

MEMO: **Responding To Freeze Memos** – How agencies delay, withdraw, or modify final rules that have been published in the *Federal Register*, but are not yet effective.

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INTRODUCTION

On the first day of his presidency, President Trump, through his Chief of Staff, issued a memorandum to the heads of executive departments and agencies that directed them to temporarily postpone for 60 days the effective dates of regulations that had been published in the *Federal Register* but had not taken effect. Many past attendees at TRG’s regulatory training courses have asked us for guidance on how their agencies can properly comply with this memorandum while staying in compliance with the Administrative Procedure Act. This type of memorandum is typical for a new administration and is referred to as a freeze memorandum, as its goal is to freeze the actions of the outgoing administration while the incoming administration gets established. Since freeze memos have come out of administrations going back to Ronald Reagan, we decided to respond to requests for advice in the form of a review of how past administrations have implemented similar freeze memos.

Presidents Barack Obama and George W. Bush each issued freeze memoranda when they took office for their first terms, in January 2009 and January 2001, respectively. In response to those memoranda, numerous agencies delayed and subsequently withdrew or modified final rules that had been published in the *Federal Register* but had not yet taken effect. This paper provides an overview of those historical rulemakings. Feel free to share this paper. If any reader of this paper has comments or suggestions please let us know. TRG’s contact information is in the header.

BACKGROUND

On January 20, 2017, President Trump’s Chief of Staff, Reince Priebus, issued a memorandum to the heads of executive departments and agencies entitled, “Regulatory Freeze Pending Review” (“Priebus Memo”) (January 24, 2017, 82 FR 8346). In paragraph 3, the Priebus Memo directs department and agency heads, as permitted by applicable law, to temporarily postpone for 60 days from the date of the memo, the effective dates of regulations that have been published in the *Federal Register* but have not taken effect, “for the purpose of reviewing questions of fact,

law, and policy they raise.” Paragraph 3 further directs department and agency heads, “[w]here appropriate and as permitted by law,” to “consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period.”

On January 24, 2017, the Office of Management and Budget issued OMB Memorandum #M-17-16 (“OMB Guidance Memo”), which provides guidance on implementing the Priebus Memo (which the OMB Guidance Memo refers to as the “Freeze Memo”). The OMB Guidance Memo offers the following guidance on paragraph 3 of the Priebus Memo:

...To the maximum extent possible, your explanations for postponement should be individualized to the regulation being postponed. In addition, the Administrative Procedure Act generally establishes procedural requirements for agencies promulgating rules, subject to certain exceptions and exemptions. Please consult with your agency’s Office of General Counsel as you implement the Freeze Memo and this Memorandum.

Second, consider postponing the effective date beyond 60 days where appropriate. If such a postponement is appropriate, seek comment on the extended postponement, in accordance with the Freeze Memo. If your agency takes comment on the initial 60-day postponement, *e.g.*, by issuing a notice of proposed rulemaking, consider using the same action to take comment on an extended postponement. In addition, please consider taking comment on the regulation itself, including about questions of fact, law, and policy that the agency should recognize as it considers whether the regulation raises any substantial questions.

Finally, if during your review you determine a regulation raises no substantial question of fact, law, or policy, please provide your Office of Information and Regulatory Affairs (OIRA) Desk Officer a list of such regulations on which you plan to take no further action no later than two weeks prior to the postponed effective date for those regulations. Alternatively, if you determine a regulation raises substantial question of fact, law, or policy, please notify your OIRA Desk Officer promptly and consider whether you[r] agency should perform additional rulemaking or take other further actions. If your agency determines it should take further actions, please consult with your OIRA Desk Officer in accordance with the Freeze Memo.

Two previous presidents issued similar memos upon taking office. In January 2009, President Obama’s Chief of Staff, Rahm Emanuel, issued the “Regulatory Review” memorandum (“Emanuel Memo”) (January 26, 2009, 74 FR 4435), which directed agencies to *consider*

extending by 60 days the effective dates of final regulations that had been published in the *Federal Register* but had not taken effect. The Emanuel Memo further advised that, where such an extension was made, agencies should immediately reopen the comment period for 30 days to allow interested parties to comment about issues of law and policy raised by the rules. In January 2001, President Bush's Chief of Staff, Andrew Card, issued the "Regulatory Review Plan" memorandum ("Card Memo") (January 24, 2001, 66 FR 7701), which, like the Priebus Memo, directed department and agency heads to postpone for 60 days the effective date of final rules that had been published in the *Federal Register* but had not taken effect.

In response to both the Card Memo and the Emanuel Memo, a number of agencies delayed and subsequently withdrew or modified final rules that had been published in the *Federal Register* but had not yet taken effect. The section below provides an overview of most of those rulemakings.

OVERVIEW OF HISTORICAL RULEMAKINGS

A. Final rules that had been published in the *Federal Register* but were not yet effective at the time of a change in administrations, and that were subsequently delayed, withdrawn, and (in all but three cases) immediately replaced.

This section presents ten rulemakings in which an agency delayed the effective date of a published final rule and then formally withdrew that rule. In the first three rulemakings presented, the agency did not engage in additional rulemaking after the delay and subsequent withdrawal. In the fourth rulemaking presented, the agency delayed and withdrew the final rule and then, several months later, engaged in additional rulemaking. In the remaining six rulemakings presented, the agency delayed the final rule and used the period of delay to amend and republish that rule as a proposed rule, which the agency then finalized at the same time as it withdrew the previously published final rule.

In some of the rulemakings presented below, the agencies expressly sought comments on whether to withdraw the previously published final rule. In other rulemakings, however, the agencies did not expressly seek comments on the possibility of withdrawal, although they did seek comments on a proposed replacement final rule before withdrawing the previously published final rule. While there is no case law requiring an agency to publish a notice to withdraw or modify a previously published final rule with an opportunity for comment, it seems like a smart thing to do. We know that changing the effective date of a published final rule is considered substantive and requires notice and comment, so one could argue that withdrawing a

final rule (which has the effect of suspending the effective date indefinitely) is also substantive and would require notice with opportunity for comment.

