



March 8, 2017

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Re: Mandatory Legal Requirements for Killing Regulations

Gentlepeople:

Your agency was responsible for proposed (published for comment) or final rules that were in the regulatory pipeline when President Trump took office.¹ As scholars who have studied and written about legal requirements applicable to the regulatory process for several decades, we are writing today to urge you to avoid the violation of the Administrative Procedure Act (APA) that would occur if these rules simply disappeared without a full, factually-based explanation to the public.

Any notice of withdrawal must demonstrate why the problems that your agency identified when it proposed a rule are no longer harming the public interest based on facts discovered after the rulemaking was initiated and in light of the comments you have received. Either silence or a statement to the effect that “President Trump was elected and decided to abandon the rule because he is opposed to regulation in general” is likely to be overturned by the courts. But even if this were not the case, good government requires that agencies explain their actions and not act in a preemptory fashion.

The APA defines *agency action* to include “an agency rule ... or denial thereof.” *Id.* §551(13). The Supreme Court has clarified that an agency action is a *denial* when the agency has denied one of the

discretion actions listed in §551(13) and denial of a rule is one of those actions. *Norton v. Southern Wilderness Alliance*, 542 U.S. 55, 61-62 (2004). The action is *final* because your agency “has completed its decisionmaking process.” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The action “marks the ‘consummation’ of the agency’s decisionmaking process.”² *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

The APA authorizes judicial review of final agency action, 5 U.S.C. §§702, 704, and final action is unlawful if it is “arbitrary and capricious.” 5 U.S.C. §706(2)(A). According to long-standing Supreme Court precedent, an action is “arbitrary and capricious” when an agency fails to provide an explanation for its action or when the explanation that is provided fails to address the problems the proposed or final rules were written to address. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

There is a fundamental reason for the requirement that an agency must provide a reasoned explanation for ending a rulemaking after receiving public comments. Supreme Court precedent incorporates a long-standing requirement that regulatory agencies, while subject to political oversight, must nevertheless be able to justify actions light of their legislative mandates. *Massachusetts v. EPA*, 549 U.S. 497 (2007). This requirement is necessary because Congress has established a policy mandate for an agency with the expectation that it will implement that mandate relying on its expertise and experience, which is tested by whether the agency can articulate a reasonable justification for its actions.

Of course, presidents and their political appointees have considerable discretion in interpreting ambiguities in the law and setting priorities for a regulatory agenda in the absence of non-discretionary statutory mandates instructing them to write a rule by a date certain. Modern laws like the Affordable Care Act and Dodd Frank Wall Street Reform and Consumer Protection Act include mandates to promulgate specific rules by dates certain, depriving the Executive Branch of authority to abandon a rulemaking. But even in the absence of those instructions from Congress, having identified a problem and explained it at length in a Notice of Proposed Rulemaking, agencies and departments are not free to simply drop the proceeding because the president—or any other group, individual, or institution—is intent on reforming the regulatory system across-the-board.

As the Court stated in *State Farm*, “We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.” 463 U.S. 29 (1983). The Court added: “While the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter that standard of judicial review established by the law.” *Id.* at 42. Acknowledging that the scope of such review is “narrow” and that the court “is not to substitute its judgment for that of the agency,” the Court nevertheless insisted an agency must “examine the relevant *data* and articulate a satisfactory explanation.” That explanation must present a “rational” connection between available *facts* and the agency’s decision. *Id.* at 43 (emphasis added).

In *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), Justice Scalia's opinion reiterated the *State Farm* principle that a rational basis must be provided for agency action: "To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." 556 U.S. at 515. According to well-established administrative law, the requirement that an agency must provide a reasonable explanation includes the obligation to respond to all significant comments. RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE §7.4, at 442 (2002).

We welcome an opportunity to discuss why your agency is required to provide a reasoned explanation for the withdrawal of a rule after the comment period is completed. Please contact Rena Steinzor (rsteinzor@law.umaryland.edu) if you wish to set up such an appointment.

Sincerely,

Thomas O. McGarity

Board Member, Center for Progressive Reform
Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law
University of Texas School of Law

Sidney Shapiro

Vice President, Center for Progressive Reform
Frank U. Fletcher Chair in Administrative Law
Wake Forest University School of Law*

Rena Steinzor

Member Scholar, Center for Progressive Reform
Edward M. Robertson Professor of Law
University of Maryland Francis King Carey School of Law

¹ Our sources for this statement include: (1) rules listed as "withdrawn" on reginfo.gov (see <https://www.reginfo.gov/public/do/eoReviewSearch> (visited on Feb. 17, 2017)); (2) as reported by the *Washington Post*, the extension of effective dates for approximately 250 rules appear pursuant to the regulatory "freeze" ordered by White House Chief of Staff Reince Priebus on January 20, 2017 (see https://www.washingtonpost.com/politics/trump-undertakes-most-ambitious-regulatory-rollback-since-reagan/2017/02/12/0337b1f0-efb4-11e6-9662-6eedf1627882_story.html?utm_term=.74267b374003 (visited Feb. 17, 2017); and (3) a *Federal Register* Notice issued by the Environmental Protection Agency (EPA) pursuant to the Priebus Memo announcing that the effective date of 30 rules have been delayed (see <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-01822.pdf> (visited Feb 17, 2017)).

² When a court reviews an agency action that is not a final agency rule, it also considers whether the action is "one by which 'rights or obligations have been determined' or from which 'legal consequences flow.'" *Appalachian Power Co. v. EPA*, 208 F.3d 1015, ** (D.C. Cir. 2000). When an agency withdraws a rule, it denied to the beneficiaries of that rule the protections that the rule would be provided.