

Institute *for* Policy Integrity

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Memorandum

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Re: Presidential Action Options to Respond to “Midnight” Regulations

Outgoing presidential administrations historically have increased their regulatory activities by a dramatic margin during the waning months of their terms. Correspondingly, the last several Presidents, upon taking office, have tried to reverse recently-passed rules and halt pending proceedings begun by their predecessors.¹ Some of the tactics employed to defeat these “midnight” regulations—though initially effective—have later been challenged in court or are otherwise inconsistent with best practices for regulatory review. This memorandum explores the different categories of midnight regulatory activities that a new President may face the first day in office, and discusses possible executive branch options to impede these regulations.

Specifically, this memorandum details how a new President can undo as many undesirable midnight regulations as possible, while minimizing the risk of successful legal challenges. Depending on when the rule was adopted and made effective, there are different procedures that a President should follow:

Draft Rules (Proposed or Final) Not Yet Published: Order agencies to freeze further submissions to the Office of the Federal Register (OFR). Order agencies to withdraw pending submissions from OFR. Consider ordering a corresponding freeze and withdrawal for rules submitted to the Office of Management and Budget.

Proposed Rules Not Yet Final: Order agencies to withdraw undesirable proposed rules. Consider recommending a program for periodic review of proposed rules.

Final Rules Not Yet Effective: If there is no urgency, order agencies to use full notice-and-comment proceedings to delay or withdraw the rule. If there is urgency, order agencies to: (1) immediately delay the effective date of the rule without public comment; (2) delay and suspend the effective date of the rule with public comment; (3) withdraw and repeal the rule with public comment.

Effective Rules: Order agencies and the Office of Information and Regulatory Affairs (OIRA) to reclassify non-“major” rules as “major,” if possible, and issue a corresponding

¹ Patrick McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time* (Mercatus Ctr., Working Paper No. 08-40, 2008), available at <http://www.mercatus.org/PublicationDetails.aspx?id=22854> (noting both the increase in last-minute regulatory activities and the attempts to undo those actions).

change to the effective date. Order agencies to prioritize rules that cannot be defeated except by a traditional notice-and-comment suspension or repeal. Work with Congress to invalidate select rules using the Congressional Review Act.

Rules that have already passed through congressional review: Order agencies to repeal rules using notice-and-comment proceedings.

I. Brief Overview of Rulemaking Procedure

Federal agencies create regulations in order to implement, administer, and enforce laws passed by Congress. The Administrative Procedure Act (APA) governs the rulemaking process.² Agencies most often use the APA's option for "informal" rulemaking—a procedure commonly referred to as "notice-and-comment rulemaking."³ Under this procedure, an agency must first propose a rule by publishing a public notice in the *Federal Register*.⁴ The general public is then

² Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2007) (creating administrative procedures). The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). The APA defines a "rule" (also referred to as a "regulation") as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency

Id. § 551(4). Some categories of rules are exempt from the APA's requirements. *See, e.g., id.* § 551(1) (exempting certain agencies from all requirements), § 553(a) (exempting certain matters from rulemaking requirements), §§ 701(a)-(b) (exempting certain actions from judicial review).

The APA allows a court to review an agency action, finding, or conclusion and hold it unlawful if it is:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing . . . ; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id. § 706(2) (providing scope of judicial review); *see also id.* §§ 702, 704 (providing right of judicial review).

³ *Id.* § 553 (setting out informal rulemaking procedures); *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 60 (4th ed., Am. Bar Assoc., 2006) (defining section 553 procedures as "informal" or "notice-and-comment" procedures). "Formal rulemaking," in contrast, calls for trial-like, on-the-record proceedings. *See id.* §§ 556-557. Formal rulemaking and other variations on rulemaking, like direct final rulemaking, are not discussed in this memorandum.

⁴ *Id.* § 553(b). Usually a single Notice of Proposed Rulemaking is sufficient, but some specific statutes require that agencies publish a preliminary Advanced Notice of Proposed Rulemaking before proposing certain rules. In some cases agencies may publish a second draft proposed rule before issuing a final rule—this is usually within the discretion of the agency.

given a period (usually 60 days) to submit comments on the proposed regulation, and the agency must take these comments into consideration before publishing a final rule.⁵

Before “significant” proposed rules are published in the *Federal Register*, agencies are required to conduct a cost-benefit analysis and submit the proposal and analysis to the Office of Management and Budget (OMB) for review.⁶ A “significant” rule is one “likely to result in” either “an annual effect on the economy of \$100 million or more” or a number of other specified adverse effects.⁷ OMB reviews significant rules before both proposal and finalization.

In order to “finalize” a rule, agencies must submit the final version of the rule to the Office of the Federal Register (OFR) for publication,⁸ as well as to Congress for review.⁹ OFR allows the public an inspection period and then publishes the final version of the rule in the *Federal Register*.

Most final rules do not immediately become “effective”—meaning the point at which the Code of Federal Regulations is officially amended and stakeholders must comply with the regulation.¹⁰ Unless subject to certain exceptions, a rule must have an effective date at least 30 days after finalization,¹¹ and any rule classified as “major” will take effect at least 60 days after

⁵ *Id.* § 553(c); LUBBERS, *supra* note 3, at 278-79, 296-98 (noting that while the APA does not specify a minimum time period, providing 60 days is common practice for complex rules). Agencies sometimes set shorter or longer periods if more appropriate and reasonable. *Id.* Agencies must accept written comments, and agencies occasionally will allow for oral comments. Some specific statutes also call for a public hearing before an agency can make a rule to enforce those statutes.

⁶ Exec. Order No. 12,866 § 6, 58 Fed. Reg. 51735 (Sept. 30, 1993) (amended by Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007)).

⁷ Executive Order 12,866 defines a “significant regulatory action” as “any regulatory action that is likely to result in a rule that may”:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

Id. § 3(f).

⁸ *See* APA, 5 U.S.C. § 553 (requiring publication in the *Federal Register*); Federal Register Act (FRA), 44 U.S.C. §§ 1501-11 (2007) (giving OFR authority over such publications).

⁹ The Congressional Review Act (CRA), 5 U.S.C. §§ 801-808 (2007), requires agencies to submit certain documents to Congress before any rule can take effect.

¹⁰ OFFICE OF THE FEDERAL REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK 2-10 (1998), *available at* <http://www.archives.gov/federal-register/write/handbook/ddh.pdf> (defining “effective date”). Some rules may also set a separate “compliance date,” giving stakeholders more time after a rule takes effect before they must come into full compliance with the new regulation. *Id.* at 2-11.

¹¹ APA, 5 U.S.C. § 553(d).

finalization.¹² The Congressional Review Act (CRA) defines which rules are “major” and gives the responsibility for this classification to the Office of Information and Regulatory Affairs (OIRA).¹³ After a rule becomes effective, Congress has a certain period of time during which it may invalidate the rule by enacting a joint resolution.¹⁴

While many of these steps in the rulemaking process require the approval or signature of an agency head or a designated official, others are carried out by career civil servants, who will not necessarily be replaced under a new presidential administration. The rulemaking process—though notoriously sluggish—at times develops a forward momentum and may continue to advance unless some affirmative action is taken. By analyzing each stage in the rulemaking process, this memorandum identifies the necessary and appropriate responses that a new President may take to assert control over regulatory proceedings begun by the preceding administration.

II. Pre-Publication

This section addresses executive options to deal with proposed or finalized rules that have not yet been published by the Office of the Federal Register (OFR). The concept of publication is important for both proposed and final rules.

A. Procedural Requirements for Publication

In order to propose or finalize a regulation, agencies must publish public notice in the *Federal Register*.¹⁵ After a rule receives the required approvals both at the agency level—and from the White House Office of Management and Budget (OMB) if the rule is “significant”¹⁶—the rule may be submitted to OFR for publication.

Agencies wishing to propose or finalize a regulation must submit the required paperwork to OFR, which must “immediately” make copies of the documents available for public inspection

¹² CRA, 5 U.S.C. § 801(a)(3). Some controversy surrounds the required effective date for “major” rules under the Congressional Review Act. *See infra* Section V.A.3 and Appendix B for more details.

¹³ *Id.* § 804(2).

¹⁴ After documentation for a rule is submitted to Congress, Congress has a 60-day period during which it may review the rule under expedited procedures and decide to invalidate it. Notably, the 60-day count may change depending on Congress’s legislative schedule. *See id.* § 802 (describing congressional disapproval procedures); *see also infra* Section V.B.3 for more details on the congressional review procedures. Congress can also use its normal (and slower) procedures to overturn a rule at any time.

¹⁵ APA, 5 U.S.C. §§ 553(b), (d). This notice must be published “unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law,” *id.*, or one of the listed specific exemptions apply, *see id.* §§ 553(b)(3)(A) & (B). *See also infra* Section IV.B.2.b for a full discussion of the exemptions to the notice-and-comment requirements.

¹⁶ *See* Exec. Order No. 12,866 § 6, 58 Fed. Reg. at 51740.

and “immediately” transmit the documents to be printed.¹⁷ To allow sufficient time for editing and formatting the rule, OFR has interpreted “immediately” to permit a two-working-day delay (with a 2:00 p.m. cutoff for submission) for public inspection and a three-working-day delay for publication.¹⁸ For example, if an agency sends the documentation for a rule to OFR on Wednesday before 2:00 p.m., OFR files the rule for public inspection on Friday (the second working day), usually by posting it on its website, and then publishes the rule in the *Federal Register* on Monday (the third working day).¹⁹

OFR has also decided that “[w]here a legal Federal holiday intervenes, one additional work day is added” to that timeline.²⁰ Likely, all this means is, in the above example, if Monday is a federal holiday, then the rule will be published on Tuesday.²¹ However, a strict reading of the language could suggest an additional work day is added *after* the federal holiday (meaning a Wednesday publication date in our example).

Anticipating OFR’s interpretation of this provision is especially important and complicated this year because, uniquely, two federal holidays immediately precede the new President’s first working day in office: January 20th, Inauguration Day, is a federal holiday for the District of Columbia, and January 19th, the day before it, is Martin Luther King Day—another federal holiday.

OFR’s interpretation will determine which midnight regulations—if any—will still be waiting for publication on the new President’s first working day in office. Most likely, any regulations submitted to OFR before 2 p.m. on Wednesday, January 14, 2009, will be scheduled for publication on the day immediately following the holidays—Wednesday, January 21, 2009, which may be one day too soon for the new President to stop publication.²² However, if OFR adds “*additional* work days” due to the intervening federal holidays, publication of such regulations might not take place until Thursday, January 22, 2009, or later—which would allow the President to stop publication. Though OFR has historically rescheduled publications for the day immediately following a federal holiday, the effect of the back-to-back holidays remains an open question.

The only certain conclusion that can be drawn is that any proposed or final regulations submitted to OFR after 2:00 p.m. on Wednesday, January 14, 2009, will not be scheduled for publication until Thursday, January 22, 2009, at the earliest. (*See* Appendix A for possible scenarios.) But

¹⁷ FRA, 44 U.S.C. § 1503.

¹⁸ 1 C.F.R. § 17.2 (2008) (OFR regulations on procedure and timing for regular publication schedule).

¹⁹ *Id.*; *see also* OFR, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, *supra* note 10, at 8-5 (discussing regular schedule for publication) & 8-4 (noting that documents on file for public inspection can be found at <http://www.nara.gov/fedreg>).

²⁰ 1 C.F.R. § 17.2(c).

²¹ For example, when setting effective dates, “[w]hen a date falls on a weekend or a Federal holiday, [OFR] use[s] the next Federal business day.” OFR, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, *supra* note 10, at 1-9.

²² *See infra* Section II.C for recommendations on when the President can prevent publication of a rule.

depending on OFR's interpretation of the holiday provision and OFR's potential publication backlogs, regulations submitted even earlier than January 14, 2009, may still be waiting for their official publication date. Similarly, agencies themselves may have backlogs, and some proposed or finalized regulations ready for publication might simply not get submitted to OFR before Inauguration Day.

B. Previous Responses

1. Executive Actions

On January 20, 2001, President Bush's Chief of Staff Andrew Card sent a memorandum to all executive departments and agencies, directing them, among other things, to: (1) withdraw all proposed and final regulations sent to OFR not yet published; and (2) refrain from submitting any further regulations to OFR until a presidential appointee could review and approve the proposal.²³

The Card Memorandum represented the fourth such across-the-board publication freeze (previously ordered by Presidents Reagan, George H.W. Bush, and Clinton), and the second such order to withdraw submissions from OFR (previously ordered by President Clinton).²⁴ The Card Memorandum initiated agency withdrawal of approximately 124 regulations from OFR.²⁵

2. Judicial Evaluations

The decision to freeze or withdraw from publication a *proposed* rule is essentially a decision not to begin rulemaking proceedings. Barring some statutory or judicial prescription to regulate, such decisions are not generally subject to legitimate legal challenges.²⁶

²³ Mem. from Andrew H. Card, Asst. to the President and White House Chief of Staff, to Heads and Acting Heads of Exec. Dep'ts & Agencies (Jan. 20, 2001), *available at* www.whitehouse.gov/omb/inforeg/regreview_plan.pdf (also published in 66 Fed. Reg. 7702 (Jan. 24, 2001)) [hereinafter Card Memo].

