

Regulatory Process, Economics, and a New Administration

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Introduction

- Using a risk management cycle we developed while I was at the GAO I took something of a shotgun approach in my white paper....., I identified 10 options to improve the regulatory process:
 - Short, conceptual, not fully worked out....just enough so others might merge with their own ideas..New issues since written...Finance; drilling
- What informs my approach? Economics perspective, EOP for in Administrations of different parties, DOI/offshore leasing, Chief economist, GAO; and academia

Breadth of Proposals

Prior to one in a bit more detail

Performance is a common theme:

1. Regulation and GPRA: Regulatory forecasting (for EOP review) provides a natural comparison for GPRA input and regulatory evaluation
2. 3rd party guidance: Experience at GAO taught me the importance of criteria against which to audit...therefore public scorecard (OMB requested comments), GAO guidance, or public private partnership on technical guidance
3. 21st century commenting: Better use of modern commenting methods, such as wiki—like wikipedia—based commenting on regulations,

Breadth of Proposals: continued

4. What are we not regulating? Residual risk accounting to use a supplement to the national income and product accounts to track, in quantity and value terms, the risks that occur.
5. Watch boundaries of regulation: e.g. Consider whether market based approaches allow all bidders: example....Bidding for delay rights as well as development rights on offshore leasing; or bidding for natural gas only as offshore the mouth of the Chesapeake

Focus on one proposal: Tighten Congressional Review for Outlier Regulations

- Typical story: Congress delegates authority to executive via statute; exec. implements, frequently the court reviews, very infrequently (once) Congress reviews and rejects AFTER final regulation has been passed (Congressional Review Act, CRA)
- Think about if you were the boss and delegated something, shouldn't there be a feedback loop between the designer and the delegator?

- Suppose high cost or other “outlier” regulations came back to “committees with jurisdiction”
 - For comment (including no comment) prior to finalization
 - And either automatic CRA filing, or requiring Congressional reapproval when the regulation is finalized?
- Examples: particularly long time since Congressional direction, particularly high cost per life saved, ...
 - Congress could provide a threshold for review perhaps unlikely; or ask CBO to assess what an outlier is...say 2 std deviations or some other measure.

Congressional review

- Such review provides either Congressional support or redirection
- Useful both within the executive branch as regulations are developed, or in judicial review

Two Examples: Traditional and the “Financial” challenge

Traditional

- Clean Water Intake Structure rule—based on several sentences written in 1972 CWA amendments on the regulation of existing power plant water intakes (court first remanded in 1977)
 - *Any standard established...shall require....the best technology available for minimizing adverse environmental impact*
- Regulation proposed in 2004 took a new approach, was projected to be high cost (about \$400 million annually) but substantially reduce “impingement and entrainment” of fish and other biota....so controversial its currently at the Supreme Court

- Impact of Congressional review proposal
 - Reg would have gone to committees of jurisdiction, such as authorizers, for comment prior to finalization.
 - With current policy, perhaps likely passed, but also likely some debate.
 - After finalization: if automatic CRA filing; may or may not have been action through CRA.
 - These could provide substantial input if judicial review continued (but may have been forestalled) if there is recent direction by Congress.....the lag since inception may have triggered the “above threshold” review

Finance and crisis regulation

- APA exempts “loans, grants, contracts” as well as “good cause” exemptions
- Executive order review: reviews but does not emphasize “budgetary” or transfer rules such as student grants, some agriculture programs, medical payments.
- CRA has “good cause” exemption so rule can go into effect immediately

Current situation

- Traditional but unusual: Entering period known for regulatory “midnight” disputes
 - Potential for action based on CRA (ergonomics rule)
- Non-traditional case: DOE regulation and the automakers
 - Dec, 2007: EISA, \$25 billion loan program for green auto mfg.
 - Sept 24, 2008: DOE letter, distribution not possible prior to Jan 2009 and noted “We anticipate the need and desirability of issuing a notice of proposed rulemaking, taking public comments, and considering those public comments, prior to drafting and issuing final regulations.”
 - Sept 30, 2008: Continuing Resolution...Congress tasked DOE to develop an interim final rule within 60 days of enactment and further stated that emergency conditions existed.
 - Nov 5, 2008: DOE issues interim final rule based on good cause exemption ..standard procedures “unnecessary, impracticable, and contrary to the public interest”, expect eventual finalization
 - Current DOE briefings on program: include NEPA compliance
 - December XX? “Bridge loan”: reprogram prior loan amounts?

Conclusion

- Consider changing default for traditional regulations that are “outliers”
- Extent of review for financial or “good cause” regulations;
 - Economics concern when there are statements similar to...the government can borrow money at essentially no interest and therefore should invest in risky enterprises.
 - An “outlier” regulation if a final (not interim) regulation has not been submitted in T period of time?