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Tools of Transition: Procedural Devices That Could Help the President-Elect Implement His Agenda

Gibson Dunn has created a Presidential Transition Task Force to track and analyze key activities throughout the transition and into the early days of the Trump-Vance administration and the 119th Congress. Through Gibson Dunn's Task Force, we plan to keep our clients and friends informed of notable developments, to explain certain transition resources and how they work, and to predict what the administration is likely to focus on in a variety of areas post-inauguration. This is the Task Force's first release. There will be a number that will follow.

To understand the priorities and strategies of the incoming Trump-Vance Administration, we can look to President-elect Trump's track record from his first term and his statements on the campaign trail regarding his post-inauguration priorities. Those priorities likely will include a largely deregulatory agenda coupled with additional regulation in some discrete areas. The President-elect also will be looking to extend provisions of the Tax Cuts and Jobs Act ("TCJA"), the signature legislative achievement of his first term. Certain corporate tax provisions are set to expire in 2025 and individual rate cuts are slated to expire in 2026. Additionally, he will be looking to confirm as many administration officials and federal judges as possible.

The President-elect will have several tools available to him and a Republican-controlled Congress to halt or otherwise claw back federal regulations promulgated during the Biden Administration, enact legislative priorities, and staff the executive and judicial branches (as well as independent agencies) with his nominees. This alert discusses the transition process as well as several of these tools and their likely efficacy and limits in facilitating the implementation of President-elect Trump's agenda. These executive and congressional tools include: (1) a White House memorandum that directs federal agencies to freeze the finalization of pending rules (or repeal or modification of rules or policy documents under the ordinary procedures), (2) legislative repeal of rules promulgated in the last few months of the Biden Administration under the Congressional Review Act, (3) the budget reconciliation process in Congress, and (4) confirmation of executive branch and judicial appointees with a simple majority vote in the Senate. In addition, the Department of Justice could decline to defend certain regulatory actions in court, increasing the likelihood those actions would be vacated. Each of these tools is discussed below.

President-elect Trump also has floated significant initiatives to reform the administrative state for which these tools may become important. For example, he announced that Elon Musk and Vivek Ramaswamy will head a task force to audit the federal government for inefficiencies. He also committed to slashing ten regulations for every new regulation his administration implements. Finally, President-elect Trump promised to reissue and expand an executive order that converted tens of thousands of career government employees into political appointees. If these employees lose civil service protections, President-elect Trump would have more power to replace them.

I. Transition Mechanics and Personnel

A. Transition Process

The Trump Administration will be the first to take office under the Electoral Count Reform and Presidential Transition Improvement Act, enacted in December 2022 to address challenges that arose most prominently in the 2020–2021 transition period. That bill amended two laws—the Presidential Transition Act of 1963 and the Electoral Count Act of 1887 ("ECA").[1]

The Presidential Transition Act, as amended, directs the General Services Administration and the President to enter into memoranda of understanding with the campaigns prior to the election. The memoranda provide the conditions under which the candidates may receive access to federal transition funding, facilities, agency documents, and security clearances. They also are to include the transition team's ethics plan, which is to address the role of registered lobbyists and foreign agents and prevent transition team members from working on matters that may give rise to a conflict of interest. Although the conflict-of-interest provisions are supposed to be the equivalent of the criminal statutory provisions that apply to federal employees, the transition team is responsible for enforcing its own ethical code.

To date, the Trump transition team has not signed either of the required memoranda of understanding. Until the transition team signs the memoranda, it can accept unlimited private

contributions and does not have to disclose them.[2] But it also means the transition team currently does not have access to federal agency resources—including significant amounts of briefing materials—or security clearances. Reporting suggests that the Trump transition team is planning to sign the memoranda at some point.[3]

As the transition moves forward, we can expect to see President-elect Trump send agency review teams, also known as landing teams, to key agencies to assess personnel, budget, and ongoing work. The Biden Administration established a formal transition process earlier this year, led by the Office of Management and Budget and General Services Administration, and directed that all agencies identify career officials to lead the transition process and prepare detailed briefing materials by November 1.[4]

At the same time, the transition team will be vetting candidates for top-level agency and White House positions. For those who require Senate confirmation, the transition team will begin working with relevant congressional committees to get their paperwork in order so the committees can move quickly once President-elect Trump is inaugurated. The transition team also will continue drafting "Day One" executive orders and proposed regulations—a process President-elect Trump's allies began at the America First Policy Institute nearly as soon as he left office in 2021.[5]

B. Transition and Administration Personnel

Former Trump Small Business Administration head Linda McMahon and CEO of Cantor Fitzgerald Howard Lutnick are co-chairing the transition. McMahon is focusing on developing policy, while Lutnick is leading the personnel effort. The honorary co-chairs are Donald Trump, Jr., Eric Trump, Vice President-elect JD Vance, Robert F. Kennedy, Jr., and former Representative Tulsi Gabbard. Susie Wiles, who will serve as the President's Chief of Staff, also will be involved in the transition. The transition is relying on a number of advisors from the America First Policy Institute and former administration personnel from the first Trump Administration. The reported members of the team—acting as either official members or unofficial advisors—include:

<u>Economic Policy:</u>
Jamieson Greer, Former USTR Chief of Staff
Vince Haley, Former Trump speechwriter
Robert Lighthizer, Former U.S. Trade Representative
Kevin Warsh, Former Member of the Federal Reserve Board of Governors

<u>Technology Policy:</u>
Michael Kratsios, Former Trump Administration Chief Technology Officer
Gail Slater, Economic policy advisor to Vice President-elect JD Vance

