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The Trump Transition

The incoming Trump Administration is expected to break the mold in many ways, but in one respect it is likely to follow recent precedent fairly closely, author Jonathan G. Cedarbaum of WilmerHale writes: President Trump is likely to act quickly to suspend and undo regulatory initiatives undertaken by the Obama Administration. Cedarbaum outlines the three main lines of attack the new president will have available, and which may be especially robust, given the probable support of a Congress fully controlled by Republicans.

The Regulatory Transition: How the Trump Administration Is Likely to Try to Block and Undo Obama Administration Regulations

BY JONATHAN G. CEDARBAUM

At least since the Carter-Reagan transition, every time party control of the White House has changed, the incoming President has acted quickly to suspend and undo regulatory initiatives undertaken by his predecessor. We can expect similar efforts by President Trump as soon as he assumes office on January 20, 2017. This article describes the different ways in which these regulatory reversals can be accomplished as well as some of the administrative law principles that constrain such efforts.

The article proceeds in three parts. Part I describes unilateral Executive Branch methods for undoing regulations. Part II explains how the Republican-controlled Congress may use the Congressional Review Act to overturn regulations adopted during the last eight months of the Obama Administration. Part III briefly identifies how the Trump Administration's arrival may affect cases in which Obama Administration regulations are already being challenged in court.

It is important to keep in mind that the discussion here provides only a brief, general overview of the issues. The fate of any particular regulatory initiative will turn in significant part on the terms of the particular governing statute, the identity of the agency involved, the status of the regulation in the rulemaking process and the timing of its adoption, and, if already subjected to judicial review, the views of the judge or judges overseeing the litigation.

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I. Unilateral Executive Branch Efforts

The rulemaking process. In order to understand the different ways in which federal regulations may be undone, one must understand the steps in the process by which regulations are created and made legally effective. Under the Administrative Procedure Act, agencies typically follow a four-step process in issuing regulations: (i) issuing a notice of proposed rulemaking; (ii) receiving comments on the proposed rule; (iii) issuing a final rule; (iv) setting an effective date for the rule that is at least 30 days after publication of the final rule in the *Federal Register*.[1]

Stopping proposed regulations and regulations that have not yet taken effect. On the first day of the George W. Bush and Obama Administrations, the White House

[1] *See* 5 U.S.C. § 553.

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chief of staff issued a memorandum on behalf of the President directing agencies to freeze rulemakings in their tracks.[2] Based on those models, we can expect Trump White House Chief of Staff Reince Priebus to issue a similar memorandum on January 20, 2017, instructing agencies to do the following:

- Prohibit the sending of proposed or final regulations to the *Federal Register* for publication until reviewed by an appropriate Trump Administration political appointee
- Direct agencies to pull back from the *Federal Register* any regulations or proposed regulations sent there that have not yet been published, again for review by an appropriate Trump Administration political appointee
- Direct agencies to delay by 60 days the effective date of final regulations that have already been published but have not yet taken effect and, possibly to re-open the comment period for these regulations.

These regulatory freeze memoranda have recognized exceptions for regulations and proposed regulations that are subject to statutory deadlines or court orders inconsistent with their directives and for regulations that need to move forward because they concern emergency or other urgent situations relating to health and safety. And it is important to note that the White House ''regulatory freeze'' memoranda have not sought to compel independent agencies—as opposed to ''regular'' departments and agencies—to follow their directions but have, if addressed to them at all, requested their compliance.[3] The Obama Administration memorandum was the first to include a directive to re-open comment periods for certain regulations.[4] On the more limited ability of the President to direct independent regulatory agencies than to direct ''regular'' departments and agencies.

Prohibitions on publication in the *Federal Register*, as well as withdrawals from the *Federal Register* appear to have been effective in the past, though evidence is difficult to collect given the non-public nature of these actions and the apparent lack of challenges to them in court.[5]

