



**MEMORANDUM**

November 14, 2011

**To:** Senator Tom Coburn

**Subject:** PPACA Provisions and Potential Use of Executive Orders

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This memorandum responds to your request for a memorandum explaining what general categories of provisions in the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup> potentially could be impacted by a President through the use of an executive order or other administrative actions.<sup>2</sup> This memorandum first provides an overview of the President's authority to issue executive orders and discusses a framework for the analysis of executive orders. This memorandum then examines, within general categories of actions mandated by PPACA and discretionary actions contained in the Act, the potential use of an executive order pertaining to those types of actions. Whether a particular executive order addressing a mandatory or discretionary action in PPACA would be upheld as a valid presidential action would depend on the content of the order itself, as well as constitutional considerations and the content of the specific congressional delegation of authority.

### **A Brief Overview of Executive Orders**

Broadly speaking, executive orders are directives issued by the President.<sup>3</sup> The President's authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II of the U.S. Constitution, which states that "the executive Power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United

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<sup>1</sup> P.L. 111-148 (2010). PPACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010) (HCERA). These Acts will be collectively referred to in this memorandum as "PPACA."

<sup>2</sup> Presidents have several methods of affecting administrative decisions, including presidential memoranda, which may be used to direct and govern the actions of government officials and agencies. See CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by Vanessa K. Burrows. Presidents may also use presidential directives, "issued from the office of the Chief Executive," which have the "same substantive legal effect as an executive order." *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, Memorandum for the Counsel to the President from Acting Assistant Attorney General Randolph D. Moss (Jan. 29, 2000), <http://www.justice.gov/olc/predirective.htm>. Additionally, "[a]gency officials may accede to [the President's] preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2298 (2001).

<sup>3</sup> Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Comm. Print 1957).

States,” and that the President “shall take Care that the Laws be faithfully executed.”<sup>4</sup> The President’s power to issue executive orders may also derive from express or implied statutory authority. If issued under a valid claim of authority and published in the *Federal Register*, executive orders may have the force and effect of law, requiring courts to take judicial notice of their existence.<sup>5</sup>

While these principles establish the authority of the President to issue executive orders generally, the question of whether a particular order comports with constitutional and statutory provisions requires a more nuanced analysis. The general framework for analyzing the validity of an executive order was delineated in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>6</sup> In that case, the Supreme Court struck down President Truman’s executive order directing the seizure of the steel mills during the Korean War. Invalidating this action, the majority held that under the Constitution, “the President’s power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>7</sup> Specifically, Justice Black maintained that Presidential authority to issue such an executive order “must stem either from an act of Congress or from the Constitution itself.”<sup>8</sup> Applying this reasoning, Justice Black’s opinion for the Court determined that as no statute or constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act. Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining “the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.”<sup>9</sup>

The concurring opinion of Justice Jackson, which has come to be regarded as more influential than the majority opinion, set forth three types of circumstances in which presidential authority may be asserted and established a scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.<sup>10</sup> First, if the President has acted according to an express or implied grant of congressional authority, presidential “authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate,” and such action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>11</sup> Second, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only “upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>12</sup> Third, in instances where presidential action is “incompatible with the express or implied will of Congress,” the power of the President is at its minimum, and any such action may be supported pursuant only to the President’s “own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>13</sup> In such a circumstance,

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<sup>4</sup> U.S. Const., Art. II, § 1, 2, and 3.

<sup>5</sup> *Armstrong v. United States*, 80 U.S. 154 (1871); *see also Farkas v. Texas Instrument, Inc.*, 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964); *Jenkins v. Collard*, 145 U.S. 546, 560-61 (1893).

<sup>6</sup> 343 U.S. 579 (1952).

<sup>7</sup> *Id.* at 587.

<sup>8</sup> *Id.* at 585.

<sup>9</sup> *Id.* at 586-89.

<sup>10</sup> *Id.* at 635-38.

<sup>11</sup> *Id.* at 635, 637.

<sup>12</sup> *Youngstown*, 343 U.S. at 637.

