

Potential Paths to Deregulation in 2017

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Following the beginning of the 115th Congress (January 3) and President-elect Trump's inauguration (January 20), the legislative and executive branches will have at their disposal a number of legal methods for following through on their deregulation pledges. Efforts to alter or abandon regulations will fall into three buckets, as described in further detail, below: rules under development, rules made final recently, and longer-standing rules.

Rules Under Development

A Trump Administration can withdraw any proposed rule. As a result, depending on the urgency of a rule, including statutes requiring rulemakings within a certain period of time, regulations not made final before the end of the Obama Administration could be abandoned altogether.

Final Rules

With respect to regulations made final after May 30, 2016¹ as well as those made final prior to that date, Congress has several paths to deregulation, as outlined below. For example, Congress could pass legislation repealing a rule that the president could sign, and Trump Administration officials could revise, replace, or eliminate a regulation, as discussed in further detail below.

Midnight rulemaking, or the phenomenon in which federal agencies issue regulations during the final months of a presidential administration, has increased in recent outgoing administrations for a number of reasons, including because they are working to finish efforts that have been underway for some time, but not yet made final for one reason or another, as well as because it may be difficult to alter or eliminate rules after they have taken effect. New presidents can impose a moratorium on new regulations, sometimes requiring them to postpone the effective dates of certain rules. Any proposed rules not published in the Federal Register as final rules can be withdrawn by a new administration. Once final regulations have been published, however, the only way for a new administration to eliminate or alter them is return to the rulemaking process.

Congress has several options for oversight of midnight and longer-standing rules. Congress has the power to overturn a regulation, deny funding for it, pass legislation that results in the need for a new rulemaking process to otherwise alter or amend a regulation, as well as to amend the statutory authority underlying a regulation. Congress may use expedited procedures outlined in the Congressional Review Act to disapprove regulations, or can add riders to appropriations bills to prohibit funds from being used to implement or enforce regulations.

Though only successful once before, the Congressional Review Act (CRA) allows Congress to overturn a final rule under certain circumstances. The CRA requires an agency to submit a final rule to both houses of Congress as well as the Government Accountability Office before it takes effect. Upon receipt of the final rule, Congress has 60 legislative days, including weekends and holidays but excluding occasions in which at least one chamber is in recess for more than three days, to pass a resolution of disapproval. If the 114th Congress adjourns before the end of the 60-day period, the 115th Congress is afforded an additional 60 days beginning on the 15th legislative day of the new session. The CRA delineates fast track procedures for the Senate to consider a resolution of disapproval. After a Senator introduces a resolution of disapproval, the resolution can be discharged from its committee after 20 days if at least 30 members sign a petition. Once discharged from the committee, any Senator can make a non-debatable motion to proceed to consideration of the resolution of disapproval, which then needs a majority vote to pass. Because each disapproval resolution must be considered alone for ten hours of floor debate, CRA votes, a legislative agenda, confirmations, and appropriations will compete for floor time, which means that Congress is likely to identify a handful of regulations to subject to the process. The House must also consider and pass by a majority a resolution of disapproval within 60 days of receiving the final rule. If both chambers pass a resolution of disapproval and the president signs it (or if it is passed over a president's veto by a two-thirds vote of both the House and Senate), a regulation is struck down and an agency is prohibited from ever promulgating a substantially similar rule without explicit congressional authorization. The Congressional Research Service estimates that rules finalized after May 30, 2016, can be subject to the CRA if Congress considers a resolution of disapproval before the end of March 2017. More than 1,400 rules fall within that window, about 150 of which are significant rules.

Members of Congress can also offer legislation to delay or overturn a regulation, though this approach is subject to a filibuster in the Senate, which may require 60 votes to be successful. Given forthcoming

Republican control of both chambers of Congress as well as the presidency, legislative riders may also play an important role in the appropriations process. A Republican Congress may attach regulatory riders to a fiscal year 2017 omnibus bill in March or to fiscal year 2018 appropriations bills. Another deregulation opportunity may arise in instances in which Congress may use the budget reconciliation process to consider certain tax and spending legislation under an expedited procedure that allows the Senate to pass legislation with a simple majority vote rather than the customary 60-vote threshold.

Rulemaking, the policy-making process for the Executive branch of the Federal government, is governed by the Administrative Procedure Act (APA) and can lead to a new rule, an amendment of an existing rule, or the repeal of an existing rule. An agency may not issue a rule unless it is granted the legislative authority to do so. The rulemaking process is lengthy, encompassing roughly nine steps: initiating events; determining whether a rule is necessary; preparing a proposed rule; White House Office of Management and Budget (OMB) reviewing a proposed rule; publishing a proposed rule; accepting public comments; preparing a final rule, interim final rule, or direct final rule; OMB reviewing a final rule, interim final rule, or direct final rule; and publishing a final rule, interim final rule, or direct final rule. In recent history, litigation often follows final publication of a rule, potentially delaying its implementation further. It remains to be seen how a Trump Administration defends existing regulations embroiled in legal battles. Furthermore, any effort by the next administration to substantively alter existing regulation, or subregulation, is almost certain to be litigious.

The Trump Administration could withdraw or amend immediately sub-regulatory provisions, such as policy statements, guidelines, FAQs, and letters, as well as executive orders. Significantly altering or repealing regulatory provisions, however, requires the administration to follow the APA. A new administration could also ignore or selectively enforce a regulation already in place, but, again, parties with standing may file lawsuits in these instances.

Regulatory Reform

In addition to the above, congressional Republicans are planning to resurrect a number of regulatory reform bills that have been unsuccessful in previous sessions of Congress. With Republican control of the executive and legislative branches of government, deregulation supporters are hopeful that they will be able to increase congressional oversight of the rulemaking process.

Though regulatory reform efforts are not overnight endeavors, we anticipate that Congress will renew its commitment to regulatory reform, both broadly and in terms of targeted reforms. A Republican Congress is likely to exercise increased oversight of, or potentially try to eliminate, various agencies and use the budget process to pressure the executive branch to regulate and operate in certain, more limited, ways at the federal level. Regulatory reform efforts will attempt to address issues related to the proper role of federal and state governments; separation of powers; and public health, safety, and welfare versus free enterprise and innovation.

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