# A Roadmap to Regulatory Strategy in an Era of Hyper-Partisanship

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# Executive Summary

Agencies and the regulations they produce are indispensable to promoting an administration's policy agenda. But to get the most out of regulations and avoid future rollbacks, agencies must navigate a tension between adequately supporting a rule and hastening the rulemaking process.

On the one hand, adequately supporting a rule involves developing legal arguments and evidentiary records necessary to survive legal challenges. Such thorough analyses take time. On the other hand, in an era of partisan tit-for-tat,[1] speed is more important than ever as the threat of rollbacks after a presidential term looms large. These two forces place conflicting pressures on a president at the beginning of a term.

This report discusses how an administration that begins a new term can navigate regulatory strategy. It offers advice on navigating this terrain for White House officials, the Office of Information and Regulatory Affairs (OIRA), transition teams at agencies, and advocates. The report also contains a section on how an incoming administration can roll back the prior administration's rules if there is an inter-party transition. Though it uses the potential for a transition from the Trump administration to a Democratic administration as an illustrative example, the report is relevant for any future inter-party transition where an administration is interested in rolling back the prior administration's regulations. A note on terminology: This report refers to the administration that wins an election as the ***incoming administration***. Second, this report refers to the presidential administration that has just ended as the ***outgoing administration***. And third, the report refers to the administration that will follow the incoming administration four or eight years later as the ***future administration***.

This report lays out several principles that should guide an administration at the beginning of a new term – whether it is Democratic or Republican. To do so, the report draws on lessons from President Trump's first term as president, during which his administration deployed an array of tactics to roll back Obama-era regulations, particularly those promulgated late in the Obama administration's tenure. These rollback tools are likely to be used in future administrations. And that risk places increased pressure on an administration's ability to make long-lasting policy through agencies. If there is an inter-party transition, the incoming administration could also use these tools to undo policies from the outgoing administration. But they must be used in accordance with the law.

As this report explains, the first priority to consider is the threat of future rollbacks: In addition to rollbacks through traditional notice-and-comment rulemaking, there are three time-sensitive tactics that a future administration can use to roll back the incoming administration's policies, all of which the Trump administration deployed: Congressional Review Act disapprovals, litigation strategies like abeyances, and administrative delays. An incoming administration must plan the timing of its rules to mitigate these risks from a future administration as much as possible.

The first time-sensitive tactic, Congressional Review Act disapproval, poses a threat if rules are finalized too late in an administration. This tactic, which typically depends on the same party controlling both houses of Congress and the White House, allows a future administration to roll back any rules that fall within a certain timeframe before the end of the prior administration.

The second tactic, abeyances, poses a threat if the administration's policies are under review in court at the end of its presidential term. In that case, the future administration can seek abeyances in court to put off judicial review, clearing the path for rollbacks through rulemakings.

And the third tactic, administrative delay, poses a threat if rules are not fully implemented—because either effective dates or deadlines for compliance have not yet passed. In that case, a future administration may attempt to delay implementation of the rules. Because the impact of these tools is muted the earlier a rule is promulgated, the possibility that a future administration will undertake all of these rollback efforts places time pressure on the administration's rulemaking from the start of the new term.

The fate of Obama-era regulations during the Trump administration makes these rollback risks apparent. The Stream Protection Rule, promulgated in the last full month of the Obama administration, was repealed under the Congressional Review Act.[2] The Clean Power Plan, promulgated in October 2015 and therefore beyond the reach of the Congressional Review Act, was nonetheless enmeshed in ongoing litigation at the end of the Obama presidency. The Trump administration requested abeyances to stall legal proceedings, which simultaneously blocked the rule from taking effect because the Supreme Court had stayed the rule during litigation.[3] And through serial delays of regulatory implementation deadlines, the Trump administration blocked some Clean Water Act regulations from being implemented.[4]

These risks are now part of the landscape for any new or second-term president. To mitigate the risks of these rollback tools, an administration must take several steps. First, where feasible, an incoming administration should strive to promulgate rules with compliance dates that pass before the end of the presidential term to minimize the risk that a future administration will seek to delay rules that have not been fully implemented. Second, the new administration should work to finalize rules in the first two to two-and-a-half years of the term to increase the chances that any judicial review can be resolved prior to a future administration's taking office. And third, the administration should avoid finalizing rules within the final eight or nine months of a presidential term because of the risk of Congressional Review Act repeals.[5]

The second priority this report addresses is an incoming president's own opportunity to quickly rescind an outgoing administration's regulations. The three rollback tools used by the Trump administration highlight opportunities for reviewing and repealing an outgoing administration's policies. This report reviews those options and explains how they should be deployed.

All these considerations together raise the stakes to complete regulations during the first two years of a presidential term. As this report lays out, an administration has the challenging task of promulgating resilient regulations quickly, while also reviewing and, if appropriate, undoing the regulations of the previous administration. This report is designed to provide guidance on meeting this challenge through highlighting the relevant timing considerations as well as the applicable legal rules.

This report has two parts. First, the report describes the procedural and timing considerations that an administration should keep in mind as it seeks to create *resilient regulations*, striking a balance between thoroughness and efficiency. And second, this report offers advice about how an incoming administration can most efficiently and effectively *reverse the regulatory agenda* of an outgoing administration if desired.

**To issue resilient regulations in the face of rollback threats:**

BEFORE ELECTION DAY:*

- Assemble a team that (in addition to identifying people for top agency positions) develops a list of policy priorities for each agency and determines the contours of regulations to fulfill those policy goals.

DURING THE TRANSITION PERIOD BETWEEN ELECTION DAY AND INAUGURATION:*

- Develop contours of priority regulations for each agency.

AFTER INAUGURATION:*

- Direct agencies to immediately begin filling in the contours of the campaign's priority regulations and select officials to fill the more than 700 top agency positions that require Senate confirmation, keeping in mind that the Senate may also need time to use the Congressional Review Act (CRA).

DURING THE TERM:

- Propose rules as quickly as reasonably possible, minimizing the time between proposal and finalization.
- Push agencies to promulgate rules with shorter compliance deadlines and prioritize rules for expeditious review by the Office of Management and Budget where appropriate.

**If there is an inter-party transition, to roll back the previous administration's regulations:**

BEFORE ELECTION DAY:

- Prioritize regulations for amendment or repeal through agency action or the CRA.

DURING THE TRANSITION PERIOD BETWEEN ELECTION DAY AND INAUGURATION:

- Continue prioritizing regulations for repeal and identify evidence and data that can be used to support a speedy repeal or amendment.

ON DAY 1:

- Issue a stop-work order halting agency work on pending regulations.
- Instruct the Justice Department to seek abeyances in any pending litigation concerning priority regulations, indicating that the new administration is planning to review those regulations.

ON WEEK 1:

- Instruct agencies to extend the effective dates for priority regulations (assuming the effective dates have not passed) by up to 60 days while also opening the original rule up for public comment.
- Work with Congress to deploy the CRA for select priority regulations.
- Instruct agencies to prepare a record sufficient to justify, through notice-and-comment rulemaking, quick and targeted rollbacks of priority regulations. To build these justifications efficiently, agencies should take advantage of analyses underlying prior policies from the Obama era, if applicable.
- Instruct agencies to consider whether it is possible to change policies through adjudications, guidance documents, and nonenforcement notices.

* May only apply to first-term candidate or president

# I. Promulgating Resilient Regulations

The incoming president faces a host of challenges when beginning the process of regulating. Agencies must ensure regulations comply with all the necessary administrative law requirements. But an incoming administration must also face the risk of future rollbacks. Recent administrations have employed an increasingly wide array of methods to undo the previous administration's regulatory agenda, in addition to pursuing more conventional rollback methods. These tools are likely to be used by future administrations and thus place new pressures on a president's ability to promulgate long-lasting regulations.

Three of these methods—administrative delays, litigation strategies like abeyances, and Congressional Review Act disapprovals—are likely to be used after future transitions by a future administration.[6] These strategies can be used primarily to target rules finalized during the last couple of years of a president's term. And given that finalizing a rule, from start to finish, can take as long as two to three years, and often takes longer, these rollback tools present a threat immediately upon the start of a new president's term.[7] On the other hand, as these particular techniques are all time-sensitive, regulations promulgated early enough in the administration's term are beyond their reach—though future administrations may still try to use traditional notice-and-comment rulemaking to roll back prior policies. For that reason, it is more important than ever to capitalize on whatever strategies are available to issue regulations expeditiously to avoid these threats. At the same time, regulations must also be grounded in rigorous legal and economic analysis not only to survive judicial review but also to better resist repeals by a future administration.

At the start of the term, an incoming administration must therefore strike a balance between efficiency and thoroughness in promulgating resilient rules. This Part begins by explaining the substantive requirements of resilient rules and then explains the time pressure that a new president is under due to rollbacks risks, as well as the actions that an administration can take to create and protect regulations from those threats.

## A. Procedural and Substantive Requirements that Govern Rulemaking

Rigorous compliance with the procedural and substantive requirements that govern rulemaking will both assist a new president in surviving potential judicial review and help fortify the rules against future rollback threats.

