

# Executive actions: A pen and a phone? It's a bit more complicated.

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When discussing the tools at a president's disposal, former President Barack Obama famously said, "I've got a pen, and I've got a phone," alluding to his powers to drive change with zero or minimal involvement from Congress. President Joe Biden has been in office for less than a month and it's clear he learned something in his old gig: that whole "pen and a phone" concept is more complicated than it sounds, leaving the president with four tools to force action:



1 Regulatory freeze

2 Reform via Executive Order

3 Rejection via Congressional Review Act

4 Reform via agency rulemaking



Observers of the Biden administration should be mindful that while these first few weeks of his presidency seem focused on what can be accomplished with the regulatory freeze and executive orders, the real work must wait for the personnel to be confirmed by the Senate and installed in their positions.

**Andy Blocker**

Head of US Government Affairs

## 1: Regulatory freeze

Within hours of being sworn in as the 46th president of the United States, Biden directed his Chief of Staff Ron Klain to order the halting of all rulemaking that had either been in the regulatory pipeline or had been completed but not yet implemented.<sup>1</sup> This so-called "regulatory freeze," which had the effect of stopping all 11th-hour actions by the outgoing administration, is frequently utilized by incoming executive branch teams as it was under Presidents George W. Bush, Barack Obama, and Donald Trump.<sup>2</sup> One example of a rulemaking caught in the regulatory freeze was the Office of the Comptroller of the Currency's (OCC's) "Fair Access" rule.

On Nov. 20, 2020, Acting Comptroller Brian Brooks proposed a rule to prohibit national banks from cutting off services to certain sectors of the economy such as private prison owners and gun manufacturers. In the preamble to the proposal, the OCC stated, "[t]he rule codifies more than a decade of OCC guidance stating that banks should conduct risk assessment of individual customers, rather than make broad-based decisions affecting whole categories or classes of customers, when provisioning access to services, capital, and credit." In the face of extensive industry and congressional opposition, the OCC pushed forward with a final rule on Jan. 13, 2021. However, the rule was not printed in the Federal Register before inauguration and was therefore put in limbo by the Klain memo.<sup>3</sup>

## 2: Reform via Executive Order

The historical use of Executive Orders to make policy is well-established but it does have its drawbacks. While it gives the president the ability to announce policy for his or her administration, an overreach can be reined in by the courts, and the policy is not permanent as each subsequent administration can change course with the same stroke of a pen. Within the first week of his presidency, however, Biden issued 24 executive orders<sup>4</sup> addressing issues such as bringing the United States back into the Paris Climate Accords, halting new construction of the border wall, cancelling the Keystone XL Pipeline, and prohibiting privately owned prisons.

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1 The White House, January 2021

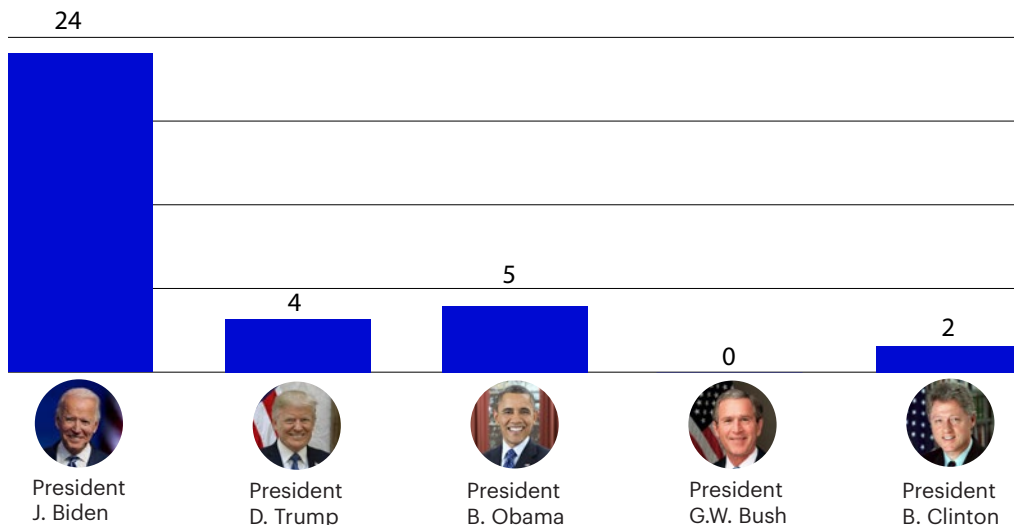
2 Gibson Dunn, November 2016

3 OCC, January 2021

4 Federal Register, January 2021

Both in speed and quantity, this is an unprecedented use of the Executive Order tool, which has even the *New York Times* editorial board cautioning the president to consider the whipsaw effect of policy change.<sup>5</sup>