1. Department of Labor, Employment Standards Administration – Labor Organization Annual Financial Reports Final Rule.

Summary: After publishing a final rule, agency publishes a notice of proposed extension of effective date and request for comments on legal and policy questions relating to that rule. Agency subsequently delays the effective date of the final rule twice. During the second period of delay, agency proposes, and then finalizes, the withdrawal of the final rule.

- January 21, 2009 (74 FR 3677) – DOL’s Employment Standards Administration published a final rule entitled “Labor Organization Annual Financial Reports,” which had an effective date of February 20, 2009.
- February 3, 2009 (74 FR 5899) – Consistent with the Emanuel Memo, DOL published a notice of proposed extension of effective date and request for public comment on legal and policy questions relating to the final rule.
- February 20, 2009 (74 FR 7814) – DOL published a final rule that delayed the effective date of the January 21st final rule for 60 days until April 21, 2009.
- April 21, 2009 (74 FR 18172 and 74 FR 18132) – DOL published a notice of proposed rulemaking, in which it proposed to withdraw the January 21st final rule. In a separate document published on the same day, DOL delayed the effective date of the January 21st final rule for an additional 6 months until October 19, 2009, to allow additional time for the agency and the public to consider the proposed withdrawal of that rule.
- October 13, 2009 (74 FR 52401) – DOL published a final rule that withdrew the previously published January 21st final rule.

2. Department of Interior, Bureau of Indian Affairs – Acquisition of Title to Land in Trust Final Rule.

Summary: After publishing a final rule, agency delays the effective date of that rule four times. In the document delaying the effective date for a second time, agency also seeks comments on whether the final rule should be amended or withdrawn in whole or in part. On the same day that the final rule is delayed for a third time, agency publishes a notice of proposed withdrawal of the final rule and request for comments on “whether to withdraw the final rule and propose a new rule that would better speak to the ongoing concerns of the public...” Following the fourth period of delay, agency withdraws the rule.

- *January 16, 2001 (66 FR 3452)* – Department of Interior’s Bureau of Indian Affairs (BIA) published a final rule entitled “Acquisition of Title to Land in Trust,” which had an effective date of February 15, 2001.
- *February 5, 2001 (66 FR 3452)* – In accordance with the Card Memo, BIA published a final rule that delayed the effective date of the January 16th final rule by 60 days. BIA implemented the delay without providing the public with prior notice or an opportunity to comment, citing the “good cause” exceptions in the Administrative Procedure Act (APA). Because the delay rule erroneously calculated the 60-day delay from the publication date of the January 16th rule instead of the effective date of that rule, BIA published a corrected document on February 20, 2001 (66 FR 10815), showing a new effective date of April 16, 2001.
- *April 16, 2001 (66 FR 16403)* – BIA published a document that delayed the effective date of the January 16th final rule for an additional 120 days until August 13, 2001. The document sought comments from the public on “whether the final rule should be amended in whole or in part or withdrawn in whole or in part.”
- *August 13, 2001 (66 FR 42415 and 42474)* – BIA published another delay of effective date of the final rule until November 10, 2001, “in order to continue to review comments that were received from the prior extension.” In a separate document published the same day, BIA issued a notice of proposed withdrawal of final rule and request for comments on “whether to withdraw the final rule and propose a new rule that would better speak to the ongoing concerns of the public...”
- *November 9, 2001 (66 FR 56608)* – BIA published a notice withdrawing the final rule.

3. *Office of Personnel Management – Time-in-Grade Rule Eliminated Final Rule.*

Summary: After publishing a final rule, agency delays the effective date and reopens the comment period of that rule. Agency subsequently publishes a notice proposing to revoke the final rule. At the same time, agency proposes and then finalizes an additional delay of the effective date of the final rule. Agency ultimately withdraws the rule.

- *November 7, 2008 (73 FR 66157)* – Office of Personnel Management (OPM) published a final rule entitled “Time-in-Grade Rule Eliminated,” which had an effective date of March 9, 2009.
- *March 9, 2009 (74 FR 9951)* – Pursuant to the Emanuel Memo, OPM published a final rule that delayed the effective date of the November 7th final rule for 60 days until May 18, 2009, and reopened the comment period on the final rule for 30 days until April 8, 2009. OPM implemented the delay without providing the public with prior notice or an opportunity to comment.

- *May 11, 2009 (74 FR 21771) and May 18, 2009 (74 FR 23109)* – OPM published a notice proposing to revoke the November 2008 final rule. OPM also proposed and subsequently finalized an additional 90-day delay of the effective date of the November 2008 final rule. OPM sought comments on the merits of revoking, retaining, or amending the final rule, and on the 90-day delay of the effective date of that rule.
- *August 11, 2009 (74 FR 40057)* – OPM published a final rule to withdraw the November 2008 final rule.

4. Department of Labor, Employee Benefits Security Administration – Investment Advice – Participants and Beneficiaries Final Rule.

Summary: After publishing a final rule, agency publishes a notice of proposed extension of effective date and request for comments on whether to rescind, modify, or retain final rule. Agency then delays the effective date several times before publishing a notice of withdrawal of the final rule. Several months later, agency amends and republishes the rule as a proposed rule. Agency ultimately publishes a new final rule approximately two-and-a-half years after the initial final rule was published.

- *January 21, 2009 (74 FR 3821)* – Department of Labor’s (DOL) Employee Benefits Security Administration published a final rule entitled “Investment Advice – Participants and Beneficiaries,” which had an effective date of March 23, 2009.
- *February 4, 2009 (74 FR 6007)* – Consistent with the Emanuel Memo, DOL published a notice of proposed extension of effective date and applicability date, and request for public comments on legal and policy questions relating to the final rule. The notice invited comments on the proposal to extend the effective date and also sought comments “generally on the rules and on the merits of rescinding, modifying or retaining the rules.”
- *March 20, 2009 (74 FR 11847)* – DOL published a final rule delaying the effective date of the January 21st final rule by 60 days from March 23, 2009 to May 22, 2009.
- *May 22, 2009 (74 FR 23951) and November 17, 2009 (74 FR 59092)* – DOL published final rules further delaying the effective date of the January 21st final rule, each time for 180 days (from May 23, 2009 to November 18, 2009 to May 17, 2010). DOL implemented the additional delays without providing the public with prior notice or an opportunity for comment. DOL did not offer a basis for its decision to skip notice and comment on the delay rules.
- *November 20, 2009 (74 FR 60156)* – Three days after publishing the third delay of effective date, DOL published a withdrawal of the January 21st final rule. The withdrawal document included discussion of the comments the agency received on the February 4th

notice. DOL noted that work was currently being completed on proposed regulation, which it anticipated would be published shortly.

