Mercatus Reports

The **Mercatus Center** at George Mason University is an education, research, and outreach organization that works with scholars, policy experts, and government officials to bridge academic theory and real-world practice. The center's Regulatory Studies Program works within the university setting to improve the state of knowledge and debate about regulations and their impact on society. More information about the center can be found on the Web at www.mercatus.org. For the latest federal regulatory developments, visit www.RegRadar.org.

Ozone Air Quality Standards

STATUS: Under Bush administration review.

On May 14, 1999, the United States Court of Appeals for the District of Columbia circuit remanded to the Environmental Protection Agency (EPA) its national ambient air quality standards for ozone. The court found that, in preparing the rule, EPA had illegally failed to consider such factors as the beneficial health effects of ozone in shielding the public from the "harmful effects of the sun's ultraviolet rays."

Before she left office last January, Clinton EPA Administrator Carol Browner signed a proposed response to the remand. It concluded that the effect of ground-level ozone on UV-B radiation "is too uncertain at this time" to warrant changing the ambient air standard of 0.08 parts per million (ppm).

The proposed response was not published in the *Federal Register* by the end of the Clinton presidency. That allows the Bush administration to review the response and adopt a different policy.

Many scientists and analysts from both inside and outside the federal government have argued that the science regarding the beneficial effects of ground-level ozone is no more uncertain than the science regarding the negative health effects of ozone. In fact, a 1997 Mercatus analysis of EPA's ozone standard showed that a standard of 0.08 parts per million is likely to make public health worse, not better.

Plant Pesticides Exemption

STATUS: Under Bush administration review.

Browner also signed a new EPA rule concerning the testing of gene-spliced crop and garden plants that have been modified for enhanced pest- or disease-resistance. The rule would treat genetically improved plants — such as corn, cotton, wheat, and marigolds — as if they were pesticides, and would subject them to EPA scrutiny.

Like the ozone air quality rule, the plant pesticide rule was not published in the *Federal Register* by the end of the Clinton presidency, which allows the Bush administration to review it and to adopt a different policy.

Many scientists have argued that genetic modification is more precise, circumscribed, and predictable than other, more traditional techniques of plant modification. Eleven major scientific societies representing more than 80,000 biologists and food professionals published a report warning that the EPA plant pesticide rule would discourage the development of new pest-resistant crops and would prolong and increase the use of chemical pesticides.

Confined Animal Feeding Operations

STATUS: Public comment requested.

On January 12, EPA proposed a new approach to regulating confined animal feeding operations (CAFOs). Comments on the proposal are due by July 30.

One of the concerns about CAFOs is their effect on water quality. Most point sources of water pollution (such as factories and sewage treatment plants) are already heavily regulated, and further tightening of those regulations likely would add substantial costs while providing little improvement in water quality. Hence, EPA is turning its attention to nonpoint sources such as CAFOs in an effort to further improve water quality.

However, the agency's proposed approach to regulating CAFOs is unlikely to yield cost-effective improvements in water quality. EPA's own analysis indicates the proposed regulations, if promulgated, would cost Americans at least $664 million more than they would provide in health and environmental benefits.

What is more, the agency's scientific data do not show CAFOs to be major contributors to water pollution nationwide. While EPA does report incidents of CAFO-produced water quality problems in certain watersheds, the incidents do not support the imposition of uniform nationwide regulation. Rather, they reveal that EPA could achieve greater environmental and public health benefits at significantly lower costs if it facilitated community-based approaches to improving the quality of impaired watersheds.

Snowmobile Use in National Parks

STATUS: Public comment requested on Rocky Mountain National Park rule.

In response to a petition from conservation groups, the National Park Service (NPS) announced in April 2000 that it would begin rulemaking to prohibit snowmobile use within units of the park system. The first snowmobile regulation, addressing Yellowstone National Park, was issued

in final form last January 22.

That was quickly followed by a proposed rule that would amend snowmobile route designations in Rocky Mountain National Park. The comment period on the Rocky Mountain rule closed on March 6, and a final rule is under development.

NPS justifies the snowmobile rules with Executive Orders 11644 and 11989, which state that recreational snowmobile use should be disallowed within a national park if it causes adverse impacts on park resources. However, NPS presents no data on adverse impacts to justify its prohibition.

