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OPAQUE 'N' FLAKE

TODAY: Clouds, flurries, sun
by afternoon, 32-37

TOMORROW: Morning sun, breezy,
then clouding up, 37

HIGH TIDE: 7:37 a.m., 8:14 p.m.
FULL REPORT: PAGE B8

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Stopping the last-minute regulatory deluge

AS THE presidential transition is beginning in earnest, most folks have fixed their eyes on the nominees, examining their experience, background, and philosophy. Few pay much attention to the departing Clinton appointees, but that's where the real action is unfolding.

Senior officials of any moribund administration tend to do two things — they spread their resumes far and wide and they pump out regulations with abandon. We should be deeply concerned about the implications of the latter — their efforts to flood us with new regulations. The incoming administration should be assessing the legal options available to avoid being saddled with a slew of regulations hastily concocted to beat the deadline.

President Clinton's last-minute regulatory zeal is unparalleled — 16,000 printed pages of proposed regulations and notices in the six weeks preceding Christmas. He's on the verge of eclipsing President Carter's record. In the past few weeks, his administration has issued a 1,550-page patient privacy regulation that could adversely af-

fect health care, as well as a half dozen environmental regulations, some of which will increase consumer prices and jeopardize jobs.

The rush to make regulatory changes is not limited to this administration or to Democrats. The ability of a newly issued regulation to withstand rescission by the new administration is a function of timing and process — some legacy rules can be delayed, others can be modified, but few can be instantly rescinded. The Administrative Procedure Act prescribes how rules are to be issued or rescinded. In most cases, an agency cannot issue or rescind a rule unless it first publishes its proposal in the Federal Register for public comment. A significant portion of any final rule is devoted to discussing why the rule is reasonable in light of public comments that the agency received in response to the proposed rule.

This is so because the agency must show that its action is not arbitrary or capricious. For example, the 1,550-page privacy rule on display last week devotes nearly 1,400 pages to a discussion of

public comments and an explanation of the new rule; the last 150 pages contain the actual rule.

New administrations have to learn that the APA imposes significant constraints on their ability to act quickly and decisively to rescind a previous administration's last-minute rule-making. Twenty years ago, after President Reagan assumed office, the issue arose whether a rule could be rescinded with minimal fanfare. The new secretary of transportation sought to rescind the Carter administration's automobile passive restraint (airbags) rule. Before doing so, he delayed its effective date, solicited comments, and after reviewing them, ordered the rule rescinded. However, many believed that he failed to provide a coherent reason to support the rescission. The Supreme Court, in *Motor Vehicle Manufacturers Association v. State Farm Mutual*, agreed and held that rescinding a rule is no different from issuing a new rule.

The rescission must be based on documented reasons. In short, the wholesale rescission of newly

issued rules is not likely to withstand judicial scrutiny.

What options are available to a new administration? In administrative law, timing is everything. There are five potentially significant times in the birth of a new regulation — the date that the regulation is signed by the head of the agency, the date it is received by the Office of the Federal Register, the date it is put on public display at the Federal Register, the date it is published in the Federal Register, and the date that it goes into operation.

The location of the rule on the regulatory assembly line has important ramifications. For example, on Jan. 19, 1993, the Bush administration, on its last full day, sent to the Federal Register a signed final rule affecting natural resources. The Clinton administration withdrew the rule two days later, before it had been either put on display or published. Industry groups challenged the action, arguing that once a rule is signed and sent to the Office of Federal Register, it cannot be rescinded without going through

notice-and-comment rule-making. The Court of Appeals in Washington disagreed, holding that an agency can withdraw documents during the brief processing time before the document is made available for public inspection.

In short, once a rule goes on public display, it cannot be withdrawn without going through notice-and-comment rulemaking.

Can a new administration endlessly extend the effective date of a new rule? Most rules go into effect 30 or 60 days after they are published in the Federal Register. As a result, virtually all of the Clinton administration's regulatory deluge will not go into effect until after George W. Bush is sworn in. However, the courts have consistently held that a new administration cannot indefinitely postpone the effective dates of rules. Such a tactic has the same practical effect as rescinding a rule.

What, then, can the new administration do to stem the regulatory tide? Soon after taking office, Reagan issued a memorandum to his Cabinet directing them to postpone for 60 days the effective date of all final rules that had not gone into effect. The 60-day postponement was designed to give the new administra-

tion an opportunity to review the Carter administration's midnight rules to ensure compliance with its new cost-benefit requirements. The Office of Legal Counsel issued an opinion that the president's action was authorized by the Constitution and, by implication, any statute that sought to curtail his authority to issue such an order might well be inconsistent with the "take care clause" in the Constitution.

Review of all last-minute rules is especially important from a good government perspective. Rules issued near transition are normally hastily written, tend to be rife with errors, and some cases, may be constitutionally infirm. For example, various portions of the recent patient privacy rule are likely unconstitutional. In such a setting, a president has an obligation to refuse to enforce unconstitutional laws. We hope that Bush follows the path of Reagan by imposing a moratorium on all midnight regulations. Complex issues warrant careful attention. A rush to regulate benefits no one except the lawyers.

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