

To Help the New Administration Help Your Industry, You Need an Agency Strategy

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In this article, the author explains that seeking to take advantage of upcoming regulatory reforms requires creativity, domain expertise, and legal acumen in crafting policy solutions, especially ones that go beyond the typical administration-to-administration policy shifts.

The Trump administration brings what may be an unprecedented opportunity to ease regulatory burdens. While much attention has focused on the new Department of Government Efficiency, or DOGE, headed up by Elon Musk, the real action in the early months will be in the agencies themselves. The Trump transition effort issued a barrage of “day one” orders that ultimately have to be executed by the agencies, and those will be followed by a stream of agency actions to reverse the policy decisions of the Biden administration and carry out the new administration’s agenda. Central planks of that agenda are deregulation, reducing the burden of government and empowering domestic business. This is a massive opportunity to improve the business environment for practically every industry.

AN AGENCY STRATEGY

To take full advantage of that opportunity, you need an agency strategy. The key ele-

ments are identifying prospects for reform that further the new administration’s priorities and mapping out how to get from here to there - in other words, what to do and how to do it. Getting those things right is essential.

The “what” involves questions of policy and law. Agency nominees and prospective nominees are looking for high-impact reforms that can be carried out through administrative action - that is, without the need for legislation. In previous changeovers, new agency leaders often concerned themselves with relatively incremental shifts, such as reversing some of the recent actions of their predecessors. This time around, they’re thinking bigger. That includes reconsidering long-standing regulatory requirements or interpretations that don’t fit current needs or that impose disproportionate costs. It also includes cleaning the slate of regulations and guidance that may exceed agency power.

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On that last point, the Supreme Court's recent *Loper Bright* decision, which eliminated most deference agencies receive for their statutory interpretations, i.e., *Chevron* deference, may aid the new administration's efforts. To be sure, that decision cuts down on agency interpretative power and so may impair some deregulatory efforts. But it also casts doubt on a potentially large swath of existing regulations that rely on aggressive interpretations of agency authority. For at least the time being, *Loper Bright* will do more to facilitate than hinder regulatory reform.

With agency heads thinking big, small-ball pitches may fall by the wayside. But for many regulatory domains, there is no list of ready-to-go big-picture reforms, because big changes long seemed beyond the realm of political possibility.

Identifying new prospects, especially big ones, is not easy. The place to start is with the statutory law, bringing to bear all the standard tools of statutory interpretation. This sort of statutory work is best done by subject matter experts working in collaboration with generalists such as appellate attorneys who excel with interpretative issues. The experts know the industry and what reforms will pay off. What the appellate team brings to the table is the ability to give statutes a rigorous reading in the same way that judges do, without the preconceptions and parochialism that can color the views of those in the field and sometimes cause them to overlook opportunities. The experts tend to know how the law in their field works today, not how it could work tomorrow. The difference between the two is often significant, with so many major statutes passed in the years before the courts took their textualist turn.

ACHIEVING POLICY TARGETS

A policy target is not enough on its own. The agency also needs to know how to achieve it. That is where administrative law wizardry comes into play. Discussions about regulatory reform often assume that the agency will undertake notice-and-comment rulemaking. But that is time-consuming, burdensome and hard to do in the early days when there may be limited capacity to carry out the new leadership's policies. It may also be unnecessary. Guidance can usually be revoked without much in the way of procedure. Interpretative rules, among other kinds, can be published without going through notice and comment. A proposal is more likely to win approval if the agency can do it quickly and easily. Can a reform that involves a legislative rule be reworked or pursued in some alternative way that dispenses with the need for notice and comment?

BIG IMPACTS

New agency heads are also looking to make a big impact fast. (In fact, that's among the considerations going into nominee selection.) Even where a reform might take time to get out the door, an agency might be able to wield its power to make a difference much sooner. A rule that hasn't gone into effect can be administratively stayed or have its compliance deadlines pushed back through an interim final rule. Rules subject to litigation can be judicially stayed. Even long-standing rules that an agency intends to rescind may be susceptible to the exercise of enforcement discretion in the meantime. Not everything can be done on day one, but a lot can be if the agency is well informed about how to exercise its power.

A whole separate set of considerations ap-

plies to rules (mostly from the Biden administration) that are subject to ongoing litigation. In addition to judicial stays, there may be prospects for settlements (or surrenders) that result in vacatur or at least remand and reconsideration. Sometimes litigation may help an agency achieve goals such as undoing prior actions with a minimum of fuss - even in circumstances where the agency might otherwise be unable to act.

Getting the “how” right can be the difference between a proposal that goes places and one that’s disregarded as infeasible or not worth the effort. It can also be the difference between an action that works and one that gets tied up in litigation or even rejected by a court. Yet agencies often lack the expertise in administrative law necessary to understand their options

and wield them effectively. Even many top law firms aren’t up to date in this area, which has moved quickly in recent years. A skilled practitioner ought to be able to reel off the potential pathways for any given objective along with the respective benefits and risks of each. Very few have that capability.

CONCLUSION

While lobbying is important, right now the new administration is looking to those in the trenches for ideas on how best to achieve its agenda of cutting regulatory burdens, strengthening domestic business and improving the functioning of government. To help the administration achieve those things, you need an agency strategy.