



Five Ways the Biden Administration Could Rescind or Reverse the Trump Administration's Regulatory Actions

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Various media outlets are reporting that President-elect Joe Biden already has plans to sign a series of executive orders shortly after being sworn into office in January.¹ Some of these planned executive orders—such as one to reinstate the Deferred Action for Childhood Arrivals (DACA) program—will immediately reverse agency action taken by the Trump administration over the past four years. While the Biden administration will likely seek to rescind or amend other Trump administration rules and policies, some actions will require additional procedures—and more time—to implement.

We explore five ways in which the incoming Biden administration could reverse the Trump administration's regulatory actions.

I. EXECUTIVE ACTION

How quickly can the Biden administration act to reverse President Trump's executive orders?

- President Biden can issue executive orders repealing President Trump's executive orders immediately after assuming office on January 20, 2021.
- Historically, incoming administrations have repealed a small number of executive orders in their initial days, with additional reversals occurring within the first several months. That is likely because executive orders, including orders repealing a previous administration's executive orders, are typically subject to inter-agency and legal review, which can take time.
- However, the media is reporting that the Biden administration's transition team is preparing for several repeals on his first day as President, so it is possible that President Biden will move more quickly.
- One widely reported executive action President Biden plans to take on day one is to rejoin the Paris Climate Agreement, which would not require congressional approval, as the Agreement is treated as an "executive agreement" under U.S. law, rather than a treaty.

Could the Biden administration freeze existing rules or regulations?

- For rules that are proposed but not yet published as final in the Federal Register, the Biden administration could halt those rules and impose a moratorium on rulemaking across federal agencies.
- For rules that have been published as final in the Federal Register but have not yet taken effect, the Administrative Procedure Act's (APA) mandatory 30-day waiting period means that the Biden administration could postpone the effective dates of those rules, likely by up to 60 days (given the practices of previous presidents).

¹ See Matt Viser, Seung Min Kim, and Annie Linskey, *Biden Plans Immediate Flurry of Executive Orders to Reverse Trump Policies*, WASH. POST, Nov. 7, 2020, available at https://www.washingtonpost.com/politics/biden-first-executive-orders-measures/2020/11/07/9fb9c1d0-210b-11eb-b532-05c751cd5dc2_story.html; Michael D. Shear and Lisa Friedman, *Biden Could Roll Back Trump Agenda With Blitz of Executive Actions*, N.Y. TIMES, Nov. 8, 2020, available at <https://www.nytimes.com/2020/11/08/us/politics/biden-trump-executive-action.html>

- If the rules are published and have taken effect, the Biden administration could not freeze, withdraw, or postpone those rules. Repealing them would in most cases require notice and comment, which is described below.

What can the Biden administration do to change a postponed rule?

- The Biden administration *could not* alter a published rule that has been postponed. Rules are final upon publication in the Federal Register, even if they have not yet taken effect.
- The Biden administration could use the time during postponement to propose a new rule or a rule repeal, which in most cases would require notice and comment.
- However, there is a “good cause” exception to the notice and comment process if an agency determines that notice and comment would be “impracticable, unnecessary, or contrary to the public interest.” See 5 U.S.C. § 553(b)(3)(B).
 - This exception is used to justify Interim Final Rules, which are published and take effect immediately with an opportunity for public comment.
 - The exception is also used to justify Direct Final Rules, which are rules that an agency deems to be routine or noncontroversial. Direct Final Rules are published as final and taking effect on a certain date with an opportunity for comment, but are withdrawn if at least one adverse comment is received.

Can the Biden administration use Interim Final Rules or Direct Final Rules to repeal postponed Trump administration rules without notice and comment?

- Nothing in the APA prevents agencies under the Biden administration from using Interim Final Rules this way, if the agencies issuing such rules can show “good cause” and satisfy the APA’s other requirements.
- Direct Final Rules would likely not be a viable pathway for repealing Trump administration rules, as they would likely not be deemed either routine or noncontroversial, or if they were, adverse comments would likely be received.

II. AGENCY RULEMAKING

How can the Biden administration repeal final rules issued by Trump’s administrative agencies?

- Rule repeals are defined as “rulemaking[s]” under the APA, as are new rules or rule amendments, and require the same process: notice and comment.

How long does notice and comment take?

