

# CORONAVIRUS INFORMATION & UPDATES

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## Administrative Responses to a Global Pandemic: Emergency Rulemaking and Other Mechanisms Agencies Are Employing to Respond to COVID-19

### Introduction

In the wake of the COVID-19 crisis, federal and state agencies have been scrambling to enact new rules and policies to address unprecedented problems. While agencies must typically provide notice and comment for newly enacted regulations, agencies may take the view that this process does not provide them with the flexibility they currently need to respond quickly to the ever-changing realities of the pandemic.

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As a result, agencies are employing other tools to expedite responses to mitigate the impact the virus is having on the health and welfare of the country. Although agencies may believe that the emergency mechanisms they are employing relieve them of some procedural requirements, the nature of the ongoing emergency may tempt agencies to move too quickly; agencies must still follow proper procedures in invoking emergency mechanisms or risk subjecting these actions to legal challenges in the future.

One such tool is emergency rulemaking, which is an exception to the typically required notice and comment procedures used by agencies in adopting regulations. In addition, agencies have been employing several mechanisms—such as issuing interpretive guidance, no-action letters, orders, and otherwise waiving certain requirements—that agencies may undertake under certain circumstances to take quick action without notice and comment.

Regulated entities can expect agencies to continue to employ a combination of these different approaches as the crisis continues to unfold. The prerequisites, substantive or temporal limits, and procedural requirements for invoking these various emergency mechanisms differ, and these distinguishing factors will be key to evaluating the impact of agency actions and to challenging any such actions that may overstep the agencies’ legal authority.

### Federal Emergency Rulemaking

The federal Administrative Procedure Act (APA) requires federal agencies to publish notice in the Federal Register at least 30 days before enacting a rule and, in that time, provide an opportunity for interested persons to comment on the proposed rule.<sup>1</sup> However, the APA allows agencies to bypass the normal notice-and-comment process for “good cause,” namely when the agency finds that “notice and public procedure thereon are *impracticable, unnecessary, or contrary to*

<sup>1</sup> 5 U.S.C. § 553(b)-(d) (2018).

# CORONAVIRUS INFORMATION & UPDATES

*the public interest.*<sup>2</sup> When an agency shows good cause, it may also be relieved of its duty to provide the requisite 30-day notice of the rule in the Federal Register.<sup>3</sup>

## *Common Examples of Agencies Invoking Emergency Procedures*

There are numerous situations where agencies have invoked the good cause exception. Select examples of these situations, and how they arise in the COVID-19 context, are discussed below.

- **Emergency Situations.** Agencies have adopted regulations without following normal procedures in “emergency situations . . . or when delay could result in serious harm.”<sup>4</sup>
  - For example, post-9/11 Federal Aviation Administration (“FAA”) regulations providing for automatic suspension of pilot certificates for any alien found by the Travel Security Administration (“TSA”) to present a security risk were upheld despite being promulgated without notice and comment.<sup>5</sup> The D.C. Circuit found that requiring notice and comment “could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate.”<sup>6</sup>
  - In the COVID-19 context, Congress explicitly directed agencies to the good cause exception in enacting the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) due to the national emergency caused by the COVID-19 pandemic.
- **Statutory Deadlines.** Agencies may assert good cause to forgo notice and comment to meet statutory deadlines if they believe those deadlines do not provide enough time for notice and comment.<sup>7</sup> But statutory deadlines alone, without additional justification, are generally not sufficient to establish good cause.
  - As related to COVID-19, Title I of the CARES Act ordered the Small Business Association (“SBA”) Administrator to “issue guidance and regulations implementing this section” within 30 days of enactment.<sup>8</sup> Section 1114 further commanded the SBA Administrator to employ the good cause exception in issuing regulations to carry out Title I within 15 days of the statute’s enactment.<sup>9</sup>
- **Temporary or Interim Rules.** Agencies often employ the good cause exception to enact temporary or interim rules, which carry the same force of law as rules promulgated through notice-and-comment rulemaking. With interim rules, however, agencies may assign expiration dates and often provide a comment period after the emergency rule has become final.<sup>10</sup>

<sup>2</sup> § 553(b)(3)(B) (emphasis added).

