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Unwinding the Trump Deregulatory State and Restoring Public Protections: Recommendations of Public Citizen

In its hurry to revoke a wide swath of regulations crafted to protect the public—rules addressing fair wages, clean air and clean water, fair housing, immigration, and health care—the Trump Administration took a variety of shortcuts. By doing so, the Trump Administration gave people who care about human health, safety, and fairness an avenue to slow, even stop, the deregulation: by challenging in court the Administration's myriad violations of the Administrative Procedure Act (APA).

Now, as we start to think about how the Biden Administration can begin the crucial task of restoring and bolstering regulations to promote the democratic and humanitarian values that have long defined our nation, and with an eye towards protecting the marginalized communities in our country, it is important not to repeat the procedural mistakes of the Trump Administration. By taking the time to regulate in accordance with the rules of the APA, the incoming Biden Administration can ensure the success of its efforts.

In addition to the requirements for rulemaking imposed by Congress through the APA, presidents have used executive orders and other tools to create additional rulemaking requirements and procedures. Most notably, the Office of Management and Budget, through its Office of Information and Regulatory Affairs (OIRA), reviews nearly all agency rules, primarily focusing on cost-benefit analysis. OIRA has been notoriously called "where good regulations go to die." To effectively restore the myriad public protections destroyed over the past three and half years, the Biden Administration must think about reforming OIRA's role creatively and with fresh eyes.

Below, we discuss two important aspects of unwinding the deregulatory state and restoring the role of the federal government in protecting public health, safety, financial security, and the environment. First, we suggest executive actions to reverse anti-regulatory measures by the Trump Administration and to address structural barriers to rulemaking, expediting the restoration of both public protections and the integrity of the regulatory process. Second, beginning on page 5, we address the legal framework established by the APA and case law interpreting the Act, particularly as it relates to rulemaking issues that arise at the start of a new administration.

The discussion proceeds as follows:

I. Executive Action to Restore Public Protections

A. Repeal of Executive Orders

The Biden Administration can take several steps on day one to begin to undo the damage of indiscriminate deregulation. To start, the Biden Administration should rescind deregulatory executive orders (and accompanying implementation memos) issued under the Trump Administration that undermine agencies' ability to fulfill their public-service missions. These orders include Executive Orders 13771 (1-in, 2-out), 13777 (deregulatory task forces), 13783 (promoting fossil fuels), 13891 (discouraging agency guidance), 13892 (standards for enforcement actions), and 13924 (suggesting waivers of regulatory requirements made during the COVID-19 pandemic should be made permanent). Rescinding these executive orders is a precondition to unwinding the deregulatory state and, if accomplished on day one, will send a strong signal that the Biden Administration will embrace federal regulation as a valuable tool to protect public health, safety, economic security, and the environment.

B. New Executive Orders

Also on day one, President Biden should issue a new executive order that sets the tone and direction of his administration's regulatory agenda by directing agencies to solicit comments from the public in two distinct but overlapping areas: (1) Trump Administration rulemakings that were "tainted" or "corrupt" (see section F below) and (2) regulatory rollbacks that harmed consumers, workers, and the environment, along with rules that disproportionately targeted and hurt women, minorities, LGBTQ communities, and other vulnerable populations such as children, the poor, and the elderly. Although the Biden Administration should already have plans for specific substantive actions in these areas, a public comment process will signal the coming effort and build public engagement in support of the bold regulatory agenda developed during the transition period.

