Chapter 5: Responsive Government

Chapter Overview

Federal regulations are critical elements to implementing public policy. They provide the protections the country needs to ensure that our food is healthy, our children's toys are safe, our air and water are clean, dangers in our workplaces are reduced or eliminated, and our economy functions efficiently and effectively. Despite the importance of these essential governmental functions, for at least a generation, many politicians and social commentators have taken aim at these protections.

The attack on regulation reached new heights over the past few years. President Trump has proudly promoted a massive attack on sensible safeguards. "We're here today to celebrate and expand our historic campaign to rescue American workers from job-killing regulations," he told an audience at the White House in July 2020. "Before I came into office, American workers were smothered by a merciless avalanche of wasteful and expensive and intrusive federal regulation… Nearly four years ago, we ended this regulatory assault on the American worker, and we launched the most dramatic regulatory relief campaign in American history by far."

Lost in these discussions is the benefits derived from such regulations. Instead, government has prioritized the costs—and mainly the costs to the regulated entities. Simply returning to the pre-Trump administration days is not an acceptable solution because even then the regulatory process was unfairly tilted in favor of regulated entities against consumers, workers, minorities, and others. The current health pandemic has demonstrated the importance of government regulation that puts people first. These recommendations present a reboot, a new way to view regulation as a way to protect the most vulnerable in our society and to pursue the common good.

Principle 10: Existing deregulatory maneuvers, which have undermined public health, safety, environment, equity, civil rights, fairness, justice and democracy should be repealed.

Recommendations for Action on Day One

1. **Rescind Executive Orders Undermining Important Public Protections**

   Rescind the deregulatory executive orders (and accompanying implementation memos) that undermine agencies' ability to fulfill their public-service missions. These orders include Executive Orders 13771 (1-in, 2-out), 13777 (regulatory reform officers in each agency and deregulatory task forces), 13783 (promoting fossil fuels), 13891 (discouraging agency guidance), 13892 (standards for enforcement actions), and 13924 (suggesting waivers of regulatory requirements made during the COVID-19 pandemic should be made permanent).

2. **Delay implementation of rules not yet in effect.**

   The administration should actively use all available tools to delay implementation of rules that have been finalized but are not yet in effect. First, following recent common practice during administration transitions, it should issue a memorandum directing all agencies to delay implementation of final rules not yet in effect for 60 days, and, with limited exception, impose a moratorium on rules in the regulatory pipeline. Second, it should direct agencies to issue new interim final rules or to propose new rules to delay implementation of problematic rules, to give itself time to issue new rules to rescind or improve the underlying substantive rules. Third, the administration should make liberal use of Section 705 of the Administrative Procedure Act, which permits an agency to delay implementation of a rule that is being reviewed by a court.

3. **Begin rulemakings to reverse key, problematic rules issued during the past four years and, as a parallel process, establish a Task Force to identify regulations that need to be redone.**

   During the transition, identify regulations issued in the past four years that should be prioritized for reversal and commence rulemakings at the inception of the new administration. Work on these rules should not be delayed or deferred pending the Task Force process described immediately below.

   At the outset of the new administration, issue a Presidential Directive creating an interagency task force to identify rules issued in the past four years that fall into two distinct but overlapping areas that should be prioritized for new rulemakings: (1) rulemakings that were “tainted” or “corrupt” due to conflicts of interest, willful violations of the rulemaking process, suppression of science or undue influence by corporate interests and (2) regulatory changes that harmed consumers, workers, and the environment, along with rules that disproportionately targeted and hurt women, minorities, LGBTQ communities, and other vulnerable populations such as children, the poor, and the elderly.

   The Task Force should solicit comments from the public on rules that fall into either category. The Task Force should submit its prioritized list to the president no later than four months after being formed. The president should provide a timeframe for agency heads to undertake new prioritized rulemakings.

Principle 11: The regulatory process should be rebalanced to advance health, safety, justice, democracy and equity values and priorities and to ensure appropriate consideration is given to non-monetary benefits.

Recommendations for Action on Day One

1. **Avoid the false tradeoff between health and the economy.**

   The next administration should reduce the outsized and harmful role that economic cost-benefit analysis currently plays in the rulemaking process. One important step is for the president and administration officials to avoid using language or adopting policies that reinforce the false premise of a trade-off between protecting the public through new regulations and promoting economic growth. The COVID-19 pandemic underscores both the interconnectedness and complementary nature of public health and a strong economy, and the dangers in presenting them as competing values.