### *1. Notice and Comment*

Under the Administrative Procedure Act (APA), agencies generally must follow "notice-and-comment" procedures when promulgating rules.[8] Broadly speaking, this means rules must go through a proposal stage and a public comment stage before publication as a final rule.[9] In some cases, agencies may forgo notice-and-comment procedures,[10] but these shortcuts are very limited and may only be available for interpretive rules, general statements of policy, or rules about agency organization, procedure, or practice.[11] Many statutes have their own specific rulemaking requirements that either complement or displace the APA's procedures, but the requirements are usually similar.[12]

Alternatively, an agency may skip notice and comment if the agency has "good cause" to do so. To satisfy that exception, the agency must prove that following notice-and-comment procedures would be "impracticable, unnecessary, or contrary

to public interest."[13] But courts do not defer to agency "good cause" claims.[14] And the standard is difficult to meet. For example, to prove that notice-and-comment processes are "impracticable," agencies must prove that "due and required . . . agency functions would be unavoidably prevented" by such procedures.[15] To prove that the "public interest" prong is met, the agency has to show that the "ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[16]

### *2. Reasoned Explanation Requirement*

Agencies must also consider all of the important factors relevant to a decision and explain why the final rule is consistent with underlying evidence.[17] Failure to follow necessary procedures or offer an adequate explanation for the rule could lead a court to deem the regulation "arbitrary and capricious" and invalidate it.[18]

One specific way to make the justification for rules more thorough is to justify rules through cost-benefit analyses. When a rule is supported by a detailed cost-benefit analysis, any attempt to weaken or repeal that rule will require a similarly robust economic justification; a weakly supported rollback will seem arbitrary and capricious against an economically justified rule.[19] To the extent quantifying costs and benefits is possible, such quantification also strengthens a rule, because a subsequent administration must take the time to contest those quantifications, rather than merely relying on subjective policy preferences.[20]

The Trump administration's experience in attempting to repeal or replace Obama-era rules has revealed the importance of robust cost-benefit analyses to withstanding attacks by a subsequent administration. For example, as part of a rule meant to reduce waste of natural gas from venting, flaring, and leaks on federal lands, the Obama-era Bureau of Land Management conducted a cost-benefit analysis finding the rule would yield $46–$204 million in annual net benefits.[21] In 2017, the Trump administration announced it was delaying the regulation for an indefinite period of time, citing only the compliance costs of the rule.[22] But the U.S. District Court for the Northern District of California vacated the delay because the agency failed to consider the forgone benefits associated with the Obama-era regulation.[23] The administration then issued a second delay, but that delay was enjoined after a new lawsuit, in part because the agency failed to give any reasons for turning its back on the facts underlying its decision to issue the rule in the first place.[24] After those two failed efforts to delay the rule, the Trump administration repealed the rule,[25] but a federal district court also struck down that repeal, citing the agency's irrational treatment of costs and benefits.[26] In other words, by producing a robust cost-benefit analysis to justify its rule, the Obama administration ensured that a future administration would need to overcome that analysis to reverse the regulation.

A robust Obama-era cost-benefit analysis justifying vehicle fuel efficiency standards also hampered Trump-era rollback efforts. To repeal these standards, the Environmental Protection Agency (EPA) and National Highway and Traffic Safety Administration had to explain why a rollback was reasonable, given the net benefits associated with the Obama-era rule. In 2018, the agency produced a proposed cost-benefit analysis supporting repeal, but the analysis showed net benefits only because of illogical assumptions and blatant mathematical errors.[27] Because the initial analysis was so weak, the agency later produced a new analysis showing the replacement rule would lead to net social costs. As that analysis shows, the rollback will cost more in fuel expenses and in lives lost in highway deaths than the benefits that the rollback promises.[28] As a result, the final replacement rule is highly vulnerable to legal challenges.[29]

## B. Rollback Risks and Resulting Time Pressures

As the administration begins the new term (whether it is President Trump's second term or a first term for the Democratic contender), it must also consider that a future administration can use the same three tools that the Trump administration used to roll back Obama-era policies to roll back the incoming administration's policies. Those three rollback strategies depend on the rules being in early stages of development or implementation. Thus, there are specific steps that the administration can take to lower the risk of the tools being used successfully against it. And the administration must consider taking these steps now, because with each of them, time is of the essence.

### *1. Threat of Future Rollbacks Through Delays*

The first strategy that a future administration might use to attack the incoming administration's policies is the strategy of delaying regulations. These types of rules can be termed a "delay," a "suspension," a "postponement," or a "stay."[30] This report will refer to any regulatory action designed to put off compliance as a "delay."

Rules frequently do not take effect on their dates of publication, and instead have later "effective dates" or "compliance dates," either to observe a gap period mandated by statute[31] or to allow regulated entities more time to reach full compliance.[32] Sometimes, a rule may have separate effective dates and compliance dates, with the rule becoming effective on a certain date, but with regulated entities needing to hit compliance milestones at distinct compliance dates. For some rules, a requirement of immediate compliance is impractical because regulated entities need time to make capital investments, redesign operating procedures, or hire or retrain staff. Thus, compliance dates have been known to stretch years into the future.

If the incoming administration promulgates rules with effective dates or compliance dates that have not occurred prior to the future administration's taking office, then the future administration may seek to delay those regulations.

The Trump administration used delays aggressively to keep Obama-era rules from coming into effect. Though the Trump administration faced many successful lawsuits on this front, not all delays were challenged.[33] With some rules, the administration issued very short-term delays and replaced them repeatedly[34] making lawsuits extremely difficult to pursue. In some cases, even though the administration faced lawsuits, the strategy of issuing serial delays helped keep the Obama-era rule from coming into effect[35] while the agency worked on rollback plans.[36]

There are many reasons that delays might prove helpful to a future deregulatory administration, including the fact that a repeal will look more beneficial when compliance costs have not yet been expended.[37] Thus, the administration should assume that it is likely that a future administration will deploy some of these strategies against any rules that are not fully implemented at the end of the president's term.

To ward off the risk of this tool, an administration should ensure that the rule is fully implemented before the end of the concurrent presidential term. If a rule has been implemented, typically an administration will have less incentive to roll it back, because regulated parties have already spent money to comply with the regulations, and that money may not be recoverable.[38] For example, a pollution regulation might require regulated industry to install pollution control technologies by a certain compliance date. If the technologies are installed, then repealing the rule afterward has little upside: More environmental harm may result, and minimal money will be saved, because the industry has already made substantial, unrecoverable investments in compliance.

In sum, to protect regulations from such delays, an administration must aim to **issue rules with effective dates and compliance dates that will occur prior to the end of the concurrent presidential term.** Because compliance dates may occur years after a rule's publication, the administration may need to promulgate some rules in the first two years of the presidential term to ensure implementation.

Future rollback threat: A future administration will seek to delay the effective dates or compliance dates of the president's regulatory priorities.

Recommended timing to mitigate threat: Promulgate rules with compliance dates that pass prior to end of presidential term; may require speedy finalization.

### 2. *Rollback Strategies in the Courts*

The second rollback strategy that a future administration can use is court-related. Perhaps most simply, if a lower court has already struck down a regulation, the administration can instruct the Department of Justice not to appeal the ruling.[39] This step leaves the unfavorable ruling in place and effectively allows courts to do the work of repeal for the administration.

Another way to halt litigation is through requests for abeyances—court orders that put off briefing, argument, and decision in a pending case.[40] Abeyances have traditionally been justified as a way of conserving court resources;[41] if an agency is going to change a regulation anyway, there is arguably little point in a court scrutinizing the rule's merits. Accordingly, administrations have traditionally requested abeyances in cases in which the court has not yet expended significant resources.[42] Abeyances are therefore common in cases that have not yet been briefed, and these requests typically go unopposed.[43]

The Trump administration's use of abeyance requests was much more aggressive, however, as many agencies asked for them late in the litigation process. The Trump administration requested abeyances in several cases that had already been fully briefed and in at least one case that had already been fully argued.[44] These abeyances were frequently opposed, but many courts granted the abeyances all the same.[45]

Abeyances will likely be used by a future administration in a similar way. The Justice Department lacks the legal authority to change an agency's policy position and generally disfavors changing the government's litigation position absent a modification or repeal by the agency.[46] A future administration therefore cannot simply order its Justice Department to reverse course in ongoing litigation, but must await agency action. Abeyances allow a future administration to avoid unfavorable court decisions that might preclude the future administration from reshaping a rule according to its own policy goals.[47] In that way, abeyances give agencies flexibility to rescind or modify a rule.[48] Abeyances also give agencies more time to rescind or modify a rule if the regulation was stayed by a court prior to the change in administrations. An abeyance keeps the court-ordered stay in place and thus further delays the rule from taking effect. Even if an abeyance is not granted and litigation continues, the Justice Department could take no position in response to a party's request to stay the rule that the administration wants to roll back.[49]

To avoid these outcomes under a future administration, a president must aim to promulgate regulations early enough so that litigation is completed prior to the end of the concurrent presidential term. The incoming administration should consider the need to go through litigation both at the trial court level as well as on appeal. Because litigation at just one

level of review can take more than a year, and many challenges will likely be appealed, it is reasonable to assume that litigation over a rule will last at least 1.5 years. Thus, agencies should **promulgate rules within the first 2.5 years of a presidential term** to minimize the risk of these rollback efforts through litigation techniques. Even with this timing, some cases could still be in litigation at the end of a presidential term—particularly if a case reaches the Supreme Court—but for most rules, promulgation within the first 2.5 years of a term is a good rule of thumb.

Future rollback threat: Future administration declines to appeal decisions striking down rule or requests abeyances to stall judicial review of the rule.

Recommended timing to mitigate threat: Finalize rule within first 2.5 years of presidential term to allow time to complete litigation prior to end of term.

### 3. *Threat of Future Rollbacks in Congress*

Another tool that Congress can use to roll back regulations is the Congressional Review Act (CRA).[50] This statute allows Congress to roll back regulations within a certain window of time if a bare majority of each house of Congress votes to do so and the President agrees.[51] Because of these requirements, the CRA has historically only been useful when the Senate, House of Representatives, and Presidency were all controlled by the same party, and following a change in the control of the Presidency.

