

Government Controversies and Public Policy Litigation
**Week Two in the Biden Administration:
Environmental Justice, COVID-19
Response, and Building Back Better**



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During his second week in office, President Biden issued an additional tranche of 12 official presidential actions, several of which rescinded actions by the Trump Administration. Our team's analysis of President Biden's week-one executive actions can be found [here](#). The Biden Administration's executive orders (EOs) and other presidential actions in week two are focused on slowing the spread of COVID-19, increasing access to health care for underserved communities, and creating a whole of government approach to combating climate change. These actions also outline new policies on discrimination, scientific integrity, criminal justice reform, and President Biden's "Build Back Better" initiative. It is anticipated that the rate of executive actions will slow this week, as President Biden switches his attention to passing his COVID-19 relief package through Congress.

COVID-19 Response and Health Care. President Biden issued three health care-focused actions during week two: a proclamation outlining new COVID-19 travel restrictions; an EO strengthening the Affordable Care Act (ACA) and Medicaid, a core campaign promise; and a memorandum addressing reproductive justice. These actions include:

- Suspending travel to the United States by noncitizens who, within the past fourteen days, were physically present in countries^[1] with the newer, more contagious strains of COVID-19;^[2]
- Directing the Secretary of Health and Human Services (HHS) to consider establishing, in light of the pandemic, a Special Enrollment Period for the ACA's Federally Facilitated Marketplace, with expected enrollment dates of February 15th to May 15th;^[3]
- Reinstating the Obama Administration's commitment to protecting individuals with preexisting conditions, including complications related to COVID-19, under the ACA;
- Revoking two Trump-era EOs that aimed to limit the ACA, including its requirement of coverage for individuals with preexisting conditions, and to facilitate the purchase of health insurance across state lines;^[4]
- Directing agencies to immediately review policies that potentially limit the reach of the ACA or Medicaid;
- Rescinding, as was done in both the Clinton and Obama Administrations, the "global gag rule," or "Mexico City Policy," which prohibits international organizations receiving US funds from performing abortions, providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize abortion;^[5] and
- Directing HHS to consider rescinding regulations under its Title X family planning program, 42 U.S.C. § 300, *et seq.*, that impose undue restrictions on the use of federal funds for women's access to reproductive information and care.

Civil Rights and Equity. In week two, President Biden took further action on civil rights and equity, taking actions to start restoring Obama-era policies on preventing gender-identity discrimination and enforcing the Fair Housing Act. Highlights include:

- Revoking President Trump's ban on transgender Americans joining the military, and prohibiting involuntary discharges or denials of reenlistment based on gender identity;^[6]

- Directing the Department of Housing and Urban Development (HUD) to reexamine the Trump Administration’s termination of the Obama Administration’s Affirmatively Further Fair Housing rule; [\[7\]](#)
- Directing HUD to reconsider a Trump Administration rule, entitled “HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” that would make it much more difficult to bring disparate-impact claims under the Fair Housing Act;
- Condemning COVID-19-spurred racism against Asian American and Pacific Islanders, directing the Attorney General to take measures to prevent further harassment and hate crimes, and expanding public reporting regarding these incidents;[\[8\]](#)
- Establishing a Justice40 initiative to develop recommendations for how federal investments in areas such as clean energy, energy efficiency, clean transit, pollution remediation, and clean water infrastructure might be made toward a goal that forty percent of the overall benefits of those funds flow to disadvantaged communities;[\[9\]](#)
- Reaffirming Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribes, and requiring executive agencies to develop and report on detailed plans for regular consultation with Tribal authorities;[\[10\]](#) and
- Forbidding the Attorney General from renewing Department of Justice contracts with privately operated criminal detention facilities.[\[11\]](#)

Science and the Environment. President Biden took actions in week two to further address climate change and science-based policymaking, including establishing climate as an essential consideration in US foreign policy and national security.[\[12\]](#) These actions include:

- Creating a Special Presidential Envoy for Climate (former Secretary of State John Kerry);
- Confirming a US-hosted Leaders Climate Summit, anticipated to occur on Earth Day (April 22nd), in preparation for the UN COP26;[\[13\]](#)
- Initiating the process to develop the United States’ “nationally determined contribution” for emissions reductions under the Paris Agreement, with the goal of submission prior to the April 22nd Leaders Climate Summit;
- Directing the State Department to take steps toward US ratification of the Kigali Amendment to the Montreal Protocol, which would require significant reductions in hydrofluorocarbon emissions;
- Establishing the interagency National Climate Task Force, the White House Office of Domestic Climate Policy, and the National Climate Advisor (former EPA Administrator Gina McCarthy);
- Encouraging clean energy projects and making federal permitting for fossil fuel projects, including pipelines, more difficult by directing the Chair of the Council on Environmental Quality and the Office of Management and Budget (OMB) to “ensure that Federal infrastructure investment reduces climate pollution,” to report to the National Climate Advisor on “siting and permitting processes,” and to “identify steps that can be taken . . . to accelerate the deployment of clean energy and transmission projects”;[\[14\]](#)
- Committing to conserving at least thirty percent of US lands and oceans by 2030;
- Directing the development of an interagency plan to use federal procurement authority to achieve a carbon pollution-free electricity sector by 2035, and clean- and zero-emission vehicles for federal and state government fleets, including United States Postal Service (USPS) vehicles;
- Directing federal agencies to work with the Export-Import Bank to promote ending international financing of carbon- and fossil fuel-based energy projects;
- Encouraging federal procurement standards to “promote increased contractor attention on reduced carbon emission[s]”;
- Encouraging employment of fossil fuel-industry workers in projects to prevent environmental damage from fossil fuel infrastructure, such as plugging leaks in wells and refurbishing abandoned industrial properties;
- Creating a Civilian Climate Corps to employ workers in conservation and climate-resilience projects;
- Creating an Environmental Justice Interagency Council and a geospatial Climate and Economic Justice Screening Tool;
- Limiting new drilling projects on federal lands and offshore waters, and directing the Secretary of

the Interior to pause and review oil and gas leases on federal lands and offshore waters and consider the climate costs of projects generally, which could include adjusting oil and gas royalties;

