
Applicability of the Biden Administration's Regulatory Freeze to Independent Agencies

February 1, 2021

On January 20, 2021, White House Chief of Staff Ron Klain issued a memorandum ordering a temporary freeze of new or pending rules in order “to ensure that the President’s appointees or designees have the opportunity” to review them.¹ Despite such action being a now-routine feature of any new incoming administration, there remains much uncertainty about the scope of this regulatory moratorium, including whether the Klain Memorandum will have the effect of halting pending rules issued by independent agencies. Although historic precedent would suggest that the Klain Memorandum does not bind independent agencies, the memorandum itself is silent on the topic, and it remains unclear how independent agencies will respond to it.

This uncertainty has potentially serious consequences for the implementation of significant forthcoming regulations that affect entities in the securities, banking and lending industries. Ultimately, the applicability of the Biden Administration’s regulatory freeze to independent agencies likely will depend on how individual officials in key positions at those agencies decide to respond to it. WilmerHale will continue to closely monitor both the new administration and independent agencies.

Analysis of the 2021 White House Regulatory Freeze Memorandum

The Klain Memorandum contains several directives aimed at suspending pending rules and policies issued during the Trump Administration. *First*, it instructs covered agencies to cease proposing or issuing rules “in any manner,” including by sending rules to the Office of the Federal Register (OFR), absent review by a Biden Administration appointee. The memorandum carves out an exception “for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters,” as permitted by the director of the Office of Management and Budget (OMB). *Second*, the memorandum directs that “rules that have been sent to the OFR but not published in the Federal Register” be “immediately withdraw[n].” Finally, with respect to rules that have been published in the Federal Register or otherwise issued but that have not yet taken effect, the memorandum instructs agencies to “consider postponing the rules’ effective dates for 60 days from the date of this memorandum.”

It is not apparent whether the Klain Memorandum intends for these directives to be heeded by independent agencies such as the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Consumer Financial Protection Bureau, and bank regulatory

¹ Memorandum from Ron Klain, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies (Jan. 20, 2021) (the Klain Memorandum), available [here](#).

agencies such as the Office of the Comptroller of Currency, Federal Reserve and Federal Deposit Insurance Corporation. A careful parsing of its text does not yield a definitive conclusion.

On the one hand, the memorandum references “rules” as defined by 5 U.S.C. § 551(4). That statute, in turn, characterizes “rules” as “statement[s] of general or particular applicability and future effect” issued by “agencies”—that is, “authorit[ies] of the Government of the United States.”² This definition is broad and does not expressly exclude independent agencies. Read in the context of its neighboring provisions, the statutory reference to § 551(4) suggests that the Klain Memorandum might contemplate a regulatory freeze that applies broadly to the rulemaking activities of independent agencies.

Moreover, the Klain Memorandum extends not only to rules as defined in § 551(4), but also to other regulatory actions, including “notices of inquiry,” a fact-gathering tool used by the Federal Communications Commission (FCC).³ Given that the FCC is an independent agency, this provides another reason to think that the regulatory freeze might have been intended to apply widely to independent agencies writ large.

On the other hand, there are several indications that the Klain Memorandum does not have such an expansive scope. The memorandum itself is addressed to “Executive Departments and Agencies.” The term “executive” could be read to modify both “departments” and “agencies,” which would mean that independent agencies fall outside the memorandum’s reach.

Further, independent agencies’ rulemakings are not typically subject to review by the executive branch. The role of the OMB in the process the memorandum outlines, including making exceptions for emergencies, reveals that the moratorium might be designed to be consistent with standard regulatory oversight processes that OMB manages. Such standard oversight, which ordinarily includes an evaluation by the OMB’s Office of Information and Regulatory Affairs, does not extend to independent agencies.⁴ In addition, the Klain Memorandum contemplates that any regulatory freeze should last “until a department or agency head appointed or designated by the President after noon on January 20, 2021, reviews and approves the rule.” The reference to “department or agency head” in the singular suggests that the memorandum applies only to those agencies headed by one person. Independent agencies ordinarily are led by multimember commissions with staggered terms, and thus would seem to fall outside the memorandum’s scope. By its terms, therefore, the memorandum appears to indicate that those rules not ordinarily subject to review by the OMB and by a single agency head—that is, rules of independent agencies—are not covered.⁵

Finally, the Klain Memorandum cites Executive Order 12866, which defines “agencies” to exclude independent agencies.⁶ This is another indication that the regulatory freeze does not extend to independent agencies.

² 5 U.S.C. § 551(1).

³ 47 C.F.R. § 1.430.