But if the two branches of Congress line up with the President, a couple of features make the CRA a potent tool for repealing the previous administration's regulations. In particular, the statute's precise specifications on how resolutions are brought to the floor for consideration and on how debate is limited effectively bypass the Senate's standard parliamentary procedures and so remove the threat of a filibuster. As a result, the Senate can pass a resolution disapproving an agency final rule by a simple majority, rather than a 60-vote filibuster-proof majority.[52] Thus, the main procedural constraint on the CRA is a requirement for 10 hours of debate in the Senate for each disapproved rule.[53] The Trump administration took advantage of these flexibilities and worked with Congress to repeal 14 Obama-era regulations using the CRA.[54]

But the CRA applies only to regulations promulgated relatively recently. Under the statute, Congress typically has 60 days in which to disapprove a regulation.[55] When Congress begins a new term, for any regulations whose 60 days have not yet expired, the clock is reset, and Congress is allowed 75 additional legislative days to review.[56] Because Congress does not meet every day, and because of peculiarities about how official adjournments can affect the counting of "legislative" days, 60 legislative days can cover a period much longer than 60 calendar days. As a result, a new administration together with Congress can repeal rules that were finalized several months before the end of the previous administration's term.[57] When President Trump came into office, the Congressional Research Service estimated that Congress could target any completed rules submitted to Congress for disapproval on or after June 13, 2016.[58] Based on current estimates, an incoming administration may be able to target Trump-era rules going back as far as mid-May 2020.[59]

Thus, to protect regulations from repeal through the CRA, the administration should **aim to finalize regulations roughly eight or nine months before the end of a presidential term.**

Future rollback threat: A future administration and Congress use the Congressional Review Act to undo regulations issued within the final several months of the previous term.

Recommended timing to mitigate threat: Finalize rules before the final eight or nine months of a presidential term.

This section has laid out time-sensitive rollbacks that the incoming administration must anticipate. Because rules take so long to issue,[60] the threat of rollbacks requires a president to frontload regulations in the first two years, to the extent possible. Given these demands and the substantive requirements that an incoming administration must comply with, the next subsection provides specific guidance for how to create resilient regulations that balance speed with thoroughness.

## C. Steps to Shorten the Timeline for Promulgating Thorough Rules

An administration can take several steps to promulgate thorough rules more quickly. These steps are discussed below.

First, an administration should take all steps available to propose rules early in a presidential term. Proposing rules earlier means that they can be finalized earlier, better protecting them from time-sensitive rollbacks by a future administration. Because resources are finite and not all rules can be prioritized, the administration should set priority regulations and ensure these rules are proposed quickly.

Second, agencies should aim to **shorten the time between proposing a rule and finalizing it**. Agencies must honor statutory terms, if applicable, that require minimum periods for public comment, and should ensure the public has adequate time to comment, particularly for complex rules. But agencies should avoid unnecessary delays that result from failing to publish all support documents on regulations.gov with or in advance of the proposal, and from tardy public hearings that further push back comment deadlines. To the extent that agencies have the flexibility to allocate resources to respond to comments on priority rules more quickly, agencies should do so. Similarly, once the substance of a rule has been finalized, agencies should work with the Federal Register to publish those rules as quickly as possible, to hasten the rule's effective date and start the clock on the CRA. The time between publication of a rule on an agency's website and in the Federal Register varies significantly,[61] so an administration should close this gap for priority rules if possible.

Third, agencies could **shorten compliance deadlines** in regulations to ensure that regulated parties must comply with the regulation before another administration gains control. This approach must be balanced with other legal requirements. If deadlines seem unreasonably short, the rule could be vulnerable to lawsuits claiming that the rule is arbitrary and capricious because regulated entities do not have enough time to comply with the rule.

Fourth, the president could **ensure the most important regulations are prioritized for review by the Office of Management and Budget**, an office within the White House. This review ensures that agencies consult one another when necessary and also analyzes the economic and technical soundness of agency rules prior to their finalization.[62] To prevent such review from unduly slowing down the promulgation of time-sensitive regulations, the incoming administration should ensure that the relevant agencies work together before the process with the Office of Management and Budget even begins, and should advise the Office of Management and Budget about which rules to prioritize.

Fifth, if a president has certain policy goals that cannot be prioritized during the first presidential term—either because of a lack of resources or because of political sensitivity that complicates reelection—the president's team should **develop rules as fully as possible so that they can be published in the Federal Register almost immediately after reelection**. This approach must be balanced against the risk of leaks.

There are other political steps that the incoming president should also consider to help avoid the risk of future rollbacks. Presidents should invest time in campaigning for their party's candidates in the Senate and House of Representatives. Doing so is an investment in the president's regulatory legacy because the election of sympathetic legislators will better shield regulations from the CRA. As previously discussed, the CRA requires the cooperation of both chambers of Congress to roll back regulations from the previous administration, and therefore typically depends on control of the House and the Senate.[63] And as a third of senators face elections every two years,[64] a president has an opportunity at each midterm election to ensure supportive senators are elected.

### Steps an Incoming Administration Should Take to Issue Thorough Rules Quickly

To make the balance between speed and thoroughness easier, agency mobilization should begin as early as possible in a presidential campaign, with the following steps:

- BEFORE ELECTION DAY: Assemble a transition team to develop a list of policy priorities for each agency, so that the transition team can begin determining the contours of regulations to fulfill those policy goals (while also searching to fill top agency positions).
- DURING THE TRANSITION PERIOD BETWEEN ELECTION DAY AND INAUGURATION: Continue developing priority regulations for each agency.
- AFTER INAUGURATION: Direct agencies to immediately begin filling in the contours of the campaign's priority regulations, select officials to fill the more than 700 top agency positions that require Senate confirmation, and work with the Senate to prioritize confirmation hearings, keeping in mind that the Senate may also need time to use the CRA.
- DURING THE REST OF THE PRESIDENTIAL TERM: Propose rules as quickly as reasonably possible, with short timelines between proposal and finalization. Push agencies to promulgate rules with shorter compliance deadlines, and prioritize rules for expeditious review by the Office of Management and Budget where appropriate.

In sum, a well-prepared administration should take steps to promulgate more regulations more quickly, using considerations laid out in this report. It is of course unlikely that the incoming administration will be able to promulgate all regulations early enough in a presidential term to avoid time-sensitive rollbacks. Limited administrative resources and political considerations will prevent some regulations from early promulgation. This reality makes it all the more important that administrations develop regulatory priorities early. Even if the incoming administration must finalize rules later, thus leaving some regulations more open to rollbacks by a future administration, the administration should make reasoned decisions about which rules to leave vulnerable.

# II. Undoing an Outgoing Administration's Policies

If there is an inter-party transition, in addition to promulgating its own regulations, an incoming administration will likely wish to roll back regulations from the outgoing administration. Rollback efforts may occur through Congress, the courts, or administrative actions. This Part discusses how each rollback works, as well as each strategy's limitations.

## A. What Congress Can Do

One of the first tools that the incoming administration should consider is the Congressional Review Act (CRA). As discussed in Part I, the CRA allows an administration to roll back rules promulgated within the last several months of the outgoing administration, if a majority of the Senate and House vote to do so.[65] Thus, the CRA is a powerful tool if the same party controls both chambers of Congress and the White House. But Congress only has 75 legislative days to review the previous administration's rules, so Congress must act quickly to deploy the CRA.

Disapproval under the CRA means the defeated rule is "treated as though such rule had never taken effect," and the previous regime takes its place.[66] Thus, the administration should consider whether the previous regulatory landscape is acceptable before undoing a rule through the CRA.

The incoming administration should also consider the fact that the CRA strikes down not only the specific regulation in question, but also future regulations that are "substantially the same," unless specifically authorized by subsequent legislation.[67] This extended ban may be a liability in some cases, because the incoming administration may wish to replace a rule with its own distinct but similar regulation. Even if the administration does not have these concerns, members of Congress necessary to form a coalition may. For example, in 2017, the Senate rejected using the CRA to strike down an Obama-era Department of Interior rule regulating methane pollution at mining facilities.[68] The vote was 51-to-49, and Senator John McCain, one of the decisive votes against using the CRA to disapprove the rule, cited his concern that the action would block any similar regulations in the future.[69]

Despite those concerns, the CRA's extended ban on similar regulations may ultimately not present a meaningful hurdle to similar rules. There is no case precedent about what constitutes a rule that is "substantially the same" under the statute. But it is likely that the incoming administration can prove that a future regulatory rule that adds new protections is not "substantially the same" as a deregulatory rule issued by the prior administration to take away those protections. The substantial differences in methodology and end goals will support an argument that the rules are different enough for purposes of the CRA.[70] Moreover, some courts may be unwilling to hear challenges to agencies promulgating similar rules, in the same way that some district courts have found that agency compliance with other CRA procedures is unreviewable.[71] If that is the case, then challengers will be unable to enforce the CRA's ban on similar regulations in court.

Use of the CRA must be balanced against other Congressional priorities. As discussed previously, although CRA repeals cannot be filibustered, the CRA nonetheless allows for up to 10 hours of Senate debate.[72] Senate hours spent repealing rules under the CRA are hours that could otherwise be spent confirming presidential appointees. Even with this tradeoff, given the successful use of the CRA by the Trump administration, it makes sense for an incoming administration to encourage Congress to prioritize CRA use for at least some high-priority rules. Of course, by using some time for CRA

disapprovals, the selection of competent acting agency heads becomes that much more critical, as acting heads will steer agencies while longer-term heads wait to be confirmed by the Senate.

In the case of an incoming administration, regulations promulgated in May 2020 or later will likely be vulnerable to the CRA.[73] The exact cutoff of the CRA's reach depends on how many legislative days are scheduled in 2020, because the CRA can reach only those regulations promulgated within the last 60 legislative days of the previous term.[74]

An incoming administration can take several steps to make the most of the Congressional Review Act.

BEFORE THE ELECTION:

- The transition team should identify a list of priority regulations to be rolled back if the CRA becomes available.

AFTER THE ELECTION:

- The incoming administration should push Congress to begin using the CRA as early as possible in its term, assuming a cooperative Congress.
- The incoming administration should collaborate with Congress to prioritize which regulations are repealed under the CRA.

## B. What the Justice Department Can Do

The incoming administration should also consider options available in court. For example, if a court has already struck down a regulation targeted for repeal,[75] the incoming administration could instruct the Department of Justice not to appeal the ruling. In so doing, the incoming administration can avoid revitalizing a rule already felled by the courts. Relatedly, if an intervening third party appeals a ruling, the Justice Department could decide not to enter the appeal to defend the government's rule.

