



Delayed Publication in the Federal Register*

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Recently, there has been considerable lag time between proposed rules being announced by federal agencies and the publication of those proposals in the Federal Register. This article looks at the requirements under the Administrative Procedure Act (APA) to publish proposed rules in the Federal Register and the implications of a delay in that publication.

I. Proposed rules that have not yet been published in the Federal Register

The Federal Reserve Board (Board), Federal Deposit Insurance Corporation (FDIC) and Office of the Comptroller of the Currency (OCC) issued several proposed rules implementing Basel III capital standards for financial institutions and holding companies. There are three separate proposals totaling over 700 pages, which include proposed changes to the risk-weighting of assets and revised risk-based and leverage capital requirements.¹ The proposals were approved by the agencies on June 12 with an original comment deadline of September 7. Yet, as they had not been published in the Federal Register, last week, the agencies announced a delay in the comment deadline until October 22.

When the Consumer Financial Protection Bureau (CFPB) released its much-anticipated proposal combining mortgage disclosures under TILA and RESPA on July 9, they took a similar approach in setting a comment deadline before the proposal was published in the Federal Register. As explained by the Bureau in the proposal, “To provide an orderly, coordinated, and efficient comment process, the Bureau is generally setting the deadlines for comments on this and other proposed mortgage rules based on the date the

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¹See *Agencies Seek Comment on Regulatory Capital Rules and Finalize Market Risk Rule*

proposal is issued, instead of the date this notice is published in the Federal Register.”² Comments on two sections of this proposal are due September 7, and the rest of the comments are due November 6. One of the sections with comments due September 7 is a proposal to change how the finance charge is calculated for closed-end transactions secured by real property; this change could have a dramatic impact on lending and applicable laws that cross reference the APR, such as state high-cost lending laws and HOEPA. The TILA-RESPA proposal is scheduled to be published in the Register on August 23. Additionally, the CFPB released a proposal under HOEPA on July 9 with comments due September 7, and that proposal is expected to be published in the Federal Register on August 15.

II. Federal Register notice requirement

For informal rulemakings, like those discussed above, the Administrative Procedure Act requires that “general notice of proposed rulemaking shall be published in the Federal Register.”³ The notice in the Federal Register must include the time, place, and nature of public rulemaking proceedings, reference to the legal authority under which the rule is proposed, and the terms or substance of the proposed rule.⁴

The Federal Register publication is legally sufficient for giving affected persons notice of the proposed rulemaking.⁵ The requirement does not apply if all persons affected have actual notice of the proposed rulemaking or if the agency finds good cause that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁶ Courts continually have found this “good cause” exception to be “narrowly construed and only reluctantly countenanced.”⁷ To have actual notice, the affected persons must be named in the proposal.

²*Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, p 36.

³U.S.C. §553(b).

⁴5 U.S.C. §§553(b)(1)-(3).

⁵See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (“Congress has provided that the appearance of rules and regulations in the *Federal Register* gives legal notice of their contents.”).

⁶5 U.S.C. §553(b)(B).

⁷*Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quotations omitted).

Since actual notice is typically impossible for a general regulation, the normal process is for rulemakings to both be published in the Register and announced on the agency's website and with press releases. Supplemental distribution of the proposed rulemaking is encouraged, but that cannot substitute for publication in the Federal Register.

For example, the EPA amended a rule without notice and comment arguing it was permitted to do so because persons affected received "actual notice" when EPA published the change on its website and held a meeting with some of the affected persons. The U.S. Court of Appeals for the D.C. Circuit disagreed with EPA's reasoning, noting that this "court has never found that Internet notice is an acceptable substitute for publication in the Federal Register" and those affected were not named in the Internet publication.⁸

III. Timing

With respect to the rulemakings under discussion here, the agencies have not indicated that they intend to bypass Federal Register publication. Instead of waiting for the publication to commence the comment period though, they have started the clock upon publication on their websites. At least two of these proposals are very lengthy; perhaps that is why the Federal Register publication has been delayed.

With the proposals on the agencies' website and some discussion of them in the national news, it is difficult to know whether any affected persons have not yet learned of these proposals. The Federal Register at least serves as one location where those interested can find all proposals that may impact them. Furthermore, the APA requires publication in the Federal Register and the courts have stated that publication on an agency's website is not a substitute.

Since publication in the Federal Register is required for these general regulatory proposals by the APA, the question then is whether there is sufficient time to comment on a proposal once it is published in the Federal Register.

The APA does not specify a minimum comment period for proposed

⁸ *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

rulemakings. It does require that after Federal Register publication “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁹ This requirement has been interpreted as requiring a reasonable time period for comments.

Courts consider the length of time to comment as only one factor in evaluating the overall adequacy of the opportunity to comment. Short comment periods have been found sufficient when there is no evidence that interested parties were harmed by the brief comment period or where it was clear that the affected industry was familiar with the problem the proposal addressed.¹⁰ However, Executive Order No. 12,866 states that most rulemakings should provide for “a comment period of not less than 60 days.”¹¹ This Order does not apply to independent agencies such as the Board, FDIC or the CFPB, but it does apply to the OCC. Additionally, the Office of Management and Budget has requested that the independent agencies voluntarily comply with provisions of the Order that are pertinent to their activities.

For lengthy and complex proposals, such as the CFPB’s proposal on mortgage disclosures, which is nearly 1,100 pages, publication in the Federal Register less than a month before comments are due will not, by itself, offer the public a reasonable opportunity to comment. The proposals discussed here impact a large number of financial institutions and consumers, and it is critical that all those affected are made aware of the proposals and given a sufficient time to comment on them. Publication in the Federal Register assures that notice is given. With only 16 days between Federal Register publication and the comment due date for the CFPB’s proposed changes to the finance charge, and only 23 days between publication and the comment deadline for changes in HOEPA, it seems that those who comment only after reading the Federal Register publication will not be able to fully participate in the rulemaking process.

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⁹5 U.S.C. §553(c).

¹⁰See *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1988) (15-day comment period is not unreasonable given that no interested persons were harmed and there was a statutory deadline for a final rule); *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 534 (D.C. Cir. 1982) (30-day comment period is not unreasonable since industry was familiar with the problem).

¹¹Exec. Order No. 12,866 §6(a).