<u>Energy Policy:</u>

Doug Burgum, Governor of North Dakota
Harold Hamm, Executive Chairman, Continental Resources

Department of Defense:
Robert Wilkie, Former Secretary of Veterans Affairs

Department of Homeland Security:
Rob Law, Former Chief of Policy at USCIS

Department of Justice:
Mark Paoletta, Former Office of Management and Budget General Counsel

Other:
David Bernhardt, Former Interior Secretary
Doug Hoeschler, Former Director of the White House Office of Intergovernmental Affairs

II. Regulatory Moratorium and Postponement

As President Biden did at the start of the current administration and as President Trump did at the start of his first administration, on January 20, 2025, President-elect Trump likely will direct executive branch agencies to freeze pending rulemakings and recommend that independent regulatory agencies do the same.[6] He also may request that departments and agencies withdraw proposed rules that have been sent to the Office of the Federal Register (OFR) but have not yet been published and postpone the effective dates of rules that have been published but have not yet taken effect, although these options may face immediate challenges under the Administrative Procedure Act ("APA").

On January 20, 2021, at the start of the Biden Administration, Assistant to the President and Chief of Staff Ronald A. Klain sent a memorandum to the heads and acting heads of all executive departments and agencies asking them to take the following steps "to ensure that the President's appointees or designees ha[d] the opportunity to review any new or pending regulations":

1. Refrain from proposing or issuing any rule in any manner—including by sending a rule to the OFR—until after review and approval by a department or agency head appointed or designated by President Biden;
2. Withdraw from the OFR any regulations that had been sent to the OFR but not yet published in the Federal Register for review and approval; and
3. Consider postponing for 60 days the effective date of regulations that had been published in the Federal Register but had not yet taken effect.[7]

The Klain memorandum permitted exceptions for "emergency . . . situations related to health, safety, environmental, financial, or national security matters" and "regulations promulgated pursuant to statutory or judicial deadlines."[8] This memorandum was generally understood not to apply to independent agencies, but a new administration might take a more aggressive

approach and seek to exert more direct control over traditionally independent agencies such as the Securities and Exchange Commission ("SEC") and Federal Trade Commission ("FTC"). [9]

At the start of the first Trump Administration in 2017, Assistant to the President and Chief of Staff Reince Preibus issued a similar memorandum, although there were some differences from the Klain iteration.[10] First, the Klain memorandum allowed exceptions for "emergency situations" relating to "environmental . . . matters," whereas the Preibus memo did not.[11] Second, the Klain memorandum asked agencies to "consider" extending the effective dates of rules that had not taken effect, rather than requiring them to do so.[12] The change in the Klain memorandum was likely due to court rulings during the first Trump Administration holding that delays in the effective date of Obama Administration rules violated the APA because the delays did not go through the notice-and-comment process.[13] Third, the Klain memorandum suggested that before the effective dates of rules were extended, agencies should provide 30 days for parties to "provide comments about issues of fact, law, and policy raised by those rules," likely to reduce the risk of similar legal challenges. [14]

Although it is difficult to evaluate the effect of these memoranda on federal agencies, it appears that agencies generally comply with their instructions. For example, in February 2002, the Government Accountability Office determined that "federal agencies delayed the effective dates for 90 of the 371 final rules that were subject to" a similar memorandum published at the beginning of the Bush Administration (*i.e.*, had been published in the Federal Register but had not yet taken effect when President Bush took office), and that a majority of the rules that were not delayed were non-controversial rules that the White House had previously agreed should be issued as scheduled.[15]

Independent regulatory agencies in some cases also abide by the regulatory moratoria, although they have not delayed the effective dates of previously published rules.[16] An agency is an "independent regulatory agency" if it is "run by principal officers appointed by the President, whom the President may not remove at will but only for cause."[17] In contrast to non-independent agencies (sometimes referred to as executive agencies), the President's control over independent agencies is limited by his inability to fire the commissioners, board members, and directors that make these agencies' final decisions, unless he has "cause" to remove them from office. For-cause removal protections are typically understood to preclude the President from removing an agency official simply because the President disagrees with the official's policy decisions.[18] At the SEC, for example, five commissioners decide whether to propose and adopt new regulations, and under current law the President is widely believed to lack the ability to prevent them from doing so if he disagrees (though an aggressive administration might argue that the President's lack of control over independent agencies is unconstitutional). Likewise, if the President orders the commissioners to repeal regulations adopted during the Biden Administration, nothing clearly requires them to obey that order. In contrast, if the Administrator of the Environmental Protection Agency ("EPA") refuses to repeal a regulation that the President wants to eliminate, then the President undoubtedly can replace him or her with a new Administrator.

It is likely that President-elect Trump will direct his Chief of Staff to issue a memorandum similar to the Klain and Preibus memoranda directing executive departments and encouraging independent regulatory agencies to refrain from promulgating any new rules left over from the Biden Administration, and to postpone the effective dates of rules that have been published but have not yet taken effect.

Generally, once final legislative rules have been published in the Federal Register, the only way for a new administration to eliminate or change them is through the notice-and-comment rulemaking process delineated in the APA.[19] The APA specifies only very narrow exceptions to notice-and-comment for legislative rules on the theory that regulated parties are entitled to notice of the regulations with which they must comply and an opportunity to comment on the government's proposal and explain what compliance will entail.[20] These limited exceptions include when the agency is issuing a "rul[e] of agency organization, procedure, or practice," or when the agency determines "for good cause" that notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest."[21] Agencies have typically relied on one or more of these exceptions when they have attempted to postpone the effective dates of published rules at the direction of a new administration without following the notice-and-comment process.[22] In many instances, however, courts have invalidated these changes as requiring notice-and-comment rulemaking.[23]

Of course, a new administration can also reverse or modify the prior administration's rules through the ordinary procedures that govern agency decisionmaking. In seeking to undo a prior administration's policies through these ordinary procedures, a key issue includes whether the prior administration adopted the policy through notice-and-comment rulemaking or more streamlined mechanisms.

