



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 20, 2021

M-21-14

MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE
DEPARTMENTS AND AGENCIES

FROM: Robert Fairweather
Acting Director

SUBJECT: Implementation of Memorandum Concerning Regulatory Freeze Pending Review

This Memorandum provides guidance on implementing the Chief of Staff Memorandum of January 20, 2021, concerning “Regulatory Freeze Pending Review” (“Regulatory Freeze memorandum”). This memorandum applies to rules as defined in 5 U.S.C. § 551(4), including regulatory actions under Executive Order 12866, as amended, and guidance documents as this term was defined in Executive Order 13422 when that order was in effect.¹

Postponement of Effective Dates of Certain Published Rules

Paragraph 3 of the Regulatory Freeze memorandum describes the agency option to temporarily postpone agency rules to permit review by an agency head appointed or designated by the President after noon on January 20, 2021.²

With respect to rules that have been published in the *Federal Register*, or rules that have been issued in any manner, but have not taken effect, consider postponing the rules' effective dates for 60 days from the date of this memorandum, consistent with applicable law and subject to the exceptions described in paragraph 1, for the purpose of reviewing any questions of fact, law, and policy the rules may raise. For rules postponed in this manner, during the 60-day period, where appropriate and consistent with applicable law, consider opening a 30-day comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules, and consider pending petitions for reconsideration involving such rules. As appropriate and consistent with applicable law, and where necessary to continue to review these questions of fact, law, and policy, consider further delaying, or

¹ 5 U.S.C. § 551(4); Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993); Executive Order 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review (Jan. 18, 2007).

² The department or agency head may delegate this power of review to any other person so appointed or designated by the President, consistent with applicable law.

publishing for notice and comment proposed rules further delaying, such rules beyond the 60-day period.

Your agency staff has, or may shortly, identify rules that have not yet taken effect and about which questions involving law, fact, or policy have been raised. For such rules, you should consider postponing the effective dates for 60 days and reopening your rulemaking processes. Please ask your staff to promptly contact your Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) desk officer with a list of those rules.

Your decision for each such rule should include consideration of whether:

- (1) the rulemaking process was procedurally adequate;
- (2) the rule reflected proper consideration of all relevant facts;
- (3) the rule reflected due consideration of the agency's statutory or other legal obligations;
- (4) the rule is based on a reasonable judgment about the legally relevant policy considerations;
- (5) the rulemaking process was open and transparent;
- (6) objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments;
- (7) interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and
- (8) the final rule found adequate support in the rulemaking record.

If in your considered judgment the identified rules already satisfy the above criteria, you need do nothing further. However, if any of these rules does not satisfy these criteria, you should consider postponing the effective date for 60 days for the purpose of enabling further review, consistent with applicable law. In no event should you postpone the effective date of rules indefinitely.

If you determine that it is appropriate and consistent with applicable law to postpone the effective date of a rule for purposes of enabling further review, you should promptly seek public comment about your contemplated postponement of the effective date, including the impacts of a delay, as well as about the legal, factual, or policy issues raised by the rule in question. You should provide at least 30 days for comment where the effective date of the rule is not imminent.³ If the rule will take effect before there is sufficient time to solicit and review comments on the extension of the effective date, you should consult immediately with agency counsel and OIRA about the appropriate course of action to delay the rule.

Following the comment period, and after considering any pending petitions for reconsideration, you should take appropriate steps to ensure fair evaluation of (a) whether to extend the effective date and (b) the rule in question, which you may wish to amend. If in light of the comments you decide that a further postponement of the effective date is necessary, appropriate, and consistent with applicable law, you should consult with agency counsel and OIRA about your decision before taking action to further postpone the effective date.

³ See Admin. Conf. of the U.S., Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47,802 (Aug. 10, 2012), available at <https://www.acus.gov/recommendation/midnight-rules>.

The Administrative Procedure Act provides that you may postpone the effective date of an agency action pending judicial review where you find that justice so requires. See 5 U.S.C. § 705. If one of these rules is challenged in court before it becomes effective, you should consult with agency counsel regarding the appropriateness of relying on this provision to suspend the rule's effective date pending judicial review. In special cases, and only upon further consultation with agency counsel, the Department of Justice, and OIRA, you may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge.

Actions Related to the Federal Register and OIRA

Subject to any exceptions, please withdraw all rules, as defined in the Regulatory Freeze memorandum, that have been sent to the Office of the Federal Register (OFR) but have not yet been published. This will permit review of those rules as the Regulatory Freeze memorandum envisions.

