The Politics of Regulation in the Obama Administration

Conference on American Government, Politics and Policy
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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 navigable 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, reproposed
  – 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)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Number of Rules</th>
<th>Benefits</th>
<th>Costs</th>
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<td>Department of Agriculture</td>
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<td>Department of Transportation</td>
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<td>11,256-19,098</td>
<td>5,218-8,968</td>
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<td>87,042-601,469</td>
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<td><strong>Totals</strong></td>
<td><strong>99</strong></td>
<td><strong>126,345-662,720</strong></td>
<td><strong>51,059-60,099</strong></td>
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</tbody>
</table>

- 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