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Agency Rescissions of Legislative Rules

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SUMMARY

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Agency Rescissions of Legislative Rules

Federal administrative agencies carry out their statutorily prescribed responsibilities in many ways. Perhaps most significantly, agencies may, pursuant to congressionally delegated authority, promulgate rules with the force of law, commonly known as "regulations," "substantive rules," or "legislative rules."

The Administrative Procedure Act (APA) establishes the procedural framework with which agencies generally must comply when issuing legislative rules. Under the APA, an agency generally must publish a notice of proposed rulemaking in the Federal Register and allow the public to comment on the proposal. After reviewing the comments received, the agency may publish a final rule in the Federal Register. The APA provides that final rules generally do not become effective until at least 30 days after publication. This type of rulemaking is known as "informal" or "notice-and-comment" rulemaking and is codified at 5 U.S.C. § 553.

Not all rules must comply with the APA's informal rulemaking requirements. The APA exempts non-legislative rules—such as interpretive rules that construe the laws an agency administers, but which carry no legal force—from notice-and-comment procedures. And the APA may exempt some legislative rules from informal rulemaking requirements. For example, an agency is not obligated to provide notice and an opportunity for public comment for a legislative rule if there is "good cause" to bypass the procedure because it would be "impracticable, unnecessary, or contrary to the public interest." And not all legislative rules are issued as "traditional" final rules. For example, when agencies avoid notice and comment under the "good cause" exception, they sometimes issue an "interim final rule." An interim final rule may be replaced with a (non-interim) final rule after the agency considers post-promulgation public comments.

In addition to *issuing* legislative rules, agencies generally are able to *rescind* or *alter* such rules. The APA's rulemaking requirements generally apply to the repeal and amendment of rules, as well as to their initial issuance. Thus, if an agency seeks to rescind or change an existing legislative rule, it generally must do so in compliance with the APA's requirements, unless an exception applies.

Agencies may also attempt to *withdraw* a final rule from the Office of the Federal Register (OFR) prior to its publication in the Federal Register, or *delay* the effective date or compliance deadlines of a rule that has been published in the Federal Register. Agencies generally may withdraw final rules before publication in the Federal Register without undergoing notice and comment. However, courts also typically have held that to suspend the effective date or compliance deadlines of a rule, an agency generally must adhere to the APA's rulemaking requirements. Additionally, while 5 U.S.C. § 705 permits an agency to postpone or stay a rule's effective date pending judicial review if the "agency finds that justice so requires," courts have rejected recent efforts under that section to postpone compliance dates for rules that have already taken effect, and to postpone effective dates where an agency has failed to adequately justify the stay.

Many agency suspensions and withdrawals of rules are driven by directives from the White House. Soon after taking office, recent presidential administrations typically have directed agencies to cease pending rulemaking activities of the prior administration, withdraw proposed and final rules from OFR prior to publication, and stay (or consider staying) the effective dates of published rules that have not yet become effective to give the new administration time to review the prior administration's late-term rulemakings.

Courts generally apply the same scrutiny to review an agency's rescission of a rule as they do for a rule's issuance. An agency must explain its departure from prior policy and show that its new policy adheres to the underlying statute; is supported by "good reasons"; and is better, in the agency's belief, than the prior policy. It must also address factual findings that are inconsistent with those supporting the former rule and consider "serious reliance interests" affected by a change in policy.

Congress has a number of options for rescinding or amending particular rules or altering the manner by which agencies or a particular agency may rescind or amend rules. Congress can overturn or amend a rule pursuant to its legislative power, either through ordinary legislation or the fast-track procedures authorized by the Congressional Review Act. In addition, along with establishing new or additional procedures with which agencies must comply when issuing certain rules, Congress may also specify in statute the procedures to which agencies must adhere when amending or repealing rules. And pursuant to its power of the purse, Congress may prohibit an agency from using funds to develop, finalize, or implement rules.

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Introduction

Federal administrative agencies may carry out their statutory obligations in many ways, including by adjudicating claims or disputes involving private parties, or by issuing oral or written guidance explaining how they understand or interpret their statutory authority or obligations.[1] In addition to these and other actions and activities, federal administrative agencies may, pursuant to congressionally delegated authority, carry out their responsibilities through the promulgation of "legislative rules"—that is, rules that carry the force of law.[2] Such rules, if consistent with applicable procedural and substantive laws, may impose requirements and standards that bind regulated parties and the agency.[3] Legislative rules are also often referred to as "regulations" or "substantive rules."[4]

The Administrative Procedure Act (APA)[5] establishes the procedural framework with which agencies generally must comply when promulgating legislative rules.[6] Under the APA, in order to

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[1] See CRS Legal Sidebar LSB10182, *D.C. Circuit Rules FTC Opinion Letter Not "Final Agency Action" Subject to Judicial Review*, by Daniel J. Sheffner, at 2.

[2] *See* Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 787-88 (D.C. Cir. 1983) ("[A] 'legislative rule[]' ... is a rule that is intended to have and does have the force of law. A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law."). Legislative (or "substantive rules" (*see infra* text accompanying note 4 & note 4)) are distinct from interpretive rules, general policy statements, and rules of agency organization or procedure, which are exempt from the requirements for legislative rulemaking. *See* 5 U.S.C. § 553(b)(3)(A); *see infra* "Exceptions to Notice-and-Comment Procedures."

[3] *See* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule."). Courts have held that a rule has the force of law "only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule." Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

[4] *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (explaining that "'regulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually implementary to an existing law") (internal quotation marks and citation omitted). However, courts have sometimes used the term "regulations" more broadly to embrace rules that do not carry the force of law and, therefore, are not required to issue under the APA's notice-and-comment procedures. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979) ("The central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other.").

The APA does not contain the term "legislative rule." But as discussed below, *see infra* "Withdrawing Rules from OFR," the APA directs agencies to publish "substantive rules of general applicability" in the Federal Register, 5 U.S.C. § 552(a)(1)(D), and refers to "substantive rule[s]" in its requirement that agencies delay the effective dates of rules required to be published in the Federal Register by at least 30 days after publication, *id.* § 553(d). And the Attorney General's 1947 manual interpreting the APA, issued shortly after the APA was enacted, refers to "substantive rules" as the rules that must be issued pursuant to notice and comment. *See* TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26, 30 (1947). The *Manual* defines "substantive rules" as "rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute.... Such rules have the force and effect of law." *Id.* at 30 n.3.

The notice-and-comment rulemaking section of the APA, discussed below, *see infra*, does not refer to "regulations" as the type of rules that must comply with its requirements. But other related provisions, such as the Freedom of Information Act, authorize or direct agencies to issue "regulations" on particular subjects. *See, e.g.*, 5 U.S.C. § 552(a)(6)(E) (directing agencies to "promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records" under the Freedom of Information Act).

[5] 5 U.S.C. §§ 551-559, 701-706.

[6] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).

issue a legislative rule, an agency generally must publish a notice of proposed rulemaking in the Federal Register and allow the public to comment on the proposal.[7] After reviewing the comments received, the agency may publish a final rule in the Federal Register.[8] The APA provides that final rules generally do not become effective until at least 30 days after publication.[9] This type of rulemaking is known as "informal" or "notice-and-comment" rulemaking[10] and is codified at 5 U.S.C. § 553.[11]

Not all rules must comply with the APA's informal rulemaking requirements. For example, the APA exempts non-legislative rules—such as interpretive rules that construe the laws an agency administers but which carry no legal force—from its notice-and-comment procedures.[12] Further, a legislative rule may be exempt from all or some of the APA's informal rulemaking requirements under specific exceptions in the APA.[13] For example, an agency does not need to engage in notice and comment for a legislative rule if there is "good cause" to bypass the procedure because it would be "impracticable, unnecessary, or contrary to the public interest."[14]

Not all legislative rules are issued as "traditional" final rules.[15] For example, when agencies avoid notice and comment under the "good cause" exception, they sometimes issue what is known as an "interim final rule." An interim final rule is a final rule that an agency issues without providing prior notice and an opportunity for public comment, but which the agency may replace with a (non-interim) final rule after considering *post*-promulgation public comments.[16]

Besides *issuing* legislative rules, agencies generally are able to *rescind* or *alter* such rules. The APA's rulemaking requirements generally apply to the repeal and amendment of rules, as well as to their initial issuance.[17] Thus, if an agency seeks to rescind or alter a legislative rule, under the APA, it must do so in compliance with these requirements, unless an exception applies.[18] In effect, the agency must issue a new rule that replaces the existing rule.

Agencies may also seek to withdraw a final rule from the Office of the Federal Register (OFR) before its publication in the Federal Register, or delay the rule's effective date or compliance deadlines after it has been published. Agencies generally may withdraw final rules before

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[7] 5 U.S.C. § 553(b), (c); *see infra* "Overview of Notice-and-Comment Rulemaking Under the APA."

[8] *See* 5 U.S.C. § 552(a)(1)(D).

[9] *Id.* § 553(d).

[10] *See* CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey, at 2.

[11] 5 U.S.C. § 553.

[12] *Id.* §§ 551(4), 553(b)(A); *see infra* "Exceptions to Notice-and-Comment Procedures."

[13] *See* 5 U.S.C. § 553(a), (b)(B), (d)(1), (3); *see infra* "Exceptions to the APA's Notice-and-Comment Rulemaking Requirements."

[14] 5 U.S.C. § 553(b)(B); *see infra* "Exceptions to Notice-and-Comment Procedures."

[15] *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 945 n.74 (2008).

[16] *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999) (footnote & emphasis omitted); *see infra* "Exceptions to the APA's Notice-and-Comment Rulemaking Requirements." Interim final rules are distinct from *direct final rules*. A direct final rule is a rule that an agency publishes in the Federal Register that states that it will become effective at some time as a final rule unless the agency receives an adverse comment or a notice of intention to submit an adverse comment. Garvey, *supra* note 10, at 4; Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995). The agency withdraws the direct final rule if it receives any adverse comments or notices of intention to submit adverse comments. Garvey, *supra* note 10, at 4; Levin, *supra*, at 1.

[17] *See* 5 U.S.C. § 551(5).

