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5 Transition Tools Trump Could Use To Implement His Agenda

By **Michael Bopp, Stuart Delery and Matt Gregory** (January 9, 2025, 4:09 PM EST)

When the incoming administration takes office on Jan. 20, President-elect Donald Trump 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.

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This article discusses several of these tools and their likely efficacy and limits. The tools we cover today are: a regulatory moratorium and slowdown, the Congressional Review Act, reconciliation, changed positions in pending legal challenges, and executive orders and presidential directives.

Regulatory Moratorium and Postponement

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As President Joe Biden did at the start of the current administration and as Trump did at the start of his first administration, on Jan. 20, Trump is likely to direct executive branch agencies to freeze pending rulemakings, and recommend that independent regulatory agencies do the same.[1]

He also may request that departments and agencies withdraw proposed rules that have been sent to the Office of the Federal Register 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.

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Independent regulatory agencies in some cases abide by these regulatory moratoria, although they have typically not delayed the effective dates of previously published rules.[2]

In contrast to nonindependent 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 — though an aggressive administration might argue that the president's lack of control over independent agencies is unconstitutional.

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.[3]

The APA specifies only very narrow exceptions to notice-and-comment for legislative rules, including when the agency determines "for good cause" that notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest."[4]

Agencies have typically relied on these exceptions when they have attempted to postpone the effective dates of published rules at the direction of a new administration.[5]

Courts have frequently invalidated these delays as requiring notice-and-comment rulemaking.[6] Of course, a new administration can also reverse or modify the prior administration's rules through the ordinary procedures that govern agency decision-making, including notice-and-comment rulemaking or more streamlined mechanisms.

The Congressional Review Act

The Congressional Review Act enables Congress to enact joint resolutions invalidating new rules adopted by federal agencies.[7] 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.[8]

In practice, if one party holds the majority in both chambers, Congress may be able to move a joint resolution through the legislative process quickly, requiring very little Senate floor time and bypassing a potential filibuster, which is the limiting factor for much legislation. Once Congress passes the resolution, as with other legislation, the president may sign or veto it.

At the start of the first Trump administration, Congress used the CRA to overturn 16 rules, including rules adopted by the U.S. Securities and Exchange Commission, U.S. Department of Education and U.S. 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.[9] As these examples show, the CRA is most likely to be used 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 occur later this month.

The CRA is also helpful in enabling Congress to repeal so-called midnight regulations adopted during the prior administration's final months.

Importantly, if Congress and the president enact 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, which would significantly limit the ability of a future administration to readopt the rule.[10]

Although the CRA can be an effective tool, 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.

Wary of these provisions 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. Although the actual date remains uncertain, the Congressional Research Service estimates that only rules submitted to the U.S. House of Representatives or Senate on or after Aug. 1, 2024, will qualify for the additional review period in the new Congress.[11]

Reconciliation

Budget reconciliation is a fast-track procedure by which Congress can pass legislation that affects federal revenues and spending. Reconciliation permits Congress to pass certain types of budget and tax-related legislation without facing a filibuster in the Senate.[12]

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.[13] 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 directing particular congressional committees to propose legislation that will help achieve the resolution's goals, without specifying the changes that should be made.[14]

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.[15]

The procedural rules that govern consideration of reconciliation bills make a profound difference in the Senate. Most significantly, the rules restrict debate to 20 hours and prohibit a filibuster, thus eliminating the need for a 60-vote supermajority to proceed to a final vote.[16] The practical effect 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.[17] Named for the late West Virginia Sen. Robert Byrd, a Democrat, 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.[18]

The Byrd rule defines "extraneous" material to include six types of provisions, including provisions that do not affect the budget, unless this is due to offsetting changes to revenues and outlays.[19]

Reconciliation has been used more than 20 times since 1980 to achieve results favored by both major parties. In 2010, Democrats used it to enact a portion of the Affordable Care Act; in 2017, the Republicans used it to enact the Tax Cut and Jobs Act; and in 2022, Democrats again used reconciliation to enact the Inflation Reduction Act.[20]

Reversing Course in Pending Regulatory Challenges

In the case of final rules that are already subject to legal challenge in federal court, a new administration can choose not to defend the previous administration's rules.

A new administration may choose not to appeal a ruling invalidating its predecessor's final rule or, on rare occasions, may choose to concede the legal invalidity of a rule being challenged even in the absence of an adverse decision from a court.

The U.S. 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 DOJ 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 an agency to correct its own errors without expending the resources of the court in a case that may be mooted by subsequent agency action.[21]

In litigation, it also is possible for a new administration to agree to a stay of the rule pending a final decision from the court.

For independent agencies, it is more difficult for a new presidential administration to abandon the government's defense of existing regulations. Still, the new heads and majorities of independent agencies will likely share some of the same goals as the new administration and can decide on their own that they do not wish to defend a prior administration's policies.

Some Supreme Court justices have criticized the executive branch for acquiescing to injunctions or vacatur of a prior administration's rules. Concurring with the U.S. Supreme Court's 2022 decision to dismiss its earlier grant of certiorari in Arizona v. City and County of San Francisco, Chief Justice John Roberts — joined by Justices Clarence Thomas, Samuel Alito and Neil 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.[22]

Some states have subsequently argued that courts should permit them to intervene in pending cases against the federal government to avoid this problem.[23]

More generally, states are increasingly seeking to intervene or participate as plaintiffs in regulatory litigation. 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.

Executive Orders and Presidential Directives and Memoranda

In recent administrations, presidents have also increasingly turned to executive orders to achieve certain legislative and regulatory priorities without the assistance of Congress or federal agencies. 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.[24]

Unlike legislation and federal regulations, presidents are free to revoke, modify or supersede executive orders at any time.[25] Indeed, new administrations often begin their terms by acting quickly to revoke previously issued orders and issue new orders.

Biden has issued 143 executive orders during his presidency. In his 100-day action plan for his first term, 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."[26]

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."[27]

In addition to executive orders, past presidents have used various written instruments to direct the executive branch and implement policy.[28] 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."[29]

Conclusion

The tools and strategies we have discussed will be available to Trump and the 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 confirm judges and members of the president-elect's team.

But each of these tools is limited in certain respects and a broad effort to repeal Biden's core legislative and regulatory decisions would take time and require a multipronged approach.

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[1] 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").

[2] 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 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 4-5 (Feb. 15, 2002) ("GAO Report") (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).

[3] 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").

[4] Id.

[5] See GAO Report, supra note 2, at 6 & app. I.

[6] 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).

[7] See 5 U.S.C. §§ 80/1-/208.

[8] See id. § 802.

[9] 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.

[10] 5 U.S.C. § 801(b)(2).

[11] 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.

[12] 2 U.S.C. §§ 601-608.

[13] See id. § 632.

[14] See id. § 641.

[15] See id. § 641(b).

[16] See id. § 641(e)(2).

[17] Id. § 644.

[18] Id. § 644(a).

[19] Id. § 644(b)(1)(A).

[20] 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.

[21] 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).

[22] 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)).

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

[24] 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.

[25] Chu & Garvey, supra note 24, at 7.

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

[27] 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/.

[28] Chu & Garvey, supra note 24, at 1.

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