<sup>13</sup> *Id.*



presidential action must rest upon an exclusive power, and the courts can uphold the measure “only by disabling the Congress from acting upon the subject.”<sup>14</sup>

In part because Congress had enacted three statutes providing for seizure of private property in particular circumstances and had considered, but not granted, the President general seizure authority for use in emergencies, Justice Jackson concluded that President Truman’s power to order the seizure of the steel mills was at its minimum because it was “incompatible with the expressed or implied will of Congress.”<sup>15</sup>

Parties challenging executive orders and/or courts reviewing such challenges have sometimes articulated constitutional arguments based on the three-part scheme for analyzing the validity of presidential actions set forth in Justice Jackson’s concurring opinion in *Youngstown*.<sup>16</sup> This analysis has appeared when presidential action has been taken pursuant to the President’s express statutory authority,<sup>17</sup> when presidential action has been viewed as conflicting with an existing statute,<sup>18</sup> and when presidential action has been based on the President’s constitutional authority.<sup>19</sup>

### Discretionary Actions by the Health and Human Services Secretary

The ability of a President to direct department or agency heads to take particular actions “within the sphere of that official’s delegated discretion” is the subject of much debate among constitutional and administrative law scholars.<sup>20</sup> One view is that an executive order to the Secretary to take an action (such as issuing a proposed regulation) would appear to be “an exercise of the kind of policymaking authority Justice Black denied the President in *Youngstown*.”<sup>21</sup> This “conventional” administrative law view is that “Congress has exercised this [administrative policymaking] power by delegating the relevant discretion to a specified agency official, rather than to the President.”<sup>22</sup> Another view, the unitary executive view, asserts that the “Constitution establishes a President with plenary control over all heads of agencies involved in executing, implementing, or administering federal law.”<sup>23</sup> Supreme Court Justice Elena Kagan has argued for a third view that would turn on the issue of statutory interpretation:

If Congress, in a particular statute, has stated its intent with respect to presidential involvement [to direct discretionary action], then that is the end of the matter. But if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on

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<sup>14</sup> *Id.* at 637-38.

<sup>15</sup> *Id.* at 637.

<sup>16</sup> For example, the district court in *AFL-CIO v. Kahn* found that President Carter’s issuance of Executive Order 12092 exceeded his authority under *Youngstown*. *AFL-CIO v. Kahn*, 472 F. Supp. 88, 102 (D.D.C. 1979). However, on appeal, both the majority and the dissent rejected this conclusion. *Kahn*, 618 F.2d at 787, 797.

<sup>17</sup> *Contractors Ass’n of Eastern Pennsylvania v. Sec’y of Labor*, 442 F.2d 159, 170 (3d Cir. 1971).

<sup>18</sup> *United States v. East Texas Motor Freight System, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977); *Kahn*, 472 F. Supp. at 100. *But see Kahn*, 618 F.2d at 786 n.10, 787.

<sup>19</sup> *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002).

<sup>20</sup> *See Kagan, supra* note 2, at 2323. *See generally id.* at 2319-31.

<sup>21</sup> *Id.* at 2321, 2323; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (“The President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, ... authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. ... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.”)

<sup>22</sup> *Kagan, supra* note 2, at 2325.

<sup>23</sup> *Id.*



the President's role in the delegation, then an interpretive question arises [as to whether the delegation is to the stated agency official only, absent "evidence to the contrary," or to the agency official "subject to the ultimate control of the President," absent contrary congressional intent].<sup>24</sup>

On the one hand, if a President were to issue an executive order concerning discretionary actions by the Secretary, such an executive order—depending on its content—may be within the President's generally recognized powers to provide for the direction of the executive branch.<sup>25</sup> PPACA contains many grants of discretionary authority to the Secretary of Health and Human Services (HHS) to implement the Act. For example, § 2713(c) provides that "The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs."<sup>26</sup> An executive order or presidential memorandum that directed the Secretary to develop such guidelines and provide guidance on compliance with the guidelines would appear to be within the President's authority.<sup>27</sup> Past Presidents have asserted similar or more expansive authority through executive orders, in particular with regard to centralization of control over agencies.<sup>28</sup> Similarly, instructions to the Secretary in an executive order on implementing the law through the potential issuance of policy statements would arguably be within the President's general authority to provide instructions to executive branch officials.<sup>29</sup> On the other hand, an executive order on discretionary actions by the Secretary—depending on its content—may be viewed as beyond the President's authority under

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<sup>24</sup> Kagan, *supra* note 2, at 2326-27; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602 (1952)(Frankfurter, J. concurring)("It cannot be contended that the President would have had the power to issue this order had Congress explicitly negated such authority in formal legislation.").

