

More than Just Midnight Regulations

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The transition of power from one Administration to another, especially when it involves a change of party, is governed both by law and custom. Both may be changing. In this post, we examine the evolving law and custom around how regulations enacted in the past few months might be rolled back by the incoming Administration.

Recent regulations that might be rolled back cover far more than the type of last-minute final regulations dubbed “midnight regulations.” Instead, under a little-used Congressional review procedure, they include all final regulations submitted to Congress as far back as June 3, 2016. Moreover, the new Congress would have until well into the first quarter of 2017 to invalidate these midnight regulations and even more time to invalidate any proposed regulations that are finalized after the new Congress is in place. It could do so under fast-track procedures by a simple majority in each house (such action would not require 60 votes in the Senate), followed by a Presidential signature. If any regulations are invalidated under this procedure, similar regulations could not be issued without a change in the relevant statute.

Since being enacted in 1996, this Congressional review process has been used only once, but it is clear that the Trump transition team is giving it serious consideration. In more usual circumstances, understandings are reached between the outgoing Agency principals and the embedded transition staff on which regulations are ordinary course and which are controversial. It is unclear if those customary accommodations will be achieved this time. For truly last-minute regulations, incoming Presidents can, and often have, asked for a delay in official publication while the new team reviews the regulation. Presidential power clearly extends to executive agencies, but independent agencies have, as a matter of courtesy, often honored such a directive. Proposed regulations which have not yet been voted on may be withdrawn or reconsidered. The rest of this post examines these conclusions in more detail.

Congressional Action

We begin with the powerful but little used tool of Congressional review. House Republican leadership have promised that “[i]t is time for Congress to take greater responsibility for federal regulations.” The [Congressional Review Act](#) (the “CRA”), which was passed in 1996, allows Congress to invalidate a final agency regulation by enacting a fast-track joint resolution (only 51 votes required in the Senate) of disapproval that then must also be signed by the President. Although this procedure does not apply to regulations that remain in proposed form, it would apply to them once they are finalized, even if they are finalized after the new Congress is in place. The CRA also requires that major regulations be laid before Congress for 60 days, giving Congress additional time to disapprove them. Major regulations are those that are expected to have an economic impact of more than \$100 million. It is safe to assume that most of the regulations that have the attention of the financial sector are likely to be major regulations.

Congress ordinarily has 60 calendar days, excluding more than three-day adjournments of either house, after it receives a final regulation to introduce a resolution disapproving the regulation. If such a resolution is introduced, the Senate has 60 legislative days to disapprove the regulation using the special fast-track procedures in the CRA. These procedures largely prevent senators from filibustering a disapproval resolution and thus permit a simple Senate majority to invalidate a regulation. Other CRA fast-track measures prevent disapproval resolutions from being held up in a Senate committee and expedite the consideration by one house of Congress of disapproval resolutions already passed by the other.

For a new session of Congress, which the 115th Congress that convenes in early January 2017 will be, the look-back is based not on calendar days but on legislative days, and the review period also contains a mixed concept of legislative and calendar days. Based on what we believe are some reasonable assumptions about when Congress was in session the last few months and will be in session during the first quarter of 2017, the outside parameters of the CRA look-back could be as far back as June 3, 2016, with a review period extending into late spring or early summer 2017. These time periods are only rough estimates, however, because the CRA is confusingly drafted, has not been interpreted in relevant

part and intersects with procedural issues that are determined by the House and Senate.

For those who want a deeper dive on the assumptions behind this look-back estimate, [click here](#). For the going-forward review period, we have made an estimate based on recent Congressional practice.

The long look-back period means that many regulations thought to be final and effective could be changed if the new Congress were willing to invoke the CRA procedure. After the new Congress is in session, any regulations that are now proposed but later finalized can be expected to be subject to a shorter review period. As currently drafted, however, the CRA requires regulation-by-regulation and committee-by-committee review of individual regulations. The realization of how clunky this process might be could explain why the House quickly passed the [Midnight Rules Relief Act](#) this week, which would permit omnibus review under the CRA. It is unclear whether the Senate will pass this bill.

Congressional disapproval of regulations creates the real possibility of a regulatory moratorium. After a Congressional disapproval, an agency may not re-issue the regulation “substantially in the same form” unless the regulation is specifically authorized by a statute enacted after the disapproval. For true midnight regulations—those voted on by an agency after a major electoral change—the collateral consequences of a disapproval may function as a disincentive to finalize regulations that are controversial for the new Administration. For those regulations voted on before the election, the CRA provides, if Congress is willing to use it, a chance to engage in a regulatory rollback.

Congress has other tools at its disposal which it could use at any time. Congress could repeal an agency regulation by statute, as the proposed Financial CHOICE Act does with the DOL Fiduciary Rule. Such a repeal would take 60 votes in the Senate under the current filibuster procedure.

For agencies subject to appropriations, Congress could use its appropriations power to prohibit funds from being used to enforce an existing regulation, finalize proposed regulations or develop new ones. Congress has frequently restricted the use of appropriated funds in order to block the development or enforcement of specific regulations, including midnight regulations issued by an outgoing Administration. While this procedure would apply to regulations issued by the SEC, CFTC or any other financial regulatory agency subject to the appropriations process, it would not apply to regulations issued by the Federal Reserve, FDIC, OCC or other federal financial agencies that are not subject to the appropriations process. Congress could include spending limitations in upcoming appropriations measures, which will need to be enacted by next April.

Executive Action

One reason why the CRA may have been invoked so little is that the threat of it alone incentivizes agencies to cooperate with the transition team of an incoming Administration, especially since the day-to-day business of government needs to continue and because many regulations are not controversial. So while initial press reports have been that the CFTC and the SEC, for example, intend to press on with certain regulations that are near a final vote, it seems likely that understandings may be reached with the embedded transition teams or other political actors about which regulations are controversial or not.

If customary understandings are not possible, the President has another tool for midnight regulations. An agency vote and web posting of a regulation does not make the regulation final and effective. Regulations must first be published in the Federal Register. Publication timing for the Federal Register is hard to predict but can be anywhere from two weeks to two months on average. Under the law, incoming presidents can order executive agencies to withdraw from publication in the Federal Register any final regulations that have not yet been published. Presidents Clinton, George W. Bush and Obama all issued directives to executive agencies to withdraw any final regulations from publication in the Federal Register. The authority of the President to send similar directives to independent agencies is less certain but, in the past, some independent agencies have voluntarily complied with a Presidential directive to withdraw recently voted-upon regulations from publication.

In the financial regulatory arena, the CFTC, FDIC, Federal Reserve, OCC and SEC are all independent agencies. Once the mandate in *PHH v. CFPB* is final, the CFPB would be an executive agency.

Proposed Rules

It will be obvious to all that proposed regulations that are not voted on as final remain proposed. They may be withdrawn, re-proposed or voted upon by the incoming Administration and their nominees to independent agencies. The incoming Administration and their nominees to the independent agencies can make their own assessment of whether and how they wish to proceed on any such proposed regulation. Any proposed regulations may also be invalidated by Congress under the CRA once they are finalized.

Law clerk Conrad Scott contributed to this post.

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