²⁴ For previous freezes, *see* Notice, Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993) (reprinting a memorandum from OMB instructing new Clinton administration agencies to suspend publication); Mem. on Reducing the Burdens of Gov't Pub., PUB. PAPERS 166-68 (Jan. 28, 1992) (detailing George H.W. Bush administration's 90-day moratorium on publication); Mem., Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981) (reprinting instructions from the Reagan White House to "refrain, for 60 days following the date of this memorandum, from promulgating any final rule"). For the previous withdrawal ordered by President Clinton, *see* 58 Fed. Reg. 6074 (reprinting a memorandum from OMB instructing new Clinton administration agencies to withdraw "all regulations . . . not yet . . . published in the [*Federal Register*]").

²⁵ William M. Jack, *Taking Care that Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1485 (2002).

²⁶ The 1985 Supreme Court case *Heckler v. Chaney* set general presumptions against the reviewability of agency inaction. 470 U.S. 821 (1985). Since then, some courts have reviewed an agency's failure to initiate rulemaking proceedings. *See, e.g., Nat'l Customs Brokers & Forwarders Ass'n v. Fed. Maritime Comm'n*, 883 F.2d 93 (D.C. Cir. 1989). However, such challenges are most likely to involve an agency's specific denial of a public request for rulemaking, as opposed to an agency's internal and independent decision not to initiate rulemaking. Moreover, the courts afford these agency decisions a high level of deference. *Id.*; *see also* *Natural Res. Def. Council v. Sec. &*

However, a decision to freeze or withdraw from publication a *final* rule could be tantamount to a decision to terminate ongoing rulemaking proceedings, especially if the freeze or withdrawal is indefinite. Such decisions are sometimes reviewed by courts.

For example, in 1993, a pre-publication withdrawal by the Clinton Administration of a Department of the Interior final regulation was challenged in court as a violation of both the APA and the Federal Register Act (FRA).²⁷ The federal Court of Appeals for the District of Columbia deferred to OFR's interpretations of the relevant statutes and ruled that reasonable withdrawals were permissible. Specifically, the court upheld the withdrawal of the Department of the Interior's regulation before it was released for public inspection, found sufficient the agency's request to OFR for withdrawal, and found no additional or public procedure was required.²⁸

The Court did not reach the question of whether withdrawals after a regulation has been released for public inspection, but before publication, would also be legal. However, the Court did defer to OFR's interpretations of the relevant statutes. A court may similarly defer to OFR's regulations that clearly permit such withdrawals: "A document that has been filed for public inspection with the Office of the Federal Register, but not yet published, may be withdrawn from publication or corrected by the submitting agency. Withdrawals or minor corrections may be made with a timely letter, signed by a duly authorized representative of the agency."²⁹ Very likely, a court would also uphold a withdrawal of a rule after inspection but before publication.

Setting time limits for the review of frozen or withdrawn rules and following proper procedures should help agencies avoid legal challenges to this type of action.

C. Recommended Executive Actions

***Publication Freeze:** The President should, through his Chief of Staff, instruct executive departments and agencies (collectively "agencies") not to submit any additional proposed or final regulations to OFR for publication in the *Federal Register* until they have been reviewed. The President derives this power as the head of the executive branch, and no formal or public procedure is required for issuing such instructions. Given the time-sensitive nature of this matter, the instructions should be issued as soon as possible, ideally immediately after inauguration. For full transparency and accountability, these instructions should be published in the *Federal Register*, and agencies should keep track of which regulations they froze. The freeze

Exch. Comm'n, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (noting that courts have no means to choose between the "infinite number of rules that an agency could adopt in its discretion").

²⁷ *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996).

²⁸ *Id.* at 1206-09.

²⁹ 1 C.F.R. § 18.13.

should create exceptions for emergencies, urgent health and safety matters, and statutory or judicial deadlines, as the Card Memorandum did.³⁰

The publication freeze set by the Card Memorandum lasted indefinitely “until a department or agency head appointed by the President . . . reviews and approves the regulatory action.”³¹ However, given the possible length of the confirmation process for presidential appointees, the President should consider whether the duration of the publication freeze should be more limited.³²

****Withdrawal from OFR:*** Using the same methods employed for the publication freeze, and the same emergency exceptions, the President should direct agencies to withdraw regulations submitted to OFR but not yet published in the *Federal Register*. For full transparency and accountability, agencies should keep track of which regulations were withdrawn and make such information publicly available.³³

OFR explains on its website the proper procedure for withdrawing either a document not yet on public inspection or a document on public inspection but not yet published.³⁴ Both procedures are simple and similar, but they do require a written request—oral communications are insufficient.³⁵ Note that “[t]he letter must reach OFR during regular office hours (8:45 a.m. to 5:15 p.m. ET) *before noon* on the workday *before* the document’s scheduled publication date.”³⁶ In other words, using OFR’s standard procedures, regulations scheduled for publication on January 21, 2009 cannot be withdrawn, since the new presidential administration will only take office at noon on the day before (which, moreover, is not a workday).

Agencies must be instructed to submit all withdrawal letters as soon as possible—at a minimum, soon after 8:45 a.m. and before noon on January 21, 2009 (the first workday after the

³⁰ Card Memo, *supra* note 23, §§ 1-5 (providing exceptions for “emergency or other urgent situations relating to health and safety,” rules that “impact critical health and safety functions of the agency,” and “regulations promulgated pursuant to statutory or judicial deadlines”).

³¹ *Id.* § 1.

³² For example, President Reagan’s publication freeze was limited to a 60-day period. Mem., Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981) (reprinting instructions from the Reagan White House to “refrain, for 60 days following the date of this memorandum, from promulgating any final rule”). Alternatively, the freeze could create procedures for an acting agency official to make a determination on regulations under review if a permanent agency head has not been confirmed after a certain length of time. Without such a time limitation, potentially beneficial regulations may needlessly languish.

³³ Reportedly, the Bush Administration was not even aware of which agencies had complied with its withdrawal instructions. Jack, *supra* note 25, at 1513.

³⁴ OFR, *Withdrawing a Federal Register Document Not Yet on Public Inspection*, <http://www.archives.gov/federal-register/write/withdrawing/not-on-public-inspection.html> (last visited Jan. 1, 2009); OFR, *Withdrawing a Federal Register Document On Public Inspection, but Not Yet Published*, <http://www.archives.gov/federal-register/write/withdrawing/on-public-inspection.html> (last visited Jan. 1, 2009).

³⁵ See OFR, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, *supra* note 10, at 4-2 (noting that while a telephone call can sometimes begin the withdrawal procedure, a follow-up letter is always necessary).

³⁶ *Id.* (emphasis in original).

inauguration)—this will allow agencies to withdraw all objectionable rules scheduled to be published *on or after January 22, 2009*. It may also be helpful for the President to alert the Director of OFR as soon as possible to expect across-the-board withdrawal requests.

Just as with the publication freeze, the President should consider whether the withdrawal order should be indefinite (ordering that regulations remain withdrawn until they are approved by an appointed agency official) or for a set period (allowing agencies to resubmit rules to OFR after a certain time period, e.g. 60 days, unless the agency has affirmatively decided after careful review to withdraw the rule).³⁷

****OMB Freeze & Withdrawal:*** Although not attempted by previous incoming administrations, the President could also direct agencies not to submit any additional proposed or final regulations to OMB. Similarly, the President could direct agencies to withdraw any regulations already sent to OMB for review. These actions will further help the President exercise control over the flow of regulations through the rulemaking process. The President derives this power as the head of the executive branch, and no formal or public procedure is required for issuing such instructions.

The President should follow the same procedures used for the OFR freeze and withdrawal described above, making sure to include the same emergency exceptions and taking into consideration the appropriate duration and scope.

D. Examples

Rules submitted to OFR shortly before January 20, 2009 will fall into this category.³⁸ As such, we are currently unable to know which rules, if any, might fit into this category when the President takes office.

III. Proposed Regulations

This section discusses executive options for rules that have been proposed (i.e. published as proposed in the *Federal Register*) but have not yet been issued in final form (i.e. not yet published as final in the *Federal Register*).

³⁷ Across-the-board withdrawals and indefinite reevaluations of all pending regulations may needlessly waste agency resources. See Jack, *supra* note 25, at 1515 (citing Prof. McGarity's congressional testimony expressing such concerns). Note that if the President does limit the duration of the withdrawal, but an agency is unable to complete its review of a final regulation within the allotted time period, publishing the rule as final is not the only option; instead, the agency could simply reissue it as a proposed regulation and reopen a notice-and-comment period, thereby giving itself more time for review.

³⁸ Including rules submitted after 2 p.m. on Wednesday, January 14, 2009, as well as rules submitted earlier if OFR has a publication backlog.

A. Procedural Significance of Proposed Regulations

After a regulation has been published in the *Federal Register* as proposed and goes through the required public comment period,³⁹ an agency can begin moving a rule toward finalization. If the previous administration has already carried out such preliminary rulemaking steps for regulations that would be distasteful to the new administration, simple inaction—or the refusal of a newly-appointed agency head to submit the rule as final to OFR—is technically sufficient to prevent the rule from moving forward to finalization. However, long periods of time frequently elapse between a rule’s proposal and its finalization. If a proposed rule is left on the books, a future administration wishing to pass that regulation already has a jump start on the required rulemaking process.

B. Previous Responses

1. Executive Actions

Agencies often will formally withdraw a proposed regulation from the rulemaking process. This is done by publishing a notice of withdrawal in the *Federal Register*. Some agencies conduct periodic, comprehensive reviews of their backlog of proposed rulemakings for which no final action has been issued. For example, the Food and Drug Administration uses such a review program on a regular basis to withdraw multiple proposed rules that it does not plan to finalize.⁴⁰ Such notices of withdrawal rarely allow for public comment and frequently feature short or vague explanations of the reasons for withdrawal.⁴¹

2. Judicial Evaluations

Courts have occasionally reviewed the withdrawal of a proposed rule, albeit with a highly deferential standard.⁴² In fact, courts may review withdrawn regulations even when the agency is under no legal obligation to regulate.⁴³ The federal Court of Appeals for the District of

³⁹ APA, 5 U.S.C. § 553(c).

⁴⁰ See, e.g., Withdrawal of Certain Proposed Rules and Other Proposed Actions, 73 Fed. Reg. 75625 (Dec. 12, 2008) (FDA notice of withdrawal). While the concept of periodic review may be useful, FDA’s execution of the practice—including the withdrawal of as many as 89 separate regulations using a single and short notice in the *Federal Register*, see 56 Fed. Reg. 67440 (Dec. 30, 1991)—may not be optimal.

⁴¹ 73 Fed. Reg. 75625 (explaining certain withdrawals only by saying “[t]he remaining regulations are not under current consideration for rulemaking”).

⁴² Many agency rulemaking decisions already receive a high level of deference under the APA’s “arbitrary and capricious” standard of review. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). However, for judicial review of these withdrawals, courts afford even greater deference: “[The Court will] give more deference to an agency’s decision to withdraw a proposed rule than we give to its decision to promulgate a new rule or to rescind an existing one.” *Int’l Union, United Mine Workers of Am. v. U.S. Dep’t of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004).

⁴³ In *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, the federal Court of Appeals for the District of Columbia concluded that a “retreat to the status quo as the agency’s policy was reviewable, even though the statute at issue, by using the term ‘may,’ allowed the agency the choice whether to engage in rulemaking in the first place.”

Columbia has held that even if an agency is under no obligation to adopt a specific proposed rule, “or, for that matter, any rule,” it is not “free to terminate the rulemaking for no reason whatsoever.”⁴⁴

The D.C. Circuit has laid out some criteria for judicial review in such cases. In short, when an agency has clearly undertaken a particular course of action, a subsequent abandonment of that action—if arbitrary or capricious—is impermissible. For example, where an agency has already expended significant resources on a rulemaking proceeding, the court will assume that the proposal is “sufficiently meritorious to warrant further investigation” on any further action on that rule, including withdrawal.⁴⁵ To justify such withdrawals, courts will require a rational explanation for the agency’s change in course based on an adequate record and sufficient administrative process, such as offering the public notice and the chance to comment.⁴⁶ By contrast, if rulemaking proceedings have been minimal, such that the regulatory proposal is not much different from a lack of agency action,⁴⁷ courts are less likely either to review the withdrawal or to find a withdrawal arbitrary.⁴⁸

Animal Legal Def. Fund v. Veneman, 469 F.3d 826 (9th Cir. 2006) (explaining the holding of *Ctr. for Auto Safety*, 710 F.2d 842, 846 (D.C. Cir. 1983)). Similarly, even if an agency has already sufficiently regulated an issue, the withdrawal of additional proposed regulations may still be reviewable. In *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, the D.C. Circuit reviewed the withdrawal of an amendment to an existing rule even though “[t]his is not a situation where the agency has shirked its statutory duty by refusing to regulate. The agency has regulated the field. In this instance, the agency’s statutory authority to regulate is permissive.” *Id.* (explaining the holding of *Prof'l Drivers Council*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)). But given such conditions, the courts recognize their limited scope of inquiry: “[R]ulemaking is an inherently policy-oriented process and the agency must be accorded considerable deference in evaluating information presented and reaching decisions based upon its expertise. Our review is also circumscribed by the fact that the agency decided not to promulgate new rules in an area already heavily regulated.” 706 F.2d at 1220-21.

