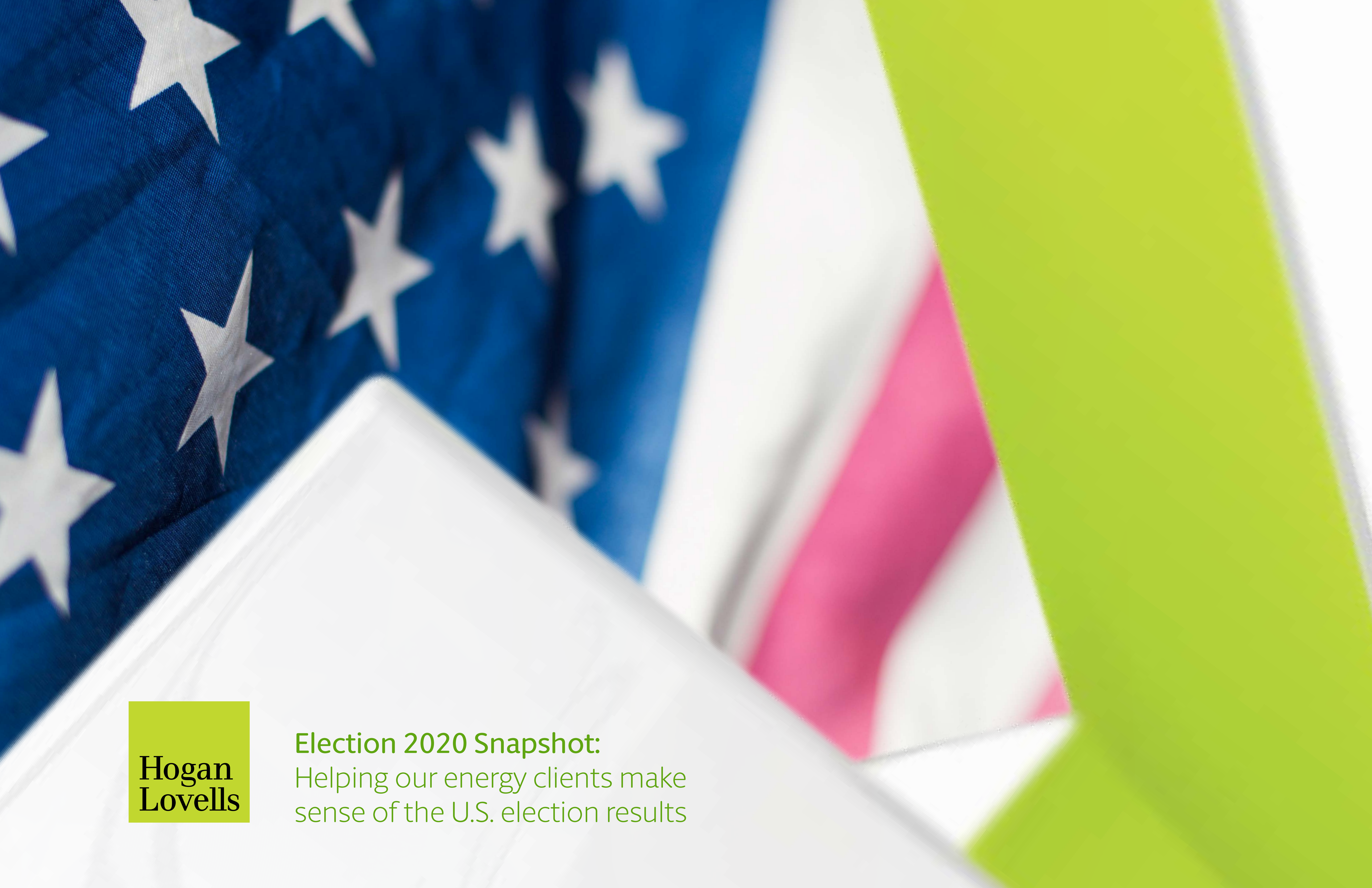

Hogan Lovells

Election 2020 Snapshot:
Helping our energy clients make sense of the U.S. election results

Through the last several Administrations (Democrat and Republican) the mantra has been “we support an all-of-the-above strategy” to meet U.S. energy needs. Expect that to change. The Biden Administration’s focus will shift to how to achieve sharp greenhouse gas emissions reductions across the economy in the relatively near-term. President-elect Biden has stated that there needs to be a transition away from fossil fuels but acknowledged that it will not happen overnight. However, the net zero carbon emission goals and strategies announced by some of the Nation’s largest electric utilities, oil companies and others outside the energy industry provide an indication of what may be achievable as the new Administration develops energy policy.

Many Agencies Have a Role

All energy agencies will see a change in emphasis. The Department of Energy will focus on advancing energy technologies that facilitate carbon emissions reductions. Battery improvements and other energy storage, along with hydrogen, will also get attention in DOE’s R&D portfolio, along with continued efforts to optimize solar and wind technology. Advanced nuclear technologies are also likely to receive continued support, not only as carbon-free power sources but also for their value to international trade and national security.

Given its abundance and established infrastructure in the U.S., DOE will likely acknowledge – at least for the near term – the central role natural gas will continue to play in our energy supply, but with an emphasis on reducing carbon impact. The Environmental Protection Agency will directly regulate methane emissions, while DOE focuses on technology solutions.

