Insight

Back to the Future: Biden's First Regulatory Agenda

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EXECUTIVE SUMMARY

- The Biden Administration released its first regulatory agenda, providing more evidence that its regulatory policies will undo Trump Administration policies and reinstate, or expand upon, Obama-era rules.
- A main area of focus is environmental rules, including the rules specifically mentioned by President Biden in one of his first executive orders.
- Also expected are Department of Labor rules that revive Obama Administration policies on investment advice, tipped wages, and joint employment.

INTRODUCTION

The Biden Administration recently released its first Unified Agenda of Regulatory and Deregulatory Actions (UA). The agenda offers a helpful glimpse into the priority regulations that federal agencies are planning to work on over the next year. As this is the first agenda of the Biden era, the UA provides more insight into how the administration plans to undo the regulatory policies of the Trump Administration.

In terms of the raw numbers, the first Biden UA differs little from the last UA of the Trump Administration, which was released in December 2020. The Biden UA contains fewer "active actions" than the last UA (2,550 actions currently being worked on, down from 2,636) and "major" actions (169 compared to 182).

A look beyond the numbers, however, shows that the Biden Administration plans to revive – or in many cases go beyond – the regulatory policies of the Obama Administration. This UA is the clearest signal yet that the Biden Administration will resurrect many regulations of the past. This analysis examines the prominent rules that are revivals from the Obama Administration and departures from the Trump Administration.

ENVIRONMENTAL RULES

Perhaps the clearest area where the Biden Administration will revive rules from the Obama Administration is the environment. On its first day, the Biden Administration directed agencies to review and revise many of the Trump Administration's environmental rules – especially those that eased burdens from the Obama Administration. The UA shows agencies plan to move quickly on all the rules specifically mentioned in that executive order.

The Department of Transportation (DOT) and Environmental Protection Agency (EPA) plan to propose new fuel economy standards for cars and light trucks next month. The proposal, when finalized, would replace the Trump Administration's signature deregulatory rule – which saved an estimated $199.5 billion over the previous rule of the Obama Administration. Whereas the Trump Administration rule eased annual required increases in fuel efficiency, the Biden Administration's UA says the standards "shall be the maximum feasible for each

model year." The implication is the rule will be more stringent than the Obama Administration's version, which is the most expensive rule recorded in the Regulation Rodeo database.

The UA also shows the administration plans to issue proposed new methane rules on oil and natural gas production by October 2021, with final rules due one year later. In addition to reviving, and likely strengthening, standards on new sources of pollution, the EPA plans to simultaneously issue a rule that would regulate existing sources for the first time – restarting an unfinished effort from the Obama Administration.

According to the UA, EPA plans to propose a new rule underpinning Mercury Air Toxics Standards in August 2021. That rule would replace a 2020 Trump Administration rule, which itself replaced a 2012 Obama Administration rule.

The Department of Energy is also working on an energy efficiency rule mentioned in the executive order. It plans on finalizing revised procedures for new or revised energy conservation standards and test procedures for consumer products and commercial and industrial equipment by September 2021. This timeline is aggressive considering the agency published the first round of a two-round proposed rulemaking just two months ago.

The Council on Environmental Quality is planning a two-phase rulemaking to revise a 2020 Trump Administration rule on implementing the National Environmental Policy Act (NEPA). The first phase will make "narrow" changes to the Trump Administration rule, which set deadlines for reviewing projects under NEPA, while the second phase will make "broader" changes. A proposed rule on the first phase is planned for next month, while the second phase rule should be proposed around November 2021.

LABOR RULES

Another area where the UA portends a return to Obama Administration regulations is at the Department of Labor (DOL).

The Employee Benefits Security Administration plans to propose a new fiduciary rule by the end of 2021. Based on the abstract in the UA, the planned rule appears to be very similar to the controversial – and expensive – Obama Administration rule, which was revised by the Trump Administration.

Prominent wage rules on the agenda include once again revising the regulations around how tips can be handled by employers. According to the UA, this will be the fifth time a revision of the rule has been proposed since the Trump Administration started revising the 2011 Obama Administration rule in 2017. Despite legislation passed in 2018 that limited DOL's discretion over how it can regulate the way tips are handled, DOL is reviewing the rule to "consider the questions of law, policy, and fact raised by the rule."

Another Trump Administration wage rule being reviewed is its joint-employer rule, which for the first time clarified in the regulatory code when workers are considered employees or contractors. That rule codified a definition that reversed Obama Administration guidance on the issue. The Biden Administration plans to rescind the Trump-era rule, and published a proposed rule in March, though the UA does not include an expected date for a final version.

On workplace safety, the Occupational Safety and Health Administration plans to resurrect provisions of an Obama Administration rule on recording instances of workplace injuries and illnesses that were removed by the Trump Administration.

OTHER REGULATORY REVERSALS FROM THE TRUMP ADMINISTRATION

Several other rules from the Trump Administration are targeted for repeal or revision. If finalized, these rules would return regulations to the status quo under the Obama Administration. These include:

- A rule on Gainful Employment from the Department of Education;
- The Affirmatively Furthering Fair Housing rule from the Department of Housing and Urban Development;
- A rule reconsidering changes to the definition of a showerhead from the Department of Energy that became an ongoing talking point of President Trump;
- A revision of a Trump Administration rule on blowout preventers for offshore drilling operations, which reversed an Obama Administration rule; and
- Several Trump Administration immigration rules, including the Public Charge rule, a rule limiting asylum eligibility, and a rule that raised certain immigration fees.

CONCLUSION

The first UA of the Biden Administration signals that many of the expected regulatory policies foretold by executive actions signed in its early days are coming soon. Many of these will rescind Trump Administration regulations and reinstate or expand upon Obama Administration actions.