

## A Step-by-Step Guide to Agency Rulemaking and Rule Rollbacks

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When Congress passes legislation, it often explicitly authorizes federal agencies to implement provisions of the law through rulemaking. While agency rulemaking authority comes from Congress, the president sets priorities for agencies, often through Executive Orders. An incoming administration decides which existing federal rules to target with rescission or replacement and directs agencies on what new rulemakings to undertake.<sup>1</sup>

We expect the Trump administration to attempt to roll back many of the rules promulgated under the Biden administration. In the first Trump administration, EELP detailed the administration's deregulatory goals and the strategies used to try to implement them.<sup>2</sup> The actions taken by the administration: (1) undermined agency expertise, (2) restricted public participation in agency action, (3) took actions that minimized regulation-triggering events, and (4) re-interpreted statutes in novel ways to limit agencies' authority to regulate.<sup>3</sup>

The Administrative Procedure Act (APA) governs how agencies conduct rulemakings and rescissions. Here we explain the specific steps agencies must take to promulgate, alter, or repeal regulations, and the exemptions provided in statute that agencies can use in certain circumstances.

The APA<sup>4</sup> enshrines public participation by requiring agencies to make parts of the rulemaking process public and creating opportunities for public comment. As the second Trump administration begins to implement its deregulatory agenda, it must follow its legal obligations under the APA. Generally, **the process an agency undertakes to undo a rule must be identical to the process used to promulgate the rule.**<sup>5</sup> To repeal final rules,<sup>6</sup> agencies must go through the specific process laid out in the APA as described below.<sup>7</sup>

### APA Procedure for Final Rules and Rule Rollbacks

To rescind or change an existing federal rule,<sup>8</sup> there are several steps an agency must take consistent with the APA. In this section we lay out the steps for promulgating a federal rule

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<sup>1</sup> For more information about rules that have not yet been published, and "midnight rulemaking," (rules written at the end of the previous administration that may not yet have been published or taken effect), refer to: CRS, [Agency Rescissions of Legislative Rules](#) (2021) and CRS, [Presidential Transitions: Midnight Rulemaking](#) (2024).

<sup>2</sup> Jody Freeman, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021), <https://harvardlawreview.org/print/vol-135/structural-deregulation/>; Hannah Perls, *Deconstructing Environmental Deregulation under the Trump Administration*, 45 VT. L. REV. 591 (2021) [https://lawreview.vermontlaw.edu/wp-content/uploads/2021/07/05\\_Perls\\_Final.pdf](https://lawreview.vermontlaw.edu/wp-content/uploads/2021/07/05_Perls_Final.pdf).

<sup>3</sup> Perls, *supra* n. 2.

<sup>4</sup> 5 U.S.C. §§ 551-559, 701-706.

<sup>5</sup> Under the APA, agencies must generally "use the same procedures to amend or repeal an old rule as were used to issue the rule in the first instance." See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

<sup>6</sup> A rule is final when an agency concludes its decision-making process and rights or obligations flow as a consequence of the agency's decision. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>7</sup> 5 U.S.C. §§ 551-559, 701-706.

<sup>8</sup> This memo addresses rules passed through "informal rulemaking," the process laid out in 5 U.S.C. § 553. For more information about other types of rulemaking refer to CRS, [A Brief Overview of Rulemaking and Judicial Review](#) (2017).

including any exceptions. An agency must follow the same steps to rescind or change an existing rule.

### 1. Agency writes a Notice of Proposed Rulemaking

If an agency proposes to rescind or change an existing final rule, it must issue a Notice of Proposed Rulemaking (NPRM) stating its intention. The APA requires the NPRM to:<sup>9</sup>

- be written in plain language,<sup>10</sup>
- include: the time, place, and nature of the public rulemaking proceedings, the legal authority the agency claims for its action, a description of the subject of the rule, and the web address at [regulations.gov](https://www.regulations.gov) where a brief summary of the rule can be found.<sup>11</sup>
- a preamble that describes the purpose of the rule and a summary of the agency action, why the action is necessary, and the effect of the action.<sup>12</sup>

### 2. OIRA reviews “significant” rule

Executive Order 12866 requires the Office of Information and Regulatory Affairs (OIRA) to review “significant rules,”<sup>13</sup> defined as rules that the agency conducting the rulemaking or OIRA determines are likely to have an effect on the economy of at least \$100 million, create inconsistency or interfere with another agency’s actions, alter the “entitlements, grants, user fees, or loan programs” or the rights of recipients of those programs, or raise “novel legal or policy issues.”<sup>14</sup> An agency must prepare a cost-benefit analysis for significant rules.<sup>15</sup> However, OIRA can waive review.<sup>16</sup>

### 3. Agency publishes proposed rule and provides opportunity for public comment

Following OIRA’s review, the agency must publish the Notice of Proposed Rulemaking in the Federal Register.<sup>17</sup> The publication of the rule starts the proposed rule’s public comment period, which usually lasts from 30 to 90 days.<sup>18</sup>

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<sup>9</sup> 5 USC § 553(b)

<sup>10</sup> 63 Fed. Reg. 31885 (1998).

