Legal and Analytical Constraints on the Regulators

Jeffrey S. Lubbers
Agricultural Outlook Forum
Presentation

Jeffrey S. Lubbers

February 22, 2008
Procedural Impediments to Regulation—The Ossification of the Rulemaking Process
First Congress: Act of September 29, 1789:

Pensions should be paid “to the invalids who were wounded and disabled during the late war . . . under such regulations as the President of the United States may direct.”
“The extent to which the administrative law of the national government is to be found in executive regulations is not ordinarily appreciated.”

“[The] procedure of administrative rule making is one of the greatest inventions of modern government.”

“Over the past few decades, Congress, the courts, and the executive branch have layered so many significant procedural requirements on notice and comment rulemaking that most academics and policymakers agree that the process has become ossified and inefficient.”

Notice-and-Comment Rulemaking Comes to China

By Jeffrey S. Lubbers

A recent newspaper article contained the following quote that everyone in the ABA Administrative Law Section could readily agree with:

"The work of law-making must be professional and precise. But to invite public suggestions into the law-making process shows an open, scientific and democratic attitude. Thus the process to solicit public opinion is a process of education, a process to foster and improve democratic awareness, as well as a process to promote democratic and legal construction."

This was not an American or EU commentary; it was an excerpt from the Chinese Worker's Daily. The quote was carried in the April 18, 2006 edition of the English-language China Daily in an article that workshop on U.S.-style rulemaking in 2003 and now had the opportunity to see just how far things had come.

The focal point of our trip was the City of Guangzhou (population around 10 million), which had just completed its first venture into notice-and-comment rulemaking, with the advice and counsel of the Yale advisers. The Director of the Guangzhou Office of Legislative Affairs (OLA), Chen Licheng, pronounced it a big success—so much so that the city had immediately thereafter enacted an ordinance (the "Measures on Public Participation in Formulating Rules") mandating that, starting in 2007, all future municipal rules must be issued according to a sophisticated and open system of public participation.

Summary of all of the inputs with an OLA response to the comments was posted on the OLA website on February 9, 2006.

To give one example, a customer of a meat and vegetable market, Mr. Huang, commented that in such markets the public scales are often not open on holidays and weekends and sellers change their scales and hurt consumers. He suggested that management of scales be standardized and that such manipulations be punishable by fines. The OLA's response indicated that this kind of situation will be dealt with in the new regulation.

OLA then formulated a discussion draft text and announced a second round of notice and comment, this time on the full draft text, with a 35-day comment...
Federal Register Pages 1985-2006

[Source: Competitive Enterprise Institute, “Ten Thousand Commandments” 27 (2006)]

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### Rules and Final Rules—1976-2004

[Source: Competitive Enterprise Institute, “Ten Thousand Commandments” 28 (2006)]

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Statutory Requirements
Formal Rulemaking

Where statute requires rulemaking to be done after an opportunity for a hearing on the record.

Rare, and generally undesirable—Still required in some FDA rulemaking.
Hybrid Rulemaking

Congress requires additional statutory requirements in specific statutes, e.g., OSHA, Clean Air Act, FTC Act.
Environmental Impact Statements

National Environmental Policy Act (1970)

NEPA requires preparation of “Environmental Impact Statements” for actions affecting the human environment.
Government–Wide Laws Affecting Rulemaking
Paperwork Reduction Act (1980)

Requires all agencies to:

- Analyze information collection burdens not only in forms, questionnaires, etc., but also in rules with reporting requirements.
- Provide additional opportunity for notice and comment
- Obtain OMB approval
Regulatory Flexibility Act (1980)
Requires all agencies to:

- Consider impacts on small entities (businesses and communities)

- If rule has a significant economic impact on a substantial number, agency must prepare a special analysis at proposed and final rule stage.

- Judicial review added in 1996 amendment.
Unfunded Mandates Reform Act (1995)

Requires agencies to assess economic impact of rules on state, local and tribal governments—and on private sector.
Congressional Review Act
(1996)

- Requires submission of final rules to Congress—major rules’ effectiveness delayed 60 days
- Provides for expedited legislative process
- Congress can only disapprove; it cannot change
- Requires Presidential agreement (or veto override)
- Because of cumbersome process, only one rule has been disapproved—in 2001)
Information Quality Act (2000)

- The IQA requires every agency, to issue guidelines, with OMB oversight, to:
  - ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency;
  - establish administrative mechanisms allowing affected persons to seek and obtain correction of such information;
  - post such requests and their responses on the agency websites.

- OMB has taken the position that the IQA applies to information that an agency cites in its notice of proposed rulemaking because the agency is thereby endorsing the reliability of that information.
Presidential Requirements Affecting Rulemaking
Issued by President Clinton, continued by President Bush. It requires

- OMB review of significant regulations
- Cost-benefit assessments of “economically significant” regulations
- Submission and publication of agencies’ annual regulatory plan and semi-annual Agenda
- Periodic Review of existing regulations
Modified by E.O. 13,422 (Jan. 23, 2007):

- OIRA review of “significant” guidance
- Agencies must now identify specific market failure
- Reg. Policy Officer must be Pres. Appointee—no longer reports to agency head
  - Reg. Policy Officer must approve Reg. Plan
  - No rulemaking may commence w/o being on the Plan
  - Aggregate costs and benefits for all rules must be included in the Reg. Plan
- “Formal” (on the record”) rulemaking to be considered for “complex determinations”
Recent study of EPA Appointees Concerning White House Review of EPA Rules
Interviewed 30 former EPA Appointees from Bush I and Clinton Administrations

