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How Trump's Administration Will Affect Communications

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It is now well-established that many of the more controversial regulations and Executive Orders adopted over President Obama's two terms in office will be on the chopping block come January 20. But how exactly can the new Administration and Congress roll back these rules, especially those promulgated by the Federal Communications Commission (FCC) with impact on the communications sector?

In general, President-elect Trump will have the authority to unilaterally alter or replace any Executive Order issued by President Obama. He can also direct agencies to withdraw or suspend any nonfinal rule proposed by such agencies over the past eight years, including those still under review by the Office of Management and Budget (OMB).

In addition, President-elect Trump will be able to work with congressional Republicans and sign any number of joint resolutions adopted under the Congressional Review Act (CRA) to overturn rules submitted to Congress within 60 legislative days of a congressional session following such rule's submission. The CRA provides for certain expedited procedures for the Senate to consider a "Resolution of Disapproval" that only requires a majority vote to pass and, if enacted, would invalidate the rule in its entirety and prohibit the promulgating agency from adopting new rules that are "substantially the same" as the ones overturned under the CRA. The CRA thus serves as an "all-or-nothing" blunt instrument that could eliminate an agency's authority to regulate certain issues, once and for all. While that instrument has only been successfully deployed once, just last week the Republican-controlled House of Representatives signaled CRA's comeback by passing the Midnight Rules Relief Act of 2016,

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which would amend the CRA to permit Congress to use one single joint resolution to disapprove multiple regulations at once. In urging the bill's passage, Rep. Bob Goodlatte (R-VA), Chairman of the House Judiciary Committee, stated that the bill "guarantees that Congress can prevent any and all last-minute defiance of the people's will by midnight regulations that stubbornly seem to entrench the last pieces of the [Obama] Administration's partisan agenda."

And of course, both Congress and executive agencies under the Trump Administration can work through the regular process to enact new laws or adopt new regulation that would effectively reverse the work of the prior Administration. Indeed, with the 114th Congress concluding next month, CRA's applicability becomes even more limited as it can only be utilized against rules submitted within the last 60 *legislative* days of the current session, which the nonpartisan Congressional Research Service calculates begins after May 30, 2016 (but is subject to change depending on when Congress actually decides to adjourn for the year). That means the vast majority of the regulations adopted over the course of the last eight years are outside of the scope of the CRA already and could only be undone through either the traditional legislative process in Congress, or through a regular notice-and-comment rulemaking proceeding at the regulatory body, subject to the Administrative Procedure Act's (APA) requirements.

So just how many of President Obama's Executive Orders relating to the communications sector and the so-called "midnight regulations" promulgated by the FCC could be subject to expeditious reversal by the Trump Administration? The answer: very few.

President Obama has issued just a handful of Executive Orders specifically addressing issues concerning the communications sector. Those include Presidential Memorandums directing the National Telecommunications and Information Administration (NTIA) to collaborate with the FCC and free up a total of 500 MHz of federal and nonfederal spectrum between 2010 and 2020, suitable for both mobile and fixed wireless broadband use; directing the creation of a Spectrum Policy Team to monitor and support advances in spectrum sharing and requiring federal spectrum users to provide quantitative assessments of actual spectrum usage; and establishing the policy of the federal government to use all available and appropriate authorities to identify and address regulatory barriers that may "unduly impede either wired broadband deployment or the infrastructure to augment wireless broadband deployment." These Executive Orders have received broad support from stakeholders within the communications sector and have been credited with helping position the United States as the global leader in the deployment of 5G wireless services. Rather than replace or repeal these Executive Orders, the Trump Administration will most likely face the challenge of figuring out how to build upon these Obama-era initiatives so that more spectrum can be repurposed to support the ever-growing needs for commercial mobile broadband services.

Similarly, the Trump Administration may view President Obama's Executive Orders on cybersecurity—such as those that directed the creation of a national cybersecurity framework and that promote cybersecurity information sharing between the public and private sectors—not as regulatory overreach, but as not going far enough. During his campaign, President-elect Trump promised that he would order an immediate review of all U.S. cyber defenses and vulnerabilities and seek recommendations on how to enhance the military's Cyber Command, with "a focus on both offense and defense." He has also taken a strong anti-encryption and pro-

surveillance stance on the campaign trail. While few additional details have emerged about the concrete steps the Trump Administration will take to enhance our nation's cybersecurity defense and response, it is unlikely that overturning President Obama's cyber Executive Orders will be its starting point.

In terms of regulations that may be eliminated under the CRA, since May 30, Congress has only received 22 rules from the FCC, all of them considered "non-major" (defined primarily as having an annual effect on the economy of less than \$100 million), and generally considered noncontroversial by stakeholders. That list is unlikely to expand much further given that FCC Chairman Tom Wheeler has complied with the requests made by Senate Commerce Committee Chairman John Thune, and House Energy and Commerce Committee Chairman Fred Upton and Communications and Technology Subcommittee Chairman Greg Walden, that the Commission refrain from adopting new rulemakings on controversial issues. One notable exception, however, is the media ownership order that the FCC adopted in August, which received extensive criticism from the broadcast and newspaper industries.

And at least one controversial set of rules adopted by the FCC has yet to reach Congress: the newly minted privacy and data security regulation for broadband carriers. One of the major controversies surrounding the item stems from the extent to which consumer data collected by broadband providers are considered "sensitive" and can only be obtained and used via "opt-in" consent by the consumer. Broadband providers that wish to participate in and monetize online advertising, for example, are therefore subject to a different—considered by many to be much less favorable—set of regulatory treatments when compared against the rest of the players in the ecosystem, even if they all collect exactly the same personal data from their users. Because the CRA "resets" the 60-day consideration period in the next congressional session to begin on the 15th legislative session day, it is thus highly likely that the broadband privacy order becomes one of the first FCC regulations to be eliminated by the Trump presidency in early 2017.