As relevant here, the APA distinguishes two kinds of actions: (1) legislative rules adopted by, for example, notice-and-comment rulemaking and (2) interpretive rules, statements of policy, and guidance documents. Legislative rules must go through notice-and-comment rulemaking absent an exception, whereas other kinds of agency documents such as guidance letters can be adopted (or withdrawn) through more informal procedures. Agencies must typically "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[24] Accordingly, it is generally harder to repeal or amend a rule adopted through notice-and-comment rulemaking than to repeal or amend interpretive rules, statements of policy, or guidance documents. And, as explained above, a new administration that tries to bypass notice-and-comment rulemaking may run into legal obstacles.

III. The Congressional Review Act

The Congressional Review Act ("CRA" or "Act") enables Congress to enact joint resolutions invalidating new rules adopted by federal agencies.[25] Among other things, the Act provides for expedited procedures that enable Congress to repeal a new regulation relatively quickly and with a simple majority in the Senate.[26]

A. Background and Process

Other than at the start of a new presidential administration, the CRA is generally not a widely used tool for invalidating new regulations because the President is likely to veto any resolution invalidating a rule adopted by an agency during his administration.[27] President Obama, for example, vetoed five disapproval resolutions during the 104th Congress, and President Biden vetoed a resolution disapproving the National Labor Relations Board's joint employer rule in May 2024.[28] In theory, a President might seek to deploy the CRA to repeal a regulation adopted by an independent agency like the SEC or Federal Communications Commission ("FCC") because they are not currently subject to the President's direct control and supervision. However, the CRA has never been used in this manner.

Although the CRA was used to invalidate a rule only once in the first twenty years after it was enacted in 1996, recent Congresses have more aggressively used the CRA to overturn final rules adopted in the last year of an outgoing administration. At the start of the first Trump Administration, Congress used the CRA to overturn 16 rules, including rules adopted by the SEC, Department of Education, and Department of Labor. In 2021, at the onset of the Biden Administration, Congress used the CRA to overturn three rules that had been adopted by the first Trump Administration.[29]

As these examples show, the CRA is most effective at the start of a new administration in which the same political party controls both houses of Congress and did not control the White House during the prior administration—*i.e.*, in the very circumstances that likely will occur come January 2025. It is also helpful in enabling Congress to repeal so-called "midnight regulations" adopted during the prior administration's final months. As discussed in further detail below, however, the Act's timing provisions render its expedited-repeal provisions inapplicable to the vast majority of regulations adopted during the Biden Administration.

The Act includes a series of complicated deadlines that govern when new rules take effect, when Congress may propose and adopt joint resolutions invalidating them, and when Congress may take advantage of the Act's expedited procedures. The process is as follows: Starting from the later of the date an agency publishes a rule in the Federal Register or submits it to Congress, Congress has sixty days to introduce a joint resolution disapproving the rule in either chamber, excluding days either chamber is adjourned for more than three days during a congressional session.[30] To give Congress sufficient time to review rules a president submits in the waning days of a session, any rule submitted less than sixty House legislative days or sixty Senate session days prior to at least one chamber adjourning for more than three days without a session (usually only at the end of a congressional session) gets a new sixty-day review period, starting from the fifteenth House or Senate legislative day of the new session. This new sixty-day period also excludes days either chamber is adjourned for more than three days during the session.[31]

In practice, if one party holds the majority in both chambers, Congress can move a joint resolution through this process very quickly, requiring very little Senate floor time, which is the limiting factor for much legislation. After introduction, the joint resolution goes to the appropriate House or Senate committee.[32] The House follows its usual legislative course of considering

joint resolutions in committee and on the floor with passage requiring a simple majority vote. During its sixty-session-day review period, however, the Senate may use fast-track procedures to consider a CRA resolution. Twenty calendar days after introduction, in the Senate, if the committee has not already reported the resolution, thirty senators may file a petition on the Senate floor to discharge the joint resolution from committee.[33] Once the resolution is reported or discharged, a senator may move to consider the resolution on the floor. That motion is subject to a simple majority vote, and is privileged, meaning that the motion to consider it may not be postponed and no one can move to consider other business. After the Senate passes the motion to consider the resolution, debate is limited to 10 hours divided equally between supporters and opponents—meaning that the Senate does not have to follow its usual cloture procedures to end debate, which usually require a super-majority vote. The Senate also may consider a non-debatable motion to limit debate.[34] The joint resolution itself may not be amended.[35] Once debate has concluded, the Senate may pass the resolution by a simple majority vote.[36] Once either the House or Senate passes a joint resolution, it is transmitted directly to the floor rather than a committee of the other chamber.[37] Once Congress passes the resolution, as with other legislation, the President may sign or veto it, and, if he vetoes it, Congress may override the veto with a two-thirds majority vote of each chamber.