<sup>3</sup> § 553(d)(3).

<sup>4</sup> See *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir 2004) (internal citations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (rejecting good cause exception in part because Congress “never suggested that it intended for the Secretary to abandon public participation” in making the rules).

<sup>8</sup> CARES Act, Pub. L. No. 116-136, § 1106(k), 134 Stat. 281, 301 (2020).

<sup>9</sup> *Id.* § 1114, 134 Stat. at 312 (emphasis added).

<sup>10</sup> Todd Garvey, Cong. Research Serv., R41546, A Brief Overview of Rulemaking and Judicial Review 9 (“A common use of the good cause exception is in the issuance of interim final rules.”)

# CORONAVIRUS INFORMATION & UPDATES

- Federal agencies are issuing interim and temporary rules in response to COVID-19. For example, on March 26, 2020, the Securities and Exchange Commission (“SEC”) announced a “temporary final rule” providing relief from certain filing requirements, emphasizing the “*temporary nature* of the relief” and the “*significant and immediate impact* of COVID-19 on affected issuers” justified forgoing notice and comment under the good cause exception.<sup>11</sup>

## Federal Informal Agency Actions

Beyond notice-and-comment rulemaking procedures, agencies have attempted to use a number of other mechanisms to address issues raised by COVID-19. These actions include established agency procedures—such as issuing interpretive guidance, adjudication, or issuing no action letters—as well as more informal actions—such as waiving formal requirements, “relaxing” rules, or extending comment periods.

In the lead up and immediate aftermath of the national emergency declaration, a number of agencies used informal actions to address the hardships caused by the pandemic. Below is a small sample of the actions agencies have taken that fall short of formal rulemaking.

- **Interpreting Statutes and Regulations.** Agencies generally have authority to interpret both statutes and their own regulations; this authority, however, is limited to interpretation of *ambiguous* portions of statutes and regulations and cannot be used to interpret a statute or rule in a way that would conflict with prior interpretations or agency practice or otherwise harm serious reliance interests.<sup>12</sup>
  - Shortly after the passage of the CARES Act, the FDA issued a press release noting the “transformative, new authorities” the law grants to the FDA to “modernize the OTC drug development and review process.”<sup>13</sup>
- **Interpretive and Informal Guidance.** While there is much case law on the murkiness of when the requirement for notice and comment is triggered under the APA, agencies also generally have the ability to issue guidance in the form of general statements of policy so long as the new guidance does not create a substantive right that would bind parties receiving the guidance.<sup>14</sup> For instance, the Food, Drug, and Cosmetics Act (“FDCA”)

<sup>11</sup> The rule provides temporary relief “for Form ID filers and for issuers subject to reporting obligations pursuant to Regulation Crowdfunding and Regulation A.” Secs. and Exch. Comm’n, Relief for Form ID Filers and Regulation Crowdfunding and Regulation A Issuers Related to Coronavirus Disease 2019 (COVID-19) (2020), <https://www.sec.gov/rules/interim/2020/33-10768.pdf>.

<sup>12</sup> See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

<sup>13</sup> Press Release, FDA, FDA on Signing of the COVID-19 Emergency Relief Bill, Including Landmark Over-the-Counter Drug Reform and User Fee Legislation (Mar. 30, 2020), <https://www.fda.gov/news-events/press-announcements/fda-signing-covid-19-emergency-relief-bill-including-landmark-over-counter-drug-reform-and-user-fee>.

<sup>14</sup> 5 U.S.C. § 553(b)(A); see also *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 250-51 (D.C. Cir. 2014). But the requirement for notice and comment is more stringent under Medicare. See *Allina Health Servs. v. Price*, 863 F.3d 937 (D.C. Cir. 2017), *aff’d sub nom.*, 139 S. Ct. 1804 (2019).