<sup>25</sup> See U.S. CONST. art. II, § 3.

<sup>26</sup> PPACA & HCERA, Consolidated Print, § 2713(c).

<sup>27</sup> See, e.g., Exec. Order No. 13141, 64 Fed. Reg. 63169 (Nov. 18, 1999)(stating, with regard to environmental review of trade agreements, that the United States Trade Representative and the Chair of the Council on Environmental Quality "shall oversee the implementation of this order, in consultation with appropriate foreign policy, environmental, and economic agencies"); Office of the United States Trade Representative, Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements, 65 Fed. Reg. 79442 (Dec. 19, 2000); see also Memorandum on Guidelines to States for Implementing the Family Violence Provisions of Welfare Reform Legislation, 2 Pub. Papers 1751 (Oct. 3, 1996)("I direct the Secretary of [HHS] and the Attorney General to develop guidance for States to assist and facilitate the implementation of the Family Violence provisions."); Memorandum on the Food Safety Initiative, 2 Pub. Papers 1285, 1286 (Oct. 2, 1997)("I direct the Secretary of [HHS], in partnership with the Secretary of Agriculture and in close cooperation with the agricultural community, to issue within 1 year from the date of this memorandum, guidance on good agricultural practices and good manufacturing practices for fruits and vegetables."); Memorandum on New Tools to Help Parents Balance Work and Family, 1 Pub. Papers 841 (May 24, 1999)("I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child. In addition, I direct the Secretary to develop model State legislation that States could use in following these regulations."); Memorandum on Reducing the Risk of *Listeria Monocytogenes*, 1 Pub. Papers 854, 855 (May 5, 2000)("I direct the Secretary of Agriculture to complete proposed regulations that include any appropriate microbiological testing and other industry measures ...."); Message to Congress Reporting on the Executive Order on Blocking Property of Certain Persons Contributing to the Conflict in Cote d'Ivoire, 1 Pub. Papers 215, 216 (Feb. 8, 2006)("I delegated to the Secretary of the Treasury, after consultation with the Secretary of State, the authority to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by the IEEPA and the United Nations Participation Act, as may be necessary to carry out the purposes of this order.").

<sup>28</sup> See, e.g., Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (President Reagan's executive order on proposed major rules, regulatory impact analysis, and cost-benefit analysis); Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (President Clinton's order on regulatory planning and review).

<sup>29</sup> See U.S. CONST. art. II, § 3; Kagan, *supra* note 2, at 2285, 2290-99 (discussing the "use of formal directives (generally styled as memoranda to the heads of departments) instructing one or more agencies to propose a rule or perform some other administrative action within a set period of time").



*Youngstown*, as Congress chose to delegate discretionary authority to the HHS Secretary, not the President.<sup>30</sup> Under Justice Kagan's theory, the question would turn on the precise statute at issue.

Additionally, if an executive order interpreting PPACA did not accurately reflect the law's text, or was interpreted to implement the law in a manner that is not compelled by PPACA's underlying legal provisions, the legal basis for the order may be less clear under the tripartite scheme in *Youngstown*.<sup>31</sup> Under the second *Youngstown* category, in which Congress has neither granted nor denied authority to the President, the President acts in reliance "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."<sup>32</sup> In these instances, the validity of the presidential action "hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'"<sup>33</sup> A reviewing court may look to the statute upon which the executive order is based, as Congress arguably has not ceded its authority with regard to domestic policy matters addressed in PPACA, and may be less likely to view the President as having independent constitutional authority in this area (as opposed to matters of foreign affairs and national security). Such an executive order also could be seen as within the third *Youngstown* category—contrary to Congress's express will that the discretionary authority within PPACA be carried out by the HHS Secretary.<sup>34</sup>