- *March 2, 2010 (75 FR 9360)* – DOL published a new proposed rule.
- *October 25, 2011 (76 FR 66135)* – DOL published a new final rule.

5. *Department of Commerce, United States Patent and Trademark Office – Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals.*

Summary: After publishing a final rule, agency delays the effective date of that rule indefinitely. Agency then publishes an advance notice of proposed rulemaking, in which it seeks comments on possible revisions to the indefinitely delayed final rule, followed by a notice of proposed rulemaking, in which it seeks comments on whether to rescind and replace the indefinitely delayed final rule. Agency ultimately publishes a new final rule in which it withdraws and replaces the previously published final rule.

- *June 10, 2008 (73 FR 32937)* – Department of Commerce, United States Patent and Trademark Office (PTO) published a final rule entitled “Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals,” which had an effective date of December 10, 2008.
- *December 10, 2008 (73 FR 74972)* – PTO published a final rule that delayed the effective and applicability dates of the June 2008 final rule, pending completion of an OMB review of a proposed information collection related to the June 2008 final rule. PTO implemented the indefinite delay without providing the public with prior notice or an opportunity to comment.
- *December 22, 2009 (74 FR 67987)* – PTO published an advance notice of proposed rulemaking (ANPRM) in which it sought comments on possible revisions to portions of the indefinitely delayed June 2008 final rule. PTO cited the Emanuel Memo in the ANPRM.
- *November 15, 2010 (75 FR 69828)* – PTO published a notice of proposed rulemaking, in which it proposed to rescind the indefinitely delayed June 2008 final rule. PTO also proposed new revisions to the current rule.
- *November 22, 2011 (76 FR 72270)* – PTO published a final rule in which it withdrew the previously published June 2008 final rule and finalized its proposed revisions to the current rule.

6. Department of Health and Human Services – Protection of Human Research Subjects Final Rule.

Summary: After publishing a final rule, agency delays the effective date of that rule twice. During the second period of delay, agency amends the final rule and republishes it as a proposed rule. Several months later, agency withdraws the previously published final rule and publishes a “replacement rule.”

- *January 17, 2001 (66 FR 3878)* – Department of Health and Human Services (HHS) published a final rule entitled “Protection of Human Research Subjects,” which had an effective date of March 19, 2001.
- *March 19, 2001 (66 FR 15352)* – In accordance with the Card Memo, HHS published a final rule that delayed the effective date of the January 17th final rule for 60 days until May 18, 2001. HHS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *May 18, 2001 (66 FR 27599)* – HHS published another final rule that delayed the effective date for another 180 days until November 14, 2001, to give the Department an opportunity to obtain comment on three modifications to the final rule. HHS again implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *July 6, 2001 (66 FR 35576)* – HHS published an NPRM, seeking public comment on three proposed modifications to the January 17th final rule. The comment period was open until September 4, 2001.
- *November 13, 2001 (66 FR 56775)* – HHS published a final rule that withdrew the January 17th final rule and issued a “replacement rule,” with an effective date of December 13, 2001. HHS never sought comment on whether it should withdraw the January 17, 2001 final rule. The Department argued that, “Given the imminence of the effective date of the final rule as amended, seeking public comment on the withdrawal of the January rule would have been impracticable, as well as contrary to the public interest in the orderly promulgation and implementation of regulations, to allow time for implementation of this final rule.”

7. Department of Health and Human Services, Health Care Financing Administration – Medicaid Program; Medicaid Managed Care Final Rule with Comment Period.

Summary: After publishing a final rule with comment period, agency delays the effective date of that rule three times. During the third period of delay, agency amends the final rule and republishes it as a proposed rule. Agency then publishes a withdrawal of the previously published final rule and, in a separate document, a new final rule.

- *January 19, 2001 (66 FR 62227)* – HHS’s Health Care Financing Administration (HCFA) (subsequently, Center for Medicare and Medicaid Services (CMS)) published a “final rule with comment period” entitled “Medicaid Program; Medicaid Managed Care,” which had an effective date of April 19, 2001.
- *February 26, 2001 (66 FR 11546) and June 18, 2001 (66 FR 32776)* – In accordance with the Card Memo, HCFA published final rules that delayed the effective date of the January 19th final rule (each time for 60 days). HCFA implemented the delay rules without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *August 17, 2001 (66 FR 43090)* – CMS published an interim final rule with comment that further delayed the effective date of the January 19th final rule for a year, until August 16, 2002. Although the additional delay was effective immediately, CMS did give the public an opportunity to comment on the length of that delay.
- *August 20, 2001 (66 FR 43613)* – CMS published a proposed rule to amend the January 19th final rule.
- *June 14, 2002 (66 FR 40988 and 66 FR 40989)* – CMS published two documents: a withdrawal of the previously published January 19th final rule with comment period and a new final rule.

8. Department of Health and Human Services, Health Care Financing Administration – Medicare and Medicaid Programs; Hospital Conditions of Participation: Anesthesia Services Final Rule.

Summary: After publishing a final rule, agency delays the effective date of that rule twice. During the second period of delay, agency amends the final rule and republishes it as a proposed rule. Several months later, agency publishes a new final rule and withdraws the previously published final rule.

- *January 18, 2001 (66 FR 4674)* – HCFA (subsequently CMS) published a final rule entitled “Medicare and Medicaid Programs; Hospital Conditions of Participation: Anesthesia Services,” which had an effective date of March 19, 2001.