[18] *See infra* "Rescinding Rules."

publication without undergoing notice and comment.[19] In contrast, courts have held that suspending or delaying a rule's effective date is tantamount to amending or repealing the rule.[20] Thus, to suspend the effective date or compliance deadlines of a rule after its publication, an agency generally must adhere to the APA's rulemaking requirements.[21] Further, although 5 U.S.C. § 705 permits an agency to postpone a rule's effective date pending judicial review if the "agency finds that justice so requires,"[22] courts have rejected recent efforts under that section to postpone compliance dates for already effective rules, and to postpone effective dates without adequate justification that is tied to the pending litigation.[23]

Many agency suspensions and withdrawals of rules are driven by directives from the White House. Soon after taking office, recent presidential administrations typically have directed agencies to cease pending rulemaking activities of the prior administration, withdraw proposed and final rules from OFR prior to publication, and stay (or consider staying) the effective dates of published rules that have not yet become effective to give the new administration time to review the late-term rulemakings of the prior administration.[24]

The APA establishes standards for judicial review of most agency rules, including rules that rescind other rules.[25] The Supreme Court has explained that courts apply the same level of scrutiny in reviewing an agency's rescission of a rule as they do when reviewing the initial issuance of a rule.[26] An agency must explain its departure from the prior policy and show that its new policy is consistent with the underlying statute; supported by "good reasons"; and better, in the agency's belief, than the previous policy.[27] Agencies must also address factual findings that are inconsistent with those supporting the previous rule and consider "serious reliance interests" that are affected by a change in policy.[28] Recent Supreme Court decisions suggest that reviewing courts should more closely scrutinize an agency's consideration of reliance interests when rescinding rules in the future.[29]

This report provides an overview of agency rescissions and alterations of rules. First, it briefly examines the APA's notice-and-comment rulemaking requirements and exceptions to such requirements.[30] It then discusses selected topics central to agency rescissions and alterations. After considering the general requirements agencies must follow when rescinding or altering a rule,[31] the report explains how courts have treated agencies' withdrawal of rules from OFR,[32]

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[19] *See infra* "Withdrawing Rules from OFR."

[20] *See, e.g.*, Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 194 (2d Cir. 2004) (noting that "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards").

[21] *See infra* "Suspension of Rules."

[22] 5 U.S.C. § 705.

[23] *See infra* "Postponement Pending Judicial Review."

[24] *See infra* "New Presidential Administrations' Responses to 'Midnight Rulemaking.'"

[25] *See* 5 U.S.C. § 706.

[26] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).

[27] *Id.* at 515.

[28] *Id.*

[29] *Id.*; *see infra* "Judicial Review of Rule Rescissions."

[30] *See infra* "Overview of Notice-and-Comment Rulemaking Under the APA."

[31] *See infra* "Rescinding Rules."

[32] *See infra* "Withdrawing Rules from OFR."

suspension and postponement of rules,[33] and stay of rules pending judicial review under the APA.[34] Following a brief explanation of how new presidential administrations typically respond to the late-term rulemaking activities of prior administrations,[35] the report then discusses the general review standards and principles courts apply when reviewing an agency rescission or change of a rule.[36] Lastly, the report concludes with a summary of selected options available to Congress pertaining to the rescission or alteration of rules and how Congress can use its power of the purse to prohibit agencies from developing, finalizing, or implementing rules.[37]

Overview of Notice-and-Comment Rulemaking Under the APA

The APA prescribes default procedures for agency rulemakings with which federal agencies generally must comply.[38] Codified at 5 U.S.C. § 553, the APA's notice-and-comment rulemaking procedures are grounded in Congress's desire to ensure public involvement in the rulemaking process.[39] Under Section 553, an agency seeking to promulgate a legislative rule generally first must publish a notice of proposed rulemaking in the Federal Register[40] and allow members of the public an opportunity to submit comments on the proposal.[41] Section 553 states that such notice of the agency's proposed rulemaking must contain "a statement of the time, place, and nature of public rule making proceedings"; a "reference to the legal authority under which the rule is proposed"; and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[42] The agency must incorporate into the final rule a "concise general statement of [its] basis and purpose"[43] and the agency's responses to what the courts have characterized as the "significant" comments it received during the comment period.[44] The APA

[33] *See infra* "Suspension of Rules."

[34] *See infra* "Postponement Pending Judicial Review."

[35] *See infra* "New Presidential Administrations' Responses to 'Midnight Rulemaking.'"

[36] *See infra* "Judicial Review of Rule Rescissions."

[37] *See infra* "Considerations for Congress."

[38] *See* 5 U.S.C. § 553. The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." *Id.* § 551(1). Several entities are explicitly excluded from this definition, including Congress and the federal courts. *See id.* § 551(1)(A), (B). In addition to rulemaking procedures, the APA also prescribes administrative adjudication procedures and standards of judicial review of final agency actions. *See id.* §§ 554-558, 701-706.

[39] 5 U.S.C. § 553; *see* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 99-100 (2020) ("Congress pursued the value of public participation in the APA ... by requiring agencies to provide public notice of their proposed rules and an opportunity for the public to comment.").

[40] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015); 5 U.S.C. § 553(b).

[41] 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

[42] *Id.* § 553(b)(1)-(3).

[43] *Id.* § 553(c). Although the statutory language describes such statements as "concise," in practice, they often consist of extensive preambles to final rules that agencies use "to advise interested persons how the rule will be applied, to respond to questions raised by comments received during the rulemaking, and as a 'history of the proceeding' that can be referred to in future applications of the rule." JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 380 (6th ed. 2019).

[44] *Perez*, 575 U.S. at 96.

provides that an agency's final rule generally must be published in the Federal Register at least 30 days before the rule becomes effective.[45]

It is important to note that several forms of rulemaking exist other than notice-and-comment rulemaking under the APA. For example, under Section 553, "when rules are required by statute to be made on the record after opportunity for an agency hearing," an agency may issue a rule only after engaging in a trial-type, evidentiary proceeding governed by the formal procedures contained in 5 U.S.C. §§ 556 and 557.[46] This is known as "formal" rulemaking.[47] In addition, the APA is not the only statute that imposes rulemaking requirements. Although the APA's procedures apply to agency rulemakings as a default, Congress may require that agencies engage in additional or alternative procedures.[48] For example, under what is known as "hybrid rulemaking," Congress imposes additional rulemaking procedures on agencies that build on the APA's procedures. Hybrid rulemakings are often of an adjudicative nature, in that they typically require an agency to hold a hearing or provide an opportunity for a hearing before issuing a rule, and may contain other trial-type attributes.[49]

However, notice-and-comment rulemaking under the APA is the most common form of legislative rulemaking.[50] And just as it is important to understand the notice-and-comment process discussed above, it is also essential to recognize which rules do *not* have to comply with those requirements. The materials below, accordingly, briefly discuss exceptions to the APA's notice-and-comment rulemaking requirements.

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[45] 5 U.S.C. § 553(d); *cf. id.* § 552(a)(1)(D) (directing agencies to publish in the Federal Register "substantive rules of general applicability adopted as authorized by law").

[46] 5 U.S.C. § 553(c).

[47] *See* Garvey, *supra* note 10, at 3. Formal rulemaking proceedings are normally presided over by impartial administrative law judges. *See* 5 U.S.C. § 556(b). The proponent of a proposed rule bears the burden of proof in formal rulemaking proceedings, and a party may support his position through the submission of "oral or documentary evidence" and cross-examination. *Id.* § 556(d). The rule must be "issued ... on consideration of the whole record or those parts thereof cited by a party and supported by ... substantial evidence." *Id.* The APA's formal rulemaking procedures apply to a particular rulemaking only when a statute explicitly requires that the rulemaking proceed "on the record after opportunity for an agency hearing" or else uses language "quite close to [those] magic words." United States v. Florida E. Coast Ry., 410 U.S. 224, 237-38 (1973); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 240 (2014) (internal quotation marks and citation omitted). Agencies engage in informal much more often than formal rulemaking. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282 (2010).

[48] *Cf.* 5 U.S.C. § 559 (providing that a "[s]ubsequent statute may ... supersede or modify" the APA if "it does so expressly").

[49] MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 239 (3d ed. 2009) (quoting JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 308-09 (4th ed. 2006)); *id.* at 236. *See, e.g.*, 15 U.S.C. § 57a(b)(1), (c)(2) (providing that the Federal Trade Commission, when developing rules under that section, must, inter alia, "provide an opportunity for an informal hearing" that allows "an interested person ... to present his position orally or by documentary submission" and, in certain circumstances, to conduct cross-examination). However, while Congress can impose procedures on agencies in excess of those required by the APA, courts may not. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 546 (1978). For an overview of formal, hybrid, and other types of rulemaking, see Garvey, *supra* note 10, at 1-6.

[50] *See* Katherine J. Strandburg, *Rulemaking and Inscrutable Automated Decision Tools*, 119 COLUM. L. REV. 1851, 1865 (2019).

Exceptions to the APA's Notice-and-Comment Rulemaking Requirements

Only a subset of agency rules must comply with the APA's notice-and-comment rulemaking requirements. The APA defines "rule" as "the 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."[51] This definition includes traditional regulations, but also a wide array of other agency actions, including nonbinding general policy statements.[52] Not every type of rule falling under that definition, however, must comply with Section 553. As discussed above, Section 553's notice-and-comment requirements apply only to legislative rules having the force of law.[53] Further, some rules are either wholly exempt from Section 553's provisions due to their subject matter[54] or are exempt specifically from the section's notice-and-comment procedures.[55] Lastly, some rules are exempt from the APA's general requirement that final rules become effective no earlier than 30 days after publication.[56]

When agencies are authorized to issue a rule without complying with notice-and-comment procedures, most often by invoking the "good cause" exception to Section 553's notice-and-comment requirements, they sometimes issue an interim final rule. An interim final rule is a final rule that an agency publishes immediately—without providing notice and an opportunity to comment prior to publication—and which requests the submission of comments following issuance.[57] The agency may revise the interim final rule and replace it with a (non-interim) final rule in response to any post-promulgation comments received.[58] Interim final rules are identical in substance to non-interim final rules.[59] As the D.C. Circuit has explained, the "key word" in the term interim final rule "is not interim, but *final*. 'Interim' refers only to the [r]ule's intended duration—not its tentative nature."[60] If an interim final rule qualifies under an applicable

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[51] *Id.* § 551(4). This definition embraces "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." *Id.* A "rule" is in contrast to an "order," which the APA defines as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). An order is the product of an agency "adjudication"—the "agency process for the formulation of an order"—not a rulemaking. *Id.* § 551(7).

