# COVINGTON & BURLING LLP

# The Law of Administration Change
# Checklist & Executive Summary

This document summarizes the legal principles that will govern the Trump Administration's ability to make policy changes through federal agencies. Below, we summarize key legal doctrines, procedural tactics for litigation, strategies for navigating agency proceedings (such as rulemakings), and the Congressional Review Act. Please reach out to the Covington Team—Kevin King, Megan Crowley, Thomas Brugato, and our Government Litigation Group—if you would like to discuss how these principles may apply to specific proceedings.

## I. *Loper Bright* and the Legal Doctrines that Govern Post-Election Policy Changes

- *Loper Bright* overruled *Chevron* deference and held that courts must exercise independent judgment in interpreting statutes. End result: considerably less deference to agency legal views than in the past.
  - Deference still available for express delegations, but may be sparingly invoked by Trump Admin.
  - *Skidmore* deference often is unavailable when a new administration changes course.
  - *Kisor* deference to agency interpretations of own rules; likely to be challenged at Supreme Court.
- *State Farm* defines the Administrative Procedure Act's "arbitrary and capricious" standard; agencies must engage in reasoned decisionmaking, including addressing alternatives and material comments.
- *Fox Television* governs when agencies depart from past practice; it requires agencies to acknowledge the change, provide good reasons for the new policy, and address changed facts/reliance interests.
- Parties that support Trump Admin.'s positions can help agencies overcome *State Farm*/*Fox* challenges by compiling a robust factual record and intervening in court. Parties that oppose Trump Admin. changes can slow agencies down and improve the odds of prevailing in court by offering alternatives and submitting comments, data, and expert reports that document flaws in the proposals.
- Four main takeaways on deference:
  - Deference is seldom available when a new administration overturns predecessor's policies.
  - Parties that challenge Trump Admin. changes will have broad range of arguments available.
  - Parties seeking to defend Trump Admin. changes should present alternative arguments (e.g., based on context, statutory purpose, and plain meaning) to backstop agency's conclusions.
  - Deference doctrines likely to be further eroded over next four years.

## II. Procedural Tactics for Regulatory Litigation

- Organizations aligned with the Biden Admin. may intervene in pending litigation to defend existing rules the Trump Admin. may seek to abandon. Essential to intervene before presidential transition takes place.
- Intervention is subject to a higher standard (e.g., standing) but provides more rights than participating as amicus curiae. Intervenors may appeal, oppose settlement, and often may present oral argument.
  - Beware of strict time limits on motions to intervene (30 days for cases in courts of appeals).
  - Even when a party files its own suit, consider intervening in other cases challenging same action.
- Government can switch sides mid-course in litigation; Trump Admin. will likely do so in many cases.
  - For parties aligned with Biden Admin. in court, Trump Admin. could switch sides at any point, making it important to participate as an intervenor capable of continuing the suit independently.
  - For parties adverse to the Biden Admin., consider reaching out to Trump transition to persuade new administration to switch sides on the merits or to seek a voluntary remand.
- Parties can strategically speed up or slow down litigation to affect which administration will be responsible for briefing or oral argument. Examples: motions for stay/abeyance or summary vacatur to delay briefing.
- Standard remedy when an agency's action is held to be unlawful is vacatur. But parties can argue for remand without vacatur, which extends the life of the challenged policies.

## III. Strategies for Navigating Agency Proceedings During/Following a Transition

- Reconsideration is a key tool for parties who may receive more favorable hearing from Trump Admin. But courts have imposed tight limits on scope of and timing for agency reconsideration.
- Notice-and-comment rulemaking: Trump Admin. must start new rulemakings from scratch to repeal or modify "legislative" rules issued by Biden Admin (*Clean Air Council*).
    - Exception for rules finalized late in Biden Admin., so long as not published for *Federal Register* public inspection before January 20 (*Humane Society*).
- Agency adjudication proceedings: Agencies often have authority to issue party-specific orders that have retroactive effect, but fair-notice and reliance principles can counteract that authority in many cases.
- Agency inaction: Trump Admin. could seek to blunt or nullify some Biden Admin. policies through non-enforcement or by allowing proposals to languish.
    - APA provides remedy for inaction where agency has statutory duty to take specific action.
- Three main approaches to agency proceedings that are likely to end up in litigation.
    - <u>Carrots</u>: comments/other inputs that provide factual or legal support to persuade an agency to adopt preferred policies. Particularly important for parties that support new administration's proposals.
    - <u>Sticks</u>: comments arguing that the agency will lose in court if it adopts unfavorable rules.
    - <u>Landmines</u>: comments, studies, expert reports, and other inputs that offer alternative to the agency's proposed approach or other data that the agency <u>must</u> address under *State Farm*.
- Executive orders: Subject to immediate litigation challenge if self-executing, but parties must wait if order merely directs agency to promulgate or consider new rules.
- Independent agencies, whose priorities are not always aligned with White House, have come under constitutional scrutiny in recent years, so their actions are vulnerable to attack (e.g., removal restrictions).
- Consider venue for litigation carefully: statutes often provide multiple options, but agencies are increasingly likely to seek transfer and the campaign to restrict forum shopping may continue under Trump.
    - Most common venue options are district/circuit where agency has headquarters and district/circuit where plaintiff is headquartered.

## IV. Congressional Review Act

- CRA provides an expedited means to override agency action through legislation.
- Allows for fast-track legislative review of agency rules adopted in the last sixty <u>session days</u> of a preceding Congress; this "lookback window" remains up in the air but will likely reach back to July or August 2024.
- CRA applies to all "rules," including legislative rules, interim final rules, and some guidance documents.
- Special procedures apply to "major rules" (i.e., likely to result in a $100 million annual effect on economy)
- Successful CRA resolutions are rare, but were more numerous following Obama-Trump transition in 2017. GOP trifecta makes significant CRA action likely at start of new Congress in 2025.
- Regulation disapproved under CRA "shall not take effect" or continue in effect and "may not be reissued in substantially the same form" – so successful resolutions have long-term lockout effect.
- CRA prohibition on judicial review could preclude litigation challenging on the ground that it is substantially the same as a prior, disapproved regulation. However, no court has reached this question.

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