Brief delays in effective dates also appear to have been effective by and large, though some have been challenged, and a study by the Government Accountability Office found that most of the rules whose effective dates were delayed at the outset of the George W. Bush Administration ultimately were allowed to go into effect after those initial delays.[6] Agencies have offered different justifications for exempting brief effective date delays from the APA's notice-and-comment requirements, with some claiming the delays are procedural rather than substantive and others pointing to various grounds as satisfying the APA's ''good cause'' exception, including the regulatory freeze memorandum itself, the need for the new Administration to have time to review the rules, and purportedly relevant economic conditions.[7] The Obama Administration made a number of efforts, when time permitted, to provide notice and seek comment on effective date delays.[8] A number of agency delays in effective dates without notice and comment have been challenged in court, with mixed results, and, given the relatively short delays involved in many cases, such delays may expire before a court has an opportunity to weigh in.[9]

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[2] *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies from Andrew H. Card, Jr., Assistant to the President and Chief of Staff (Jan. 20 2001), 66 Fed. Reg. 7702 (Jan. 24, 2001); Memorandum for the Heads of Executive Departments and Agencies from Rahm Emanuel, Assistant to the President and Chief of Staff (Jan. 20, 2009), 74 Fed. Reg. 4435 (Jan. 26, 2009). At the start of the Clinton Administration, OMB Director Leon Panetta issued the equivalent memorandum. *See* Memorandum For the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291 from Leon E. Panettta, Director, Office of Management and Budget, Re: Regulatory Review (Jan. 22, 1993), 58 Fed. Reg. 6074 (Jan. 25, 1993). President Reagan himself issued a similar memorandum a week after the start of his administration. See Memorandum from President Ronald Reagan for the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health and Human Services, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Secretary of Energy, the Secretary of Education, the Administrator of the Environmental Protection Agency, Re: Postponement of Pending Regulations (Jan. 29, 1981), 46 Fed. Reg. 11227 (Jan. 29, 1981). The Justice Department's Office of Legal Counsel issued a memorandum early in the Reagan Administration briefly setting forth its view of the legal basis for the President's memorandum. *See* Memorandum for the Director, Office of Management and Budget, from Larry L. Sims, Acting Assistant Attorney General, Re: Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. OLC 55 (Jan. 28, 1981). A few weeks later, President Reagan issued Executive Order 12291, establishing a process for centralized review of rulemaking efforts. See Executive Order 12291: Regulatory Review, 46 Fed. Reg. 13193 (Feb. 17, 1981). For an informative review of these efforts, see Jack M. Beerman, Midnight Rules: A Reform Agenda, Final Report for the Administrative Conference of the United States (May 14, 2012), available at https://www.acus.gov/sites/default/files/documents/FINAL%20Midnight%20Rules%20Report%20%5B5-14-12%5D.pdf.

[3] On the more limited ability of the President to direct independent regulatory agencies than to direct ''regular'' departments and agencies, *see, e.g.*, Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2319-2331 (June 2001).

[4] The initial memorandum from Obama Chief of Staff Rahm Emanuel was followed by a memorandum from OMB Director Peter Orszag giving further instructions on how **to** determine which regulations should have their effective dates delayed and which have comment periods re-opened. See Memorandum for the Heads of Executive Departments and Agencies from Peter R. Orszag, Director, Office of Management and Budget, Re: Implementation of Memorandum Concerning Regulatory Review (Jan. 21, 2009), available at http://www.foreffectivegov.org/sites/default/files/regs/PDFs/OrszagMemo09-08.pdf.

[5] *See* Beerman, *supra*, at 66-68.

[6] *See* GAO, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2011 Memorandum, GAO-02-370R (Feb. 15, 2002); *see also* Beerman, *supra*, at 68-80.

[7] *See* Beerman, *supra*, at 68-80, for a review of the use of these various justifications. The OLC memorandum issued at the outset of the Reagan Administration outlined all of them as possibilities, noting that all such decisions would subject to challenge in court.

[8] *See* Beerman, *supra*, at 75-76.

[9] *See Sierra Club v. Jackson*, F. Supp.2d 11, 26-28 (D.D.C. 2012) (reviewing decisions reaching different conclusions on the question whether a delay in effective date constitutes sub-

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Once temporary delays in effective dates run out, if agencies want to revoke regulations or make substantive amendments to them, they will normally need to proceed through notice-and-comment procedures, and courts will judge their actions under the same APA standards that they use in assessing the lawfulness of other rulemaking efforts.[10] As the Supreme Court has explained more than once, ''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. . . . 'In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.' It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.' ''[11]

II. Congressional Disapproval of Final Regulations Under the Congressional Review Act

Enacted in 1996, the Congressional Review Act (CRA) requires agencies to submit rules to Congress and establishes a special process for Congress to overturn rules by enacting a special joint resolution within 60 legislative days of a rule's submission.[12] Because joint resolutions are subject to presidential veto, and a President is virtually certain to veto a joint resolution disapproving a rule promulgated during his own administration, Congress has rarely passed joint resolutions of disapproval under the CRA, and it has used the CRA to overturn a rule only once.