<sup>11</sup> 5 USC § 553(b)(1-4).

<sup>12</sup> 1 CFR 18.12.

<sup>13</sup> Executive Order 12866, 58 Fed. Reg. 51735, 51742.

<sup>14</sup> Executive Order 12866, 58 Fed. Reg. 51735, 51738.

<sup>15</sup> Executive Order 12866, 58 Fed. Reg. 51735, 51742. This addendum is called a Regulatory Impact Analysis (RIA). For guidance from the White House on what an RIA should include, see [Agency Checklist: Regulatory Impact Analysis](#). Upon receipt of a significant rule, OIRA must circulate the rule to other agencies within 10 days. Executive Order 12866, 58 Fed. Reg. 51735, 51739. Agency heads can submit concerns in writing if they see potential conflicts with the proposed rule. *Id.* Generally, the review process is completed within 90 days though there are instances where the review period is shorter or longer. *Id.* at 51743. For some rules that have already been reviewed, OIRA may complete its review in 45 days, or for rules that require more time, OIRA can extend the review period, only once, for 30 days. *Id.* at 51742.

<sup>16</sup> *Id.* at 51741.

<sup>17</sup> 5 U.S.C. § 553(b).

<sup>18</sup> 5 U.S.C. § 553(c). Agencies must provide a method for the public to submit comments electronically. 44 U.S.C. § 3501. The APA does not mandate a specific amount of time that a rule must be available for comment. 5 U.S.C. § 553. Executive Order 12866, governing regulatory review, recommends a comment period of no less than 60 days. Comment periods can be longer for more complex rules. Federal Register, [A Guide to the Rulemaking Process](#) [I’m getting “page not found” for this link].

#### 4. Agency revises rule in response to comments

Following the opportunity for public comments, the agency reviews comments and prepares the final rule. The APA requires the agency to consider public feedback.<sup>19</sup> Courts read this requirement to mean that an agency must respond to “significant”<sup>20</sup> comments in the rule’s preamble.<sup>21</sup>

Additionally, courts require the language of the final rule be a “logical outgrowth” of the NPRM such that the public feedback provided on the NPRM is sufficient to inform the promulgation of the rule.<sup>22</sup> The agency meets the notice-and-comment requirement as long as “affected parties ‘should have anticipated’ the final rule in light of the notice.”<sup>23</sup> Office of Management and Budget (OMB) regulations require the agency to provide a description of any significant differences between the proposed rule and the final rule.<sup>24</sup>

#### 5. OIRA reviews final rule

Executive Order 12866 requires OIRA to review “significant” rules a second time. OIRA must review the final rule and circulate it to other agencies for review, which can take up to 90 days.<sup>25</sup>

#### 6. Agency publishes final rule, which goes into effect after 30-day notice period

An agency finalizes the rule through publication in the Federal Register. Once published, the APA requires that the rule not go into effect for at least 30 days following publication.<sup>26</sup> This period provides notice of the regulatory action before regulated parties must comply.<sup>27</sup>

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<sup>19</sup> 5 U.S.C. § 553(c).

<sup>20</sup> *Perez v. Mortg. Bankers Ass'n* 575 U.S. 92, 96 (2015). While courts have not clearly articulated a single standard for which comments are significant, as a useful guide, the Ninth Circuit defined “significant” as “those which raise relevant points and which, if adopted, would require a change in the agency’s proposed rule.” *Am. Min. Cong. v. U.S. EPA.*, 965 F.2d 759, 771 (9th Cir. 1992); The Supreme Court in *Ohio v. EPA*, 603 U.S. 279 (2024) granted a stay of the EPA’s “Good Neighbor” rule, 88 Fed. Reg. 36654 (2023), while the case proceeded in the lower court. The Court issued the stay on the basis that petitioners were likely to succeed on the merits, that EPA had acted arbitrarily and capriciously, because the agency failed to address specific concerns about what would happen to the rule if it only applied to some but not all states. *Ohio v. EPA*, 603 U.S. 279, 287 (2024). If precedential, the standard applied in *Ohio* intensifies the standard because the comment EPA seemed to fail to address was not specific in its concerns - “commenters merely criticized EPA’s decision to propose a [federal plan] before [state plan] disapprovals were final.” *Ohio v. EPA*, 603 U.S. 279, 300 (2024) (Barrett, J. dissenting). And “likely merited no response” *Id.* at 318.

