

## Legal Sidebar

# What Can the New President Do About the Effective Dates of Pending Regulations?

01/18/2017

---

It has become [common practice](#) for a new President to impose an executive branch-wide freeze, or moratorium, on all regulations under development so that the previous administration's regulatory proposals may be reviewed for consistency with the current administration's policy goals. Like his recent predecessors, President-elect Trump is [reportedly](#) considering issuing such a directive. Depending on his approach, and how the directive is implemented by agencies, that action may raise interesting legal questions.

As discussed in this [previous Sidebar](#), generally, once a regulation is in effect, suspending or repealing that regulation can only occur after the public is notified about the change to the regulation and the agency considers public comments about the change (i.e., the Administrative Procedure Act's [notice and comment requirements](#)). The notice and comment process can take several months or longer. A new administration has much broader authority, however, to immediately halt *pending* rules that have not yet been published as final rules in the *Federal Register*. As a result, presidential regulatory moratoria have [typically](#) targeted rules that are not yet in effect, instructing agencies to: (1) refrain from submitting for publication, or immediately withdraw from submission, any **pending rules that have not yet been published** as final rules in the *Federal Register*, and (2) delay for 60 days the effective date of **rules that have been published as final rules, but have not yet become effective**. [Some](#) of these 60-day delays have been implemented by agencies without going through the notice and comment process.

While it is generally recognized that an agency, has the authority to immediately halt agency rulemaking activities on rules that are not yet finalized (prong 1 of the moratoria), it is much less clear whether an agency may delay the effective date of a rule that has already been finalized, but is not yet effective, without first engaging in the notice and comment process (prong 2 of the moratoria). Nevertheless, because the implemented delays in effective dates are typically short in duration, only a handful of courts have evaluated the legality of these actions.

### **Judicial Decisions Relating to Delayed Effective Dates**

The APA generally [requires](#) agencies to go through the notice and comment process whenever “[formulating, amending, or repealing a rule](#).” That [process](#), at a minimum, requires agencies to provide the public with notice of a proposed action and a meaningful opportunity to comment on the rule before it is finalized. Courts have [generally](#) suggested that the effective date of a rule is as much a part of the rule as its substantive provisions and, therefore, delaying or altering the effective date of a rule can be viewed as an amendment to the rule sufficient to trigger notice and comment procedures. The APA, however, explicitly [waives](#) the notice and comment requirement in various situations, including for (1) “rules of agency organization, procedure, or practice;” or (2) when the agency “for [good cause](#) finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” Recent [administrations](#) have [relied](#) on these exceptions to delay effective dates following a presidential transition without engaging in notice and comment.

In one of the few cases to directly address the delay question in the context of a presidential transition, the U.S. Court of Appeals for the Second Circuit held in [Natural Resources Defense Council \(NRDC\) v. Abraham](#) that the Department of Energy's (DOE) temporary delay of a rule, implemented pursuant to President George W. Bush's [transitional regulatory](#)

[moratorium](#), violated the APA. *NRDC* arose after the DOE published a final rule governing air conditioner efficiency standards on January 22, 2001. The rule was to take effect on February 21, 2001, and compliance with the substantive standards would begin by January 23, 2006. On February 2, 2001, the agency, without prior notice and comment, [delayed](#) the effective date of the rule for 60 days, citing the Bush directive. In a challenge to the DOE action, the court held that the temporary delay was a “rule” subject to notice and comment and rejected DOE’s arguments that the delay qualified for the “procedural rule” or “good cause” exceptions. According to the court, the action was not a procedural rule because the effective date had “considerable substantive significance.” Specifically, the court viewed the effective date of the rule as altering the agency’s substantive authority, in that federal environmental law prevented an agency from “backsliding” or amending the efficiency standards downward once they became effective. The court also held that the agency lacked good cause to forgo notice and comment, holding that the only existing “emergency” that made notice and comment impracticable—the impending effective date—was one of DOE’s “own making.” The Court further noted that in order for the “mere existence of a deadline” to constitute “good cause,” there must be a threat of “real harm” to the “public interest.”

It is perhaps due to the reasoning employed in *NRDC* that the most recent transitional regulatory moratorium, [issued](#) by President Obama in 2009, asked agencies to “consider” delaying effective dates by 60 days rather than directing them to do so. The memo also suggested that if an agency chooses to implement a delay, it “should immediately reopen the notice-and-comment period for 30 days.”

While considering a slightly different set of circumstances, the U.S. District Court for the District of Columbia in the 2012 decision of [Sierra Club v. Jackson](#), appears to have broken from the reasoning in *NRDC*. *Sierra Club* did not involve a challenge to an effective date delay implemented pursuant to a transitional regulatory moratorium, but rather a delay instituted by the Environmental Protection Agency (EPA) as a result of pending litigation. The dispute in [Sierra Club](#) arose after the EPA [delayed](#) the effective date of two rules that were [subject to legal challenge](#) “until the proceedings for judicial review ... are completed ....” The delay notice was issued after final publication of the rules, but two days before the rules were set to take effect, without notice and comment. In reviewing the delay, the district court acknowledged that the delayed implementation of a finalized rule “normally” constitutes the type of rulemaking that is subject to notice and comment. However, the court nevertheless held that because the EPA delay was a “temporary measure for preserving the status quo,” it was not the type of substantive rulemaking that should trigger notice and comment requirements. The court appears to have given great weight to the fact that both *Sierra Club* and the government had “expressly disclaimed any argument that the [delay] operates as an amendment or rescission of the” EPA rules. Moreover, the court appears to have articulated a distinction between a “temporary measure for preserving the status quo” and a decision to “suspend indefinitely regulations that are the product of exhaustive study and comprehensive rulemaking, in order to allow a wholesale reevaluation of a major regulatory program.” The latter, the court suggested, would be subject to notice and comment while the former would not. However, the court also explicitly stated that “the central question is not the length of the stay or its temporary nature.”

It may be difficult to harmonize the *NRDC* and *Sierra Club* opinions, in that one suggests that temporary effective date delays are subject to notice and comment and the other does not. Each opinion also raises significant questions of application. Under *NRDC*, the anti-backsliding provision of the applicable statute gave the rule’s effective date increased substantive importance. Absent that rather unique characteristic, it is unclear whether the court would have upheld the delay as falling within the procedural rule exemption. Under *Sierra Club*, it would appear that most, if not all, temporary rule delays would act to preserve the “status quo,” given that by definition, preventing a new regulation from taking effect preserves the current regulatory scheme. Should the opinion therefore be interpreted to suggest that there must be evidence of a “wholesale reevaluation of a major regulatory program” in order for a temporary delay of an effective date to be subject to notice and comment? While it may appear that an effective date delay occurring after a presidential transition would generally be implemented for the purposes of “reevaluating,” and perhaps ultimately halting, a rule, a 2002 Government Accountability Office (GAO) [report](#) may suggest otherwise. That report found that 67 of the 90 rules that were delayed pursuant to the Bush moratorium were permitted to take effect at the end of the 60-day period. Eight additional rules were permitted to take effect at some point within the following year.

Given the lack of cases on temporary delays, the extent to which a new administration can immediately delay effective dates (without notice and comment) as a means of reevaluating rules that have not yet taken effective is unclear. Nevertheless, history would suggest that a definitive legal resolution to this issue may be unlikely due to both the

difficulty of challenging delays of short duration and, as evidenced in the GAO report and the flexible language used in the Obama directive, the relatively varied implementation of regulatory freezes by federal agencies.

Posted at 01/18/2017 01:48 PM