- Obligating the OMB and the National Climate Advisor to review fossil fuel subsidies provided to agencies and ensure that Federal funding “is not directly subsidizing fossil fuels,” and work to “eliminate fossil fuel subsidies from the budget request” beginning in Fiscal Year 2022;
- Revoking the Trump-era President’s Council of Advisors on Science and Technology (PCAST), and instituting a new PCAST to help guide the Biden Administration’s commitment to science, technology, and innovation;^[15] and
- Creating the Role of Director of the Office of Science and Technology Policy and a Task Force on Scientific Integrity to review the effectiveness of scientific integrity across federal agencies.^[16]

Trade. President Biden furthered one of his key “Build Back Better” campaign pledges this week by signing an EO directing federal agencies to institute a policy of proactively “preferring” the purchase of goods made in the United States.^[17] The EO’s actions include:

- Establishing a policy to maximize the use of goods, products, and materials produced in and services offered in the United States under federal financial assistance awards and federal procurements;
- Encouraging replacement of the Federal Acquisition Regulatory Council’s (FAR Council) “component test” to identify domestic products with a test under which domestic content is measured by the value added through US-based production or US job-supporting economic activity;
- Encouraging the FAR Council to increase the domestic content requirements and price preferences for domestic end products and domestic construction materials;
- Revoking three Trump-era EOs that, among other things, had the stated purpose of “ensur[ing] H-1B visas [were] awarded to the most-skilled or highest-paid beneficiaries” and encouraging USPS to preference the procurement of US goods and products;^[18]
- Requiring the FAR Council to hold off on any final determination of domestically nonavailable articles until it has reviewed an Office of Federal Procurement Policy recommendation on whether goods and materials mined, produced, or manufactured in the United States are sufficiently and reasonably available;
- Limiting, centralizing, and publicizing waivers of domestic preference laws, by clearing them through a “Made in America Director” appointed by the Director of OMB, who would require agency’s assessments of whether the cost advantage of the foreign-sourced product arises from dumped or injuriously subsidized steel, iron, or manufactured goods; and
- Encouraging supplier scouting to increase federal procurement from small- and medium-sized American businesses.

This week we anticipate that the President will issue additional executive actions on immigration,^[19] but that otherwise his focus will largely pivot towards his legislative agenda, specifically passing a COVID-19 relief bill.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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[1] The suspension impacts travel from the Schengen Area in Europe, the United Kingdom (excluding overseas territories outside of Europe), Ireland, Brazil, and South Africa.

[2] Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease (Jan. 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/>.

[3] Executive Order on Strengthening Medicaid and the Affordable Care Act (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/executive-order-on-strengthening-medicaid-and-the-affordable-care-act/>; “Fact Sheet: President Biden to Sign Executive Orders Strengthening Americans’ Access to Quality, Affordable Health Care,” White House Briefing Room (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/28/fact-sheet-president-biden-to-sign-executive-orders-strengthening-americans-access-to-quality-affordable-health-care/>.

[4] Specifically, President Biden revoked the following: “Promoting Healthcare Choice and Competition Across the United States” (Oct. 12, 2017) and “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal” (Jan. 20, 2017).

[5] Memorandum on Protecting Women’s Health at Home and Abroad (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/>.

[6] Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform (Jan. 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/>.

[7] Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory

Housing Practices and Policies (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>; see also Department of Housing and Urban Development, *Secretary Carson Terminates 2015 AFFH Rule: Removal of rule returns power to localities in effort to advance fair housing nationwide*, HUD Press Room (July 23, 2020), https://www.hud.gov/press/press_releases_media_advisories/hud_no_20_109.

[8] Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/>.

[9] Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

[10] Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

[11] Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/>.

[12] Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

[13] “Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government,” White House Briefing Room (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

[14] Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

[15] Executive Order on the President’s Council of Advisors on Science and Technology (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-presidents-council-of-advisors-on-science-and-technology/>.

[16] Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>.

[17] Executive Order on Ensuring the Future Is Made in All of America by All of America’s Workers (Jan. 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/>.

[18] Specifically, President Biden revoked the following: the “Buy American and Hire American” EO (Apr. 18, 2017), section 5 of the “Strengthening Buy-American Preferences for Infrastructure Projects” EO (Jan. 31, 2019), and the “Encouraging Buy American Policies for the United States Postal Service” EO (Jan. 14, 2021).

[19] Reuters Staff, *Biden to sign order to modernize the U.S. immigration system on Tuesday*, Reuters (Jan. 29, 2021), <https://www.reuters.com/article/us-usa-biden-immigration-idUSKBN29Y23G>.

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