

The State Of Play In 2015: Year Of The Regulator

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Even before the 2014 midterm elections put the Senate in Republican control, President Obama was frustrated at having his legislative agenda blockaded on everything from immigration reform to gun control. So he declared, “I’ve got a pen ... and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.”

Despite expected pledges to “work together” from both the Republican leadership and the president, congressional gridlock looks to only get worse. So 2015 promises to be a year of expanding on the theme of unilateral exercise of federal power by the executive branch. In fact, not just last year, but the last few years have seen an expansive exercise of federal power through the issuance of new regulations, the reinterpretation of existing ones, and the enforcement of both, as well as more novel regulatory approaches. The trend shows through in virtually every regulatory area, and it looks likely to continue through 2015 and beyond.



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The Obama administration is proud of this assertive stance, pointing to progress even in the face of what it calls a “do-nothing” Congress. By contrast, congressional Republicans — and some constitutional scholars — have accused the administration of regulatory overreaching. But one thing seems certain about this new wave of administrative activism: it spells new headaches for business.

More regulation means more compliance costs and challenges. More aggressive enforcement means harsher penalties and more intrusive sanctions for failure to comply. And more key decisions being made by the executive branch — rather than by Congress or the courts — means businesses have to be even more focused and strategic to make their views known and influence the outcomes.

With an executive branch that is increasingly willing to take action through regulation and enforcement power, businesses must be prepared to react differently.

This is not how government always operated in the past. The federal branch is grabbing all of the levers, every tool at its disposal, to achieve its policy objectives. Supporters of the administration’s policies may applaud, but for businesses, this new use of executive power requires a more sophisticated understanding of the new regulatory paradigms.

Counting the Cost

What might have been the president's most substantial policy achievement last year never got a hearing in Congress — it came instead through executive action. It was the U.S. Environmental Protection Agency's proposed rules to cut carbon pollution from power plants. This action, coupled with President Obama's overall aggressive stance on the environment, may have the biggest impact on business of any policy area. The U.S. Chamber of Commerce claims the new carbon emissions regulations alone will cost the economy an average of \$51 billion each year through 2030.

Even with this strong commitment to move the legislative ball forward, President Obama has issued fewer executive orders than his two most recent predecessors, according to the American Presidency Project at the University of California at Santa Barbara. But critics and admirers alike cite his willingness to make extensive use of interpretive memoranda and more creative administrative approaches to regulation that have made big impacts in areas including labor and employment, financial services, immigration, health care and consumer protection.

Some of these actions fly under the radar of the popular press. A typical example is the slew of "fair pay" orders and memoranda imposing new obligations on federal contractors issued last year. Though they received relatively little national attention, these actions will have a big impact on business: The U.S. Department of Labor estimates that 24,000 companies have federal contracts, employing about 28 million workers.

There is much debate about the potential cost of all these new regulations on business. But there is no doubt that companies must budget and plan for compliance.

Going it Alone

The president's orders and actions have been crafted "almost entirely behind closed doors," The New York Times noted in an analysis last August. White House officials held dozens of "listening sessions" in 2014 as they formulated policy in a variety of areas. While businesses and business groups were invited to some of these sessions, they were not public hearings, with full public debate and invitations for comment.

As the Times noted, "The go-it-alone approach has left the administration — which claims to be the most transparent in United States history — essentially making policy from the White House, replacing congressional hearings and floor debates with closed meetings for invited constituencies."

This approach has attracted criticism even from allies. George Washington University law professor Jonathan Turley — who has said his politics generally align with the president's — recently testified that Obama has continued President George W. Bush's practice of "issuing signing statements that 'interpreted' statutes in ways that effectively amended or negated provisions." But Obama has gone further, Turley says, by barring enforcement of rules by agencies (such as provisions of the Affordable Care Act) for political reasons. Such practices amount to "legislation by executive fiat," he said.

