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# What To Know About Proposed Chemical Safety Reg Changes

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When most Americans think about the traditions of presidential transitions, they recall the oath of office, the prior president and family leaving the White House, the inaugural parade, the balls with their beautiful gowns and sharp tuxedos, and more. What they more than likely don't think about, much less even know about, are other happenings in the White House and in the agencies that run our government. While the peaceful transfer of power is a hallmark of the American political system, it is not without controversy, particularly where the outgoing president is a member of a different political party with remarkably different political views than the incoming commander in chief.

The less publicized traditions of passing the mantle of power include the White House chief of staff's memo directing review of actions taken in the waning days of the prior administration, or midnight rules, and a slew of executive orders laying out for the new political appointees and career staff at a host of agencies the new administration's priorities. These customs — now entrenched in the modern era — occurred in the transition from Presidents Jimmy Carter to Ronald Reagan, George H.W. Bush to Bill Clinton, Clinton to George W. Bush, and Bush to Barack Obama. The transition from Obama to President Donald Trump was no different. Then-Chief of Staff Reince Priebus issued the obligatory "Regulatory Freeze Pending Review" memorandum on inauguration day, and the president signed several executive orders on a range of environmental (and other) issues in rapid succession thereafter, promising improved infrastructure environmental permitting, rollback of wasteful regulations, and more. In other words, he was sending a message that change was coming — and soon.

All of this promised activity begs a key question: After the transition to a new administration, can an agency, like the U.S. Environmental Protection Agency change its mind and reverse a regulation issued just months or even days before the change in power? Some people say that to do so an agency needs to prove that its new rule is "better" than the old rule, but that is not the law. In *FCC v. Fox Television*, the U.S. Supreme Court said that the "agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."

As a practical matter, if an agency wants its revised regulations upheld when opponents challenge them

in court, it is well-advised to address the prior record. After all, the last administration created a record to support its action, likely including a range of studies and other information. Opponents of the new administration's policies will point to those documents in court, claiming the new guard is irrationally changing its position. Further, the agency needs to provide a basis for the policy choice it is making in the new rule, just as it would for a regulation being issued for the first time. Thus, effective, durable reform of existing regulations cannot simply be accomplished with a memorandum or even the president's executive orders. It requires hard work. The EPA's 100-plus page proposed regulation and public hearing scheduled for this week on the EPA's revisions of a core Obama administration midnight rule, the Risk Management Plan, or RMP, program regulatory revisions, demonstrate how this work is done.

A very costly and controversial regulation, the 2017 RMP rule revisions, issued just one week before Obama left the White House, impose vast new requirements for certain chemical, refining and general manufacturing facilities aimed at preventing catastrophic releases of chemicals and mitigating harms when releases do occur. You might ask, "What could be wrong with preventing accidents?" Well, that is what Congress intended by authorizing the RMP rules in the Clean Air Act Amendments of 1990 Section 112(r), to require plants that store certain quantities of hazardous substances to undertake, among other things, a prevention program for catastrophic releases. And the EPA already implemented an extensive RMP program. In June 1996, the EPA implemented the mandate by issuing the RMP regulations and companies across the country have been implementing those requirements for about 20 years. The Obama EPA acknowledged that the RMP regulations had already been highly successful and effective in preventing, and mitigating the impacts of, accidents. In the wake of the tragedy at a fertilizer plant in West Texas in 2013, however, Obama issued an executive order to "improve" chemical facility safety and security, effectively giving birth to the 2017 RMP revisions.

While the 1996 RMP rules included extensive accident prevention requirements like hazard assessments, identification of worst-case scenarios, compliance auditing, incident investigation, and preparedness evaluations, the 2017 RMP amendments went further, adding new elements to require companies to bring in a third-party auditor in case of a release or on regulator demand; enhanced investigations; a process to evaluate what the EPA called "safer technology alternatives"; that facilities work with state and local governments to conduct drills, for which no money would be provided to the governments; and disclosure of information in the spirit of transparency but that could expose security vulnerabilities at a plant to those who might seek to harm a facility and those living near it. Regulated facilities explained their concerns with the new provisions, focusing both on significant safety concerns from making security-sensitive information available to terrorists and on the agency's inability to quantify any benefits from these costly requirements. Indeed, a large portion of the costs of the rule, some $70 million, was attributed to the new safer technology analysis, which would not result in any risk reduction at all and is effectively used only on new processes and plants, not on existing ones. In addition to these, serious concerns were raised about the efficacy of the 2017 revisions, commenters pointed out that several of them would divert resources from beneficial activities and could actually render the program less effective than the 1996 regulation!