The Biden Harris Plan for a Clean Energy Revolution and Environmental Justice establishes a goal of reaching a 100% clean energy economy, and net-zero emissions, by 2050. Many of the proposals in this Plan, such as expanding tax incentives for electric vehicles, eliminating tax preferences for oil and gas production, and increased federal appropriations for clean energy investments, cannot be achieved without congressional action, which will be difficult without strong Democratic majorities in both houses. Many things can be accomplished, however, by executive action under existing statutory authority. This includes, for example, use of the federal procurement system,”which spends $500 billion every year,’ to drive toward 100% clean energy and zero emissions vehicles.[1]

The largest sources of carbon emissions are from the transportation and building sectors. A push for improved efficiency in those sectors is also likely to be high on the Biden Administration’s agenda and may include a renewed focus on advanced biofuels, as well as vehicle electrification. In addition, DOE has missed statutory deadlines for proposing new efficiency standards for more than two dozen types of appliances and commercial equipment. It is reasonable to expect a flurry of new efficiency standards proposals, although the “process rule” that the Trump Administration put in place requires greater efficiency to justify new standards.

DOE also plays a role in securing the interstate power grid. President Trump’s Bulk Power Supply Executive Order, which focused attention on the threat to the grid from equipment supplied by “adversary countries,” will continue to be an issue of concern to the industry. There has been no indication that this Executive Order is on the new President’s chopping block. DOE is in the early stages of the rulemaking process to implement the Executive Order, and there is ample room for unintended consequences in this effort, including for the renewable energy industry. It warrants close engagement with DOE as the agency develops the rules.

Once it has a Democratic majority in place, the Federal Energy Regulatory Commission will also be looking for ways to contribute to the climate action effort. Although it operates under statutes passed many decades ago, FERC will look for new ways to apply those statutes to give a greater weight to state carbon reduction goals and new technologies, including energy storage, in the markets it regulates. Democratic Commissioner Glick’s dissents over the past few years likely provide a guide to what is coming. Additionally, the climate impact and “social cost of carbon” will likely gain new prominence in FERC’s environmental evaluation of projects requiring its approval.

The Department of the Interior, with its vast federal land holdings and its jurisdiction over the Outer Continental Shelf, also plays an important part in the U.S. energy picture. President-elect Biden has indicated that there will be no new oil and gas leasing on federal lands and has sent mixed messages regarding hydraulic fracking activity. Legal rights under existing leases may prevent an outright moratorium on oil and gas development, but DOI will seek to regulate methane emissions and hydraulic fracturing activity on public lands, and it may also adopt enhanced impact mitigation requirements. And it will be no surprise if the new Administration looks for ways to roll back any oil and gas leases in the Alaskan National Wildlife Refuge that the Trump Administration may conclude in its waning days.

The new Administration will seek to advance renewable energy development on federal lands. To be successful, that initiative will need to be accompanied by efforts to accelerate permitting processes, which may prove challenging given the new Administration’s concomitant goals of landscape conservation and wildlife protection. DOI will also be under immediate pressure to “unstick” the review processes for offshore wind development, which have languished under the Trump Administration.

[1] https://joebiden.com/climate-plan/#

No Nirvana for Advocates of the New Energy Economy

Supporters of carbon-free energy need only to think back a few years to recognize that having friends in the White House does not mean clean energy projects will move forward at lightspeed. Multi-agency jurisdiction over most energy projects results in bureaucratic delays that every Administration in modern times has committed to fixing, with little apparent success. That effort is further complicated by the recent re-write of the regulations that implement the National Environmental Policy Act. The new rules face numerous legal challenges, and a Biden team cannot simply revert to the old rules that they may prefer. A new rulemaking will be required. In the meantime, successfully navigating NEPA reviews will require a careful look at the risks under the rule changes and ensuring an appropriate level of conservatism in environmental reviews.

The Endangered Species Act and wetlands protections under the Clean Water Act, to name just two, bedevil many energy projects. A change in the White House does not change that, and it can slow approvals for any energy project with a significant federal involvement, particularly on federal lands. Careful attention to risk management strategies is key.

The same is true on the Outer Continental Shelf. Experienced wind developers are anxious to finally move forward expeditiously, but they cannot ignore the fishery, maritime and U.S. shipbuilding industries that all seek to protect their interests in how offshore wind development proceeds. Those competing interests, too, can expect a sympathetic hearing from the Biden Administration. The Jones Act may be ancient and protectionist, but it has a lot of enthusiastic supporters who will not be ignored.

Fossil fuel interests, which make important contributions to many regional economies, may wish to engage with the Biden Administration not only on high tech solutions for sequestering carbon, but also on its plans to work with farmers to create "carbon banks," sequestering carbon emissions in soil and vegetation, and other potential carbon offset initiatives.

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New Opportunity for the Industry

One of the most notable developments in energy industry over the last four years is the embrace of sustainability goals and carbon emissions reduction plans, along with new types of partnerships with state and local governments to advance their goals. The opportunity exists now to engage the Biden Administration, not just in its regulatory function, but as a partner, to advance shared goals and identify the problems where government can uniquely help in creating solutions. Engaging early may provide the best strategy for ensuring that the next four years produce important advances for the energy industry consistent with the new Administration's climate objectives.

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