⁴⁴ *Int'l Union, United Mine Workers of Am.*, 358 F.3d at 43-44. Despite applying a highly deferential standard, the Court in that case found the agency’s decision was arbitrary and capricious, because the agency’s explanation was inadequate (the agency’s explanation was that its priorities changed, the record was stale, and a recent court case was possibly relevant to the rulemaking). *Id.*

⁴⁵ *Natural Res. Def. Council v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

⁴⁶ *See id.* at 1045-46. Though courts are wary of wasting agency resources, they feel the additional procedure is necessary to review the rule and is warranted because any rule that the agency has already spent resources pursuing is “sufficiently meritorious to warrant further investigation.” *Id.*

⁴⁷ For example, withdrawal of a proposal that vaguely suggested the need for some agency action on an issue and requested public comment on a variety of issues (including the option of not regulating) would be much more likely to escape judicial review than withdrawal of a well-developed proposal with specific regulatory details based on a series of meetings and hearings with stakeholders. As noted above, *supra* note 26, withdrawal of proposed rulemakings initiated after a public petition may be most susceptible to judicial challenge.

⁴⁸ *Sec. & Exch. Comm’n*, 606 F.2d at 1046 (explaining that courts have no means to choose between the “infinite number of rules that an agency could adopt in its discretion”); *see also supra* note 26. “Failure to act” is a reviewable agency action under the APA, 5 U.S.C. § 551(13), but only where the failure is discrete and the action was legally required.

C. Recommended Executive Actions

****Withdraw Proposed Rules:*** Undesirable rules that have only been proposed pose little immediate danger, and action is not time-sensitive. However, the new President should include instructions to withdraw such rules in the same memorandum used to direct publication withdrawals and freezes (described above), in order to ensure that future administrations cannot easily resurrect these proposed rules.

The President should consider whether to instruct agencies to allow for public comment on decisions to withdraw proposed rules. Notice-and-comment proceedings do consume precious agency resources, and not all regulatory actions are legally required to provide notice-and-comment;⁴⁹ however, providing at least a short comment period when possible may help minimize the risk of legal challenges.⁵⁰

If agencies choose not to use notice-and-comment proceedings, they should include in their withdrawal notice a reasoned explanation of the decision based on an adequate rulemaking record.⁵¹ OFR guidelines on withdrawing a final rule are instructive on the required contents for any withdrawal notice, even a proposed rule: “Explain, in a paragraph or two, the purpose and intended effect of the original rule and why it is being withdrawn If necessary, include background information, precise legal citations, or additional information that is required by law, agency policy, or Executive order.”⁵²

Additionally, to ensure consistent and comprehensive action on this issue among the various agencies, a new President should consider suggesting a model for periodic review and withdrawal of proposed regulations, like the Food and Drug Administration’s program mentioned above.

D. Examples

The following regulations are anticipated to remain proposed but not finalized by January 20, 2009:

- On May 8, 2007, the Environmental Protection Agency (EPA) proposed a rule that would change its New Source Review program (which requires new and renovated facilities to install better pollution control technologies) by subjecting fewer facilities to its requirements.⁵³ Bush administration officials have publicly stated that they do not intend

⁴⁹ See *infra* Section IV.B.2.b.

⁵⁰ Also note that, due to the lack of urgency, agencies can take their time withdrawing proposed rules, which will somewhat lessen the burden of the notice-and-comment requirements.

⁵¹ It may be helpful to explicitly claim a “good cause” exception to the notice-and-comment requirements, or at least model the explanation after such exceptions. See *infra* Section IV.B.2.b for more on the good cause exception.

⁵² OFR, *Withdrawing a Document That Has Been Published in the Federal Register*, <http://www.archives.gov/federal-register/write/withdrawing/published.html> (last visited Jan. 1, 2009).

⁵³ See Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units, 72 Fed. Reg. 26202 (May 8, 2007).

to finalize the rule.⁵⁴ The incoming President should direct EPA to withdraw this proposed rule through notice-and-comment procedures.

- On June 6, 2008, EPA proposed another rule to change its New Source Review program by easing current restrictions on locating power plants near national parks.⁵⁵ On December 11, 2008, EPA ended OMB's review of the rule, indicating the agency's intentions not to finalize the rule.⁵⁶ The incoming President should direct EPA to withdraw this proposed rule through notice-and-comment procedures.
- On August 29, 2008, the Department of Labor proposed a regulation that would overhaul the way agencies treat toxic chemical risks in the workplace.⁵⁷ The Department has not yet submitted a final version of the regulation to OMB for review,⁵⁸ making finalization of the rule before inauguration extremely unlikely. The incoming President should direct the Department to withdraw this proposed rule through notice-and-comment procedures.

IV. Final Regulations

This section discusses executive action options for rules that have been published as final but have not yet taken effect.

A. Procedure for Finalization

After a rule has been proposed and has been subject to public comment, an agency generally can publish the rule as final in the *Federal Register*.⁵⁹ However, with some exceptions, most rules do not become "effective" immediately upon publication. Various statutes set minimum

⁵⁴ See Katherine Boyle & Katie Howell, *EPA Abandons New Source Review Proposal*, E&E NEWS (Dec. 10, 2008).

⁵⁵ See Prevention of Significant Deterioration New Source Review: Refinement of Increment Modeling Procedures, 73 Fed. Reg. 31372 (June 6, 2008).

⁵⁶ See Robin Bravender, *Bush Admin. Drops Controversial Rule Proposal for Air Quality Near Parks*, E&E NEWS (Dec. 10, 2008).

⁵⁷ Requirements for DOL Agencies' Assessment of Occupational Health Risks, 73 Fed. Reg. 50909 (Aug. 29, 2008) (to be codified at 29 C.F.R. pt. 2).

⁵⁸ Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, OIRA Conclusion of EO 12866 Regulatory Review: Requirements for DOL Agencies' Assessment of Occupational Health Risks, <http://www.reginfo.gov/public/do/eoDetails?rrid=115970> (last visited Jan. 5, 2009) (indicating receipt and review only of the proposed regulation, not a final regulation).

⁵⁹ APA, 5 U.S.C. § 553(d). Before published as final, the rule must also have passed through OMB review, and the agency must have responded to any public comments received. Note that if an agency has simply announced a rule as final or posted a final regulation on its website, but the rule has not yet been published in the *Federal Register* as final, the rule is not yet truly "final," and publication can be frozen or withdrawn as described above, *supra* Section II.

requirements for a delayed effective date (usually 30 or 60 days after publication).⁶⁰ The effective date marks when the new rule is officially incorporated into the U.S. Code of Federal Regulations.

Certain executive actions can defeat a regulation after finalization but before it takes effect. If a rule is final but not yet effective, an agency can withdraw the rule or delay the rule's effective date. OFR's guidelines suggest that, at least sometimes, little administrative process is necessary to accomplish either of these actions.⁶¹ By contrast, once a rule takes effect, repealing it or suspending its effectiveness will usually require a great deal more procedure.⁶²

This section addresses executive action options if a final regulation's effective date is set for after January 21, 2009. If a final regulation has taken effect on or before January 21, 2009, whether the effective date was set correctly and legally becomes an important issue. Therefore, the statutory requirements for effective dates are discussed below in Section V, which explores executive action options for regulations that have already taken effect.

B. Previous Responses

1. Executive Actions

The Card Memorandum directed agencies to delay the effective dates of all regulations (with certain exceptions for emergencies and legal deadlines) that were final but not yet effective.⁶³ It was the second presidential order for an across-the-board delay on final regulations.⁶⁴

However, even without an administration-wide order, agencies often will delay the effective date of a regulation or withdraw a regulation before it takes effect.⁶⁵ Frequently, these actions are taken without following the procedure for notice-and-comment rulemaking.⁶⁶

⁶⁰ See APA, 5 U.S.C. § 553(d) (setting a 30-day minimum with exceptions for certain types of rules and for good cause); CRA, 5 U.S.C. § 801(a)(3) (setting a 60-day minimum for "major" rules; exceptions for certain types of rules and for good cause are laid out in § 807). Also note that some statutes may specify that "publication in the Federal Register, not modification of the Code of Federal Regulations, is the culminating event in the rulemaking process." See *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004).

⁶¹ See OFR, *Withdrawing a Document That Has Been Published in the Federal Register*, <http://www.archives.gov/federal-register/write/withdrawing/published.html> (last visited Jan. 1, 2009) (providing a short model template for the notice of withdrawal, requiring only a "paragraph or two" of explanation and not including as standard a period for public comment).

⁶² Sometimes, the terms "delay," "postpone," and "suspend" are used interchangeably. However, while either "delay" or "postpone" can refer to changing the effective date of a rule not yet in effect, "suspend" more properly refers only to changing the effective date of a rule *already* in effect. Similarly, a final rule can be "withdrawn," but an effective rule must be "repealed."

⁶³ Card Memo, *supra* note 23.

⁶⁴ See Exec. Order No. 12,291, 3 C.F.R. 127, 131-32 (1981) (suspending the effective dates of all major rules).

⁶⁵ For example, on July 3, 2008, FDA published a final rule prohibiting the extralabel use of certain antimicrobial drugs in food-producing animals, setting a 60-day comment period. In response to comments, on August 18, 2008, FDA delayed the effective date of the final rule until November 30, 2008. Then, on November 26, 2008, the agency

2. Judicial Evaluations

a. Arbitrary and Capricious Review

The decision either to postpone the effective date of a final rule or to withdraw a final rule is a regulatory action subject to judicial review under the APA.⁶⁷ Delays, however, tend to evade judicial review due to their short timeframe.⁶⁸

In particular, courts have reviewed agency decisions to postpone or withdraw rules under the APA's "arbitrary and capricious" standard.⁶⁹ Though that standard gives a great deal of deference to agency decisions, courts also adopt a presumption in favor of the validity of previous agency rulemakings and against changes in current policy not justified by the record.⁷⁰ In other words, an agency cannot postpone or withdraw a final rule without providing sufficient data and analysis to overcome that presumption and explain the shift in policy. Simply stating that the rule was passed by a previous administration is unlikely to be enough to pass an arbitrary and capricious test, especially if a thorough notice-and-comment process supported the original rule.

withdrew the final rule. New Animal Drugs; Cephalosporin Drugs; Extralabel Animal Drug Use; Revocation of Order of Prohibition; Withdrawal, 73 Fed. Reg. 71923 (Nov. 26, 2008).

⁶⁶ For example, in the above FDA rule, *supra* note 65, the withdrawal was explained only by citing a need for more time to review public comments. No public comment was allowed on the withdrawal itself because the agency found "good cause" (explaining with somewhat circular logic that "comment procedures are unnecessary because . . . the order is being revoked"). 73 Fed. Reg. 71923.

⁶⁷ Courts will not accept the argument that, because the underlying rule has not taken effect, there is no "final agency action" to give the courts jurisdiction. *Natural Res. Def. Council v. Env'tl. Prot. Agency*, 683 F.2d 752, 759 (3d Cir. 1982) ("If an agency could simply alter its regulations at any time between their final promulgation and their effective date, that agency would be able to moot a challenge to its 'final' regulations at any time simply by altering them substantively or by postponing their effective date indefinitely."); *Am. Fed. of Gov't Employees v. Pierce*, 673 F.2d 425, 446 n.74 (D.C. Cir. 1982) (holding that a final rule was not "any less final" because it had not gone into effect). Moreover, an effective date is part of an agency's "statement of general or particular applicability and of future effect," and therefore changes to the effective date are "rules" subject to judicial review. *Env'tl. Prot. Agency*, 683 F.2d at 762.

⁶⁸ Indeed, many of the key court cases deal with indefinite postponements, which are more likely to be reviewed. *See, e.g., Env'tl. Prot. Agency*, 683 F.2d at 764 ("Because the *indefinite* postponement of the effective date of a final rule fits the APA definition of 'rule' where, as here, the postponement has a substantial impact upon the public and upon the regulated industry, we conclude that the postponement challenged in this case was subject to the rulemaking procedure of the APA." (emphasis added); *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (equating an indefinite suspension with the outright revocation of the rule).