Note that the OFR's specific requirements for the withdrawal of documents depend on whether those documents have been filed for public inspection. Some of those requirements are particularly time sensitive. Specifically, for those documents that have been filed for public inspection but are not published, Chapter 5.3 of the OFR's Document Drafting Handbook⁴ requires the following for withdrawals:

If we have filed the document for public inspection, your [Federal Register] Liaison Officer may withdraw it from publication only by emailing a pdf (preferred method) or faxing the signed letter requesting withdrawal.

In light of the Coronavirus Disease 2019 (COVID-19) Pandemic Public Health Emergency, agency designated OFR Liaison Officers or their approved alternates are strongly encouraged to e-mail, rather than fax, signed withdrawal letters to the OFR at fedreg.liaison@nara.gov. In addition:

The letter must reach the OFR before 12 noon on the business day before the document's scheduled publication date. We will not withdraw the document until we receive your letter.

Thus, if it has not already done so, your agency should submit withdrawal letters to the OFR as soon as possible. To facilitate such withdrawals, please see an example withdrawal letter in Appendix A: Model Letters of the OFR's Document Drafting Handbook. Please note that agencies may address requests for multiple documents in a single letter, as long as all are clearly identified by the Federal Register document number (if known), subject line, docket number, and RIN (if any).

⁴ See National Archives and Records Administration, Office of the Federal Register, Document Drafting Handbook (Revision 1.1, dated August 9, 2019), available at <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>.

In addition, subject to any exceptions and until such time as the agency head determines that it is appropriate for publication to resume, send no further rules to the OFR until an agency head appointed or designated by the President after noon on January 20, 2021, reviews and approves the rule. Also, consistent with the Regulatory Freeze memorandum's direction to comply with applicable Executive Orders (EOs) concerning regulatory management, please continue to follow the process outlined in EO 12866 to determine whether any such approved rule is significant and therefore subject to OIRA review.⁵

Finally, consistent with the Regulatory Freeze memorandum's broad scope, and to ensure that OIRA reviews only those rules that have already been reviewed by the appropriate person at each agency, I am requesting that your agency withdraw any rules that were submitted to OIRA prior to January 20, 2021.⁶

Agency Publication of Rules

The Regulatory Freeze memorandum contains a broad definition of rule, which may include regulatory actions or guidance documents not subject to a delay in effective date or publication in the Federal Register. Paying particular attention to significant rules,⁷ agencies should publish no further rules before an agency head appointed or designated by the President after noon on January 20, 2021 reviews and approves the publication and until such time as the agency head determines that it is appropriate for publication to resume. Consistent with the Regulatory Freeze memorandum's direction to comply with applicable Executive Orders concerning regulatory management, please continue to follow the process outlined in EO 12866 to determine whether any such approved rule is significant and therefore subject to OMB review.

Exceptions

There are some exceptions to the above directions.

First, the Regulatory Freeze memorandum authorizes OMB to make exceptions from the Regulatory Freeze memorandum's requirements under paragraphs 1-3 "for emergency situations or other urgent circumstances." This includes rules to address the continued health or economic consequences of COVID-19 Pandemic Public Health Emergency. Please bring any COVID-19 rules to the immediate attention of your OIRA desk officer.

Second, exclude from those actions any rules that are "subject to statutory or judicial deadlines." These are rules where performing the otherwise required review actions would endanger compliance with an operative statutory or judicial deadline. For example, agency civil monetary penalty adjustments that were due this month⁸ and were not

⁵ Executive Order 12866, § 6(a)(3)(B) & (C).

⁶ Your staff should reach out to OIRA staff to begin this process.

⁷ *Supra*, note 5.

⁸ *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (amended

significant rules under EO 12866 likely fall within this exception.

For all non-COVID-19 rules, please contact your OIRA desk officer as soon as possible with a list of those rules as well as a brief explanation of your determination that provides the basis for the requested exception. OMB will review your justification promptly and provide further guidance.

Paperwork Reduction Act Review

OMB has a well-established process to review agency collections of information under the Paperwork Reduction Act (PRA), typically after publication of a notice or regulation in the Federal Register providing an opportunity for public comment. Your agency staff has, or may shortly, identify collections of information that are pending OMB review and approval and that you may also wish to review because they relate to rules being reviewed or otherwise raise substantial issues of law, fact, or policy. We request that your staff promptly bring any pending submissions that raise substantial questions of law, fact, or policy to the attention of your OIRA desk officer to ensure appropriate coordination.

Your agency staff may also identify collections of information for which approval would require timely publication of Federal Register notices soliciting public comment or notifying the public of revisions prior to OMB submission. Unintended delays in Federal Register publications and OMB submissions under the PRA may inhibit the process by which the public can provide feedback on pending collections of information and their potential impacts or, if approval lapses, agency information collection goals.

2015) (codified as amended at 28 U.S.C. § 2461 note).