The CRA provides a second opportunity for congressional review of rules that are submitted during the last 60 legislative days of a congressional session. Those rules are also subject to review by Congress in its next session, as though the rules had been submitted on the fifteenth legislative day of that session.[13] When a presidential transition involves a change in party and the new Congress that convenes at the beginning of the new President's term is controlled by his party, this CRA ''second look'' provision may thus provide an opportunity for the new Congress to disapprove regulations promulgated by the outgoing administration unhindered by the prospect of a presidential veto.

The convening in January 2017 of the 115th Congress, both of whose houses will be controlled by Republican majorities, presents just this scenario. All final rules issued less than 60 legislative days before the end of the current congressional session will be subject to CRA review and potential disapproval by the Congress that convenes in January. According to the Congressional Research Service (CRS), based on the expected legislative calendars for the rest of the current congressional session, all final regulations submitted to Congress after May 16, 2016, will be vulnerable to CRA disapproval by the new Congress.[14] CRS has recently identified 48 ''major rules'' that fall into this category.[15] For these purposes, major rules are ones that either are expected to have ''an annual effect on the economy of $100,000,000 or more,'' result in ''a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions,'' or cause ''significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability'' of U.S. companies to compete against non-U.S. companies.[16] For major rules (with certain limited exceptions, the CRA also requires a delay in their effective date until the latest of ''[i] 60 days after the date that the rule is published in the *Federal Register* or received by Congress, whichever is later; [ii] if Congress passes a joint resolution of disapproval and the President vetoes it, the date on which either house of Congress votes and fails to override the veto or 30 session days after the date Congress received the veto, whichever is earlier; or [iii] the date the rule would have otherwise taken effect, if not for this provision of the CRA.''[17]

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stantive rulemaking); *Sierra Club v. Jackson*, F. Supp.2d 9 (same and calling for additional briefing on the issue); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 204-206 (2d Cir. 2004) (finding 60-day delay in effective date of Energy Department regulation to be substantive rulemaking and rejecting availability of good cause exception); *Environmental Def. Fund v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (deferral of permitting process under EPA regulations was equivalent to suspension of the regulation and so substantive rulemaking requiring notice-and-comment procedures); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 762-767 (3d Cir. 1982) (indefinite suspension of EPA regulations constituted substantive rulemaking requiring notice-and-comment rulemaking); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981) (six-month delay in effective date of Labor Department regulation constituted substantive rulemaking, but finding good cause exception to notice-and-comment requirements applicable based on five considerations rendering this a ''special, possibly unique, case'').

[10] *See generally Motor Vehicle Mfrs Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-43 (1983). For two examples of courts holding unlawful an attempt by a new Administration to make substantive changes in regulations promulgated by its predecessor because of inadequate notice-and-comment procedures, *see North Carolina Growers' Ass'n v. United Farm Workers*, 702 F2d 755 (4th Cir. 2012) (Obama Labor Department's ninth-month suspension of Bush Administration H-2A regulations and temporary reinstatement of prior regulation constituted rulemaking and was arbitrary and capricious because of limitations on notice-and-comment process); *United Farmworkers v. Chao*, 227 F. Supp. 2d 102, 107-110 (D.D.C. 2002) (Bush Administration abrupt change in interpretation of H-2A regulations required notice-and-comment process and was arbitrary and capricious).

[11] *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (internal citations omitted; quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

[12] The CRA is codified at 5 U.S.C. § § 801-808.

[13] *See* 5 U.S.C. § 801(d).

[14] CRS, Agency Final Rules Submitted After May 16, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act, Insight IN10437 (Nov. 9, 2016).

[15] CRS, ''Major'' Obama Administration Rules Potentially Eligible to be Overturned under the Congressional Review Act in the 115th Congress (Nov. 17, 2016), available at https://www.fas.org/sgp/crs/misc/major-rules-cra.pdf.