⁶⁹ *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (finding a rule rescission by the National Highway Traffic Safety Administration to be arbitrary and capricious); *Pub. Citizen*, 733 F.2d at 105 (finding the National Highway Traffic Safety Administration's indefinite suspension of a rule to be arbitrary and capricious).

⁷⁰ *State Farm*, 463 U.S. at 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place."); *id.* at 43 ("[An] agency must examine the relevant data and articulate a satisfactory explanation of its action, including a 'rational connection between the facts found and the choice made.'") (citation omitted).

Rule delays or withdrawals can also be reviewed as contrary to a statute.⁷¹ For example, in *Natural Resources Defense Council. Abraham*—one of the few legal challenges to actions taken under the Card Memorandum—the Department of Energy first postponed and later withdrew a rule setting energy efficiency standards for air conditioners. However, a statutorily-prescribed “anti-backsliding” standard prohibited the agency from withdrawing an energy efficiency standard once it had been established. Based on the unique statutory language, the court found that “publication in the *Federal Register* [i.e., finalization], not modification of the Code of Federal Regulations [i.e., effectiveness], is the culminating event in the rulemaking process” for energy efficiency standards.⁷² Therefore, withdrawal of the final energy efficiency rule was prohibited in that particular case given the uniqueness of the anti-backsliding provision.

b. Notice-and-Comment Requirements

Delays and withdrawals of final rules can also be challenged on procedural grounds. The APA generally requires that, prior to issuing a final rule (including rules delaying or withdrawing other rules), an agency must provide both notice and an opportunity for public comment.⁷³ However, delaying or withdrawing a rule is usually time-sensitive, since it must be accomplished in the short period before the effective date. Therefore, agencies frequently do not follow the time-consuming notice-and-comment procedures when delaying or withdrawing a final rule, instead citing an exception to the APA requirements.⁷⁴

The APA’s notice-and-comment requirements do not apply if: (1) an agency is prescribing an interpretive rule, a general policy statement, or a rule of agency procedure; or (2) an agency finds good cause that notice-and-comment would be “impracticable, unnecessary, or contrary to the public interest.”⁷⁵ Courts have held that these exceptions should be “narrowly construed and only reluctantly countenanced.”⁷⁶

The exact boundaries and criteria for the first exception are not entirely clear. The courts have struggled to draw a line between a “procedural” and a “substantive” rule, and no clear test has emerged.⁷⁷ Many commentators recommend that agencies voluntarily use notice-and-comment proceedings even for clear rules of procedure.⁷⁸ Similarly, even though the test articulated by courts for “interpretive rules” is clearer (hinging on whether the rule is binding and the degree of policymaking involved), generally scholars agree that “neither agencies nor affected persons can reliably predict the outcome of a challenge to an agency’s use of the APA’s exemption for

⁷¹ APA, 5 U.S.C. § 706(2) (providing judicial invalidation of agency actions “otherwise not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

⁷² *Abraham*, 355 F.3d at 196. For an additional discussion of the case, see *infra* Section IV.B.2.b.

⁷³ APA, 5 U.S.C. § 553(c).

⁷⁴ See, e.g., 73 Fed. Reg. 71923; see also accompanying analysis at note 65, *supra*.

⁷⁵ APA, 5 U.S.C. § 553(b)(3)(A) & (B).

⁷⁶ *Am. Fed. of Gov’t Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

⁷⁷ See LUBBERS, *supra* note 3, at 73.

⁷⁸ See *id.* (citing recommendations of the Administrative Conference of the United States).

interpretive rules and policy statements.”⁷⁹ It is risky for agencies to rely solely on this exemption as a reason not to comply with notice-and-comment procedures.

It is somewhat easier to predict the outcome of claiming good cause not to follow notice-and-comment procedures. (Notably, to claim good cause, the agency must incorporate its finding of good cause into the rulemaking.)⁸⁰ Notice-and-comment may be “unnecessary” if the rule is minor and the agency does not reasonably expect any significant public interest in the delay or withdrawal. Notice-and-comment may be “impracticable” or “contrary to the public interest” if immediate action is necessary to avoid an immediate public harm or when the fundamental purpose of the regulatory proposal is in jeopardy.⁸¹ Courts are most inclined to uphold a good cause exception if an emergency is created by circumstance beyond the agency’s control,⁸² if the delay or withdrawal is limited in duration or scope,⁸³ and if the agency initiates prompt follow-up proceedings that comply with notice-and-comment requirements.⁸⁴ Note that the mere existence of an impending administrative deadline cannot in itself constitute good cause, because this “emergency” is merely of the agency’s “own making.”⁸⁵

⁷⁹ See *id.* at 104 (paraphrasing Judge Wald’s observations in *Am. Hospital Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987)).

⁸⁰ 5 U.S.C. § 553(b)(3)(B).

⁸¹ See LUBBERS, *supra* note 3, at 105. See also *Abraham*, 355 F.3d at 205 (finding the claimed emergency insufficient for a good cause exception because “[t]he only thing that was imminent was the impending operation of a statute intended to limit the agency’s discretion, which cannot constitute a threat to the public interest,” but leaving open the question of which threats to public interest might constitute good cause); e.g., *Northwest Airlines v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981) (upholding a good cause exception in part because “the rapid resolution of the . . . problem . . . was not only in the interest of the traveling public, particularly on the eve of the winter holiday season, but also consistent with the national interest in the efficient utilization of the navigable airspace”).

⁸² See *Nat’l Fed’n of Fed. Employees v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) (“The situation facing [the Office of Personnel Management] on November 6, 1981 was an ‘emergency’ within the scope of the ‘good cause’ exception. The agency’s action was required by events and circumstances beyond its control, which were not foreseen in time to comply with notice and comment procedures.”).

⁸³ See *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981) (upholding the agency action in part because “when the Secretary did postpone the implementation date, he deferred implementation for a relatively short time. If a rule ranks as a substantive regulation, the limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures. We have recognized, however, that ‘[t]he more expansive the regulatory reach of [agency] rules, . . . the greater the necessity for public comment.’ Conversely, the limited scope of the December 5 order influences our finding that the Secretary possessed good cause to dispense with prior notice and comment.”) (citation omitted).

⁸⁴ See *Donovan*, 653 F.2d 573 (upholding the agency action in part because the agency assured the court it was following a “persistent course toward implementation of the regulations without unnecessary delay”); *Devine*, 671 F.2d at 612 (noting that, since the agency had quickly followed up its emergency action with notice-and-comment procedures for a new final rulemaking, the scope of the emergency action was limited and, therefore, more justifiable).

⁸⁵ 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. Envtl. Prot. Agency*, 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

Most case law in this area addresses the delay or withdrawal of regulations proposing new and affirmative government action. There is a chance that the delay or withdrawal of deregulatory actions may more easily fit into the good cause exception, if the agency can argue that deregulation would pose an immediate public harm or undermine the fundamental purposes of the regulatory regime. However, scholars warn of the exception's narrow scope: not every health threat, for example, will automatically fall into the good cause exception.⁸⁶ In any case, boilerplate language claiming good cause is insufficient, and the agency must do more than merely cite a presidential order as the reason for immediate delay or withdrawal of a final rule.⁸⁷ An agency must clearly explain its reasoning and support the justification with appropriate data or analysis.

An initially improper delay or withdrawal is not necessarily resolved by a subsequent opportunity for notice-and-comment. Often, agencies delay the effective date of a final rule with an immediate postponement, but allow for proper notice-and-comment on a continuation of that delay or on the ultimate withdrawal of the rule. However, the subsequent proper procedure does not necessarily moot a legal challenge to the initial action; moreover, the subsequent action may be invalid simply because the initial action was invalid.

In general, the courts seek to ensure that the public has a chance to comment on all relevant aspects at every stage in the rulemaking process.⁸⁸ Soliciting comments on whether to continue postponing a rule's effective date does not substitute for failing to solicit comments on whether the delay should have been issued in the first place.⁸⁹ Similarly, if an initial delay was invalid, and the rule in fact should already be effective, an agency cannot merely propose and solicit

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.”).

⁸⁶ See LUBBERS, *supra* note 3, at 110.

⁸⁷ This is especially true when the presidential order is not necessarily inconsistent with the APA requirements. According to the Third Circuit in *Natural Res. Def. Council v. Envtl. Prot. Agency*, neither “the imminence of a deadline or the ‘urgent need for action’ is sufficient to constitute ‘good cause’ within the meaning of the APA where it would have been possible to comply with both the APA and the statutory deadline.” 683 F.2d at 765. The Court further noted that while Executive Order 12,291 did instruct agencies to delay effective dates, it gave no “explicit indication” that the President intended agencies not to comply with the APA. Ultimately, the case did not reach the question of whether a deadline imposed by Executive Order is entitled to the same deference as a deadline created by statute.

⁸⁸ See, e.g., *Union of Concerned Scientists v. Nuclear Reg. Comm.*, 711 F.2d 370 (D.C. Cir. 1983) (holding that where an interim rule—not subject to public comment—made an express finding that maintaining the status quo would not pose undue risk to public health and safety, and that finding became the basis for the final rule, the safety finding remains a live issue, and the challenge to the interim rule is not mooted by the subsequent rulemaking proceedings).

⁸⁹ *Envtl. Prot. Agency*, 683 F.2d at 768-69 (holding that post-promulgation comments on the question of postponing an effective date cannot cure lack of pre-promulgation notice-and-comment, and noting that the questions addressed post-promulgation would be different from those addressed pre-promulgation); *Abraham*, 355 F.3d at 206 n.14 (explaining that the new notice-and-comment period “addressed questions wholly different from those that would have been addressed in [the original] proceeding to amend the standards’ effective date”).

comments on the withdrawal of a final rule; rather, the agency should be following the procedure for repeal of an effective rule.⁹⁰

Finally, agencies must be careful not to violate other statutes or their own internal regulations in choosing not to engage in notice-and-comment procedures. Such violations may also be grounds for reversal.⁹¹

Natural Resources Defense Council v. Abraham is notable as one of the few cases to address the legality of delays of effective dates pursuant to the Card Memorandum.⁹² Many of its holdings bear directly on the issues discussed in this section. However, the fact pattern presented in that case is fairly unique due to a special provision in the underlying statute that prevented the agency from repealing many of its own regulations.⁹³ Because of this special circumstance, much of what is discussed in that case is not applicable more generally. The relevant rulings in that case were based on legal precedents that were explained in full above. But the case does demonstrate that the earlier case law still holds, and courts will still apply those tests rigorously. In particular, an agency's final withdrawal of a rule cannot substantially depend on a previous temporary delay issued without notice-and-comment.⁹⁴

C. Recommended Executive Actions

***If No Immediate Response Is Necessary, Use Full Notice-and-Comment Proceedings:** The effective dates for some rules may fall far enough into the future that an agency could reasonably incorporate full notice-and-comment proceedings from the start of any decision to delay or withdraw the rule. For this small universe of rules, there is little urgency. Generally, effective dates falling after March 21, 2009 should allow the new administration's agencies sufficient time—more than 60 days—to provide notice and opportunity for comment. However, agencies should be able to review rules with earlier effective dates on a case-by-case basis. Courts give agencies little leeway if they were capable of complying with the full measure and spirit of the APA but chose not to; whenever practical, agencies should incorporate full notice-and-comment proceedings from the start.

⁹⁰ *Env'tl. Prot. Agency*, 683 F.2d at 768 (“The amendments should have gone into effect on March 30, 1981, because the action of EPA in postponing them was invalid for failure to comply with the APA. Commendably, EPA did conduct a rulemaking on the question of whether its already accomplished postponement should be continued; however, that rulemaking cannot replace one on the question of whether the amendments should be postponed in the first place. Further, if the amendments had gone into effect, as they should have, on March 30, 1981, the question to be decided in the rulemaking would have been whether the amendments, which had been in effect for some time, should be suspended, and not whether they should be further postponed.”); *Abraham*, 355 F.3d at 204 (finding the second rulemaking could not moot challenges to the first rule “because the subsequent proceedings would be barred themselves if petitions prevail on their claim regarding the [illegality of the original] delay”).

⁹¹ *See Union of Concerned Scientists*, 711 F.2d 370.

⁹² 355 F.3d at 204-206.

⁹³ In particular, the underlying statute prevented the agency from issuing rules with less stringent efficiency requirements than previous rules. *See* text accompanying note 72, *supra*, for further discussion.

⁹⁴ *Abraham*, 355 F.3d at 204-06.

****If an Immediate Response is Necessary, Use a Three-Step Process:*** If a rule is scheduled to take effect before an agency can reasonably respond with full notice-and-comment proceedings, a three-step process will help agencies minimize exposure to legal challenges: (1) Agency Delay for Fixed Period without Notice-and-Comment; (2) Agency Delay and Suspension with Notice-and-Comment; and (3) Agency Withdrawal and Repeal with Notice-and-Comment.