### Executive orders in the first week of a new administration signed

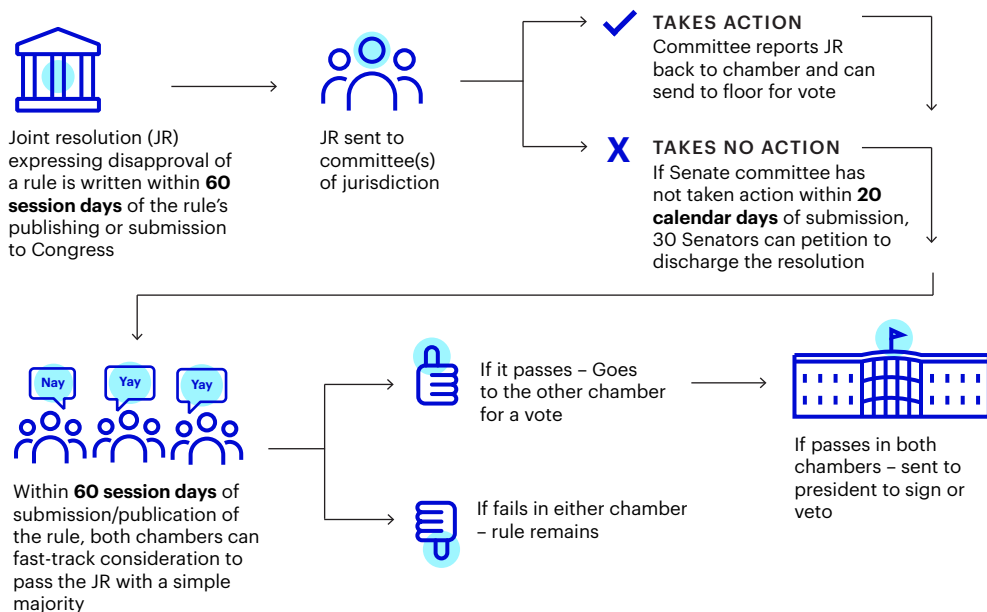


Source: Federal Register

### 3: Rejection via Congressional Review Act

Another (admittedly blunt) instrument to reverse a previous administration’s policies is the Congressional Review Act (CRA), which allows for a vote in Congress to kill a recent rulemaking with a simple majority vote in the House and Senate. Prior to the Trump administration, however, this tool in the regulatory toolbox had only been utilized once since the law was enacted back in 1996.<sup>6</sup> Among other factors, like the use of scarce Senate floor time, the primary reason it has seldom been invoked is that the law prevents a “substantially similar” rule from replacing any rule which is successfully voted down by Congress and agreed to by the president. Simply put, the CRA is more of a scorched earth approach.

### Congressional review act process



Source: PoliticoPro, January 2021

The CRA gained popularity during the first year of the Trump administration under a unified Republican government. 16 rulemakings were successfully overturned, including an environmental rule protecting streams and a Consumer Financial Protection Bureau (CFPB) rule governing the use of arbitration. While the early agenda of this current period of unified Democratic government has not suggested the CRA will be used in a similar way, there are more than two dozen rules that fit within the eligible criteria under the law, including the Department of Housing and Urban Development's (HUD) "disparate impact" rule and the Securities and Exchange Commission's (SEC) amendments of the "accredited investor" definition, among others.<sup>7</sup>

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### Potential Trump-era rules that could be repealed with the CRA

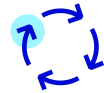
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**Department of Transportation** rule raising the reporting threshold for gas pipeline property damage reports



**Environmental Protection Agency (EPA)** rule requiring the agency to rely more heavily on publicly available data



**EPA Clean Air Act** rule requiring the agency to focus only on the direct, rather than indirect, benefits of a given rule when conducting a cost-benefit analysis



**Department of Justice** rule changing evidentiary standards and shortening deadlines for asylum applications



**Department of Housing and Urban Development** rule raising the threshold required to prove a disparate impact claim under the Fair Housing Act



**Securities and Exchange Commission** rule amending procedural requirements for a shareholder to submit proposals at annual shareholder meetings

Source: Covington & Burlington LLP, February 2021

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#### 4: Reform via agency rulemaking

The tools described above, are hardly the most traditional ways for a new administration to make its mark. The normal (and often boring) path involves agencies and departments across the government promulgating new rules or amendments to existing rules to carry out their respective duties from their establishing statutes or new laws from Congress. The machinations of the federal bureaucracy are typically slow and deliberate, often incorporating several periods of public comment and undertaken with an eye towards protecting both the agency involved and the rulemaking in question from any potential legal challenge. In a typical year, tens of thousands of pages of regulation<sup>8</sup> are put on the books using the rulemaking process. Observers of the Biden administration should be mindful that while these first few weeks of his presidency seem focused on what can be accomplished with the regulatory freeze and executive orders, the real work must wait for the personnel to be confirmed by the Senate and installed in their positions. Only then can the big wheel of government truly start turning to meet the new government's priorities.

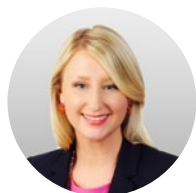
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**Andy Blocker**  
Head of US  
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**Andy Blocker** serves as Head of US Government Affairs for Invesco. In this role, he drives Invesco's legislative and regulatory advocacy initiatives with policymakers, engages with clients and opinion leaders on public policy developments, and seeks to maximize the company's political footprint. Previously, Andy served as executive vice president of public policy and advocacy for the Securities Industry & Financial Markets Association, where he led a team engaging lawmakers on international, federal and state issues impacting the financial services industry. Andy spent five years as managing director for the US Office of Public Policy for UBS. He also served as vice president of government relations for the New York Stock Exchange, as managing director of government and international affairs for American Airlines, and for the White House as special assistant to the president for legislative affairs.



**Jennifer Flitton**  
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**Jennifer Flitton** is Vice President of Federal Government Affairs with the US Government Affairs team where she advocates on behalf of Invesco's policy initiatives with policymakers and regulators, and ensures the firm is an influential part of the Washington conversation. Jen joined Invesco from the Securities Industry and Financial Markets Association, where she led lobbying initiatives on behalf of the asset management and broker dealer industries. Jen spent 16 years on Capitol Hill, last serving as the Deputy Chief of Staff and Legislative Director for Congressman Patrick McHenry, and as Congressman McHenry's designee to the House Financial Services Committee's Oversight and Investigations Subcommittee.

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