



Obama at 100 Days – Regulatory Reform

April 2009

In November 2008, a group of 17 experts in regulatory policy released a report recommending that the incoming administration and the 111th Congress adopt a series of reforms aimed at improving the federal regulatory process. The authors believe these reforms are essential to fixing a system that has lost its ability to protect public health, safety, welfare, and environmental quality. The report, *Advancing the Public Interest through Regulatory Reform*, includes a chapter that contains recommendations for the new president's first 100 days in office.

As a traditional milestone for assessing progress of new administrations, the 100-day mark in the Obama presidency provides a limited opportunity to compare his administration's work to the recommendations that the authors of *Advancing the Public Interest* suggested. Overall, President Obama has set a positive tone on key regulatory components, such as transparency, scientific integrity, rolling back harmful deregulatory practices, and appointing well qualified people to top positions at major regulatory agencies. On other major regulatory fronts, it is either too soon to know what the administration plans, or there are reasons for concern about how the administration will address a regulatory process that is highly dysfunctional. Below are the 100-day recommendations from the report, with brief descriptions of and President Obama's actions on each.

1. Place a moratorium on finalizing any new regulations, and review those rules finalized but not yet in effect, except those required by statutory deadlines, court order, or necessary to meet regulatory emergencies, for 60 days pending agency review and reconsideration.

Status: Significant progress

Recent administrations have developed rules in their final days that reflect the outgoing president's policy priorities. The Bush administration carried out a carefully

orchestrated campaign to ensure that certain politically controversial regulations were finalized and in effect by Jan. 20, 2009.¹

This recommendation urged the Obama administration to follow the same path that other presidents have taken to stop midnight regulations. The authors also asked that, "For those midnight regulations the previous president finalized and published, the new administration should review any final rules not yet in effect" and "determine the approaches that can be employed to change or rescind a rule on a case-by-case basis."

On Jan. 20, White House Chief of Staff Rahm Emanuel issued a memo covering these two categories of regulations: those still in the pipeline and those final but not yet in effect. The memo instructs agencies to "consider extending for 60 days the effective date" of those rules that were finalized but were not in effect as of Jan. 20.²

The Emanuel memo did not address those regulations already in effect – a class comprising the majority of the rules finalized during the Bush administration's midnight regulations campaign.³ Separately, Obama administration appointees have begun to address, on a case-by-case basis, those controversial regulations that had been finalized and put into effect.

2. To set a new tone for the new administration, the president should pursue the timely appointment of qualified individuals to regulatory agencies critical to protecting the public.

Status: Significant progress

This recommendation called on the president to refrain from appointing people either unqualified or tied too closely to interests regulated by the agencies to which they are appointed. President Obama has passed this test for critical, nonfinancial regulatory agencies. His appointments to these agencies are former elected officials with government management expertise or public servants who have served at federal, state, and/or local levels. For example, several former governors and elected representatives

¹ OMB Watch has identified 23 controversial regulations finalized by the Bush administration on or after Oct. 28, 2008, and in effect by Jan. 20, 2009.

² The administration extended the effective dates of at least three controversial Bush-era regulations identified by OMB Watch.

³ On Jan. 21, OMB Director Peter Orszag issued a memo to agency heads with directions for how to implement Emanuel's directions. Included in Orszag's memo was a suggestion to agencies to consider not defending "a legally doubtful rule in the face of a judicial challenge." This opens another path for agencies to reconsider rules on a case-by-case basis.

have been confirmed as department heads, and other appointees have experience at various governmental levels.⁴

Although many Senate-confirmed positions remain unfilled in these agencies, those whom Obama has nominated or announced for assistant and undersecretary positions fit this same pattern. Further, Obama issued a memo March 9 on scientific integrity in which he wrote, "The selection of scientists and technology professionals for positions in the executive branch should be based on their scientific and technological knowledge, credentials, experience, and integrity." This raises the bar for his appointments and should provide a benchmark for future appointees.

3. Increase agency funding for regulatory implementation and enforcement.

Status: Incomplete

Years of budgetary neglect have left many regulatory agencies starved for funding and staff. Time and time again, lapses in public health and safety have been traced back to agencies lacking the resources needed to keep tabs on an industry or to monitor an area of concern.⁵ Solving this problem will require a long-term effort, but the authors urged Obama to take action quickly to show his administration's commitment to restoring agency resources.

The authors recommended that Obama "Ask agencies to review their budgets to identify data gaps, restore needed collection programs, and address new areas of information needs as they are confronted with new regulatory problems, and for developing and enforcing regulations." In order to raise resources to appropriate levels, a reliable baseline must be developed, and new and existing responsibilities must be identified.