A more complicated decision concerns how to handle cases in which a court has not yet ruled. The Department of Justice generally disfavors changing its position mid-litigation unless the agency involved has formally changed its position through rulemaking, and as discussed above, rulemaking takes time.[76] A quicker way to halt litigation is through abeyance requests that put off briefing, arguments, or decisions in litigation, giving agencies time to rescind or modify a rule, render the litigation moot, and avoid an unfavorable court decision.[77] Better still, if the regulation is stayed by a court prior to litigation, an abeyance further delays the rule from taking effect.

The prudence of invoking an abeyance may depend on whether the administration anticipates a judicial decision that aligns with the new administration's agenda. As an illustration, under the Trump administration, the Justice Department allowed a challenge to a Department of Labor rule to proceed in the Fifth Circuit, perhaps anticipating that the court would agree with the Trump administration's own interpretation and strike down the previous rule—as indeed happened.[78] By contrast, the Department sought and received an abeyance in the D.C. Circuit litigation of the Clean Power Plan.[79] This abeyance helped the Trump administration avoid a possible judicial decision that could have upheld the regulation—blocking the administration from citing illegality as a reason for subsequent repeal.[80] In addition, because the Supreme Court had issued a stay, the abeyance kept the Clean Power Plan from going into effect, and bought the agency time to repeal the rule.[81]

Keeping these considerations in mind, the incoming administration should consider deploying abeyances broadly and ambitiously. These abeyances will allow the agencies time to repeal or replace the underlying Trump-era rules and ensure that agencies have flexibility in their justifications for their repeals.

To take advantage of the power of abeyances, an administration should take the following steps soon after coming into office:

- Do not appeal cases that have struck down the outgoing administration's rule.
- Instruct the Justice Department to request abeyances in all pending cases, excepting possibly cases in which courts are highly likely to issue a decision aligned with the incoming administration's position.

## C. What Other Executive Agencies Can Do

An incoming administration has many agency-level tools at its disposal to roll back a previous administration's regulations.

An incoming administration can:

- Issue stop-work orders
- Promulgate delay, repeal, or replacement rules through notice-and-comment rulemaking
- Promote new legal positions through adjudication

These approaches involve varying degrees of time and resources. Some of the less labor-intensive solutions, like stop-work orders, may also have more limited applicability or effectiveness than more labor-intensive approaches, like notice-and-comment rulemaking. Therefore, the less labor-intensive approaches may be good short-term solutions while an agency works on longer-term repeal and replacement through more labor-intensive strategies.

### *1. Pull Back on Non-Final Rules Through Stop-Work Orders and Implement Legal Delays*

For rules issued very recently by an outgoing administration—by the Trump administration, for example—the incoming administration should issue a stop-work order to instruct agencies to stop work on rules under development.[82] Stop-work orders may apply to rules in various stages of development: rules that have not yet been finalized, proposed or final rules currently under review by the Office of Management and Budget, and proposed or final rules that have not yet been published in the Federal Register. The incoming administration should issue stop-work orders instructing agencies to cease work on all of these phases of rulemaking.

An administration may detail in a stop-work order exactly what steps agencies should take, but the goal of stop-work orders is to prevent the completion of the previous administration's rulemakings.[83] A stop-work order can be achieved through a single memorandum to all agencies, as has been used by incoming administrations for decades.[84] Such a memorandum would instruct agencies to stop work on all unfinalized regulations, withdraw regulations from review under the Office of Management and Budget, and recall regulations from the Office of the Federal Register. The memorandum could contain a carveout to continue work that agencies deem essential, though agencies should be required to explain such judgments, and the administration should be able to override them.

For rules that have not yet reached the publication stage, a stop-work order should:

- Halt agency work on the previous administration's rules, so that they can be reviewed by the current administration and abandoned if appropriate.
- Withdraw rules from review by the Office of Management and Budget.
- Withdraw rules that have not yet been published by the Federal Register.

Stop-work orders may also target rules *already* published in the Federal Register with effective dates that have not yet passed.[85] A broad policy of delaying rules should be used with great care, however, because courts have held that delays amount to substantive changes[86] and that agencies must go through notice and comment and provide a reasoned explanation for the changed course.[87] As such, delays that are too long are vulnerable to court reversals.

Nonetheless, short-term delays could be useful for rules with effective dates that are too soon after inauguration to allow typical notice-and-comment rulemaking. For the purpose of the 2020 election, regulations with effective dates prior to March 21, 2021 will generally fit this description. For such rules, the administration may order agencies to extend effective dates for a short period—up to 60 days—while the agency reconsiders the rules.

The Obama administration used this strategy. That administration issued a stop-work order to delay the effective dates of all rules not yet in effect by 60 days, but also instructed agencies to immediately open the delayed rules for 30 days of public comment.[88]

The incoming administration should also consider whether any major rules[89] whose effective dates have ostensibly passed were miscategorized as non-major rules and therefore avoided the requisite 60-day period between publication and effective date.[90] If such rules exist and 60 days have not yet passed since their publication, agencies can cite this failure as a reason to extend the effective date. The incoming administration should use these short-term delays if, and only if, it cannot promulgate a new rule through notice and comment amending the rule that needs to be rolled back promptly. And at the end of the 60-day delay, the agency should use the public input to finalize a change to the rule.

For finalized rules with effective dates that have not yet passed, an administration should:

- Instruct agencies to delay rules by 60 days and immediately open up the original rule and the delayed effective date to public comment.

### 2. *Promulgate Regulations Delaying, Repealing, or Replacing Rules*

A more labor-intensive strategy to roll back regulations is notice-and-comment rulemaking, but promulgating targeted rollbacks should be doable quickly. Repealing and replacing rules through notice-and-comment rulemaking has no temporal limitation and therefore has the benefit of working for any past rule, even if its effective date has already passed.[91] And some types of rollbacks require notice-and-comment rules. Notice-and-comment regulations are necessary to change a policy or statutory interpretation that the outgoing administration announced in its own notice-and-comment rule. This includes delays to a rule, because courts have equated such reinterpretations to revising the rule itself.[92]

### a. Delays Through Notice-and-Comment Rules

As discussed in Part I, **notice-and-comment rules must satisfy the procedural and substantive guidelines of the Administrative Procedure Act.**[93] **This applies to rules announcing delays, repeals, or replacements.** Agencies must provide a "reasoned explanation" for changing course, show awareness of a changed position, and give "good reasons for the new policy."[94] If the prior rule relied on an evidentiary record or cost-benefit analysis as justification, then the delay, repeal, or replacement rule must explain its reasons for "disregarding facts and circumstances that underlay or were engendered by the prior policy."[95] Accordingly, the agency should give an explanation for changing course that relies on substantive merits reasons, rather than simply a desire to reconsider.

Courts since the Reagan era have interpreted delays as substantively changing or repealing rules; thus, judges have required agencies to go through the Administrative Procedure Act's notice-and-comment rulemaking when issuing delays.[96] Failing to do so can result in the delay's invalidation. For example, many of the Trump administration's delays were struck down in court for failure to follow notice-and-comment rulemaking procedures.[97] In addition to following notice-and-comment requirements, agencies must also offer a reasoned explanation for a decision to delay a rule.[98]

Agencies may be allowed to skip notice-and-comment rulemaking to delay the effective date of regulations pending judicial review, but only in limited circumstances. For example, an agency may be able to invoke 5 U.S.C. § 705, the Administrative Procedure Act provision allowing delay of effective dates.[99] This tactic has an advantage over stop-work orders in that agencies clearly have the authority to pursue this type of delay, and the delay is not limited to a short period of roughly 60 days. But section 705 is not available if the effective date has already passed.[100] In addition, the agency will need to make sure to comply with the provision's other requirements. For example, there must be pending litigation and the agency must show that the delay is necessary for the courts to review the original rule in a "just" manner.[101]

Along similar lines, some statutes have specific rulemaking procedures that must be followed when delaying regulations governed by those statutes. For example, under the Clean Air Act's rulemaking provisions in 42 U.S.C. § 7607, agencies have discretion to delay a rule during a pending reconsideration proceeding.[102] But that delay authority is very strictly limited and allows agencies to issue only a three-month suspension.[103] And some statutes have specific deadlines that agencies cannot contravene through delays.[104] For example, the Northern District of California struck down the Trump administration's attempt to delay a formaldehyde emissions rule because the applicable statute required the emissions standard to go into effect within 180 days after regulations announcing the standard were promulgated.[105] The Trump administration's delay, the court found, would impermissibly delay the standards beyond this deadline.[106]

### b. Interim Final Rules

The Administrative Procedure Act allows agencies to skip notice-and-comment rulemaking in certain circumstances to produce "interim final rules," which take effect without notice and comment. Under 5 U.S.C. § 553, agencies may issue interim final rules only for "good cause," which involves showing that notice-and-comment is "impracticable, unnecessary, or contrary to public interest."[107]

Courts review this "good cause" exception narrowly, so promulgating interim final rules involves some inherent risk. If a court disagrees with an agency's "good cause" claim for short-circuiting full notice-and-comment rulemaking, it may vacate the interim regulations. And judicial opinions about what constitutes good cause are not always predictable. For example, a tight statutory deadline to promulgate regulations has supported forgoing notice-and-comment in some appellate courts,[108] but others have explicitly noted that this factor alone is not sufficient to support "good cause."[109]

But if the agency decides to go the route of an interim final rule, courts have instructed that the public interest exception can be met "in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[110] For example, the exception was met when "air travel security agencies" would have been otherwise "unable to address threats posing 'a possible imminent hazard to aircraft, persons, and property within the United States,'" or when "a rule was of 'life-saving importance' to mine workers in the event of a mine explosion."[111] An agency should thus support a "good cause" claim by emphasizing the imminent potential harm the public would suffer if the rule were to take effect during the 30 to 60 days required for notice-and-comment procedures. In particular, the agency should explain that the time-crunch is not of the agency's own making (i.e., an impending administrative deadline the agency set for itself).[112]