This is why the new administration followed the direction in the Priebus memo, delaying the effectiveness of the 2017 RMP revisions until 2019 to allow the EPA to re-evaluate what a final rule should contain. While litigation is pending over the validity of the "Delay Rule," the EPA is moving forward to complete its new regulation before the Delay Rule expires by its own terms.

So what has the EPA proposed to do? A lot.

First, the EPA proposes to repeal the most costly provision — the safer technology and alternatives analysis requirement. The gist of the requirement is that companies, as part of their hazard assessment, are newly required to evaluate alternative technologies for their processes. This built on an approach used in other countries, "IST" or inherently safer technology, the theory of which is that if you can find a way to cost-effectively eliminate or reduce a hazard, you should do that. The criticisms of the final rule included that the analysis itself was enormously costly and for existing plants, would be highly unlikely to result in any improvement in safety. Many commenters told the EPA that this approach is useful when designing a plant but after the fact, it adds no value (except perhaps as evidence for plaintiffs attorneys to support claims of design failure).

Second, the EPA proposes to repeal the third-party audit provisions. These 2017 provisions require a third-party audit when an accidental release occurs or upon request of the permitting agency when it finds noncompliance. The idea was that having third parties come in would help facilities and the EPA and give the public more confidence that any concerns were being surfaced and addressed. The problems pointed out by commenters included significantly increased audit frequency, without a corresponding benefit in safety performance and risk minimization. This is so because releases are already required to be investigated and most companies' investigations address both the incident itself and the elements of RMP implicated by the incident. The ability of regulators to demand a third-party audit based on any noncompliance (as compared with significant noncompliance) was criticized for potentially resulting in multiple audit demands and inappropriately delegating to private parties the government's duty to enforce its regulations. Finally, the exacting independence requirements were cited as leading to a shortage of available auditors, thereby undermining audit effectiveness and substantially increasing audit costs.

Third, the EPA proposes to delete new words it added to the existing compliance audit provisions. Companies have long been required to evaluate their compliance with the RMP rules every three years. In the 2017 regulations, the EPA inserted new language to require an evaluation for "each covered process." This approach ran counter to accepted and fundamental principles of auditing — an audit is typically a representative sampling so that a company can effectively evaluate how a program is working. They typically select a representative number of processes and audit compliance for key elements to evaluate the program. Critics stated that the 2017 RMP revisions would have undermined the ability to go in-depth on a particular process and actually would have undermined the quality of the compliance evaluations — essentially resulting in audits that are "a mile wide, but only an inch deep." Companies stated that they wanted to really dig in on those processes that would be indicative of the quality of their program, rather than conducting a surface-level audit, but if each covered process had to be audited for every element, the time and resources for an in-depth review would simply not be available given the need to complete the "each covered process" audit.

Fourth, the EPA proposes to delete the public disclosure provisions that could put information about facility vulnerabilities out onto the web or otherwise into the hands of terrorists. The EPA had intended to eliminate this problem when it issued the 2017 final rule, according to its response to comment document. The EPA instead moved the provision to another section of the rule, without realizing that the entities to which it would now provide information were uncontrolled in terms of who is selected and how the information is protected.

Fifth, the EPA proposes to make the provisions that direct facilities to coordinate with local responders more flexible. The biggest complaints about these provisions in the 2017 RMP revisions actually came

from state and local governments, who considered this an unfunded mandate that would not enhance safety and that it is already required under existing statutes such as the Community-Right-to-Know Act. An area with a concentration of chemical facilities could find itself doing drills every week to comply with the regulation, while they are already underfunded and lack resources. The EPA has proposed to cut those back but it is likely that commenters will seek further modifications of the regulation.

Importantly, the EPA also proposes to keep some of the changes that were made in 2017, like the notification and tabletop drills.

What's next? Stakeholders need to provide comments on the proposed rule — it is important to recognize that the agency may or may not adopt the proposed changes. The EPA seeks comment on numerous specific questions throughout the proposed rule and even suggests that several of the provisions could be retained and modified rather than deleted. Stakeholders will need to provide information that the EPA can evaluate to determine how its final rule should look. And, the EPA's deadline to accomplish all of this is February 2019 — that's when the 2017 RMP revisions spring back to life if the EPA has not finalized this action. Interested parties should not expect an extension of the comment period, which ends on July 30, 2018.

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