Initially, as previously discussed, the incoming President should issue an order immediately after inauguration directing agencies to delay the effective dates for all final rules that would otherwise take effect before an agency could reasonably complete a case-by-case review using full notice-and-comment proceedings. Agencies should be instructed to delay rules only as long as necessary to complete a review and take proper action, but the President should consider limiting these initial postponements to 60 days. As always, the President should consider setting exceptions for emergencies, public health and safety, and legal deadlines.

Then, as the first agency action, all agencies should temporarily delay the effective dates of the undesirable final rules. OFR sets a procedure for delaying the effective dates of final or interim rules not yet in effect.⁹⁵ If urgency requires an agency to forego even a shortened comment period on this initial delay,⁹⁶ the agency must claim an exception to the APA's requirements. The agency may claim that the delay is merely a procedural rule requiring no public notice or comment; but the effectiveness of this claim is unpredictable.⁹⁷ The agency may also justify its action with an explanation of good cause. To support its finding of good cause, the agency should emphasize any potential and imminent harm to the public and, if possible, should explain how the emergency is not of the agency's own making (asserting that the rule is of the previous administration's making may not be enough).⁹⁸

Second, simultaneous to that delay, the agency should issue and publish a separate Notice of Proposed Rulemaking to delay and suspend the undesirable rule. The delay and suspension may be indefinite if necessary, but when possible should only be long enough to allow for full agency review. According to OFR, a "suspension" stays a rule already in effect, whereas a "delay"

⁹⁵ OFR, *Withdrawing a Document That Has Been Published in the Federal Register*, <http://www.archives.gov/federal-register/write/withdrawing/published.html> (last visited Jan. 1, 2009). OFR does not specifically require notice-and-comment procedures. But even though courts have deferred to OFR on proper withdrawal procedure when statutes are vague, *see supra* notes 27-29 and accompanying text, the plain statutory language probably does require notice-and-comment in this case.

⁹⁶ When possible, agencies should set even shortened comment periods. *See, e.g., Northwest Airlines*, 645 F.2d 1309 (upholding a good cause exemption where the agency set only a seven-day comment period).

⁹⁷ A delay is most likely to be found procedural or interpretive if the underlying rule is procedural or interpretive. However, it is possible that a delay even to a substantive rule could be procedural, perhaps if the delay is sufficiently short or if the compliance dates for the original rule were far in the future. Still, claiming this exemption may not be the safest option.

⁹⁸ Note that the agency will also have to justify why its delay order should take effect immediately, rather than waiting the requisite 30- or 60-day period before effectiveness as prescribed by the APA and the CRA. 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. *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)).

postpones the effective date of a final rule.⁹⁹ The agency should solicit comments both on whether the rule should have been immediately delayed and whether, assuming the rule has taken effect, it should be suspended. The agency should allow for full public notice-and-comment on both actions to insulate itself from judicial challenge.¹⁰⁰ The notice-and-comment process should be completed within the time period of the initial delay, and the agency should then finalize this delay and suspension.

Finally, in order to ensure that the rule will never take effect or be resurrected by a subsequent administration, the agency should issue another rule using the notice-and-comment process to withdraw and repeal the original rule. As an independent rulemaking, the repeal's validity should not be affected by any judicial invalidation of previous regulatory actions.¹⁰¹

In this way, this three-step process will create the conditions for the least possible legal challenges.

D. Examples

Many rules falling into this category will be published in January 2009, up until the inauguration. As such, it is possible that some controversial rules will be published as final in the coming weeks but will not take effect until after inauguration. At least one rule already provides an example of a final regulation not yet effective that the incoming administration may want to review:

- On December 29, 2008, the U.S. Forest Service, a sub-agency of the Department of Agriculture, issued a final rule on the use, harvest, and sale of botanical products from National Forest System lands.¹⁰² The rule's effective date is set for January 28, 2009. Some comments on the proposed rule expressed concerns that the rule would harm the traditional cultural practices of Native Americans.¹⁰³ If desired, the incoming President could direct his appointees at the Forest Service to review this regulation, and follow the steps laid out above for delaying a rule's effective date if more time is necessary to complete the agency's review.

⁹⁹ *SEE OFR, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, supra* note 10, at 2-13.

¹⁰⁰ *See Devine*, 671 F.2d at 613 (“The validity of the interim regulation, however, is conditioned on expeditious conduct of notice and comment procedures in good faith.”).

¹⁰¹ The repeal can be accomplished using a more thorough notice-and-comment process, as there is no urgency since the rule has already been suspended (perhaps indefinitely). The agency may want to solicit comments both under the assumption that the initial delay and suspension were valid (seeking comments on whether withdrawing the final rule is appropriate) and under the assumption that the initial delay and suspension were not valid (seeking comments on whether repealing a rule already in effect is appropriate). By allowing the public the fullest possible chance to comment, and by covering the eventuality that the initial delay was invalid, the process used to accomplish this final repeal of the undesirable rule will likely render any legal challenges moot.

¹⁰² *Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products*, 73 Fed. Reg. 79367 (Dec. 29, 2008) (to be codified at 36 C.F.R. pts. 223, 261).

¹⁰³ *Id.* at 79369-71.

V. Effective Regulations

This section discusses regulations that are already in effect but may still be subject to reclassification or congressional review.

A. Procedure for Setting Effective Dates

When an agency submits a final rule to OFR for publication, it either sets a specific effective date or instructs OFR to calculate a given number of days after publication.¹⁰⁴ Those determinations are based on statutory requirements for minimum delays before a rule can take effect. Once a rule has taken effect, executive options for changing that rule become much more limited. Therefore, determining a rule's correct effective date is crucial. Below are important considerations for determining a rule's effective date.

1. 30-Day Minimum for Most Rules

The APA states that “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except [in certain circumstances.]”¹⁰⁵ In short, a 30-day window will apply to most regulations, during which they will be final but not effective. An agency may prescribe a later effective date if it so chooses, as no statute sets a maximum delay for an effective date.

2. Exceptions to the 30-Day Rule

There are three main exceptions in the APA that allow certain rules to take effect sooner or even immediately upon their publication as final.¹⁰⁶ First, an agency can find “good cause” for a different effective date and publish an explanation of such cause with the rule. Though “good cause” is not defined in that section of the statute, most courts agree that the term references the good cause exception to the notice-and-comment requirements provided earlier in the APA.¹⁰⁷

¹⁰⁴ OFR, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, *supra* note 10, at 2-10. OFR starts the count with the day after publication. Notably, when a calculated effective date falls on a weekend or federal holiday, OFR designates the next business day as the effective date.

¹⁰⁵ 5 U.S.C. § 553(d).

¹⁰⁶ *Id.* It is unclear whether the CRA wrote another exception into the APA. Section 808 of the CRA provides that for rules relating to hunting and rules where an agency finds good cause the notice-and-comment requirements are impracticable “shall take effect at such time as the Federal agency promulgating the rule determines.” 5 U.S.C. § 808; *see also infra* note 122 (quoting statutory language). As the CRA applies “notwithstanding any other provision of law,” *id.* 806(a), (presumably including Section 553(d) of the APA), and the CRA was passed after the APA, the CRA could be viewed to create this fourth exception to the APA's 30-day rule. However, this fourth exception would only come into play with a small subset of hunting-related or good cause rules.

There are also whole categories of rules that are exempt from the APA's requirements. *See, e.g.*, 5 U.S.C. § 553(a) (excepting rules relating to the military, foreign affairs, or public finances).

¹⁰⁷ *See supra* Section IV.B.2.b. *But see Riverbend Farms*, 958 F.2d 1479 (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)).

There, “good cause” is defined to occur when the action would be “impracticable, unnecessary, or contrary to the public interest.”¹⁰⁸ The parameters of this exception are discussed above.¹⁰⁹ Second, “interpretive rules and statements of policy” are exempt; this category is also discussed in the same section above. Third, “a substantive rule which grants or recognizes an exemption or relieves a restriction” may take effect immediately.¹¹⁰

There is another implicit exemption to this 30-day rule: where Congress has passed a statute after the APA (i.e., after 1946) that sets a different effective date for specific rules, the later statute governs. For example, the Agent Orange Act of 1991 states that regulations under the Act “shall be effective on the date of issuance.” The Federal Circuit Court of Appeals found this language controlling, and set the effective date for a regulation promulgated under the statute as the date of publication, even though the rule did not fit into any of the APA’s exceptions to the 30-day waiting requirement.¹¹¹

3. 60-Day Minimum for “Major” Rules

In 1996, Congress passed the Congressional Review Act (CRA), which created an expedited procedure under which Congress may pass a joint resolution revoking an agency’s regulatory action.¹¹² This Act also changed the effective dates of rules in two crucial ways. First, the CRA declares that no rule can take effect until the promulgating agency submits certain documents to Congress.¹¹³ Even if 30 days have passed since publication and the rule’s effective date has arrived, the rule will remain final but not effective if the proper documents have not been submitted to Congress.¹¹⁴

Second, the CRA sets new guidelines for “major” rules. “Major” rules are defined as:¹¹⁵

¹⁰⁸ 5 U.S.C. § 553(b)(3).

¹⁰⁹ See *supra* Section IV.B.2.b.

¹¹⁰ The exact scope of this third exemption is unclear, but it is unlikely to apply to its broadest possible reach (which would cover any deregulatory action). For cases applying this exception, see *Indep. U.S. Tanker Owners Comm. v. Skinner*, 884 F.2d 587, 591 (D.C. Cir. 1989) (upholding use of exemption); *Joseph v. U.S. Civil Serv. Comm’n.*, 554 F.2d 1140, n. 23 (D.C. Cir. 1977) (finding use of exception unjustified).

¹¹¹ See *Liesegang v. Sec’y of Veterans Affairs*, 312 F.3d 1368, 1373-74 (Fed. Cir. 2002). For example, the Court would not have been able to find a good cause exemption because the agency failed to publish an explanation of good cause with the rule. Notably, this opinion also held that the CRA does not set a 60-day minimum effective date for major rules. *Id.* at 1374-76. This interpretation of the CRA is most likely incorrect, as discussed in the next section and more fully in Appendix B.

¹¹² Enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 801-808 (1996).

¹¹³ 5 U.S.C. § 801(a)(1)(A). This provision applies to all rules, whether categorized as major or non-major.

¹¹⁴ See, e.g., *Ashley County Med. Ctr. v. Thompson*, 205 F. Supp. 2d 1026 n.1 (E.D. Ark. 2002) (delaying effective date of a rule because the proper documents were not submitted to Congress on time).

¹¹⁵ 5 U.S.C. § 804(2). This definition excludes rules promulgated under the Telecommunications Act of 1996. *Id.* Notably, the CRA’s definition of “major” varies slightly from the definition of “significant” under Executive Order 12,866. Compare Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. at 51738. See also *infra* note 116.

any rule that the Administrator of the Office of Information and Regulatory Affairs . . . finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

This definition was intended to be construed broadly.¹¹⁶ Under the CRA, major rules “shall take effect on the latest of” three dates:¹¹⁷

1. 60 days after either when Congress receives the required documents on the rule or when the rule is published as final in the *Federal Register* (whichever is later);
2. If Congress passed a joint resolution revoking the rule but the President vetoes, either when a veto override vote fails or 30 legislative days after the veto (whichever is earlier); or
3. The date the rule would have otherwise taken effect.

One simple conclusion can be drawn from this provision: the effective date of major rules must be *at least* 60 days after publication as final in the *Federal Register*.

However, in *Liesegang v. Sec’y of Veterans Affairs*, the Federal Circuit Court of Appeals issued a seemingly contrary ruling.¹¹⁸ This holding, which was later adopted by the Second Circuit,¹¹⁹ found that the CRA does not actually alter the effective dates of major rules, but instead only changes the “operative date” (i.e., when the agency can begin enforcing the rule). An alternate interpretation—that the CRA does in fact change effective dates for major rules—is in many ways more persuasive than *Liesegang* for several reasons: it accords more closely with the plain text of the statute; it does not render a provision of the CRA ineffective (as *Liesegang* does); and it is supported by key legislative history. See Appendix B for a full discussion of the Federal Circuit’s holding.

¹¹⁶ See 104 Cong. Rec. H3005 (1996) (statement of Rep. McIntosh on H.R. 3136):

The version of subtitle E that we will pass today takes the definition of a ‘major rule’ from President Reagan’s Executive Order 12291. Although President Clinton’s Executive Order 12866 contains a definition of a significant rule that is purportedly as broad, several of the administration’s significant rule determinations under Executive Order 12866 have been questionable. The administration’s narrow interpretation of ‘significant rulemaking action’ under Executive Order 12866 helped convince me that Congress should not adopt that definition. We intend the term ‘major rule’ to be broadly construed, particularly the non-numerical factors contained in the new subsection 804(2) (B) and (C).