⁴ Tom Vilsack is a former Iowa governor who now heads the Agriculture Department, and Ken Salazar, a former Colorado attorney general and senator, heads the Interior Department. Obama nominated Kansas Governor Kathleen Sebelius to lead the Health and Human Services Department. Two former members of the House, Hilda Solis and Ray LaHood, lead the departments of Labor and Transportation, respectively. Obama tapped former New York City Health Commissioner Dr. Margaret Hamburg to lead the Food and Drug Administration. He named former commissioner of the New Jersey Department of Environmental Protection, Lisa Jackson, to lead the U.S. Environmental Protection Agency. Jackson also worked at EPA for fifteen years.

⁵ For example, see the OMB Watch article series, *Bankrupting Government*, which compared long-term budget trends at federal agencies to growing responsibilities and lapses in performance.

Obama has not made such a request, at least not formally and publicly. However, Obama has taken other actions in his first 100 days that signal his views on agency resources. Those actions have come as Congress and the administration finished work on the FY 2009 budget and began work on the FY 2010 budget.

FY 2009

President Obama signed into law an omnibus spending bill that included significant budget increases for the Consumer Product Safety Commission and the Food and Drug Administration. However, the bill included only marginal increases for other regulatory agencies facing budgetary challenges, including the Occupational Safety and Health Administration, the Mine Safety and Health Administration, the Food Safety and Inspection Service, and the U.S. Environmental Protection Agency (EPA).

FY 2010

Although President Obama has yet to release his budget request for FY 2010, he has issued an outline of his spending priorities.⁶ The outline commits the president to requesting an increase in funds for food safety efforts and worker protection agencies. It also pledges a significant budget increase for the EPA.

4. The president should form a blue ribbon commission to analyze the regulatory process with the goals of examining existing requirements and reducing unnecessary delay.

Status: Some progress

There are many requirements – assessments, directives, legislative provisions, internal agency procedures, etc. – that create burdens on agencies as they try to develop regulations in a responsive manner. People often differ over whether certain requirements are burdens or necessities, but most students of the regulatory process recognize that it now takes far too long for most agencies to complete regulations.

This recommendation called for the president to create a special commission to first study the sources of delay and then consolidate necessary analytical requirements into a coherent set of recommendations for change. Second, the authors recommended that the commission should review the policies regarding regulatory review set out in Executive Order 12866, President Clinton's order that currently governs the process.

⁶ Obama is weeks behind presidents Bill Clinton and George W. Bush, who released their first budget requests on April 8, 1993, and April 9, 2001, respectively.

Obama initiated a process to reform the executive order, saying in a Jan. 30 memo that the principles set out in E.O. 12866 "should be revisited." He did not create a body to analyze the procedural requirements and assessments that exist in the current process.

For the first time, however, a president has created a process in which both agency opinions and public opinions are being considered. Obama's Jan. 30 memo asked agencies to develop within 100 days recommendations for a new order. Subsequently, on Feb. 26, OMB published a request for public comment in the *Federal Register* (public comments were accepted until March 31).

In the memo to agency heads and in the *Federal Register* request for comments, the administration asked that consideration be given to several factors, including sources of delay. Approximately 170 groups and individuals submitted comments, some in great detail, for the Obama administration to consider in drafting a new order.

One major task facing the administration is how to reconcile the March 9 memo on scientific integrity with cost-benefit analysis, a tool strongly supported by Obama's nominee to head the Office of Information and Regulatory Affairs (OIRA), Cass Sunstein. The memo states, "Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues ... The public must be able to trust the science and the scientific process informing public policy decisions." The memo goes on to argue for the importance of disclosure and transparency. It also assigns to the director of the Office of Science and Technology "the responsibility for ensuring the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes."

Reconciling this strong call for scientific integrity in decisions with an economic tool – cost-benefit analysis – that is an overlay on public health and environmental statutes presents a considerable challenge. These statutes often require agencies to regulate based on criteria other than costs, such as an adequate margin of safety. Cost-benefit analysis requires agencies to calculate the dollar value of benefits and costs and calculate the net benefits. It is too early to know whether Obama will retain the basic structure of the regulatory process that has been in place since the Reagan administration, with its heavy reliance on cost-benefit analysis, or if he will reshape the process with, for example, a different role for OIRA and the agencies and a more timely and responsive process that leads to greater public protections.