If Congress enacts a CRA joint resolution overturning a regulation, the agency may not reissue the rule "in substantially the same form" unless Congress passes legislation authorizing such a rule.[38] Note that the CRA deadlines do not affect rules' effective dates. The CRA does require that major rules—*i.e.*, rules that have an annual economic effect of more than $100 million, result in "a major increase in costs or prices," or have "significant adverse effects on" competition or employment—generally may not take effect until sixty calendar days after an agency submits the rule to Congress or publishes the rule in the Federal Register, whichever is later.[39] The APA requires only a thirty-day delay for other rules. Once these time periods expire, the rules may take effect, even if a CRA resolution is pending. If Congress passes a CRA resolution after the rule takes effect, the rule "shall be treated as though [it] had never taken effect."[40]

B. Application to Biden-Era Regulations

Wary of the CRA, agencies now try to finalize rules sufficiently in advance of a presidential election to prevent the streamlined legislative procedures in the CRA from being available to the next administration and Congress. As relevant here, the Biden Administration finalized new rules almost daily in April 2024 on matters ranging from "forever chemicals" to nursing homes.[41]

Because we do not know yet for certain how many legislative days will pass before the House and Senate will adjourn on January 3, 2025, we cannot precisely calculate which rules will be subject to the CRA in the 119th Congress, but the Congressional Research Service estimates that rules submitted to the House or Senate on or after August 1, 2024 will qualify for the additional review period.[42] That means the sixty-day time limit has already expired for most of the major regulations adopted during the Biden Administration.

Still, according to one estimate, the next Congress could use the CRA to repeal several dozen significant new rules.[43] If the cutoff is August 1, vulnerable rules include construction and

safety standards for manufactured housing and lead and copper in drinking water.[44] Moreover, the Biden Administration (including independent agencies) has yet to finalize some significant rules such as the Department of Labor's heat-stress regulation, the Food and Drug Administration's proposed rules to ban flavored cigars and menthol cigarettes, the FTC's proposed rule to ban junk fees, the SEC's proposed Best Execution rule, the Federal Reserve's proposed rule implementing the Basel III capital requirements, and several of the EPA's proposed rules on "high-priority" chemicals. These pending rulemakings will be vulnerable to the CRA if agencies finalize them between now and January 20, or if an independent agency finalizes a pending rulemaking after January 20 over the Trump Administration's opposition. And repeal under the Act would have the added effect of preventing agencies from readopting substantially similar rules in the future.

IV. Reconciliation

Budget reconciliation is a fast-track procedure by which Congress can pass legislation that affects federal spending. Part of the Congressional Budget Act of 1974, reconciliation permits Congress to pass certain types of budget and tax-related legislation without facing a filibuster in the Senate.[45]

A. Background and Process

Each year, Congress prepares a budget for the federal government by adopting a budget resolution—that is, a resolution adopted by both houses of Congress that sets forth the levels of spending, revenue, and debt.[46] Because the bill is not submitted to the President for signature, the budget resolution itself lacks the force of law.

A budget resolution may include "reconciliation instructions" designed to reconcile existing law with the dictates of the budget resolution. These instructions direct particular congressional committees to propose legislation that will help achieve the resolution's goals, without specifying the changes that should be made.[47] For example, the 2021 budget resolution directed 12 Senate committees and 13 House committees to increase the deficit between FY 2022 to FY 2031 by a specified amount for each committee totaling no more than $1.75 trillion.[48]

When multiple committees are subject to reconciliation instructions, each committee submits its proposed amendments to the relevant chamber's budget committee, which packages together and reports the amendments without substantive changes in a single, consolidated reconciliation bill.[49] There are no immediate penalties if the reconciliation bill fails to satisfy the reconciliation instructions, but the committees generally satisfy them. (If they do not, the reconciliation bill can be amended on the floor.) Notably, the targets set by the reconciliation instructions apply only to the initial proposals from the committees, not to the final bill that results from the reconciliation process.

The procedural rules that govern consideration of reconciliation bills make a profound difference in the Senate, which—unlike the House—does not use bill-specific rules to limit debate time or structure amendments. Most significantly, the rules restrict debate on reconciliation bills to 20

hours and prohibit a filibuster, thus eliminating the need for a 60-vote supermajority to invoke cloture and proceed to a vote on final passage of the bill.[50] The practical effect of this provision is that reconciliation bills can pass the Senate by a simple majority.

The "Byrd Rule" limits the permissible scope of a reconciliation bill in the Senate.[51] Named for the late West Virginia Senator Robert Byrd, the rule generally provides that provisions "extraneous to the instructions to a committee" may be stricken from the reconciliation bill and may not be offered as an amendment.[52] The Byrd Rule defines "extraneous" material to include six types of provisions: (1) provisions that do not affect the budget (unless this is due to offsetting changes to revenues and outlays); (2) provisions that increase the budget deficit, if the committee does not satisfy the reconciliation instructions; (3) provisions that are outside the jurisdiction of the relevant committee; (4) provisions that produce budgetary changes that are merely incidental to the provisions' non-budgetary components; (5) provisions that increase the budget deficit for a year not within the scope of the budget resolution or the reconciliation bill; and (6) provisions that would make changes to Social Security programs.[53] When a senator raises a Byrd Rule objection, the Senate Parliamentarian decides the question, unless the Senate—using ordinary rules—votes to waive the objection.[54] In practice, many of these deliberations take place prior behind the scenes in Byrd Rule sessions between Senate committee staff and the Parliamentarian prior to floor consideration of the bill.

Once the House and Senate have agreed on their respective reconciliation bills, they work out the differences between them to develop a final bill that will be voted on by both chambers. This process typically occurs through a conference committee consisting of members from both chambers.

B. Examples and Implications

Reconciliation has been used more than 20 times since 1980 to achieve results favored by both major parties. In 2001 and 2003, for example, Congress used reconciliation to enact tax cuts proposed by President Bush; in 2010, Democrats used it to enact a portion of the Affordable Care Act ("ACA"); the first Trump Administration used it to enact the Tax Cut and Jobs Act; and in 2022, Democrats again used reconciliation to enact the Inflation Reduction Act.[55] There is no requirement that reconciliation be used to decrease the deficit.

