Insight

The Return of the Trump Deregulatory Regime

DAN GOLDBECK | NOVEMBER 14, 2024

EXECUTIVE SUMMARY

- The election of Donald Trump to a second – albeit non-consecutive – term as president represents a unique opportunity to gauge what his regulatory policy agenda will likely look like based upon his first term.
- One can expect this second Trump term to look much like the first, with a significant number of Biden Administration rules being repealed under the Congressional Review Act in the near term and a broader deregulatory agenda to follow over the next few years.
- While this second Trump Administration may be more vigorous in how it implements such policies, it will face similar challenges to those it faced the first time around: deregulatory savings coming into conflict with its own inherently regulatory policies in other areas and substantial political and legal challenges to its overarching agenda.

INTRODUCTION

With his election earlier this month, President-elect Trump now joins President Grover Cleveland as the only other United States president elected to two non-consecutive terms. As such, while he is not the incumbent president, there is still a prior policy record to draw from in discerning what to expect from this second Trump term. In the case of regulatory policy, due primarily to his administration's relatively novel "regulatory budget" framework, the first Trump Administration saw a historically low level of new regulatory requirements. There was little in Trump's recent campaign to suggest that his second term will fundamentally differ from his first on the regulatory front – if anything, there is reason to believe that this now-returning administration will be more aggressive in its policy goals. Heading into 2025, the nation can expect the upfront repeal of rules finalized toward the end of the Biden Administration through the Congressional Review Act (CRA), followed by a more expansive deregulatory push over the coming years that may yet experience some policy-based and legal headwinds.

IMMEDIATE ADMINISTRATIVE ACTIONS

The first actions that will take place – perhaps as soon as the afternoon of Inauguration Day – will be the issuance of assorted memoranda and executive orders establishing the broad regulatory policy goals of the Trump Administration. One of the core items here is a memorandum establishing a "regulatory freeze," wherein all agencies cease work on any rulemakings currently under development in order to ascertain whether it aligns with the incoming administration's policy preferences. While this may seem like a dramatic move on its face, it is standard practice for an incoming administration, especially one succeeding an administration of the other party. The Obama, (first) Trump, and Biden Administrations all issued such a directive.

Along with these regulation-freeze memos, President Trump will then likely announce a series of executive orders establishing some of the overarching policy goals of his new administration. Some of his initial 2017 orders can be found here. On the regulatory front in particular, one can expect the incoming administration to reinstate Executive Orders 13,771 and 13,777 , which established the "regulatory budget" framework and its execution, respectively. President Biden effectively wiped away these orders – and a series of others – with his Executive Order 13,992.

In somewhat similar fashion, one can expect President Trump to issue a blanket executive order reversing or rescinding a series of Biden Administration orders, either from those early, goal-setting days of 2021, or later items such as Executive Order 14,094 on "Modernizing Regulatory Reform." That order included a series of updates to policies regarding regulatory analysis and the rulemaking process, including the issuance of an updated "Circular A-4," the government-wide set of parameters for cost-benefit analysis. Some of the changes made under Executive Order 14,094 will require some time to unwind while others will be more immediate. Nevertheless, the overall direction of regulatory policy will likely become clear rather quickly.

Beyond these broad policy pronouncements, there will only be limited immediate impact on rules that became final under the Biden Administration. There will be some instances – dependent upon the exact timing of the rules in question and the underlying authority involved in issuing them – where some Biden-era rules have their effective date delayed or extended. For instance, the first Trump Administration delayed the effective date of the Obama Administration's "Fiduciary Rule," and claimed some degree of regulatory savings as a result. Instances of this happening in 2025, however, will be somewhat limited in number and inherently be only temporary in nature; further action will be required to fully repeal such rules.

CONGRESSIONAL REVIEW ACT

How the incoming Trump Administration will be able to roll back Biden-era rules most directly will come in working with Congress to pass "resolutions of disapproval" under the CRA. For those unfamiliar with the CRA, it is a 1996 law that allows Congress to review and potentially repeal rules promulgated by administrative agencies. Crucially, for a limited time, these votes can bypass the filibuster in the Senate, thus allowing passage by a simple majority in both chambers. Since an incumbent president is unlikely to sign off on the rescission of rules produced under their watch, however, the only times the CRA has really been operative has been in instances where one party has assumed a "trifecta" (control of the White House and both chambers of Congress) in the wake of a preceding administration of the other party. The other aspect of the CRA that is critical here is the "look-back" window, which allows this new trifecta of government to review and vote on rules from the waning months of the prior administration.

For much of the CRA's history, even with this "look-back" opportunity, the law laid fallow. Up until Trump's first term, the only successful instance was the disapproval of a Department of Labor rule in 2001. Then, in 2017, with President Trump's initial term and Republican majorities in Congress, there were 14 successful resolutions of disapproval. That trifecta also passed another two resolutions in 2018 addressing rules issued by the Consumer Financial Protection Bureau that had a hold-over Obama Administration appointee. When President Biden assumed office with Democratic majorities in 2021, they successfully repealed three Trump-era rules under the CRA.