- *March 19, 2001 (66 FR 15352)* – In accordance with the Card Memo, HCFA published a final rule that delayed the effective date of the January 18th final rule for 60 days until May 18, 2001. HCFA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *May 18, 2001 (66 FR 27598)* – HCFA published a final rule that further delayed the effective date of the January 18th final rule for 120 days until November 14, 2001. HCFA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *July 5, 2001 (66 FR 35395)* – HCFA published a proposed rule to amend the January 18th final rule.
- *November 13, 2001 (66 FR 56762)* – In a single document, CMS withdrew the January 18th final rule and published a new final rule, effective immediately.

9. U.S. Small Business Administration – New Markets Venture Capital Program Interim Final Rule.

Summary: After publishing an interim final rule, agency delays the effective date of that rule twice. On the same day that it publishes the second delay, agency amends the interim final rule and republishes it as a proposed rule. The proposed rule also contains a proposal to withdraw the previously published interim final rule. One month later, agency publishes a new final rule and withdraws the previously published interim final rule.

- *January 22, 2001 (66 FR 7217)* – The U.S. Small Business Administration (SBA) published an interim final rule (IFR) entitled “New Markets Venture Capital Program,” which had an effective date of February 21, 2001.
- *February 20, 2001 (66 FR 10811)* – In accordance with the Card Memo, SBA issued a final rule that delayed the effective date of the January 22nd IFR for 60 days until April 23, 2001. SBA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *April 23, 2001 (66 FR 20529 and 66 FR 20531)* – SBA issued a final rule that further delayed the effective date of the January 22nd IFR for another 60 days until June 22, 2001. SBA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions. In a separate document, SBA published a proposed rule in which it proposed to withdraw the January 22nd IFR and implement a revised rule.

- *May 23, 2001 (66 FR 28602)* – SBA published a document in which it withdrew the January 22nd IFR and adopted a new final rule, effective immediately. SBA had not received any comments on its proposal to withdraw the previously published IFR and had only received three comments on its proposed new rule.

10. Department of Energy, Office of Energy Efficiency and Renewable Energy – Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards Final Rule.

Summary: After publishing a final rule, agency receives a petition for reconsideration. Agency delays the effective date of that rule twice – once for 60 days in accordance with the Card Memo and a second time for an indefinite period of time pending the outcome of the petition for reconsideration. A few months after the second delay, agency grants the petition and publishes a supplemental proposed rule and proposed withdrawal of the previously published final rule. Ten months later, agency publishes a new final rule and withdraws the previously published final rule. A Federal court later invalidated the new final rule and directed the agency to reinstate the original final rule.

- *January 22, 2001 (66 FR 7169)* – Department of Energy’s Office of Energy Efficiency and Renewable Energy (DOE) published a final rule entitled “Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards,” which had an effective date of February 21, 2001. The efficiency standards adopted in the final rule applied to products manufactured for sale in the United States as of January 23, 2006.
- *February 2, 2001 (66 FR 8745)* – In accordance with the Card Memo, DOE published a final rule that delayed the effective date of the January 22nd final rule by 60 days until April 23, 2001. DOE implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *April 20, 2001 (66 FR 20191)* – DOE published a final rule that further delayed the effective date of the January 22nd final rule, “pending the outcome of petitions for administrative reconsideration and judicial review” (i.e., indefinitely). DOE implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions. On January 22, 2001 (the day the final rule was published and prior to the first delay), the Air-Conditioning and Refrigeration Institute (ARI) had petitioned for reconsideration by DOE and for judicial review by the courts. DOE did not provide an opportunity for public comment on the further delay of effective date. DOE also announced its decision to issue a notice of proposed rulemaking to revise the January 22nd final rule.

- *July 25, 2001 (66 FR 38821)* – DOE granted ARI’s petition and published a supplemental proposed rule and proposed withdrawal of the January 22nd final rule. DOE stated that the proposed withdrawal was “[i]n response to a petition for reconsideration, and as a result of review under President Bush’s Regulatory Review Plan.” DOE invited public comments on its proposal to withdraw and replace the January 22nd final rule. DOE also scheduled a public hearing on the supplemental proposed rule for September 13, 2001 (which it later rescheduled for October 2, 2001(66 FR 49325)).
- *May 23, 2002 (67 FR 36367)* – DOE published a new final rule and withdrew the previously published January 22nd final rule. The delay, withdrawal, and replacement of the January 22nd final rule led to a lawsuit, in which the U.S. Court of Appeals for the Second Circuit ultimately invalidated the May 23, 2002, final rule and directed DOE to reinstate the January 22nd final rule. That case, *NRDC, et al. v. Abraham, et al.*, 355 F.3d 179 (2004), is discussed in section C of this document.

B. Final rules that had been published in the *Federal Register* but were not yet effective at the time of a change in administrations, and that were subsequently delayed and partially modified (but not withdrawn).

This section presents nine rulemakings in which an agency delayed and then partially modified a published final rule. The actions through which each agency modified the published final rule vary from rulemaking to rulemaking.

Although not discussed below, three other rulemakings are worth noting for their handling of published, not-yet-effective rules during a presidential transition. In the first rulemaking, the Department of Defense, Office of the Secretary delayed the effective date of a final rule once, in accordance with the Emanuel Memo, before allowing the rule to go into effect unchanged (*see* 74 FR 6228, February 6, 2009). Because the delay rule had included an opportunity for public comment on the previously published final rule, the Department published a separate notice, after the final rule went into effect, in which it responded to the public comments (*see* 74 FR 21547, May 8, 2009). In the second rulemaking, the Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA) also delayed the effective date of a final rule once, in accordance with the Emanuel Memo, before allowing the rule to go into effect unchanged (*see* 74 FR 11318, March 17, 2009). Like DOD, FMCSA had also afforded the public an opportunity to comment on the previously published final rule during the period of delay, and then also published a separate “notice of disposition,” after the final rule went into effect, in which it responded to those comments (*see* 74 FR 36614, July 24, 2009). In the third rulemaking, the Forest Service delayed the effective date of a final rule indefinitely, after initially delaying

the rule for two 60-day periods in accordance with the Emanuel Memo (*see* 74 FR 26091, June 1, 2009).