In addition, the Supreme Court has recently emphasized that "[f]ormal labels aside," interim final rules may replace proposed rules without meeting the "good cause" standard if the interim final rules "contain[] all of the elements of notice of proposed rulemaking as required by the APA."[113] In the case in question, Justice Thomas, writing for the majority, explained that the government's interim final rules fulfilled the function of a proposal by describing the legal authority under which the agencies acted and the substance of the regulation.[114] By providing the public an opportunity to comment on the interim final rule and then promulgating non-interim final rules, the agency functionally satisfied the requirements of notice-and-comment rulemaking.[115] Thus, the Court determined that it did not have to reach the question of whether the agency satisfied the good cause standard.[116]

Note that the agency will also have to justify why its interim rule should take effect immediately, rather than waiting the requisite 30- or 60-day period before effectiveness as prescribed by the APA[117] and the Congressional Review Act.[118] The good cause exceptions to the required effective dates are similar, but not necessarily identical, to the good cause exceptions for notice-and-comment requirements.[119]

Building off the precedent discussed above, the agency could minimize risk from the "good cause" standard by promulgating a proposed rule at the same time, or allowing the interim final rule to function as a proposal, before proceeding quickly to a final rule. If the agency finalizes the rule quickly enough, then the interim final rule will be replaced and the good cause standard moot by the time a court rules on the changed policy. However, interim final rules would still remain susceptible to preliminary injunctions, and for that reason, including a compelling "good cause" explanation in the interim final rule is still prudent.

In sum, because of the "good cause" requirement, interim final rules are not appropriate for all situations, but where applicable, they offer an efficient way to delay, repeal, or replace regulations. The next subsection discusses how agencies can go through full notice-and-comment rulemaking to roll back regulations effectively and efficiently.

### c. Strategies for Effective and Efficient Rollbacks Through Notice-and-Comment Rulemaking

Whether going through full notice-and-comment rulemaking or issuing shorter-term delays or an interim final rule, an incoming administration can strategically target rules for rollbacks by targeting both vulnerable rules and rules where a previous same-party administration established a record supporting the incoming administration's goals. For example, if a Democratic administration wins election in 2020, that administration may want to revitalize some Obama-era policies. Rather than rebuilding the record from scratch, an incoming Democratic administration could make use of records developed under Obama-era agencies that support the original, Obama-era rules.

### i. VULNERABLE RULES

Some rules may be particularly vulnerable to rollbacks and a new administration should consider targeting them when appropriate.

***Rushed rules:*** First, agencies may have an easier time delaying, repealing, or replacing regulations that were rushed during the last days of the previous administration.[120] Such rules may have skipped notice-and-comment rulemaking, making them susceptible to APA challenges.[121] Alternatively, the agencies may have gone through the necessary APA procedures, but may have rushed the legal and factual analyses undergirding the regulations, making their justifications easier to attack in a delay or repeal rule.

***Legal issues with the rule:*** Second, the incoming administration should target rules that seem inconsistent with court rulings.[122] For example, if a rule arguably misinterpreted court opinions, or if subsequent court opinions invalidated the rule, an agency has ready-made legal justifications to support a rule changing or delaying the regulation.[123]

***Outdated analysis:*** Third, rules with outdated legal or factual justifications make relatively easy targets for rollbacks. If agencies gain new information or circumstances have changed since the rule was finalized, the agency can more easily justify postponing or replacing the rule.[124] In other cases, a finalized rule may have been "stale" to begin with, perhaps because of an unusually long gap between the public's opportunity to comment and finalization.[125] The Trump-era Department of Agriculture, for example, delayed and then withdrew an interim final rule published in December 2016, partly because the only opportunity to comment had occurred six years earlier, in a 2010 notice of proposed rulemaking.[126] The Eighth Circuit upheld this agency decision.[127] Such weaknesses in the original rule provide justifications the agency can cite for postponing and reviewing it.

### ii. RULES WITH PRIOR RECORDS

Another approach that the incoming administration can use is to rely on Obama-era analyses to support a rollback. In circumstances in which the rule being repealed or replaced was itself a repeal or replacement rule, agencies should incorporate any economic analyses completed for the rule that preceded the Trump-era rule. The original Obama-era rule may have included economic and legal justifications that could bolster attacks on the Trump-era's subsequent repeal or replacement. Agencies can save time and strengthen their reasoned explanations by expressly casting a change to the rule as a "follow-on" rulemaking to the Obama-era rule, incorporating the factual findings of that original rule.[128] At least one circuit court has interpreted this framing as evidence that the agency had enough information to consider all of the relevant decisionmaking factors required by statute—in that case, the Clean Water Act.[129]

### iii. OTHER CONSIDERATIONS

To support a valid rollback, the incoming administration should also ensure that its rollback rule adequately fits within the factors mandated by applicable statutes. If the governing statute allows the agency to consider "other factors" when promulgating regulations, the agency may present the concern underlying its delay or repeal as a permissible "other factor" to be considered.[130] In the same Clean Water Act case referenced above, EPA cited "serious concerns about the availability and affordability of the technology" required by the suspended rule as an issue requiring further consideration.[131] The Fifth Circuit found this reason a permissible "other factor" to be considered, justifying the delay.[132]

Agencies must also avoid pitfalls related to economic analyses. If a delay, repeal, or replacement rule involves a cost-benefit analysis, agencies must pick the correct baseline for comparison with the new rule. The baseline is the agency's "best assessment of the way the world would look absent the proposed action."[133] And a baseline should incorporate the anticipated costs and benefits of the original rule, even if some of those costs and benefits have not yet occurred.

Of course, if the agency has new information or if an intervening event has made the cost-benefit analysis of the original rule obsolete, the agency must adjust its analysis. In that case, the agency must calculate what the costs and benefits of the rule would be were it to stay in place, taking into account this new information or circumstance.[134] By comparing this baseline to the costs and benefits of the new delay, repeal, or replacement rule, agencies can get an accurate picture of the net costs or benefits of switching from the old rule to the new one.

Failure to accurately set the baseline may invite successful legal challenges under the APA. For example, under the Trump administration, EPA attempted to delay a rule preventing chemical disasters, but failed to take into account all of the forgone benefits associated with delaying this protective rule.[135] Due at least in part to this failure, the D.C. Circuit invalidated the delay.

To effectively change dates, or repeal and replace rules, an administration should do the following:

- Before inauguration, the transition team should develop a list for each agency of regulations to prioritize for repeal or replacement through notice-and-comment rollbacks.
- During the transition period after election, transition teams should continue this work and begin to develop explanations and a record that supports delay, repeal, or replacement rules.
- After inauguration, agencies should begin as quickly as possible to build on these explanations and, if necessary, develop evidentiary records and economic analyses to support a repeal or replacement of the old rule.
- For rules with fast-approaching effective dates or compliance dates, at the end of a 60-day stop-work order, issue a new rule (based on the comments received during the delay) delaying the rule further. If appropriate, the agency should consider using an interim final rule to delay the rule.
- Agencies should repeal and replace rules as quickly as reasonably possible to prevent regulated parties from investing significantly to comply with the prior rule, thereby giving rise to reliance interests.

### 3. Promote Legal Positions Through Adjudications and Nonenforcement

Agencies can announce new legal positions through one-off adjudications that may require fewer resources and less time than notice-and-comment rulemaking.[136] For certain types of decisions, agencies may receive petitions to make specific regulatory decisions directly. Some examples include deciding whether a group of employees at a specific company can unionize[137] or whether to honor a specific arbitration agreement.[138] Even if a previous administration interpreted a statute in a particular way in the context of past adjudications, a new administration may change its interpretation, effecting policy change without notice-and-comment rulemaking.

An agency may also announce policy changes through guidance documents. Less formal than notice-and-comment rules, guidance documents can inform the regulated community of an agency's new interpretation or enforcement priorities,

thereby realizing policy change.[139] Some types of changes in agency practice are exempt from APA requirements across agencies, including interpretive rules, general statements of policy, or rules governing agency organization, procedure, or practice.[140] Such rules may be good candidates for revision through guidance documents.

There may be other options as well. For example, tools used to implement regulations, like "information-collective devices," are not subject to notice-and-comment rulemaking requirements.[141] In one Trump-era case, the U.S. District Court for the District of Columbia blessed the Department of Housing and Urban Development's withdrawal of an Obama-era tool used by municipalities to measure progress in fair housing.[142] Although petitioners argued repealing the tool would substantively change how the agency's regulations were enforced, the court found the tool, which consisted of a series of questions to be answered, to be an information-collection device not subject to the APA.[143]

In some cases, an administration can realize policy change quickly by declining to enforce regulations from the previous administration. For example, the Trump administration announced its intention not to enforce against Health and Human Services grantees for discriminating on the basis of sexual orientation on the same day the administration proposed a rule to the same effect.[144] By issuing the notice of nonenforcement, the Trump administration was able to alert the regulated community to the policy change immediately. And by proposing a rule, the administration could lay the groundwork for longer-term change. The incoming administration should similarly identify policies from the outgoing administration that it does not intend to enforce and announce that intention.

To make a policy change without notice-and-comment rulemaking, agencies should:

- Consider taking advantage of opportunities to meaningfully change policy positions through adjudications, guidance documents or nonenforcement notices.
- Begin notice-and-comment rulemaking processes, if reinterpreting a notice-and-comment rule is necessary.

## 4. Recommendations for a New Administration to Use Administrative Tools

Based on the tools discussed above, an incoming administration should consider the following steps to roll back a previous administration's regulations.