C. Congressional Review Act

If Democrats regain the majority in the Senate and retain control in the House, the White House should immediately begin the process of working with Congress to make use of the Congressional Review Act (CRA). Although Congress can enact legislation at any time to invalidate an agency regulation, the CRA provides a limited period of time during which Congress may pass a joint motion of "disapproval"—not subject to filibuster—that, once signed by the President, renders a regulation null and void. Although used only once prior to 2017, Congress has now used the CRA to invalidate more than a dozen rules. The CRA provides a quick and powerful tool for blocking rulemakings issued from

June 2020, through January 2021, without having to undergo a notice-and-comment rulemaking process.[1]

The legal effect of a successful joint resolution of disapproval under the CRA is generally to restore the regulatory status quo prior to the rulemaking that was disapproved under the CRA. Although the CRA bars agencies from issuing rules in the future that are "substantially the same" as rules that are disapproved, the scope of this prohibition is unclear and, in any event, should not be considered an obstacle to the adoption of stronger regulations after successful CRA challenges. The CRA may be used to "disapprove" any agency "rule" (defined to include regulations, policy statements, and guidance documents). In considering whether to encourage use of the CRA process for agency policy statements and guidance documents, the administration should consider, on the one hand, that an agency can rescind policy statements and guidance fairly expeditiously (although it must provide a reasoned explanation, see below at page 8) and, on the other hand, that proceeding through CRA blocks a future administration from re-issuing a substantially similar policy or guidance, and also gives members of Congress a chance to engage on important rules.

D. Rethinking the Role of Cost-Benefit Analysis

The Biden Administration should reduce the outsized and harmful role that economic cost-benefit analysis currently plays in the rulemaking process. One important step is for President Biden and administration officials to avoid using language or adopting policies that reinforce the false premise of a trade-off between protecting the public through new regulations and promoting economic growth. The Biden Administration should make clear that a solid economy and strong economic growth depend on public health and safety, which depend on a strong system of regulations, as the COVID-19 pandemic has clearly proven. Regulatory policies that affirm the role of cost-benefit analysis in the rulemaking process will undermine President Biden's ability to accomplish a bold policy agenda.

Another critical step is to shift control over regulatory decision-making away from OIRA and back to the regulatory agencies with subject matter expertise. OIRA has been referred to as the "most powerful agency you've never heard of" because most regulatory agencies cannot propose or finalize regulations without OIRA's review and approval. Yet historically, OIRA has played an antagonistic role, focusing heavily on cost-benefit analysis, while second-guessing and overriding agency experts, evidence, and data, and frustrating both the agencies' missions to protect the public. A regulatory agenda that repairs the damage from four years of deregulation and discriminatory regulation will require fundamental reforms at OIRA to re-orient it to advance a pro-regulatory agenda, rather than serve as an obstacle to it. Suggestions for doing so follow.

E. Rethinking the Role of OIRA

The best way to reorient OIRA is to remove its authority to conduct review of agency cost-benefit analysis. That authority is conferred by executive order and therefore is easily removed. OIRA can then focus on its responsibilities under the Paperwork Reduction Act and its role in coordinating interagency review of draft regulations. OIRA can also play a useful role in prompting agencies to consider suggestions for improving its regulations. Although OIRA has in the past done so through so-

[1] The estimate of June 2020 is based on the current calendar for the remainder of the 116th Congress and will change if Congress meets significantly more or less often than currently expected.

called "prompt letters," it appears to have dropped the practice in about 2006. In light of OIRA's role in compiling the semi-annual Unified Agenda, it could also play a useful role in developing tools to make rulemaking more efficient so as to facilitate—rather than hindering—agency rulemaking.

To the extent that OIRA review has in the past facilitated an administration's ability to exert political control over the regulatory agenda, the policy staff within the White House can serve that function—indeed, they already do so to a great extent. This solution would diminish the role of cost-benefit analysis while preserving the President's ability to influence and direct the regulatory agenda.

Further, to the extent that OIRA review continues, President Biden should make clear by executive order that final decision-making authority rests with the head of the regulating agency, not with OIRA. In addition, the OIRA review period is currently set by executive order 90 to 120 days, but the office rarely meets this timeline, causing rules to be delayed by months or longer. The new executive order should set a shorter period for OIRA review (45 days) and explore mechanisms allowing an agency to issue a rule if OIRA misses the deadline and requiring OIRA to publicly report the reasons for missed deadlines and expected completion dates. Finally, to enhance transparency, any changes made to a proposed or final rule during the OIRA review process should be publicly disclosed. To the extent that a rule undergoes interagency review as part of the OIRA review process, all communications related to such review should be made public. (This transparency requirement exists under Executive Order 12866, but it is largely ignored.)