¹¹⁷ 5 U.S.C. § 801(a)(3).

¹¹⁸ 312 F.3d 1368, 1374-76 (Fed. Cir. 2002).

¹¹⁹ *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201-02 (2d Cir. 2004).

When assessing executive action options, this case law, although potentially incorrect, must be taken into consideration, as it will affect the effective dates of major rules. In particular, if a court follows the Federal Circuit's holding, there is no statutorily-required 60-day delay for the effective dates of major rules. Many of the options for executive action explored below would not be available under such circumstances.

4. Exceptions to the 60-Day Rule

Several exceptions exist to the 60-day-delayed effective date required for major rules by the CRA. First, the CRA's special provisions for major rules will not delay the effective date of a rule beyond when Congress acts to reject a joint resolution of disapproval of the rule.¹²⁰ In other words, Congress can speed up the effectiveness of a major rule (though the APA would still apply) by specifically voting *not* to reject it. Second, the President can issue an Executive Order exempting the rule and setting an earlier effective date (consistent with the APA) due to "an imminent threat to health or safety" or other urgent concerns.¹²¹ Third, the CRA explicitly exempts rules related to hunting and rules for which the agency publishes a finding of good cause.¹²² Fourth, if Congress does pass a joint resolution of disapproval, the rule is construed to have never taken effect, even if the effective date has passed.¹²³

B. Previous Responses

1. Executive Actions

If an effective date has been improperly calculated, agencies might be able to correct the date, thereby delaying effectiveness and pushing the rule back into the previous category of "final but not effective." There is precedent for such a reclassification. For example, EPA reclassified its Standards of Performance for Petroleum Refineries rule from non-major to "major" under the CRA.¹²⁴ On June 24, 2008, EPA published its final rule with an immediate effective date. Then, on July 28, 2008, after that rule was both final and effective, EPA reclassified the rule as "major" and stayed the effective date until 60 days after the reclassification. EPA explained that the previous final rule "contained an incorrect effective date and contained an error in the [CRA]

¹²⁰ 5 U.S.C. § 801(a)(5).

¹²¹ 5 U.S.C. § 801(c) (allowing the Presidential to exempt rules that are: "(A) necessary because of an imminent threat to health or safety or other emergency; (B) necessary for the enforcement of criminal laws; (C) necessary for national security; or (D) issued pursuant to any statute implementing an international trade agreement").

¹²² 5 U.S.C. § 808. *See also supra* note 106. These "hunting" and "good cause" exemptions include:

- (1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or
- (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

¹²³ 5 U.S.C. § 801(a)(5).

¹²⁴ Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 43626 (July 28, 2008) (codified at 40 C.F.R. pt. 60).

statement in the Statutory and Executive Order Reviews section.”¹²⁵ This error was an incorrect classification of all parts of that rule as non-major, when in fact one part was major.

EPA took this action without prior proposal and without offering an opportunity for public comment. EPA explained that it “has determined that there is good cause for making today’s rule final without prior proposal and opportunity for comment because EPA is merely correcting the effective date of the promulgated rule to be consistent with the congressional review requirements of the CRA as a matter of law and has no discretion in this matter.”¹²⁶

Two key observations can be drawn from this example. First, although the CRA gives the Office of Information and Regulatory Affairs (OIRA) the responsibility for classifying rules as “major,” EPA issued this notice changing the classification. OIRA may have directed EPA to comply with the CRA and change the classification, but OIRA’s involvement in the determination is not entirely clear.

Second, EPA set the 60-day effective date not from the original publication of the final rule, but rather from the publication of the correction. EPA did not explain this action. However, the CRA arguably does mandate this result as the CRA requires an agency to submit certain documents to Congress when promulgating a major rule. An agency must submit, for example, a report containing “a concise general statement relating to the rule, including whether it is a major rule,” and “the proposed effective date of the rule.”¹²⁷ As these two statements will have changed upon reclassification of the rule, the rule was arguably not properly submitted to Congress in the first instance. Thus, the 60-day count should only start when the reclassified rule has been submitted to Congress.

2. Judicial Response

a. Correcting Effective Dates

Courts have also taken it upon themselves to correct improper effective dates. For example, when the Department of Justice violated the APA’s minimum requirement of a 30-day delay, a court found the proper remedy was to deny the rule’s effectiveness for the mandated 30 days.¹²⁸

More importantly, at least one federal district court has changed a rule’s effective date to comply with the 60-day delay required by the CRA.¹²⁹ On January 18, 2002, the Department of Health

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 5 U.S.C. §§ 801(a)(1)(A)(2), (3).

¹²⁸ *Prows v. Dep’t of Justice*, 938 F.2d 274, 275 (D.C. Cir. 1991) (“We join the other circuits that have addressed the matter in holding that violations are remedied by denying such a rule effectiveness for the mandated 30 days, allowing it to take effect in full thereafter.”).

¹²⁹ See *Ashley County Med. Ctr.*, 205 F. Supp. 2d, 1026, 1026 n.1.

and Human Services published a major rule with an effective date of March 19, 2002.¹³⁰ On March 19, 2002, the Department suspended the effective date until April 15, 2002, due to pending litigation and concerns over compliance with the CRA—the suspension contained no real explanation and does not appear to have allowed for public comment.¹³¹ On April 10, 2002, a federal district court in Arkansas ruled during the oral arguments of a lawsuit challenging the substance of the underlying rule, that since the Senate had not received its copy of the rule until March 15, 2002, “pursuant to the Congressional Review Act,” the original effective date should have been May 14, 2002 (i.e., 60 days after actual submission to Congress).¹³²

b. Judicial Review of the CRA

If the President’s new OIRA Administrator reclassifies a rule as major (a recommendation discussed in Section 5.C, *infra*), that reclassification could be challenged in court as invalid, since the rule already took effect. In normal practice, the OIRA classification is made *before* the rule is finalized. No statutory provision clearly gives OIRA the authority to reclassify a rule *after* it has already been published as final, let alone after it has already taken effect. But neither is there any clear prohibition of such reclassification, and as described above both agencies and courts have at times made such corrections to rules that were already in effect.¹³³ However, it is possible that such a reclassification may not be judicially reviewable.

Generally, actions of agencies are reviewable by courts under the APA.¹³⁴ But the CRA provides that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”¹³⁵ There are two interpretations of this language among district courts. Some courts believe this language is unambiguous and prevents judicial review of all congressional determinations and agency actions under the CRA.¹³⁶

However, the Southern District of Indiana disagreed with those cases, finding the language in the CRA to be ambiguous and susceptible to two readings: (1) Congress did not intend for courts to have any judicial review of Congress’s or an agencies’ compliance with the CRA, or (2)

¹³⁰ Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals, 67 Fed. Reg. 2602 (Jan. 18, 2002) (codified at 42 C.F.R. pt. 447).

¹³¹ Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals: Delay of Effective Date, 67 Fed. Reg. 12479 (Mar. 19, 2002) (codified at 42 C.F.R. pt. 447).

¹³² 205 F. Supp. 2d at 1026 n.1.

¹³³ See, e.g., 73 Fed. Reg. 43626; *Prows*, 938 F.2d 274.

¹³⁴ 5 U.S.C. §§ 702, 704, 706(2); see also *supra* note 2.

¹³⁵ 5 U.S.C. § 805.

¹³⁶ See, e.g., *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, No. A 97 CA 421, 1998 WL 842181, at *7 & n. 15 (W.D. Tex. Jun. 25, 1998) (interpreting the plain language of Section 805 to provide for no judicial review and therefore refusing to address a claim brought under the CRA), *aff'd*, 201 F.3d 551 (5th Cir. 2000); *United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931 (S.D. Ohio) (same). Notably, as the CRA applies notwithstanding any other provisions of law, 5 U.S.C. § 806(a), under this first interpretation of the CRA, the CRA’s prohibition on judicial review would nullify the APA’s more general provision for judicial review over agency actions.

Congress only intended to preclude judicial review of Congress's own findings made under the CRA.¹³⁷

The court addressed the question of whether an agency's decision not to submit a rule to Congress was reviewable. The court held that the judicial review exclusion applies to any determinations or *findings by Congress* but not to the *agency action* of submitting a rule to Congress in the first place. The court reasoned that "[a]gencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA" and that Congress only meant to "bar[] review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extend[] the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place."¹³⁸ (Notably, this is not a clear distinction as OIRA—an agency—does make findings under the CRA.)

As evidence for its holding that EPA's action was judicially reviewable, the court drew a contrast to OIRA's finding of whether a rule is major—which it reasoned would *not* be judicially reviewable. The court reached this conclusion by examining the legislative history of the CRA, in which one of the primary sponsors stated:¹³⁹

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." *Thus, the major rule determinations made by the Administrator of [OIRA] are not subject to judicial review.* Nor may a court review whether Congress complied with the congressional review procedures under this chapter.

This language clearly states that OIRA's classification would *not* be judicially reviewable. Although this language is dicta, there are other court decisions indirectly supporting this view.¹⁴⁰ However, other cases have assumed that the classification is reviewable.¹⁴¹ In sum, judicial reviewability of the OIRA classification is an open question.

Even if the CRA excludes judicial review of OIRA's finding that a rule is major, there may be other grounds for review under a constitutional provision—such as the due process clause. If a court were to review an OIRA reclassification of a rule, it is not clear whether a court would

¹³⁷ *U.S. v. Southern Indiana Gas & Elec. Co.*, No. IP99-1692, 2002 WL 31427523, at *4-*5, 55 E.R.C. 1597 (S.D. Ind. Oct. 24, 2002).

¹³⁸ *Id.* at *5.

¹³⁹ *See id.* & n.3.

¹⁴⁰ *See, e.g., In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004) ("The FWS [Fish & Wildlife Service] determined that the designation of the plover's critical habitat was not a major rule under § 804(2). Under [the CRA], this determination is not subject to judicial review. Even so, there is no evidence that the FWS's decision was arbitrary and capricious."). As noted in Section V.B.1, *supra*, although OIRA is responsible for the finding of a rule as major, agencies may be involved in publishing this finding.

¹⁴¹ *See, e.g., Home Builders Ass'n of N. Cal. v. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1234 (E.D. Cal. 2003) (assuming FWS's classification of a rule as not major was judicially reviewable but not addressing the issue for other reasons).

uphold the reclassification. As explained previously, as courts have upheld agency delays of effective dates and agencies have previously reclassified rules without any legal challenge,¹⁴² courts may also uphold OIRA reclassifications (if such findings are judicially reviewable). However, there is little law in this area, so a court's response to an OIRA reclassification is not predictable.

3. Congressional Review

The CRA establishes a “waiting period” before a rule is completely irreversible.¹⁴³ During this waiting period, Congress may disapprove any rule—major or non-major—using an expedited procedure to enact a joint resolution of disapproval. After an agency submits a rule to Congress, Congress has 60 days to introduce such a joint resolution (excluding when Congress is adjourned for long stretches).¹⁴⁴

The start of the 60-calendar-day review period changes depending on when Congress is in session. For any regulation submitted within 60 legislative days of Congress's year-end adjournment, Congress is allotted an additional 60-calendar-day review period beginning the fifteenth legislative day of Congress's new session.¹⁴⁵ A single legislative day often lasts several calendar days.¹⁴⁶ Because of lengthy congressional breaks in August, October, and December, a rule submitted as final in May 2008 may be subject to expedited congressional review well into April 2009—and well after the new President takes office.¹⁴⁷

Despite the potential power and reach of the CRA's expedited review provision, it has only been used once by Congress. In 2001, a newly formed Congress used the CRA to pass a joint resolution to invalidate an ergonomics regulation finalized by President Clinton's Occupational Safety and Health Administration.¹⁴⁸

¹⁴² See *supra* Section V.B.1-2.

¹⁴³ 5 U.S.C. §§ 801-02. Some judicial opinions have referred to the end of this waiting period as the “operative date” of a rule (the date an agency can enforce the rule). See *Liesegang*, 312 F.3d at 1374-76; *Abraham*, 355 F.3d at 201-02. However the CRA does not use this terminology.

¹⁴⁴ 5 U.S.C. § 801(d)(1). See *supra* Section V.A.3 for a definition of “major.”

¹⁴⁵ *Id.* § 801(d).

¹⁴⁶ LUBBERS, *supra* note 3, at 189 n.193.

¹⁴⁷ If the 110th Congress adjourns for the session in early January, counting back 60 legislative days in the House, for example, may reach back to May 2008. The fifteenth legislative day of the next session may not be until late January or even early February 2009, and 60 calendar days from that point will land in April 2009. Notably, the joint resolution need only be *introduced* during the 60-calendar-day period—Congress has additional time to debate and vote on the resolution.

¹⁴⁸ S.J. Res. 6, 107th Cong. (2001) (enacted) (repealing 29 C.F.R. 1910.900 (2001)).