It is impossible to know exactly when the "look-back" window for the final Biden Administration rules will begin until this current Congress adjourns *sine die*. The consensus estimate, however, seems to be that this period will begin sometime in early August 2024, running through the end of Biden's term. Looking at rules recorded in the American Action Forum's (AAF) RegRodeo data from August 1 through this past week, the following are the 10 costliest rules that are likely vulnerable to CRA action next year.

Top 10 Costliest Biden Rules in CRA Look-back Window

Agency	Regulation	Total Costs
EPA	National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI)	$42.8 billion
Defense	Cybersecurity Maturity Model Certification (CMMC) Program	$42.3 billion
Treasury	Financial Crimes Enforcement Network: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers	$7.3 billion
Treasury	Anti-Money Laundering Regulations for Residential Real Estate Transfers	$2.2 billion
HHS [issued jointly with IRS and DOL]	Requirements Related to the Mental Health Parity and Addiction Equity Act	$1.5 billion
EPA	Phasedown of Hydrofluorocarbons: Management of Certain Hydrofluorocarbons and Substitutes Under the American Innovation and Manufacturing Act of 2020	$1.5 billion
HHS	Medicare Program; Calendar Year (CY) 2025 Home Health Prospective Payment System (HH PPS) Rate Update; HH Quality Reporting Program Requirements; HH Value-Based Purchasing Expanded Model Requirements…	$904.3 million
HHS	Supporting the Head Start Workforce and Consistent Quality Programming	$781.5 million
HHS	Medicare and Medicaid Programs and the Children's Health Insurance Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2025 Rates…	$615.7 million
HHS	Medicare Program; FY 2025 Hospice Wage Index and Payment Rate Update, Hospice Conditions of Participation Updates, and Hospice Quality Reporting Program Requirements	$554.4 million

The total cost ascribed to these rules is not, however, the determinative factor in whether they will face scrutiny under the CRA – especially since a CRA resolution of disapproval obviates the rule in question in its entirety. For instance, while the CMMC rule included above has a high-cost figure, policymakers may be willing to accept that due to the national security concerns the rule might address. Items such as the Department of Treasury measures on anti-money laundering reporting requirements may also fall into such a category. Additionally, as one can see from the 2017 cohort of rules, or from those currently included in AAF's CRA tracker of activity under the law during the current Congress, while there are some for which the economic impact is the main reason for scrutiny, there are many others with a limited estimated economic effect that policymakers will focus on due to some other political reason.

There will be some constraints. For one, each resolution of disapproval can only address a single rule and carries with it a certain amount of "floor time" during a period when Congress will also need to devote a significant amount of consideration of other items such as President Trump's appointees and looming debates over tax and spending policy. Second, the Republican majority in the House looks to be remarkably narrow, which may make resolutions on politically contentious rules more difficult to pass. Nevertheless, given how often Republicans have introduced CRA resolutions during the current Congress – despite such resolutions doomed to face a Biden veto – one can expect a steady flow of such resolutions next spring. Ultimately, it would not be surprising for the incoming 2025 trifecta to surpass the mark set by that 2017 cross-branch coalition.

LONGER-TERM ACTIONS

The main portion of the returning Trump Administration's regulatory agenda will come in the re-implementation of its "regulatory budget" program. The concept of such a framework is relatively simple: Much as it would for a fiscal budget, the administration sets a certain level of agency-by-agency regulatory costs or cost savings it expects to produce in a given year. Under the first Trump term, the standing policy was also to eliminate two rules for each new one. During this past campaign, candidate Trump announced that his expected ratio is now 10-to-1. While setting such a benchmark may help further motivate deregulatory action on some level, it is important to be mindful of which rules are involved in such calculus and how long it will take to truly implement such changes.

Outside of the limited pool of CRA and other time-sensitive actions discussed earlier, much of a second Trump term's regulatory budget will hinge upon undergoing the full notice-and-comment rulemaking process. This will involve agencies issuing new proposed rules with updated cost-benefit analyses arguing for why the prior rule is no longer necessary or beneficial. Then, they will need to take in and consider public comments before producing the final deregulatory action. This process typically takes roughly one to two years. Given this dynamic, it is hardly surprising that the first Trump term only started to see net-cost reductions in 2018.

Beyond the temporal limitations facing a second Trump deregulatory agenda, there are also headwinds due to other Trump Administration policy priorities. As AAF noted at the end of his first term, the original Trump regulatory legacy left roughly $40 billion in total net regulatory costs. To be sure, relative to either preceding administrations or this current one, this still represents a restrained regulatory cost total – but a net-cost legacy nevertheless. Sizable cost totals from the Departments of Defense, Health and Human Services, and Homeland Security all contributed to that result. Much as with a fiscal budget, a regulatory budget in and of itself is a value-neutral tool that is only as regulatory or deregulatory as its inputs. The ultimate regulatory record of a second Trump term will largely depend upon how vigorously the incoming administration pursues some of its inherently *regulatory* stated policy preferences on issues like immigration.

