



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

THE DIRECTOR

January 21, 2009

M-09-08

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

FROM:

Peter R. Orszag
Director

SUBJECT:

Implementation of Memorandum Concerning Regulatory Review

This Memorandum provides guidance on implementing paragraph 3 of the Memorandum of January 20, 2009, concerning "Regulatory Review." That paragraph describes this option:

"Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules. Following the 60-day extension:

- a. for those rules which raise no substantial questions of law or policy, no further action needs to be taken; and
- b. for those rules which raise substantial questions of law or policy, agencies should notify the OMB Director and take appropriate further action."

Your agency staff has, or may shortly identify, rules that have not yet taken effect and about which significant concerns involving law or policy have been raised. For such rules, you should consider postponing the effective dates for 60 days and reopening your rulemaking processes. Your decision for each such rule should be based on the following considerations: (1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

If in your considered judgment the identified rules already satisfy these standards, you need do nothing further. However, if any of these rules do not satisfy these standards, you should consider extending their effective date for 60 days for the purpose of enabling further review. In no event should you extend the effective date of rules indefinitely.

If you determine that you want to extend the effective date for purposes of enabling further review, you should promptly provide a 30-day notice-and-comment period, seeking public comment about both your contemplated extension of the effective date and the rule in question. Following the comment period, you should take appropriate steps to ensure fair evaluation of (a) whether to extend the effective date and (b) the rule in question, which you may wish to amend. If in light of the comments, you decide that an extension of the effective date is appropriate, you should consult with the Department of Justice's Office of Legal Counsel (OLC) and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) about your decision before taking action to extend the effective date. In addition, if the rule will take effect before there is sufficient time to solicit and review comments on the extension of the effective date, you should consult immediately with OLC and OIRA about the appropriate course of action.

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