Because it precludes a filibuster in the Senate, reconciliation is an attractive tool for a congressional majority to accomplish certain economic objectives, like revising tax rates and changing mandatory spending programs.[56] Indeed, the reconciliation process was used by the Republican Senate during the first Trump Administration and congressional Republicans to pass the TCJA and the Republican majority will likely try to use it again to extend those cuts. The reconciliation process could also be used to adjust spending on veterans and even to repeal some aspects of the ACA, as House Republicans voted to do in 2016.[57] But it is not a filibuster cure-all. The Byrd Rule sharply limits the types of provisions that may be enacted through the reconciliation process, and while the boundaries of the rule are subject to interpretation—making the Senate Parliamentarian's role an important one—the limitations it imposes are

meaningful. Ultimately, the reconciliation process is best viewed as having the potential to secure significant changes to relatively narrow areas of U.S. law and policy.

V. Appointments and Confirmations

In light of changes to the filibuster over the last decade, President-elect Trump will need only a simple Senate majority to confirm his judicial and executive branch nominees. Senate Democrats reinterpreted Senate rules in 2013 "so that [most] federal judicial nominees and executive-office appointments could advance to confirmation votes by a simple majority of senators, rather than the 60-vote supermajority" previously required to defeat a filibuster.[58] Republicans expanded the interpretation in 2017 to allow Supreme Court nominees to be confirmed by a simple majority.[59] And both parties have recently modified the "blue slip" tradition that required senators from the state where there is a vacancy to sign off on judicial nominees for courts of appeals; although the parties still expect consultation between the White House and senators from the vacancy state, they will call nominees to a vote even if a senator does not return a blue slip. By contrast, both parties have continued to observe the tradition for judicial nominees for district courts, with the result that as a practical matter individual senators from the state where there is a vacancy still can block district court nominees.

For much of President Biden's term, the Senate was evenly divided between Democrats and Republicans. Thus, President Biden often needed the votes of every single Democratic senator, plus Vice-President Harris's tiebreaking vote, to confirm his nominees. Beginning next year, Republicans will control the Senate with at least 53 seats, giving President-elect Trump more leeway to confirm his choices on a purely partisan basis even if he loses the votes of three members of the Republican party.

VI. Reversing Course in Pending Regulatory Challenges

In the case of final rules that are already subject to legal challenge in federal court, whether a new administration can or is likely to opt not to defend a previous administration's final rule depends on a number of factors. A new administration may choose not to appeal a ruling invalidating its predecessor's final rule or, on rare occasions, concede the legal invalidity of a rule being challenged. The Department of Justice and agencies may also ask federal courts for extensions of litigation deadlines to permit agencies to reconsider their policies; courts are generally more receptive to these extension requests given that they are less susceptible to the charge that the agency is using litigation to bypass the normal requirements of the APA.

If the agency is an independent regulatory agency (such as the SEC, FTC, or Federal Reserve), it is more difficult for a new administration to direct the agency to abandon the defense of existing regulations because, as explained above, the heads of independent regulatory agencies can only be removed "for cause." Still, the new heads and majorities of independent agencies will likely share some of the same goals as the new administration and can decide that they do not wish to defend an existing rule adopted in the last administration. For example, a new majority at the SEC may pull back from the current majority's aggressive approach towards regulation and enforcement of digital assets such as cryptocurrencies. Agencies without independent litigating

authority may need to coordinate with the Department of Justice to achieve that result. And the issue becomes further complicated for Supreme Court litigation, because most independent agencies are required by statute to be represented by the Solicitor General in the Supreme Court and even agencies that have a high degree of independent litigating authority generally must, in that forum, secure approval from the Department of Justice or at least the absence of any objection to proceed.[60]

If the agency is not an independent agency, a new president could direct the agency to refrain from defending a prior administration's regulation. The more likely scenario, however, is that the heads of agencies—independent or not—who are appointed by the new administration might ask the Department of Justice not to defend a rule, and the Department of Justice can agree or refuse. If the Department of Justice agrees not to defend a final rule in a pending legal challenge, it could move for a voluntary remand back to the agency to reevaluate the rule. Courts often grant federal agencies' motions for voluntary remand because they allow the agency to correct its own errors without expending the resources of the court in reviewing a record that may be incorrect or incomplete, or in a case that may be mooted by subsequent agency action.[61] In litigation, it also is possible for a new administration to support a stay of the rule pending completion of the litigation.

Recent administrations have changed the government's position in pending legal challenges to the prior administration's rules. For example, the Trump Administration declined to seek a rehearing after a court vacated the Department of Labor's "fiduciary rule." The Department of Justice dropped its appeal in a dispute between MetLife Inc. and the Financial Stability Oversight Council. During the Bush Administration, the EPA and Attorney General were directed to review Clean Air Act enforcement actions stemming from Clinton-era investigations to determine whether they should be continued. The review resulted in the EPA dismissing enforcement actions (launched by the Clinton Administration) against dozens of coal-fired power plants.[62] The Bush administration prosecutors also changed course from the Clinton administration in the Microsoft antitrust litigation, which reportedly resulted in the company obtaining a more favorable settlement than had been offered previously.[63] In the case of the Biden administration's Non-Compete Rule, Department of Labor Independent Contractor Rule, and other regulations currently being reviewed by federal courts, the Trump administration could use a similar approach and opt to move for a voluntary remand back to the agency to repeal or revise the regulations being challenged.[64]