Testing Limits

Encouraged by an activist White House, federal agencies have also been testing the limits of their statutory authority. Like the president, agency leaders also see themselves as taking up a baton that Congress has dropped. For example, no major environmental statute has undergone a major reauthorization since the 1990s. In the meantime, new environmental challenges — greenhouse gases,

new findings about substance toxicity, and the like — have emerged. In some cases, there is broad agreement — among stakeholders, if not in Congress — that revisions are needed because the laws as currently written cannot be interpreted to address these newer concerns.

In the absence of clear congressional direction, agencies are finding new ways to regulate. But in doing so, they have at times been accused of collaborating with favored interest groups when setting their priorities. In a tactic known as “sue-and-settle,” an interest group sues an agency claiming that agency is not enforcing the law. As part of a legal settlement (developed behind closed doors), the agency makes promises, such as agreeing to write new regulations. While there may be public comments on the draft settlement, and will be on any resulting proposed rules, it may well be too little, too late: Those rules are more difficult to change through public comment. Sue-and-settle can provide interest groups a fast track to expand an agency’s power and reach, and to promulgate rules that they wanted — and that the agency may have wanted as well.

Sue-and-settle tactics are most frequently employed by environmental groups. (One of us is a former EPA official, and in our experience, these suits are overwhelmingly based on the EPA’s failure to take some action, allowing interest groups to influence the agency’s agenda). And the agency may bind itself to comply with court-ordered schedules, instead of other priorities.

Affected industry is not entirely powerless in the face of such tactics. Indeed, sue-and-settle tactics have been thwarted successfully in court on a number of occasions. And companies are free themselves to petition agencies to take specific actions or issue new interpretations.

The Enforcers

As the number and scope of administrative rules multiply, so do the penalties for failing to comply. If just measured in fines alone, these penalties are rising fast: more than \$13 billion in 2014, up from about \$7 billion in 2013, according to economist Brandon Garrett at the University of Virginia. (In 2008, the figure was closer to \$2 billion.) And, in the realm of consumer protection, for example, the Federal Trade Commission has been increasingly willing to go to court to seek monetary damages or consumer redress rather than settling for an injunction to “go and sin no more.”

But enforcement actions are increasingly resulting in much more than a fine and an order to stop the violations. Prosecutors are demanding deep and very specific changes in management and embedding monitors in the company to ensure that they occur. Settlements are requiring corporate policy changes, staff training, remedial community training programs, and more.

In a typical example, in the aftermath of a tragic 2010 mining accident, the mine operator paid \$209 million. In addition to fines and restitution to victims, the 2011 settlement included \$80 million for mine safety improvements in all the company’s mines and \$48 million for a “mine health and safety research trust,” as well as a commitment to self-report violations and to apprise regulators of progress toward further safety improvements.

In addition, companies facing even the threat of enforcement actions have allowed regulators to influence their policies in new ways. For example, after a safety crisis, General Motors signed an accord with the National Highway Traffic Safety Administration in which it agreed to “implement training policies that ‘expressly disavow statements diluting the safety message’ in internal communications,” according to an article in Law360. The move is part of a growing trend of agencies trying to “shake up the company culture they attribute the safety crisis to,” the article reports.

In another case, the Consumer Product Safety Commission is calling on retailers to pull products from their shelves when the agency cannot convince manufacturers to recall them. Retailers are increasingly willing to go along, now that the commission's civil penalty cap has increased from \$1.8 million to \$15 million.

Regulators are also becoming more aggressive in their efforts to root out alleged misdeeds, largely through efforts to recruit insiders. For example, in 2013 the government enhanced whistleblower protections for employees of government contractors and extended the protections to subcontractors. When coupled with significant awards afforded to whistleblowers, the protections amount to deputizing the workers of America to blow the whistle on their employers and act as a partner in enforcement.

Our Forecast

The recent regulatory expansionism will continue through 2015 — and likely beyond — thanks to a striking confluence of events.

First, the third year of a president's term tends to be the most aggressive in terms of policymaking. Midterm elections are over, political appointees are firmly in place, and the administration is acting with its legacy in mind. By contrast, in 2016, the administration may face pressure to pull back on rulemaking for the sake of pre-election politics or transitional smoothing.