### Requirements for Federal Regulations Implementing PPACA

PPACA contains numerous requirements that the Secretary must issue rules to implement particular provisions of the Act. For example, § 1104(c) requires the Secretary to issue several final rules establishing a unique health plan identifier, a standard for electronic funds transfers, and a transaction standard and a single set of associated operating rules for health claims attachments. These three statutory requirements for the issuance of rules also state that the Secretary may issue such rules as interim final rules, so that such rules and standards are effective no later than particular dates in 2012, 2014, and 2016.

A President would not appear to be able to issue an executive order halting an agency from promulgating a rule that is statutorily required by PPACA, as such an action would conflict with an explicit congressional mandate. Under the third *Youngstown* category, an executive order preventing issuance of a congressionally-mandated PPACA rule could be viewed as "incompatible with the express or implied will of Congress."<sup>35</sup> As mentioned earlier, such a presidential action must rest upon an exclusive power, and the courts can uphold the measure "only by disabling the Congress from acting upon the subject."<sup>36</sup>

For example, in 1996, in *Chamber of Commerce of the United States v. Reich*, the U.S. Court of Appeals for the District of Columbia Circuit found that Executive Order 12954 was invalid in part because it conflicted with the National Labor Relations Act (NLRA).<sup>37</sup> Executive Order 12954 directed the

<sup>30</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); see Kagan, *supra* note 2, at 2325.

<sup>31</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.")

<sup>32</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

<sup>33</sup> *Dames & Moore*, 453 U.S. at 668-69 (quoting *Youngstown*, 343 U.S. at 637).

<sup>34</sup> *Youngstown*, 343 U.S. at 637.

<sup>35</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

<sup>36</sup> *Id.* at 637-38.

<sup>37</sup> 74 F.3d 1322, 1339 (D.C. Cir. 1996). The court did not mention *Youngstown*.



Secretary of Labor to promulgate regulations providing for the debarment of contractors who hired permanent replacements for striking workers,<sup>38</sup> and was issued after Congress debated, but failed to pass, amendments to the NLRA that would have prohibited employers from hiring permanent replacements.<sup>39</sup> The court discussed the ability of the courts, in cases where Congress has not precluded non-statutory judicial review, to review the legality of the President's order and the actions of subordinate executive officials acting pursuant to a presidential directive.<sup>40</sup> The court stated that it was "untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to the Federal Property and Administrative Services Act [FPASA<sup>41</sup>] in pursuit of governmental savings."<sup>42</sup>

However, Presidents have issued executive orders on regulatory review that have increased the President's involvement in agency rulemaking generally.<sup>43</sup> Additionally, White House Chiefs of Staff under the incoming Administrations of Presidents George W. Bush and Barack Obama have issued memoranda to the heads of executive branch departments and agencies requesting that certain steps be taken with regard to various proposed and final regulations from the outgoing Administration.<sup>44</sup> For example, on January 20, 2009, President Obama's then-Chief of Staff issued a memorandum that directed department and agency heads to do the following:

Consider extending for 60 days the effective date of regulations that have been published in the *Federal Register* but not yet taken effect, subject to the exceptions described in paragraph 1 [which addresses exceptions for unpublished proposed and final regulations relating to urgent or emergency situations], for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules. Following the 60-day extension:

- a. for those rules that raise no substantial questions of law or policy, no further action needs to be taken; and
- b. for those rules that raise substantial questions of law or policy, agencies should notify the OMB Director and take appropriate further action.<sup>45</sup>

This memorandum specified that the requested actions did not apply to regulations subject to statutory or judicial deadlines.<sup>46</sup> Further, this memorandum provided that if the head of a department or agency

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<sup>38</sup> 60 Fed. Reg. 13023 (Mar. 10, 1995).

<sup>39</sup> 74 F.3d at 1325; *see, e.g.*, H.R. 5, 103d Cong.; S. 55, 103d Cong.; Ronald Turner, *Banning the Permanent Replacement of Strikers by Executive Order: The Conflict between Executive Order 12945 and the NLRA*, 12 J.L. & POL'Y 1 (1996).