Still, some Supreme Court Justices have criticized the executive branch for acquiescing to injunctions or vacatur of a prior administration's rules. In one notable example, President Biden's Department of Justice and Department of Homeland Security declined to appeal an injunction invalidating the Trump Administration's so-called Public Charge Rule. The Supreme Court initially granted certiorari to address whether states could intervene to defend the rule, but ultimately dismissed the writ of certiorari as improvidently granted. In a concurrence, Chief Justice Roberts (joined by Justices Thomas, Alito and Gorsuch) expressed concern that a strategy of "rulemaking-by-collective-acquiescence" may allow a new administration to circumvent the APA's requirements for repealing final rules, although he ultimately agreed that

dismissal was appropriate because the specific procedural posture could complicate the Court's resolution of important questions in the case.[65]

Some states have subsequently argued that courts should permit them to intervene in pending cases against the federal government to avoid this problem, and this strategy may repeat itself with Democratic state Attorneys General in the next Trump Administration[66] More generally, states are increasingly seeking to intervene or participate as plaintiffs in regulatory litigation. For example, in 2022, several states with Republican attorneys general sought to intervene in litigation challenging Title 42, a component of the Public Health Service Act of 1944 that enables the Centers for Disease Control director, with approval of the President, to restrict entry of individuals from a country in which there is a communicable disease.[67] States with Democratic attorneys general will likely take a similar approach in the next Trump Administration.

For similar reasons, companies with an interest in *upholding* regulations that are currently being challenged in court may wish to consider intervening as defendants to make it more difficult for the next administration to settle or acquiesce to an adverse ruling. The presence of an intervening defendant can make it more difficult for the government to change positions in the middle of litigation challenging an agency's rule and, even if the government does change positions, an intervening defendant can make it more difficult for the government to prevent a federal court from upholding the rule on the merits.

VII. Executive Orders and Presidential Directives and Memoranda

In recent administrations, presidents have increasingly turned to executive orders and presidential memoranda and directives to achieve certain legislative and regulatory priorities without the assistance of Congress or federal agencies.

A. Executive Orders

Executive orders are presidential directives that have the force of law when they are issued pursuant to a valid claim of constitutional or statutory authority.[68] Unlike legislation and federal regulations, presidents are free to revoke, modify, or supersede executive orders at any time.[69] Indeed, new administrations often begin their terms by acting quickly to revoke previously issued orders. In October 2019, for example, President Trump revoked President Barack Obama's executive order relating to protections for qualified civil service workers.[70] On his first day in office, President Biden issued an executive order revoking a number of executive orders issued by President Trump[71]

President Biden has issued 143 executive orders during his presidency. In his 100-day action plan for his first term, President Trump pledged that he would immediately "cancel every unconstitutional executive action, memorandum and order issued by President Obama" in order "to restore security and the constitutional rule of law."[72] During this year's campaign, he pledged that he would "sign an executive order directing every federal agency to immediately remove every single burdensome regulation driving up the cost of goods."[73] While there has

been much speculation about precisely which executive orders President-elect Trump could revoke, they may include:

- Regulatory Review
    - EO 14094 (directing the Office of Management and Budget to revise how executive branch agencies conduct cost-benefit analyses)
- Economy
    - EO 14036 (directing agencies to take a variety of steps to regulate business's competitive practices)
- Energy and the Environment
    - EO 14008 (rejoining the Paris Climate Agreement)
- Labor and Federal Employment
    - EO 14035, 14091 (implementing plans to improve diversity, equity, and inclusion within the federal workforce)

B. Presidential Directives, Memoranda, and Proclamations

In addition to executive orders, past presidents have used various written instruments to direct the executive branch and implement policy.[74] These include presidential memoranda, directives, and proclamations, which generally are less formal than executive orders and need not be published in the Federal Register unless the President determines that they "have general applicability and legal effect."[75] Like executive orders, presidential memoranda, directives, and proclamations can be undone by new executive actions revoking the prior action.[76]

President Biden has used these instruments, particularly presidential memoranda, to achieve numerous policy goals.[77] For example, in January 2021, President Biden issued several memoranda, including on discrimination in housing and the Deferred Action for Childhood Arrivals ("DACA") program.[78] President-elect Trump may revoke President Biden's presidential memoranda when he assumes office on January 20, 2025, and he is likely to issue some of his own to shape the course of the administrative state during his term.

Conclusion

The tools and strategies we have discussed will be available to President-elect Trump and the likely Republican-controlled Congress in their efforts to halt or repeal regulatory actions undertaken during the Biden Administration, pursue legislative initiatives (such as extending the TCJA), and confirming judges and members of the President-elect's team. Each of these tools is limited in certain respects. For example, an effort to repeal President Biden's core legislative and regulatory enactments—with the exception of executive orders and presidential directives and memoranda, which may be revoked immediately and unilaterally by President-elect Trump—will not be immediate and will require coordination and a multi-pronged approach. However, if

pursued over time, these tools—as we have seen through their historical application—can be effective in furthering the President-elect's agenda.

[1] 3 U.S.C. § 102; 3 U.S.C. § 15.

[2] *See* 3 U.S.C. § 102 note.

[3] Betsy Klein, *What We Know About the Transition So Far*, CNN (Nov. 6, 2024, 11:49 AM), https://www.cnn.com/2024/11/06/politics/what-we-know-about-the-transition-so-far/index.html.

[4] *See* Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies (April 26, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/04/M-24-13-Implementing-the-Presidential-Transition-Act.pdf; Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies (Sept. 6, 2024), https://www.whitehouse.gov/wp-content/uploads/2024/09/M-24-17_2024-Memo-Guidance-on-Presidential-Transition-Planning.pdf.

