The Biden Administration's impact on oil and gas

Energy Alert

Sustainability and Environmental, Social and Governance Alert

18 February 2021
By: Jeff L. Salinger | Dante Alessandri

After merely one month in office, the Biden Administration has already had a profound impact on the oil and gas industry. Having promised to prioritize climate change on the campaign trail, President Biden has taken swift action, signing executive orders aimed at everything from curbing emissions to environmental justice.

While the Biden Administration's 60-day halt on new oil and gas leases on federal lands and the cancellation of the Keystone XL Pipeline have received the majority of press coverage, the Administration's actions have also had both direct and indirect impacts on oil and gas companies. These actions include: (1) an order directing federal agencies to eliminate subsidies for fossil fuels; (2) reversing the Trump Administration's rollback on methane regulations; and (3) staffing the SEC in preparation to mandate ESG and climate disclosures. While these changes primarily aim to reduce the nation's carbon footprint, they will also add an additional layer of regulations for oil and gas operations and will sharpen public attention on oil and gas companies.

Eliminating fossil fuel subsidies

As one of his first actions in the Oval Office, President Joe Biden signed an executive order directing federal agencies to eliminate subsidies for fossil fuels, stating "[u]nlike previous administrations, I don't think the federal government should give handouts to Big Oil."

Subsidies take various forms, ranging from tax breaks to regulatory advantages. The Environmental and Energy Study Institute calculated that the federal government funds $20 billion every year in fossil fuel subsidies. While most taxes are levied by Congress, the Biden Administration could take two actions through the executive branch to put further pressure on the industry:

- **Ensure oil and gas companies pay government penalties**. Natural resource damages are currently tax deductible. In 2015, the DOJ entered a settlement with BP over the Deepwater Horizon Spill for $20.8 billion in damages. However, the settlement was tax-deductible, and BP was able to write off $15.3 billion of the penalty as "natural resource damages payments, restoration and reimbursement of government costs." Under President Biden, the DOJ could eliminate this loophole and deny tax deductions for corporate actors that reimburse the federal government for certain cleanup related costs.
- **Stop maintaining shipping lanes on rivers**. The federal government spends over $700 million each year constructing and maintaining shipping lanes on rivers, which are often used for the transportation of oil and gas. Under President Biden, the federal government may require companies, including heavy users such as oil and gas companies, to fund all or a portion of the construction and maintenance of these shipping lanes.

President Biden has also expressed his intent to reform oil and gas tax subsidies. In Congress, the Biden Administration could seek to reduce two tax credits:

- *An intangible drilling costs deduction* which allows producers to deduct a majority of their costs from drilling new wells. The Joint Committee on Taxation, a nonpartisan panel of Congress, has estimated that eliminating this deduction could generate $13 billion over 10 years.
- *The percentage depletion tax break*, which allows independent producers to recover development costs of declining oil gas and coal reserves, could also be stricken, or reduced. The Joint Committee on Taxation estimated that eliminating this tax break could generate approximately $12.9 billion in revenue over 10 years.

Reforming or eliminating any fossil fuel tax break would require Congressional action – which is far from certain. Any bill to alter the tax provisions for the fossil fuel sector would also face heavy resistance from lobbyists, who would likely trumpet the fact that solar, wind and other non-fossil energy sources receive substantial taxpayer support.

Reversing the Trump Administration's rollback on methane regulations

President Biden also plans to revise the Trump Administration's loosened methane regulations. He has already issued an executive order calling for methane regulations to be reviewed and setting a September deadline for new rules to be proposed. Methane emissions from the oil and gas sector were regulated for the first time in 2016 when the Obama Administration started requiring companies to monitor and prevent leaks in new facilities. But under President Trump, the EPA replaced those regulations and limited their impact, specifically by eliminating transmission and storage from regulation.

Now President Biden is seeking to implement stronger controls for methane leaks from existing operations in the oil and gas sector, including the exploration and production, transmission, processing, and storage segment. The Biden Administration may also extend methane regulations to older wells, which could impact smaller producers not currently required to monitor methane emissions. In preparation for this regulatory shift, some oil and gas companies have begun to reassess and reduce their methane emissions. Operators should also prepare for likely regulatory action requiring more specific disclosures of methane emissions, as well as methane reduction strategies, to the public and investors.

SEC staffing with ESG in mind

The Biden Administration has taken steps to staff the SEC with climate focused regulators in anticipation of mandating ESG disclosures. President Biden's pick to head the SEC, Gary Gensler, is expected to make ESG issues a priority, in line with Biden's key environmental mandates. The SEC has already made several key hires to further these ESG initiatives. Among these officials are Satyam Khanna, who will serve as senior policy adviser on ESG issues, and Didem Nisanci, who will serve as the Treasury Department's new chief of staff and was previously part of the SEC's Task Force on Climate-Related Financial Disclosures.

Given that the SEC will likely focus on climate risk disclosures as part of its ESG platform, oil and gas companies should be prepared to disclose and discuss the impact of climate change on its business. In preparation, businesses should conduct an ESG audit, seeking to identify material risks that would require disclosure. Companies should also consider which set of ESG disclosures best suit their needs.

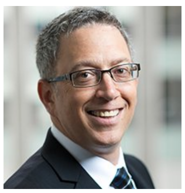
Conclusion

President Biden has thus far followed through on his campaign promise to prioritize climate change. While his actions to pause drilling on federal land and reenter the Paris Climate Accord have received much attention, his early executive orders, hiring decisions and public statements indicate that even greater change is coming to the oil and gas industry. While many of the Biden Administration's regulatory changes will take time to implement, oil and gas companies should begin preparing now for their likely arrival.

To learn more about the implications of these developments for your business, please contact either of the authors or your DLA Piper relationship lawyer.

Please visit our Sustainability and Environment, Social and Governance portal. Subscribe to our Roadmap to Recovery weekly bulletin here, and read more of our insights on the federal government transition here.

AUTHORS



Jeff L. Salinger
Partner
New York | T: +1 212 335 4500
jeff.salinger@dlapiper.com

Dante Alessandri
Associate
Houston | T: +1 713 425 8400
dante.alessandri@dlapiper.com