F. Regulatory Integrity and Improvement Task Force

A day one executive order on regulation should authorize a task force of executive branch officials to investigate repeals of regulations under the Trump Administration that may have been the product of:

1. Deliberate and willful violations of the rulemaking process
2. Significant irregularities that do not comport with the rulemaking process
3. Suppression of scientific evidence or credible data
4. Conflicts of interest involving agency heads or officials
5. Undue influence by corporate stakeholders in the rulemaking process

Establishing the Task Force will serve three critical functions. First, it will signal aggressive action to put back in place the public health, safety, economic, and environmental regulations that were lost under the Trump Administration. Second, it will make clear that the Biden Administration will regulate based on evidence, science, and the public good—not personal interests or corporate influence. Third, the task force's identification of rules affected by the categories listed above will lay the groundwork both for restoring the wrongly repealed regulations and for restoring integrity to the rulemaking process.

The primary responsibility of the Task Force would be to identify regulatory actions that fit the criteria above, conduct fact-finding investigations of those regulatory actions, and produce a report listing (de)regulatory actions that the Task Force found to have been the product of an abuse or corruption of the rulemaking process, or a conflict of interest. The Task Force could use congressional oversight investigations, inspector general investigations and findings, and news media reporting, as well as recommendations solicited from the public, as the basis for identifying regulatory actions to

investigate. Its final report would be a compilation of individual reports from each agency. The Task Force should be given three to four months to prepare its report. The report would then be used to guide agency rulemaking priorities in the coming year.

G. Appointments

Effective regulation requires qualified leadership. The Biden Administration should draw a sharp contrast with the Trump Administration by appointing agency heads and other top level agency political officials who have both expertise in the subject matter, track records of supporting strong public protections, and no connection with industry or corporate stakeholders that government agencies should be regulating at arm's length. Agency leadership must be free from financial conflicts of interest and avoid even the appearance of taking actions that financially benefit themselves or past or potential future employers.

With respect to OIRA, the Biden Administration should nominate a head that strongly believes in the value of regulation in improving the lives of Americans. Under past administrations, OIRA heads have placed too much weight on the importance of economic analysis and not enough on the public benefits of regulations. An OIRA head should understand the crucial role of OIRA in driving forward the administration's regulatory agenda and should be skilled at making the public case for how that agenda will benefit the public.

H. Guidance Documents

Although "guidance document" has become a negative term under the Trump Administration, guidance is in fact a benign and useful tool for helping regulated entities and the general public understand an agency's expectations and procedures. Agencies in the new administration should not hesitate to use guidance documents—understanding, however, that guidance documents do not bind the agency or, more importantly, the public. An agency runs afoul of the APA if it seeks to issue as "guidance" a rule that seeks to impose obligations or create rights and, therefore, can be properly issued only through notice-and-comment rulemaking. Guidance is distinct from a regulation, not interchangeable. But appropriately used, guidance is proper, valuable, and efficient. (See further discussion of guidance documents below, at page 10.)

II. Legal Considerations in Rulemaking

Under the APA, the typical avenue for rulemaking—whether intended to regulate, deregulate, or reregulate—is for an agency to publish a proposed rule with a preamble discussing the issue, questions the agency is grappling with, and possible alternative approaches. The public then has an opportunity to comment. After considering the comments, the agency issues a final rule, along with a preamble explaining its decisions and responding to substantive public comments. This process provides both opportunities and hurdles for new rulemaking, some of which are discussed below.

The notice-and-comment process is required for all "substantive" or "legislative" rules, meaning rules that impose rights or obligations. In contrast, other "rules"—such as policy statements, guidance documents, interpretative rules, and procedural rules—can be issued, revised, or rescinded without undergoing that process. Nonetheless, changes to those types of "non-legislative" rules may still be challenged if the reasons for issuing or changing them are arbitrary and capricious or contrary to express

statutory requirements, or if the agency fails to adequately explain the change. This point is also discussed further below.