[52] *See id.* § 553(b)(A).

[53] *See supra* "Introduction" & "Overview of Notice-and-Comment Rulemaking Under the APA."

[54] 5 U.S.C. § 553(a); *see infra* "Rules That Are Wholly Exempt from 5 U.S.C. § 553."

[55] 5 U.S.C. § 553(b); *see infra* "Exceptions to Notice-and-Comment Procedures."

[56] 5 U.S.C. § 553(d); *see infra* "Exceptions to the 30-Day Delayed-Effectiveness Requirement."

[57] Asimow, *supra* note 16, at 704 (footnote & emphasis omitted). As mentioned above, interim final rules are used most frequently when an agency invokes the good cause exception to the APA's notice-and-comment procedures. *See* Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43110 (Aug. 18, 1995) (explaining that, while interim final rules have "been used in a variety of contexts, [they are] used most frequently where an agency finds that the 'good cause' exemption of the APA justifies dispensing with pre-promulgation notice and comment").

[58] *See* Asimow *supra*, note 16, at 704, 736; *cf.* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 903 n.38 (2008) (writing that, "[t]echnically, agencies are supposed to issue [non-interim final rules to replace interim final rules], but most agencies do not, leaving interim final rules in force").

[59] *See* Career College Ass'n v. Riley, 74 F.3d 1265, 1268–69 (D.C. Cir. 1996).

[60] *Id.* at 1268; *but see* Analysas Corp. v. Bowles, 827 F. Supp. 20, 21 n.3 (D.D.C. 1993) (expressing uncertainty as to

exception to the 30-day delayed-effective requirement discussed below,[61] it may take effect immediately upon publication.[62]

Rules That Are Wholly Exempt from 5 U.S.C. § 553

Some rules are wholly exempt from the rulemaking provisions of 5 U.S.C. § 553 even though they may carry the force of law. Section 553 does not apply "to the extent that there is involved" in a rule either "a military or foreign affairs function of the United States," or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[63] Rules involving such criteria are entirely exempt from Section 553. This means that these rules are exempt not only from the section's notice-and-comment procedures, but also from the section's provisions generally requiring that substantive rules only become effective 30 or more days after publication and allowing parties to petition an agency to institute a rulemaking proceeding.[64]

Exceptions to Notice-and-Comment Procedures

Although the rules discussed above are wholly exempt from 5 U.S.C. § 553's requirements, the APA also contains two exceptions that permit agencies to issue, alter, or rescind covered rules without using the APA's notice-and-comment procedures (unless "notice or hearing is required by statute").[65] Both exceptions are contained in Section 553(b).

First, that subsection exempts from the APA's notice-and-comment procedures "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice."[66] Interpretative rules (or "interpretive" rules, as they are more commonly known[67]) are statements that "advise the public of the agency's construction of the statutes and rules which it administers"

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whether "'interim final rule' means that [the agency] has issued a *final rule* which only applies temporarily (i.e., in the *interim*), or that [the agency] has agreed upon a *final version* of an *interim rule*"). The court in *Bowles*, however, did note that the latter "structure violates standard rules of construction in the English language, that adjectives precede the nouns that they modify." *Id.*

[61] *See* 5 U.S.C. § 553(d).

[62] *See infra* "Exceptions to the 30-Day Delayed-Effectiveness Requirement."

[63] 5 U.S.C. § 553(a)(1)–(2). With respect to the second group of rules, the exception applies "'to the extent that' any one of the enumerated categories is 'clearly and directly' involved in the regulatory effort at issue." Humana of S.C., Inc. v. Califano, 590 F.2d 1070, 1082 (D.C. Cir. 1978) (citation omitted). The U.S. District Court for the District of Columbia (D.C. District Court) recently applied this standard to the "military or foreign affairs function" prong, as well. Cap. Area Immigrants' Rights Coal. v. Trump, 471 F. Supp. 3d 25, 52 (D.D.C. 2020) ("[A] rule falls within the foreign affairs function exception only if it 'clearly and directly' involves 'a foreign affairs function of the United States.'") (citations omitted).

[64] 5 U.S.C. § 553(d), (e); *see* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PENN. L. REV. 540, 549 (1970) ("The exemptions contained in section 553(a) for rulemaking involving 'a military or foreign affairs function,' rulemaking 'relating to agency management or personnel,' and rulemaking relating to 'public property, loans, grants, benefits, or contracts' operate to exclude entirely, and without qualification, all rulemaking in these categories from every provision of subsections 553(b)-(e)."). For more information on the subsection (a) exceptions, see Garvey, *supra* note 10, at 6.

[65] 5 U.S.C. § 553(b)(A)–(B). The exceptions do not specify that the covered rules are exempt from the other provisions of § 553. However, as noted below, *see infra*, the requirement in Section 553 that rules take effect no earlier than at least 30 days after publication does not apply to interpretive rules and "statements of policy" or when an agency finds there is "good cause" for a rule to take immediate effect, 5 U.S.C. § 553(d)(2)-(3).

[66] 5 U.S.C. § 553(b)(A).

[67] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 n.1 (2015) (remarking that "interpretive" "is the more common phrasing today").

but which lack the force of law.[68] General policy statements, which also lack the force of law, are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[69] Lastly, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has explained that "rules of agency organization, procedure, or practice"—commonly referred to as "procedural rules"[70]—refer to the "technical regulation of the form of agency action and proceedings" and "merely prescribe[] order and formality in the transaction of ... business."[71]

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[68] *Id.* at 97 (internal quotation marks and citation omitted).

[69] Lincoln v. Vigil, 508 U.S. 182, 197 (1993) (internal quotation marks and citation omitted); *see* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001) (explaining that general policy statements, as well as interpretive rules, "are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties."). For a general overview of general statements of policy, see CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.

Interpretive rules and general policy statements are often referred to as "non-legislative rules," *see* Funk, *supra*, at 1322, or "guidance documents," *see* Cole & Garvey, *supra*, at 1. Courts are commonly tasked with determining whether an interpretive rule or general policy statement is in fact binding and, therefore, should have undergone the APA's notice-and-comment procedures. *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (examining the distinction between legislative rules, interpretive rules, and general policy statements, and explaining that the "most important factor" for determining whether an agency action is a legislative rule or a general policy statement "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities"). For a discussion of the approaches courts takes to determine whether a general policy statement or interpretive rule is actually a legislative rule, *see* Cole & Garvey, *supra*, at 6-13; LUBBERS, *supra* note 43, at 74-96.

[70] *See* Elec. Privacy Info. Ctr. v. DHS, 653 F.3d 1, 5 (D.C. Cir. 2011) ("We consider first the [agency's] argument it has announced a rule of 'agency organization, procedure, or practice,' which our cases refer to as a 'procedural rule.'").

[71] Pickus v. United States Bd. of Parole, 507 F.2d 1107, 113-14 (D.C. Cir. 1974). Procedural rules do not themselves "alter the rights or interests of parties," even though they "may alter the manner in which the parties present themselves or their viewpoints to [an] agency." *Elec. Privacy Info. Ctr.*, 653 F.3d at 5 (internal quotation marks and citation omitted).

Courts generally categorize procedural rules as non-legislative rules. *See, e.g.*, Preminger v. Sec'y of Veterans Affairs, 632 F.3d 1345, 1349 (Fed. Cir. 2011) (noting that the term "'non-legislative rules' is used to describe collectively those rules that are exempt from notice-and-comment rulemaking, including those with labels such as 'interpretive rules,' 'procedural rules,' and 'policy statements.'") (footnotes and citations omitted); DOL v. Kast Metals Corp., 744 F.2d 1145, 1152 (5th Cir. 1984) ("The central distinction among agency regulations found in the APA is that between substantive rules on the one hand and interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice on the other. Whereas substantive or 'legislative' rules affect individual rights and obligations and are binding on the courts, nonlegislative rules do not have the force of law.") (internal quotation marks and citations omitted); Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19, 46 (D.D.C. 2018) ("Unlike a legislative rule, a procedural rule does not itself alter the rights or interests of parties or impose new substantive burdens.") (internal quotation marks omitted).

Commentators, however, differ on whether to identify procedural rules as non-legislative rules or instead view them as not susceptible to simple categorization as either nonlegislative or legislative rules. *See, e.g.*, ASIMOW & LEVIN, *supra* note 49, at 319 ("Legislative rules are sometimes known as 'substantive rules.' That usage can be misleading, because it undesirably implies a contrast with 'procedural rules.' Actually, procedural rules are often legislative rules."); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 254 ("Whether characterized as interpretative rules, procedural rules, or policy statements, none of these nonlegislative rules carries the force and effect of law.") (footnotes omitted); Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 602 (2006) ("This does not mean that the distinction between legislative rules and nonlegislative rules does not apply to procedural rules. Agencies can issue legally binding procedural rules and procedural rules that are merely advisory or that act as guidelines to good practice."); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 716 (2000) ("The APA does not require rulemaking procedures for either non-legislative or procedural rules.... ") (footnotes omitted).

A related and consequential issue subject to litigation is whether a rule is "procedural" or "substantive." *See* ASIMOW & LEVIN, *supra* note 49, at 316 ("A constant problem in the law is to distinguish 'procedure' from 'substance.'

Interpretive Rules, General Policy Statements, and Procedural Rules

Interpretive rules construe the laws an agency administers but lack the force of law.

General policy statements explain how an agency plans to apply a discretionary authority, but lack the force of law.

Procedural rules govern the format of agency actions and proceedings, agency organization, and other procedural matters.