<sup>40</sup> 74 F.3d at 1328 ("That the 'executive's' action here is essentially that of the President does not insulate the entire executive branch from judicial review. ... Even if the Secretary were acting at the behest of the President this 'does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.'") (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12) (D.C. Cir. 1971)); *see also Reich*, 74 F.3d at 1331 n.4.

<sup>41</sup> P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified in scattered sections of Titles 40 and 41 of the United States Code).

<sup>42</sup> 74 F.3d at 1332 (emphasis in original).

<sup>43</sup> *See, e.g.*, Exec. Order No. 11821, 39 Fed. Reg. 41,501 (Nov. 29, 1974)(President Ford); Exec. Order No. 12044, 43 Fed. Reg. 12,661 (March 24, 1978)(President Carter); Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981)(President Reagan); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993)(President Clinton); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011)(President Obama).

<sup>44</sup> Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

<sup>45</sup> Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 20, 2009).

<sup>46</sup> 74 Fed. Reg. at 4436 (see paragraph 4).



believed that any regulations should not be subject the memorandum's directives because the regulations "affect critical health, safety, environmental, financial, or national security functions of the department or agency, or for some other reason," they should notify the OMB Director promptly.<sup>47</sup> The memorandum's use of the word "consider" and the option to notify OMB indicate that department and agency heads maintained some discretion in implementing this memorandum, although department and agency heads were "request[ed]" to "immediately take" steps with regard to review of new and pending regulations.<sup>48</sup>

On January 21, 2009, the then-OMB Director issued a separate document providing guidance on implementing the above paragraph of the memorandum.<sup>49</sup> The OMB memorandum explained that for regulations that were published in the *Federal Register* but did not yet take effect and for which significant concerns involving law or policy were raised, an agency head should have considered postponing the effective date of such regulations for 60 days and reopening the rulemaking process.<sup>50</sup>

### Mandatory PPACA Programs and Appropriations

Similar to the above discussion on statutorily-required rulemakings, a President would not appear to be able to issue an executive order halting statutorily-required programs or mandatory appropriations for a new grant or other program in PPACA,<sup>51</sup> and there are a variety of different types of these programs. Such an executive order would likely conflict with an explicit congressional mandate and be viewed "incompatible with the express ... will of Congress" under the third *Youngstown* category.<sup>52</sup> However, there may be instances where PPACA leaves discretion to the Secretary to take actions to implement a mandatory program, and, as discussed above, an executive order directing the Secretary to take particular actions may be analyzed as within or beyond the President's powers to provide for the direction of the executive branch.

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<sup>47</sup> 74 Fed. Reg. at 4436 (see paragraph 5). In this case, the OMB Director will "review all such notifications and determine whether an exception is appropriate." *Id.*

<sup>48</sup> 74 Fed. Reg. at 4435.

<sup>49</sup> Memorandum from Peter R. Orszag, Director, Office of Management and Budget (Jan. 21, 2009).

<sup>50</sup> The effective date of a final rule has been held to be a substantive portion of a rule that generally may only be changed through notice and comment rulemaking. *Natural Resources Defense Council v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982). According to the OMB Memorandum, the decision regarding these rules should be based on certain standards: (1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

<sup>51</sup> CRS Report R41301, *Appropriations and Fund Transfers in the Patient Protection and Affordable Care Act (PPACA)*, by C. Stephen Redhead, <http://www.crs.gov/products/r/pdf/R41301.pdf>, summarizes all the mandatory appropriations in PPACA, most of which are for new programs. See Table 1 in the report. Each row entry in the table includes the following information: (i) the PPACA section; (ii) whether or not the program is new, or simply an amendment to an existing program; (iii) a description of the program; and (iv) details of the appropriation. As summarized in R41301, many of the provisions provide annual appropriations for one or more specified fiscal years; a few provisions are multiple-year appropriations. Often the provision includes additional language stating that the funds are to remain available "until expended" or "without fiscal year limitation." A couple of provisions appropriate an indefinite amount.

<sup>52</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).