<sup>21</sup> A preamble is a written statement accompanying the regulatory text that explains the underlying law and the purpose of the agency’s rule. 1 CFR § 18.12

<sup>22</sup> CRS, [A Brief Overview of Rulemaking and Judicial Review](#) (2017).

<sup>23</sup> *Brennan v. Dickson*, 45 F.4th 48, 69-70 (2022) (citing *Covad Commc'ns Co. v. F.C.C.*, 450 F.3d 528, 548 (D.C. Cir. 2006)).

<sup>24</sup> 1 CFR § 18.12

<sup>25</sup> Executive Order 12866, 58 Fed. Reg. 51735, 51742.

<sup>26</sup> 5 U.S.C. § 553(d).

<sup>27</sup> Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 201 (1946).

For “major”<sup>28</sup> rules, the APA requires that the rule not go into effect until 60 days after publication in the Federal Register or after Congress receives a report on the rule, whichever is later.<sup>29</sup> Note that for IRS regulations, the 30-day notice period is likely not required.<sup>30</sup>

## 7. Congress can review final rule under the Congressional Review Act

The Congressional Review Act (CRA) provides Congress with 60 days to review and issue a joint resolution of disapproval of “major” rules.<sup>31</sup> If Congress passes a joint resolution and the president signs it, the resolution prevents the rule from taking effect and blocks any rule that is substantially similar from being reissued.<sup>32</sup>

### Exceptions

The APA outlines specific exceptions to the rulemaking requirements that allow agencies to promulgate rules under certain circumstances without going through the notice-and-comment rulemaking process described above.<sup>33</sup>

#### 1. Exemptions from both notice and comment and from 30-day notice period

- **Statutorily exempt:** The APA provides three statutory exemptions from notice-and-comment and the 30-day notice period:
  - Rules concerning the military or foreign affairs function of the United States are exempt.<sup>34</sup>
  - Rules concerning agency management or personnel are also exempt<sup>35</sup> but the exception is “narrowly construed.”<sup>36</sup>
  - Rules relating to public property, loans, grants, benefits, or contracts are exempt.<sup>37</sup> This exception has been read to give the executive significant

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<sup>28</sup> “Major” rules are rules OMB decides are “likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 USC § 804(2).

<sup>29</sup> 5 U.S.C. § 801(a)(3)(A)

<sup>30</sup> The Ninth Circuit stated that “[i]t is doubtful that treasury regulations need to comply with the 30-day notice requirement.” *Redhouse v. Comm’r*, 728 F.2d 1249, 1253 (9th Cir. 1984). The IRS has statutory authority to make regulations effective retroactively. I.R.C. § 7805(b)(1)(A). The Ninth Circuit held that this specific statutory authority “would in any conflict take precedence over the general notice statute (5 U.S.C. § 553(d)).” In that case, the Ninth Circuit ultimately did not have to decide the issue because the regulation in question was an interpretive rule, which is not subject to the notice requirement.

<sup>31</sup> 5 USC § 804(2).

<sup>32</sup> 5 U.S.C. § 801(a)(3)(B); 5 U.S.C. § 801(b)(2)

<sup>33</sup> 5 U.S.C §553

<sup>34</sup> 5 U.S.C. § 553(a)(1). The Ninth Circuit has held that “[f]or the foreign affairs exception to apply” agencies must be able to show “the public rulemaking provisions . . . provoke definitely undesirable international consequences.” *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020) (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)).

<sup>35</sup> 5 U.S.C. § 553(a)(2).

<sup>36</sup> *Joseph v. U.S. Civ. Serv. Comm’n*, 554 F.2d 1140, 1153 n. 23 (D.C. Cir. 1977) (finding a rule only “directed at government personnel” was not exempt because “outside individuals are substantially affected.”).

<sup>37</sup> 5 USC 553(a).

powers,<sup>38</sup> including, for example, a rule that changes the procedure by which grants are distributed in addition to rules governing the grants themselves.<sup>39</sup>

- **Good cause:** Under the APA, agencies may promulgate a rule without notice and comment and expedite the 30-day notice period following publication if the agency can show “good cause.”<sup>40</sup> Good cause is the most common reason an agency bypassed NPRM according to a 2012 GAO Report.<sup>41</sup>