   The president should direct the director of the Office of Management and Budget to inform agency heads that they should be guided by the following principles and priorities and to develop a new regulatory executive order reflecting these principles:

   a. Agencies should promulgate regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as the need to ensure market rules adequately protect or improve the health and safety of the public, the environment, or the well-being of the American people.

   b. In deciding whether and how to regulate, agencies should assess statutory requirements; where these requirements designate criteria for regulatory decision-making, they must take precedence over any requirements established by the administration.[13]

   c. As agencies consider statutory standards or cost-effective approaches to rulemakings, they must analyze distributive impacts of such approaches and prioritize those approaches that have beneficial effect on equity and those the regulation is intended to benefit.

   d. Incentives to regulatory entities that include compliance flexibility should only be considered upon certifying that workers and the public are protected to the maximum extent permitted by law.

   e. Agencies must have plans for strong, consistent and predictable enforcement and compliance.

[13] See: https://www.politico.com/news/2020/10/02/trump-white-house-coronavirus-positive-425229ask)

Recommendations for Short-term Action (First 100 Days)

1. **Regulatory review executive orders.** The administration should issue a new executive order to update Executive Orders 13563 (issued Jan. 18, 2011) and 12866 (issued Sept. 30, 1993) that have guided regulatory review activities. The updated executive order should address more than the regulatory review process:

    a. Regulatory decisions should be timely and responsive to public need. It takes far too long to complete most rules. Timely action is a benefit to public and business interests. Government must actively assess public needs, identify where regulatory gaps exist, and act to address such gaps. Regulatory decisions should be based on the best available information, balanced with the need to act in a timely manner. Precautionary considerations are an appropriate basis for regulatory action. That is, regulators may appropriately err on the side of caution in assessing scientific and other uncertainties.

    b. The regulatory process must be transparent and improve public participation. Too many important regulatory decisions are made behind closed doors. Openness, from pre-rulemaking to publication, is essential to meaningful accountability. The Internet age affords new ways of fostering meaningful public participation.

    c. Regulatory decisions should be based on well informed, flexible decision making. The regulatory process under the Trump administration consists of unprecedented levels of suppressing, altering, and discrediting the information used to support regulatory decisions. There needs to be a premium on placing authority within regulatory agencies to decide what information is critical to effective regulations.

    d. Authority to make decisions about regulations should reflect the statutory delegation granted by Congress. Federal agencies are given the responsibility to implement legislation and have the substantive expertise necessary to develop effective standards. That expertise should be recognized and provide the foundation for sound regulatory decisions.

    e. A robust and equity-focused approach to analyzing costs and benefits should be adopted.[14]

    Whether or not the administration determines that it wishes to maintain cost-benefit analysis as a feature of its regulatory decision making, the new executive order should clarify:

[14] Cost-benefit analysis has been required by presidential executive orders, and OMB Circular A-4 (Regulatory Analysis) provides guidance to how agencies are to conduct such analysis. Those developing these recommendations had differing views on the utility of cost-benefit analysis, particularly for social regulations, and could not reach consensus on its use for regulatory decision-making.

a. Cost-benefit analyses must properly weight benefits and costs, and not overemphasize costs. No government document or public statement should reference the cost of regulation without raising the benefits derived from such regulation.

b. Cost-benefit analyses must take into account co-benefits (benefits from regulatory action distinct from the explicit objective of the action).

c. Cost-benefit analyses must include non-monetized considerations such as fairness, distributional equity, community protection, and redressing racial and other historic discriminatory actions.

d. Cost-benefit analyses should squarely address where costs and benefits are not precisely quantifiable, including the nature, scope and importance of such non-quantifiable costs and benefits.

e. Cost-benefit analyses should include an explicit statement about who benefits and who bears the costs.

f. Information and assumptions used in cost-benefit analysis should be transparent and allow for the analysis to be replicated. The analysis should include statements of uncertainty about the assumptions.

Recommendations for Legislative Action

1. **No judicially imposed cost-benefit analysis.**

   Congress should adopt legislation clarifying that agency decisions should be made based on criteria stated in their organic statutes and that judicial review should apply the same criteria. Judges should not impose cost-benefit standards where not required by statute.