Second, subsection (b) of Section 553 exempts from its notice-and-comment requirements a rule that otherwise is required to undergo notice-and-comment rulemaking when an "agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[72] Courts have applied this "good cause" exception to notice-and-comment requirements in a variety of circumstances, such as when a rule involves "emergency situations, or [situations] where delay could result in serious harm."[73] Application of the exception is necessarily fact-specific, and courts have instructed that the "exception should be narrowly construed and only reluctantly countenanced."[74] To properly invoke the good cause exception, an agency must "incorporate[] the finding [of good cause] and a brief statement of reasons therefor in the rules issued."[75]

Exceptions to the 30-Day Delayed-Effectiveness Requirement

Section 553 prohibits the "publication or service of a substantive rule" less than 30 days before the rule's effective date.[76] The APA's legislative history indicates that this requirement was included to provide affected parties "a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt."[77] This directive, however, does not apply (1) to "a substantive rule [that] grants or recognizes an exemption or relieves a restriction," (2) to interpretive rules or "statements of policy," or (3) when an agency finds there is "good cause" for the rule to take immediate effect.[78] Rules fitting any of these categories may take effect immediately upon being published.

Nevertheless, such a distinction must be drawn under [the exception from notice-and-comment under the APA for procedural rules]").

[72] 5 U.S.C. § 553(b)(B).

[73] Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004). For more information on the good cause exception, including the circumstances under which it may apply, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

[74] Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018) (internal quotation marks and citation omitted).

[75] 5 U.S.C. § 553(b)(B).

[76] *Id.* § 553(d) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date.... ").

[77] CLARK, *supra* note 4, at 36 (quoting ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, SEN. DOC. NO. 248, at 201, 259 (1948)).

[78] 5 U.S.C. § 553(d)(1)–(3). Recall that agencies may also be excused from notice-and-comment procedures for "good cause." *Id.* § 553(b)(B); *see supra* "Exceptions to Notice-and-Comment Procedures."

Rescinding Rules

An agency typically may amend or repeal a rule it has issued.[79] The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule."[80] In light of this definition, the Supreme Court has recognized that, under the APA, an agency must comply with 5 U.S.C. § 553's requirements not only when issuing a new rule with the force of law, but also when altering or rescinding such a rule.[81] But unless a statute or rule provides otherwise, an agency is not required to follow notice-and-comment procedures when amending or repealing an interpretive rule, general policy statement, or procedural rule.[82]

The effect of the rescission of a rule likely depends on both the specific rule being repealed and the content of the rule announcing the repeal. When a court vacates a rule as invalid, the ordinary effect is to return the law to its state before the rule was promulgated.[83] But when an agency "rescinds" a rule, it does so through a new rulemaking that may retain or amend some of the provisions of the prior agency action that it addresses.

For example, in 2019, the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) repealed their 2015 rule[84] defining "waters of the United States" subject to the jurisdiction of the Clean Water Act (CWA).[85] Instead of replacing the 2015 definition with a newly developed definition, the 2019 rule reimposed "the regulations [that were] in existence immediately prior to the 2015 [r]ule."[86] However, in April 2020, the agencies then rescinded the 2019 repeal-rule and replaced it with the Navigable Waters Protection Rule, which imposed a revised definition of "waters of the United States."[87]

Sometimes, however, a repeal-rule revokes a rule without either imposing new requirements or reimposing prior ones. For example, in 2017, the Department of Agriculture (USDA) repealed[88] an interim final rule it had issued in December 2016 that would have added a new paragraph to regulations implementing the Packers and Stockyards Act, codifying the agency's interpretation

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[79] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). An agency may not be authorized to rescind rules that are legally required (for example, by statute), as such actions would "not [be] in accordance with law" under the APA. 5 U.S.C. § 706(2)(A).

[80] 5 U.S.C. § 551(5).

[81] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 101 (2015) (explaining that the definition of "rule making" in the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). A statute that requires procedures different from or in addition to the APA's informal rulemaking procedures could require that the agency use such alternative procedures to amend or repeal the rule, as well. *See* Garvey, *supra* note 10, at 10 & n.88.

[82] 5 U.S.C. § 553(b)(A); *cf. Perez*, 575 U.S. at 101 ("Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.").

[83] *See* Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002) ("Normally when an agency so clearly violates the APA we would vacate its action ... and simply remand for the agency to start again.").

[84] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

[85] Definition of ''Waters of the United States''—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019); *see* 33 U.S.C. § 1362(7) (defining "[t]he term 'navigable waters'" subject to the CWA's jurisdiction as "the waters of the United States").

[86] 84 Fed. Reg. at 56,664.

[87] The Navigable Waters Protection Rule: Definition of ''Waters of the United States,'' 85 Fed. Reg. 22250 (Apr. 21, 2020). EPA issued the two rules pursuant to a planned two-step process. *See* EPA, *Navigable Waters Protection Rule, Rulemaking Process* (last updated Aug. 27, 2020), https://www.epa.gov/nwpr/rulemaking-process.

[88] Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48,594, 48,594 (Oct. 18, 2017).

of a provision of that statute.[89] Instead of substituting a different interpretation of the statute, USDA's 2017 repeal-rule simply ensured that its regulations did not contain the additional paragraph created by the interim final rule.[90]

As discussed above, while 5 U.S.C. § 553 generally prohibits rules that must undergo notice and comment from becoming effective until at least 30 days after their publication in the Federal Register, certain rules are exempt from this requirement.[91] Thus, if an agency has "good cause" or if amending or repealing a rule would remove a restriction or provide an exemption, an agency's amendment to or repeal of a rule with the force of law may become effective immediately upon publication.[92]

Selected Issues

Because rescinding a rule generally requires new rulemaking, including notice-and-comment procedures, agencies have at times sought alternatives to formal rescission. In some instances, rather than repealing a rule, an agency may attempt to (1) withdraw a rule from OFR prior to publication; (2) delay the effective date of a rule that has been published in the Federal Register or the date on which the regulated public must comply with the rule; or (3) stay a published rule's effective date or compliance date pending judicial review. Courts generally have held that agencies may withdraw a rule from OFR prior to its publication in the Federal Register without engaging in notice-and-comment proceedings.[93] And courts typically have held that an agency must adhere to the APA's rulemaking procedures when delaying a rule's effective or compliance dates,[94] and that such a delay may not be used to stay the effective or compliance dates of a rule that has already become effective.[95]

Many agency suspensions and withdrawals of rules are driven by directives from the White House. As examined below, soon after taking office, recent presidential administrations typically have directed agencies to cease pending rulemaking activities, withdraw proposed and final rules from OFR prior to publication, and stay or consider staying the effective dates of published rules that have not yet become effective to give the new administration sufficient time to review the late-term rulemakings of the prior administration.[96]

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[89] Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92,566 (Dec. 20, 2016). The agency had twice delayed the effective date of the 2016 interim final rule before proposing to rescind it. *See* 82 Fed. Reg. 9489 (Feb. 7, 2017); 82 Fed. Reg. 17,531 (April 12, 2017). The Packers and Stockyards Act is codified at 7 U.S.C. §§ 181 *et seq.*

[90] 82 Fed. Reg. at 48,594.

[91] *See supra* "Exceptions to the 30-Day Delayed-Effectiveness Requirement"; 5 U.S.C. § 553(d). Pursuant to the Congressional Review Act, 5 U.S.C. §§ 801 *et seq.*, a rule as defined by that act, *id.* § 804(3); *see infra* text accompanying note 205 & note 205, may not take effect until the promulgating agency submits a report that contains "a copy of the rule"; "a concise general statement relating to the rule"; and "the proposed effective date of the rule" to both houses of Congress and the Comptroller General of the United States, 5 U.S.C. § 801(a)(1). "Major rules," as defined by the act, may not go into effect until 60 days after Congress receives the rule or the rule is published in the Federal Register (if the rule is "so published"), whichever is later. *Id.* § 801(a)(3)(A). For the definition of "major rule" under the act, see *id.* § 804(2). The Congressional Review Act is discussed below. *See infra* "Considerations for Congress."

[92] 5 U.S.C. § 553(d)(1), (3).

[93] *See infra* "Withdrawing Rules from OFR."

[94] *See infra* "Suspension of Rules."

[95] *See infra* "Postponement Pending Judicial Review."

[96] *See infra* "New Presidential Administrations' Responses to 'Midnight Rulemaking.'"

Withdrawing Rules from OFR

The Freedom of Information Act (FOIA),[97] a component of the APA, directs agencies to publish their "substantive rules of general applicability adopted as authorized by law" in the Federal Register.[98] To comply, an agency submits these rules to OFR—a component of the National Archives and Records Administration.[99] OFR does not publish a rule immediately; it holds the rule for "confidential processing" and then files the rule for "public inspection."[100] Generally, a rule OFR receives before 2:00 p.m. will be filed for public inspection on the second working day following receipt, and a rule received after 2:00 p.m. will be filed on the third working day.[101] Publication generally occurs the day after the rule is filed for public inspection.[102] OFR permits agencies to withdraw rules during either the "confidential processing" or "public inspection" phases.[103]

Case law generally supports an agency's ability to withdraw a rule from OFR before the rule has been published in the Federal Register to prevent the rule from taking effect.[104] For example, in *Kennecott Utah Copper Corp. v. Department of the Interior*,[105] the D.C. Circuit held that the government did not violate FOIA, the Federal Register Act,[106] or the APA when the Department

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[97] 5 U.S.C. § 552.

[98] *Id.* § 552(a)(1)(D); *see id.* § 553(d) (referring to the "required publication ... of a substantive rule"). For more information on the Freedom of Information Act's affirmative disclosure requirements, see CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner, at 11-15.

Courts have held that, under the APA, a legislative rule cannot become legally effective if it has not been published in the Federal Register. *See, e.g.*, Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 106 (2d Cir. 2018) ("[A] regulation ... does not have legal effect until it is published in the Federal Register."); Nat. Res. Def. Council v. EPA, 559 F.3d 561, 565 (D.C. Cir. 2009) ("Agencies must publish substantive rules in the Federal Register to give them effect."); Humane Soc'y of the United States v. USDA, No. 19-02458, 2020 U.S. Dist. LEXIS 132378, at *18 (D.D.C. July 27, 2020) ("[I]n a case where the agency does not consider a rule to be finalized, and the rule has not been published in the Federal Register, it does not constitute a finalized, legislative rule.").

[99] 44 U.S.C. § 1503 ("The original and two duplicate originals or certified copies of a document required or authorized to be published by [44 U.S.C. § 1505] ... shall be filed with [OFR], which shall be open for that purpose during all hours of the working days when the National Archives Building is open for official business."); *see id.* § 1505(a)(3) (providing that "documents or classes of documents that may be required so to be published by Act of Congress" must "be published in the Federal Register").