A. Delaying Effective Dates of Final Regulations

As the Biden Administration comes into office, it will surely want to delay implementation of regulations finalized by the Trump Administration but not yet in effect. There are two potential avenues for doing so—both with limitations set forth in the APA and case law.

1. Section 705 Postponements

The APA, 5 U.S.C. § 705, allows an agency to postpone, or stay, the effective date of a rule while the rule is being reviewed by a court: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." The purpose of an agency-imposed stay is to maintain the status quo while a court considers a challenge to a regulation.

Even when a new administration does not like a regulation and plans to revise or rescind it, the agency may have reasons for defending the regulation in court: The lawsuit may challenge the agency's authority to address the substantive topic, the lawsuit may challenge procedures that the agency wants to use again, or the agency (or Department of Justice, as agency litigating counsel) may feel obligated for institutional reasons to defend the regulation. Where the conditions for invoking section 705 are present, section 705 can be helpful to allow an agency time to work on revising or repealing the rule while litigating is proceeding.

An agency may invoke section 705 when three criteria are met.

First, section 705 applies only to a rule that is *not yet* in effect. (An agency cannot delay a date that has already passed.)

Second, section 705 can be invoked only "pending judicial review." The stay therefore ends when judicial review ends.

Third, the agency must make a finding that "justice so requires." Although only a few cases address the meaning of this requirement, some courts have held that this criterion means that, to justify a stay under section 705, the agency must satisfy a four-part test, modeled on the test that courts apply to a motion for a preliminary injunction. The test requires the agency to consider (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm absent a stay, (3) the prospect that others will be harmed by the stay, and (4) the public interest in granting the stay. Other courts have held that, the agency must weigh the same equitable considerations that courts weigh when a party requests a stay of a court decision, including competing claims of injury, the effect on each party of granting the stay, and any public consequences. The two articulations of the standard are similar; at bottom, each requires the agency to articulate a rational connection between the section 705 stay and the underlying litigation.

Section 705 was seldom invoked and even more seldom litigated prior to the Trump Administration. Based on use of section 705 in 2017–2019, the courts addressed a few points worth keeping in mind. First, an agency cannot properly invoke section 705, announcing a stay pending judicial review, if it likewise intends to stay the litigation. Thus, although the agency may work on revising the rule during the period of the section 705 stay, section 705 is not intended as a way to stay a rule

indefinitely. In particular, it is not a mechanism to stay rules pending agency reconsideration as opposed to litigation. Second, a section 705 stay itself is subject to legal challenge and judicial review.

Notable cases

- *NRDC v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 149 (S.D.N.Y. 2019) (agency acts arbitrarily and capriciously when it stays a rule pending review but fails to make any effort to see the litigation to a conclusion).
- *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106–07 (D.D.C. 2018) (agency not required to use four-factor test for court-ordered stays but must weigh the same equitable considerations).
- *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012) (agency must articulate a rational connection between its stay and the underlying litigation).

2. Postponing Effective Dates by Issuing a New Rule

Section 705, as explained above, applies only to final rules that have not yet gone into effect and are currently being challenged in court. For final rules that have not yet gone into effect but are *not* being challenged in court, the agency cannot postpone the effective date based on section 705. Instead, to change the rule's effective date, the agency must proceed through notice-and-comment rulemaking.

The APA requires agencies to use notice-and-comment rulemaking to issue substantive rules. A rule that revises or rescinds a substantive rule is itself a rule for which the agency likewise must use notice-and-comment rulemaking. Importantly, the effective date of a rule is a substantive part of the rule and, therefore, can be altered only through the same process.

In some instances, agencies have postponed effective dates for a period of time that effectively precludes judicial review. For example, in what was commonly referred to as the "Priebus memo," the Trump Administration on January 21, 2017, directed all agencies to extend for 60 days the effective dates of all final rules that had not yet gone into effect. That extension was not lawful, but because a legal challenge could not be completed within 60 days, it was essentially not challengeable. Prior administrations likewise issued similar memos.