C. Recommended Executive Actions

***Delay Effective Date By Reclassifying Non-Major Rules as Major:** Some rules that were classified as non-major when they were finalized might actually qualify as major rules under the CRA's definition of major.¹⁴⁹ The President should direct his new Administrator of OIRA to review recently finalized non-major rules for possible reclassification. As explained above, there is an existing court and agency practice to change effective dates when necessary to correct errors. While OIRA's authority in this area has never been tested, there is no clear prohibition against reclassification of rules that have gone into effect in order to comply with relevant law. Moreover, it is possible that such a reclassification may be insulated from judicial review. Thus, this memorandum recommends that the incoming President attempt such reclassifications when appropriate.

OIRA should work with relevant agencies to identify and reclassify any rules potentially misclassified as non-major. Agencies should then publish notice of the correction in the *Federal Register*, with sufficient supporting evidence on why the rule should be considered major under the CRA. The notice should set a new effective date 60 days from the publication of the correction.

Since the original effective date will have already passed, the agency may not have time to wait for a public comment period on its reclassification. Instead, the agency should make a case for a good cause exemption, noting that the action is a mandatory legal correction outside the scope of agency discretion. Once the rule is reclassified and the effective date changed, the new administration should take advantage of the executive action options described in Section IV.C, *supra*, for rules that are final but not yet effective.

***Delay Effective Date by Reclassifying as Not Within Good Cause or Other Exception:**

Similarly, agencies may have improperly used an exception to the APA or CRA to set an early effective date (perhaps even an immediate effective date) for some rules. In the same manner as described above for reclassifying rules as major, agencies may have some leeway to correct other errors in setting the effective date.

***Suspend or Repeal Rules through Notice-and-Comment Proceedings:** If a rule is already in effect and the effective date cannot be delayed using one of the above methods, the executive branch has few remaining options to independently and entirely overturn a rule. The agency must suspend or repeal the rule using traditional notice-and-comment procedures. The President should direct agencies to identify and prioritize such rules, so the most distasteful ones can be addressed most quickly.

***Redirect Agency Resources:** If the new administration is unable to prevent a distasteful rule from taking effect, the President still retains some control over the enforcement of the regulation. The President may direct agencies to exercise their enforcement discretion and limit the execution of the regulation. Agency discretion over enforcement actions is typically not

¹⁴⁹ See *supra* Section V.A.3 for the CRA's definition of a "major" rule.

judicially reviewable.¹⁵⁰ Furthermore, the President may be able to redirect some resources away from agency offices or programs affected by the new regulation.

****Communicate Informally with Congress during the CRA Review Period:*** After a rule goes into effect, Congress has the power to review and reject regulations under the expedited procedures of the CRA. The President has a formal role in such a review process (signing or vetoing a joint resolution of disapproval if passed by Congress) and may also have an informal role in suggesting to Congress rules it should consider reviewing. The President should coordinate with Congress to identify which rules—if any—are good candidates for disapproval under the CRA.

****After CRA review period expires, repeal using notice-and-comment:*** Once the Congressional review period expires, an agency must engage in notice-and-comment rulemaking to repeal the rule. Alternatively, Congress can still use traditional legislative procedures to pass a statute overturning an agency regulation.

D. Examples

Below are several examples of regulations anticipated to be effective by January 21, 2009, with recommended actions:

- On December 16, 2008, the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration finalized a rule removing requirements under the Endangered Species Act for federal agencies to undergo an independent scientific review when determining whether any proposed project would threaten animals or wildlife.¹⁵¹ The final rule set an effective date of January 16, 2009, and was classified as not significant and not major.

This rule arguably is “likely” to have a \$100 million impact on the economy, and therefore the President should direct OIRA to reclassify the rule as major. FWS should then publish a notice in the *Federal Register* stating that this rule has been reclassified as major due to a legal error, and resetting the rule’s effective date for 60 days after publication of the correction. Once that rule is reclassified, and the effective date changed, during those 60 days the agency should repeal the rule using notice-and-comment procedures.

- On December 19, 2008, the Department of Health and Human Services finalized a rule to expand protections for medical professionals who refuse to provide health care services

¹⁵⁰ See *Heckler v. Chaney*, 470 U.S. 821 (1985) (setting general presumptions against the reviewability of agency inaction).

¹⁵¹ Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).

on moral grounds.¹⁵² The final rule set an effective date of January 20, 2009, and was classified as significant but not major.

This rule arguably is “likely” to have a \$100 million impact on the economy, and therefore the President should direct OIRA to reclassify the rule as major. HHS should then publish a notice in the *Federal Register* stating that this rule has been reclassified as major due to a legal error, and resetting the rule’s effective date for 60 days after publication of the correction. Once that rule is reclassified, and the effective date changed, during those 60 days the agency should repeal the rule using notice-and-comment procedures.

- On November 19, 2008, the Federal Motor Carrier Safety Administration, a subagency of the Department of Transportation, finalized a rule that would allow truck drivers to drive up to 11 consecutive hours.¹⁵³ The rule was classified as major, and its effective date was set for January 19, 2009. As the rule was already classified as major with a 60-day effective period, the President does not have the option to change the effective date through reclassification. To defeat this rule, the President either should work with Congress to initiate the CRA disapproval process or should direct the agency to repeal the rule using notice-and-comment procedures.

VI. Conclusion

Midnight regulatory activity is an extremely nuanced area of law. Despite these complexities, the President has viable and legal options to defeat much of this activity. The options available to the President, however, vary greatly depending on which stage of the rulemaking process a rule falls into on the President’s first working day in office—this year, on January 21, 2009. By exercising the appropriate options, the President can undo as many undesirable midnight regulations as possible, while minimizing the risk of successful legal challenges.

¹⁵² Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

¹⁵³ Hours of Service of Drivers, 73 Fed. Reg. 69567 (Nov. 19, 2008) (to be codified at 49 CFR Parts 385 and 395).

Appendix A: Possible Timelines for Rule Publication and Withdrawal

(*final actions with respect to the example rules below are indicated in bold)

Date (2009)	Day	Original Schedule (Assuming No Holidays) <i>Purely Hypothetical Timeline</i>	Holiday Schedule #1 (Rescheduling Immediately) <i>Most Probable Timeline</i>	Holiday Schedule #2 (Adding Extra Days) <i>Unlikely but Possible Timeline</i>
Jan. 13	Tuesday <i>Work Day</i>	<ul style="list-style-type: none"> • RULE X: Submitted to OFR before 2 p.m. OFR Review Day #1 	<ul style="list-style-type: none"> • RULE X: Submitted to OFR before 2 p.m. OFR Review Day #1 	<ul style="list-style-type: none"> • RULE X: Submitted to OFR before 2 p.m. OFR Review Day #1
Jan. 14	Wednesday <i>Work Day</i>	<ul style="list-style-type: none"> • RULE X: OFR Review Day #2 • RULE Y: Submitted to OFR before 2 p.m. OFR Review Day #1 • RULE Z: Submitted to OFR after 2 p.m. 	<ul style="list-style-type: none"> • RULE X: OFR Review Day #2 • RULE Y: Submitted to OFR before 2 p.m. OFR Review Day #1 • RULE Z: Submitted to OFR after 2 p.m. 	<ul style="list-style-type: none"> • RULE X: OFR Review Day #2 • RULE Y: Submitted to OFR before 2 p.m. OFR Review Day #1 • RULE Z: Submitted to OFR after 2 p.m.
Jan. 15	Thursday <i>Work Day</i>	<ul style="list-style-type: none"> • RULE X: Filed for Public Inspection • RULE Y: OFR Review Day #2 • RULE Z: OFR Review Day #1 	<ul style="list-style-type: none"> • RULE X: Filed for Public Inspection • RULE Y: OFR Review Day #2 • RULE Z: OFR Review Day #1 	<ul style="list-style-type: none"> • RULE X: Filed for Public Inspection • RULE Y: OFR Review Day #2 • RULE Z: OFR Review Day #1
Jan. 16	Friday <i>Last Work Day of Bush Administration</i>	<ul style="list-style-type: none"> • RULE X: Published • RULE Y: Filed for Public Inspection • RULE Z: OFR Review Day #2 	<ul style="list-style-type: none"> • RULE X: Published • RULE Y: Filed for Public Inspection • RULE Z: OFR Review Day #2 	<ul style="list-style-type: none"> • RULE X: Published • RULE Y: Filed for Public Inspection • RULE Z: OFR Review Day #2
Jan. 17	Saturday <i>Weekend</i>			
Jan. 18	Sunday <i>Weekend</i>			
Jan. 19	Monday <i>MLK Day (Holiday)</i>	<ul style="list-style-type: none"> • RULE Y: Published • RULE Z: Filed for Public Inspection 	<ul style="list-style-type: none"> • RULE Y: Publication Delayed (holiday) • RULE Z: Public Inspection Delayed (holiday) 	<ul style="list-style-type: none"> • RULE Y: Publication Delayed (holiday) • RULE Z: Public Inspection Delayed (holiday)
Jan. 20	Tuesday <i>Inauguration Day (DC Holiday)</i>	<ul style="list-style-type: none"> • RULE Z: Published 	<ul style="list-style-type: none"> • RULE Y: Publication Delayed (holiday) • RULE Z: Public Inspection Delayed (holiday) 	<ul style="list-style-type: none"> • RULE Y: Publication Delayed (holiday) • RULE Z: Public Inspection Delayed (holiday)
Jan. 21	Wednesday <i>First Work Day of Obama Administration First Chance to Request Withdrawals</i>		<ul style="list-style-type: none"> • RULE Y: Published • RULE Z: Filed for Public Inspection 	<ul style="list-style-type: none"> • RULE Y: Publication Delayed (extra day) • RULE Z: Public Inspection Delayed (extra day)
Jan. 22	Thursday <i>First Chance for OFR Withdrawal</i>		<ul style="list-style-type: none"> • RULE Z: Withdrawn Before Publication 	<ul style="list-style-type: none"> • RULE Y: Withdrawn Before Publication • RULE Z: Withdrawn Before Public Inspection

Appendix B: Analysis of Case Law on Effective Date of Major Rules

It is commonly believed that the Congressional Review Act (CRA) delays the effective date of major rules by at least 60 days. It is also the common practice of agencies to set a 60-day effective date for major rules. This interpretation is supported by the plain language of the statute, which states that a major rule “shall take effect on the latest of” 60 days after the date on which Congress receives the report on the rule or the date on which the rule is published in the *Federal Register*, or when the rule otherwise would have taken effect (assuming Congress does not initiate a disapproval process).¹⁵⁴ This interpretation is also supported by the legislative history of the CRA.

However, two federal appellate courts have taken the view that the CRA does not change the effective date, but rather only changes the “operative date” of a major rule. There do not appear to be any other cases discussing this issue, although one case addressed this issue in oral argument without providing an explanation. These cases are discussed below.

I. Case Law

In *Liesegang v. Sec’y of Veterans Affairs*, the U.S. Court of Appeals for the Federal Circuit answered a question of first impression.¹⁵⁵ That case dealt with a major rule finalized by the Veterans’ Affairs Administration that granted health benefits to veterans with diabetes. That rule was passed pursuant to the Agent Orange Act (AOA) of 1991, which mandated that all AOA rules promulgated under that act have an immediate effective date.¹⁵⁶ However, the Department of Veterans Affairs finalized a rule regulating benefits to veterans with diabetes and assigned an effective date 60 days after publication, in order to comply with the CRA. According to the AOA, veterans could only submit claims for benefits dated after the effective date of a particular rule, not before. Veterans then brought suit claiming the effective date should have been immediate.

The court was faced with an apparent conflict between the AOA and the CRA. The court rejected the agency’s argument that the CRA implicitly repealed part the section of the AOA on effective dates, relying on the canon of construction against repeals by implication unless the two statutes are irreconcilable.¹⁵⁷

Instead, the court decided the two statutes were reconcilable by holding that the AOA’s reference to “effective date” was different than the CRA’s reference to date when the rule would “take effect.” It held that although the CRA uses the term “take effect,” the natural definition of that language is not equivalent to the term “effective date.” The court looked to the ordinary

¹⁵⁴ 5 U.S.C. § 801(a)(3) .

¹⁵⁵ 312 F.3d 1368, 1374-76 (Fed. Cir. 2002).

¹⁵⁶ *Id.* at 1373; AOA, 38 U.S.C. § 1116(c)(2).