1. Department of Housing and Urban Development, Office of the Secretary – Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs Final Rule.

Summary: After publishing a final rule, agency proposes and finalizes a delay of the effective date of that rule. Agency then delays the final rule for a second time. During that second period of delay, agency publishes a proposed rule to make certain changes to the previously published final rule. Agency subsequently publishes a final rule that clarifies certain provisions and rescinds other provisions of the previously published final rule.

- *January 27, 2009 (74 FR 4831)* – Department of Housing and Urban Development, Office of the Secretary (HUD), published a final rule entitled “Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs,” which had an effective date of March 30, 2009.
- *February 11, 2009 (74 FR 6839) and March 27, 2009 (74 FR 1333)* – In accordance with the Emanuel Memo, HUD proposed a 60-day delay and subsequently finalized a 6-month delay of the effective date of the January 27th final rule until September 30, 2009. The February 11th proposal sought comments on both a proposed 60-day delay of the effective date and also generally on the January 27th final rule. HUD finalized a 6-month delay, saying that the additional time was necessary to respond to comments received on the February 11th proposal, and to consider whether additional regulations or changes to the January 27th final rule were necessary or appropriate.
- *August 28 2009 (74 FR 44285)* – CMS published a final rule that delayed the effective date of the January 27th final rule for another four months until January 31, 2010. HUD said the additional delay was necessary because the two HUD Assistant Secretaries with responsibility for the programs affected by the rule were only recently confirmed and would need additional time to review the subject matter of the rule to review and to consider the public comments received in response to the February 11th notice. HUD implemented the delay rule without providing the public with prior notice or an opportunity for comment.
- *October 15, 2009 (74 FR 52931)* – HUD published a proposed rule to make “certain changes” to the January 27th final rule.
- *December 29, 2009 (74 FR 68924)* – HUD published a final rule that revised the January 27th final rule by clarifying certain regulatory provisions of that rule and returning other regulatory provisions to their pre-January 2009 final rule content. The new final rule

stated that the regulatory amendments made by the new final rule superseded provisions of the previously published January 27th final rule.

- *January 27, 2010 (75 FR 4271)* – HUD published a final rule and withdrawal of rescinded regulatory amendments to formally withdraw the rescinded regulatory amendments made in the original January 27th final rule. HUD noted that, although the preamble to the new December 29th final rule clearly stated that the rule was rescinding specified regulatory changes made by the January 27th final rule, the regulatory text of the December 29th final rule inadvertently omitted corresponding regulatory instruction to that effect.

2. *Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement – State Parent Locator Service; Safeguarding Child Support Information Final Rule.*

Summary: After publishing a final rule, agency proposes and subsequently finalizes two delays to the effective date of that rule. During the second period of delay, agency proposes and subsequently finalizes certain “limited changes” to the previously published final rule.

- *September 26, 2008 (73 FR 56421)* – HHS’s Administration for Children and Families, Office of Child Support Enforcement published a final rule entitled “State Parent Locator Services; Safeguarding Child Support Information,” which had an effective date of March 23, 2009.
- *March 3, 2009 (74 FR 9171) and March 20, 2009 (74 FR 11879)* – In accordance with the Emanuel Memo, HHS proposed then finalized a 60-day delay of effective date of the September 2008 final rule until May 22, 2009.
- *April 15, 2009 (74 FR 17445) and May 21, 2009 (74 FR 23798)* – HHS proposed and then finalized another delay of effective date until December 30, 2010. Although the March 2009 proposed delay of effective date only invited comments on the proposed delay, it nevertheless generated comments recommending changes to several substantive areas of the September 2008 final rule. HHS said the additional delay was necessary to complete its review of those comments and possibly revise the previously published final rule.
- *June 7, 2010 (75 FR 32145)* – HHS published a notice of proposed rulemaking, in which the Department proposed “limited changes” to the September 2008 final rule to address concerns of Department officials and public commenters.
- *December 29, 2010 (75 FR 81894)* – HHS published a final rule to revise certain aspects of the previously published September 2008 final rule.

3. Department of Health and Human Services, Centers for Medicare and Medicaid Services – Medicaid Program; Premiums and Cost Sharing Final Rule.

Summary: After publishing a final rule, agency delays the effective date, and reopens the comment period, of that rule two times. Agency then proposes and subsequently finalizes a third delay of the effective date. During the third period of delay, agency publishes a final rule with comment period that revises the previously published final rule.

- *November 25, 2008 (73 FR 71827)* – CMS published a final rule entitled “Medicaid Program; Premium and Cost Sharing,” which had an effective date of January 27, 2009.
- *January 27, 2009 (74 FR 4888)* – CMS published a final rule that delayed the effective date of the November 2008 final rule for 60 days until March 27, 2009, and reopened the comment period on the final rule for 30 days until February 26, 2009. CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions.
- *March 27, 2009 (74 FR 13346)* – CMS published another final rule that further delayed the effective date of the November 2008 final rule until December 31, 2009, and reopened the comment period until April 27, 2009. CMS noted that, upon review of public comments submitted during the first period of delay, it believed it may be necessary to revise a substantial portion of the November 2008 final rule. CMS said the extended delay was necessary for CMS to consider additional comments and develop appropriate revisions to the delayed rule. CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions.
- *October 30, 2009 (74 FR 56151) and November 30, 2009 (74 FR 62501)* – CMS proposed and finalized another delay of the effective date of the November 2008 final rule until July 1, 2010.
- *May 28, 2010 (75 FR 30243)* – CMS published a final rule with comment period that revised the previously published November 2008 final rule, “to address public comments received during reopened comment periods, and to reflect relevant statutory changes...” CMS addressed comments it had received on the original proposed rule (dated February 22, 2008) that led to the November 2008 final rule, as well as to comments it had received when it reopened the comment period.

4. Department of Health and Human Services, Centers for Medicare and Medicaid Services – Medicaid Program; State Flexibility for Medicaid Benefit Packages Final Rule.

