

January 21, 2021

BIDEN ADMINISTRATION ISSUES RULEMAKING FREEZE AND NEW ORDERS GOVERNING THE REGULATORY PROCESS

To Our Clients and Friends:

On January 20, 2021, the inaugural day of the new presidency, the Biden administration issued a series of across-the-board regulatory directives. These directives press pause on federal rulemakings, rescind Trump-era executive orders on the regulatory process, and set a framework for “modernizing” review of regulatory actions.

First, the new administration issued a [memorandum](#) freezing rulemakings pending review. Covered agencies are not to “propose or issue” any rule “until a department or agency head appointed or designated” by President Biden “approves the rule,” unless the rule falls into an exception “for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters,” as permitted by the Director of the Office of Management and Budget (“OMB”). For rules that have been published in the *Federal Register* but have not yet taken effect, agencies should consider “postponing the rules’ effective dates for 60 days” and opening a new “30-day comment period” to evaluate the rules further. After the 60-day delay, if a rule raises “substantial questions of fact, law, or policy,” agencies should “take further appropriate action in consultation” with the Director of OMB. This memorandum applies broadly to all “substantive action by an agency” that is anticipated to lead to “a final rule or regulation.” It does not appear to include independent agencies, though there is some ambiguity; while the memorandum is addressed to executive departments and agencies, its definition of “rule” is expansive enough that it could be read to cover actions by independent agencies such as the SEC. Either way, this memorandum will likely cause reconsideration of a wide variety of rules proposed or issued in the final days of the Trump administration.

This memorandum is similar to the [regulatory freeze](#) put in place on the first day of the Trump administration four years ago, though there are notable differences. For example, the Trump administration left agencies with no choice but to postpone by 60 days the effective date of any regulations published in the *Federal Register* that had not yet taken effect. By contrast, and as noted above, the Biden administration’s freeze instructs agencies to “consider” instituting this 60-day delay for such rules, which gives them more flexibility. Even with this added flexibility, it is still expected that many agencies will exercise the option to delay rules.

Second, President Biden issued an [Executive Order](#) revoking a number of Trump-era orders on the regulatory process, including:

- [Executive Order 13771](#) “Reducing Regulation and Controlling Regulatory Costs” (Jan. 30, 2017), which [created](#) the 2-for-1 rule requiring agencies to repeal two regulations for every one new regulation they issued. This order also established a budgeting process that required agencies to limit the incremental cost of new regulations under supervision of the OMB Director.

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- [Executive Order 13777](#) “Enforcing the Regulatory Reform Agenda” (Feb. 24, 2017), which required each agency to designate a Regulatory Reform Officer and establish a Regulatory Reform Task Force to oversee regulatory reform initiatives and recommend regulations to be repealed. The order further required agencies to measure and report their progress in implementing these reforms.
- [Executive Order 13875](#) “Evaluating and Improving the Utility of Federal Advisory Committees” (June 14, 2019), which required each executive department and agency (independent regulatory agencies excepted) to review, reduce, and limit the number of federal advisory committees, terminating at least one-third of these committees by September 30, 2019. The order also capped the government-wide total number of advisory committees at 350.
- [Executive Order 13891](#) “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 9, 2019), which required agencies to treat guidance documents as “non-binding both in law and in practice,” maintain an online database of all guidance documents, rescind outdated guidance documents, and establish procedures for issuing new guidance documents, including a clear statement of their non-binding effect, opportunities for the public to petition for withdrawal or modification of guidance documents, and a 30-day period of notice and comment for certain significant guidance documents.
- [Executive Order 13892](#) “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication” (Oct. 9, 2019), which limited agencies’ ability to enforce standards of conduct that were not publicly stated or issued in formal rulemakings. It also provided that agencies issuing notices of noncompliance provide an affected party the opportunity to be heard, encouraged “self-reporting of regulatory violations . . . in exchange for reductions or waivers of civil penalties,” and imposed requirements governing administrative inspections and certain statutory obligations.
- [Executive Order 13893](#) “Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO” (Oct. 10, 2019), which sought to ensure compliance with the “pay-as-you-go” requirement (“PAYGO”) first adopted in 2005. PAYGO mandates that agencies propose ways to reduce mandatory spending whenever they undertake a discretionary action that would increase mandatory spending. Executive Order 13893 required agencies to submit proposed discretionary actions and proposals for compliance with PAYGO to the OMB Director for review.

In sum, this sweeping order undoes many of the reforms implemented by the Trump administration that were designed to reduce regulatory burdens, cut costs, shrink the size of government, and increase agency transparency.

Third, the Biden Administration issued a [memorandum](#) on “Modernizing Regulatory Review,” which instructs the Director of OMB to make “recommendations for improving and modernizing” review of regulations. Such recommendations should provide “concrete suggestions” on how to “promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human

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dignity, equity, and the interests of future generations” in the regulatory process. Specifically, these recommendations should ensure that policies “reflect new developments in scientific and economic understanding,” account for “regulatory benefits that are difficult or impossible to quantify,” and do not cause detrimental “deregulatory effects.” OMB is also instructed to evaluate ways that the Office of Information and Regulatory Affairs (“OIRA”) can partner with agencies to support “regulatory initiatives that are likely to yield significant benefits” and to identify reforms that further the “efficiency” and “transparency” of the interagency review process.

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We will continue to monitor changes to the regulatory and rulemaking process taken by the new administration and keep you apprised of significant developments.



The following Gibson Dunn lawyers assisted in the preparation of this client update: Helgi C. Walker, Lucas Townsend, Michael Bopp, Jessica Wagner, Matt Gregory, Robert Batista, and Matthew Butler.

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