

Biden Regulatory Freeze Snags Few Tax Regs — For Now

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By Jonathan Curry

The Trump administration's rush to complete tax guidance ahead of the Biden administration's governmentwide regulatory freeze looks to have been successful, but the new administration might be on the hunt for legal recourse.

In keeping with recent tradition, President Biden's [regulatory freeze memo](#) applies to federal agencies across the board, thus encompassing the IRS and Treasury's tax regs. Some past administrations, like that of George W. Bush, had exempted tax regulations from their regulatory freeze upon taking office.

Biden's freeze temporarily halts any regulation that hasn't taken effect. That means proposed and final regs that haven't been sent to the *Federal Register* are held up, pending review by the new agency head. Likewise, rules that have been sent to the *Federal Register* but aren't yet published are withdrawn and subject to review as well. The memo also includes language suggesting that the freeze applies to subregulatory guidance like revenue rulings, revenue procedures, notices, or FAQs that are substantive.

Another category of rules caught up by the freeze includes those that have been published in the *Federal Register* but weren't yet effective when Biden took office.

However, in recent weeks, [Treasury appears to have skirted that rule](#) by making almost all of its final regs effective upon publication in the *Federal Register* and by invoking the good cause exception for "major" rules that would ordinarily be subject to the Congressional Review Act's (CRA's) 60-day delay in the effective date, making them effective upon publication.

That leaves just one pre-released final regulation from Treasury that's likely to be caught up in the freeze: [T.D. 9949](#), a non-major rule involving health reimbursement accounts. The IRS has finalized more than two dozen regulations since the November 2020 election, almost all of which were effective immediately upon publication, and several of which waived the CRA's 60-day hold period, when applicable.

However, the Biden memo, signed by White House Chief of Staff Ronald A. Klain, also includes novel language compared with past freeze memos, stating: "Should actions be identified that were undertaken before noon on January 20, 2021, to frustrate the purpose underlying this memorandum, I may modify or extend this memorandum, pursuant to the direction of the President, to request that agency heads consider taking steps to address those actions."

Limited Options

According to Kristin E. Hickman of the University of Minnesota Law School, even if Biden's team is unhappy with the Trump Treasury's invocation of the good cause exception, its legal options are limited.

"Every incoming presidential administration complains about the outgoing administration's midnight regulations, but outside of the joint resolution mechanism contained in the Congressional Review Act, I am unaware of any shortcuts an incoming presidential administration can take on its own to undo the prior administration's regulations once they are finalized," Hickman told *Tax Notes*.

Actions taken under the CRA aren't judicially reviewable, and that appears to extend to good cause exception claims, Hickman said.

To Monte Jackel of Leo Berwick, the situation created by Treasury's actions in avoiding the CRA is "absurd."

"What this all means is that if the outgoing administration can get a regulation published before the new one takes power, then the only way to void the action is through the normal [Administrative Procedure Act (APA)] process," Jackel said. That effectively means that "no one can challenge it, even though the rule should be invalid" if it inappropriately invoked a good cause exception, he added.

"The APA seems to lay out protective rules but then provides few, if any, remedies to fix a violation. No judicial review is allowed for CRA violations, and regular APA challenges are frustrated by [Anti-Injunction Act] constraints," Jackel said.

Jackel suggested that Biden's Treasury consider recalling all final regs that asserted the good cause exception within the past 30 days, although he acknowledged that "havoc would ensue." Nevertheless, he said, that would be the "logical course of action," and it's unclear whether a court could review that kind of action either.

Jackel noted that while the novel language in Biden's freeze memo about reviewing actions that may have been taken to avoid the coming freeze would likely include Treasury's recent regs that invoked the good cause exception, that provision in the memo isn't self-executing. The issue would have first have to be elevated to the "powers that be," and even then, they would have to agree and modify the memo somehow, he said.

Anthony P. Campau of Clark Hill PLC recalled that at the start of the Trump administration, the White House was faced with a similar question of what to do with the Obama administration's final tax regulations caught up in its regulatory freeze, but that it ultimately decided to let them remain.

"Even though we didn't like some of the policy, on balance it was more important to have certainty, so we let those rules be finalized," said Campau, a former counselor and chief of staff at the Office of Management and Budget's Office of Information and Regulatory Affairs. "I suspect something similar may play out."

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