Finally, where the effective date is not far off and the agency therefore lacks time to complete notice-and-comment rulemaking in advance of that date, it may issue an "interim final rule" describing a new effective date and requesting comment, with a fairly short comment period, say 30 days. In that situation, the agency may explain that the interim final rule is in effect while the agency considers whether to further change the effective date. Then after reviewing the comments, the agency may issue a new final rule that changes the effective date (or, based on the comments, decide to allow the rule to go into effect). The Department of Labor followed this approach in 2017. It went through a brief notice-and-comment rulemaking to delay significantly the effective date of what was called the "Fiduciary Rule." As a result, that delay was not susceptible to challenge in court on procedural grounds.

The APA does not expressly provide for the use of interim final rules. Generally, however, courts have allowed interim final rules where supported by "good cause." An agency's desire to delay a rule before it goes into effect does not constitute good cause to forgo notice-and-comment rulemaking, and neither does a new administration's desire to have time to review (and possibly revise or repeal) its

predecessor's regulations. Regulated parties' interest in avoiding the administrative costs of complying with a rule that might be rescinded also does not satisfy the good cause standard. Practically, however, because they typically last for a short period of time, interim final rules are difficult to challenge. (More about interim final rules, below.)

Notable cases

- *NRDC v. Nat'l Highway Traffic Safety Admin*., 894 F.3d 95, 113 (2d Cir. 2018) (notice-and-comment requirements apply with equal force when an agency seeks to delay or repeal a previously promulgated final rule).
- *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (EPA's stay pending reconsideration of a final rule was essentially an order delaying the rule's effective date, which is tantamount to amending or revoking a rule).
- *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1028 (N.D. Cal. 2019) (agency's desire to delay a rule before it goes into effect does not constitute good cause to forgo notice-and-comment rulemaking).
- *Bauer v. DeVos*, 325 F. Supp. 3d 74, 100 (D.D.C. 2018) (regulated parties' interest in avoiding the administrative costs of complying with a rule that might be rescinded does not satisfy the good cause standard).
- *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (new administration's desire to have time to review, and possibly revise or repeal, its predecessor's regulations does not constitute good cause).

B. Reversing Agency Policies

An effective date is not, of course, the only aspect of a regulation that the administration may wish to change. The Biden Administration will likely want to do an about-face on the substance of a wide range of agency policies and regulations. To do so, an agency cannot simply state that it disagrees with the position taken by the previous administration. The APA requires agencies to explain the reasoning behind their decisions—including the reason for a change in position. Failure to acknowledge that the agency is changing its position and to explain the reason for doing so is grounds for a court to invalidate the new position as "arbitrary and capricious."

When revising a regulation through notice-and-comment rulemaking, explaining the basis for the reversal should flow as a matter of course in the notice and the preamble to the new rule. For reversals of policies and interpretations of law, although notice-and-comment rulemaking is not required, policies and interpretations nonetheless may be set aside in court if they are arbitrary and capricious. Therefore, when an agency changes or reverses a policy or position, it must contemporaneously provide a "reasoned explanation" for doing so. The agency does not generally have to provide a more detailed justification than would suffice if it were operating on a blank slate. When the new position rests on factual findings that contradict those underlying the prior position, however, a more detailed explanation for the change may be required. In addition, when changing a longstanding

policy, the agency must take into account reliance interests of regulated entities or the public that may have developed based on the prior policy.

Notable cases

- *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1907, 1915 (2020) (stating that an agency must provide a reasoned explanation for a decision to revoke a policy and that, if the decision is challenged, it will be judged based on the reason given at the time of the revocation; and holding that DHS erred in failing to take into account reliance interests when it rescinded DACA).
- *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that the Department of Labor's minimal explanation for reversing its decades-old policy fell short of the agency's duty to explain why it was necessary to overrule its previous position, particularly in light of the industry's significant reliance interests).
- *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that an agency must show that there are good reasons for the change in policy but need not demonstrate that the reasons for the new policy are better than the reasons for the old one).

