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Regulatory Update

Regulations and Presidential Transitions

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. 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. An incoming President faces significant challenges in rescinding regulations that were adopted and finalized before the end of the prior administration.

Options for Incoming Administrations

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.

A 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 During the suspension period, the new administration can assess whether the rule should be implemented, modified, or rescinded.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 is therefore typically reviewable in court under the Administrative Procedure Act ("APA").

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

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Judicial challenges can also seek to overturn regulations, as a court striking down a rule often has a similar effect to an agency repealing a regulation through the rulemaking process. Under the *Chevron* doctrine, courts give agencies a fair amount of deference in their review of the rule, however.[2]

Bush and Obama Administration Memos

Following the two most recent major Presidential elections (2000 and 2008) that resulted in a change in party control, each of the incoming administrations issued memorandums articulating their approach to the implementation of regulations. The incoming Presidents' Chiefs of Staff issued memos addressed to heads of departments and agencies, in which they directed agency action on behalf of the President. The Bush and Obama Administration memos were substantially similar in that they instructed agency heads to: (1) 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 20th, reviewed and approved the regulation; (2) withdraw any regulation already sent to OFR that was not yet published, pending review and approval; and (3) postpone for 60 days the effective date for any regulation that was published, but not yet effective.[3] On this third instruction, the Obama Administration asked agency heads to "consider" postponing the effective dates of covered rules, and 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 were granted, the agency was required to 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 was found to not raise substantial questions of law or policy, then "no further action" would be required; but if a rule did raise a substantial question of law or policy, then the agency was directed to "notify the OMB [Office of Management and Budget] Director and take appropriate further action." Both the Bush and Obama Administration memos provided for "emergency" exceptions for regulations addressing health or safety issues.

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.[4] 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

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984).
[3] Card Memorandum, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001); and Emanuel Memorandum, 74 Fed. Reg. 15, 4435 (Jan. 26, 2009).
[4] Orszag Memorandum, Implementation of Memorandum Concerning Regulatory Review, (Jan. 21, 2009).

relied; and (8) whether the final rule found adequate support in the rulemaking record.[5]

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.[6] Since enactment it has only been used successfully once to repeal the outgoing Clinton Administration's Occupational Safety and Health Administration ("OSHA") ergonomics rule.[7] 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"[8] 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 "would be deemed not to have had any effect at any time."[9] 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 Senate 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.

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[5] Id.
[6] 5 U.S.C. §§ 801-808.
[7] 65 Fed. Reg. 68621 (Nov, 14, 2000).
[8] "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.
[9] The Congressional Review Act: Frequently Asked Question, Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis, Congressional Research Service, (April 17, 2015).

There is no similar expediting procedure available in the House of Representatives. 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.[10] 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.[11]

Recent Use of the Congressional Review Act

Given Republicans' control of the both the House and Senate since the beginning of 2015, Congress has passed several disapproval resolutions under the CRA, but has failed to override any of the President's vetoes:

- On June 22, 2016, the House failed, by a 239-180 vote, to override the President's veto of H.J.Res. 88, which would have repealed the Department of Labor's rule related to the definition of the term fiduciary.
- On January 21, 2016, the Senate failed to invoke cloture, by a 52-40 vote, on the President's message for S.J.Res. 22, which would have nullified the U.S. Army Corps of Engineers and the Environmental Protection Agency's ("EPA") rule relating to the definition of "waters of the United States" under the Clean Water Act.
- On December 18, 2015, the President vetoed S.J.Res. 24, which would have rescinded the EPA's rule requiring states to reduce carbon dioxide emissions from existing fossil fuel-fired electric generating units. No action has been taken to override the veto.
- Also on December 18, 2015, the President vetoed S.J.Res. 23, which would have nullified the EPA's rule establishing new source performance standards under the Clean Air Act. No action has been taken to override the veto.
- On March 31, 2015, the President vetoed S.J.Res. 8, which targeted the National Labor Relations Board's rule relating to representation case procedures. No action has been taken to override the veto.

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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[10] 5 U.S.C. §802(f)(1).
[11] 5 U.S.C. §805.

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