Summary: After publishing a final rule, agency delays the effective date and reopens the comment period of that rule two times. Agency then proposes and subsequently finalizes a third delay of the effective date. During the third period of delay, agency publishes a final rule that revises the previously published final rule.

- *December 3, 2008 (73 FR 73693)* – CMS published a final rule entitled “Medicaid Program; State Flexibility for Medicaid Benefit Packages,” which had an effective date of February 2, 2009.
- *February 2, 2009 (74 FR 5808)* – In accordance with the Emanuel Memo, CMS published an interim final rule with comment period that delayed the effective date of the December 2008 final rule for 60 days until April 3, 2009, and reopened the comment period on the final rule for 30 days until March 4, 2009. CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions. Although the delay rule was effective immediately, CMS nevertheless invited comments on both the previously published final rule and the delay rule.
- *April 3, 2009 (74 FR 15221)* – CMS published a final rule that further delayed the effective date of the December 2008 final rule until December 31, 2009, and that reopened the comment period on the final rule until May 4, 2009. CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions.
- *October 30, 2009 (74 FR 56151) and November 30, 2009 (74 FR 62501)* – CMS proposed and finalized another delay of the effective date of the December 2008 final rule until July 1, 2010.
- *April 30, 2010 (75 FR 23068)* – CMS published a final rule that revised the previously published December 2008 final rule to address statutory changes and public comments received during the reopened comment periods. CMS addressed comments it had received on the original proposed rule (dated February 22, 2008) that led to the December 2008 final rule, as well as comments it had received when it reopened the comment period.

5. Department of Health and Human Services, Health Care Financing Administration – Medicare and Medicaid Programs; Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships Final Rule with Comment Period.

Summary: After publishing a final rule with comment period (characterized as Phase I of a bifurcated final rulemaking), agency delays the effective date of one portion of the rule and extends the comment period on the rule. Agency later further delays the effective date of the last sentence of the delayed portion of the final rule four times. During the fourth period of delay, agency publishes an interim final rule with comment period, which it characterizes as Phase II of the bifurcated final rulemaking, in which it removes the last sentence of the delayed portion of the final rule. Prior to the effective date of that interim final rule, agency publishes a final rule that further delays the effective date of the last sentence of the delayed portion of the previously published final rule. The new final rule also announces that, upon its effective date, the interim final rule will supersede the portion of the previously published final rule that included the sentence that was deleted by the interim final rule.

- *January 4, 2001 (66 FR 856)* – HHS’s HCFA (subsequently CMS) published a final rule with comment period entitled “Medicare and Medicaid Programs; Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships.” One portion of the final rule, which revised 42 CFR 424.22, had an effective date of February 5, 2001. The rest of the final rule had an effective date of January 4, 2002. HCFA explained in the preamble that the final rule comprised Phase I of a bifurcated final rulemaking, and that the agency intended to publish a second final rule with comment period (Phase II of the rulemaking) “shortly.”
- *February 2, 2001 (66 FR 8771)* – In accordance with the Card Memo, HCFA published an action that delayed for 60 days the effective date of the portion of the final rule that was scheduled to go into effect on February 5, 2001, until April 6, 2001. HCFA implemented the delay rule without providing the public with prior notice or an opportunity for comment.
- *April 4, 2001 (66 FR 17813)* – HCFA published a notice that extended the comment period for the January 4th final rule with comment period for 60 days until June 4, 2001.
- *December 3, 2001 (66 FR 60154)* – CMS published an interim final rule with comment period that delayed for 1 year the effective date of one small portion of the January 4th final rule – the last sentence of 42 CFR 411.354(d)(1) – which originally had an effective date of January 4, 2002. CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions. Though the delay was immediately effective, CMS nevertheless stated that it would consider comments on the length of the delay if the agency received them by February 1, 2002.

- *November 22, 2002 (67 FR 70322), April 25, 2003 (68 FR 20347), and December 24, 2003 (68 FR 74491)* – CMS published three final rules that each delayed the effective date of the last sentence of § 411.354(d)(1) for an additional 6 months, from January 4, 2002, to July 7, 2003 (*see* 67 FR 70322), then from July 7, 2003, to January 7, 2004 (*see* 68 FR 70322), and finally from January 7, 2004, to July 7, 2004 (*see* 68 FR 74491). CMS implemented the delay rules without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions.
- *March 26, 2004 (69 FR 16053)* – CMS published an interim final rule with comment period, which it characterized as Phase II of the bifurcated final rulemaking. The IFR had an effective date of July 26, 2004. The IFR removed the last sentence of § 411.354(d)(1) from the regulation. CMS waived notice and comment and published the rule as an interim final rule under the APA’s “good cause” exceptions.
- *June 25, 2004 (69 FR 35529)* – CMS published another final rule that delayed the effective date of the last sentence of § 411.354(d)(1), this time for 19 days until July 26, 2004. The final rule also announced that on July 26, 2004, the last sentence of § 411.354(d)(1), originally published in the January 4th final rule, would be automatically superseded by the March 26, 2002, IFR (which removed that sentence from the regulation). CMS implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “good cause” exceptions.

6. Department of Health and Human Services, Health Care Financing Administration – State Child Health; Implementing Regulations for the State Children’s Health Insurance Program Final Rule.

Summary: After publishing a final rule, agency delays the effective date of that rule twice. On the last day of the second period of delay, agency publishes an interim final rule with comment period that revises certain provisions of, and makes technical corrections and clarifications to, the previously published final rule. The interim final rule also delays the effective date of the final rule, making the final rule effective, as amended by the interim final rule, in 60 days.

- *January 11, 2001 (66 FR 2489)* – HHS’s HCFA published a final rule entitled “State Child Health; Implementing Regulations for the State Children’s Health Insurance Program,” which had an effective date of April 11, 2001.
- *February 26, 2001 (66 FR 11547)* – In accordance with the Card Memo, HCFA published a final rule that delayed the effective date of the January 11th final rule for 60 days until June 11, 2001. HCFA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.

