



ML Strategies Legislative Update

FOLLOW US ON TWITTER: [@MLStrategies](https://twitter.com/MLStrategies)

ML Strategies, LLC
701 Pennsylvania Avenue, N.W.
Washington, DC 20004 USA
202 296 3622
www.mlstrategies.com

JANUARY 19, 2017

MLS 2017 Outlook: Regulatory Reform

Following the beginning of the 115th Congress and President-elect Trump's inauguration, 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: rules under development, rules made final recently, and longer-standing rules.

Executive Branch Agenda

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 the CRS-estimated June 13, 2016¹ as well as those made final prior to that date, the executive and legislative branches have several paths to deregulation, as outlined below. For example, Trump Administration officials could revise, replace, or eliminate a regulation, and Congress could pass legislation repealing a rule that the president could sign, as discussed in further detail below.

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:

1. Initiating events;
2. Determining whether a rule is necessary;
3. Preparing a proposed rule;

¹ <https://fas.org/sgp/crs/misc/IN10437.pdf>

4. White House Office of Management and Budget (OMB) reviewing a proposed rule;
5. Publishing a proposed rule;
6. Accepting public comments;
7. Preparing a final rule, interim final rule, or direct final rule;
8. OMB reviewing a final rule, interim final rule, or direct final rule;
9. 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 sub-regulation is almost certain to be litigious.

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 can be difficult to alter or eliminate rules after they have taken effect. New presidents can also impose a moratorium on new regulations, sometimes requiring them to postpone the effective dates of certain rules. As discussed above, 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 the executive branch to eliminate or alter them is return to the rulemaking process.

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.

President Obama has issued 260 executive orders, and the Obama Administration has crafted more than 20,000 new regulations, all of which could potentially be subject to deregulation under the Trump Administration and 115th Congress. In a situation in which President-elect Trump has indicated that he may eliminate two regulations for every new regulation promulgated, top targets for Executive Branch action include existing executive orders, with an initial focus on hiring, immigration, and climate issues, among other areas.

Potential Legislative Activity

Congress has several options for oversight of midnight and longer-standing rules. Congress has the power to overturn a regulation, deny funding for it, or 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. In certain circumstances, Congress may use expedited procedures outlined in the Congressional Review Act (CRA) to disapprove regulations, or can add riders to appropriations bills to prohibit funds from being used to implement or enforce regulations.

Congressional Review Act

Though only successfully once before, the 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 adjourned before the end of a particular regulation's 60-day period, the 115th

Congress is afforded an additional 60 days beginning on the 15th legislative day of the new session as a sort of reset provision.

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 only 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 June 13, 2016, can be subject to the CRA if Congress considers a resolution of disapproval before the end of the spring. More than 1,400 rules fall within that window, about 150 of which are significant rules. Regarding the specific date, it is important to note that CRS estimates are nonbinding, and that House and Senate Parliamentarians are the sole definitive arbiters of the CRA mechanism operation.

Senate Majority Leader Mitch McConnell (R-KY) asked Senate committee chairs to submit CRA requests earlier this month, and he received more than 200 requests. Given time constraints, we anticipate somewhere between 6-25 items to be addressed from the single compiled list. Top targets include the Department of Labor's overtime and blacklisting rules; the Federal Communications Commission's Broadband Privacy Rule; the IRS' re-characterization of some debt as equity; the Department of Education's teacher preparation and state and local accountability rules; the Department of Interior's public land planning, methane emissions, and energy valuation rules; the Environmental Protection Agency methane and municipal landfill rules and aircraft emissions endangerment finding; Department of Energy efficiency rules; Department of Agriculture nutrition standards; Department of Transportation drone regulations; and others.

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 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 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.

Regulatory Reform

In addition to the above, congressional Republicans have already resurrected 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.

One of the House of Representatives' first acts of the 115th Congress was to pass, 237-187, January 5 a measure requiring congressional approval for significant regulations: the Regulations from the

Executive in Need of Scrutiny Act ([H.R. 26, REINS Act](#)). The measure would require any regulation that would have an economic impact of \$100 million or more to pass Congress and be signed by the president. If a regulation failed to do so after 70 days, it would become null and void. The legislation moves to the Senate, where it will receive substantial Democratic scrutiny and opposition in a close chamber. President-elect Trump has pledged to sign the bill if it reaches his desk.

The previous day, the House approved 238-184, the Midnight Rules Relief Act (H.R. 21) for the second time in less than two months. If the Senate passes it and President-elect Trump signs it, the measure will amend the CRA to allow Congress to repeal in a single vote any rule finalized in the last 60 legislative days of the previous administration. Similar to the REINS Act, the bill will face significant opposition from Senate Democrats.

The following week, the House approved, 238-183, the Regulatory Accountability Act (H.R. 5), a package of six previously House-passed bills that would require agencies to adopt lowest-cost options; increase public input in the rulemaking process; repeal the Chevron and Auer legal doctrines, which encourage the courts to defer to agencies' interpretations of laws; prevent billion-dollar rules from taking effect until courts resolve related litigation; require agencies to explain how their actions impact small business; require agencies to publish transparency reports; and require agencies to publish summaries of new rules. This measure will also face an uphill battle in the upper chamber.

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.

Notable Congressional Committee Changes

Sen. Ron Johnson (R-WI) will remain chairman of the Senate Homeland Security and Governmental Affairs Committee and Sen. Claire McCaskill (D-MO) will replace Sen. Tom Carper (D-DE) as ranking member following his ascent to ranking member of the Senate Environment and Public Works Committee. Sens. John Hoeven (R-ND), Steve Daines (R-MT), Maggie Hassan (D-NH), and Kamala Harris (D-CA) will join the committee.

Reps. Jason Chaffetz (R-UT) and Elijah Cummings (D-MD) will remain at the helm of the House Oversight and Government Reform Committee.

While the Senate Homeland Security and Governmental Affairs Committee and the House Oversight and Government Reform Committee serve as the primary oversight committees, we anticipate that other committees will also be significantly involved in the oversight and regulatory reform process as issues pertain to their committees.

* * *

View ML Strategies professionals.

Boston · Washington www.mlstrategies.com