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Presidential Transitions: A Primer on Rulemakings

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A smooth transition from the outgoing to incoming administration is a hallmark of democracy and something both parties strive to achieve. Among the myriad issues that must be addressed, one of the more important ones for both the incumbent Obama administration and that of President-Elect Donald J. Trump is how to deal with agency rulemakings.

In the current landscape of Congressional gridlock, agency rulemakings have become a powerful tool to create policy. During the campaign, President-Elect Trump did not mince words about reducing the impact of regulations and other administrative actions. He said, among other things that he will "issue a temporary moratorium on new agency regulations," "cancel immediately all illegal and overreaching executive orders," and put the "job-killing regulation industry out of business." Regardless of his ability to execute on these promises, it is clear that current regulations will come under scrutiny and the appetite for new, sweeping regulations will be diminished.

The customary process

President-Elect Trump's authority commences immediately upon taking the oath of office on January 20th. Like every modern President before him, he will seek to ensure that his authority is not impacted by pending rulemakings from the Obama Administration. Similarly, as the sitting Administration seeks to cement its policies, it will be looking for ways to finalize its more important rulemakings, presumably including those issued by the Department of Education as discussed in greater detail below.

While the Constitutional transfer of power takes place on January 20th, there are two earlier dates which historically are important to watch: November 20th and December 20th. Typically, agency rulemakings are classified into two categories, "significant" and "not significant."[1] Working back from January 20th, rulemakings that are significant usually require a 60-day notice and comment period which, to allow promulgation by Inauguration Day, would need to be published by November 20th. Those rules that are considered not significant usually have a 30-day notice and comment period which would end December 20th. These dates are not hard and fast requirements but have served as good historic guideposts for most federal agencies. As a result, it's prudent to watch for new proposed rules that come around those two dates.

A tool many incoming Administrations have used to control so-called "midnight rulemakings" has been postponement or moratoriums on new and unfinished regulations.[2] Moratoria, normally issued in the form of a memorandum from the White House Chief of Staff to incoming heads of executive agencies, have included a requirement that the departments and agencies postpone the effective dates of certain rules that were issued but not published as final rules, at the end of the previous President's term. Also, any proposed rules that have not been published in the Federal Register as final rules by the time the outgoing President leaves office can simply be withdrawn by a new Administration. However, once final rules have been published, they can only be replaced through a new rulemaking process.

The impact on key higher education rulemakings

Regulations issued by the Department of Education would generally be subject to the timeframes and moratoria discussed above. However, rulemakings that involve Title IV of the Higher Education Act of 1965, have a unique requirement to meet the deadlines of the "Master Calendar" prescribed by the Higher Education Act. In short, to align Title IV rulemakings, final regulations must be published in the Federal Register by November 1st to become effective July 1 of the following year. This means that the November and December dates are less critical as many significant rulemakings from the Department of Education will have been promulgated as final by November 1.

Borrower Defense to Repayment – the final Borrower Defense to Repayment (BD2R) rule was published in the Federal Register on November 1, 2016. However, as was made clear in the rule, several key procedural elements such as how students will apply for relief, how their claims will be adjudicated, and particularly how institutions will be able to defend against repayment claims, must await the issuance of another rule or set of procedures. Therefore, while BD2R cannot be undone without a subsequent rulemaking, if these key policies and procedures are not in place prior to January 20th, it will be up to the new Administration to fill in the blanks and determine how the rule would be implemented. That would not in itself necessarily push the effective date beyond July 1, 2017, but the Administration would certainly have ample time to consider changes, notably to those portions that do not directly relate to the granting of relief to student borrowers.

Gainful Employment – the final Gainful Employment (GE) rule was published in the Federal Register on October 31, 2014, and has been legally in effect for almost 18 months as the Department implements the rule in stages. Certain parts of the GE rule have been implemented, such as institutional reporting requirements and the first round of draft rates have been issued, but other elements are still in process.

The most critical aspect of the rule – the publication of final debt-to-earnings rates – is still in process, and the Department has announced its intent to publish those rates in January 2017 (which we have to presume means before January 20th). If the rates are published in official form before the change in Administration, we would expect them to have their prescribed consequences, including the requirement for institutions to issue warnings with respect to their failing programs. It is not clear if the new Administration can "un-do" the legal consequences of official rates, or declare those official rates non-effective, if they are published. At a minimum, the new Administration would have to be extremely well organized to take immediate steps toward that end and its legal authority to do so without a new rulemaking could be challenged.

Of course, if the current Administration is unable to issue the first set of official rates by January 20th, the new Administration can slow or even halt the final steps in the calculation process, delaying the publication date to allow time to revisit the rule itself. Given the policy debates about this rule and the severity of the GE sanctions, the certainly is a candidate for a new negotiated rulemaking with a new panel of federal and non-federal negotiators. If the incoming Department of Education appointees chose this path, the revised rule would likely be markedly different.

State Authorization – the proposed State Authorization rule has not been published in the Federal Register, though it is expected that it will be in 2017 with an effective date of July 1, 2018. However, if it is not published by January 20th, it will be up to the new Administration to determine whether to proceed with the rule, change it or not issue it at all. Unlike the BD2R, which is required to implement a statutory mandate, the proposed state authorization rule is more in the form of an interpretation and could never see the light of day in its present, or for that matter, any form.

Subregulatory policy – Subregulatory polices such as Dear Colleague Letters (DCL) and other Department of Education guidance do not expire when a new Administration assumes authority. However, once the transfer of authority occurs on January 20th, the new Administration can issue new guidance that supersedes the guidance currently in place. Moreover, the new Administration may simply choose not to enforce prior policy guidance with which it disagrees. However, reliance on published guidance does afford a "safe harbor" until the guidance is affirmatively rescinded or changed: an institution acting in reliance of published guidance (such as a DCL) would have considerable (but not absolute) protection from being found in violation of the underlying rule or statute.

Notes

1. Per Executive Order 12866, in order to be "significant" a regulation has to:
    a. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
    b. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
    c. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
    d. Raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order
2. See, e.g., memos from the Clinton Administration, G.W. Bush Administration and Obama Administration

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