[100] 1 C.F.R. § 17.1; *see id.* § 17.2(a) ("Each document received shall be filed for public inspection only after it has been received, processed and assigned a publication date.").

[101] *Id.* § 17.2(b)–(c); Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 339 (2013).

[102] 1 C.F.R. § 17.2(b)-(c).

[103] *Id.* § 18.13(a); NAT'L ARCHIVES & RECORDS ADMIN., DOCUMENT DRAFTING HANDBOOK, at 5.3 (Apr. 2019), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf; *see* Beermann, *supra* note 101, at 340 (noting that generally, OFR will not allow withdrawal of a document that has been filed for public inspection without "a legal justification such as a legal mistake in the drafting of the document").

[104] *See* Nat. Res. Def. Council v. Perry, 940 F.3d 1072, 1077 (9th Cir. 2018) ("[O]rdinarily, agencies are free to withdraw a proposed rule before it has been published in the Federal Register, even if the rule has received final agency approval."); Chen v. INS, 95 F.3d 801, 805 (9th Cir. 1996) ("[O]n its own terms, th[e] rule was to become effective only on the date of publication in the Federal Register. In accordance with President Clinton's directive, this rule was withdrawn from publication. It was never subsequently published; therefore, it has no legal effect and is not binding on this court."); *but see* Xin-Chang Zhang v. Slattery, 859 F. Supp. 708, 713 (S.D.N.Y. 1994) (holding that an unpublished rule that had been "signed by the Attorney General," intended for publication in the Federal Register, and "confer[red] a substantive benefit" on the petitioner, "became effective despite the agency's failure to publish it in the Federal Register"), *rev'd on other grounds*, 55 F.3d 732 (2d Cir. 1995).

[105] 88 F.3d 1191 (D.C. Cir. 1996).

[106] 44 U.S.C. §§ 1501 *et seq.*

of the Interior withdrew a rule, without providing notice and an opportunity to comment, just two days after OFR had received the rule and before the rule had been made available for public inspection.[107] The court explained that "permitting agencies to ... withdraw regulations until virtually the last minute before public release" ensures "that regulations appearing in the Federal Register are as correct as possible in both form and substance" and "that the work of publishing the government's regulations proceeds in an orderly fashion."[108] The D.C. District Court recently concluded that agencies may also withdraw rules during the public inspection stage.[109] However, withdrawal is not permitted where an agency is under a nondiscretionary legal responsibility to publish a rule in the Federal Register.[110]

Suspension of Rules

In some instances, an agency may suspend (or postpone) the effective date or compliance deadlines of a rule that has already been published. Agencies may seek to suspend a rule's implementation in order to reconsider the rule or undertake notice-and-comment rulemaking to replace it,[111] to collect additional information necessary for the rule's implementation,[112] or to implement a new presidential administration's directive to temporarily postpone all regulations published after a certain date that had not yet taken effect.[113] While agencies sometimes pair suspension with repeal and replacement,[114] courts have cautioned that "a decision to reconsider a rule" in and of itself "does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration."[115]

Courts have uniformly held that suspension of a published rule is normally tantamount to an amendment or repeal of a rule.[116] This is because the effective date is "an essential part of any

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[107] *Kennecott*, 88 F.3d at 1202-09.

[108] *Id.* at 1206.

[109] Humane Soc'y of the United States v. USDA, No. 19-02458, 2020 U.S. Dist. LEXIS 132378, at *21-26 (D.D.C. July 27, 2020); *see id.* at 33 ("As was held in *Chen v. INS* [*see supra* note 104], a signed, purportedly final rule that is withdrawn and never published has no legal effect, and the Court sees no reason why this would not be true regardless of whether the public is aware of the rule's existence or not.") (citation omitted).

[110] *See Perry*, 940 F.3d at 1078-80.

[111] *E.g.*, Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (delaying effective date of 2015 rule amending definition of "waters of the United States" under the CWA in order to maintain status quo while EPA and the Corps took steps to review and revise the definition).

[112] *E.g.*, Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981) (upholding Mine Safety and Health Administration's postponement of safety regulations for coal mine operators while the agency gathered additional field-testing information regarding the equipment to be required under the rule).

[113] *E.g.*, 82 Fed. Reg. at 8499 (setting new effective date for 30 regulations in order to implement the Priebus Memorandum).

[114] *See* 83 Fed. Reg. 5200.

[115] Nat. Res. Def. Council v. Nat'l Hwy. Traffic Safety Admin., 894 F.3d 95, 111-12 (2d Cir. 2018) (citing Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2019)). *See also* Air Alliance Houston v. EPA, 906 F.3d 1049, 1065 (D.C. Cir. 2018) (rejecting agency argument that statutory grant of authority to amend a final rule also authorized agency "to delay a final rule merely because [the agency] is *considering* revising it").

[116] Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 194 (2d Cir. 2004) (noting that "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards"); Env't Def. Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) ("[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553."); Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 761-62 (3d Cir. 1982). *See also* Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Regime*, 12 Harv. L. & Pol'y Rev. 13, 17-18 (2018).

rule" in that it gives an agency statement future effect and ensures that adherence to the rule will be required.[117] As with the promulgation of a rule, suspension of a rule's deadlines has a "substantive effect on the obligations of [regulated entities] and on the rights of the public."[118] Such a decision "affects regulated parties' rights or obligations" in that it "relieves regulated parties of liability they would otherwise face."[119]

As a result, courts regard rule suspensions as final agency actions that are subject to judicial review.[120] For an agency action to be reviewable under the APA, it must be final.[121] The Supreme Court has held that for an agency action to be "final," it must (1) "mark the 'consummation' of the agency's decisionmaking process," and (2) be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[122] In *Clean Air Council v. Pruitt*, the D.C. Circuit concluded that an EPA order suspending for 90 days a 2016 rule establishing new source performance standards under the Clean Air Act for fugitive emissions of methane and other pollutants by the oil and natural gas industries was "essentially an order delaying the rule's effective date," that this was equivalent to amending or revoking the rule, and was thus a reviewable final agency action.[123]

Additionally, the APA's procedural requirements for rulemaking apply with equal force to rule suspensions. This includes the requirements for notice and comment, unless an agency can satisfy the statute's good-cause exception or another relevant exception set forth in 5 U.S.C. § 553.[124] Courts have noted that applying the APA's rulemaking requirements to rule suspensions prevents agencies from "[employing] delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits."[125] Similarly, the reinstatement of a prior rule also qualifies as a rulemaking for purposes of determining whether the relevant requirements apply.[126]

Reviewing courts typically focus on a rule suspension's effects (for instance, whether the suspension effectively allows an agency to repeal a rule without undertaking the processes

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[117] *Nat. Res. Def. Council*, 683 F.2d at 761-62.

[118] Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 815-16 (D.C. Cir. 1983).

[119] *Clean Air Council*, 862 F.3d at 6-7.

[120] The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. For further discussion of finality and the prerequisites to judicial review, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole [hereinafter Cole, *Judicial Review*], at 9-12.

[121] 5 U.S.C. § 704.

[122] Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

[123] *Clean Air Council*, 862 F.3d at 6. EPA issued the stay pursuant to Section 307(d)(7)(B) of the Clean Air Act, which provides that the agency may stay a rule for up to three months if the Administrator has initiated proceedings to reconsider the rule if the CAA provisions for mandatory reconsideration apply. 42 U.S.C. § 7607(d)(7)(B). The Clean Air Act requires EPA to convene reconsideration proceedings if it receives objections to a rule and the objector can demonstrate that it was impracticable to raise the objection during the period for public comment, and if the objection "is of central relevance to the outcome of the rule." *Id. See also* Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 579-80 nn. 26 & 28 (D.C. Cir. 1981) (concluding that the court had jurisdiction to review Department of Labor's deferral of the implementation of safety regulations for coal mine operators).

[124] *E.g.*, Nat. Res. Def. Council v. Nat'l Hwy. Traffic Safety Admin., 894 F.3d 95, 113-14 (2d Cir. 2018).

[125] Air All. Houston v. EPA, 906 F.3d 1049, 1065 (D.C. Cir. 2018). *See also Nat. Res. Def. Council*, 683 F.2d at 762 (noting that allowing agencies to suspend rules without adhering to the notice-and-comment requirement could result in the indirect repeal of a rule "simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the statute requires a rulemaking proceeding").

[126] N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 765 (4th Cir. 2012).

required by the APA) as opposed to the precise duration of the suspension. In this vein, some courts have been wary of rule suspensions that offer only a limited opportunity for public comment. In *North Carolina Growers' Association, Inc. v. United Farm Workers*, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) struck down a 2009 Department of Labor rule that suspended 2008 regulatory changes to certain employment regulations. The Department's proposed rule allowed for a 10-day comment period and indicated that the agency would consider comments regarding only the suspension, and not the substance of the regulations.[127]

The Fourth Circuit held that the suspension of the 2008 regulation and temporary reinstatement of an earlier regulation constituted a rulemaking that was subject to the APA's notice-and-comment procedures.[128] The court concluded that, although the Department's reasons for suspending the 2008 regulation called into question the substance of that rule, "the Department refused to receive comments on and to consider or explain 'relevant and significant issues.'"[129] Accordingly, the court held that the agency arbitrarily and capriciously failed to provide a meaningful opportunity for public comment or to give adequate consideration to "relevant and significant issues."[130] Similarly, two courts cited *North Carolina Growers' Association* in striking down the suspension of an earlier regulation clarifying the regulatory definition of "waters of the United States" under the CWA.[131]

Finally, as with the promulgation and repeal of rules, the suspension or postponement of a rule may be exempt from the APA's notice-and-comment requirements if an agency properly invokes the statute's good cause exception.[132] But courts have held that an agency may not invoke the exception to suspend or postpone a rule simply because it wishes to have time to review and amend the rule.[133] For example, in 2018, the U.S. Court of Appeals for the Second Circuit held that the National Highway Traffic Safety Administration had failed to establish good cause to indefinitely suspend, without notice and comment, the effective date of a rule setting penalties for noncompliance with fuel economy standards.[134] In sum, although agencies may suspend or

[127] *Id.* at 761.

[128] *Id.* at 765.