Principle 12: Centralized review of regulatory action should be revamped to promote timely rulemaking to strengthen public protections.[15]

The president has an appropriate interest in ensuring that agencies proactively carry out his policy priorities and that agency actions are coordinated. The centralized review of regulatory action should be undertaken exclusively by the Office of Information and Regulatory Affairs and should be geared to affirmatively advancing the president's priorities. With due regard to ensuring that agency action is supported by evidence and defensible from legal challenge, OIRA must not impose needless delays and impediments to adopting strong public protections.

[15] Centralized regulatory review has been debated for at least 40 years. Those developing these recommendations had differing views on centralized regulatory review and did not have a consensus on the subject. Accordingly, the committee agreed to recommend changes to the current review process.

Recommendations for Short-term Action (First 100 Days)

1. **Executive Order: A New Role for OIRA.**

   The relationship between the Office of Information and Regulatory Affairs and regulatory agencies should be refashioned to be synergistic rather than oppositional. Regulatory decisions should presumptively come from the expert agencies, and the Office of Information and Regulatory Affairs should take care not to mandate one-size-fits-all approaches to promulgating rules. Together, OIRA and the agencies should ensure respect for statutory mandates and embrace the president's affirmative agenda to adopt a robust set of public protections—to address both immediate needs, such as responding to Covid-19, and long-term, systemic change, such as advancing racial justice.

   With this new approach, the new role of the Office of Information and Regulatory Affairs should:

   a. Hold agencies accountable for their priorities and regulatory actions and coordinate those actions among federal agencies. Taking this approach, the Office of Information and Regulatory Affairs should communicate to the agencies that the Unified Agenda is a serious planning tool that can be used to enhance policy goals and hold agencies accountable. The Agenda can become a tool for achieving policy consistency government-wide and spotting interagency policy conflicts before significant resources are spent on individual rules. A mechanism like the Regulatory Working Group may serve to resolve interagency conflicts, and the Office of Information and Regulatory Affairs could facilitate that dialog among agencies and clarify presidential priorities. The Office of Information and Regulatory Affairs should use "prompt letters" when an agency is falling behind timetables identified in the Agenda or failing to act nimbly in response to changed circumstances. The Office of Information and Regulatory Affairs should also help agencies utilize fully the range of regulatory authorities they have, and help them meet agency objectives through novel exercise of existing authority.

   b. Help identify regulatory gaps and inconsistencies with the president's policy priorities. When the president wishes an agency to act, particularly in addressing regulatory gaps, the Office of Information and Regulatory Affairs should communicate this message to the agency head through a "prompt letter." It should be the agency head's responsibility to implement the president's priorities. This should not be construed as a recommendation for the Office of Information and Regulatory Affairs to engage in approval or disapproval of agency regulatory plans.

   c. Help to achieve consistency in regulations in policy areas that cut across agencies, such as food safety. Having identified such a cross-cutting area through the Unified Agenda as one in which multiple agencies are taking action, the Office of Information and Regulatory Affairs should ensure that regulatory

outcomes are consistent with each other. This should not be construed as a recommendation for the Office of Information and Regulatory Affairs to review and approve all individual rules proposed but rather as a responsibility to coordinate regulatory activities before agencies have expended time and resources developing regulations that conflict with other agency actions.

d. Facilitate interagency comments on significant proposed and final rules. The interagency review process plays a critical role in ensuring rules benefit from the full range of expertise in the executive branch. However, this interagency comment process should not be an excuse for delaying regulatory decisions, especially if the Office of Information and Regulatory Affairs has successfully coordinated agencies at the planning stage. Nor should the interagency comment process be an excuse for delaying regulations through de facto vetoes over the types and quality of the underlying information.

e. Help agencies address a range of other information resources management issues. The Office of Information and Regulatory Affairs was created by the Paperwork Reduction Act which has a statutory requirement to address information resources management needs of agencies, such as helping with the use of interactive technologies to improve agency dissemination practices as required under the Paperwork Reduction Act. These skills may also help agencies in finding new and better ways of engaging the public in rulemakings.

f. Expedite its review process. The new executive order should establish that OIRA review should emphasize final rules that meet the threshold of significance or are otherwise designated as benefitting from interagency review. Office of Information and Regulatory Affairs review should aim to be completed within 45 days.

Principle 13: Citizens should be empowered to participate to make regulations work, and undue influence of regulated entities in rulemakings should be ended.