The new rules seem driven by a winner-take-all conflict between snowmobile use and non-motorized recreational uses of parkland. That conflict arises despite NPS's statutory mandate to promote "the freest use of said park for recreation purposes by the public" and to minimize conflicts among competing users of public lands.

The Bush administration announced in April that it intends to allow the implementation of prohibitions on snowmobiles in Yellowstone and Grand Teton national parks. However, Interior and Justice Department lawyers are negotiating a settlement of a suit brought by the International Snowmobile Manufacturers Association and others that might allow the use of cleaner, quieter snowmobiles in those parks. The settlement may allow the Park Service to reduce conflicts between groups of users instead of having to declare one group to be superior to another.

SRO Rule-change Review

STATUS: Proposed rule under consideration.

On February 5, the Securities and Exchange Commission (SEC) proposed to modify its Rule 19(b), implemented under the Securities Exchange Act of 1934, that requires self-regulatory organizations (SROs) like the New York Stock Exchange to file proposed rule changes with the commission before implementing them. The 1934 requirement sometimes results in lengthy delays and unnecessary burdens on the SROs.

The current law does include a category of proposed rule changes whose regulatory review can be expedited. The proposed rule would expand that category to include trading rules (other than a trading rule that would make fundamental structural changes to the market, significantly affect the protection of investors or the public interest, or impose a significant burden on competition). The proposed changes may also permit the SROs to file proposed rule changes electronically.

The SEC recognizes that the structure of securities markets is changing rapidly and that it must expedite the SROs' ability to adapt their internal rules without extensive SEC oversight. However, less than one-fifth of all SRO rule changes (according to data supplied by the SEC) will be eligible for expedited treatment under the proposal. A Mercatus analysis concluded that the proposed rule changes will maintain the regulatory status quo with only slight modifications.

Retail Electricity Competition

STATUS: Public comment requested.

Concerned with the recent experiences of some states that restructured their electricity markets in order to promote competition, the Federal Trade Commission (FTC) has requested public comment that will assist it in assessing the advantages and disadvantages of different approaches to restructuring. The FTC wants to determine what future federal actions, if any, are desirable.

Experience in a variety of other deregulated industries shows that competition and deregulation tend to produce price reductions of between 10 and 25 percent, along with improvements in service quality. That suggests that retail competition in electricity could produce significant cost reductions and other benefits for consumers.

Among the benefits would be electricity prices that would more accurately signal resource scarcities. Retail competition would facilitate innovative price structures that reward customers for shifting consumption away from peak times. If regulation holds prices below levels that would exist in a competitive market (as is the case in California), then scarce resources are not channeled toward high-value uses. Free-market prices would encourage more effective use of electricity in the short run, and would provide incentives to increase capacity in the long run.

Electricity restructuring has the potential to create net benefits, but not all restructuring plans are equally effective at moving from monopoly to competition. In particular, California's restructuring plan has hampered the development of a competitive retail market, while Pennsylvania's restructuring plan has been the most successful at promoting competition and producing consumer savings.

Blacklisting

STATUS: December 2000 rule stayed.

The Federal Acquisition Regulatory Council (FAR Council), last December 20, issued a final rule on procurement policies for all federal contractors. The rule would modify the prior requirement that a federal contractor have a "satisfactory record of integrity and business ethics" by stipulating that any record of noncompliance with federal laws or regulations is grounds for being debarred, or "blacklisted," from federal contracts. More importantly, the procurement officer would be the one to make such blacklisting determinations.

The General Services Agency (GSA), EPA, NASA, and the Defense Acquisition Regulation Council opposed the rule, arguing that existing rules adequately cover business ethics concerns. Further, some legal scholars claimed that the rule would illegally grant authority to issue remedies for transgressions of federal regulations to GSA contracting officers when Congress has explicitly delegated that authority exclusively to other agencies, such as the National Labor

Relations Board.

On April 3, the FAR Council published an interim rule that placed a stay on enactment of the December rule, and published a proposed rule that would reverse it. The proposed rule would cause the rules of procurement to revert to the status quo prior to the December rule because "it is not clear to the FAR Council…that the rule provides contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation."

