



Regulatory Outlook, 2009

Revolution or Nudge?

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Challenges for Sure...

- Global and national economy
- Credit and banking
- Political cycle



Challenges for Sure...

- Global and national economy
- Credit and banking
- Political cycle

... but Opportunities for Success

- Many new faces
- Lots of new energy
- Some new thinking



A Road Map for Today

1. A historical baseline
2. A ringside view of the Obama administration
 - a) Personnel
 - b) Process
3. Regulatory policy priorities
4. Regulatory process changes
5. 'Nudge' -compatible advocacy tools

Start at the beginning...

● **I. HISTORICAL
BASELINE**



‘Faction’

- United States of America
- Competing branches: designed and intended to contain faction
 - Divided government is normal; united government is not
 - Constitutional design ensures that united governments are temporary
- Federalist No. 10

James Madison on “Faction”



“By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”

-- November 22, 1787

James Madison on “Faction”



“There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.”

James Madison on “Faction”



“It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”

Factions Amidst a ‘United Government’

- The Senate
- The Democratic ‘Blue Dog Coalition
- The Executive Branch
 - Agency vs. Agency
 - Agency vs. White House
- The Administration
 - Campaigning vs. governing
 - Legislating vs. executing
 - Administration vs. Congress



A new circus comes to town.

2. **A RINGSIDE VIEW OF
THE OBAMA
ADMINISTRATION**



Rules for Presidents

- Personnel is policy.
- Do not appoint anyone you can't fire.
- All agency appointees go native eventually.
- You can delegate authority but not responsibility.



a) Personnel who can't be fired

- Political powers
 - Hillary Clinton, Sec State
 - Robert Gates, Sec Def
- Friends & associates
 - Rahm Emanuel, WH Chief of Staff
 - Valerie Jarrett, WH Assistant to the President for Intergovernmental Affairs and Public Liaison
 - Cass Sunstein, OIRA Administrator



b) Process

- ‘Team of Rivals’ metaphor
- No rivals in foreign affairs or defense
 - NSC director Jim Jones: career military
 - DNI director Dennis Blair: career military
- New White House Policy ‘Czars’
 - Larry Summers [finance & economics]
 - Carol Browner [energy & environment]
 - Tom Daschle (!?!) [health care]

Centralized WH Control: Example: Energy policy



“Energy Secretary Steven Chu, who held a forum with reporters Thursday, said he is still learning about what the U.S. position on oil policy should be, as well as President Barack Obama's stance.” *Wall Street Journal*, 2/20/09



Bush

- Empowered VP
- Delegated decision-making to agencies
 - Nat' l security | 01-06
 - Foreign affairs | 07-08
- Centralized decision-making in WH
 - Everything else | 01-08
 - Nat' l security | 07-08

Obama

- 'Normal' VP
- Delegated decision-making to agencies
 - Nat' l security
 - Foreign affairs
- Very centralized decision-making in WH
 - Economy
 - Health care
 - Energy & environment
 - Others?

A continuation of the primary campaign.

3. REGULATORY POLICY PRIORITIES



National & Homeland Security

- National
 - Withdrawal from Iraq
 - Replacement of NATO in Afghanistan
 - Significant delegation to UN and other multilateral institutions
- Homeland
 - Immigration & E-Verify



Economic Recovery

- ‘Given lemons, make lemonade’
 - Transform energy supply and demand
 - Transform health care
 - Transform Federalism
 - Transform consumption
 - Transform investment
- International trade
- Fiscal and monetary polices



Health Care

- 100% of population covered by insurance
 - Third-party insurance if possible
 - Universal Medicare if not
 - A new ‘middle-class entitlement’
- Replace (weak) price signals with non-price allocation
 - Waiting times
 - Gatekeeping
 - Federal cost-effectiveness standards



Energy & Environment

- Alternative fuel subsidies
- Systematically reduced energy consumption
 - Energy efficiency standards if possible
 - European energy prices if necessary
- GHG mitigation, not climate change adaptation
 - Cap-and-trade
 - Carbon tax

The art of the 'nudge'.

4. REGULATORY PROCESS CHANGES



Centralized Regulatory Review

- Executive Orders
 - 12291 (Reagan 1981)
 - Supplemented by 12498 (Reagan 1985)
 - Replaced by 12866 (Clinton 1993)
 - Amended by 13258 (Bush 2002)
 - Amended by 13422 (Bush 2007)
- OMB
 - Office of Information and Regulatory Affairs
 - Paperwork Reduction Act



Executive Order 13497

- Revoked Bush Executive Orders
 - Restores VP' s role in conflict resolution
 - Removes authority to review 'guidance'
- Temporary, but future is uncertain
 - 100-day interagency review underway
 - Review led by expected new OIRA Administrator Cass Sunstein

Who Is Cass Sunstein? Why Should You Care?



- Obama colleague at U of Chicago Law School
- Prolific scholar
 - At least 33 books
 - 100? articles
- Strongly-held views on relevant issues
 - Benefit-cost analysis
 - Centralized regulatory review
 - Regulatory instruments

‘Cost-Benefit State’ (2001)

- There is no technically credible or democratically legitimate alternative to cost-benefit analysis
- Centralized regulatory oversight by OMB is both ‘legitimate’ and ‘appropriate’
 - ‘Legitimate’ means constitutional, legal
 - ‘Appropriate’ means necessary to achieve stated policy goals and objectives



‘Risk and Reason’ (2003)

- Experts are better than the public at estimating risk and formulating regulatory alternatives
- Cost-benefit analysis should guide regulatory decision-making
- CBA highlights tradeoffs
 - Cost per unit of benefit
 - Health-health
 - Health-wealth



‘Nudge’ (2007)

- ‘Humans’ are not ‘Econs’
- ‘Libertarian Paternalism’
 - ‘Libertarian’ : Preserve liberty, but respect Humans’ capacity for utter foolishness
 - ‘Paternalism’ : ‘Help people make the decisions they really would like to make based on their own preferences if they knew what experts know.’



‘Nudge’ (2007)

- ‘Choice Architecture’
 - iNcentives
 - Understand mappings
 - Defaults
 - Give feedback
 - Expect error
 - Structure complex choices



‘Nudge’ (2007)

- Applying ‘Nudge’ to regulation
 - Regulatory design
 - Regulatory impact analysis
 - Centralized regulatory review
- Applying ‘Nudge’ to issue advocacy
 - Opposing regulation per se will fail
 - Crafting ‘nudges’ may work
 - Requires thinking creatively
 - Real-world experience is very handy



5. ‘Nudge’ -compatible Advocacy Tools

- Paperwork Reduction Act 44 USC 3501
 - 1980; 1995 amendments
 - Balancing ‘practical utility’ and ‘burden’
 - Utilizing the law’s public protection provisions
- Information Quality Act of 2000
 - Utility, integrity and objectivity
 - Administrative error correction petition procedures
 - Systematic agency resistance



Questions?

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