ROLLBACKS AND REPEALS: HOW A NEW ADMINISTRATION EFFECTUATES POLICY CHANGES

Date: 18 December 2024

US Policy and Regulatory Alert

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When a new president is elected, the incoming administration often engages in an intense review of its predecessor's policy actions, particularly when there has been a shift in party control. This process typically begins during the presidential transition, long before Inauguration Day. Claiming a political mandate to implement the policy goals it campaigned on, a new administration often looks for all viable options to effect immediate change and obtain quick wins by relying on executive authority. As a rule of thumb, what can be done by the president or an administrative agency can usually by undone by those same actors, using the same administrative processes.

EXECUTIVE ACTIONS ON "DAY 1" AND BEYOND

Since the start of the 21st century, there has been a general rise in the use of executive orders (EO) during the beginning of a new presidential administration.[1] Indeed, executive actions are now expected on "Day 1" and throughout its first 100 days.

These EOs are often oriented toward one of three objectives: (1) rescinding EOs issued by the prior administration; (2) ordering agencies to withdraw guidance documents and other sub-regulatory guidance; and (3) issuing EOs to implement new policy mandates. Each of these objectives deserves examination.

First, recission orders. A new president often issues a series of EOs rescinding prior ones that conflict with the incoming president's agenda. Incoming administrations have enacted and rescinded the same policies in a back-and-forth oscillation for decades. For example, in April 1992, President George H. W. Bush ordered federal contractors to notify their employees that they were not legally obligated to join a labor union. During President Clinton's first month in office, he rescinded that EO. In President George W. Bush's first month, he rescinded President Clinton's EO. And in President Obama's first 30 days, he reversed course again, revoking President George W. Bush's EO.[2]

To date, this oscillating pattern has grown more frequent. In President Biden's first 100 days in office, he reversed 62 of President Trump's 219 EOs.[3] President-Elect Trump is likewise expected to rescind a flurry of President Biden's EOs. For example, he has already announced plans to reverse President Biden's EO on regulating artificial intelligence.[4]

Second, withdrawal orders. A new president will also act to direct the agenda of executive branch departments and agencies by ordering the heads of those agencies to rescind, to the extent permitted by law, guidelines,

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policy statements, opinion letters, and other sub-regulatory guidance that implemented the prior administration's policies. The incoming administration is expected to roll back Biden-era guidance documents on issues such as border security[5] and the scope of Title IX discrimination protections.[6]

Third, new policy orders. Incoming presidents may issue EOs as a means of implementing affirmative policy objectives. For example, during the first week of his presidency, President Obama issued EO 13492 to close the detention facilities at the Guantánamo Bay Naval Base.[7]

The executive actions outlined above can often occur quite quickly because every president is free to repeal or modify any executive order and there is generally no particular process required for an agency to rescind a previously issued guidance document or other interpretive rule explaining the agency's then-interpretation of underlying statutes and regulations. No public comment period or notice is required when the guidance being replaced did not have the force of law or was not issued under the procedure required for such rules.

RULE RECISSIONS AND RULEMAKING

A new administration will also have its eye on reversing course on many legislative regulations promulgated by the prior administration, but this will not be as easy as a mere stroke of a presidential pen. Of course, outgoing administrations, like the Biden administration, often push hard to finalize priority rules in the final months of the administration.

If rules are not finalized by the start of a new administration, the incoming administration will frequently press the brakes on all pending rules—the gears of government must stop before going in reverse. This is accomplished through a “regulatory freeze” memorandum by the Office of Management and Budget that is sent to the heads of agencies. The memo imposes a moratorium on regulations that have not yet been published in the *Federal Register*, giving the incoming administration the opportunity to review pending rules before deciding to finalize or abandon them. Such moratoria are ubiquitous, and were used by President Obama,[8] President Trump,[9] and President Biden.[10]

If rules *are* finalized before the close of the outgoing administration, the new administration faces a cumbersome process before it can reverse course. A regulation is finalized when it is placed on public inspection or published in the *Federal Register*.[11] Under the Administrative Procedure Act (APA),[12] the rulemaking procedures that an agency must follow for repealing or amending a regulation are the same as for issuing a new rule.[13] A final rule's effective date will often determine a new administration's authority over it. Under the APA, an executive department or agency must generally provide a period of at least 30 days after a final rule is published in the *Federal Register* before the rule takes effect.[14] The Congressional Review Act (CRA) extends this deadline to 60 days for “major rules.”[15] If a final rule has not yet taken effect, the new administration can suspend the rule. A suspension provides the administration time to determine if the final rule should be implemented, modified, or rescinded. However, because courts view suspension as an analog to amending or repealing a rule,[16] an agency must adhere to the APA's rulemaking requirements to suspend a rule's effective date.[17]