Trucker Hours of Service

STATUS: Finalization prohibited until Oct. 30.

Based on a concern that fatigued truck drivers cause fatal highway accidents, the federal Department of Transportation (DOT) proposed a regulation in May 2000 to limit the number of allowed driving hours per day, per week, and per time of day. The proposed regulation would also require electronic onboard recording devices to monitor compliance with the drive-time regulation.

In its October 2000 DOT appropriations, Congress directed DOT not to promulgate a final drive-time rule before October 30, 2001, although DOT could continue work on proposed revisions.

A Mercatus analysis of the proposed rule found that DOT did not present data to support its assertion that fatigue systematically contributes to highway fatalities, nor that its proposed solutions will address either driver fatigue or accidents. If implemented, the proposal could increase, rather than reduce, fatal accidents. The proposed time-of-day driving requirements may increase congestion, and the hours-per-week restrictions may lead to less, rather than more, rest or sleep, depending on how drivers spend their off-duty time.

The Mercatus analysis concluded that DOT's estimated benefits are inflated and its costs are underestimated. The benefits are almost exclusively from savings on paperwork used in log-keeping and firm accounting. DOT's fatality-reduction benefits are overstated and sensitive to key assumptions, according to the analysis. What is more, DOT's cost estimates ignore important costs, such as the cost of new trucks, and understate others, such as the cost of hiring new drivers. After adjusting for those flaws, Mercatus estimated that the proposal would impose net costs ranging from over $1 billion per year if paperwork benefits are included, to almost $5 billion per year when paperwork benefits are excluded.

What Happened After "Midnight"

The status of "midnight" regulations that were finalized in the last weeks of the Clinton administration (see *Regulation*, Vol. 24, No. 1):

AGENCY	REGULATION	FINAL DATE	STATUS
DOE	Appliance standards for central air conditioners and heat pumps	1/22/01	DOE has delayed the rule's effective date and announced plans to propose revised standards that reduce energy use by 20 percent, rather than 30 percent as set by the Clinton administration.
EPA	Arsenic in drinking water systems	1/22/01	EPA delayed the rule's effective date until February 2002, and has asked the National Academy of Sciences to examine health effects at different levels of arsenic exposure.
EPA	Heavy-duty truck emissions	1/18/01	The new standards, which will affect both truck design and diesel fuel formulation, are still scheduled to take effect in 2004. Petroleum refiners have filed suit over the deadlines in the rule.
DOE	Energy standards for water heaters	1/17/01	DOE denied a petition requesting the rule's reconsideration.
EPA	Revisions to the Clean Water Act definition of "Discharge of Dredged Material" ("Tulloch" rule)	1/17/01	After initially delaying the regulation's effective date, EPA announced that it would not change the revision.
EPA	Toxic release inventory: lead and lead compounds	1/17/01	EPA announced that it would let the rule stand. The National Federation of Independent Businesses (NFIB) Legal Foundation has filed a complaint against EPA, charging that the agency did not take the concerns of small business into account when issuing the regulation, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).
DOE	Clothes washers efficiency	1/12/01	Despite a petition requesting reconsideration of the rule, DOE announced it would let the standards stand.
USDA	Roadless areas	1/12/01	Despite a Bush administration decision not to retract the rule, U.S. District Judge Edward J. Lodge blocked the road building ban in May. Lodge ruled that the ban would cause "irreparable harm" to the timber industry and to state and local officials who are pushing for increased management of the forests to avert disastrous fires.
HHS	New regulations for the state Children's Health Insurance Program	1/11/01	HHS delayed the rule's effective date until June 11.
EPA	Identification of dangerous levels of lead-based paint hazards	1/5/01	The rule's effective date was not delayed.
HHS	Medical privacy	12/28/00	After re-opening the final rule for additional public comment, Bush HHS Secretary Tommy Thompson allowed it to go final on April 12 without significant change.
DOD GSA NASA	Blacklisting	12/20/00	On April 3, the Federal Acquisition Regulation Council issued an interim rule staying the Blacklisting rule, and proposed the repeal of the Blacklisting rule.
DOI	Regulations governing hard rock mining operations (43 CFR 3809)	11/21/00	The Bureau of Land Management has proposed to suspend the new rules to provide "an opportunity to review some of the new requirements in light of issues plaintiffs raise in four lawsuits challenging the rules and in light of issues the Governor of Nevada and others have raised since the final rules were published."
DOL	Ergonomics program	11/14/00	Congress issued a joint resolution to disapprove the rule under the Congressional Review Act. R

Does Medical Privacy Measure Up?