[5] *See* Dave Davies, *How a Little-Known Organization is Poised to Shape a Second Trump Administration*, NPR (Oct. 30, 2024), https://www.npr.org/2024/10/30/g-s1-30917/how-a-little-known-organization-is-poised-to-shape-a-second-trump-administration.

[6] *See* Memorandum from Reince Preibus to the Heads and Acting Heads of Executive Departments and Agencies, 82 Fed. Reg. 8346 (Jan. 20, 2017, published Jan. 24, 2017) (the "Preibus memorandum").

[7] Memorandum from Ronald A. Klain to the Heads and Acting Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 20, 2021, published Jan. 28, 2021) (the "Klain memorandum").

[8] *Id.*

[9] *Id.*

[10] Preibus memorandum, *supra* note 6.

[11] *Id.*

[12] *Id.*

[13] *See Open Cmtys. Alliance v. Carson,* 286 F. Supp. 3d 148, 152 (D.D.C. 2017); *Pineros y Campesinos Unidos Del Noroeste v. Pruitt,* 293 F. Supp. 3d 1062, 1066-67 (N.D. Cal. 2018).

[14] Klain memorandum, *supra* note 7.

[15] *See* U.S. Gov't Accountability Office, GAO-02-370R, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2001 Memorandum 2-5 (Feb. 15, 2002) ("GAO Report").

[16] *Compare* Securities & Exchange Commission Acting Chairman Laura S. Unger, "What's New in the Land of Regulation?" (Mar. 2, 2001), https://www.sec.gov/news/speech/spch465.htm (announcing plan to defer any rulemaking in light of the Card memorandum); *with* GAO Report at 4-5 (noting that none of the 30 final rules that were issued by independent regulatory agencies (the FCC, Nuclear Regulatory Commission, and SEC) during the period subject to the Card memorandum were delayed).

[17] *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

[18] *See id.* at 502.

[19] *See* 5 U.S.C. § 551 *et seq*. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." *Id*. § 551(5). The APA generally requires agencies to (1) publish a notice of proposed rulemaking in the Federal Register; (2) allow interested parties an opportunity to participate in the rulemaking process by providing "written data, views, or arguments"; and (3) publish a final rule 30 days before it becomes effective. *Id*. § 553. *See also Humane Soc'y v. Dep't of Agric.*, 41 F.4th 564, 575 (D.C. Cir. 2022) (holding that once a rule was "made available for public inspection" through the Federal Register, it "prescribe[d] law with legal consequences," and the "APA require[d] the agency to undertake notice and comment before repealing it").

[20] *Id.* § 553(b)(3).

[21] *Id.*

[22] GAO Report, *supra* note 15, at 6 & app. I.

[23] *See, e.g.*, *Am. Pub. Gas Ass'n v. United States Dep't of Energy*, 72 F.4th 1324, 1339-40 (D.C. Cir. 2023) (Department of Energy failed to show good cause to circumvent APA notice-and-comment requirements); *Regeneron Pharms., Inc. v. United States Dep't of Health & Hum. Servs.*, 510 F. Supp. 3d 29, 45-50 (S.D.N.Y. 2020) (plaintiffs were likely to succeed on the merits in arguing that an agency lacked good cause to implement President Biden's executive orders without using notice and-comment procedures); *Clean Water Action v. EPA*, 936 F.3d 308, 314-15 (5th Cir. 2019) ("the modification of effective dates is itself a rulemaking" that requires notice-and-comment procedures); *Air All. Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018) ("EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits."); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (rejecting the Department of Energy's arguments that its notice delaying a published rule's effective date in accordance with the Card

memorandum was a procedural rule exempt from the notice-and-comment requirements, or that there was "good cause" to not comply with the notice-and-comment requirements).

[24] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015).

[25] *See* 5 U.S.C. §§ 801–808.

[26] *See id*. § 802.

[27] *See* Curtis W. Copeland & Richard S. Beth, Cong. Research Serv., RL34633, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress 1 (2008), *available at* https://www.fas.org/sgp/crs/misc/RL34633.pdf; Diego Areas Munhoz, Biden Vetoes Resolution to Block Labor Board Joint Employer Rule, Bloomberg, May 3, 2024, available at https://news.bloomberglaw.com/daily-labor-report/biden-vetoes-resolution-to-block-labor-board-joint-employer-rule.

[28] Christopher M. Davis & Richard S. Beth, Cong. Research Serv., IN10437, Agency Final Rules Submitted After May 30, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act 1 (2016), *available at* https://www.fas.org/sgp/crs/misc/IN10437.pdf.

[29] Maeve P. Carey & Christopher M. Davis, Cong. Research Serv., R43992, The Congressional Review Act (CRA): Frequently Asked Questions (2021), *available at* https://crsreports.congress.gov/product/pdf/R/R43992.

[30] 5 U.S.C. § 802(a).

[31] *Id.*

[32] 5 U.S.C. § 802(b).

[33] 5 U.S.C. § 802(c).

[34] *Id*.

[35] 5 U.S.C. § 802(d).

[36] *Id.*

[37] 5 U.S.C. § 802(f).

[38] 5 U.S.C. § 801(b)(2).

[39] 5 U.S.C. § 801(a)(3), 804(2).

[40] 5 U.S.C. § 801(f).

[41] 5 U.S.C. § 802(d).

[42] *CRA Lookback Period Currently Estimated to Begin in August 1 Time Frame*, Cong. Research Serv. (Aug. 21, 2024), https://crsreports.congress.gov/product/pdf/IN/IN12408.

