By Benjamin H. Patton, Jennifer A. Smokelin, Jessyka S. Linton and Casey J. Snyder

Biden's 2021 ESG orders set stage for environment, health and safety battles

The Biden administration is using regulatory bodies, such as the EPA and Departments of Labor and Transportation, to promote environmental, social and governance (ESG) policy objectives in addition to their normal job of promulgating safety-focused requirements. While this regulatory bent bypasses the constraints of the legislative process, it is still susceptible to push-back from other forces, notably states and state and federal courts, up to the U.S. Supreme Court.

Take*aways*

- Administration uses executive orders and rulemaking to promote ESG policies.
- States and the judicial system, including the Supreme Court, may curb or thwart certain requirements.

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ESG policy initiatives

Climate change. Biden has issued several executive orders directing federal agencies to implement ESG-related practices, including a key order on Jan. 27, called "Tackling the Climate Crisis at Home and Abroad." The order:

- Requires agencies to consider the effects of federal permitting decisions on greenhouse gas emissions and climate change;
- Initiates an agency-wide push to incorporate programs, policies and activities to promote environmental justice; and among other things,
- Encourages the development of renewable energy production on land and in water.

Key recent and ongoing EPA rulemakings affecting climate change include rules to:

- Reduce methane emissions from abandoned oil and gas wells;
- Cut emissions from existing oil and natural gas operations;
- Tighten emissions standards for transportation and other mobile sources; and
- Phase out hydrofluorocarbons, a potent greenhouse gas.

The administration's use of regulatory agencies to further ESG policy objectives is apparent in OSHA's recent involvement in climate change as a workplace safety issue, with the agency moving to implement standards to address heat and wildfire hazards.

PFAS. On Oct. 18, the Biden administration announced a joint effort with eight agencies to address the growing public health concern over certain per- and polyfluoroalkyl substances (PFAS), spearheaded by a four-year strategic roadmap from the EPA outlining next steps and efforts to regulate PFAS under major environmental laws and regulations. PFAS concerns implicate many industries, including industrial operations like metal and electronics manufacturing, as well as the packaging and transportation industries, to name a few.

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“The high-risk, high-reward nature of this business means that risks can present themselves at any moment, and proper due diligence must be performed to identify any such risk or signs of such risk.”

OSHA COVID-19 vaccine mandate. The recently released Emergency Temporary Standard (ETS) is an example of President Biden’s use of regulatory bodies to promote ESG policy objectives. Historically, OSHA used its regulatory authority to identify a hazard and implement a discrete requirement to address the identified hazard. Indeed, OSHA’s initial COVID-19 related ETS was focused on the healthcare industry and was not published until June 21 – what was then thought to be after the peak of the pandemic.

However, on Sept. 9, President Biden issued his “Path Out of the Pandemic,” in which he tasked OSHA with developing a significantly broader ETS to encourage vaccinations among the workforce. The temporary standard, effective Nov. 5, requires employers with over 100 employees to either:

- Ensure all employees are fully vaccinated; or
- Require unvaccinated employees to: (i) produce a negative test result at least once every seven days before coming to work; and (ii) wear a mask.

Under the standard, employers must provide paid time off for the time employees use to get vaccinated and/or recover from post-vaccination illness.

The rule is comprehensive, as state plans will be required to implement equally protective rules within 30 days of the effective date, or Dec. 5.

State-based opposition

Climate change. Arkansas, Mississippi, Nebraska, North Dakota and Wyoming have said that they would challenge any new federal policies that require the power sector to cut carbon emissions. Pennsylvania, which is expected to join the Regional Greenhouse Gas Initiative through a rulemaking set to take effect in 2022, is facing staunch opposition from Republican legislators arguing that such a decision must come from the legislative body and not the executive branch. At the federal level, in March 2021, 12 state attorneys general sued President Biden over his executive order directing agencies to consider the social cost of greenhouse gas pollution in future federal rulemakings, arguing the directive violated the separation of powers, although the lawsuit was later dismissed.

COVID-19 vaccine mandate. Several states that strongly oppose vaccine mandates may attempt to disrupt Biden’s use of agencies to promote policy by opposing the federal requirement once issued. For example, Republican attorneys general in seven states with their own state OSHA plans – Alaska, Arizona, Indiana, Kentucky, South Carolina, Utah and Wyoming – have vowed to fight the federal testing and vaccination mandate.

The judicial system and Supreme Court

President Biden, federal agencies and states are not the only contributors to forthcoming ESG policy in the law. The Supreme Court agreed to hear a case on interstate disputes over natural resources and likely will determine how the doctrine of equitable apportionment will apply to groundwater in *Mississippi v. Tennessee*, No. 2201 (argued Oct. 4, 2021). While the Supreme Court sidestepped questions relevant to ESG issues in the climate tort lawsuit *BP P.L.C. et al. v. Mayor and City Council of Baltimore*, it recently agreed to hear a challenge to the EPA’s authority to regulate greenhouse gas emissions in *West Virginia v. Environmental Protection Agency*. Elsewhere, municipal entities are suing chemical manufacturers throughout the United States over costs incurred to remediate PFAS impacts to groundwater and damages to natural resources, and future lawsuits challenging unfavorable regulatory outcomes over new PFAS regulations are likely.

Conclusion

As federal and state executive branches continue to roll out ESG objectives, the judicial system and states could stymie such initiatives based on concerns that such executive actions intrude on legislative powers. Expect more litigation challenging executive actions over ESG policy objectives as the contours of executive agency authority over ESG matters are defined.

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About the authors

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Ben concentrates his practice on environmental and safety regulatory and compliance. He routinely counsels companies in connection with major industrial accidents, internal investigations and root cause analysis, workplace culture, compliance assurance, crisis response, whistleblowers, process safety incidents, and workplace injuries and fatalities. Ben also advises companies on government agency investigations and enforcement, environmental litigation, and responses to regulatory rulemakings.

Ben has a particular focus on the environmental and governance aspects of ESG. He routinely counsels clients on risk management, environmental and safety social governance, and ethics in crisis response.

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Jennifer is a thought-leader on environmental and emerging energy issues, greenhouse gas legislation and related environmental issues, with particular experience in Pennsylvania, the Mid-Atlantic, California and the European Union.

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Casey focuses on federal, state and local environmental regulations affecting a wide variety of industries and advises on environmental issues in real estate transactions. Additionally, he leverages his environmental insight to track and evaluate developments relating to climate change.

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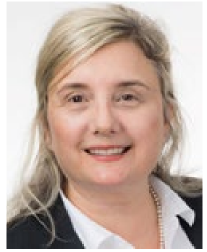

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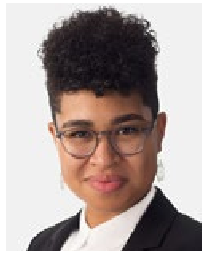

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