- **Question:** The White House sought changes that would make a regulation more protective of human health and the environment

  - Never true: 17.9%
  - Rarely true: 53.6%
  - Sometimes true: 21.4%
  - Often true: 3.6%
  - Always true: 0.0%
  - Other: 3.6%

- **Question:** “The White House sought changes that would make a regulation less burdensome for regulated entities”

  - Never true: 0.0%
  - Rarely true: 0.0%
  - Sometimes true: 35.7%
  - Often true: 60.7%
  - Always true: 3.6%
  - Other: 0.0%

- **Question:** As between the White House and EPA, which was more likely to be captured by an interest group?

  - (1) White House: 60.7%
  - (2) EPA: 17.9%
  - (3) Other: 21.4%
Impact Statements Required by Other Executive Orders

- **Federalism**: Requires agencies to consult with state and local governments and consider impacts of rulemakings on them.
- **Indian Tribal Governments**: Requires agencies to consult with Indian Tribes and consider impacts of rulemakings on them.
- **Civil Justice Reform**: Requires agencies to comply with requirements to improve rulemaking drafting to reduce needless litigation.
- **Governmental Actions Interfering with Property Rights**: Avoid improper “takings” of private property.
- **Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**
- **Protection of Children from Envt’l Health & Safety Risks**
- **Implementation of the North American Free Trade Agreement**: Requires agencies to provide a 75-day comment period for any proposed technical regulation.
- **Regs. affecting Energy Supply, Distribution or Use**
Other Presidential Requirements

- Presidential Memorandum on Plain Language (1998)
- OMB Peer Review Bulletin (2004): Requires all agencies to conduct a peer review of “scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government.” Applies to rulemaking—peer review reports normally must be made available to potential commenters in the rulemaking.
Principles for Risk Assessment (updated 9/2007)

1. Agencies should employ the best reasonably obtainable scientific information to assess risks to health, safety, and the environment.

2. Characterizations of risks and of changes in the nature or magnitude of risks should be both qualitative and quantitative, consistent with available data. The characterizations should be broad enough to inform the range of policies to reduce risks.

3. Judgments used in developing a risk assessment, such as assumptions, defaults, and uncertainties, should be stated explicitly. The rationale for these judgments and their influence on the risk assessment should be articulated.

4. Risk assessments should encompass all appropriate hazards (e.g., acute and chronic risks, including cancer and non-cancer risks, to human health and the environment). In addition to considering the full population at risk, attention should be directed to subpopulations that may be particularly susceptible to such risks and/or may be more highly exposed.

5. Peer review of risk assessments can ensure that the highest professional standards are maintained. Therefore, agencies should develop policies to maximize its use.

6. Agencies should strive to adopt consistent approaches to evaluating the risks posed by hazardous agents or events.
One way out for agencies: Issue more “guidance”—exempt from notice-and-comment requirements?
“Guidance”

- Guidance is desirable, but can be abused.
  - Can fit within “policy statement” exemption from N&C; but to do so, must be non-binding.
    - Provides for standardized drafting elements, public access, and N&C for “significant” guidance.
    - Provides for OMB review of “significant” guidance.
“When spiderwebs unite, they can tie up a lion.”

Ethiopian proverb
Another way out? Use of the Internet to Enhance Public Participation and Transparency?
“The Electronic Revolution in Rulemaking”

Beth Simone Noveck, 53
“The Internet Still Might (but Probably Won’t) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking”

Early Adopter of E-Rulemaking

But...Emerging Problem: Information Overload?

Notice +
Object Lesson: Volume of E-mails to Congress is Skyrocketing

- According to Washington Post:
  - 2004—Congress received 200 million e-mails and postal letters
  - 2006—Congress received 318 million e-mails

- Response: Erect barriers
Can agencies develop good sorting techniques?
E-Rulemaking--Emerging Issues

Access to Information Issues — Ideally, what information should be available electronically?
Text of the proposed and final rules, public comments, preambles, ex parte communications, videotaped or audio taped public hearings, OMB review documents, relevant impact statements, related studies, relevant court proceedings, etc., etc.
“Drilling Down”—Studies and analyses that are in the docket, or public comments, and links to secondary studies and analyses referenced in the primary studies.
Special issues concerning electronic public comments:
- Need to scan & docket written (paper) comments
- How should exhibits, forms, photographs, etc. be dealt with?

Legal Issues---
- Archiving issues. Do (redundant) paper copies need to be kept? [ditto ditto ditto ditto ditto]
- Obscene or indecent speech issues [?&%^*^%^$]
- Copyright concerns ©
- Digital signatures [10101010101]
- Security issues
- Privacy issues
- Mandating e-comments
Will E-Rulemaking lead to:

• Greater Politicization?
• Greater White House influence?
Another suggestion: Negotiated Rulemaking
APHIS Negotiated Rulemakings

- Varroa Mite (1988)
- Scrapie (1990)

Mixed success—negotiated rule proposed and issued, but was the problem solved?
Can E-Rulemaking allow interactive “chatrooms”—or interactive negotiated rulemakings? Can they work?
For a lot more......

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