To roll back rules early in development, the administration should issue a stop-work order that requires:

- Halting work on rules that have not yet been finalized
- Withdrawing rules from review by the Office of Management and Budget
- Withdrawing pending rules from the Office of the Federal Register
- Delaying the effective date of published rules by a short period while also opening up the original rule for comment

To effect longer delay of a rule's implementation, agencies should:

- Establish an evidentiary record as quickly as possible and legal justification to support a change in the rule's deadlines or effective date which can go through notice and comment. The rule should rely on substantive reasons for the change, not just a need to reconsider.
- Issue an interim final rule delaying the rule in cases where appropriate. At the same time as the interim rule, issue a proposed rule seeking comment on the original rule and on the delay.

To reverse Trump-era legal interpretations that were not promulgated through notice-and-comment rulemaking, agencies should consider the following options:

- Issue nonenforcement notices.
- Announce new interpretations in adjudications.
- Announce new interpretations in guidance documents, if interpretations are not already codified in regulations.
- Replace tools that substantively affect how agency regulations are implemented, if such tools operate as information-gathering tools outside the APA's scope.
- Change agency organization, procedures, or general statements of policy, which are exempt from notice-and-comment rulemaking requirements.

To quickly repeal or replace finalized Trump rules, agencies should:

- Use the original record from the original, Obama-era rule, if applicable, to support a rule proposing to repeal the Trump-era rule.
- Incorporate unfavorable rulings, if applicable, against other Trump-era repeal rules as evidence that this Trump repeal rule was illegal.
- Ensure the record and analysis have been updated as needed due to new information and circumstances.
- Ensure the repeal rule uses the correct baseline for economic analyses.
- Propose, allow for comment, and finalize rules as quickly as possible, while maintaining thorough analyses defensible in court.

# Conclusion

An administration must begin before election day to lay the groundwork to develop its regulatory agenda and promulgate it. Accordingly, any transition team should begin planning early to prioritize regulations for immediate promulgation and choose target regulations to repeal or replace. The more planning is done by day one of the presidency, the more effective these strategies will be.

# Endnotes

[1] Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 48–54 (2019).

[2] *See* Steam Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016); Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama's Legacy*, Wash. Post (last updated Jan. 20,2018), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.85df9b299a47 (tracking rollbacks including the Stream Protection Rule by Congressional Review Act).

[3] *See* 80 Fed. Reg. 64,662 (Oct. 23,2015); Dana Nuccitelli, *The Trump EPA Strategy to Undo Clean Power Plan*, Yale Climate Connections (June 21, 2019), https://www.yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/.

[4] Clean Water Action v. EPA, 936 F.3d 308, 311–12 (5th Cir. 2019).

[5] Administrations should also take steps outside of the traditional rulemaking process. For example, a president should use political capital to support the campaigns of legislators and successors who will protect an administration's regulatory legacy, as discussed in Part I.C.

[6] For practical reasons, successful use of the Congressional Review Act generally requires the same party to control both chambers of Congress and the presidency, but such consolidated control is not an unlikely event during inter-party presidential transitions. Since the passage of the Congressional Review Act, inter-party presidential transitions have occurred three times: President Clinton to President Bush; President Bush to President Obama; and President Obama to President Trump. In each instance, the incoming President's party also controlled both chambers of Congress. Davis Noll & Revesz, *supra* note 1, at 17.

[7] *See id.* at 55–57 (discussing timeline for promulgation).

[8] 5 U.S.C. §§ 551–59 (2012). A "rule," according to APA definitions, is an agency statement "of general or particular applicability and future effect designed to implement, interpret, or prescribe law." *Id.* § 551(4). Some rules are exempted from notice-and-comment rulemaking, including rules implicating the military or foreign affairs, and rules relating to agency management or personnel, or "to public property, loans, grants, benefits, or contracts." *Id.* § 553(a). Interpretive rules are also exempted from notice-and-comment requirements, unless specifically required by statute. *Id.* § 553(b)(3)(A).

[9] *Id.* § 553.

[10] *See infra* Part II.C.

[11] *Id.* § 553(b).

[12] For example, the Clean Air Act has its own rulemaking procedures, which generally track those of the APA, at 42 U.S.C. § 7607, and the Federal Land Policy and Management Act also has statute-specific rulemaking provisions at 43 U.S.C. § 1712. *See* 43 U.S.C. § 1712(c) (outlining criteria for developing or revising land use plans, including the requirement to "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences" and the requirement to "give priority to the designation and protection of areas of critical environmental concern," among many other requirements). *See also id.* § 1712(f) (instructing the agency to develop rulemaking procedures for land use management). The regulations developed to govern revisions to land management plans can be found at 43 C.F.R. § 1605.5-5, which lists the conditions under which an amendment shall be initiated and discusses how environmental assessments should be handled.

[13] 5 U.S.C. § 553(b).

[14] Bauer v. DeVos, 325 F. Supp. 3d 74, 97 (D.D.C. 2018) (quoting N.J. Dep't of Envtl. Prot. v. EPA, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (describing review as *de novo*).

[15] *Id.* (quoting N.J. Dep't of Envtl. Prot. v. EPA, 626 F.2d 1038, 1046 (D.C. Cir. 1980)).

[16] Cap. Area Immigrants' Rts. Coal. v. Trump, 2020 WL 3542481, at *12 (D.D.C. 2020) (internal quotation marks omitted).

[17] *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29 (1983); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971).

[18] *See* Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2120 (2016) (explaining that a failure to follow procedural requirements of rulemaking, like a failure to provide adequate reasons for a decision, renders a rule arbitrary and capricious); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (describing a failure to examine relevant data as a procedural flaw that can render a rule arbitrary and capricious); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 403 (1971) (explaining that a court reviewed agency action to ensure decisionmaking followed "necessary procedural requirements" and was not arbitrary and capricious).

[19] Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 Duke L.J. 1593, 1628–37 (2019) (explaining the constraining power of cost-benefit analysis on rollbacks and providing examples from failed attempts by the Trump administration to overturn Obama-era regulations).

[20] *Id.* at 1634–35 (describing the Trump EPA's struggle to work around an Obama-era cost-benefit analysis's quantification of wetland benefits, and the Trump rule's resultant vulnerability to lawsuits).

[21] 81 Fed. Reg. 83,008, 83,014 (Nov. 18, 2016).

[22] State v. BLM, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017).

[23] *Id.* at 1122–23.

[24] California v. BLM, 286 F. Supp. 3d 1054 (N.D. Cal. 2018), *appeal dismissed* (9th Cir. No. 18-15711).

[25] 83 Fed. Reg. 49,184 (Sept. 28, 2018).

[26] *See* California v. Bernhardt, No. 18-5712, 2020 WL 4001480, *23–31 (N.D. Cal. 2020) (discussing the agency's failure to appropriately analyze the costs and benefits of repealing the Obama-era rule).

[27] *See* Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, Atlantic (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errorsclouding-its-legal-future/574249/; Antonio Bento, Kenneth Gillingham, Mark. R. Jacobsen, Christopher R. Knittel, Benjamin Leard, Joshua Linn, Virginia McConnell, David Rapson, James M. Sallee, Arthur A. van Benthem & Kate S. Whitefoot, *Flawed Analyses of U.S. Auto Fuel Economy Standards*, 362 Sci. 1119 (Dec. 7, 2018), https://doi.org/10.1126/science.aav1458; Inst. for Pol'y Integrity, Comments on The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986 (proposed Aug. 24, 2018), https://policyintegrity.org/documents/Emissions_Standards_EPA_NHTSA_Comments_Oct2018.pdf.

[28] Press Release, Inst. for Pol'y Integrity, Key Economic Errors in the Clean Car Standards Rollback 1 (Apr. 1, 2020), https://policyintegrity.org/projects/update/key-economic-errors-in-the-clean-car-standards-rollback (discussing how the agency finalized a rule "that shows net costs to society"); Bethany A. Davis Noll et al., Inst. for Pol'y Integrity, Shortchanged: How the Trump Administration's Rollback of the Clean Car Standards Deprives Consumers of Fuel Savings 3 (2020); David Roberts, *Gutting Fuel Economy Standards During a Pandemic Is Peak Trump*, Vox (Apr. 2, 2020), https://www.vox.com/energy-and-environment/2020/4/2/21202509/trump-climate-change-fuel-economy-standards-coronavirus-pandemic-peak.

[29] *See* Matt Stieb, *Trump Administration Pushes Huge Environmental Rollbacks in the Midst of a Pandemic*, N.Y. Mag. (Mar. 30, 2020), https://nymag.com/intelligencer/2020/03/trump-admin-pushes-environmental-rollbacks-during-a-pandemic.html (describing costs of the rule and anticipated court challenges).

[30] *See* Bethany A. Davis Noll & Alec Dawson, Deregulation Run Amok 15 n.8 (2018), https://policyintegrity.org/files/publications/Deregulation_Run_Amok_Report.pdf.

[31] *See, e.g.,* 5 U.S.C. § 553(d) (requiring at least a 30-day period between publication and effective date, with exceptions); 5 U.S.C. § 801(a)(3) (requiring a 60-day delay after submittal to Congress or publication in the Federal Register, whichever is later, before major rules can take effect); Off. of the Fed. Reg., A Guide to the Rulemaking Process 8 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (explaining when rules become effective).

[32] *See, e.g.,* 17 U.S.C. § 160.18 (providing a later compliance date "to provide sufficient time for [regulated parties] to establish policies and systems to comply with the requirements for this part" related to privacy of consumer financial information); Nat'l Archives and Recs. Admin., Document Drafting Handbook 3-7–3-8 (2018), https://www.archives.gov/federal-register/write/handbook [https://perma.cc/GT44-HTGV] (listing different relevant dates to rules, including effective dates and compliance dates).

[33] Davis Noll & Dawson, *supra* note 30, at 10 (listing examples).