# CORONAVIRUS INFORMATION & UPDATES

explicitly gives the FDA authority to develop guidance documents, though these guidance documents cannot “create or confer any rights for or on any person” and are not binding on the FDA.<sup>15</sup>

- Under this authority, the FDA issued new guidance regarding the conduct of clinical trials during the COVID-19 public health emergency. The FDA emphasizes throughout that the guidance merely “describe[s] the Agency’s current thinking on a topic and should be viewed only as recommendations.”<sup>16</sup>
- As another example, the FDA issues guidance on eligibility criteria for blood donations. The COVID-19 pandemic has severely strained the U.S. blood supply; to encourage more blood donations, the FDA revised its prior guidance on eligibility criteria to shorten or eliminate certain recommended waiting periods for blood donors.<sup>17</sup>
- **No-Action Letters.** Certain agencies provide guidance to regulated entities through no-action letters.<sup>18</sup> While specific to the party requesting the letter, agencies are using these letters as tools to inform members in various industries of their positions on actions taken during the COVID-19 pandemic.
  - On March 26, the SEC issued a no-action letter addressed to the Investment Company Institute noting that during the national emergency caused by the COVID-19 outbreak it would not recommend action against certain registered open-end investment companies or affiliated persons where the affiliated person purchases debt securities from the investment companies, subject to certain conditions. The no-action letter specifically limits its terms to the duration of the emergency caused by the outbreak.<sup>19</sup>
- **Agency Orders.** Some agencies also have the statutory ability to issue orders to enforce statutes, or to announce their decisions following adjudications or administrative proceedings.<sup>20</sup> For example, the SEC has the authority to issue orders and exemptions, which are then reviewable by U.S. federal courts.<sup>21</sup>
  - On March 23, the SEC issued an order that exempted non-money market registered funds from certain requirements in the 1940 Act. The order was intended to allow these funds to obtain short-term funding from affiliates. The order noted that the relief provided may be terminated on two weeks’ public notice, but would not terminate before June 30, 2020.<sup>22</sup>

<sup>15</sup> 21 U.S.C. § 371(h)(1)(A)-(B). Notably, however, the FDCA also requires the FDA to allow public comment after implementation of certain guidance that did not allow for public participation prior to implementation. *Id.* § 371(h)(1)(C).

<sup>16</sup> Guidance Document, *FDA Guidance on Conduct of Clinical Trials of Medical Products during COVID-19 Public Health Emergency*, FDA (Mar. 2020), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/fda-guidance-conduct-clinical-trials-medical-products-during-covid-19-pandemic>

<sup>17</sup> Press Release, FDA, Coronavirus (COVID-19) Update: FDA Provides Updated Guidance to Address the Urgent Need for Blood during the Pandemic (Apr. 2, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-provides-updated-guidance-address-urgent-need-blood-during-pandemic>.

<sup>18</sup> See 17 C.F.R. § 140.99 (CFTC); *No Action Letters*, SEC (last visited Apr. 21, 2020), <https://www.sec.gov/fast-answers/answersnoactionhtm.html>.

<sup>19</sup> *SEC No-Action Letter Temporarily Expands Ability of Affiliates to Purchase Debt Securities from Mutual Funds*, Ropes & Gray LLP (Mar. 30, 2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/03/SEC-No-Action-Letter-Temporarily-Expands-Ability-of-Affiliates>.

<sup>20</sup> See 5 U.S.C. § 551(6), (13).

<sup>21</sup> See, e.g., 15 U.S.C. § 77i; 15 U.S.C. 80a-6(c).

<sup>22</sup> *SEC and Federal Reserve Actions to Enhance Funds’ Liquidity*, Ropes & Gray LLP (Mar. 27, 2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/03/SEC-and-Federal-Reserve-Actions-to-Enhance-Funds-Liquidity>.