- It varies but can take several months to several years, depending on the agency and significance of the rule.

- New rules, including rule repeals, must also undergo a separate review by the Office of Information and Regulatory Affairs (“OIRA”), which is part of the Office of Management and Budget (“OMB”).

Are any rules exempt from notice and comment?

- Rules for which the agency finds “good cause” that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” See above regarding Interim Final and Direct Final Rules.
- Rules that involve “matter[s] relating to agency management or personnel” or “to public property, loans, grants, benefits, or contracts.” 5 U.S.C. § 553(a). Rules relating to agency management or personnel are those that apply *only internally* within an agency.
- Certain “general statements of policy” and interpretive rules and agency guidance, discussed below. See 5 U.S.C. § 553(b)(3)(A).
 - An example of a general statement of policy is the “directive” by former Trump EPA Administrator Scott Pruitt barring individuals who receive EPA grants from serving on EPA federal advisory committees. The directive was cast as preventing conflicts of interest, but was criticized for excluding academic scientists and experts (many of whom conducted research under EPA grants) from expert committees advising on policy and giving greater influence to industry scientists (seen as possibly more sympathetic to Trump’s environmental agenda). The directive was issued without publication in the Federal Register or notice and comment. The Southern District of New York upheld the directive’s classification as a general statement of policy but ultimately invalidated it as arbitrary and capricious.²

What process is required to repeal or amend agency interpretive rules or guidance?

- Under the APA, the notice-and-comment requirement generally “does not apply” to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). The Supreme Court has explained that “[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.”³ Therefore, notice-and-comment rulemaking is generally *not* required for agencies to promulgate, amend, or repeal (for example) guidance documents, agency manuals, or interpretive bulletins.
- However, this does not mean that no rulemaking standards apply—the APA’s proscription against agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” still governs. 5 U.S.C. § 706(2)(A). Even with respect to interpretive rules, agencies must engage in reasoned decisionmaking.
- In the context of repealing or revising an agency action, “reasoned decisionmaking” means an agency may not “depart from a prior policy *sub silentio* or simply disregard rules that are still

² *NRDC v. United States EPA*, 438 F. Supp. 3d 220, 227 (S.D.N.Y. 2020).

³ *Perez v. Mortgage Bankers Ass’n.*, 575 U.S. 92, 101 (2015).

on the books.”⁴ The agency must show that there are good reasons for the new policy. Further, a more substantial explanation is required if an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”⁵

- Two recent Supreme Court cases shed light on the standard that courts would apply in reviewing informal agency action.
 - In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court found it arbitrary and capricious for DHS to rescind DACA while failing to consider whether it could have maintained the centerpiece of the policy—the forbearance of enforcement actions—even without the associated benefits.⁶ The Court also found it arbitrary and capricious for DHS to fail to consider and address the legitimate reliance interests on DACA.⁷
 - In *Department of Commerce v. New York*, concerning the Secretary of Commerce’s memorandum reinstating a citizenship question on the 2020 Census questionnaire, the Supreme Court found that the stated explanation for the agency’s action was “incongruent with what the record reveal[ed] about the agency’s priorities and decisionmaking process.”⁸ The Court explained that “[t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.”⁹

III. ACTIONS AFFECTING PENDING LEGAL CHALLENGES TO TRUMP ADMINISTRATION RULES

What could the Biden Administration do to affect pending litigation challenging Trump executive actions or Trump agency rules?

- Presidential administrations have broad discretion to set litigation and enforcement priorities and positions. Department of Justice policy generally requires that DOJ defend federal statutes in court if reasonable, even if ultimately unpersuasive, arguments can be made to support them. That duty does not explicitly extend to agency rules or other executive actions.
- Regarding executive orders subject to litigation, the Biden administration could revoke those orders and potentially moot pending court challenges.
- Regarding rules subject to litigation, the Biden administration could stop defending those rules in court and request stays until they could be amended or repealed. Courts retain discretion to

⁴ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁵ *Id.*

⁶ 140 S. Ct. 1891, 1913 (2020).

⁷ *Id.*

⁸ 139 S. Ct. 2551, 2575 (2019).

⁹ *Id.* at 2575-2576.

grant stays, but stays were granted for Trump agencies to reconsider Obama-era rules that were subject to litigation.

