



From Obama to Trump: Opportunities and Risks in Influencing a New Regulatory and Policy Agenda

December 15, 2016

The Four Tools Available to the Trump Administration:

1. **New, deregulatory rulemakings**
2. **Repeal by Presidential Executive Orders**
3. **“Midnight regulations” options**
4. **Disapproval under the *Congressional Review Act* (for “major” rules only)**



Deregulatory Rulemakings by Agencies Under Trump Administration

New rulemakings are the most common method of deregulation, but they have drawbacks that may lead the new administration to try to work around them:

- **Slow – notice and public comment required.**
- **Allows opponents of the changes time to get organized and present a more effective defense.**
- **Career civil servants will have significant influence over the rule.**
- **Subject to judicial review under the same standards as the regulation it seeks to roll back.**
- **An interpretation changing the agency's construction of the statute is entitled to deference if it is permissible.**
- **The record must support the deregulatory rule, including the agency's consideration of costs, and effects on human health and the environment.**



Executive Orders are useful tools in a deregulatory program, but have limits:

- **Most Executive Orders (EOs) by the President are to the heads of Executive agencies**
 - are only “politically enforceable” by the President against his appointees
- **Most EOs state they do not grant rights to third parties**
 - not enforceable in court
- **Most regulatory statutes delegate authority to the heads of Executive agencies**
 - in most cases the President cannot himself impose changes on regulations; only the agency heads can revoke or modify a rule

HOWEVER:

- **The White House staff has to work with the agency heads to ensure that they comply with the President’s wishes.**
- **There are some EOs that implement authority delegated directly to the President by Congress. *Example: statute allowing the President to establish rules governing federal contractors***



- **The Obama Administration “*Midnight Rules*” procedures are important regulations issued between the election and January 20**
- **Many regulatory agencies are now working with OMB (the Office of Information and Regulatory Affairs) and the White House staff to obtain authority to issue backlogged rules**
- **Bottlenecks: (1) obtaining OIRA approval; (2) getting printed in the *Federal Register* by January 19**



- **A rule must be published in the *Federal Register* to have legal force. Signature by the agency head is not sufficient.**
 - **A published rule can be revised only by adoption of a new rule after notice and comment.**
 - **A rule not published by January 19 can be withdrawn by the new agency head.**
 - **Agency heads have greater authority over published rules whose effective date is after January 20.**

- **The Trump administration will issue an order to agency heads on January 20 directing them to withdraw or stay the effective date of all rules submitted by the Obama administration that have not yet been published.**



Disapproval of Major New Rules Under the Congressional Review Process

- **The *Congressional Review Act* authorizes Congress to overturn a “major” rule by adopting, within 60 business days after its convening, a Joint Resolution of Disapproval that is then signed by the President.**
- **With both political branches under Republican control, the new Congress will try to make greater use of law to overturn major Obama rules promulgated after June 2, 2016 (assuming December 16th adjournment).**
 - **A “major” rule is one that has an annual effect of \$100 million or more on the economy**
 - **Exempt from Senate filibuster**
- **Possible limiting factors:**
 - **Floor time provided for debate of Joint Resolutions of Disapproval in the Senate (10 hours) per resolution**
 - **Competing priorities, intense competition**
 - **“Substantially similar” prohibition**
- **Wildcard: Midnight Rule Relief Act of 2016 (H.R. 5982)**



**Regulations Ripe for Invalidation Under the
*Congressional Review Act***



For Rules Issued:

- **June 2, 2016 – January 3, 2017: “the 2016 Carryover” for “major rules”**
- **Mid-May 2017 is the expiration of the period to invalidate**

Other Dates of Note:

- **Spring 2017: release of the President’s FY 2018 Budget**
- **Mid-March 2017: debt ceiling**
- **April 28, 2017: expiration of current government funding**



Disapproval of Major New Rules Under the Congressional Review Process

Potential Rules Subject to CRA Invalidation:

- Over 100 “major” rules since June 2017
- CFPB: prepaid cards; possible arbitration rules
- EPA: methane emissions for oil/gas, truck emissions, aircraft greenhouse gas, formaldehyde in wood products; municipal landfills
- DOT: drones, rail tank cars
- Energy: appliance efficiency
- Education: For-profit universities, school lunch requirements
- HHS: implementation of ACA; Head Start program requirements; FDA: nutrition labeling
- Procurement: wage & leave for federal workers
- CFTC: swaps rules
- SEC: resource extraction issuers

Rules That May Be Outside the “Window” Based on Fed Reg Publication Date:

- Department of Labor “Fiduciary Rule”: April 8, 2016
- Department of Labor “Overtime Rule”: May 23, 2016
- EPA Clean Power Plan: August 2015



- **Executive Orders**
- **Appointments and regulatory interpretation**
- **Legislative repeal**
- **Federal budget process and appropriations**



Repeal President Obama's Executive Order

- 249 Executive Orders under President Obama
- Trade: NAFTA, TPP
- Healthcare: orders effectuating the *Affordable Care Act (ACA)*
- Immigration: *Deferred Action for Childhood Arrivals (DACA)*
- National security: sanctions relief; interrogations
- Federal contracting: wage; anti-discrimination
- Gun violence: studies, mental illness in background checks

Initiate New Executive Orders

- Cybersecurity
- Regulatory reform: for every new regulation, 2 must be eliminated
- Immigration issues: “sanctuary cities”; visa program investigations



- **Cabinet positions**
- **4,000 jobs**
- **Expiring terms, interim leadership**
- **Regulators**
 - **Removal for cause versus at will or “pleasure of the President”**
 - **Pro-business, pro-growth deregulatory preference**
 - **Reinterpretations are challenging**
- **Supreme Court**



Legislative Repeal

- Invalidate regulations outside of the CRA process
- Repeal the rule or change the statute underlying the regulation
- Usually as part of larger piece of legislation

Example: proposals in the Financial CHOICE Act: Repeal the Volcker Rule and Durbin Amendment

“Power of the Purse”: Appropriations and the Federal Budget

- The President is able to demonstrate presidential priorities in the development and submission of his federal budget to Congress
- Reconciliation may provide expedited treatment
- Appropriations “riders”



Legal and Ethical Considerations



Major changes to federal executive branch gift rules take effect on January 1, 2017 and change how outside sources may engage with government officials.

Examples:

- **Officials must obtain written authorization to attend all widely attended gatherings.**
- **Speakers at widely attended gatherings may accept a separate meal for presenters.**
- **New exception for information materials.**
- **Officials may attend receptions hosted by former employers.**
- **Alcohol is not a “modest item of food or refreshment.”**
- **Social media relationship is insufficient to show gift based on “personal relationship.”**



New Factors to Consider for Declining Permissible Gifts

- **High market value**
- **Timing**
- **Other appearance concerns**



Recent Rule Changes on Federal Employee Interaction with Potential Employers Outside Government

- **Expanded view of situations posing conflicts**
- **More written disclosure**
- **New rules on the use of LinkedIn, online hiring**



- **Contributions to official committees**
- **Hosting private events**
- **Handling tickets for official and unofficial events**



- **What interactions are considered lobbying?**
- **Employee participation – legal and ethical considerations**
- **Confidentiality**



Questions?



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