C. Pending and Forthcoming APA Lawsuits

When the Biden Administration takes office, numerous lawsuits challenging agency regulations will undoubtedly be pending. For rules issued shortly before the change of administration, additional lawsuits may soon follow. Even if the administration wants to rescind a rule that is being challenged in court, an agency cannot do so through a settlement of the lawsuit. That is, the agency cannot agree simply to announce the rescission of a rule; an agency can rescind a rule only through rulemaking.

To avoid defending the rule in court, the agency may suggest to the plaintiff that the parties jointly move for a stay of the litigation, to give the agency time to propose a new rule (one either rescinding or revising the challenged regulation), take comment, and issue a new final rule. If the agency wants to proceed in that way, the plaintiff will likely (and reasonably) insist on a timeline for the new rulemaking. Importantly, though, the agency cannot make an agreement as to the substance of the new final rule, only that it will undertake a new rulemaking.

The agency may also move for a voluntary remand, essentially asking the court to send the matter back to the agency so that it may either augment its explanation (if it wants to keep the rule), revise the final rule on the existing record (essentially, agreeing that the rule is not supported by the rulemaking record), or initiate a new rulemaking (to revise the rule).

Finally, the agency may decline to defend the rule, as the Obama Administration declined to defend the Bush Administration's repeal of the EPA's "Roadless Rule" (and as the Bush Administration had itself declined to defend the Roadless Rule). In that circumstance, the court will decide the issue either based on the agreement of the parties on the dispositive legal issues or in light of a defense provided by intervenors, if any. One advantage of this approach is that it can result in vacatur of the rule

(and reinstatement of its predecessor by operation of law) without the need for notice-and-comment rulemaking.

Examples

- Joint Motion to Hold Case in Abeyance Pending Issuance of a New Notice of Proposed Rulemaking, *Public Citizen v. FMCSA*, No. 09-1094 (D.C. Cir. Oct. 29, 2009), https://www.citizen.org/wp-content/uploads/hos20joint20motion20to20hold20in20abeyance.pdf.
- *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002) (successful appeal by environmental-group intervenors after the Bush Administration declined to appeal a district court decision striking down a rule issued by the Clinton Administration).

That said, and as explained above, if a pending suit challenges an agency policy or agency interpretation of a statute or regulation, the agency may revise or rescind it without notice-and-comment rulemaking. This option is available regardless of the existence of a legal challenge and is subject only to the requirement that the agency's change in position be properly explained. See "Reversing Agency Policies," above.

D. Exceptions to Notice-and-Comment Rulemaking

As noted above, notice-and-comment rulemaking is not required for issuing (or rescinding) policy statements, guidance documents, statements of agency interpretations of the law, and procedural rules. In addition, direct final rules and interim final rules may be issued without notice-and-comment rulemaking. Each provides opportunities for more expeditious action, but each has limitations that affect its value for restoring regulatory protections.

1. Guidance Documents and Policy Statements

The distinction between guidance, interpretative rules, and policy statements is fuzzy and, for APA purposes, unimportant. They may address an agency's informal explanation of how a company can best comply with application requirements, what enforcement actions an agency is prioritizing, or how an agency expects to implement a regulation. Both guidance and policy statements are "rules" under the APA that can be issued without notice or an opportunity for public comment. (That said, providing an opportunity for comment should be encouraged.) The key distinction between guidance or a policy statement, on the one hand, and a regulation, on the other, is that guidance and policy statements cannot impose new rights or obligations with the force of law; they can, however, explain the agency's thinking on a topic and recommend approaches to compliance or enforcement.

Although the Trump Administration used these tools as much as prior administrations, it also issued policy statements railing against "Guidance." Its criticism built on a conservative complaint that the Obama Administration had avoided rulemaking by denominating regulations as "guidance." Regardless of whether the complaint was accurate, three observations are in order.

First, despite the criticism, guidance is a legitimate and valuable tool for administrative agencies, the public, and regulated entities. Agencies have no need to be hesitant about issuing guidance.