By Jay Cochran III
Mercatus Center

In 1999, the Department of Health and Human Services (HHS), using authority granted it under the 1996 Health Insurance Portability and Accountability Act, proposed rules to protect individually identifiable health information that is electronically stored or communicated. After a public comment period and some revision, HHS promulgated a final set of privacy regulations late last December.

Because of a delay in presenting the final rule to Congress, its effective date was pushed back to April 14. New HHS secretary Tommy Thompson used the delay to collect additional comment, and the department soon was inundated with letters on the final rule. Nevertheless, President Bush directed Thompson to adopt the rule changes and to implement them expeditiously. Bush hailed the implementation in a White House press release, saying, "For the first time, patients will have full access to their medical records and more control over how their information is used and disclosed."

REDUNDANT AND INCONSISTENT

Unfortunately, the president overstated the rule's benefits. A Mercatus Center analysis shows that many of the privacy protections are redundant and inconsistent; the rule neither confers full patient access for the "first time," nor gives patients "more control over how their information is used and disclosed."

The privacy regulations are redundant in the sense that they require such things as written patient consent for the release of information, even though such consent was routinely obtained before the rule's implementation. It is also redundant in that it mandates patients' ability to inspect, copy, or amend their medical records, even though most health care plans and providers allowed that practice prior to the rule.

What is more, the HHS rule overrides existing varieties of state protections for privacy of medical information, but then replicates some of what had already existed in many states. While a uniform national standard might appeal to some, such an approach could prove stifling to privacy because, at the state level, innovations can be devised and tested on small subsets of the population without subjecting the entire country to what could prove to be an ill-fitting set of requirements.

The HHS privacy rule is inconsistent in that it purports to protect patient privacy, but contains exceptions for internal marketing and fundraising, as well as for information collection by law enforcement officials and the secretary of HHS. The new rule provides, at best, only perfunctory respect for due process and Fourth Amendment protections.

HIGH COSTS AND NO NET BENEFITS

The rule mandates that health care plans and providers establish formal procedures for protecting patient privacy. The procedures include training personnel, updating computer systems to reflect the new policies, designating an internal privacy official, developing and adhering to a "minimum necessary" disclosure standard, and ensuring that third-party businesses with whom a plan or provider conducts business respect and follow lawful privacy practices.

Even though most health care plans and providers already provide varying levels of privacy protection today, the rule's establishment of a strict set of minimum requirements will lead to significant initial and ongoing compliance costs. Our estimates place the one-time start-up costs at more than $4 billion, and we project recurring costs to be more than $2 billion per year.

The rule is supposed to protect privacy, but it contains exceptions for internal marketing and fundraising, as well as for use by law enforcement and the HHS. At best, the rule provides perfunctory respect for the Fourth Amendment.

SOCIETY'S COST

The economic costs might be acceptable if HHS could demonstrate that the rule conferred genuine benefits worth the multi-billion dollar price. However, the best the department could do was to theorize that a small subset of the population that currently avoids the health care system because of perceived poor privacy protections might begin to access the system again. Even if one were to accept HHS's dubious methodology in supporting that theory (the department used unconstrained polling data to arrive at its estimates for the number of people currently avoiding the health care system), the benefits to re-entrants do not constitute net benefits for society.

To understand why that is, we must consider the financial side of health care. Because the rule limits insurers' and creditors' access to health care records (thus preventing those firms from pricing risks accurately), the new rule will redound negatively to all borrowers and potential insurance buyers. In economic terms, the benefits identified by HHS are really just transfers from low-risk purchasers of insurance and applicants for credit to individuals who currently avoid the health care system.

Hence, the new rule is not only inconsistent and redundant, but also its alleged benefits are not net increases in social welfare. The likely long-run effect of the rule will be that it becomes another albatross on an already heavily regulated part of the U.S. economy. R

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