisiana and Mississippi) because of the high percentage of drilling that takes place on federal lands in those areas. In addition, a Biden administration could enact policies that require new projects requiring federal approvals to address the effects of GHGs and the impact on climate change in a more significant fashion than in the past.

2. **No Fracking Ban.** Significantly, the Plans do not specifically address fracking. Although there are powerful voices in the Democratic Party strongly supportive of a ban on fracking (such as Senators Elizabeth Warren and Bernie Sanders), based on Vice President Biden's past relatively moderate approach to fracking, there is reason to believe that he would not support a ban on fracking on private or public lands.
3. **Regulating Methane Emissions, Venting and Flaring.** While the Biden Energy Plan does not discuss limiting venting or flaring, we anticipate this to be a high priority for a Biden administration consistent with the Biden Energy Plan's focus on reducing GHG emissions. In May 2019, three Democratic Representatives introduced legislation requiring oil and gas producers to capture almost 99% of the natural gas produced on public lands. This legislation would effectively ban methane venting and flaring at new wells and is representative of the Democratic Party's position on regulation of methane emissions.
4. **Elimination of "Subsidies."** The Democratic Party has long been against certain tax rules (sometimes described as "subsidies") that benefit the oil and gas industry. The Biden Energy Plan promises to dispose of oil and gas industry subsidies completely within the Biden administration's first term, and we expect a push for significant cuts from the start, likely within the first year.
5. **Challenges to Building Pipeline Infrastructure.** The Federal Energy Regulatory Commission ("FERC") likely would revise its natural gas pipeline siting policy to implement a more stringent threshold for new gas pipeline and LNG projects, requiring applicants to show that they will not contribute to climate change. A change like this would significantly increase the cost and difficulty of developing new pipeline infrastructure and could further constrain pipeline capacity in many areas. In another scenario, FERC could allow new infrastructure when the impact on climate change is offset by a concurrent positive effect on the climate. For example, new projects could be accompanied by the concurrent retirement of a coal-fired power plant.
6. **Net Zero Emissions Targets.** The Biden Energy Plan announced a goal to achieve a carbon pollution-free power sector by the year 2035. Whether or not

this goal is attainable (and despite its non-binding nature), the goal would be a driver for federal and state policy. This is a significant change from Vice President Biden's previous campaign pledge and could have significant have impacts on natural gas production.

Implementation and Challenges

Executive Actions. In general, a Biden administration would exercise substantial discretion on a broad set of policies that could impact oil and natural gas in the U.S. through the use of executive actions. For the most part, such executive actions are implemented by regulations (either by promulgating new regulations or making changes to existing regulations) or through administrative decisions made by agency heads who report, ultimately, to the President.

Traditional Regulatory Tools and Legislation. Policy change by executive action in the energy space is easiest to accomplish where the focus of the executive action is on public (federal) lands and prospective in nature. The more traditional tools available to FERC (such as adopting policies to inhibit investment in, and development of, new interstate natural gas pipelines and LNG facilities) and the Environmental Protection Agency (such as the EPA's authorities under the Clean Air Act and Clean Water Act) could also be used to implement the Democratic Party's policies on oil and gas development. And, if the Democrats control both chambers of Congress, it will be easier for a Biden administration to get legislation passed to achieve his energy goals.

Fiscal Impacts. A Biden administration also is likely to consider the fiscal impact of potential new regulations, such as the consumer impact of increased energy prices that may result from limits to drilling or the jobs impact of decreased infrastructure development. These fiscal concerns, if they materialize, may prove to be a significant barrier to new energy policy implementation.

Conclusion

The regulatory environment under a Biden administration is certain to be different than under a continuation of the Trump administration, particularly as it pertains to new projects on federal lands and interstate pipelines. Companies should give consideration to working with environmental and energy regulatory counsel to conduct specific analysis on the potential effects of a new regulatory regime as the election approaches.

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