[34] Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines for Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sep. 18, 2017) (replacing Postponement of Certain Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005 (Apr. 25, 2017)); Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (replacing Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 1027)); Off-Label Intended Use Rule; Partial Delay of Effective Date, 83 Fed. Reg. 11,639 (Mar. 16, 2018) (replacing Off-Label Intended Use Rule; Delayed Effective Date, 82 Fed. Reg. 9,501 (Feb. 7, 2017)); Medicare Program; Cancellation of Advancing Care Coordination, 82 Fed. Reg. 57,066 (Dec. 1, 2017) (replacing Medicare Program; Advancing Care Coordination; Delay of Effective Date, 82 Fed. Reg. 14,464 (Mar. 21, 2017)).

[35] *See, e.g.,* Clean Water Action v. EPA, 936 F.3d 308 (5th Cir. 2019).

[36] Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 84 Fed. Reg. 64,620 (proposed Nov. 22, 2019).

[37] *See* Davis Noll & Revesz, *supra* note 1, at 43–47 (describing benefits of suspensions to both deregulatory and pro-regulatory administrations).

[38] Connor Raso, *Trump's Deregulatory Efforts Keep Losing in Court—and the Losses Could Make It Harder for Future Administrations to Deregulate*, Brookings (Oct. 25, 2018), https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate [https://perma.cc/L89S-6CV2] (explaining that when regulated

parties invest in compliance they may lose their "appetite . . . to eliminate the rule"); Amena H. Saiyid, *We Already Spent the Money, Keep Air Toxics Rule: AEP, Duke to EPA (Corrected)*, (July 13, 2018), Toxics L. Rep. (BNA), https://www.bloomberglaw.com/document/XBG7N7A0000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001648e8dd62fad769fedd21e0000#jcite [https://perma.cc/PZV4-X9Z7] (explaining that power companies generally can recoup through customer fees only costs that are deemed "prudent" and that rolling back a rule might interfere with those companies' ability to recoup the costs they spent on complying with a now-defunct rule).

39 *See* Dep't of Justice Manual § 2-2.121 https://www.justice.gov/jm/jm-2-2000-procedure-respect-appeals-generally#2-2.121 (explaining steps that must be taken before an appeal).

40 Davis Noll & Revesz, *supra* note 1, at 24.

41 *Id.* at 27.

42 *Id.*

43 *Id.* at 27–29.

44 *See* Order at 2, Dalton Trucking, Inc. v. EPA, No. 13-74019 (9th Cir. May 10, 2017) (granting opposed motion to postpone oral argument in case challenging diesel-engine regulation after all briefs had been filed); Order at 1, North Dakota v. EPA, No. 15-1381 (D.C. Cir. Apr. 28, 2017) (granting opposed abeyance in case challenging carbon dioxide emissions from new and modified power plants after briefing was complete); Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (granting opposed abeyance in case challenging the Clean Power Plan after all briefs had been filed and en banc oral argument held); Order at 1, ARIPPA v. EPA, No. 15-1180 (D.C. Cir. Apr. 27, 2017) (per curiam) (granting abeyance in challenge to EPA's denial of reconsideration in mercury rule after all briefs were filed and when oral argument was less than a month away); Order at 1, Murray Energy Corp. v. EPA, No. 16-1127 (D.C. Cir. April 27, 2017) (granting opposed abeyance in case regarding Obama-era mercury rule after all briefs had been filed); Order at 2, Sw. Elec. Power Co. v. EPA, No. 15-60821 (5th Cir. Apr. 24, 2017) (granting opposed abeyance in case challenging wastewater limits after opening briefs had been filed); Order at 2, Walter Coke, Inc. v. EPA, No. 15-1166 (D.C. Cir. Apr. 24, 2017) (per curiam) (granting opposed abeyance in case challenging EPA's start-up and shutdown rule after briefs had been filed and shortly before oral argument was meant to happen).

45 Davis Noll & Revesz, *supra* note 1, at 29–30.

46 *Id.* at 26. *See also* Donald L. Horowitz, The Jurocracy: Government Lawyers, Agency Programs, and Judicial Decisions 5, 37 (1977); Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 Geo. Immigr. L.J. 271, 291–92 (2002).

47 Davis Noll & Revesz, *supra* note 1, at 24.

48 *See, e.g.,* Order Dismissing Case as Moot, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (dismissing case defending Clean Power Plan as moot in light of repeal by Trump administration during abeyances).

49 *See, e.g.,* Federal Respondents' Resp. to Pets' and Intervenor Pets' Mots to Lift the Stay at 11-15, Wyoming v. Dept. of Interior, No. 16-285 (D. Wy. Mar. 14, 2018) (explaining that the federal respondents "do not oppose a stay of the implementation deadlines of the Waste Prevention Rule"), No. 207.

50 This report focuses on the CRA because of its increased use in recent years and its time sensitivity, which bears on a president's decisions of when to promulgate regulations. But Congress can also repeal policies through appropriation riders or legislation more generally. *See generally* Thomas O. McGarity, *Deregulatory Riders Redux*, 1 Mich. J. Envtl. & Admin. L. 33 (2012).

51 *See* 5 U.S.C. §§ 801–02 (describing President's ability to veto Congress's disapproval decision and explaining the role of each chamber of Congress under the Congressional Review Act, respectively).

52 5 U.S.C. § 802(d)(2); Maeve P. Carey et al., Cong. Research Serv., R43992, The Congressional Review Act: Frequently Asked Questions 1 (2016). Of course, if a future Senate relaxes or removes the rules allowing filibusters, this particular advantage of the CRA's procedure would be reduced.

53 5 U.S.C. § 802(d)(2).

54 Alex Guillén, *GOP Onslaught on Obama's 'Midnight Rules' Comes to an End*, Politico (May 7, 2017), https://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051 (listing each of the rolled back regulations).

55 5 U.S.C. § 801(c).

56 *Id.* § 801(d).

57 Davis Noll & Revesz, *supra* note 1, at 16.

58 *See* Christopher M. Davis & Richard S. Beth, Cong. Research Serv., IN10437, Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress (2016).

59 Dan Goldbeck, *An Update on the Congressional Review Act in 2020*, Am. Action F. (June 24, 2020), https://www.americanactionforum.org/insight/an-update-on-the-congressional-review-act-in-2020/.

60 *See* Davis Noll & Revesz, *supra* note 1, at 55–57 (describing the typical timeframe for issuing new rules).

61 For example, roughly one month passed between the date the Trump administration announced the new fuel economy standards on agency websites and the date it was published in the Federal Register. For the announcement, *see* EPA, U.S. DOT and EPA Put Safety and American Families

First with Final Rule on Fuel Economy Standards (Mar. 31, 2020), https://www.epa.gov/newsreleases/us-dot-and-epa-put-safety-and-american-families-first-final-rule-fuel-economy-standards. For the finalized rule in the Federal Register, *see* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). By contrast, EPA took about three months between announcing its Navigable Waters Protection Rule on its website and publishing it in the Federal Register. For the announcement, *see* EPA, *EPA and Army Deliver on President Trump's Promise to Issue the Navigable Waters Protection Rule – A New Definition of WOTUS* (Jan. 23, 2020), https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-1, and for the rule published in the Federal Register, see The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

62 OIRA, https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp (last visited Jul. 24, 2020).

63 5 U.S.C. §§ 801–02.

64 United States Senate, *Elections*, https://www.senate.gov/reference/Index/Elections.htm (last visited June 9, 2020).

65 *See supra* Part I.B.3.

66 5 U.S.C. § 801(f) (2012).

67 5 U.S.C. § 801(b)(2).

68 H.R.J. Res. 36, 115th Cong. (2017); 163 Cong. Rec. S2852 (daily ed. May 10, 2017).

69 Tom DiChristopher, *John McCain Just Delivered Trump a Rare Loss in His Bid to Roll Back Energy Rules*, CNBC (May 10, 2017), https://www.cnbc.com/2017/05/10/mccain-delivered-trump-a-rare-loss-in-his-bid-to-kill-energy-rules.html [https://perma.cc/F54G-E7S6].

70 Davis Noll & Revesz, *supra* note 1, at 23.

71 *See, e.g.,* Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) (declining to review compliance with the Congressional Review Act in reviewing denial of reimbursement of Medicare depreciation expenses by the Secretary of Health and Human Services); Kansas Nat. Res. Coal. v. Dep't of Interior, 382 F. Supp. 3d 1179, 1185 (D. Kan. 2019) (finding failure to submit rule to Congress unreviewable because of statutory bar on judicial review under 5 U.S.C. § 805); Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) (declining to review amendments of a forest plan by the U.S. Forest Service for compliance with the Congressional Review Act reporting requirement). *But see* Tugaw Ranches v. Dep't of Interior, 362 F. Supp. 3d 879, 883 (D. Idaho 2019) (finding 5 U.S.C. § 805 to be ambiguous in light of statutory text, legislative history, and policy concerns and thus allowing judicial review); United States v. S. Ind. Gas & Elec. Co., IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936, at *11–18 (S.D. Ind. Oct. 24, 2002) (holding that court was not barred from reviewing EPA's compliance with the CRA).

72 5 U.S.C. § 802(d)(2).

73 Dan Goldbeck, *An Update on the Congressional Review Act in 2020*, Am. Action F. (June 24, 2020), https://www.americanactionforum.org/insight/an-update-on-the-congressional-review-act-in-2020/ (noting that Congress met more in June than an initial COVID-19-based prediction anticipated, pushing the deadline back to May 13 from a previous estimate of April 17, thus protecting the SAFE rule and the Redefinition of the Waters of the United States).

74 5 U.S.C. § 801(d).

75 *See*, e.g, California v. Bernhardt, No. 18-5712, 2020 WL 4001480, at *27 (N.D. Cal. July 15, 2020) (vacating the repeal of the Waste Prevention Rule).

76 Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 Neb. L. Rev. 545, 551 (2018) (explaining Justice Department practice of not changing position until agency announces new position through notice and comment).

77 *See, e.g.,* Order Dismissing Case as Moot, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (dismissing case defending Clean Power Plan as moot in light of repeal by Trump administration during abeyances).