¹⁵⁷ 312 F.3d at 1373-74

meaning of “take effect,” which according to Black’s Law Dictionary meant “to be in force; go into operation.”¹⁵⁸ Thus, the court concluded that the CRA does not change the date on which the regulation becomes effective, but rather only affects the date the rule becomes “operative.” In other words, the CRA merely provides for a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation; however, during this time the rule is still in effect.¹⁵⁹

The Federal Circuit pointed to the legislative history of the CRA to strengthen its conclusion, stating:

There is no indication that Congress intended to change, amend, or repeal the effective date provision of the AOA in enacting the CRA. Rather, the legislative history shows that the CRA aimed to be a “hold” provision that stays the operative date of a rule while the legislature can review and, if necessary, disapprove a final regulation. Consequently, the agency’s erroneous assumption regarding the meaning of “take effect” has no support either in the plain language of the statute or the legislative history.¹⁶⁰

The Second Circuit, in *Natural Resources Defense Council v. Abraham*, adopted the holding of *Liesegang* with little analysis.¹⁶¹ *Abraham* dealt with the Bush Administration’s attempt to suspend and then withdraw a midnight regulation issued by the Clinton Administration’s Department of Energy on energy efficiency standards. The question in that case turned on whether the standards had been “established” and on the proper effective date for the final regulation. The court held that the CRA did not require a 60-day delay of the effective date, as the CRA only changed the “operative” date of a rule.¹⁶²

At least one federal court case, however, refers to the CRA as actually changing the effective date but offers no rationale, as the court decided the matter during oral argument. *Ashley County Med. Ctr. v. Thompson* addressed a legal challenge to a rule promulgated by the Department of Health and Human Services (HHS).¹⁶³ On January 18, 2002, HHS published a major rule with an effective date of March 19, 2002. On March 19, 2002, HHS suspended the effective date until April 15, 2002, due to pending litigation and concerns over compliance with the CRA—the suspension contained no real explanation and does not appear to have allowed for notice-and-comment. On April 10, 2002, a federal district court in Arkansas ruled during an oral arguments in a suit challenging the underlying rule, that since the Senate had not received its copy of the rule until March 15, 2002, “pursuant to the Congressional Review Act,” the original effective

¹⁵⁸ *Id.* at 1374-75.

¹⁵⁹ *Id.* at 1375.

¹⁶⁰ *Id.*

¹⁶¹ 355 F.3d 179, 201-02 (2d Cir. 2004).

¹⁶² *Id.* at 202. For further discussion of the other notable holdings of this case on other issues *see supra* Sections IV.B.2.a & b.

¹⁶³ 205 F. Supp. 2d 1026 (E.D. Ark. 2002).

date should have been May 14, 2002 (i.e., 60 days after actual receipt by Congress).¹⁶⁴ The court assumed that the CRA mandated a 60-day effective period for major rules.

II. Analysis

The Federal Circuit's holding in *Liesegang* is more than likely incorrect and the alternate interpretation—that the CRA does in fact delay the effective date of major rules—is more persuasive.

The Federal Circuit understandably was hesitant to assume that Congress intended to repeal an earlier statute setting an immediate effective date for certain regulations.¹⁶⁵ The court therefore found that the CRA's language on when major rules "shall take effect" was not the same as setting an "effective date." Unfortunately, that ruling is contrary to the plain text of the statute, misinterprets the structure and intent of the CRA, and ignores key legislative history.

A. Contrary to Plain Meaning

The court placed a great deal of weight on the fact that the CRA uses the phrase "shall take effect" rather than the phrase "the effective date is . . ." ¹⁶⁶ First, assigning different definitions to those terms seems questionable, especially as courts have used the terms interchangeably.¹⁶⁷

Second, the CRA itself repeatedly refers to "effective dates," and even uses the two terms interchangeably. Within section 801, subsection (a)(3) contains the language on when major rules "shall take effect," and subsection (a)(5) reads "[n]otwithstanding paragraph (3), *the effective date of a rule shall not be delayed by operation of this chapter* beyond the date on which either House of Congress votes to reject a joint resolution of disapproval."¹⁶⁸ In other words, section (a)(3) and the entire chapter generally work to delay the effective date of a rule. Similarly, concerning statutory or judicial deadlines for agency action, section 803 states that "[n]othing in this subsection shall be construed to affect a deadline merely by reason of *the postponement of a rule's effective date* under section 801(a)."¹⁶⁹

Finally, when creating exemptions to its terms, the CRA (under the section heading "*Effective dates of certain rules*") states that "[n]otwithstanding section 801, [certain rules] *shall take effect* at such time as the Federal agency promulgating the rule determines."¹⁷⁰ In short, it appears

¹⁶⁴ *Id.* at 1026 n. 1.

¹⁶⁵ The Court may have also been persuaded to act to protect health benefits for veterans.

¹⁶⁶ 312 F.3d at 1374.

¹⁶⁷ *See, e.g., Natural Res. Def. Council v. Envtl. Protection Agency*, 683 F.2d 752, 762 (3rd Cir. 1982). Moreover, the very statute the court claimed set the immediate effective date in the first place provides "[s]uch regulations *shall be effective* on the date of issuance," 38 U.S.C. § 1116(c)(2), and the phrase "shall be effective" appears on its face to be more similar to "shall take effect" than to "the effective date is."

¹⁶⁸ 5 U.S.C. §§ 801(a)(3), (5) (emphasis added).

¹⁶⁹ *Id.* § 803(a) (emphasis added).

¹⁷⁰ *Id.* § 808.

unlikely that there is a true distinction between the terms “the effective date is” and “shall take effect.”

B. Renders a Provision of the CRA Ineffective

Second, the CRA does not, as the court suggested, “merely provide[] a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.”¹⁷¹ The CRA’s rules for expedited congressional review are entirely independent of its provisions governing major rules.¹⁷² Congressional review extends to both major and non-major rules; under the Court’s reasoning, agencies could not begin enforcing *any* rule until 60 days after publication. If the Federal Circuit is correct, then it is difficult to understand the import of the distinction between major and non-major rules. If they both are granted the 60-day waiting period, and if the CRA does not change the effective date of major rules, then no purpose is served by congressional creation of the major/not-major distinction—and canons of construction dictate against interpretations that nullify statutory provisions.

Also, the review period is not restricted to a strict 60-day calendar period after finalization of a rule. Congress need only introduce a joint resolution of disapproval within 60 days; final congressional action can occur well after that.¹⁷³ The 60-day count also does not continue when Congress is adjourned for prolonged periods: quite possibly, the 60th calendar day may fall while Congress is adjourned, yet the congressional review period continues. In fact, the 60-day count does not even start until fifteen legislative days into Congress’s next session for any rules submitted within 60 legislative days of the end of the current session.¹⁷⁴ Legislative days are distinct from calendar days or working days; as a result, a rule submitted as final in May 2008 may be still be subject to expedited congressional review well into April 2009.¹⁷⁵ If an agency was required to wait to begin enforcing a rule until Congress has had a chance to review the rule under the CRA’s expedited procedures, months would elapse after the rule was published as final. Yet the Court’s distinction between an effective date and operative date would create such a situation.

C. Misreads Legislative History

Third, the Members of Congress who designed and enacted the CRA were well aware of the difference between the effective date delay for major rules and the expedited review period. The Federal Circuit ignored significant legislative history that points to an opposite interpretation of the provision.

¹⁷¹ 312 F.3d at 1375.

¹⁷² Compare 5 U.S.C. § 802 with *id.* §§ 801(a)(3), (4).

¹⁷³ *Id.* § 802(a).

¹⁷⁴ *Id.* § 801(d). This is an additional review period and does not replace Congress’s first review period (a 60-calendar day count from the rule’s submission).

¹⁷⁵ See *supra* note 147 and accompanying text.

As “the principal House sponsor of the Congressional Review subtitle,” Rep. McIntosh felt obligated to explain the key provisions of the CRA, since a conference report would not be written. In one section of his statement, entitled “The 60-Day Delay on the Effectiveness of Major Rules and the Emergency and Good Cause Exceptions,” Rep. McIntosh explained:¹⁷⁶

Two of the three previous Senate versions of this subtitle would have *delayed the effective date* of a major rule until at least 45 days One of the Senate versions and both House versions opted for at least a 60-day delay on the *effectiveness* of a major rule. The 60-day period was selected to provide a more meaningful time within which Congress could act to pass a joint resolution *before a major rule went into effect*. Even though the expedited congressional procedures extend beyond this period—and some of the special House and Senate rules would never expire—it *would be preferable for the Congress to act before outside parties are forced to comply with the rule*. The subtitle provides an emergency exception in section 801(c) and a limited good cause exception in section 808(2) from the 60-day delay on the effectiveness of a major rule. Sections 801(c) and 808(2) should be narrowly construed, for any other reading of these exceptions would defeat the purpose of the delay period. The emergency exception in section 801(c) is only available pursuant to Executive order and after congressional notification that a specified situation exists. The good cause exception in section 808(2) is borrowed from the chapter 5 of the Administrative Procedure Act and applies only to rules which are exempt from notice and comment under section 553. Even in such cases, *the agency should provide for the 60-day delay in the effective date* unless such delay is clearly contrary to the public interest. This is because a determination under section 801(c) and 808(2) shall have no effect on the procedures under 802 to enact joint resolutions of disapproval respecting such rule, and it is contrary to the policy of this legislation that major rules take effect before Congress has had a meaningful opportunity to act on such joint resolutions.

In other words, Congress intended the Act to delay the effective dates of major rules by 60 days.¹⁷⁷ Congress also knew that the effectiveness delay operated independently of the expedited review period. Indeed, Senator Levin explicitly noted that the congressional review period should not define the period of enforcement or compliance:¹⁷⁸

¹⁷⁶ 104 Cong. Rec. H3005 (1996) (statement of Rep. McIntosh on H.R. 3136) (emphasis added).

¹⁷⁷ See also 104 Cong. Rec. S3120 (statement of Sen. Nickels, who developed the legislation) (“Major final rules . . . may not take effect until at least 60 calendar days after the rule is published. However, major final rules addressing imminent threats to health and safety, or other emergencies, criminal law enforcement, matters of national security, or issued pursuant to any statute implementing an international trade agreement may be exempted by Executive Order from the *60-day minimum delay in the effective date*.”) (emphasis added); 104 Cong. Rec. H2999 (statement of Rep. Hyde) (“Specifically, title III would allow Congress to *postpone for 60 days the implementation of any major rule*, generally defined as having an annual effect on the economy of \$100 million or more. The language allows the President to bypass the 60-day delay.”) (emphasis added).

¹⁷⁸ 104 Cong. Rec. S3122 (statement of Sen. Levin) (emphasis added).

The bill we have before us would allow a major rule to take effect within 60 calendar days, but would allow the expedited procedure for congressional review to occur within 60 legislative or session days. That's a very big difference in time. At the end of a session of Congress, that could mean we would have the opportunity to disapprove a rule possibly 6 months after it took effect Moreover, Mr. President, *the fact that Congress retains the legal right, using expedited procedures, to overturn a rule should not be used by a court to stay the effective date of a rule or to allow a regulated person to delay compliance.* That would violate the intent of this legislation. *We are very clear in this legislation that major rules take effect within 60 calendar days and nonmajor rules take effect after the rule is sent to Congress and in accordance with the agency's normal procedures.* There is no basis in this legislation for delaying the effective date or the requirements for compliance with a rule other than what I just described. So a court would not have any basis for delaying compliance based on the longer period for expedited procedures. The expedited procedures are Congress' internal mechanism for prompt consideration of a joint resolution to disapprove a rule. We could disapprove rules now, by using a joint resolution of disapproval. But being aware of that possibility does not permit a court to waive compliance or delay the effective date of a rule and it shouldn't just because we've added expedited procedures.

These legislators clearly understood the distinction between the two provisions.

D. No Conflict Between Statutes

Finally, the court created a conflict between the CRA and the AOA when none really existed. The CRA provides that "this chapter shall apply notwithstanding any other provision of law."¹⁷⁹ This could be understood as an explicit repeal of other laws with contrary effective dates, including the AOA.

Alternatively, the agency could have placed the benefits rule at issue into one of the exceptions to the CRA's effective date provisions. For example, the agency could have cited the "good cause" exception of section 808 of the CRA allowing for an earlier effective date.¹⁸⁰ The agency could also have initiated other actors to use CRA procedures to speed up the effective date. For example, the President could have issued an Executive Order, claiming a quicker effective date was necessary due to health concerns, or Congress could have acted to vote down a disapproval resolution, thereby speeding up the effective date.

¹⁷⁹ 5 U.S.C. § 806(a).

¹⁸⁰ *Id.* § 808(2). Unfortunately, however, given the facts in *Liesegang*, if the agency had attempted to retroactively fit the delay of effective date of the rule into the good cause exemption, the court would not have invalidated the use of the exception since the agency did not originally articulate this rationale in the rulemaking. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

III. Conclusion

There is a strong case that the Federal Circuit's interpretation of the CRA is incorrect. As that case is not controlling on other federal circuits, this issue is still an open question and can be re-litigated. However, because there is already clear case law in the Federal and Second Circuit, if litigation challenging any Presidential or agency action were brought in either of those two circuits, the executive action may not be upheld. In other circuits, the President would have a strong argument that the court should not follow the erroneous decisions of the Federal and Second Circuits.