

January 23, 2009

MUSINGS ABOUT THE NEW ADMINISTRATION

In a memo issued on Tuesday, January 20, 2009, by Assistant to the President/Chief of Staff Rahm Emanuel, President Obama directed that all federal agencies hold off on proceeding with any regulations not then final for a period of 60 days. Agencies were also asked to withdraw any unpublished regulatory proposals and to not submit new proposed regulations for publication to the Federal Register for that same 60-day period. There were, however, exceptions granted for emergency situations or other urgent circumstances related to health, safety, environmental, financial, and national security matters. During this review period, something typically put in place with each change of administration, new agency and department heads will have an opportunity to consider all such proposals for substantial policy and questions of law reasons.

Any agency or department contending that it is entitled to rely on an exception may make a request to the Office of Management and Budget, and if any proposals are delayed, the recommendation is to reopen the comment period for 30 days. The OMB Director is authorized to make the final determination as to whether a given regulatory proposal may go forward during this review period.

The next day, January 21, the OMB Director published a notice to all departments and agencies explaining the procedure to follow in making any requests to proceed. No request is required if the agency determines its proposal does not raise any substantial questions of law or policy. However, if the proposal does indeed raise such concerns, then the agency or department is expected to decide how to proceed based on the following considerations, specifically whether:

1. the rulemaking process was procedurally adequate;
2. the rule reflected proper consideration of all relevant facts;
3. the rule reflected due consideration of the agency's statutory or other legal obligations;
4. the rule is based on a reasonable judgment about the legally relevant policy considerations;
5. the rulemaking process was open and transparent;
6. objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments;
7. interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and
8. the final rule found adequate support in the rulemaking record.

Having factored in these considerations, the memo goes on to say: "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..."

The immediate concern for the trade community has, of course, centered on the Importer Security Filing (10 + 2), the Lacey Act, the Consumer Product Safety Improvement Act (CPSIA) and TSA's Certified Cargo Screening Program and the related certified forwarder and shipper programs. As to the TSA programs, they have been in process for quite some time and are not likely to be impacted at all. As to the remaining ones, with the exception of the Lacey Act related regulations, they would seem

to fall neatly into the national security or health exception. However, things may never get that far if the issuing agency reaches the conclusion that its proposal does not raise any substantial issues of law or policy. Similarly, if the issuing agency concludes such concerns have been raised, but its proposed regulations meet all eight OMB criteria, then again the regulations may go forward as originally scheduled.

On the other hand, if the issuing agency reaches the conclusion that substantial issues of the law or policy are raised but not all the criteria articulated by the OMB Director has been met, the next step is for the agency or department to evaluate whether a credible argument can be made if there is either an emergency situation or if there is urgency to proceed as originally intended. If we assume for these purposes that CBP finds the need to claim an exception, then it will, of course, marshal its own facts, but it would be realistic to anticipate Customs will say that protecting the homeland and keeping the population safe is an urgent need, especially given the state of the world today and the myriad threats with which the intelligence community deals with daily. In the case of CPSC, if we assume that it too, were to find the CPSIA related regulations under consideration do require an exception request, it seems likely the Commission will argue that public health, especially protecting children, is a critical and urgent issue.

While it is admittedly still too early to tell exactly how things will turn out, it is reasonable to think that CBP and CPSC may well conclude no further delay is required for their regulations. Alternatively, these agencies may conclude their rulemaking passes muster as the OMB factors have been met. Should any of the agencies decide differently and file a request for an exception, it seems likely OMB will conclude that there is no need to delay these proposals. On the other hand, the Lacey Act is focused on environmental issues and specifically illegal logging, while a serious concern, the same sense of urgency does not seem to be present. USDA will make its own decision, but it seems logical that a delay of two months for these Lacey Act regulations is likely (and we hear that is the direction in which the agency is leaning anyway), but stay tuned as nothing is certain right now!

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