If an agency seeks to publish a rule without notice and comment, the APA requires a showing that it would be “impracticable, unnecessary, or contrary to the public interest.”<sup>42</sup> Although the good cause exemption “should be read narrowly,” the exception applies when “delay would do real harm.”<sup>43</sup> For example, agencies have shown good cause in emergencies,<sup>44</sup> instances where Congress set procedures suggesting an agency need not go through notice and comment,<sup>45</sup> and circumstances where notice may hinder the rule’s efficacy.<sup>46</sup>

Interim final rules are generally issued under the good cause exemption.<sup>47</sup> Agencies do not need to provide notice and comment for interim final rules, and these rules are effective when published, but may modify the rule based on comments received after the rule is promulgated.<sup>48</sup>

- **Interpretation and Guidance:** “Non-legislative rules,”<sup>49</sup> such as interpretive rules and policy statements, do not have to go through notice-and-comment rulemaking and

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<sup>38</sup> See, *i.e.*, *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 674 (9th Cir. 1978) (“[T]he rule making section of the APA, § 553, manifests a clear legislative intent to permit ad hoc decision making in the distribution of public property.”).

<sup>39</sup> *Nat’l Wildlife Fed’n v. Snow*, 561 F.2d 227, 232 (D.C. Cir. 1976).

<sup>40</sup> 5 U.S.C. § 553(b)(B). The D.C. Circuit held that the rationale behind these two procedural safeguards differs and therefore, “good cause to forgo one notice requirement may not satisfy the other.” *Am. Fed’n of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)

<sup>41</sup> GAO, [Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments](#) (2012). In a 2012 study of rules published without NPRM between 2003 and 2010, 77% of major rules and 61% of non-major rules cited good cause as the reason for the exemption.

<sup>42</sup> 5 U.S.C. § 553(b)(B). Some circuit courts have found it is the same standard to show good cause to make a rule immediately effective. *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982).

<sup>43</sup> *United States v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010) (quoting *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207, 214 (5th Cir.1979))

<sup>44</sup> *Tri-Cnty. Tel. Ass’n, Inc. v. Fed. Commc’ns Comm’n* arose out of the Universal Services Fund and an order that, without notice and comment, disbursed subsidies to Puerto Rico following a hurricane. Here the court held “good cause” existed because of an “ongoing emergency situation” that required immediate response. 99 F.3d 714, 717 (D.C. Cir. 2021).

<sup>45</sup> *Asiana Airlines v. F.A.A.*, 134 F.3d 393 (D.C. Cir. 1998).

<sup>46</sup> For example, when the government sets price controls. CRS, [The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action](#) (2016).

<sup>47</sup> Congress has specifically authorized their use in some instances. CRS, [A Brief Overview of Rulemaking and Judicial Review](#) (2017).

<sup>48</sup> *Id.* Note that the Congressional Review Act applies to interim final rules.

<sup>49</sup> William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001).

are exempt from the 30-day waiting period.<sup>50</sup> They generally do not have the force of law, and instead serve to inform the public or regulated parties.<sup>51</sup>

## 2. Exempt from notice and comment only

- **Agency organization, procedure, practice:** Rules that relate to the “technical regulation of the form of agency action and proceedings” are exempt from notice and comment but still require at least 30 days’ notice before they are effective.<sup>52</sup> They regulate agencies themselves and do not include actions which affect the rights of regulated parties or the public.<sup>53</sup>
- **Direct final rules:** Since the 1980s, several agencies including EPA have issued direct final rules that do not go through notice and comment prior to publication.<sup>54</sup> These rules generally provide 30 days post-publication for comment and become effective 60 days after publication.<sup>55</sup> They are not exempt from notice and comment altogether: if an agency receives a comment opposing the rule, it must withdraw the rule and publish it as a NPRM.<sup>56</sup>

## 3. Exempt from 30-day notice period only

- **Reducing regulatory burden:** APA §553(d)(1) waives the 30-day notice period after publication for substantive rules that relieve a restriction or grant an exemption to a regulated party.<sup>57</sup>
- **Internal Revenue Service:** As noted above, the tax provisions may be exempt from the 30-day notice requirement.<sup>58</sup>

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<sup>50</sup> 5 U.S.C. § 553(b)(A).

<sup>51</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S. Ct. 1705, 1718, 60 L. Ed. 2d 208 (1979) (“Interpretive rules are issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers. General statements of policy are statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” (internal quotations and citations omitted.)).

<sup>52</sup> *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974)

<sup>53</sup> *Id.*; *U.S. Dep’t of Lab. v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984)

<sup>54</sup> Ronald M. Levin, [Direct Final Rulemaking](#), 64 GEO. WASH. L. REV. 1, 4 (1995).

<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Id.* at 9.

<sup>57</sup> 5 U.S.C. § 553(d)(1).

<sup>58</sup> I.R.C. § 7805(b)(1)(A).