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Reopening of US-Mexico Border: Challenges and Opportunities for the Biden Administration

The Biden administration should consider actions to balance ensuring that border communities can function while appropriately using already appropriated federal dollars to maintain a safe and secure U.S.-Mexico land border, say Maka Y. Hutson, counsel, and Hans Christopher Rickhoff, senior counsel, at Akin Gump Strauss Hauer & Feld.

BY MAKAY HUTSON AND HANS CHRISTOPHER RICKHOFF

As the COVID-19 pandemic continues to improve, the U.S. and Mexican governments—and the local authorities in the border communities—are balancing health concerns with reestablishing border security, travel and commerce. Taking into account the broader politics surrounding immigration and the influx of migrants, we discuss specific, measurable policy considerations for reopening the border.

Closed Land Border

The U.S.-Mexico land border closed to non-essential travel in March 2020 and the closure has been extended every month since. This includes all travel other than work, school and humanitarian circumstances. The land border closure has had a significant negative impact on communities on both sides of

the border. Vehicular and foot traffic is down 50-60% compared to pre-pandemic levels, and the border communities who rely on commerce and fees collected at border crossing bridges are particularly impacted.

In one of his earliest executive orders (EO), President Joe Biden directed the secretaries of Health and Human Services, Transportation and Homeland Security and the CDC director to “immediately commence diplomatic outreach to the governments of Canada and Mexico regarding public health protocols for land ports of entry” and to submit to him a plan to implement appropriate public health measures at those ports of entry. This plan should “implement CDC guidelines, consistent with applicable law, and take into account the



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Courtesy photos

operational considerations relevant to the different populations who enter the United States by land.” These operational considerations include, among others, the recent surge of border crossings, the construction of the border wall, and the testing and vaccination campaigns in the border communities.

Migrant Protection Protocols and Unaccompanied Minors Surge

The Migrant Protection Protocols (MPP) program—also

known as “Remain in Mexico”—was put in place in the early days of the pandemic. Under the program, Central American asylum seekers were required to wait in Mexico while their asylum claims were considered by U.S. immigration courts. This created crowding of asylum seekers in border communities of Mexico, often in temporary housing, furthering the spread of COVID. The Biden administration terminated the MPP program. Small groups are allowed to cross the border every day, and border towns have taken on the responsibility of testing for COVID and contact tracing any positive cases to make sure that the migrants complete their self-quarantine. The **situation** is exacerbated by a significant surge of unaccompanied minors from Central America and an increase in border apprehensions. The Biden administration has **reversed the previous administration’s decision** to prevent all border crossings and is allowing unaccompanied minors to enter the U.S. With Customs and Border Protection (CBP) facilities and Health and Human Services shelters beyond capacity, controlling the entry of the large number of migrants at the border will likely be a prerequisite to border reopening, both for



Photo: Isabel Mateos/AP

Migrants walk on train tracks on their journey from Central America to the U.S. border, in Palenque, Chiapas state, Mexico, Feb. 10, 2021. President Joe Biden’s administration has taken steps toward rolling back some of the harshest policies of ex-President Donald Trump, but a policy remains allowing U.S. border officials to immediately send back almost anyone due to the new coronavirus pandemic.

political and health-related reasons.

Border Wall Construction and Allocated Funding

The Biden EO returned to the Department of Defense funding that former President Donald Trump redirected for the border wall. However, the EO that “paused” construction—as well as all real estate acquisition activities—may run counter to congressional appropriation of border wall funding, approximately \$2.75 billion. There is **ongoing debate** if the president has the ability to redirect or “pause” the funds through executive action. Republican members of Congress have expressed concerns with the Biden administration and are pressuring it to maintain

funding as appropriated by Congress. Considering the surge of migrants and the need for border security, consultations with local border authorities on how to best utilize the funds allocated to DHS should be a central component of the current debate.

Some of the potential uses of the funds promoted by members of Congress representing border communities include: (1) strengthening the COVID testing and vaccination campaigns in the border regions; (2) improving and expanding border technology, such as rescue beacons and video surveillance cameras; (3) securing additional immigration judges and support staff to reduce the backlog of immigration cases at the southern border; and (4)

securing additional CBP officers, Border Patrol agents and processing coordinators, and agriculture specialists to help streamline trade at the ports of entry as well as improve security along the border. It remains to be seen whether the Biden administration and Congress will reach a compromise on repurposing border wall funds, in particular with the challenges of including any potential in any larger immigration package.

COVID-19 Testing and Vaccination Campaigns

The **COVID public health emergency** remains a significant challenge to overcome. Both the United States and Mexico have had a similarly high rate of infections and extensive community spread. However, different approaches taken by the United States and Mexico toward resolving the pandemic may complicate the process of reopening the border.

Mexico has not prioritized COVID testing and is significantly behind the United States in the percentage of the **population that has been vaccinated**. The border communities on both sides will

need to emphasize continued aggressive testing as any new outbreak in the border communities on the U.S. side—once the virus has been declared controlled—could create additional complications. Some have suggested that U.S. authorities could consider transferring surplus testing infrastructure to Mexico border regions, and the Biden administration has already transferred a significant number of AstraZeneca vaccine doses to Mexico.

Finally, there has been significant discussion of “vaccine passports” as a solution for reestablishing normal border operations. While a seemingly attractive solution, it would likely be very difficult to implement: vaccines are administered by various providers, and travelers are unlikely to be able to provide a secure and consistent proof of vaccination. CBP agents are already screening travelers for drugs, weapons and fraudulent documents and would not welcome the additional vaccination screening. Furthermore, without a change in U.S. immigration laws, CBP would likely not have authority to prevent non-vaccinated

travelers from entering for temporary reasons. Civil liberties advocates and some members of Congress may also be concerned about digitally storing individual vaccination records and sharing them with government authorities and private entities.

Separating these issues from the larger immigration debate will prove difficult. Reopening the border for legal crossings and trade and returning to pre-pandemic border crossing regulations will be a challenge. That said, the Biden administration should consider actions to balance ensuring that these symbiotic border communities can function while appropriately using already appropriated federal dollars to maintain a safe and secure border.

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