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Regulations and Potential Presidential Transition

Overview

Presidential transitions in which one party takes over from the other can trigger regulatory activity in both the outgoing and incoming administrations, designed to further each President's policy priorities. Outgoing administrations can issue what are termed "midnight regulations", which are federal regulations promulgated in the lame-duck period of an outgoing President's administration. An outgoing President may attempt to finalize a number of regulations before leaving office. The incoming President can be left with the responsibility of implementing policies that are not aligned with the new administration's agenda. Incoming Presidents do not have easy options for addressing regulations adopted by outgoing administrations.

Rescinding Regulations under the Administrative Procedure Act

As a matter of administrative law, under the *State Farm* doctrine, an agency may only rescind a rule originally promulgated through notice-and-comment rulemaking by: undertaking a new notice-and-comment rulemaking; and providing a rational explanation for why the rule is no longer appropriate.[1] Agencies must not only find a justification that can withstand judicial review to repeal the regulation, but then they must repeat the entire notice and comment rulemaking process, including observing the required public comment period and delayed effective dates. This creates substantial hurdles for an incoming President to use this process to overturn regulations implemented by an outgoing President.

The Executive Branch and Midnight Regulations

If a regulation has yet to become law, the new administration can issue an executive order suspending new regulations that have not yet been finalized. Once a regulation becomes effective, however, it becomes much more difficult to repeal. New presidents can order a "regulatory freeze," which directs agencies to suspend the effective dates of final regulations that have not taken effect and to offer a short defense for each suspension. During the suspension period, the new administration can assess whether the rule should be implemented, modified, or rescinded. The suspension of a rule's effective date often counts as a final agency action, and thus is typically reviewable in court under the Administrative Procedure Act ("APA").

Judicial review may also be an option, as a court striking down a rule often has a similar effect to an agency repealing a regulation through the rulemaking process. Article III courts are required to give agencies a fair amount of deference in their review of the rule, however. Depending on the type of rule, courts will review the rule under either an "arbitrary and capricious" or a "substantial evidence" standard.

Following the two most recent major Presidential elections (2000 and 2008) that resulted in a change in party control, each of the incoming Presidents issued memorandums articulating their approach

[1] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

to the implementation of regulations. The incoming President's Chief of Staff issued a memo addressed to "the Heads and Acting Heads of Executive Departments and Agencies" in which he directed agency action on behalf of the President. President George W. Bush and President Barack Obama's memos were substantially similar in that they instructed agency heads: (1) to refrain from sending any proposed or final regulation to the Office of the Federal Register ("OFR") until a department or agency head appointed by the President after noon on January 20, 2001, reviewed and approved the regulation; (2) to withdraw any regulation already sent to OFR that was not yet published, pending review and approval; and (3) to postpone for 60 days the effective date for any regulation that was published, but not yet effective.[2] On this third instruction, the Obama Administration elaborated that that the 60-day extension was "for the purpose of reviewing questions of law and policy raised by those regulations." If this extension is granted, the agency must immediately reopen the notice and comment period for 30 days to allow interested parties an opportunity to comment. After the 60-day extension, if the rule does not raise substantial questions of law or policy, then "no further action needs to be taken;" but if a rule does raise a substantial question of law or policy, then the agency should "notify the OMB [Office of Management and Budget] Director and take appropriate further action."

On January 21, 2009, OMB Director Peter Orszag issued a supplemental memo with additional guidelines about implementing "paragraph 3" of the January 20, 2009 memo.[3] In deciding whether or not to reopen a rule for the rulemaking process, he instructed the agencies to consider the following factors:

> (1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.[4]

Congressional Review Act

If the President and Congress are aligned, the Congressional Review Act ("CRA") has the potential to be a powerful tool in rescinding recently-promulgated regulations. The CRA was enacted in 1996 and allows Congress to review new federal regulations issued by government agencies and, by passage of a joint resolution, to repeal a regulation.[5] Since enactment it has only been used successfully once to repeal the outgoing Clinton Administration's Occupational Safety and Health

[2] Card Memorandum, 66 Fed. Reg. 7702, 7702 (Jan. 20, 2001); and Emanuel Memorandum, 74 Fed. Reg. 15, 4435 (Jan. 20, 2009).
[3] Orzag Memorandum, Implementation of Memorandum Concerning Regulatory Review, (Jan. 21, 2009).
[4] Id.
[5] 5 U.S.C. §§ 801-808.

Administration ("OSHA") ergonomics rule.[6] As a practical matter, disapproval resolutions will likely only be enacted early in an incoming administration that is controlled by the same party as Congress.