78 Chamber of Com. v. Dept. of Labor, 885 F.3d 360, 368 (5th Cir. 2018).

79 Order Granting Abeyance, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

80 Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,523 (July 8, 2019) (claiming Clean Power Plan was illegal and thus repealing it).

81 *See* Order Extending Abeyance, No. 15-1363 (D.C. Cir. Aug. 8, 2017); Davis Noll & Revesz, *supra* note 1, at 25.

82 Davis Noll & Revesz, *supra* note 1, at 46.

83 *Id.* at 5.

84 *See* Memorandum for the Heads of Executive Departments and Agencies, 82 Fed. Reg. 8346 (Jan. 24, 2017) (instructing agencies not to submit any proposed or final regulations to the Office of the Federal Register and to withdraw any rules that had already been submitted to the Office but not yet published); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009) (same); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (same); Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993) (instructing agencies not to send any proposed or final regulation to the Federal

Register for publication until it has been approved by a presidential-appointee); Postponement of Pending Regulations, 46 Fed. Reg. 11,227, 11,227 (Feb. 6, 1981) (instructing agencies to "refrain, for 60 days following the date of this memorandum, from promulgating any final rule").

85 *See* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. at 4435 (instructing agencies to "[c]onsider extending for sixty days the effective date" of regulations that have been published, but not yet taken effect).

86 Envtl. Def. Fund v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983); Nat. Res. Def. Council v. EPA, 683 F.2d 752, 762 (3d Cir. 1982); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981).

87 Nat. Res. Def. Council v. NHTSA, 894 F.3d 95 (2d Cir. 2018) (notice-and-comment violation in delay); California v. BLM, 286 F. Supp. 3d 1054 (N.D. Cal. 2018), *appeal dismissed* (9th Cir. No. 18-15711) (failure to provide a reasoned explanation for delay). *See also* Air All. Houston v. EPA, 906 F.3d 1049, 1065 (D.C. Cir. 2018) ("EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits.").

88 74 Fed. Reg. at 4435–36.

89 The CRA defines "major rules" as those that a) have a $100,000,000 effect on the economy or more, b) result in a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions, or c) have significant effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete globally. 5 U.S.C. § 804(2).

90 5 U.S.C. § 801(a)(3) (requiring major rules to take effect either 60 days after submission to Congress or after publication in the Federal Register, whichever is later).

91 74 Fed. Reg. at 4435.

92 Envtl. Integrity Project v. EPA, 425 F.3d 992, 995 (D.C. Cir. 2005) ("[O]therwise, an agency could easily evade notice-and-comment requirements by amending a rule under the guise of reinterpreting it."); Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment").

93 *See supra* Part I.A and accompanying notes.

94 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *accord* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (holding that where the agency's prior rule had engendered "significant reliance interests" a "summary discussion" explaining a changed position was insufficient).

95 *Fox*, 556 U.S. at 516.

96 Nat. Res. Def. Council v. EPA, 683 F.2d 752, 762 n.23 (3d Cir. 1982); *accord* Envtl. Def. Fund v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final rulemaking normally constitutes substantive rulemaking.").

97 *See, e.g.,* Nat. Res. Def. Council v. NHTSA, 894 F.3d 95 (2d Cir. 2018) (vacating delay for failure to fulfill notice-and-comment requirements); Am. Acad. of Pediatrics v. FDA, 379 F. Supp. 3d 461, 497 (D. Md. 2019) (vacating delay of e-cigarette regulation because of failure to follow notice and comment); Nat. Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5 (D.D.C. 2017) (vacating delay of Entrepreneur Rule as violating notice-and comment requirements).

98 *See, e.g.,* Bauer v. DeVos, 325 F. Supp. 3d 74 (D.D.C. 2018) (finding the Department of Education's delay of Borrower Defense Rule was arbitrary and capricious for failing to provide meaningful reasons for delay).

99 5 U.S.C. § 705; Safety-Kleen Corp. v. EPA, 111 F.3d 963 (D.C. Cir. 1997).

100 *See, e.g.,* Becerra v. U.S. Dep't of Interior, 276 F.Supp.3d 953, 964 (N.D.Cal. 2017).

101 *Bauer*, 325 F. Supp. 3d at 107.

102 42 U.S.C. § 7607(d)(7)(B).

103 *Id.*

104 *See, e.g.,* 15 U.S.C. § 2697(d)(3)(A) (laying out compliance deadlines in Formaldehyde Act).

105 Sierra Club v. Pruitt, 293 F. Supp. 3d 1050, 1058 (N.D. Cal. 2018).

106 *Id.*

107 5 U.S.C. § 553(b).

108 *See, e.g.,* Petry v. Block, 737 F.2d 1193, 1200–03 (D.C. Cir. 1984) (explaining that statutory deadlines are not enough to support a "good cause" finding, but together with the totality of circumstances, like complexity of the task at hand, urgency from Congress, agency diligence and personnel shortages, can meet the good cause standard); Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980) (finding tight statutory deadline and repeated noncompliance on the part of states supported good cause for EPA's promulgation of interim rule for state plans); U.S. Steel Corp. v. EPA, 605 F.2d 283, 287–89 (7th Cir. 1979) (finding tight statutory deadlines and state delays supported good cause for EPA's interim rule guiding state plans).

109 *See, e.g.,* United States v. Cain, 583 F.3d 408, 421–22 (6th Cir. 2009) (finding a statutory deadline cannot support good cause when the agency would have had time to comply with notice and comment and meet the statutory deadline); N.J. Dep't of Envtl. Prot. v. EPA, 626 F.2d 1038, 1046–48 (D.C. Cir. 1980) (finding that EPA could have complied with statutory purpose through notice-and-comment process and that statutory deadline alone was not enough to support good cause); Sharon Steel Corp. v. EPA,

597 F.2d 377, 380 (3d Cir. 1979) (same); U.S. Steel Corp. v. EPA, 595 F.2d 207, 213–14 (5th Cir. 1979) (same).

110 Capital Area Immigrants' Rts. Coal. v. Trump, 2020 WL 3542481, at *12 (D.D.C. 2020).

111 *Id.* (quoting Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012)).

112 *See, e.g., Abraham*, 355 F.3d at 205 ("[Department of Energy issued the emergency order without a chance for public comment because it] wished for more time to 'review and consider[]' the new efficiency standards, and the effective date designated for those standards was imminent. We cannot agree, though, that an emergency of DOE's own making can constitute good cause."); U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979) ("[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception. The deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment.").

113 Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, No. 19-431, 22–23 (July 8 2020), https://d2qwohl8lx5mh1.cloudfront.net/MWUBLSIbIozZa67co2yJcw/content.

114 *Id.* at 23.

115 *Id.*

116 *Id.* at 26 n.14.

117 5 U.S.C. § 553(d).

118 5 U.S.C. § 801(a)(2)(B)(3).

119 *See* Riverbend Farms, Inc., v. Madigan, 958 F.2d 1479 (9th Cir. 1992) (upholding an agency's use of the good cause exemption from the 30-day requirement of 553(d) but not its use of the exemption from the publication requirement of section 553(b)(3)).

120 *See* Org. for Competitive Markets v. USDA, 912 F.3d 455, 458–59 (8th Cir. 2018) (referring to the suspended interim final rule as a "ticking time bomb" that had not gone through notice-and-comment rulemaking).

121 *See, e.g., id.*

122 *See id.* at 459–60 (citing the suspended rule's inconsistency with multiple circuit court rulings as a reasonable justification offered by the agency for withdrawing the regulation after suspension).

123 *See id.*

124 The agency could frame the previous administration's rule as failing to consider an important factor now relevant. *See* Dep't of State v. Coombs, 482 F.3d 577, 581 (D.C. Cir. 2007).

125 *See* Org. for Competitive Mkts. v. USDA, 912 F.3d 455, 459–60 (8th Cir. 2018) (approving the agency's second offered justification for withdrawal of the suspended final interim rule which had come six years after the comment period).

126 *Id.*

127 *Id.*

128 Clean Water Action v. EPA, 936 F.3d 308, 315 (5th Cir. 2019).

129 *Id.*

130 *Id.* at 315–16.

131 *Id.*

132 *Id.*

133 *See* Office of Mgmt. & Budget, OMB Circular A-4 at 15 (2003).

134 The need to ensure up-to-date reasoning extends beyond cost-benefit analyses to agency decisionmaking in general. A court may accept an agency's justification for methodology in one case, but require the agency to review that methodology to ensure its reasoning remains current. For example, after allowing the Federal Energy Regulatory Commission to reject using the Social Cost of Carbon in a decisionmaking in 2016, in part because FERC argued the methodology was contested among the expert community, the D.C. Circuit has required FERC to reevaluate whether its reasoning "still holds, and why" in subsequent decisionmaking. Sierra Club v. FERC, 867 F.3d 1357, 1375 (D.C. Cir. 2017).

135 Air All. Hous. v. EPA, 906 F.3d 1049, 1061 (2018).

136 *See* Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 Fla. St. U. 529, 552 (2005) (referring to policymaking by adjudication as a "nimble" means of producing relatively narrow policies).

137 NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

138 Am. Fed'n of Gov't Emps. v. NLRB, 777 F.2d 751 (D.C. Cir. 1985).

139 Admin. Conf. of the United States, *Guidance in the Rulemaking Process* (June 10, 2014), https://www.acus.gov/recommendation/guidance-rulemaking-process (describing the function of guidance documents).

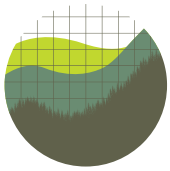
140 5 U.S.C. 553(b).

141 Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14, 54–55 (D.D.C. 2018) (citing Dole v. United Steel Workers, 494 U.S. 26, 33 (1990)).

142 *Id.* at 22–23, 55–57.

143 *Id.* at 55–57.

144 HHS, *HHS Issues Proposed Rule to Align Grants Regulation with New Legislation, Nondiscrimination Laws, and Supreme Court Decisions* (Nov. 1, 2019), https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html.



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