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Report

How the Trump administration can legally delay Obama-era regulations

Connor Raso Wednesday, February 7, 2018

Editor's Note:

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President Trump has made clear his desire to repeal many rules issued late in the Obama administration, an effort tracked by Brookings. This is no easy task in most cases. Repealing rules requires agencies to go through a public rulemaking process that can take years and may become mired in litigation. If the rule remains in effect during the repeal process, then regulated parties are required to make initial investments to comply before it is ultimately repealed. Eliminating or scaling back a rule is less valuable to regulated parties after this initial compliance investment. In some such cases they may actually prefer that the rule remain to act as a barrier to new entrants. To avoid such scenarios, delaying implementation of the rule is critical. This piece outlines the various strategies to *quickly* delay rules and the legal risks posed by each strategy.^[1]

Delay the effective date for rules that have not yet taken effect

New presidents often order agencies to postpone the effectiveness of rules that have been finalized by the prior administration but are not yet in effect. On inauguration day, the chief-of-staff for the incoming administration typically instructs agencies to postpone for 60 days the effective dates of rules that have not taken effect. Many agencies bypass notice-and-comment in complying by citing an exemption in the Administrative Procedure Act (called “good cause”) as well as the White House directive.

While some courts have held that this practice violates the Administrative Procedure Act and requires notice-and-comment, in practice the 60-day delay is usually short enough so as not to prompt a legal challenge. In the event that a challenge is filed, the 60-day period is generally short enough that the case is moot by the time it reaches court. In one recent exception, environmental groups successfully challenged and thereby vacated the EPA's stay (90 days in this particular case) that was enacted without notice-and-comment of an Obama-era rule regulating methane emissions.

This strategy cannot delay a rule indefinitely. Courts are likely to hold that indefinite postponement of a rule's effective date is the functional equivalent of repeal, which requires notice-and-comment. Delaying the effective date is therefore only a temporary solution for a new administration.

Delays in litigation context

If a rule has been challenged in court, agencies can explore three other possible routes of delay.

1. First, an agency may fail to defend the rule (or parts of it) in court.^[2] In this scenario, a litigant would seek a preliminary injunction against a rule, which the agency would not oppose. If successful, the rule would then be delayed by the court pending subsequent litigation. This strategy may be undermined if the court grants leave to intervene to an outside party (such as an interest group) that supports the original rule. If the rule is important and controversial, someone who supported enacting it in the first instance may seek leave to intervene or the court could appoint a party to represent the rule.
2. Second, agencies facing litigation may ask the court to remand the rule to the agency for reconsideration. In this case, the court would actually dismiss the case and send the rule back to the agency to address the deficiencies noted in the plaintiff's lawsuit. While the law is ambiguous and in flux, some courts may agree to stay the rule pending remand to the agency. If the court does not stay the rule during the remand, then the delay strategy fails. This strategy is therefore risky, but if successful, it

provides the agency time to rescind or change the rule via notice-and-comment while it is not in effect.

3. Third, Section 705 of the Administrative Procedure Act provides agencies the authority to postpone the effective date of actions being challenged in court upon finding that “justice so requires.” This provision has traditionally been used infrequently but several Trump administration agencies have relied upon it recently, including the Department of Education, Department of the Interior, and the Department of Energy. To date, the courts have provided relatively little guidance on the requirements for agencies to invoke this provision. This year courts held that Section 705 is not available for rules that have taken legal effect but do not yet require legal compliance. Key questions remain unanswered. How much justification must agencies provide to invoke a Section 705 delay? Does the “interest of justice” encompass the interests of the full public or only the immediate parties to the case? Must agencies meet the standard required for courts to issue a stay? If agency use of Section 705 increases over time, these and other questions will need to be resolved. This strategy therefore remains risky for agencies but probably worth asserting as an alternative basis for delay.

Lastly, while not a legal delay, agencies have discretion to signal that they are deprioritizing enforcement of a rule they intend to amend or repeal. This strategy has limits. Agencies cannot definitively rule out enforcement or provide a specific reason for deprioritizing enforcement, as doing so would constitute repeal without public comment. The rule therefore legally remains in effect, providing less assurance for parties that may wish not to comply. This problem may be especially pronounced for rules that allow state governments or private parties to sue for noncompliance.

Conclusion

Speedy delay is of the essence for the Trump administration’s efforts to repeal or overhaul rules issued late in the Obama administration. Full repeal or overhaul subject to public comment usually takes a long time but is less valuable after a rule has taken effect and regulated entities have made the effort to comply. New presidents therefore typically delay

the effectiveness of rules issued by their predecessors. Other options to delay arise in the litigation context but entail legal risk and uncertainty. The legal permissibility of delays will likely be refined as more cases arise.

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Footnotes

1. 1 This piece does not focus on altering or repealing rules through the standard rulemaking process, which typically requires much more time and effort. In many cases, rules delayed temporarily will eventually be altered or repealed through this extended process.
2. 2 Agencies may also agree to settle a lawsuit with a party challenging the rule in court. This strategy is likely to fail, as courts generally hold that agencies cannot use settlement to alter a rule without following statutorily required procedures. An agency may only permissibly admit an error in a rule if that error is grounded in the rule itself and not the desire for a policy change.