

Legal Sidebar

With the Stroke of a Pen: What Executive Branch Actions Can President-elect Trump “Undo” on Day One?

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Throughout the campaign, Donald Trump [suggested](#) that, if elected, he would rescind significant pieces of the Obama Administration’s domestic policy. Now that President-elect Trump will assume the duties and powers of the presidency at noon on January 20, 2017, [questions](#) have been raised regarding what types of executive branch actions he can, in fact, unilaterally and immediately revoke. While the Constitution does not permit the President to single-handedly repeal or amend statutes, there is much that a new President can do to rapidly reverse the policies of a previous administration.

The process and expediency by which an executive action can be rescinded depends on the type of action in question and the existence of any statutorily or judicially imposed restraints. Generally, most executive actions can be broken down into three basic categories: [executive orders](#), which are written directives issued by the President that govern the actions of executive branch officials and agencies; [discretionary agency directives and guidance documents](#), which are agency policy or interpretive pronouncements that are not issued pursuant to formalized procedures and do not have the force and effect of law; and [agency rules](#), which are issued pursuant to delegated authority from Congress—typically pursuant to notice and comment rulemaking procedures—and have the force and effect of law.

Executive Orders

The [President](#) can immediately revoke, modify, or supersede executive orders issued by a predecessor. In comparison to statutes and agency rules, executive orders generally can be issued quickly and without compliance with elaborate procedures or participation from other parties. The trade-off, however, for the expediency of an executive order is its inherent fragility, especially across administrations. An executive order may be as swiftly repealed as it was issued, and recent Presidents have traditionally exercised this prerogative. For example, both Presidents [Obama](#) and George W. [Bush](#) acted quickly to revoke executive orders issued by their predecessors that did not reflect their own policy goals.

Despite the attention paid to executive orders, not all policy initiatives emanating from the executive branch have been implemented [via executive order](#) during the Obama Administration. Some of the current Administration’s more contentious policies were [instead](#) implemented pursuant to discretionary agency directives and guidance documents.

Discretionary Agency Directives and Guidance Documents

A new President can also immediately direct the heads of executive branch agencies to withdraw discretionary directives and guidance documents that were issued by an executive agency during a previous administration. These pronouncements can generally be identified by the procedures, or lack thereof, employed by the agency prior to their issuance. For example, these [directives](#)—which would include agency policy statements, interpretive rules, guidance documents, letters, and press releases—are not issued pursuant to the [notice and comment rulemaking procedures](#) of the Administrative Procedure Act (APA), and thus generally lack the force and effect of law. Like executive orders, the expediency and ease with which discretionary agency directives and guidance documents are issued contributes to their

lack of permanence. It is unlikely that an agency head would need to comply with many additional procedures in withdrawing these types of directives, and thus they can generally be withdrawn swiftly.

There are numerous examples of discretionary agency directives and guidance documents issued during the Obama Administration. These documents form the basis for policies such as the Administration's [Deferred Action for Childhood Arrivals](#) program in immigration; the Department of Justice's [non-enforcement of federal marijuana laws](#) in states that have legalized the drug; and the Department of Education's [interpretive guidance](#) governing the application of civil rights laws to transgender individuals. All of these documents may be revoked by a new administration.

Agency Rules and Regulations

Agency rules and regulations may also be [repealed](#) by a new administration; however, the repeal process can be time consuming and must comply with certain mandated procedures. The vast majority of agency "rulemakings" must comply with the APA's [notice and comment process](#), which requires an agency to provide the public with notice of a proposed rulemaking and a meaningful opportunity to comment on the rule (generally lasting 30 days or more). The APA explicitly [defines](#) rulemaking as "the agency process for formulating, amending, or *repealing a rule*." Thus, whether issuing a new rule, or amending or repealing an existing rule, agencies are typically required to engage in the same notice and comment process. The APA provides explicit exceptions to the notice and comment requirements, including when agencies can show "[good cause](#)" for why such procedures would be "impracticable, unnecessary, or contrary to the public interest." [At times](#), agencies have relied on this narrow good cause exception as justification for not engaging in notice and comment prior to repealing a rule; however, these arguments have typically been [rejected](#) by the courts.

In addition, an agency's repeal of a rule may generally be challenged by an injured party and will be subject to the same [standard of review](#) as new rules, namely "arbitrary and capricious" review. Under this standard of review, a reviewing [court](#) will consider whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Accordingly, the [Supreme Court](#) has established that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change" That "reasoned analysis" must be based on permissible factors and be reflected in evidence included within the rulemaking record.

In light of these principles, and in the absence of specific statutory requirements, it would appear that a new President can generally direct executive branch agencies to revoke existing rules. In implementing that direction, however, the agency will likely have to engage in the notice and comment process to effectuate the repeal, and, in the case of a challenge to the repeal, provide a "reasoned analysis" for its decision to repeal the rule. [Reports suggest](#) that that the Trump Administration may target any number of existing rules for repeal, including rules issued by the Environmental Protection Agency, Department of Labor, and Food and Drug Administration.

While the repeal of *finalized* rules may take time, recent Presidents have acted immediately to freeze agency actions on *pending* rules. As discussed [here](#), these moratoriums generally apply to all pending rules that have not yet been published as final rules in the Federal Register. In addition, although administrative repeals may be subject to some procedural delay, Congress has the authority, either through the traditional legislative process or in some cases through the expedited procedures of the [Congressional Review Act](#), to enact legislation that immediately terminates a rule.

Lastly, it should be noted that the President's ability to compel agency action likely differs depending on whether the agency is a traditional executive branch agency or an independent agency. Although the President's scope of authority over independent agencies is not completely clear, the President is [generally viewed](#) as lacking the direct authority to order an independent agency to repeal a rule or revoke a discretionary agency directive or guidance document. Over time, however, the President may be able to appoint members to head the independent agency that will be willing to implement his viewpoints.