Second, whether a rule is "guidance" or, instead, is a "regulation" (that is, a "substantive" or "legislative" rule) is not determined by the agency's designation. The distinction flows from the content: Does the rule impose binding rights or obligations? If the answer is yes, the agency was required to go through notice-and-comment rulemaking. If it failed to do so, the rule is vulnerable to legal challenge, because the agency did not follow the procedure required by the APA. That said, the agency's express disclaimer of an intent to impose rights or obligations may inform a court's consideration of the question.

Third, even where an agency provided notice and an opportunity for comment when it issued a guidance document, it is not required to use a notice-and-comment process to rescind or alter the guidance.

Finally, Trump issued two executive orders, Nos. 13891 and 13892, intended to limit appropriate use of agency guidance. Although private parties cannot enforce the executive orders against agencies, the Biden Administration should revoke them, as explained at the beginning of this memo. (A president's issuance or revocation of an executive order is not subject to the APA.)

Notable cases

- *NRDC v. Wheeler*, 955 F.3d 68, 83–84 (D.C. Cir. 2020) (distinguishing guidance documents from substantive rules).
- *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–23 (D.C. Cir. 2000) (stating that whether a document is guidance or a substantive rule does not turn on agency's statement but on whether document has effect of a substantive rule).
- *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (notice-and-comment procedures not required for issuing or rescinding interpretative rules).

2. Fees and Restrictions on Services

The current administration has increased fees for various immigration services, eliminated waivers for immigration-related fees, and imposed a variety of restrictions on services. These agency actions are "rules" under the APA. And to the extent that new rules reversing those provisions impose or expand rights or obligations, the APA requires that agencies go through notice-and-comment rulemaking.

Some such new rules, however, may fall into an exception to the general requirement of notice-and-comment rulemaking. For example, procedural rules do not require notice-and-comment rulemaking. Therefore, a change to a Department of Homeland Security requirement that applicants must type "n/a" into a form (rather than leaving inapplicable fields blank) is a procedural rule that the agency can alter without providing prior notice and opportunity for comment.

In addition, to the extent that there is uncertainty as to whether an action such as changing an existing fee or similar requirement is a substantive or procedural rule, the administration's evaluation of litigation risk might include the consideration that a change that only advantages people (by lowering a

fee) is difficult to challenge under the APA. Such changes do not cause anyone else an injury that could form the basis for standing to sue.

Examples

- DHS, Ombudsman Alert: Recent Updates to USCIS Form Instructions (Jan. 23, 2020), https://www.dhs.gov/blog/2020/01/23/ombudsman-alert-recent-updates-uscis-form-instructions (stating that certain immigration forms may be rejected if fields are left blank, rather than completed as "none" or "n/a").
- DHS, Proposed Rule, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280, 62281–82 (Nov. 14, 2019), https://www.federalregister.gov/documents/2019/11/14/2019-24366/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration (proposing increases in immigration-related application fees).

3. Interim Final Rules

Interim final rules are used to promulgate rules without first undertaking notice-and-comment rulemaking procedures. An interim final rule is considered "interim" because the agency intends to replace the rule with a (non-interim) final rule that will be promulgated after soliciting public comment. To that end, an interim final rule will typically incorporate a request for comment or, alternatively, the agency may publish a notice of proposed rulemaking concurrently with the interim final rule.

An agency's authority to adopt interim final rules arises from one of two sources. First, a statute may grant the agency authority to adopt interim rules without regard to the notice-and-comment requirements of the APA. Second, the agency may invoke the APA's "good cause" exception to the notice-and-comment requirement if the agency concludes that notice-and-comment is "impracticable" or "contrary to the public interest."

If the agency lacked "good cause" to make the rule immediately effective, the interim final rule is subject to challenge during the period in which it is in effect, prior to issuance of a final rule. Courts interpret the good cause exception narrowly and are less likely to uphold an interim final rule if the agency cannot demonstrate an urgent need for dispensing with the notice-and-comment process. Courts, however, will take the interim nature of the rule into account when considering whether the agency invoked the exception properly.