5. The president should appoint a qualified administrator for the Office of Information and Regulatory Affairs within the Office of Management and Budget who can lead the office in fulfillment of its statutory obligations and transform the role of OIRA.

Status: Incomplete

Over the past three decades, OIRA has increasingly centralized control over agencies' regulatory decision making, manipulated scientific information used in developing regulations, and increasingly used cost-benefit analysis as the determinative criterion when approving rules. In the course of this evolution, OIRA has strayed from its responsibilities under the Paperwork Reduction Act (PRA).

This recommendation supplements the recommendation above by calling for a new role for OIRA's administrator – one who will consult with agency heads (those who generally have the statutory responsibility for agency rules), alter OIRA's role in rule-by-rule review, and focus the office more on its information resources management role under the PRA. The report calls for the president to appoint someone committed to this revised role.

As indicated above, Obama has nominated Cass Sunstein to be OIRA administrator. Sunstein was a colleague of Obama's on the University of Chicago law faculty and is a prolific academic, most recently serving as a faculty member at Harvard University. He is a controversial figure when it comes to administrative law issues; he is an ardent supporter of using cost-benefit analysis in regulatory decision making, and he has written about the need to further centralize power in OIRA, continuing the trend of recent OIRA administrators.

We must wait to see how Sunstein makes the transition from legal scholar to government administrator and how the responsibilities of the office change. Obama has indicated that he believes that the regulatory processes for social and financial regulation need to be reformed. Sunstein has written about the need to reform cost-benefit analysis as currently used but that it should retain its position as a critical component of regulatory decisions.

6. The president should rescind E.O. 13422 immediately.

Status: Completed

President George W. Bush issued Executive Order 13422 in January 2007 to further centralize power in OIRA and to bypass agency heads. The order amended E.O. 12866 by calling for the installation of presidential appointees in each agency who worked directly with OIRA on regulatory matters, thereby circumventing the legal responsibility of agency heads for regulatory actions. In addition, it created a more rigorous market-based criterion agencies had to meet for regulatory approvals and expanded OIRA's role in reviewing agency guidance documents, materials issued to clarify how to implement regulations that, unlike rules, do not have the force of law.

On Feb. 4, Obama issued an executive order rescinding E.O. 13422 (along with an earlier Bush order that made minor changes to E.O. 12866). Removing the Bush order reinstated E.O. 12866, the 1993 Clinton order, to its original text. E.O. 12866 will remain in place until and unless Obama issues a new order.

7. The president should improve executive branch transparency by replacing the Ashcroft memorandum with another memorandum directing agencies to make more information publicly available.

Status: Completed

President Bush's first attorney general, John Ashcroft, issued a memo in October 2001 urging federal agencies to exercise more caution in disclosing information under the Freedom of Information Act (FOIA). In practice, agencies were prompted to withhold information and resist the public's request for information releases under FOIA.

This recommendation called for the new administration to replace the Ashcroft memo with a policy that changes the presumption about disclosure from one of secrecy to one of openness.

On March 19, the Obama administration issued a new set of guidelines to federal agencies on implementation of FOIA. Written by Attorney General Eric Holder, the Department of Justice (DOJ) memorandum outlines a spirit of transparency that reflects President Obama's Jan. 21 assertion, "In the face of doubt, openness prevails."

Among other things, Holder's memo promises to defend agency decisions to withhold information only if the agency demonstrates a reasonably foreseeable risk of harm to an

interest protected by FOIA exemptions or statutory law. Further, the memo focuses on timeliness, declaring that "long delays should not be viewed as an inevitable and insurmountable consequence of high demand."

Although most administrations issue FOIA memos outlining policy guidelines, the Obama administration issued its memo earlier in its tenure than other administrations. Most importantly, the memo does change the presumption of disclosure to one of openness. As a sign of the memo's importance, DOJ issued follow-up guidance on April 17.

Conclusions

President Obama has set a positive tone for the administration with his calls for increased transparency and renewed scientific integrity throughout government, his appointments of well qualified people to serve in regulatory agencies, his reversal of harmful regulatory practices and rushed deregulatory actions, and his initiation of an open process to reform the executive order that governs the rulemaking process. For these actions, the president deserves high marks.

It is too early to know if the administration will fight to provide necessary resources to restore regulatory agencies after decades of neglect and dismantling. There is considerable concern in the public interest community about whether the administration will continue the trends of increasing OIRA's power over regulatory decisions and relying on cost-benefit analysis to assess the worthiness of proposed regulations. Movement in these directions would be the opposite of what the authors of *Advancing the Public Interest* sought in their recommendations.