

## A Brief Outline of Executive Actions

This resource outlines actions the President can take through the Executive Office or one of the numerous federal agencies. While the list is not exhaustive, these actions are the primary opportunities advocates can creatively use to effect change without relying only on Congressional action. Sometimes an executive action may be a combination of the listed actions, and, as indicated below, some actions are much harder to achieve than others. However, advocates can focus on lower level executive actions to bide time and to build political will for higher level ones.

### Executive Order/Action

An executive order is a policy statement that comes directly from and is signed by the President. Presidents primarily use them to maintain control over the executive branch by outlining procedures that executive offices must follow. However, they are sometimes used to carry out the President's political agenda.

### Examples:

- LGBT workplace nondiscrimination executive order – see <https://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employment>
- Immigration executive actions – see <http://www.dhs.gov/immigration-action>

### Benefits:

- Has the force of law
- Tend to be very high profile
- Immediately raises profile of the issue
- Helps to make the issue more public – generates media attention
- Lasts until superseded by another executive order

### Drawbacks:

- Can be rescinded easily without any process by future administration
- Very hard to get
- Takes a lot of advocacy; usually years
- Very political – takes a lot of political capital and will be based on political considerations that are hard to predict
- Very rare

**Difficulty attaining:** Very Hard

### Regulations/Rulemaking

The regulation or rulemaking process occurs at the federal agency level. The most important federal agencies, headed by a cabinet secretary, are “departments,” such as the Department of the Treasury or the Department of Homeland Security. There are 15 Cabinet-level departments. Each department contains other federal agencies as well, such as the Food and Drug Administration and the Centers for Disease Control and Prevention in the Department of Health and Human Services. Agencies also exist outside of the Departments, like the United States Postal Service and the Environmental

Protection Agency. Federal Agencies are part of the Executive Branch and are under the control of the President. Agencies' primary function is to enforce legislation enacted by Congress; this is accomplished in part through the regulation and rulemaking process.

When an agency is ready to propose a rule, it may publish an "Advance Notice of Proposed Rulemaking" in the *Federal Register* (<https://www.federalregister.gov/>). This is the agency's way of inviting the public to participate in the creation of the rule through comment submission. Interested members of the public may submit critiques of the rule, express disapproval or approval of the rule, and other suggestions through comments. When the agency is ready, it will issue a "Notice of Proposed Rulemaking" in the *Federal Register* which announces the rule and its text. The agency allows the public to comment on the proposed rule within a certain time frame, typically within 30 or 60 days. The agency may re-open a comment period if it wants more information from the public.

After the agency has considered the public's comments and crafted the Final Rule, it will publish the Final Rule in the *Federal Register*. The rule may take effect immediately or in 30 or 60 days depending on the type of rule.

**Examples:** Department of Housing and Urban Development's (HUD) LGBT Equal Access Rule – see <https://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>

#### **Benefits:**

- Public has access to contribute and comment
- They become law for the agency program and services regardless of where they are
- Can only be repealed by another notice and comment period
- Enforcement and implantation handled by the agency so you can work with the same people to have the rule enforced
- They tend not to generate a lot of political opposition because they tend to fly under the radar
- Agencies work closely with advocates on these so you can have a big impact
- The rule doesn't have to be LGBT specific to help the LGBT community – you can identify regulations around particular areas that disproportionately impact the LGBT community and then advocate for inclusive language that will help the LGBT community
- You get a proposed rule, so you can see what the agency is thinking before it becomes final, plus that affords another advocacy opportunity

#### **Drawbacks:**

- To get an agency to consider a regulation is hard; advocates have to know the right people and the process takes a long time usually (could take up to a year to even get proposed rule)
- They're clunky and confusing – very legalistic and subject matter specific, so a lot of times they're hard to understand and hard to advocate around
- They're program rules, so they can only impact the specific agency's work
- They're hard to finalize – sometimes a lot of work can get done, and then they languish at the WH waiting for approval
- Congress can cut funding or eliminate programs to try to undermine the rule if there is enough political pressure to do so

**Difficulty:** Hard

**Policy Advisory/Directive**

A memo/letter from agency notifying stakeholders of a policy change and directing them to take a specific action

**Example:** Attorney General's letter stating the executive office would no longer defend the Defense of Marriage Act (DOMA) – see <http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>

**Guidance**

A memo/letter from agency notifying stakeholders of best practices, urging a policy change, or other suggested or preferred action without going so far as to require it

**Example:** Department of Justice guidance on modernizing HIV criminalization state laws – see <https://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>

**Benefits:**

- There's a lot more options so advocates can be more creative in what they ask for
- They are considered official statements of the administration
- They are really useful for clarifying the enforcement of already existing and enforceable law
- You can use it to attract media attention

**Drawbacks:**

- It's just a statement of policy with nothing else attached to it
- No uniformity enforcement mechanism or guaranteed process – varies greatly depending on agency will to enforce
- It raises the profile of an issue, but often that publicity makes people come forward and assume they can sue or the law has changed and it hasn't – often results in people being more conscious of the ways the law is flawed as opposed to the new change being announced

**Difficulty:** Medium to easy

**Frequently Asked Questions (FAQ)s, Best Practices, Handbooks**

A category of guidance that allows agency to explain/clarify its position on an issue in a way that is more accessible but less official

**Example:** FAQs on Title IX – see <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

**Benefits:**

- Often are easy lifts
- Allows the agency to do or say something they want to say even when there isn't the political will for something bigger to be done
- Written for the general population – they're not jargony or legalistic, so they can be pushed out to the community
- Good tools for agencies that want to do something for Pride or an event/anniversary

**Drawbacks:**

- Persuasive but not mandatory and there won't necessarily be a mechanism to make anyone do anything
- Sometimes don't carry any weight beyond drawing attention to something

**Letters to Grantees/Notice of Funding Availability (NOFA)**

A letter or notice to grantees or grant seekers making certain requirements in order to continue or receive funding or granting competitive points for grant applications that serve certain communities

Example: Notice of Funding Availability for the Rural Energy for America Program – see (Section VIII. Nondiscrimination Statement) <https://federalregister.gov/a/2014-10054>

**Benefits:**

- The groups that receive this money have a huge incentive to comply because money is contingent on it
- It impacts all grantees regardless of where they're based
- Competitive points for grants encourage people to work with underserved populations

**Drawbacks:**

- Not as visible – won't generate media attention
- Stopping funding is a bureaucratic process and takes time so sometimes organizations break the rule and their money isn't pulled immediately
- Government funding is hard to get and hard to navigate so even with competitive points, many LGBT organizations will not apply

**Additional Resources**

Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV

[http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Roadmap\\_For\\_Change\\_full\\_report.pdf](http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Roadmap_For_Change_full_report.pdf)

Federal Register Tutorial

<http://www.archives.gov/federal-register/tutorial/online-pdf.html>

A Guide to the Rulemaking Process

[https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)

List of Federal Agencies

<http://www.usa.gov/directory/federal/index.shtml>



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