Even if an agency issues an interim final rule without good cause, a final rule that follows the interim final rule is not therefore tainted. As long as the agency allows comment before issuing the final rule and addresses the comments when issuing the final rule, the APA's rulemaking requirements are satisfied. In a challenge to a final rule, a reviewing court should consider only whether the APA's notice-and-comment requirements were met and whether the procedures used prejudiced the party challenging the rule, not whether the interim final rule was properly used or whether the agency maintained an "open mind."

Useful sources

- *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, __ U.S. __, 2020 WL 3808424, at *12 (U.S. July 8, 2020).
- *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93–95 (D.C. Cir. 2012) (holding interim final rule invalid because agency lacked good cause to dispense with notice-and-comment procedures).
- Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703 (1999).

4. Direct Final Rules

A direct final rule is issued without first issuing a proposed rule. It is typically used for rules that the agency expects will be noncontroversial and unlikely to elicit comments. To issue a direct final rule, an agency publishes the rule in the Federal Register and provides that the rule will become effective automatically unless an adverse comment is received during the comment period. If an adverse comment is received, then the agency withdraws the rule. The agency may then reissue the rule using notice-and-comment rulemaking procedures. An agency following best practices should publish a notice in the Federal Register announcing that the rule has taken effect.

A direct final rule can be useful for quickly issuing rules that are unlikely to be opposed by interested parties. Even in that narrow situation, however, it carries a practical risk: Although the purpose of direct final rules is to streamline the rulemaking process for substantive rules that the agency believes will not generate public comment, even a single adverse comment will preclude the direct final rule from taking effect and require the agency to start the process with a new notice of proposed rulemaking. In that circumstance, the attempt to use a direct final rule in the end delays the issuance of the rule. This risk has become more pronounced in recent years due to the increase in political polarization and the ease of filing adverse comments using online systems.

Useful sources

- Philip Wallach & Nicholas Zeppos, *Contestation of direct final rules during the Trump administration*, Brookings Inst. (Oct. 9, 2018), https://www.brookings.edu/research/contestation-of-direct-final-rules-during-the-trump-administration/.
- Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 Admin. L. Rev. 757 (1999).
- ACUS Recommendation 95-4, 60 Fed. Reg. 43108, 43110 (Aug. 18, 1995).

E. Exercising Enforcement Discretion

Adoption of a policy of non-enforcement of regulatory requirements is more often a tool for an administration interested in deregulation, rather than regulation. In instances where a prior administration—rather than rescinding a regulatory requirement—has ceased enforcement, the new administration may be able to correct course by altering or ending that non-enforcement policy.

An agency's decision not to take enforcement action in a particular instance is generally unreviewable in court. However, an agency's *policy* with respect to its exercise of enforcement discretion is likely reviewable in at least some circumstances, although the question has not been

definitively decided; it likely may be challenged as arbitrary and capricious under the APA. Accordingly, as with all agency action, the agency's reasons for its new policy should be stated and, if the policy reverses the existing one, the agency should acknowledge and explain the reversal.

Moreover, as with any agency policy, if an enforcement policy is stated using mandatory language (for example, statements that the agency "will" or "shall" act or not act in particular circumstances), it may constitute a substantive rule requiring notice-and-comment rulemaking. To avoid litigation over whether an enforcement policy is a substantive rule, as happened with the Obama Administration's DACA program, the agency should make sure to state that the policy will guide its discretion but is not binding. (In the alternative, the agency may wish to adopt an enforcement policy through notice-and-comment rulemaking.)

Notable cases

- *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905–06 (2020) (discussing reviewability of an agency enforcement policy but concluding that the Court need not decide the issue because the challenged action was "not simply a non-enforcement policy").
- *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that an individual enforcement decision is generally not reviewable).
- *Public Citizen Health Research Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018) (rejecting agency's argument that its statement concerning enforcement discretion was a policy statement, not a substantive rule).