



Cleaning Up and Launching Ahead

What President Obama can learn from previous administrations in establishing his regulatory agenda

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Executive summary

As presidential transitions approach, a flurry of new regulation typically occurs as the outgoing administration moves to wrap up work and cement the president's legacy. The Bush administration was no different. It finished more significant regulatory actions in the third quarter of 2008—the last quarter for which there is consolidated information—than in any preceding quarter of the administration, according to data gathered for this report.

Attention now turns to the Obama administration and how it will respond. Just as administrations finish with a midnight flurry, new administrations begin with “crack-of-dawn” actions designed to block or undo the outgoing administration's work.

Such countermeasures take considerable energy and resources. Perhaps as a result, new presidents typically initiate fewer regulatory actions, or rulemakings, in the first year of their terms than in later years. President Barack Obama will have to change past practice if he wishes to avoid this pattern and capitalize on his electoral mandate by quickly implementing an affirmative regulatory agenda.

This report analyzes comprehensive new data on federal agency rulemaking, particularly during White House transitions, from 1983 to 2008. The data put in context the Bush administration's midnight rulemaking and offer lessons for the Obama administration as it assumes power. In particular, this analysis reveals:

- **Regulatory output spikes in the final year of an administration.** Cabinet departments under Presidents Ronald Reagan and George H.W. Bush finished more rulemaking actions in the final year than in any other year of their administrations. President Bill Clinton's cabinet also increased its output in the final year, but completed considerably more actions in 1994, the last year before the Republicans took control of Congress.
- **Significant rulemaking also appears to increase in the last months of an administration.** In addition to the Bush administration's spike in output in the third quarter of 2008, mentioned above, President Clinton finished more “significant” rules in his final quarter than in any quarter since 1995, the earliest year for which agencies regularly reported on the economic and social importance of their regulations.

- **Administrations sometimes start regulations in the waning months that they are unable to finish.** President Clinton’s spate of midnight regulatory activity generated much press attention. But President George H.W. Bush’s cabinet began over 75 percent more notice-and-comment rulemakings in the final quarter of his term than did President Clinton, and nearly 30 percent more than President Reagan. President George W. Bush’s cabinet and executive agencies also initiated many new actions over the last year, issuing as many or more notices of proposed rulemaking, or NPRMs, in the first three quarters of 2008 as in any similar preceding period. The Obama administration must decide whether to withdraw regulations proposed but not finished under President Bush from agency regulatory agendas.
- **Recent presidents have all immediately tried to block or undo some regulatory actions of their predecessors.** All four administrations analyzed in this report imposed a temporary moratorium on rulemaking until their political appointees were in place and withdrew at least some regulations that were started under their predecessor. In both the Clinton and George W. Bush administrations, for example, the Department of Interior withdrew the greatest number of rules from its regulatory agenda in the inaugural year. In addition, Presidents Reagan and George W. Bush suspended the effective dates of regulations that had been issued in the waning days of the Carter and Clinton administrations, respectively. President George W. Bush also signed a “resolution of disapproval” passed by Congress under the fast-track process of the Congressional Review Act to repeal a rule designed to protect workers from repetitive stress injuries that was enacted in Clinton’s closing days.
- **President George W. Bush took unprecedented steps to make his last-year regulations harder to overturn.** In May 2008, White House Chief of Staff Joshua Bolten informed executive agencies that they should not propose any new rules after June 1 and should finish rules by November 1, except in “extraordinary circumstances.” Major economic rules generally cannot take effect for at least 60 days after they are issued. The Bolten directive was, it seems, intended to block the new president from suspending the effective dates of Bush rules, as the Bush administration did to the Clinton administration. Agencies, however, did not always meet the November 1 deadline. President Obama may be able to suspend the effective dates of major rules issued within 60 days of his inauguration.
- **Recent presidents have been much slower in initiating their own notice-and-comment rulemakings.** Cabinet departments and executive agencies, as groups, have started fewer, not more, rules in the first year of a presidential administration than in later years. In the first year of President Clinton and President George W. Bush’s administrations, for example, the Environmental Protection Agency issued 75 and 45 proposed rules, respectively, in contrast to 105 and 75 in their second years. The Department of Interior, likewise, issued only 49 proposed rules in President Bush’s first year, the lowest annual number during his administration.

- **Emergency or interim rules sometimes spike in the first year of an administration.**

Agencies can enact emergency or interim rules without prior notice and comment. Such rules may be appealing to new administrations because they take far less time to issue.

These rules increased at cabinet departments, for example, in the first year of the Clinton administration and in the first year of the George W. Bush administration.

To exert control over the rulemaking process, a new president should focus on two primary tasks: undoing undesirable actions of the outgoing administration as efficiently as possible and formulating quickly his own regulatory agenda. This report proposes eight steps, summarized in the box below, to foster this control. These reforms are, with one exception, within the direct control of the executive branch. Because of potential legal challenges, the executive branch must implement these reforms with care.

Recommendations

1. President Obama should immediately direct the cabinet and executive agencies to pull unpublished rules sent to the *Federal Register* in the last days of the outgoing administration.
2. President Obama should direct non-independent agencies to temporarily suspend the effective dates of final regulations that have not taken effect and provide a short justification for any suspension.
3. The White House should work with the Justice Department to settle certain lawsuits challenging midnight regulations so that new agency leaders can revise those regulations.
4. The White House should work with Congress to use the Congressional Review Act to repeal undesirable midnight rules that have taken effect.
5. President Obama should direct agency heads to immediately establish new rulemaking priorities, consistent with his agenda.
6. The presidential personnel office should work to quickly staff agencies critical to the president's regulatory priorities.
7. The White House should work with executive agency leaders to issue notices of proposed rulemaking swiftly to implement the administration's regulatory priorities.
8. The White House should work with agency leaders to determine which regulatory priorities can be achieved without prior notice-and-comment procedures.

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