- One prominent example is the Trump administration's approach to litigation challenging the Obama-era EPA's Clean Power Plan, which regulated power plant emissions. The Trump administration obtained successive 60-day stays while EPA considered repealing the rule. EPA ultimately proposed and finalized a replacement, the Affordable Clean Energy rule, which is now subject to separate court challenges that could be affected by a change in approach under the Biden administration.

IV. ADMINISTRATIVE ENFORCEMENT DISCRETION

Are there limits on how the Biden administration can utilize its enforcement discretion?

- With some important limitations, the Biden administration can effectively reverse Trump administration policy by declining to pursue or withdrawing agency enforcement actions.¹⁰
- The APA's basic presumption of judicial review does not apply to agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court has recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion,"¹¹ and therefore presumptively unreviewable by courts. However, this default presumption can be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"¹² or where an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."¹³
- Recent developments shed some light on, but also raise new questions concerning, the scope of agency enforcement discretion. The Trump administration tried to take advantage of the presumption of unreviewability in *Department of Homeland Security v. Regents of the University of California* (concerning the rescission of DACA), but the Court rejected the view that DACA is simply a non-enforcement policy whose rescission is unreviewable. Instead, the Court found that DACA conferred benefits beyond non-enforcement and that its rescission was reviewable under the APA.¹⁴ Additionally, President Trump issued an Executive Order on Regulatory Relief to Support Economic Recovery, which directed agencies to consider

¹⁰ While this pathway is available, in practice it may have limited utility where reports show that the number of enforcement actions has declined across various agencies under the Trump administration. *See, e.g.*, Tom Dreisbach, *Under Trump, SEC Enforcement of Insider Trading Dropped to Lowest Point in Decades*, NPR, Aug. 14, 2020, available at <https://www.npr.org/2020/08/14/901862355/under-trump-sec-enforcement-of-insider-trading-dropped-to-lowest-point-in-decade>; Charles Piller, *FDA Enforcement Actions Plummet Under Trump*, SCIENCE, July 2, 2019, available at <https://www.sciencemag.org/news/2019/07/exclusive-fda-enforcement-actions-plummet-under-trump>; Juliet Eilperin and Brady Dennis, *Under Trump, EPA Inspections Fall to a 10-year Low*, WASH. POST, Feb. 8, 2019, available at <https://www.washingtonpost.com/climate-environment/2019/02/08/under-trump-epa-inspections-fall-year-low/> (reporting that the "number of civil cases the division started and completed in 2018 hit a 10-year low, and the \$69 million in civil penalties it leveled [sic] represents the lowest in nearly a quarter-century.").

¹¹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

¹² *Id.* at 833.

¹³ *Id.* at 833 n. 4.

¹⁴ 140 S. Ct. 1891, 1913 (2020).

policies of enforcement discretion that decline enforcement against persons and entities that have attempted to comply with the law in reasonable good faith. Whether any policy established pursuant to this directive would be subject to judicial review would depend on the specific facts, circumstances, and procedure under which that policy was established.

V. THE CONGRESSIONAL REVIEW ACT

Can Congress repeal agency rules?

- Pending the outcome of the two runoff races for Georgia's Senate seats, congressional Democrats may also have the option of exercising control over certain recent rulemakings through the Congressional Review Act ("CRA"). The CRA establishes a mechanism for Congress to disapprove a final rule promulgated by a federal agency through a "joint resolution of disapproval" ("ROD").
- Before a "major rule" rule can take effect, the promulgating federal agency must submit a copy, and a report, to Congress. A major rule will take effect 60 calendar days after the date either (i) Congress receives the rule and report, or (ii) the rule is published in the Federal Register—whichever is *latest*.
- Congress has 60 *continuous* "legislative days" to review a rule for the purposes of introducing a ROD for each final rule it seeks to overturn. Based on the technical definition of a legislative day—and depending on how frequently Congress meets during the lame duck session—it is possible that rules finalized as far back as July 2020 may be subject to CRA action at the start of the new Congress.
- Members from either house of Congress may introduce a ROD for each rule. As with other legislation, the ROD is referred to the relevant House or Senate Committees once introduced.
- Once Congress adopts a ROD on an individual rule, it must be presented to the President for consideration. If the President vetoes the ROD, then the rule will become effective unless Congress can override the veto with a supermajority within 30 days of receiving the President's veto.