The administrative state is not managed solely by the executive. Congress also enjoys broad legislative power over regulations. In our current political context, the Republicans' congressional control, even with tight margins, may very well help the new administration's agenda. The US Chamber of Commerce estimates that 56 major rules are subject to the CRA in the new Congress, and because Republicans will control both the House and

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Senate in the 119th Congress, there will almost certainly be efforts to overturn certain Biden-era regulations.[18] Congress can pass laws overturning or amending previously issued regulations, issue an "appropriations rider" which attaches conditions on appropriated agency funds, or use the CRA's fast-track provisions to disapprove final rules via joint resolution.[19] These "fast-track provisions" create expedited procedures for a joint resolution of disapproval in the Senate. Under these provisions, committee consideration of a disapproval resolution can be discharged with the signature of 30 senators, and the resolution can only be debated on the floor for up to 10 hours before a simple majority vote.[20]

A NEW ADMINISTRATION'S ABILITY TO CHANGE RULES POST-*LOPER BRIGHT*

The ease with which a new administration can change an existing rule also depends on whether the rule has previously been challenged in court, and whether the court concluded that the current rule was the "best reading" of its enabling statute. The US Supreme Court's landmark 2024 ruling in *Loper Bright Enterprises v. Raimondo* overturned the 40-year-old *Chevron* doctrine that required courts to defer to federal agencies' interpretations of ambiguous statutes.[21] In his first term, 28.1% of President Trump's major agency rules faced legal challenges[22] and 57.1% of those challenges were successful.[23] Biden era rules will now face many similar challenges. It is unclear how *Loper Bright* will now affect the rate at which the Biden administration's challenged rules will be struck down, but in broad strokes, *Loper Bright's* policy-agnostic approach to statutory construction may make it more difficult to shift agency positions under certain circumstances.

Under *Loper Bright*, the single "best" interpretation of a statute will govern, not merely a "permissible" construction by the agency. So, if a court has already ruled that a prior administration's regulation was valid because it represented the best interpretation of a statute (or old *Chevron* Step 1), that interpretation is likely locked in, and the new administration will have difficulty changing it without congressional intervention. But if a prior administration's regulation was untested in court or was upheld because the court merely deferred to the agency's reasonable interpretation of the statute (under the old *Chevron* Step 2), then the new administration will be in a better position to defend its repeal or amendment of the regulation by arguing that its new approach reflects the best interpretation of the statute. While the new administration may have to contend with the stare decisis impact of earlier court rulings, that is not an impossible hurdle to clear. Moreover, if the new administration is successful in defending its chosen interpretation of the statute as the "best" view of the law, that interpretation will become solidified and it will be more difficult for future administrations to repeal Trump-era rules that are based on that best view of the statute.

If a Biden-era regulation was itself challenged and remains in litigation when the new administration takes office, the Trump administration may decide to stay that litigation while it considers repealing or replacing the regulation, as often happens with new administrations.

The full impact of *Loper Bright* on the new administration's deregulation agenda remains to be seen. Some argue that the rollback of Biden's policies that conservatives deem unlawful is supported by *Loper Bright*, while others believe that the decision hamstrings Republican and Democratic administrations equally. For further insight on understanding, anticipating, and navigating the full impact of *Loper Bright*, access our Post-Chevron Toolkit: A New Era for Regulatory Review.

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THE "DEPARTMENT" OF GOVERNMENT EFFICIENCY

On 12 November 2024, President-Elect Trump announced his intention to form the Department of Government Efficiency (DOGE). Despite its title of "Department," DOGE will be an advisory body, not a federal executive department, which can only be created by legislation.