Second, the 2013 decision by Democrats to strip Republicans' ability to filibuster the president's nominees has resulted, for the first time in a decade, in a federal appeals bench — including the all-important D.C. Circuit — in which judges appointed by Democrats considerably outnumber Republicans. These judges are generally thought to be more receptive to the regulators in legal challenges to the administration's authority.

Third, a U.S. Supreme Court ruling in 2013, *City of Arlington v. FCC*, appears to give agencies wide discretion in deciding the scope of their own statutory authority. *Arlington* continues a tendency running back 30 years for courts to defer to agencies when there is ambiguity about whether the agency is allowed to act under its authority established by Congress. As a result, unless Congress clearly mandates otherwise, agencies can expand their authority as far as they see fit. And since their statutory authority tends to be quite broadly stated, agencies have a lot of leeway.

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The most immediate impact of all the federal activism on industry is an increase in compliance costs. The American Action Forum, a think tank, says that in the first nine months of 2014 alone, the federal government had proposed or finalized rules imposing \$150 billion in compliance costs and had imposed 30 million hours in paperwork on American companies. That's up from \$112 billion for all of 2013. (The largest reported costs — by far — are imposed by rules related to energy and the environment. Food and drugs are a distant third.)

The administration's approach to governing has created a cloud of uncertainty for companies trying to plan and budget for compliance. While agencies are being given leeway in drafting and interpreting rules, many of the new rules will almost certainly face legal challenges based on accusations that they have overstepped their statutory authority. Companies are left with questions like: Which rules will survive legal challenges? How will the agencies interpret the rules? And how might their interpretations

change, with or without rulemaking?

The picture gets even cloudier when politics are thrown into the mix. What will happen to this wave of regulation, for example, if Republicans take the presidency in 2016? Will they suspend or repeal regulations, and which ones? Will the next president — from whichever party — voluntarily relinquish power the Obama administration claimed, or will he or she retain or even grow it?

Another concern for companies: the impact of gridlock and federal government-bashing on the federal workforce. Already, about a third of federal workers are eligible for retirement. The exodus may well accelerate as employee morale plummets in the face of constant congressional investigations, criticism and budget cuts. Highly regulated companies may have hundreds or even thousands of weekly contacts with their federal regulators, usually for routine operating, permitting and approval issues. As experienced personnel depart, these activities will face delays. To take just one example, the timing for a major capital improvement could be off by months if an experienced agency permit writer retires and isn't replaced, or is replaced by someone unfamiliar with the company's operations, resulting in delays and possible cost overruns. In this respect, the gridlock between Congress and the president has a more granular impact on a company than Washington's policy debates.

Strategies for 2015

For businesses hoping to have an influence on the course of regulation, much of the action has moved from Congress to the executive branch. It is more important than ever to build and sustain relationships with relevant agencies. That means interacting with them regularly and educating them about issues important to your industry. The goal is to build your reputation and their comfort level well before any sensitive issues come up, such as potential enforcement actions or proposed regulations you want to fight.

Companies struggling with compliance do have a range of options. As they devise their compliance strategy, companies may want to seek guidance from agencies on how their rules might apply to them; seek waivers, exceptions and mitigating guidelines; and develop sound policy reasons to have the agency construe its rules in a manner that achieves the regulatory goal but is less onerous for a company.

Congress still has a role to play in affecting an industry's regulatory burden. For one, a legislator can write letters or hold hearings in an attempt to influence agencies on important issues. Congress can constrain agency actions by appropriations riders or budgetary restrictions. And legislative wins are still possible for companies that can find issues that can be trumpeted by both sides of the aisle as job creators. As in the case of agency leaders, it's important for companies to establish ongoing relationships with relevant members of Congress, rather than reaching out only when they need something from them.

In short, 2015 looks to be a banner year for regulation and enforcement. Businesses will need to work harder than ever to prepare for new executive actions, comply with existing ones, and make their views known.

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