[129] *Id.* at 770.

[130] *Id.*

[131] S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 963 (D.S.C. 2018); Puget Soundkeeper All. v. Wheeler, No. C15-1342, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018). In November 2017, EPA and the Corps proposed to add an applicability date to the 2015 Clean Water Rule, thereby delaying its implementation for two years. Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017). The proposed rule provided a 21-day period for public comment, solicited comment only on whether it would be appropriate to add an applicability date to the 2015 Rule, and declined to solicit comments on the scope of the definition of "navigable waters" or on the regulation that the 2015 Clean Water Rule replaced. *Id.* at 55,544-45.

[132] 5 U.S.C. § 553(b)(B).

[133] Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (citing Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017)). *See also* Nat'l Educ. Ass'n v. DeVos, 379 F. Supp. 3d 1001, 1021-28 (N.D. Cal. 2019).

[134] Nat. Res. Def. Council v. Nat'l Hwy. Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018). *But see* Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581-82 (D.C. Cir. 1981) (in an "extremely close case," upholding the Secretary of Labor's deferral without notice or an opportunity for comment of the implementation of safety regulations for coal mine operators when the agency had not completed field testing for the relevant safety equipment because the agency did not realize, despite its best efforts, that a postponement would be necessary for reasons beyond its control until it was too late to follow notice-and-comment procedures).

postpone rules for various reasons, agency attempts to bypass the APA's procedural requirements when doing so have received close scrutiny from reviewing courts.

Postponement Pending Judicial Review

The APA also permits an agency to postpone a rule's effective date, without providing notice and an opportunity for public comment, if the rule is pending judicial review and "an agency finds that justice so requires."[135] One court has observed that the purpose of a stay pursuant to 5 U.S.C. § 705, unlike the other actions discussed in this report, is not to amend or repeal a rule but "to maintain the status quo in order to allow judicial review of the underlying regulation to proceed in a 'just' manner."[136] Case law on agencies' use of 5 U.S.C. § 705 is limited. District courts have generally allowed agencies to invoke Section 705 only to postpone rules that are not yet in effect, rather than compliance dates after the rule's effective date.[137] Additionally, the statute does not specify what an agency must consider in determining whether "justice so requires" a stay while legal challenges to a rule are pending.

Though federal appellate courts have not weighed in on the issue, district courts have endorsed different approaches to construing Section 705. Some have held that that a stay is appropriate only if the agency finds all four of the factors that are commonly necessary for a court to grant a preliminary injunction while a legal challenge is pending.[138] Another court has instructed that agencies need not consider whether the legal challenge is likely to succeed, but must weigh the other three injunction factors.[139]

Regardless of what framework they use to evaluate the substance of an agency's invocation of 5 U.S.C. § 705, several courts have rejected recent agency attempts to use the statute to postpone rules both before and after those rules' effective dates.[140] For example, the U.S. District Court for the District of Columbia held in *Bauer v. DeVos* that the Department of Education failed to support its stay of the implementation of student loan borrower regulations where it provided only a "boilerplate" statement that pending litigation had raised questions about the validity of the

[135] 5 U.S.C. § 705. Section 705 also provides that the reviewing court may postpone the effective date of an agency action "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." The authority of reviewing courts to alter a rule's effective date is beyond the scope of this report.

[136] Bauer v. DeVos, 325 F. Supp. 3d 74, 106-07 (D.D.C. 2018).

[137] Becerra v. U.S. Dep't of the Interior, 276 F. Supp. 3d 953, 965 (N.D. Cal. 2017) (holding that Department of Interior could not delay oil and gas valuation rule's compliance deadlines after effective date had passed); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1121 (N.D. Cal. 2017) (discussing *Becerra*, and noting that "[e]ffective and compliance dates have distinct meanings"); Nat. Res. Def. Council v. U.S. Dep't of Energy, 362 F. Supp. 3d 126, 151 (S.D.N.Y. 2019). *See also* Heinzerling, *supra* note 116, at 26-27.

[138] Sierra Club v. Jackson, 833 F. Supp. 2d 11, 30-31 (D.D.C. 2012); *Nat. Res. Def. Council*, 362 F. Supp. 3d at 149; *Bauer*, 325 F. Supp. 3d at 106. The four-factor test instructs courts to weigh the likelihood of success on the merits, the possibility of irreparable harm absent an injunction, the balance of equities, and the public interest in evaluating whether to issue a preliminary injunction. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Courts have also rejected the government's contention that stays under 5 U.S.C. § 705 are "committed to agency discretion by law" under Section 701(a)(2) of the APA and therefore unreviewable. *Nat. Res. Def. Council*, 362 F. Supp. 3d at 144-47; 5 U.S.C. § 701(a)(2). For an overview of Section 701(a)(2), see CRS Legal Sidebar LSB10536, *Judicial Review of Actions Legally Committed to an Agency's Discretion*, by Daniel J. Sheffner.

[139] *Bauer*, 325 F. Supp. 3d at 105-06.

[140] *E.g.*, *Nat. Res. Def. Council*, 362 F. Supp. 3d at 150-51 (holding that Department of Energy's indefinite postponement of effective date of energy efficiency regulations was arbitrary and capricious); *Bauer*, 325 F. Supp. 3d 74 (holding that Department of Education's stay of implementation of student loan borrower regulations was arbitrary and capricious); *Becerra*, 276 F. Supp. 3d at 965; *California*, 277 F. Supp. 3d at 1121.

rule.[141] The court reasoned that this statement failed to explain why it was necessary to stay a large portion of the rule, did not connect the possibility of potential compliance costs absent a stay or the agency's decision to review and revise the regulation to the pending litigation, and did not consider the impact of a stay on the public interest or the interest of student borrowers.[142]

New Presidential Administrations' Responses to "Midnight Rulemaking"

It is common for federal agencies to increase their rulemaking activities during the final months of a presidential administration.[143] Incoming administrations have responded to such late-term rulemaking activities—typically referred to as "midnight rulemaking"[144]—in a number of ways. Either by memorandum or executive order,[145] the White House has often instructed agencies to take some or all of the following actions—subject to exceptions—to give the new administration sufficient time to review the prior administration's midnight rulemakings: (1) refrain from sending any proposed or final rules to OFR for publication in the Federal Register; (2) withdraw from OFR any proposed or final rules that have not yet been published in the Federal Register; and (3) postpone or consider postponing the effective dates of rules that have been published in the Federal Register but that have not yet taken effect.[146] Such directives often exempt rulemakings responding to emergencies "or other urgent circumstances" (such as health or safety matters), as well as those subject to deadlines imposed by statute or court order.[147]

The Biden Administration's response to midnight rules issued by the outgoing Trump Administration fits this pattern. On January 20, 2021—President Joe Biden's first day in office—the White House issued a memorandum to executive departments and agencies outlining the President's "plan for managing the Federal regulatory process at the outset of his Administration."[148] The memorandum instructed agencies to

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[141] *Bauer*, 325 F. Supp. 3d at 107-10.

[142] *Id*.

[143] *See* Beermann, *supra* note 101, at 1; CRS Report R42612, *Midnight Rulemaking: Background and Options for Congress*, by Maeve P. Carey, at 1.

[144] *See* Carey, *supra* note 143, at 1.

[145] *See, e.g.*, Memorandum from President Ronald Reagan to the Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, and Administrator of the Environmental Protection Agency (Jan. 29, 1981) [hereinafter Reagan Memorandum]; Memorandum from Reince Priebus, Assistant to the President and Chief of Staff, for the Heads of Executive Departments and Agencies, 82 Fed. Reg. 8346 (Jan. 24, 2017) [hereinafter Priebus Memorandum]; Exec. Order 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[146] *See* Carey, *supra* note 143, at 3–8; Priebus Memorandum, 82 Fed. Reg. at 8346. The modern presidential approach to midnight rulemaking began in the Reagan Administration, and has been used to some extent by each subsequent administration. *See* Reagan Memorandum; Exec. Order 12291, 46 Fed. Reg. 13191 (Feb. 17, 1981); *see also* Heinzerling, *supra* note 116, at 16. During the Reagan Administration, DOJ's Office of Legal Counsel opined that a presidential suspension of the effective date of a final, published rule that has not yet become effective is not a "rule making" under the APA and, therefore, need not be issued in compliance with the APA's rulemaking procedures. *Presidential Memorandum Delaying Proposed and Pending Regulations*, 5 Op. O.L.C. 55, 57 (1981).

[147] *See, e.g.*, Priebus Memorandum, 82 Fed. Reg. at 8346; Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435, 4435-36 (Jan. 26, 2009); *see* Carey, *supra* note 143, at 3 n.13.

[148] Memorandum from Ronald A. Klain, Assistant to the President and Chief of Staff, for the Heads of Executive Departments and Agencies (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/.

- refrain from proposing or issuing any "rule"[149] until an appointee or designee of President Biden has reviewed and approved it;
- withdraw from OFR those rules that had been sent to OFR by the prior administration but not yet published "for review and approval as described" above; and
- consider postponing for 60 days the effective dates of rules published in the Federal Register or issued in another manner that have not yet become effective "for the purpose of reviewing any questions of fact, law, and policy the rules may raise."[150]

The memorandum directed agencies postponing rules for 60 days to consider instituting a 30-day comment period during the 60-day postponement time frame "to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules," and to "consider pending petitions for reconsideration involving such rules."[151] It also instructed agencies to "consider further delaying, or publishing for notice and comment proposed rules further delaying, such rules beyond the 60-day period."[152] Agencies have implemented the memorandum on an individual basis.[153]

Judicial Review of Rule Rescissions

As the foregoing discussion suggests, the APA establishes standards for judicial review of certain types of agency actions, which may apply to challenges to agency rule rescissions. What, then, must an agency show to justify its rescission of a rule under those standards? Section 706 of the APA directs courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[154] Courts apply the "arbitrary and capricious" standard of review when reviewing final agency action that is not precluded from review.[155] Judicial review of rules and rescissions may entail consideration of both the substance of the agency's action and the agency's compliance with

[149] The memorandum explained that it applied "not only to 'rules' as defined in [the APA], but also to" "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking," as well as to "any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." *Id.* (emphasis omitted).