Guided in part by the belief that *Loper Bright* and *West Virginia v. Environmental Protection Agency* renders many current federal regulations unlawful,[24] DOGE intends to pursue mass regulatory recissions, administrative reductions, and cost savings via executive action.[25] Given the procedural limitations surrounding rule recissions, DOGE's task will be difficult. But Congress's broad authority to repeal rules could bolster DOGE's mandate. House Oversight Chair James Comer (R-KY) has established the Subcommittee on Delivering Government Efficiency (also acronymized as DOGE) that will work with the new administration and DOGE advisory body. Sen. Joni Ernest (R-IA) has also emerged as the chair and founder of the Senate DOGE Caucus. DOGE co-chairmen Elon Musk and Vivek Ramaswamy are already meeting with House and Senate leaders. Although DOGE is an advisory body, its ability to highlight what it views as government inefficiencies is likely to trigger significant executive branch and Congressional action, particularly given its high-profile leaders and a mandate strongly endorsed by the incoming administration and GOP Congress.

CONCLUSION

As the Trump administration enters office, it marks a period of pronounced regulatory uncertainty. The Trump administration itself will likely revisit many of the Biden administration's regulations. Congress may exercise its own power over the regulatory environment, attaching conditions or amendments to continued funding. And the judiciary will see challenges to a host of regulations, both new and old, in the wake of *Loper Bright*.

Our Public Policy and Law practice and Administrative Law practitioners are well-positioned to combine a deep understanding of the issues with significant policy experience to develop and implement comprehensive strategies for this new environment.

FOOTNOTES

[1] Congressional Research Service, IF12724, *Executive Orders and Presidential Transitions* (2024), https://crsreports.congress.gov/product/pdf/IF/IF12724.

[2] *Id*.

[3] Jason Breslow, *Biden's 1st 100 Days: A Look By The Numbers*, NPR (Apr. 27, 2021), https://www.npr.org/2021/04/27/988822340/bidens-1st-100-days-a-look-by-the-numbers; Alvin Chang, Francisco Navas, and Daniel Strauss, *Every executive action Joe Biden has signed – and what they do*, The Guardian (Mar. 8, 2021), https://www.theguardian.com/us-news/2021/feb/08/joe-biden-executive-orders.

[4] Greta Reich, Emmy Martin, and Kierra Frazier, *Trump's plans to remake America in 1 week*, Politico (Dec. 3, 2024), https://www.politico.com/news/2024/12/03/trump-week-one-policy-promises-00192436?nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000014c-2419-d9dd-a5ec-34bd68d40002&nlid=630318.

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[5] Donald Trump, *This is how I will end Joe Biden's border disaster on day one*, Des Moines Register (Jan. 3, 2024), https://www.desmoinesregister.com/story/opinion/columnists/caucus/2024/01/03/donald-trump-joe-biden-border-disaster/72093156007/.

[6] Reich, et al., *supra* note 4.

[7] Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

[8] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEM. M-09-08, IMPLEMENTATION OF MEM. CONCERNING REGUL. REV.(2009).

[9] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEM. M-17-16, IMPLEMENTATION OF REGUL. FREEZE (2017).

[10] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEM. M-21-14, IMPLEMENTATION OF MEM. CONCERNING REGUL. FREEZE PENDING REV.(2021).

[11] Congressional Research Service, IF12723, *Presidential Transitions: Midnight Rulemaking* (2024), https://crsreports.congress.gov/product/pdf/IF/IF12723.

[12] 5 U.S.C. § 551 *et seq*.

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

[14] 65 U.S.C. § 553(d).

[15] 5 U.S.C. § 801(a)(3).

[16] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2019); *Air All. Hous.v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018).

[17] 5 U.S.C. § 705.

[18] Congressional Research Service, *supra* note 12.

[19] Chad Whiteman, *Potential CRA Rules for the New Administration* (2024), U.S. Chamber of Commerce (Nov. 15, 2024), https://www.uschamber.com/regulations/potential-cra-rules-for-the-new-administration-2024.

[20] Congressional Research Service, IF10023, *The Congressional Review Act (CRA): A Brief Overview* (2024), https://crsreports.congress.gov/product/pdf/IF/IF10023.

[21] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

[22] *Challenge Rates*, Institute for Policy Integrity (June 21, 2024), https://policyintegrity.org/tracking-major-rules/challenge-rates.

[23] *Presidential Win Rates*, Institute for Policy Integrity (June 21, 2024), https://policyintegrity.org/tracking-major-rules/presidential-win-rates.

[24] *West Virginia v. Environmental Protection*, 597 U.S. 697 (2022).

[25] Elon Musk and Vivek Ramaswamy, *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, WSJ (Nov. 20, 2024), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020.

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