

The Politics of Regulation in the Obama Administration

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Under the Patronage of His Highness Sheikh Dr. Sultan Bin Mohammed Al Qassimi, Supreme Council Member, Ruler of Sharjah, President of AUS

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The Challenge for President Obama

- Relying upon statutory authority in place and laws enacted during his administration, promulgate wide variety of rules and regulations that address his priorities.
- Administrative rulemaking is necessary because:
 - Congress chooses to pass broad legislation
 - Agencies have expertise in subject areas, flexibility in tailoring the provisions and an orderly and inclusive process of promulgation
 - Agencies are responsible for the results
 - Appeals: administrative, Congressional Review Act and judicial

Midnight Regulations

- Last chance for a President to affect policy through the administrative process
- Usually within the last three months
- Every President: President's Carter (10,000 pages FR), President Bush I (greatest proportion of rules), President Clinton (26,000 pages FR).
- Why? Too busy, too distracted, rule too controversial?

President George W. Bush – Midnight Deregulation

- Endangered Species Act: removed provision for scientists to harm to endangered species and substituted Federal Highway Administration, Army Corp of Engineers
- Federal Motor Carrier Safety Act: > 14 hours/day trucker could drive
- Clean Water Act: narrowed definition of navigatable waters thereby allowing discharge of oil in more waters
- Department of Human and Health Services: rule requiring health care facilities to certify that employees can refuse to provide services they find morally reprehensible or at odds with their religion

Obama's Regulatory Options

- Agency activity in progress: administrative hold for two to four months pending review and personnel appointments
 - Exception is rare: court ordered actions
- Regulations that have taken effect:
 - new rulemaking (Environmental Protection Agency (EPA) proposes to withdraw rule that had reclassified tons of hazardous waste as “fuel” leading to less government oversight and regulation)
 - court finding that the rule was illegally promulgated (Rule allowing concealed guns in national parks blocked by federal judge who said environmental analysis flawed)
 - Congressional finding of disapproval under the Congressional Review Act (One success in over a decade: Occupational Safety and Health Administration's (OSHA) Ergonomics rule)

President Obama's Major Regulatory Initiatives

- EPA primarily under the Clean Air Act
 - proposals to reduce ozone levels, increase number of monitors for lead, strengthen standards for nitrogen dioxide and sulfur dioxide
 - Green House Gases (GHS)
 - Finding that GHGs pose threat to public health and the environment
 - Proposed rule limiting GHGs from passenger vehicles and power plants, factories and other facilities
 - Final rule creating GHG registry to collect emissions data and increased reportage by lowering tonnage emitted for inclusion
 - Stricter exhaust emission standards can cleaner fuel standards for large marine diesel engines on large US-flagged ships

- OSHA
 - Final rules
 - Hazards of Cranes and Derricks
 - Global Harmonization of Classification and Labeling of Chemicals
 - Proposed rules
 - Crystalline silica
 - Beryllium
 - Diacetyl
 - Investigative preliminary work
 - Combustible dust
 - Airborne infectious disease
- Mine Safety and Health Administration: Program to end Black Lung and Silica

Financial Initiatives

- Raise capital and liquidity requirements, place interconnected firms whose failure could threaten system under supervision of Federal Reserve, establish council of regulators
- For loaners, require robust reporting requirements, reduce reliance on credit rating agencies, retain financial interest. Harmonize and strengthen regulation of futures and securities
- Build on credit card protection and extend consumer and investor protection across the board
- Create resolution mechanism for orderly resolution of financial company whose failure may threaten the system
- Lead effort in improving global regulation and supervision around the world

Other Rulemaking Issues

- Consumer Product Safety Commission: proposed to prevent speculation by financial traders from driving up the price of oil by restricting what the large traders can do.
- All the agencies that address healthcare will likely be promulgating rules if the new health care reforms are enacted
- **Overall assessment**
 - Midnight regulations most at odds with President Obama's agenda will be scraped if in process and if completed, repropoed
 - President Obama will use all of the regulatory agencies to codify the particulars of his policies

Appendix

How Significant is Regulation and for Whom?

- Regulation Affects Us All
- Cost of Regulation
- Why Regulate?
- Legal Requirements of The Process
- Midnight Regulations
- President Obama's Regulatory Priorities & Initiatives

What is a Rule?

- Prescribed guide for conduct or action
- Agency action that regulates future conduct of groups of persons or a person
- Legislative in nature because it operates in the future and because it is primarily concerned with policy considerations
- Implements laws that are broad

Estimates of the Total Annual Benefits and Costs of Major Federal Rules, October 1, 1998 - September 30, 2008 (millions of 2001 dollars)

Agency	Number of Rules	Benefits	Costs
• Department of Agriculture	6	906-1,315	1,014-1,353
• Department of Education	1	633-786	349-589
• Department of Energy	6	4,954-5,391	3,067-3,118
• Department of HHS	19	20,590-32,562	3,966-4,508
• Department of Homeland Security	1	20-29	13-99
• Department of HUD	1	190	150
• Department of Justice	1	275	108-118
• Department of Labor	6	481-1605	320-347
• Department of Transportation	18	11,256-19,098	5,218-8,968
• Environmental Protection Agency	40	87,042-601,469	36,853-40,85
Totals	99	126,345-662,720	51,059-60,099

- Source: Draft 2009 Report to Congress on Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities

The Administrative Procedures Act (APA) of 1946

- Publication of Notice of Rulemaking (NPRM)
- Opportunity for public participation by written comments
- Publication of a final rule with statement of bases not less than 30 days before its effective date
- Today: floor for agency action but now requirement expanded by courts, legislation, executive orders and agency practice
 - Rule must be based on administrative record,
 - Court will overturn if the rule is “arbitrary and capricious”
 - Failure to follow factors in statute
 - Failure to consider important aspect
 - Decisions counter to the evidence
 - Too implausible for difference of view or agency expertise

Rulemaking Process

- Catalyst: statute, petition, catastrophe, policy decision (within authority of statute)
- Initial Agency Investigation: review of petition information, research, contact with other government agencies, universities, trade or professional organizations through meetings or other informal contacts
- RFI or ANPR or both
- Policy decision to continue

- Notice of Proposed Rulemaking
- Comment Period
- Hearing, if requested or required
- Briefing period + extensions
- Agency digestion of the entire record & drafting of final standard and its preamble
- Internal and external (OMB) reviews
- Promulgation and publication
- Submission to Congress for CRA review
- Appeals
 - Administrative appeal,
 - Judicial Appeal,
 - Enforcement appeal