[16] 5 U.S.C. § 804(2).

[17] CRS, The Congressional Review Act: Frequently Asked Questions, Report R43992 (Nov. 17, 2016), at 9; see 5 U.S.C. § 801(a)(3).

One indication that Congress intends to make use of its CRA authority at the outset of the next Congress is the recent passage by the House of Representatives of an amendment of the CRA that would make it procedurally simpler to disapprove regulations adopted near the end of a presidential administration. Under the CRA as it stands today, Congress must pass a separate joint resolution for each rule it wants to disapprove. On November 17, largely along party lines, the House passed H.R. 5982, the Midnight Rules Relief Act, which would amend the CRA to allow a single joint resolution to be used to disapprove more than one rule. The amendment would thus potentially reduce the committee and floor time required to overturn regulations adopted late in the Obama Administration.[18] Although a likely veto by President Obama means the amendment will almost certainly not be enacted in the current Congress, it could be introduced again at the beginning of the new Congress in January. Enactment of the Midnight Rules Relief Act would presumably require 60 votes in the Senate, but approval of particular joint resolutions of disapproval under the CRA require a simple majority in both chambers.[19]

III. Ongoing Litigation Challenging Final Regulations

Litigation challenging some Obama Administration regulations will be ongoing when the Trump Administration begins on January 20, 2017. Depending on the status of the case, the new Administration could back away from defense of some of those regulations in ways that might lead to their undoing.

Apart from agencies that, by statute, have independent litigating authority[20], the Attorney General controls litigation on behalf of the United States.[21] If the government has already filed its briefs, changing position could be awkward. But in a number of cases, courts have already begun delaying briefing schedules or entering stays in order to allow the new Administration to define the government's position.[22]

If a district court invalidates an Obama regulation, the Trump Administration could choose not to appeal. An interested private party could nonetheless intervene to pursue the appeal. Under Federal Rule of Appellate Procedure 24, courts typically allow intervention as of right based on four considerations: ''(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'' *Karsner v. Lothian*, 532 F.3d 876, 887 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)).[23]

Under the new Administration, the government could also choose to settle a case to avoid the court's reaching a judgment possibly upholding a regulation promulgated by the Obama Administration. But the settlement would leave the regulation in place. Revision or revocation would still require the issuing agency to undertake a new rulemaking process.

Conclusion

The Trump Administration is likely to follow in its predecessors' footsteps by trying to delay and undo regulations adopted by the Obama Administration, particularly ones proposed or adopted late in President Obama's second term. Past experience suggests that short delays in effective dates for rules that have not yet taken effect by January 20 are likely to succeed, but substantive revisions or repeals will require fuller rulemaking efforts, action by Congress, or successful challenges in court by regulated parties.[24]

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[18] H.R. 5982 (114th Cong., 2d Sess.), available at https://www.congress.gov/bill/114th-congress/house-bill/5982/text.

[19] ''Once a CRA joint resolution of disapproval is reported or discharged from Senate committee, any Senator may make a nondebatable motion to proceed to consider the disapproval resolution. This motion to proceed requires a simple majority for adoption. If the motion to proceed is successful, the CRA disapproval resolution would be subject to up to 10 hours of debate, and then voted upon. A nondebatable motion to limit debate below 10 hours is in order. No amendments are permitted. A CRA disapproval resolution requires a simple majority in order to pass. CRS, The Congressional Review Act: Frequently Asked Questions, Report R43992 (Nov. 17, 2016), at 14.

[20] *See, e.g.*, 12 U.S.C. § 5564 (CFPB), 42 U.S.C. § 7171 (FERC).

[21] *See* 28 U.S.C. § 516.

[22] *See* U.S. courts look ahead to Trump as Obama cases fizzle, Reuters (Dec. 6, 2016), available at http://mobile.reuters.com/article/idUSKBN13V2PQ.

[23] Denial of a motion to intervene would itself be an appealable order. *See, e.g., Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 896 9th Cir. 2011).

[24] The House Freedom Caucus has recently released a report identifying regulations its members favor revoking. See House Freedom Caucus, First 100 Days: Rules, Regulations, and Executive Orders to Examine, Revoke, and Issue (Dec. 14, 2016), available at https://meadows.house.gov/first-100-days.

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