[150] *Id.* The memorandum was subject to "exceptions [from OMB allowing] for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, or otherwise," and did not apply to "any rules subject to statutory or judicial deadlines." *Id.*

[151] *Id.*

[152] *Id.*

[153] *See, e.g.*, Implementation of Executive Order on Access to Affordable Life-Saving Medications, 86 Fed. Reg. 7059, 7059 (Jan. 26, 2021) ("In accordance with the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, ... this action temporarily delays for 60 days from the date of the memorandum the effective date of the final rule titled 'Implementation of Executive Order on Access to Affordable Life-saving Medications,' published in the December 23, 2020, Federal Register.") (emphasis omitted).

[154] 5 U.S.C. § 706(2)(A). For additional discussion of the arbitrary and capricious standard of review, see Cole, *Judicial Review*, *supra* note 120.

[155] 5 U.S.C. § 706.

statutory procedural requirements, including the procedures for notice-and-comment rulemaking.[156]

The Supreme Court elaborated on the arbitrary and capricious standard of review in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co* (*State Farm*).[157] In *State Farm*, the Court explained that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[158] A court will typically hold a rule to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[159] The court must base its decision on the administrative record compiled by the agency and submitted for review; a reviewing court may not "substitute its judgment for that of the agency," or supply a basis for upholding agency action that the agency itself did not provide.[160]

As discussed above, an agency's rescission of a substantive rule is generally considered to require a new substantive rulemaking, and the same APA standards for judicial review apply in both contexts.[161] In *State Farm*, the Supreme Court affirmed that agencies must supply a "reasoned analysis" when changing course.[162] Over the past four decades, the Court has clarified the stringency of the standard of review for rule rescission relative to other agency actions.[163]

Although rules representing a change in administration policy generally are subject to the same standard of review as other rules, an agency must set forth a "reasoned explanation" for its change in policy. [164] The "reasoned explanation" requirement means that an agency must include certain elements in its analysis in addition to the general requirements that apply to all agency rules. First, the agency must explain its departure from its prior regulatory approach.[165] Agencies

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[156] *Id.* § 553; FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (noting that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness").

[157] 463 U.S. 29 (1983).

[158] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[159] *Id.*

[160] *Id.* A reviewing court may, however, uphold a rule where the agency's decision is "of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc., 419 U.S. 281, 286 (1974).

[161] 5 U.S.C. § 706(2) (enumerating conditions under which courts shall set aside "agency action, findings, and conclusions"); FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009). *See also* Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 1197, 1212 (D. Wyo. 2003) (applying arbitrary and capricious standard of review in considering U.S. Forest Service rule regarding protection of roadless wilderness areas); California v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 904 (N.D. Cal. 2006) (applying arbitrary and capricious standard to review of the earlier roadless rule).

[162] *State Farm,* 463 U.S. at 57 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971)).

[163] *See id.*; *Fox,* 556 U.S. at 514; Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-26 (2016).

[164] *Fox,* 556 U.S. at 514. In ruling that the standard of review when considering the substance of a rule rescission is no more or less stringent, the Court rejected the Second and D.C. Circuits' position that the APA and the Court's precedent required a more substantial justification when an agency changes its position. *Id.* (discussing *Fox Television Stations, Inc. v. FCC,* 489 F.3d 444, 456-57 (2d Cir. 2007), and NAACP v. FCC, 682 F.2d 993, 998 (D.C Cir. 1982)). *See also Encino*, 136 S. Ct. at 2127 (Ginsburg, J., concurring) (emphasizing that "where an agency has departed from a prior position, there is no 'heightened standard' of arbitrary-and-capricious review"); California by and through Becerra v. Azar, 950 F.3d 1067, 1096 (9th Cir. 2020) (noting that initial agency positions are "not instantly carved in stone," and changes in agency policy therefore are not subject to heightened review).

[165] *Encino,* 136 S. Ct. at 2125 ("Agencies are free to change their existing policies as long as they provide a reasoned

"may not ... depart from a prior policy sub silentio or simply disregard rules that are still on the books."[166] This explanation must come at the time the agency suspends or repeals a rule, not after it has completed reconsideration or finalized a replacement for the rule.[167]

The requirement that an agency "show that there are good reasons for the new policy" does not, however, mean it must "demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."[168] Instead, as the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, an agency need only show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."[169] In many circumstances, an agency therefore "need not ... provide a more detailed justification than what would suffice for a new policy created on a blank slate."[170]

Where an agency is changing a prior rule, that prior rule constitutes an additional factor that the agency must consider as part of its reasoned decisionmaking. In *Fox Television Stations*, the Supreme Court identified two examples. First, an agency must provide a more detailed justification when it issues a rule that "rests upon factual findings that contradict those which underlay its prior policy."[171] An agency may not "simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."[172] For instance, in *California v. Bernhardt*, the U.S. District Court for the Northern District of California held that the Bureau of Land Management's (BLM's) rescission of a rule governing waste prevention by oil and gas lessees was arbitrary and capricious because the agency failed to address its prior factual findings.[173] Specifically, the agency ignored several independent oversight reviews that gave rise to the rule, and did not explain why it disagreed with the conclusions or recommendations of those reviews.[174]

Second, the Supreme Court explained in *Fox Television Stations* that agencies must consider "serious reliance interests" that are affected by a change in policy.[175] This element of agency decisionmaking has been of increasing interest to the Supreme Court in recent years. In *Encino Motorcars, LLC v. Navarro*, the Court struck down a 2011 Department of Labor regulation that

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explanation for the change.") (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 961, 981-82 (2005); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863-64 (1984)).

[166] *Fox*, 556 U.S. at 514.

[167] *State Farm*, 463 U.S. at 52 (noting that a reasonable explanation should include "a justification of rescinding the regulation before engaging in a search for further evidence"); Pub. Citizen v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984) (holding that an agency's suspension of a program while it further studied the program was arbitrary and capricious). *See also* Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269, 278-79 (2017).

[168] *Fox*, 556 U.S. at 514.

[169] *Id.* at 515.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 537 (Kennedy, J., concurring in part and concurring in the judgment).

[173] California v. Bernhardt, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020).

[174] *Id. See also State Farm*, 463 U.S. at 47-51 (invalidating the National Highway Traffic and Safety Administration's rescission of a rule requiring automobile manufacturers to install passive car safety restraints because the agency did not address the benefits of airbags or the earlier finding that such restraints saved lives); Organized Village of Kake v. USDA, 795 F.3d 956, 969 (9th Cir. 2015) (holding that U.S. Department of Agriculture's rescission of land management rule was arbitrary and capricious because the agency did not explain "why an action that it found posed a prohibitive risk to the ... environment only two years before now poses merely a 'minor' one").

[175] *Fox*, 556 U.S. at 515.

would have had the effect of requiring automobile dealerships to pay overtime compensation to certain covered employees.[176] In a prior interpretation dating to 1978, the Department had taken the position that those employees were not entitled to overtime compensation.[177] The Court noted that the Department "offered barely any explanation" for its change in position in the 2011 regulation, and concluded that the agency's rationale was inadequate in light of the significant reliance interests affected by the rule.[178] Writing for the majority, Justice Kennedy paid particularly close attention to the fact that dealerships had relied for decades on the Department's prior policy and would need to make major changes to their compensation agreements in order to avoid "substantial" FLSA liability.[179]

The Supreme Court has continued to emphasize agencies' need to consider reliance interests. In *Department of Homeland Security v. Regents of the University of California*, the Court held in a 5-4 opinion that the Department of Homeland Security's (DHS's) rescission of the Deferred Action for Childhood Arrivals (DACA) initiative violated the APA.[180] The DACA program, established eight years earlier by the Obama Administration, granted benefits to certain unlawfully present individuals who arrived in the United States as children, including temporary relief from removal and work authorization.[181] One of the flaws the Supreme Court identified with DHS's rescission of the program was the agency's failure to consider the ways in which DACA recipients and those connected to them had come to rely on the program for their educational, professional, and personal endeavors.[182] Citing *Fox Television* and *Encino Motorcars*, the Court held that it would be arbitrary and capricious for an agency to change course and fail to take into account "serious reliance interests" a long-standing policy may have engendered.[183] While DHS had discretion to conclude that reliance on DACA was unjustified or that other concerns outweighed any reliance interests, the Court held that the agency at a minimum must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[184]

DHS created and then rescinded DACA through memoranda, not notice-and-comment rulemaking. Some commentators have observed, however, that the majority opinion marks an expanded focus on reliance interests in judicial review of agency action more generally.[185] Under *Encino* and *DHS v. Regents*, it is possible that reviewing courts will expect agencies to more robustly address reliance interests when rescinding rules.

To the extent a rule rescission involves an interpretation of a governing statute that is inconsistent with the agency's prior approach, such an interpretation may still be entitled to deference under

[176] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

[177] *Id.* at 2123.

[178] *Id.* at 2126.

[179] *Id.*

[180] 140 S. Ct. 1891 (2020). For additional discussion of DHS v. Regents of the University of California, see CRS Legal Sidebar LSB10497, *Supreme Court: DACA Rescission Violated the APA*, by Ben Harrington.

[181] *See generally* CRS Report R45158, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others*, by Ben Harrington, at 13-14.

[182] *Regents*, 140 S. Ct. at 1913-14.

[183] *Id.* at 1913

[184] *Id.* at 1914-15.

[185] William Yeatman, *Taking a Hard Look at DHS v. Regents of the University of California*, YALE JOURNAL ON REGULATION NOTICE & COMMENT (June 25, 2020), https://www.yalejreg.com/nc/taking-a-hard-look-at-dhs-v-regents-of-the-university-of-california-by-william-yeatman/.

the two-step framework outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[186] Under step one, courts consider "whether Congress has directly spoke to the precise question at issue."[187] If so, "that is the end of the matter," and a court must enforce the "unambiguously expressed intent of Congress."[188] Where a statute is silent or ambiguous on an issue, the court moves to step two and must defer to a reasonable agency interpretation even if the court would have otherwise reached a different conclusion.[189]

Courts may accord "considerably less deference" to an agency interpretation that conflicts with a previous interpretation of a statute it administers.[190] A rescission that fails to satisfy the "reasoned explanation" requirement is procedurally defective, and thus unlawful in and of itself, and therefore is not entitled to *Chevron* deference.[191] And although an agency's interpretations of its own regulations are governed by a different framework than *Chevron*, if a rescission of an agency rule is premised on an agency reinterpreting a prior regulation to justify the rescission, those changes must likewise include a "reasoned explanation," and will rarely receive deference.[192]

Finally, after a rule has been challenged, an agency may sometimes be able to achieve an outcome through litigation that would ordinarily require notice-and-comment rulemaking as described above. Such examples, however, depend upon outside factors (such as litigation strategy and court decisions that the agency itself does not fully control), and are therefore beyond the scope of this report.[193]

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[186] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."). The precise level of deference due to an agency relates to certain characteristics of the agency's action that are beyond the scope of this report. For further discussion of deference to agency interpretations of statutes and regulations, see Cole, *Judicial Review*, *supra* note 120, at 12-18.