⁴ Congressional Research Service, Independence of Federal Financial Regulators: Structure, Funding, and Other Issues 6 (Feb. 28, 2017), available [here](#).

⁵ This reading is also consistent with the Supreme Court’s acknowledgment in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512–513 (2010), that while an independent agency such as the SEC can have a “head,” that head is the full multimember body itself—not simply the chairman appointed by a president.

⁶ [Executive Order 12866, Regulatory Planning and Review \(Sept. 30, 1993\)](#).

Comparison With Past Practice

In many respects, the Klain Memorandum is substantively identical to its predecessors issued by the chiefs of staff to former Presidents Trump,⁷ Obama,⁸ Bush⁹ and Clinton.¹⁰

None of the previous regulatory freeze memoranda reference independent agencies, with one exception. The Card Memorandum, issued by the chief of staff to President George W. Bush, noted that “independent agencies are encouraged to participate voluntarily” in the rulemaking moratorium.¹¹ This additional text (absent in the Klain Memorandum and other memoranda) would indicate that at least the George W. Bush Administration did not contemplate that its regulatory moratorium had the effect of binding independent agencies. In response to the Card Memorandum, the head of at least one independent agency made public statements expressing an intent to comply with that regulatory freeze directive. Then-Acting SEC Chair Laura S. Unger publicly stated that she planned to “defer any new rulemaking for now” in accordance with the Card Memorandum.¹²

Notwithstanding Ms. Unger’s statement, however, it is not apparent that the effective dates of any pending regulations were, in fact, delayed—either by the SEC or by any other independent agencies. A 2002 report by the Government Accountability Office did not identify any final rules promulgated by independent agencies whose implementation was delayed in response to the Card Memorandum.¹³ This conclusion is bolstered by analysis from the Congressional Research Service, which recently observed that regulatory moratoria have not historically affected independent agencies’ rulemaking actions because these entities “are more independent from presidential control.”¹⁴ Ms. Unger’s statement does, however, indicate that even if the memorandum does not formally bind an independent agency, an independent agency nonetheless might take steps to comply voluntarily.

Potential Implications for Pending Rules of Independent Agencies

The ambiguity surrounding the Klain Memorandum’s scope may lead to delays in the effective dates of significant rules issued by a number of independent agencies if, for example, independent agencies vote to delay pending rules in the spirit of cooperation with the new administration’s regulatory agenda. That said, the practical ability of agencies to delay implementation is uncertain. For example, as to the SEC, such a decision presumably would require a vote of the full commission, which is currently split 2-2 between Democratic and Republican appointees. It remains to be seen whether President Biden’s nominee for SEC chair, Gary Gensler, will be confirmed quickly enough to order an SEC vote to delay pending regulations.

⁷ Memorandum from Reince Priebus, Assistant to the President and Chief of Staff to the Heads of Executive Departments and Agencies, 82 Fed. Reg. 8,346 (Jan. 24, 2017).

⁸ Memorandum from Rahm Emanuel to the Heads and Acting Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,435-02 (Jan. 26, 2009).

⁹ Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, The White House, to Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7,702 (Jan. 24, 2001) (the Card Memorandum).

¹⁰ Memorandum from Leon Panetta, Director of the Office of Management and Budget, to Heads and Acting Heads of Agencies, 58 Fed. Reg. 6,074 (Jan. 25, 1993).

¹¹ Card Memorandum, 66 Fed. Reg. at 7,702.

¹² Securities and Exchange Commission Acting Chairman Laura S. Unger, “What’s New in the Land of Regulation?” (Mar. 2, 2001).

¹³ US Gov’t Accountability Office, GAO-02-370R, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s January 20, 2001 Memorandum 6 & app. I (Feb. 15, 2002) (“GAO Report”).

¹⁴ Congressional Research Service Insight, Presidential Transitions: Midnight Rulemaking (Nov. 24, 2020), available [here](#).

Notable examples of key policies promulgated by independent financial regulators that potentially could be in flux as a result of the recent moratorium include the following:

Securities and Exchange Commission

- **Investment Advisor Marketing**, effective 60 days after publication in the Federal Register (modernizing rules that govern investment advisor advertisements and payments to solicitors, and including tailored requirements for certain types of advertisements, such as those transmitted via social media).¹⁵
- **Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information**, effective February 10, 2021 (amending disclosure requirements under Regulation S-K and changing requirements for Management’s Discussion & Analysis of Financial Condition and Results of Operations).¹⁶
- **Use of Derivatives by Registered Investment Companies and Business Development Companies**, effective February 19, 2021 (requiring that funds seeking certain exemptions under the Investment Company Act have a derivatives risk management plan, and limiting fund leverage risk).¹⁷
- **Good Faith Determinations of Fair Value**, effective March 8, 2021 (establishing requirements for satisfying a fund board’s obligation to determine fair value in good faith for purposes of the Investment Company Act, and clarifying how boards can satisfy valuation obligations in light of market developments).¹⁸
- **Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets**, effective March 15, 2021 (increasing offering limits and revising some individual investment limits to expand small and medium-sized businesses’ access to capital, and amending the standard that applies when a company wants to redact confidential information from exhibits filed with its SEC reports).¹⁹
- **Disclosure of Payments by Resource Extraction Issuers**, effective March 16, 2021 (requiring that the annual reports of resource extraction issuers include information about any payments made to the federal government or any foreign government related to commercial development of oil, minerals and natural gas).²⁰

Consumer Financial Protection Bureau

- **Role of Supervisory Guidance**, effective 30 days after publication in the Federal Register (codifying an interagency statement that makes clear that supervisory guidance does not have the force of law but rather outlines expectations and priorities, and that enforcement actions cannot be taken based only on violations of supervisory guidance).²¹
- **Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition**, effective March 1, 2021 (changing requirements for determining whether consumers can be presumed to repay a General Qualified Mortgage loan).²²

¹⁵ [Securities and Exchange Commission, Final Rule, Investment Advisor and Marketing \(Dec. 22, 2020\)](#).

¹⁶ [86 Fed. Reg. 2,080 \(Jan. 11, 2021\)](#).

¹⁷ [85 Fed. Reg. 83,162 \(Dec. 21, 2020\)](#).

¹⁸ [86 Fed. Reg. 748 \(Jan. 6, 2021\)](#).

¹⁹ [86 Fed. Reg. 3,496 \(Jan. 14, 2021\)](#).

²⁰ [86 Fed. Reg. 4,662 \(Jan. 15, 2021\)](#).

²¹ [Consumer Financial Protection Bureau, Final Rule, Role of Supervisory Guidance \(Jan. 19, 2021\)](#).

²² [85 Fed. Reg. 86,308 \(Dec. 29, 2020\)](#).

- **Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition**, effective March 1, 2020 (creating a new category of General Qualified Mortgages).²³

Commodity Futures Trading Commission

- **Exemption From Registration for Certain Foreign Intermediaries**, effective February 5, 2021 (providing that certain foreign-located persons acting as commodity pool operators on behalf of offshore commodity pools can claim a registration exemption under CFTC Regulation 3.10(c) on a pool-by-pool basis).²⁴
- **Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants**, effective February 24, 2021 (amending the margin requirements for uncleared swaps for swap dealers and major swap participants for which there is no prudential regulator).²⁵
- **Position Limits for Derivatives**, effective March 15, 2021 (conforming regulations about speculative position limits to requirements under the Dodd-Frank Act and the Commodity Exchange Act and revising definitions for “bona fide hedging transaction or position” and “economically equivalent swaps”).²⁶

Federal Deposit Insurance Corporation

- **Parent Companies of Industrial Banks and Industrial Loan Companies**, effective April 1, 2021 (promulgating requirements to ensure that the parent of a covered industrial bank approved for deposit insurance serves as the source of strength for the industrial bank).²⁷

Federal Reserve

- **Amendments to Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies**, effective 60 days after publication in the Federal Register (among other things, changing capital planning requirements to require firms in the lowest risk category to operate on a two-year stress test cycle and not be subject to company-run stress test requirements).²⁸

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In sum, the reach of the Biden Administration’s regulatory freeze is uncertain and has the potential to slow or reverse the course of significant rulemaking activity by independent agencies. WilmerHale will continue to monitor the effect that the Klain Memorandum might have on independent agencies and the entities they regulate.

²³ 85 Fed. Reg. 86,402 (Dec. 29, 2020).

²⁴ 85 Fed. Reg. 78,718 (Dec. 7, 2020).

²⁵ 86 Fed. Reg. 6,850 (Jan. 25, 2021).

²⁶ 86 Fed. Reg. 3,236 (Jan. 14, 2021).

²⁷ Federal Deposit Insurance Corporation, Final Rule, Parent Companies of Industrial Banks and Industrial Loan Companies (Dec. 15, 2020).

²⁸ Federal Reserve, Final Rule, Amendments to Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies (Jan. 19, 2021).

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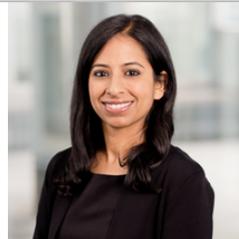


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