# CORONAVIRUS INFORMATION & UPDATES

- **Extending Deadlines.** Agencies establish various deadlines with which regulated entities must comply for certain filings or information that must be provided to the agencies. Agencies have used their discretion in setting these deadlines to extend the time for regulated entities to provide the necessary information.
  - The SEC, for example, has extended filing periods for public companies filing certain reports required by the Securities Exchange Act of 1934 if those companies are unable to file those reports timely due to the COVID-19 pandemic.<sup>23</sup>
  - In a similar vein, the Consumer Financial Protection Bureau (“CFPB”) has postponed data collection for certain rules in response to regulated entities’ operational challenges “to allow companies to focus on responding to consumers in need.”<sup>24</sup>
  - The CFPB and other agencies have also been extending comment periods for notices published in the Federal Register in response to stakeholders requesting additional time due to challenges posed by the COVID-19.<sup>25</sup>

## State Emergency Rulemaking

States also have their own emergency rulemaking procedures, which, unlike the APA, often contain language limiting the duration of rules promulgated through emergency rulemaking. Below are highlights from the rules in New York, Massachusetts, and California.

### *New York*

- An agency may “dispense with all or part” of normal rule making procedure if the “agency finds that the immediate adoption of a rule is *necessary for the preservation of the public health, safety or general welfare*” and that following normal rulemaking procedure “would be contrary to the public interest.”<sup>26</sup>
- While this statutory language is similar to the APA, rules adopted on an emergency basis by New York agencies only remain in effect for up to 90 days,<sup>27</sup> at which time agencies can readopt the rule for no longer than 60 days.<sup>28</sup>

<sup>23</sup> *SEC Extends Conditional Regulatory Relief for Companies Affected by COVID-19, and SEC Staff Issues COVID-19 Disclosure Guidance*, Ropes & Gray LLP (Mar. 27, 2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/03/SEC-Extends-Conditional-Regulatory-Relief-Companies-COVID-19-SEC-COVID-19-Disclosure-Guidance>.

<sup>24</sup> Press Release, CFPB, CFPB Provides Flexibility During COVID-19 Pandemic (Mar. 26, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-flexibility-during-covid-19-pandemic/>.

<sup>25</sup> Supplemental notice of proposed rulemaking; extension of comment period, CFPB (Mar. 20, 2020), [https://www.consumerfinance.gov/documents/8668/cfpb\\_debt-collection-supplemental-nprm\\_comment-extension-notice.pdf](https://www.consumerfinance.gov/documents/8668/cfpb_debt-collection-supplemental-nprm_comment-extension-notice.pdf).

<sup>26</sup> N.Y. A.P.A. § 202(6)(a) (McKinney 2020).

<sup>27</sup> *Id.* § 202(6)(b).

<sup>28</sup> *Id.*

# CORONAVIRUS INFORMATION & UPDATES

## Massachusetts

- An agency can forgo normal procedures when “the agency finds that the immediate adoption, amendment or repeal of a regulation is *necessary for the preservation of the public health, safety or general welfare*, and that observance of the [notice and comment requirements] would be contrary to the public interest.”<sup>29</sup>
- Massachusetts caps the lifespan of an emergency regulation at three months.<sup>30</sup>

## California

- An agency can enact emergency regulations when the agency “makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency.”<sup>31</sup>
  - California defines “emergency” as “a situation that calls for immediate action to avoid *serious harm to the public peace, health, safety, or general welfare*.”<sup>32</sup>
  - The agency’s finding of emergency cannot be “based only upon expediency, convenience, best interest, general public need, or speculation.”<sup>33</sup>
- Emergency regulations remain in effect up to 180 days<sup>34</sup> and can be readopted a maximum of two times, each for up to 90 days.<sup>35</sup>
- The existence of an emergency, however, does not exempt California agencies from all notice requirements.
  - An agency must still send notice of proposed emergency regulations “at least five working days” before the agency submits the emergency regulation to the Office of Administrative Law to “every person who has filed a request for notice of regulatory action with the agency.”<sup>36</sup>
  - Agencies can only forgo this limited notice requirement when “the emergency situation clearly poses such an *immediate, serious harm* that delaying action to allow public comment would be inconsistent with the public interest.”<sup>37</sup>

## State Actions in Response to COVID-19

States have been utilizing their authority under these emergency rulemaking laws to respond to the COVID-19 pandemic. Below are a few examples from New York, Massachusetts, and California:

- In New York, the Workers’ Compensation Board (“WCB”) has adopted several emergency amendments to address the issues caused by COVID-19. For example, on April 20, 2020, the WCB adopted an emergency

<sup>29</sup> Mass. Gen. Laws Ann. ch. 30A §§ 2, 3 (West 2020).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 11346.1(b)(1).