OTHER POTENTIAL CONSIDERATIONS

The "Department of Government Efficiency"

One of the more novel announcements from the nascent administration has been that of President-elect Trump "appointing" Elon Musk and Vivek Ramaswamy to head a "Department of Government Efficiency," or DOGE (not to be confused with the ubiquitous canine meme or the leader of the Venetian Republic). Per the president-elect's official statement, the mission of the DOGE will be "to dismantle Government Bureaucracy, slash excess regulations, cut wasteful spending, and restructure Federal Agencies." It is worth noting that, barring some unforeseen and unlikely legislative measure to establish and fund a new government department, this entity effectively amounts to an advisory body. The core positions with any real authority to implement policy ideas from the DOGE will be the director of the Office of Management and Budget and the administrator of the Office of Information and Regulatory Affairs, both of which are Senate-confirmed appointees. Trump's eventual picks for those positions may very well try to implement whatever ideas Musk and Ramaswamy come up with – to the extent such ideas can be implemented administratively rather than legislatively – but it is important to understand that any policy prescriptions emanating from the DOGE will merely be recommendations.

Judicial Review

One of the other headwinds that a returning Trump Administration will likely face – for both its deregulatory and regulatory actions – will be judicial challenges of its rulemakings. Historical data on the matter show that Trump Administration rules faced the highest level of legal challenges compared to its recent predecessors and also saw a higher rate of its rules being struck down by the courts. While the incoming administration will have little control over how it fares in terms of the former, its record on the latter will depend on some level upon making sure that its rulemakings do not include some kind of procedural or legal deficiency that make them particularly vulnerable to judicial remand or vacatur.

An especially interesting development to follow on this front with be how the end of *Chevron* deference factors into any prospective challenge of Trump rulemakings. While the data suggest that *Chevron* has had increasingly waning influence on such proceedings in recent years, the formal repeal of it as judicial doctrine under the *Loper Bright* decision may have important implications for regulatory actions going forward. To the extent that future rulemakings under the incoming administration hinge primarily on the relevant agency "re-interpreting" its statutory authority in some novel way, such measures may face greater scrutiny from judges that find such an interpretation unreasonable.

"Schedule F"

Another item of administrative policymaking under a returning Trump Administration that has received a considerable amount of attention is the expected second attempt at implementing "Schedule F." This policy would recategorize certain civil service employees in such a way that removes their current employment protections and give political appointees greater discretion to fire them. In recent weeks, the Biden Administration has promulgated a rulemaking which seeks to mitigate aspects of such a policy change. Schedule F, to be sure, would represent one of the most dramatic reorganizations of the federal bureaucracy in recent history.

Its implementation may also present another set of unintended headwinds for the new administration, though.

Both the overall policy and any number of attempted civil servant removals will face a wave of legal challenges. Additionally, the operational chaos that will almost certainly ensue at the agency level would delay the administration's core rulemakings. And, even if such an agenda ultimately proves largely successful, while the resulting agencies may be composed of more ideologically aligned personnel, the diminished levels of both sheer manpower and expertise may lead to fewer and less well-crafted rulemakings.

Other Reform Efforts

While the centerpiece of the regulatory policy world over the coming years will be this second iteration of the "regulatory budget," there are other policy ideas floating around regarding the administrative state. AAF has previously catalogued some of the most long-standing legislative proposals on this front here. Despite the coming Republican trifecta, however, there's little reason to believe these reform measures could become law short of somehow having the kind of bipartisan support to exceed the 60-vote threshold in the Senate. Nevertheless, there is an interesting reform policy that could hold some promise and be implemented administratively.

In the waning weeks of the first Trump Administration, the Department of Health and Human Services (HHS) proposed the "Securing Updated and Necessary Statutory Evaluations Timely" (SUNSET) rule. The rulemaking would have established a retrospective review program wherein the agency would reexamine prior rulemakings to re-affirm that they are effective and/or cost-beneficial. In the absence of such an affirmation, the regulatory requirements in question would automatically expire after a certain period. The proposed policy builds on aspects of current laws such as the Regulatory Flexibility Act that already require (ostensibly, but often not effectively) retrospective review for certain types of agencies and rulemakings.

The main issue with this original SUNSET rule, however, was – somewhat ironically – timing. It did not hit the pages of the Federal Register until the day after the 2020 presidential election. As such, it faced both a hurried implementation period and then prompt reconsideration and withdrawal under the Biden Administration. To the extent HHS or any other agency under this incoming administration would like to revive a similar effort, it behooves them to pursue such a policy much, much earlier on in this second term.

CONCLUSION

The second iteration of the Trump regulatory regime will likely be quite vigorous from the outset. With both administration officials and Congress being more well-versed in the ways of the Congressional Review Act, a substantial number of rules finalized in the waning months of the Biden Administration is likely set for repeal relatively shortly. From there, the various agencies will undergo the more difficult, time-consuming process of more fully implementing a broadly deregulatory agenda. While the officials charged with implementing such policies may be more well-prepared this time around having had the experience of the first term, there are potential impediments ahead. Some of the president-elect's own policy priorities – especially on immigration and trade – may contravene the economic savings produced by the administration's more deregulatory actions. And if past is prologue, there are set to be both political controversies and legal challenges that lie in the way of this agenda. Buckle up.