

January 28, 2021

President Joseph R. Biden, Jr.  
The White House  
1600 Pennsylvania Ave, NW  
Washington, D.C. 20500

Dear President Biden:

As you conduct the consequential work of setting up a new administration, we write to remind you of your obligations in so doing to both ensure a smooth transition and understand the weight of the Constitutional responsibilities you have assumed—namely, to “take [c]are that the [l]aws be faithfully executed.”<sup>1</sup>

Over the course of the campaign, and more recently post-election, some transition officials and congressional leadership have used rhetoric that raises concern with those of us committed to good government and the well-being of the American people. It would be unwise to undo the achievements of the last several years with rushed actions that undermine the thoughtful regulatory reforms that have saved Americans \$50 billion in regulatory costs.

We urge the incoming administration to place particular emphasis on thoughtful rulemaking, taking care to be attentive and responsive to the American public through the Administrative Procedure Act’s (“APA”) notice and comment rulemaking process. The APA places appropriate safeguards on the rulemaking process to avoid unintentional or undue harm that may be caused by reactionary or hasty rulemaking, and also provides avenues for an administration to implement well-reasoned alternatives.

Final rules that have completed the APA rulemaking process generally do not go into effect until at least 30 days after the rule is published in the Federal Register, or, in the case of a “major rule” as designated by the Congressional Review Act (“CRA”), at least 60 days after publishing. It is worth noting that the CRA passed the Senate by unanimous consent in 1996—while you served in the Senate. The CRA’s waiting period generally gives “affected parties time to adjust their behavior before the final rule takes effect,” since “until the final rule is published, the public is not sure of what the rule will be or when the rule will actually be promulgated.”<sup>2</sup> But a final rule is not “any less final” simply because it has not yet gone into effect.<sup>3</sup>

As directed under the APA, a substantive amendment to a final rule—such as a delay of the rule’s effective date<sup>4</sup>—may not be undertaken without appropriate notice and comment. We

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<sup>1</sup> U.S. CONST. art. II, § 3.

<sup>2</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992).

<sup>3</sup> *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 446 n.74 (D.C. Cir. 1982).

<sup>4</sup> *See Env’tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (“The suspension or delay of a final regulation normally constitutes substantive rulemaking under APA § 553.”); *see also* *Clean Air*

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urge you not to tamper with rules promulgated through notice and comment simply because the effective date is a few weeks away, as proposed by White House Chief of Staff Ronald Klain on January 20, 2021.<sup>5</sup> Such tampering would not only undermine the rulemaking process which, as described above, generally reflects our most thoughtful law-making, but—driven by a desire to erase the past several years—would undermine our democratic institutions.

Congress has carefully considered the process it expects our agencies to follow in issuing agency rulemakings. Through our adoption of the APA and CRA, we have crafted appropriate procedures that ensure careful and thoughtful rulemaking, as well as scrupulous oversight. And, when necessary, Congress is the appropriate body to undertake such oversight. In fact, Congress availed itself of the expedited procedures available under the CRA to revoke 14 final rules in the 16-week period following the issuance of 41 “economically significant” regulations in the final weeks of the Obama-Biden administration.

Absent action by Congress expressing its disapproval with any late-term rules issued by the outgoing administration, an incoming administration should carry out its duties and faithfully execute federal law—including by allowing lawfully issued final rules to go into effect.

Sincerely,



Rob Portman  
United States Senator



Lisa Murkowski  
United States Senator



Jerry Moran  
United States Senator



Pat Toomey  
United States Senator

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Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017) (“[A]n order delaying the rule’s effective date...[is] tantamount to amending or revoking a rule”).

<sup>5</sup> RONALD A. KLAIN, CHIEF OF STAFF, EXEC. OFFICE OF THE PRESIDENT, MEMO: REGULATORY FREEZE PENDING REVIEW (Jan. 20, 2021).



Marco Rubio  
United States Senator



Ron Johnson  
United States Senator



Ted Cruz  
United States Senator



Deb Fischer  
United States Senator



James Lankford  
United States Senator



Thom Tillis  
United States Senator



Ben Sasse  
United States Senator



Dan Sullivan  
United States Senator



Todd Young  
United States Senator



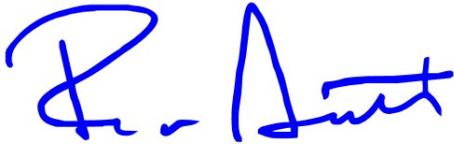
Marsha Blackburn  
United States Senator



Kevin Cramer  
United States Senator



Mitt Romney  
United States Senator



Rick Scott  
United States Senator



Roger Marshall, M.D.  
United States Senator



Bill Hagerty  
United States Senator