[187] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[188] *Id.* at 842-43.

[189] *Id.* at 843. Recent trends suggest that the Supreme Court could narrow *Chevron*'s scope. For additional discussion, see CRS Legal Sidebar LSB10204, *Deference and its Discontents: Will the Supreme Court Overrule Chevron?*, by Valerie C. Brannon and Jared P. Cole.

[190] Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993).

[191] Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-26 (2016).

[192] Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (discussing the framework for deference to agencies' interpretation of their regulations as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997)).

[193] Agencies occasionally confess error and decline to defend a rule in pending litigation, particularly where it is the prior administration's rule that is subject to litigation. Such an action is separate from, and may proceed parallel to the rule rescission process, which can result in a complicated tangle of agency actions. This process is evident in the progress of two related rules issued by BLM to address methane emissions from oil and gas operations on public lands. In 2016, BLM issued the Waste Prevention Rule to achieve reductions in waste from oil and gas flaring, venting, and equipment leaks. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 6,616 (Feb. 8, 2016). After the rule was challenged in the U.S. District Court for the District of Wyoming, the Trump Administration postponed compliance dates for certain provisions of the rule pursuant to 5 U.S.C. § 705. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017). The U.S. District Court for the Northern District of California then overturned the postponement. California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017). BLM subsequently issued a rule suspending certain requirements of the 2016 rule, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8, 2017), which the court also enjoined. California v. U.S. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018). Next, BLM issued a final rule rescinding and modifying portions of the 2016 rule. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018). On July 15, 2020, the Northern District of California vacated the 2018 rule. California v. Bernhardt, 2020 WL 4001480 (N.D. Cal. Jul. 15, 2020). In a brief filed in August 2020, the government confessed error in the Wyoming

In sum, the rescission of agency rules that are governed by the APA is generally subject to the same "arbitrary and capricious" standard of judicial review as the promulgation of such rules. This means that an agency must provide a reasoned analysis when changing course. While this standard is no more stringent than for other agency regulations that do not mark a change in administrative policy, a "reasoned analysis" for an agency's change in position generally must explain the departure from the prior regulatory approach, show that there are good reasons for the new policy (but not necessarily that the new policy is better than the old one), address contradictory factual findings, and consider reliance interests that are affected by the rule.

Considerations for Congress

Congress has a number of options for altering the manner by which agencies or a particular agency may rescind or amend rules, or for rescinding or amending particular rules itself. For example, Congress can overturn or alter a particular rule through exercise of its legislative power.[194] Administrative agencies are creatures of statute and exercise only such authority as has been delegated to them by Congress.[195] Thus, an agency may not issue a legislative rule unless it does so pursuant to a relevant statutory grant of authority.[196] And just as Congress may, by statute, authorize or require an agency to issue rules, it also may rescind or alter an agency's rules through the normal legislative process.[197] For example, in 2017, Congress passed and President Trump signed into law a bill rescinding the Metropolitan Planning Organization Coordination and Planning Area Reform rule,[198] which had been promulgated by the Federal Highway Administration and Federal Transit Administration in December 2016.[199] The statute stated that

litigation. Federal Respondents' Supplemental Merits Response Brief, Wyoming v. U.S. Dep't of the Interior, No. 16-cv-00285, ECF No. 278 (D. Wyo. Aug. 18, 2020). The District of Wyoming vacated all but two severable provisions of the 2016 rule on October 8, 2020. Order on Petitions for Review of Final Agency Action, Wyoming v. U.S. Dep't of the Interior, No. 16-cv-00285, ECF No. 284 (D. Wyo. Aug. 18, 2020). For further discussion of agencies' changes in litigation posture, see William W. Buzbee, *Deregulatory Splintering*, 94 CHI.-KENT L.R. 439, 452-54 (2019).

[194] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). Congress may also by statute prohibit an agency from amending or repealing a regulation.

[195] *See* Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 502 F.2d 349, 353 n.* (D.C Cir. 1974) ("An administrative agency ... is a creature of the statute that brought it into existence ... [and] has no powers except those specifically conferred upon it by statute."); *accord* Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017) (per curiam) ("[I]t is axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress.") (internal quotation marks and citation omitted).

[196] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). It follows that Congress can by statute prohibit or limit an agency's existing ability to issue rules by removing or amending the relevant grant of statutory authority.

[197] *See* CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner, at 9. Further, amendments to the statute granting an agency rulemaking authority could require the agency to amend or repeal a rule issued under such authority. *See* Carey, *supra* note 143, at 10; *see, e.g.*, Repeal of Regulations Concerning the Rural Telephone Bank, the Public Television Station Digital Transition Grant Program, and the Local Television Loan Guarantee Program, 84 Fed. Reg. 59,919 (Nov. 7, 2019) (adjusting the Code of Federal Regulations and modifying rules to remove references to several Rural Utilities Service programs that Congress repealed in the 2018 Agricultural Improvement Act).

[198] 81 Fed. Reg. 93,448 (Dec. 20, 2016).

[199] P.L. 115-33, 131 Stat. 845 (May 12, 2017).

the rule "shall have no force or effect," and further provided that "any regulation revised by that rule shall be applied as if that rule had not been issued."[200]

Congress also, via application of its legislative power, may use the expedited procedures provided by the Congressional Review Act (CRA) to overturn an agency's rule.[201] Under the CRA, an agency must submit a covered rule to Congress before the rule may go into effect and, once submitted, Congress can use special, fast-track procedures to consider a joint resolution of disapproval of the rule.[202] If a joint resolution is enacted either by presidential signature or congressional override of a presidential veto, the relevant rule "shall not take effect (or continue)."[203] An agency is prohibited from reissuing a rejected rule "in substantially the same form" or from issuing "a new rule that is substantially the same," unless the "rule is specifically authorized" under a subsequently enacted law.[204] The CRA's definition of what constitutes a covered "rule" under the act is broader than the category of rules that generally must undergo the APA's notice-and-comment procedures.[205]

Congress by statute often imposes procedural requirements on agency rulemakings in addition to or in place of the APA's rulemaking procedures.[206] Along with establishing new or additional procedures with which agencies must comply when *issuing* certain rules, such requirements may also explicitly specify the procedures to which agencies must adhere when *amending* or *repealing* such rules. For example, the Consumer Product Safety Act[207] specifically provides that the Consumer Product Safety Commission may only revoke a "consumer product safety rule"[208] by, inter alia, "publish[ing] a proposal to revoke [the] rule in the Federal Register, and allow[ing] oral and written presentations."[209] And revocation is only permitted if the Commission "determines that the rule is not reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product."[210] Congress also can amend the rulemaking provisions of the APA if it seeks to alter the default manner by which most agencies amend and repeal rules.[211]

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[200] *Id.*

[201] For information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis; CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey [hereinafter Brannon & Carey, *"Rules"*]; CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Maeve P. Carey and Christopher M. Davis; CRS In Focus IF11096, *The Congressional Review Act: Defining a "Rule" and Overturning a Rule an Agency Did Not Submit to Congress*, by Maeve P. Carey and Valerie C. Brannon.

[202] *See* 5 U.S.C. §§ 801(a)–(b), 802; *see supra* note 91.

[203] 5 U.S.C. § 801(b)(2).

[204] *Id.*

[205] *See* Brannon & Carey, *"Rules," supra* note 201, at 11-12. The CRA adopts the definition of "rule" from the APA, subject to three exceptions. 5 U.S.C. § 804(3). As discussed above, the APA's definition of "rule" embraces not only rules with the force of law that must go through notice and comment, but also procedural rules, interpretive rules, and general policy statements, which are not required to undergo such procedures. *Id.* §§ 551(4), 553(b)(A); *see supra* "Exceptions to Notice-and-Comment Procedures." Thus, in addition to legislative rules, many procedural rules and agency statements often referred to as guidance documents may also potentially be governed by the CRA, subject to the act's exceptions. *See id.* at § 804(3)(A)-(C); Brannon & Carey, *"Rules," supra* note 201, at 11-12.

[206] *See supra* text accompanying notes 48-49.

[207] 15 U.S.C. §§ 2051 *et seq.*

[208] *See id.* § 2052(a)(6) (defining "[c]onsumer product safety rules").

[209] *Id.* § 2058(h).

[210] *Id.*

[211] *Cf.* Am. Inst. of Certified Pub. Accountants v. IRS, 746 F. App'x 1, 18 (D.C. Cir. 2018) (explaining that "the APA's rule making procedures apply by default").

Congress has near plenary authority over the provision of funds to federal agencies.[212] In addition to allocating money for agency operations and activities, Congress also is authorized, as the Supreme Court has recognized, to "circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[213] Thus Congress may, pursuant to its power of the purse, prohibit an agency from using funds to develop, finalize, or implement rules.[214] For example, Congress has prohibited the Occupational Safety and Health Administration from using appropriated funds "to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the [Occupational Safety and Health] Act which is applicable to any person who is engaged in a farming operation which does not maintain a temporary labor camp and employs 10 or fewer employees."[215]

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[212] *See generally* CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff.

[213] Lincoln v. Vigil, 508 U.S. 182, 193 (1993); *cf.* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[214] *See* Carey, *supra* note 143, at 12-13.

[215] *See* Further Consolidated Appropriations Act, 2020, P.L. 116-94, div. A, tit. I, 133 Stat. 2534, 2546 (Dec. 20, 2019). For more information on Congress's funding authority over the executive branch, see Garvey & Sheffner, *supra* note 197, at 13–14.