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ALERT

Trump Directs Agencies to Quickly Repeal Unlawful Regulations, Without Notice-and-Comment

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On April 9, 2025, President Trump signed a Presidential Memorandum (Memorandum) entitled *Directing the Repeal of Unlawful Regulations*. The Memorandum – part of a broader "Department of Government Efficiency" Deregulatory Initiative reflected in Executive Order 14219 and other Administration actions – directs agencies to prioritize the repeal of regulations that are unlawful under 10 recent U.S. Supreme Court cases. Further, the Memorandum instructs that "[i]n effectuating" such repeals, agencies should proceed "without notice and comment" pursuant to a statutory "good cause" exception in the Administrative Procedure Act (APA).

Below, we discuss the types of rules in the Administration's crosshairs, how the Administration intends for agencies to skip the APA's notice-and-comment requirements, and considerations for regulated entities.

The Memorandum Targets a Broad Range of Regulations the Administration Considers to Be Potentially Unlawful.

Agencies are already in the process of reviewing existing regulations for conflicts with law or Trump Administration policy objectives pursuant to Executive Order 14219. The Memorandum instructs agencies conducting this review to "prioritize, in particular, evaluating each existing regulation's lawfulness under" 10 enumerated Supreme Court decisions. Those decisions involve three broad categories of regulations:

1. Regulations That Exceed an Agency's Statutory Authority. The Memorandum cites three decisions that held unlawful a regulation that exceeded an agency's statutory authority. First

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is *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron* deference and held that courts – not federal agencies – have the final say on the meaning of federal statutes. Second is *West Virginia v. EPA*, which declared unlawful an EPA emissions program under the major-questions doctrine. Third is *Sackett v. EPA*, which rejected the EPA's broad interpretation of the Clean Water Act. Agencies reviewing the lawfulness of regulations under these decisions will thus consider whether the regulation is consistent with the underlying statute – likely with heavy scrutiny on regulations that were upheld under the now-defunct *Chevron*

2. Regulations That Are Inadequately Explained. The Memorandum cites two decisions that held unlawful regulations where the agency failed to explain its decision-making. First is *Ohio v. EPA*, which preliminarily held that an EPA rule was arbitrary and capricious because it overlooked important aspects of the problem before the agency. Second is *Michigan v. EPA*, which held that an agency violated a statute because of a deficient cost-benefit analysis. Agencies reviewing the lawfulness of regulations under these decisions will thus likely consider whether the regulation adequately explained its reasoning and considered the relevant costs and benefits.
3. Regulations That Are Unconstitutional. The EO cites several decisions that held unlawful agency actions that run afoul of the Constitution. First is *SEC v. Jarkesy*, which held that an agency violated the Seventh Amendment when it sought civil penalties against a regulated party without a jury trial. Second its *Cedar Point Nursery v. Hassid*, which held that a state law violated the Fifth Amendment's Taking Clause by mandating property owners give union organizers access to their property. Third is *Students for Fair Admissions v. Harvard*, which held that race-based university admissions programs violated the Fourteenth Amendment's Equal Protection Clause. Last are *Carson v. Makin* and *Roman Catholic Diocese of Brooklyn v. Cuomo*, both of which struck down state laws under the First Amendment's Free Exercise Clause. Agencies reviewing the lawfulness of regulations under these decisions will consider whether the regulation is consistent with each of these constitutional protections.

The Memorandum Instructs Agencies to Skip Notice-and-Comment Rulemaking Through a Narrow APA Exception.

Generally, agencies must go through the APA's notice-and-comment procedures to make or repeal regulations. As the Supreme Court explained in *Perez v. Mortgage Bankers Association*, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."

However, the Memorandum invokes a statutory exception to that general rule, known as the "good-cause exception." That provision provides that an agency need not use notice-and-comment rulemaking "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

The Memorandum asserts that the good-cause exception applies to the repeal of unlawful regulations for two reasons. First, it says that "[r]etaining and enforcing facially unlawful regulations is clearly contrary to the public interest." And second, it says that "notice-and-comment proceedings are 'unnecessary' where repeal is required as a matter of law to ensure consistency with a ruling of the United States Supreme Court." Thus, the Memorandum concludes, agencies have "ample cause and the legal authority to immediately repeal unlawful regulations."

Historically, federal courts have held that "the good cause exception is to be narrowly construed and only reluctantly countenanced." These courts have reasoned that a narrow interpretation is necessary to avoid swallowing the APA's general requirement that agencies engage in notice-and-comment rulemaking before issuing or amending federal regulations. When courts have held the exception applicable, it has often been in response to discrete emergencies or statutory deadlines. For example:

- In *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004), the Federal Aviation Administration (FAA) successfully invoked the good-cause exception when it promulgated a regulation allowing it to immediately revoke pilot certificates in the face of "a security threat."
- In *Hawaii Helicopter Operators Association v. FAA*, 51 F.3d 212 (9th Cir. 1995), the FAA successfully invoked the good-cause exception for new requirements for airplane and helicopter air tour operators in Hawaii based on an "urgent" need to prevent further "escalation of fatal air tour accidents."
- In *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), an agency successfully invoked the good-cause exception where there was an imminent congressionally imposed deadline, the agency attempted in good faith to meet the deadline, and the rules (which dealt with coal mining safety) were of "life-saving importance." The D.C. Circuit emphasized that its holding was "based on the totality of the special circumstances presented."

Also potentially relevant is the Supreme Court's decision in *DHS v. Regents of the University of California*, 591 U.S. 1 (2020). In that case, an agency tried to rescind a policy on the ground that it contravened a federal statute. The Supreme Court found the recission arbitrary and capricious because the agency failed to explain why a complete repeal was necessary, as opposed to more targeted changes to cure the statutory issue. Although this case did not address the APA's good-cause exception, its arbitrary-and-capricious holding suggests that finding a regulation unlawful may not give the agency authority to effect a full repeal in every case.

Any time an agency issues or amends an important rule, litigation is likely. Thus, parties should expect litigants to raise arguments about the Memorandum's interpretation of the good-cause exception in cases where an agency has relied on it, particularly given the narrow scope some courts have given this exception in prior cases.

Regulated Parties Should Consider Opportunities and Risks from Rapid Deregulation.

The Memorandum, like the Administration's other deregulatory efforts, presents both opportunities and risks for regulated entities. The potential for rapid repeal of regulations without notice and comment provides opportunities for regulated entities to seek immediate relief from burdensome regulations. But, on the other hand, the Memorandum creates the risk that beneficial regulations may be repealed without an opportunity to raise objections or defend the utility, application, or legality of a targeted regulation. Another risk is that regulatory repeals undertaken without notice and comment may face additional legal obstacles in court, potentially creating regulatory uncertainty – at least in the short term.

These considerations counsel in favor of actively engaging with federal regulators. Stakeholders should proactively flag harmful regulations that are unlawful, as well as defend beneficial regulations that may come under attack. Many agencies have opened deregulatory proceedings to take input from regulated parties on precisely such issues – for example, the FCC's Delete, Delete, Delete proceeding. Wiley attorneys are actively monitoring the Administration's deregulatory efforts and regularly provide input to agencies on rulemakings and regulatory reform. Our team can offer deep regulatory expertise to assist in these and other proceedings.

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