[43] *See* George Washington University Regulatory Studies Center, *Congressional Review Act Window Exploratory Dashboard*, https://regulatorystudies.columbian.gwu.edu/congressional-review-act-window-exploratory-dashboard.

[44] *See id.*

[45] 2 U.S.C. §§ 601-608.

[46] *See id*. § 632.

[47] *See id*. § 641.

[48] S. Con. Res. 14, 117th Cong. (2021).

[49] *See* 2 U.S.C. § 641(b).

[50] *See id*. § 641(e)(2).

[51] *Id*. § 644.

[52] *Id*. § 644(a).

[53] *Id*. § 644(b)(1)(A).

[54] *See id*. § 644(e).

[55] *See* Manu Raju, *GOP Targets Budget Process for Tax Reform*, Politico (Jan. 13, 2015), http://www.politico.com/story/2015/01/gop-tax-reform-114201.

[56] Congress addresses discretionary spending separately through the appropriations process.

[57] *See* Jennifer Haberkorn, *Trump Victory Puts Obamacare Dismantling Within Reach*, Politico (Nov. 9, 2016), http://www.politico.com/story/2016/11/trump-victory-obamacare-risk-231090.

[58] Paul Kane, *Reid, Democrats Trigger 'nuclear' Option; Eliminate Most Filibusters on Nominees*, Wash. Post (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; *see also* Valerie Heitshusen, Cong. Research Serv.,

Majority Cloture for Nominations: Implications and the 'Nuclear' Proceedings 4-5 (Dec. 6, 2013), https://www.fas.org/sgp/crs/misc/R43331.pdf ("CRS Nominations Report"). Note that the Senate "did not change the text of Rule XII of the [Senate] Standing Rules," but rather "established a new *precedent* by which it reinterpreted the provisions of Rule XXII to require only a simple majority to invoke cloture on most nominations." CRS Nominations Report*, supra* note 58, at 4-5; *see also id.* at 8- 9 (providing a detailed discussion of the procedures the Senate majority used to set new precedent in relation to consideration of nominations).

[59] Ed O'Keefe & Sean Sullivan, *Senate Republicans go 'nuclear,' pave the way for Gorsuch confirmation to Supreme Court*, Wash. Post (April 6, 2017), https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html.

[60] *See, e.g.*, 12 U.S.C. § 5564(e) ("Appearance Before the Supreme Court") ("The [CFPB] may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau.").

[61] *See, e.g.*, *Ethyl Corp v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24-25 (D.D.C. 2008).

[62] Elizabeth Shogren, *EPA Drops Its Cases Against Dozens of Alleged Polluters*, N.Y. Times, Nov. 6, 2003.

[63] D. Ian Hopper, *New Administration Takes Less Fractured View of Microsoft*, AP, Sept. 7, 2001, *available at* http://cjonline.com/stories/090701/usw_microsoft.shtml#.WDR6k-YrLGh; Jonathan Krim, *Circumstance Had Role in U.S.-Microsoft Deal*, Wash. Post, Nov. 3, 2001, at A21.

[64] Tim Devaney, *14 Obama regs Trump could undo*, TheHill.com (Nov. 12, 2016), http://thehill.com/regulation/305673-14-obama-regs-trump-could-undo.

[65] *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, J., concurring) (quoting *City & County of San Francisco v. United States Citizenship and Immigration Servs.*, 992 F.3d 742, 744 (9th Cir. 2021) (VanDyke, J., dissenting)).

[66] *See, e.g.*, Brief for Petitioners at 4, *Arizona v. Mayorkas*, No. 22-592 (2022).

[67] 42 U.S.C. § 265.

[68] Vivian S. Chu & Todd Garvey, Cong. Research Serv., Executive Orders: Issuance, Modification, and Revocation 1-2 n.3 (Apr. 16, 2014), https://www.fas.org/sgp/crs/misc/RS20846.pdf (quoting Staff of House Comm. on Gov't Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of A Use of Presidential Powers (Comm. Print 1957)); *see also* John Contrubis, Cong. Research Serv., Executive Orders and Proclamations 2 & n.4 (Mar. 9, 1999), http://www.llsdc.org/assets/sourcebook/crs-exec-orders-procs.pdf.

[69] Chu & Garvey, *supra* note 68, at 7.

[70] Exec. Order No. 13897 (Oct. 31, 2019) (revoking Exec. Order No. 13495 (Jan. 30, 2009)).

[71] Exec. Order No. 13985 (Jan. 20, 2021) (revoking Exec. Order No. 13950 (Sept. 22, 2020); Exec. Order No. 13958 (Nov. 2, 2020)); https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/.

[72] *Donald Trump's Contract with the American Voter*, Donald J. Trump for President (Oct. 23, 2016), https://www.donaldjtrump.com/contract/.

[73] Robin Bravender, *Trump Says New Cabinet Official Will "reduce cost of living,"* E&ENews (Oct. 31, 2024), https://www.eenews.net/articles/trump-says-new-cabinet-official-will-reduce-cost-of-living/.

[74] Chu & Garvey, *supra* note 68, at 1.

[75] *See id.* at 1-2 & n.7 (citing 44 U.S.C. § 1505).

[76] Contrubis, *supra* note 68, at 19.

[77] John T. Woolley & Gerhard Peters, *Biden's Use of Discretion*, The American Presidency Project (Feb. 10, 2023), https://www.presidency.ucsb.edu/analyses/bidens-use-discretion.

[78] Presidential Memorandum, Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021); Presidential Memorandum, Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021).

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