Recommendations for Short-term Action (First 100 Days)

1. **Create the Office of the Public Ombudsman.**

   The Public Ombudsman would be charged with advancing the public interest in the rulemaking process. The Public Ombudsman would monitor rulemakings across the government to make sure that the public and public interest organizations were as involved in rulemakings as affected industries. The Public Ombudsman would be empowered to file their own comments, particularly on procedural matters and the failure to tailor rulemakings to promote public engagement or reflect the interests of those who are traditionally underrepresented. The Public Ombudsman would be charged with paying particular attention to the interests of communities of color and other traditionally

under-represented communities, in order to ensure their active involvement in rulemakings as well as represent their interests in rulemaking proceedings.

2. **End negotiated rulemaking.**

   Except as required by statute, adopt a policy to end negotiated rulemaking, which invites industry to negotiate the rules they must follow, empowers corporations to delay the rulemaking process and excludes the general public.

Recommendations for Legislative Action

1. **Authorize deadline lawsuits.**

   Environmental statutes such as the Clean Air Act authorize citizen suits for agency violations of the underlying statute. Congress should enact a general statutory provision that establishes a prospective legal claim, in the name of the government, for public interest organizations to sue agencies for failure to issue prescribed rules within one year or the statutory specified period.

2. **End the Small Business Regulatory Enforcement Fairness Act (SBREFA) review process.**

   Practical experience shows that this process does not aid small business, but in fact allows powerful trade groups to get a sneak peek at certain regulations and weaken or delay them before they are ever made public.

Principle 14: When rules are challenged, agency expertise should be given deference

Recommendations for Legislative Action

1. **Codify Chevron.**

   Congress should codify the precedent of judicial deference to agency expertise in decision-making established by the U.S. Supreme Court in Chevron v. NRDC. Under Chevron, federal courts follow a two-step process for reviewing an agency's interpretation of a statute. First, the court assesses whether a statute provides clearly stated Congressional intent about an issue. Second, if the statute is silent or ambiguous, courts are to defer to the agency's interpretation, so long as it is reasonable.

   Too often, regulatory entities are able to defeat in court carefully crafted agency protections, as judges rely on information from regulated interests or even their own knowledge over the more expert opinion of agencies. By contrast, Chevron and the doctrine of agency deference elevates agency expertise.

Principle 15: Regulatory enforcement and accountability for regulatory violations should be strengthened.

Recommendations for Short-term Action (First 100 Days)

1. **Bolster agency regulatory enforcement budgets:** In its first budget, the new administration should bolster each agency's regulatory enforcement budget by at least 50 percent and it should specify the dollar amount available for each agencies' regulatory enforcement division. Then the administration should work with Congress to secure the budgetary increases needed to make up for government-wide degradation of enforcement capacity.
2. **Government must do a better job of encouraging compliance with existing regulations and fairly enforcing them.** Agencies have too often been discouraged or prevented from using their compliance and enforcement tools to achieve effective compliance. A Presidential Memorandum should establish that regulatory enforcement is a priority, including to advance racial justice and equity considerations and to prevent climate catastrophe. In order to strengthen public protections and provide regulated communities with fair and predictable compliance approaches, agencies must be enabled to more effectively meet both current and new demands and work to improve regulatory compliance.
3. **Company disclosure of regulatory violations:** The Securities and Exchange Commission should adopt a rule requiring corporations to disclose publicly, on their websites, and in investor filings regulatory violations and fines paid to resolve those violations over the previous 10 years. These violations are of material interest to investors and the public generally.
4. **Corporate crime and wrongdoing database**: The Department of Justice should establish a publicly accessible and searchable database compiling crimes, regulatory violations and settlements entered into by corporations. This information is relevant for sentencing for future violations, procurement decisions, emerging trends in corporate wrongdoing that may require the attention of policy makers, and to enable the public to encourage corporate responsibility.

Recommendations for Legislative Action

1. **Criminalize corporate action that recklessly endangers the public:** Congress should pass the Hide No Harm Act to criminalize actions by corporations and their executives that recklessly endanger the public or conceal product defects or workplace hazards that imminently threaten American lives or serious harm.

2. **Citizen enforcement of regulatory protections:** Congress should adopt legislation that empowers individuals or organizations to bring enforcement actions, either as victims of wrongdoing or as private attorneys general, against corporations that are violating regulatory safeguards. Such private rights of action have proven workable and vital to

environmental protection and disability rights, to name two important examples. Where such private rights do not exist, corporations may ignore regulatory standards with little consequence.