- *June 11, 2001 (66 FR 31178)* – HCFA published a final rule that further delayed the effective date of the January 11th final rule until June 26, 2001. HCFA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *June 25, 2001 (66 FR 33809)* – HCFA published an interim final rule with comment period that revised certain provisions of, and made technical corrections and clarifications to, the January 11th final rule. The IFR also delayed the effective date of the January 11th final rule for an additional 60 days, making the final rule effective, as amended by the IFR, on August 24, 2001. HCFA waived notice and comment and published the rule as an interim final rule under the APA’s “good cause” exceptions.

7. *Department of Health and Human Services, Food and Drug Administration – Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; Policies, Requirements, and Administrative Procedures Final Rule.*

Summary: After publishing a final rule, agency receives communications from affected parties and members of Congress objecting to three provisions of that rule, as well as petitions to reconsider the final rule and to delay the effective date of the three challenged provisions. Based on the concerns of industry and Congress, agency publishes a final rule that delays the effective date of two of the challenged provisions of the final rule, and delays the applicability date of the third challenged provision. Agency subsequently delays the effective date of the two challenged provisions and the applicability date of the third challenged provision four more times (noting that the first additional delay rule “satisfies” the Card Memo and that the subsequent delay rules were published “to give Congress additional time to determine whether legislative action was appropriate and to give the agency time to consider whether regulatory changes were warranted”). During the fifth period of delay (and more than six years after the final rule was initially published), agency publishes a proposed rule to amend the provision of the previously publishing final rule with the delayed applicability date. Agency subsequently delays the applicability of that provision for an additional two years before publishing a new final rule that adopts the proposed amendments to the delayed provision of the previously published final rule.

- *December 3, 1999 (64 FR 67720)* – HHS’s Food and Drug Administration (FDA) published a final rule entitled “Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; Policies, Requirements, and Administrative Procedures,” which had an effective date of December 4, 2000. After FDA published the final rule, it received communications from affected parties and members of Congress objecting to two provisions in the final rule. FDA also received a petition requesting that the challenged provisions of the final rule be stayed until October 1, 2001. Finally, the Small Business Administration petitioned FDA to reconsider the final rule and suspend

its effective date because of the severe economic impact it would have on more than 4,000 businesses. The agency also received letters on, and held several meetings to discuss, the implications of a third provision of the final rule for blood centers that distribute blood derivative products.

- *May 3, 2000 (65 FR 25639)* – Based on the concerns of industry and Congress, FDA published a final rule that delayed the effective date of two of the challenged provisions of the final rule, and delayed the applicability of the third challenged provision to wholesale distribution of blood derivatives by health care entities, until October 1, 2001. FDA also reopened the administrative record of the December 1999 final rule until July 3, 2000, to receive additional comments on those three delayed provisions. The rest of the provisions of the December 1999 final rule took effect on December 4, 2004. FDA implemented the delay rule without providing the public with prior notice or an opportunity for comment.
- *March 1, 2001 (66 FR 12850)* – FDA published a final rule that further delayed the effective date of two of the challenged provisions of the December 1999 final rule, and the applicability date of the third challenged provision of that final rule, until April 1, 2002. Although the agency stated that the delay “satisfies” the Card Memo, it also stated that it was “taking this action to address concerns about the requirements raised by affected parties.” FDA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions. At the direction of Congress, FDA submitted a report to Congress on June 7, 2001, which summarized the comments and issues raised and outlined agency plans to address those concerns.
- *February 13, 2002 (67 FR 6645), January 31, 2003 (68 FR 4912), and February 23, 2004 (69 FR 8105)* – FDA published three more final rule, each of which further delayed the effective date of two of the challenged provisions of the December 1999 final rule, as well as the applicability date of the third challenged provision of that final rule, for one year or more. Through those three delay rules, the relevant provisions of the December 1999 final rule were ultimately delayed until December 1, 2006. In the February 23, 2004, delay rule, FDA stated that the February 13, 2002, and January 31, 2003, delay rules were published “to give Congress additional time to determine whether legislative action was appropriate and to give the agency time to consider whether regulatory changes were warranted.” FDA stated that its decision to further delay the effective dates of two of the challenged provisions of the December 1999 final rule until December 1, 2006, was based in part on comments received on an interim report from FDA’s Counterfeit Drug Task Force. Although the agency stated that each of the three delay rules was exempt from the notice-and-comment requirements of the

APA (citing both the “procedural” exemption and “good cause” exceptions), it nevertheless provided an address where the public could submit comments.

- *February 1, 2006 (71 FR 5200)* – FDA published a proposed rule to amend the provision of the December 1999 final rule with the delayed applicability date.
- *November 13, 2006 (71 FR 66108)* – FDA published a final rule that delayed the applicability date of the provision of the December 1999 final rule (that the agency had proposed to amend in its February 1, 2006, proposed rule) for an additional two years until December 1, 2008. The agency said that the delay was necessary “to give FDA additional time to address comments on the proposed rule and consider the appropriate regulatory changes.” FDA implemented the delay rule without providing the public with prior notice or an opportunity for comment, citing the APA’s “procedural rule” exemption and “good cause” exceptions.
- *October 9, 2008 (73 FR 59496)* – FDA published a final rule that adopted the proposed amendments to the previously delayed provision of the December 1999 final rule.

8. Department of Energy – Office of Security and Emergency Operations; Security Requirements for Protected Disclosures Under Section 3164 of the National Defense Authorization Act for Fiscal Year 2000 Interim Final Rule with Opportunity for Public Comment.

Summary: After publishing an interim final rule with opportunity for public comment, agency delays the effective date of that rule one time. A few months later, agency publishes another interim final rule in which it announces that it has completed its review of the previously published interim final rule and “does not intend to initiate any further rulemaking action to modify its provisions.” Several months later, agency publishes a final rule, adopting the initial interim final rule, “with minor change.”

- *January 18, 2001 (66 FR 4639)* – DOE published an interim final rule with opportunity for public comment entitled “Office of Security and Emergency Operations; Security Requirements for Protected Disclosures Under Section 3164 of the National Defense Authorization Act for Fiscal Year 2000,” which had an effective date of February 20, 2001.
- *February 2, 2001 (66 FR 8747)* – In accordance with the Card Memo, DOE published a final rule that delayed the effective date of the January 18th IFR for 60 days until April 23, 2001. DOE implemented the delay rule without providing the public with prior notice or an opportunity for comment. Without actually citing the APA, DOE said that seeking prior public comment on the delay rule would have been impractical and contrary to the public interest.