<sup>32</sup> *Id.* § 11342.545

<sup>33</sup> *Id.* § 11346.1(b)(2).

<sup>34</sup> *Id.* § 11346.1(e).

<sup>35</sup> *Id.* § 11346.1(h).

<sup>36</sup> Cal. Gov’t Code § 11346.1(a)(2) (West 2020).

<sup>37</sup> *Id.* § 11346.1(a)(3).

# CORONAVIRUS INFORMATION & UPDATES

amendment to allow telemedicine in certain circumstances for social distancing purposes.<sup>38</sup> The prior month, the WCB adopted an emergency amendment explicitly stating that employees can take family leave to care for family members diagnosed with COVID-19.<sup>39</sup> Both of these actions explicitly limited the emergency rulemaking to 90 days and were accompanied by a “Reason for Finding of Necessity” detailing the reason for adopting the measure.

- In Massachusetts, the Attorney General’s Office amended the state’s price-gouging regulation, which previously applied only to the sale of gasoline and petroleum products, to include prohibitions on price gouging on goods or services necessary for the health, safety, or welfare of the public during a state or national emergency. The Attorney General’s Office justified the emergency regulation by describing the “critical strain” placed on hospitals and other medical facilities and asserting that “all possible measures to ensure the availability of necessary goods and services—including, but not limited to, personal protective equipment for medical professionals—must be taken immediately.”<sup>40</sup>
- The California Office of Administrative Law has considered several requests for new or renewed emergency rules since the crisis started, including requests for emergency rulemaking from the California Health Benefit Exchange, the School Finance Authority, the California Secure Choice Retirement Savings Investment Board, the Fair Political Practices Commission, the State Allocation Board, and the Superintendent of Public Instruction.<sup>41</sup> As one example, the State Allocation Board issued an emergency regulation to extend deadlines set forth in the Board’s regulations.<sup>42</sup>

## Conclusion

Agencies continue to use various tools in rapidly responding to the ever-changing situation created by the COVID-19 pandemic. While allowable in certain circumstances, agencies’ use of emergency procedures will, in some cases, go beyond what is permissible. Agencies may be tempted to invoke these procedures to rush through non-emergency substantive regulations that would be difficult or impossible to implement under the normal rules. These actions are worth monitoring going forward, as agencies continue to issue directives under emergency rulemaking provisions or through more informal means without providing notice and comment. Should such actions in the future negatively impact you or your business, such actions may be subject to substantive or procedural challenges under the APA and other statutes governing agency action.

<sup>38</sup> Emergency Adoption of Amendments to 12 NYCRR 325-18 et al., New York Workers’ Compensation Board (Apr. 20, 2020), <http://www.wcb.ny.gov/content/main/wclaws/Covid-19/>.

<sup>39</sup> Emergency Adoption of Amendment to 12 NYCRR 355.9, New York Workers’ Compensation Board (Mar. 27, 2020), <http://www.wcb.ny.gov/content/main/wclaws/Covid-19/SeriousHealthCondition/>.

<sup>40</sup> 940 Mass. Code Regs. § 3.18 (2019); Mass. Office of the Attorney Gen., Addendum to Massachusetts Secretary of State Regulation Filing Form, 940 CMR 3:18, Price Gouging (2020), <https://www.mass.gov/doc/amendment-to-940-cmr-318/download>.

<sup>41</sup> See *Recent Actions Taken by OAL on Proposed Regulations*, Office of Administrative Law, [https://oal.ca.gov/rulemaking\\_process/regular\\_rulemaking\\_process/recent-actions/](https://oal.ca.gov/rulemaking_process/regular_rulemaking_process/recent-actions/) (last visited May 7, 2020).

<sup>42</sup> *Emergency Powers of the Executive Officer During the COVID-19 State of Emergency*, State Allocation Board (Mar. 25, 2020), <https://www.dgs.ca.gov/-/media/Divisions/OPSC/Agenda-Items/2020/03-March/SAB-COVID-19-Emergency-Regulation.pdf>.