The law stipulates that any agency promulgating a "major rule"[7] must submit a report to each House of Congress and to the Comptroller General that contains a copy of the rule, a concise general statement describing the rule (including whether it is a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. If a disapproval resolution is passed and signed by the President, then the rule "not only becomes of no force and effect, but is treated as if it had never taken effect."[8] Under the CRA, if the President vetoes the disapproval resolution, it may still become law through a Congressional override (which requires a two-thirds vote by both the House and the Senate). Once Congress rescinds a rule through the CRA, the agency may not issue another regulation that is "substantially similar" without subsequent authorization by law. Generally, the joint resolution must be submitted within 60 days after Congress receives the regulation. However, if the regulation is submitted 60 or fewer session days before a Congressional adjournment, the 60 day clock begins on the 15th session day of the next session.

The CRA provides for expedited consideration of disapproval resolutions in the Senate: if the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a petition signed by 30 Senators. The measure is then placed on the calendar, and it is in order at any time for a Senator to move to proceed to the joint resolution. If the Senate agrees to the motion to proceed, debate on the floor is limited to 10 hours and no amendments to the resolution or motions to proceed to other business are in order. The Senate may pass the joint resolution with a simple majority.

There is no similar expediting procedure available in the House. However, when a disapproval resolution is sent from the Senate to the House (or vice versa) the receiving chamber cannot refer the resolution to a committee.[9] The Act also has other safeguards to streamline consideration of disapproval resolutions: first, it prohibits filibusters; second, a resolution can only be enacted as a stand-alone measure; and third, any "determination, finding, action, or omission" is not subject to judicial review.[10]

Recent Use of the Congressional Review Act

While not yet successfully employed in the 113th Congress, Republicans have introduced CRA disapproval resolutions that have been voted on in the House and Senate. Recently, the Ranking Member of the Senate Finance Committee and the Chairman of the House Ways and Means

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[6] 65 Fed. Reg. 68621 (Nov, 14, 2000).

[7] "Any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in— (A)an annual effect on the economy of $100,000,000 or more; (B)a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C)significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." 5 U.S.C. §804.

[8] The Congressional Review Act and Possible Consolidation into a Single Measure of Resolutions Disapproving Regulations, Richard S. Beth, Congressional Research Service, (Jan. 26, 2009).

[9] 5 U.S.C. §802(f)(I).

[10] 5 U.S.C. §805.

Committee wrote jointly to the Government Accountability Office ("GAO"), asking for guidance on recent action taken by the Department of Health and Human Services ("HHS"). Specifically, the GAO was asked to determine whether an "informational memorandum" issued on July 12, 2012 by HHS advising states to apply for waivers under the Temporary Assistance for Needy Families ("TANF") welfare program constituted a "rule" under the Congressional Review Act.

On September 4, 2012, GAO ruled that HHS's "informational memorandum" is considered a rule under the CRA, and as such it must be submitted to Congress before taking effect.[11] The GAO decision stated that "the definition of "rule" in the CRA incorporated by reference the definition of "rule" in the Administrative Procedures Act (APA)", and HHS's memo fell within the APA's definition.[12] The GAO found that the HHS memo is an interpretation of law of general applicability, is prospective in nature, and does not fall within any of the three exclusions for a rule under the CRA. GAO went on to state that the "definition of 'rule' is expansive and specifically includes documents that implement or interpret law or policy," and "we have held that agency guidance, including guidance characterized as non-binding, constitutes a rule under the CRA."

After the GAO report found HHS's memo to be a rule, both Members and Senators quickly acted to introduce CRA disapproval resolutions of HHS's policy.[13] On September 13, 2012, both the House Committee on Ways and Means and the House Committee on Education and the Workforce voted the House disapproval resolution (H.J.Res. 118) out of committee. On September 20, the House approved H.J.Res. 118 by a 250-164 vote.

The same disapproval resolution was received by the Senate Committee on Finance, but no action has been taken by that panel before the Senate recessed on September 22, 2012.

During the 112th Congress, the Senate has voted on resolutions of disapproval under the CRA, with each failing to garner a simple majority for passage:

- On November 10, 2011, the Senate rejected, by a 41-53 vote, S.J.Res. 27, which would have rescinded the Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule;
- Also on November 10, 2011, the Senate rejected, by a 46-52 vote, S.J.Res. 6, which would have revoked the Federal Communications Commission's rule "…relating to the matter of preserving the open Internet and broadband industry practices"; and
- On June 20, 2012, the Senate rejected, by a 46-53 vote, S.J.Res. 37, which would have rescinded the EPA's Mercury and Air Toxics Standards for electric utilities.

Conclusion

New Presidents have few simple options for rescinding regulations that were finalized by outgoing administrations. While the Congressional Review Act allows for review and repeal of regulations, the successful use of this process requires cooperation by the legislative and executive branches, and action must be taken within the statutory deadlines.

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[11] GAO, Letter to The Honorable Orrin Hatch and the Honorable Dave Camp, B-323772, Sept. 4 2012.
[12] 5 U.S.C. §551(4).
[13] H.R.J. Res 118, 112th Cong. (2012); S.J. Res. 50, 112th Cong. (2012).