

JUST PUSH PAUSE: REVISITING PROPOSED REGULATIONS

Feb 21, 2017

On January 20, 2017, President Trump signed an executive order entitled “Regulatory Freeze Pending Review” (the “Freeze Memo”). The Freeze Memo was anticipated, and mirrors similar memos issued by Presidents Barack Obama and George W. Bush during their first few days in office. In light of the Freeze Memo, we have reviewed some of our recent posts discussing new regulations to determine the extent to which the Freeze Memo might affect such regulations.

The Regulatory Freeze

The two-page Freeze Memo requires that:

1. Agencies not send for publication in the Federal Regulation any regulations that had not yet been so sent as of January 20, 2017, pending review by a department or agency head appointed by the President.
2. Regulations that have been sent for publication in the Federal Register but not yet published be withdrawn, pending review by a department or agency head appointed by the President.
3. Regulations that have been published but have not reached their effective date are to be delayed for 60 days from the date of the Freeze Memo (until March 21, 2017), pending review by a department or agency head appointed by the President. Agencies are further encouraged to consider postponing the effective date beyond the minimum 60 days.

Putting a Pin in It: Impacted Regulations

We have previously discussed a number of proposed IRS regulations which have not yet been finalized. These include the proposed regulations to allow the use of forfeitures to fund QNECs, regulations regarding deferred compensation plans under Code Section 457, and regulations regarding deferred compensation arrangements under Code Section 409A.

Since these regulations were only proposed as of January 20, 2017, the Freeze Memo requires that no further action be taken on them until they are reviewed by a department or agency head appointed by the President. This review could conceivably result in a determination that one or more of the proposed regulations are inconsistent with the new administration’s objectives, which

might lead Treasury to either withdraw, reissue, or simply take no further action with respect to such proposed regulations.

A Freeze on Reliance?

The proposed regulations cited above generally provide that taxpayers may rely on them for periods prior to any proposed applicability date. Continued reliance should be permissible until and unless Treasury takes action to withdraw or modify the proposed regulations.

The DOL Fiduciary Rule

The Freeze Memo does not impact the DOL's fiduciary rule, which was the subject of its own presidential memorandum, discussed in detail elsewhere on our blog.

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