- *May 10, 2001 (66 FR 23833)* – DOE published an IFR in which it announced that it had completed its review of the January 18th IFR and did “not intend to initiate any further rulemaking action to modify its provisions.” DOE further announced in the IFR, however, that “based on the written comments received on the interim final rule, DOE may make minor, non-substantive changes to the rule,” which the Department said it would announce in a notice of final rulemaking. The Department also retroactively confirmed the effective date of the January 18th IFR as April 23, 2001.
- *October 30, 2001 (66 FR 54643)* – DOE published a final rule in which it adopted the January 18th IFR, “with minor change.”

9. Department of Labor, Occupational Safety and Health Administration – Occupational Injury and Illness Recording and Reporting Requirements Final Rule.

Summary: After publishing a final rule, agency proposes and finalizes two one-year delays to the effective date of three provisions of that rule. During the first period of delay, agency amends the final rule by adding a paragraph to one of the delayed provisions. During the second period of delay, agency further amends the final rule and also deletes two of the delayed provisions of that rule.

- *January 19, 2001 (66 FR 5915)* – The Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule entitled “Occupational Injury and Illness Recording and Reporting Requirements,” which had an effective date of January 1, 2002.
- *July 3, 2001 (66 FR 35113)* – Pursuant to the Card Memo, OSHA published a proposed delay of effective date and request for comments, in which the agency proposed to delay the effective date of three provisions of the January 19th final rule for one year until January 1, 2003.
- *October 12, 2001 (66 FR 52031)* – OSHA published a final rule that delayed the effective date of three provisions of the January 19th final rule. The October 12th final rule also amended the January 19th final rule by adding a new paragraph to one of the delayed provisions. That amendment was to become effective on January 1, 2002.
- *December 27, 2001 (66 FR 66943)* – After the January 19th final rule was published, the National Association of Manufacturers (NAM) had sued the agency over the rule. OSHA and NAM entered into a settlement agreement to resolve the legal challenge, which OSHA published in the *Federal Register*.
- *July 1, 2002 (67 FR 44037 and 67 FR 44124)* – OSHA published a proposal to further delay the effective date of the three delayed provisions of the January 19th final rule for one year until January 1, 2004 (OSHA finalized that delay in a final rule published on

December 17, 2002, 67 FR 77165). In a second document published on the same date, the agency amended one of the delayed provisions of the January 19th final rule.

- *June 30, 2003 (68 FR 38601)* – OSHA published a final rule that deleted two of the delayed provisions of the January 19th final rule (effective January 1, 2004).

C. Lawsuits related to delays of published, not-yet-effective final rules during changes in administrations

In response to the January 24, 2017, “Regulatory Freeze Pending Review” memorandum, agencies have been postponing the effective dates of published final rules without providing the public with prior notice or an opportunity for comment. There is, however, some argument against doing that. Compliance with a presidential directive to postpone the effective dates of a published final rule led to a lawsuit during the George W. Bush administration.

During the Bush Administration, the Natural Resources Defense Council (NRDC), along with several other organizations and states attorneys general, sued DOE for delaying the effective date of a final rule without prior notice and comment, and the court held that the temporary delay was a substantive rule that was subject to notice-and-comment requirements. The final rule at issue in *NRDC, et al. v. Abraham, et al.*, 355 F.3d 179 (2nd Cir. 2004), was published on January 22, 2001, and set efficiency standards for central air conditioning units, as required under the Energy Policy and Conservation Act (EPCA). The effective date of that rule was February 21, 2001, but on February 2, 2001, without prior notice or comment, DOE published a final rule (in accordance with the Card Memo) that delayed the effective date of the efficiency standards to April 23, 2001. DOE asserted that the delay rule was exempt from the APA’s notice-and-comment requirements because it was a rule of procedure or, alternatively, because it was subject to the APA’s “good cause” exceptions. DOE delayed the effective date of the final rule a second time on April 20, 2001, this time indefinitely. Once again, DOE implemented that delay without prior notice or comment. DOE also announced that it intended to rescind and revise the efficiency standards, which led NRDC and several other interested parties to file petitions for review of the delay rules in June 2001. DOE subsequently withdrew and replaced the January 2001 final rule on May 23, 2002. In the intervening time, the district court had dismissed the petitions for review of the delay rule for lack of subject matter jurisdiction. The petitioners filed a notice of appeal, as well as petitions for review of the May 23 final rule.

One of the petitioners’ arguments on appeal was that the February 2 and April 20 delay rules were invalid for failure to comply with the APA’s notice-and-comment requirements or any of the exceptions to those requirements. The court agreed, finding that the February 2 delay rule was invalid because it failed to meet any of the exceptions to the APA’s notice-and-comment

requirement. First, the court disagreed with DOE’s assertion that the February 2 delay rule was a procedural rule and therefore exempt from the APA’s notice-and-comment requirement. For this decision, the court looked to the EPCA, which prescribes certain deadlines for DOE to conduct rulemakings on efficiency standards. Under that statute, publication of a rule setting efficiency standards signifies the culmination of the rulemaking, and DOE may not amend those efficiency standards downward after the passage of the effective date of that rule. Noting that the EPCA “imbues the designated effective date with considerable substantive significance,” the court held that DOE therefore could not claim that a final rule delaying that effective date of efficiency standards set under EPCA was a procedural rule that is exempt from the APA’s notice-and-comment requirements. 355 F.3d at 204-205. The court also disagreed with DOE’s “good cause” argument, holding that an emergency of DOE’s own making (i.e., imminence of a self-imposed deadline) cannot constitute good cause. *Id.* at 205. The court further found that there was no emergency because, “[t]he only thing that was imminent was the impending operation of a statute intended to limit the agency’s discretion (under DOE’s interpretation), which cannot constitute a threat to the *public* interest.” *Id.*