

How Regulatory Rollback Works

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This blog post sets out how rollback of the Dodd-Frank Act or its implementing regulations might work. President Elect Trump's administration and the new Republican majority in Congress could amend the relevant statutes or amend, repeal or block current regulations. Most of the methods are neither simple nor quick. Repealing and amending regulations is a complex and messy process. In this post we will outline how the various rollback processes could work for fully effective and final regulations.

Executive Orders

Executive orders are fairly simple to rescind—it can be done by the stroke of the presidential pen. The vast majority of financial regulations, however, are not executive orders but rather are statutes (e.g. Dodd-Frank), regulations (e.g. the final Volcker Rule regulations), or regulatory guidance (e.g. the leveraged lending guidelines).

Changes in the Statute

A new statute (legislation) that repeals an older statute instantly nullifies any regulations adopted under the older statute's authority. For example, if the statutory text of Volcker were to be repealed in toto, all of the Volcker regulations would be nullified without any further action by any agency. This process can either be quick or slow and will require a majority of votes in the House and, because of the threat of a filibuster, 60 votes in the Senate. The new Republican majority will need 8 Democratic Senators to achieve this number. Congress could also propose budget reconciliation legislation in order to avoid the 60 vote requirement in the Senate as such legislation only needs a simple majority (51 votes) in order to make it to the President's desk.

Statutory Repeal of Regulations

A new statute can repeal a regulation. For example, Congress could repeal the DOL Fiduciary rule as the proposed [Financial CHOICE Act](#) suggests should be done. The timing is the same as above: the process can be either quick or slow and will require 60 votes in the Senate.

Guidance and Interpretations

Agency interpretative rules and guidance, including FAQs, state how an agency interprets a statute and what must be done to comply. They are not required to be published in the Federal Register (although some are), and do not have a public comment period. Changes to agency interpretations and guidance do not require a notice and comment period. Agency Changes of Final Regulations An agency, under new leadership, can repeal or amend a final and fully effective regulation. Any repeal or amendment must go through its own notice and comment process, and the agency must do a cost-benefit analysis if the original regulation or a new regulation were subject to such a requirement as stated in [Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 \(1993\)](#). It would therefore take many months for any agency to repeal or amend any regulations.

If a final and fully effective regulation by its terms permits the agency to extend the compliance date or to be flexible in other ways without going through a new notice and comment process, the agency's new leadership could do so. The agency may also have authority to suspend enforcement or be flexible depending upon its powers, authorizing statute and regulations. This flexibility might be used during the interim period before new regulations and will require a regulation by regulation review.

Congressional Review Act and Proposed Rules

A later post will deal with how recently promulgated regulations still subject to review under the Congressional Review Act (and therefore not yet fully effective) or midnight regulations that have been voted upon by executive and independent agencies but not yet published in the Federal Register might be rolled back.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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