White Paper

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Regulatory Trends under the Obama Administration – Year One

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During its first year in office, the Obama Administration has moved aggressively to adopt new regulatory initiatives and to enforce existing laws and rules. The level of activity will increase in 2010, as more Administration officials are confirmed to the sub-Cabinet posts that are directly responsible for rule writing and enforcement efforts. In addition, a new wave of regulations will be issued in the health care field over the next few years, now that comprehensive legislation has been passed. A similar level of activity can be anticipated in the financial services and energy and environmental areas, once Congress has taken action in these fields.

This White Paper discusses the Obama Administration's regulatory and enforcement efforts in some of the most significant policy areas. As has been true for all Presidents since the mid-1970s, the related environmental and energy policy areas present the most significant issues that the Obama Administration must face.

I. Direct White House Involvement in the Regulatory Process

A. Providing More Resources

The most important step the Administration has taken in the regulatory area is to include in the President's Budget, major increases in the appropriations available to the major regulatory agencies. The enhanced appropriation levels support the three principal components of a strengthened regulatory program – data collection to understand issues and develop options for rules; the drafting of regulations; and more compliance investigations and enforcement proceedings.

B. "Unpreempting the States"

The Obama Administration has demonstrated great confidence in the ability of the states, as laboratories of innovation, to develop initiatives to help address pressing social problems. In May 2009, the President issued a Memorandum to the

Heads of all Executive Departments directing them not to act reflexively to preempt state regulations that differ from the counterpart federal rules that the agencies administer. 74 Fed. Reg. 24,692 (May 22, 2009).

The White House has implemented this concern with non-preemption of state law in some of its major legislative initiatives. For example, the Administration's proposed bill to establish a stand-alone federal Consumer Financial Protection Agency provides that state consumer financial protection laws shall not be deemed to be inconsistent with federal law, and thus preempted, simply because the protection afforded consumers by the state law "is greater than the protection provided under" federal law.

As suggested by its actions in the financial consumer protection area, the Administration's effort to narrow the doctrine of conflict preemption may reflect its recognition that some states may be willing to adopt more pro-consumer provisions than Congress or the federal banking agencies.

C. The White House Regulatory Review Program

Since the Carter Administration, each President has, by Executive Order, maintained a process, conducted by the Office of Management and Budget, to review "major rules" proposed by the agencies prior to their promulgation, to make certain that they conform to the President's policy priorities and are coordinated with the regulatory initiatives of other agencies.

1. In designing its program, the Obama Administration abandoned the Bush Administration's approach to regulatory review and reverted to the policies followed by the Clinton Administration in Executive Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). "Major rules" subject to review under the Obama program are those with an annual economic impact of $100 million or more, or rules that the White House specifically requests be submitted for review.

In each Administration since Carter, the White House regulatory review process has spent more time dealing with issues presented by proposed EPA rules than those of any other agency. The Obama Administration is following the same course. For example, in its first year, the White House has perhaps spent more time analyzing EPA's proposed rule on treatment of solid wastes resulting from generation of electricity by coal-fired plants than on any other regulatory proposal.

2. In conducting its regulatory reviews, the Administration follows established principles of cost-benefit analysis, as modified to reflect research in

behavioral economics:

(a) Focus on *homo sapiens*, not on *homo economicus*. The Administration has acted upon the findings of behavioral economics that people do not operate as rational economic actors, as normal cost-benefit analysis assumes. They remember information only if it is brought home dramatically. Examples: Plain English warning on cigarette labels; OSHA posting of the names of companies that have experienced worker fatalities ("shaming").

(b) "Choice architecture." The Administration seeks to establish "default settings" to produce the behavior it believes is in the consumer's self-interest, but that individuals may not affirmatively adopt on their own. Example: Make participation in employer-provided 401(k) plans automatic unless the employee affirmative opts out.

(c) "Humanize" cost-benefit analysis, by putting more weight on qualitative factors. The Bush Administration, by contrast, relied on quantitative measures. Example: The Obama FAA has adopted a rule on the maximum time that an airplane may remain on the tarmac without taking off, due to its giving greater weight to passenger discomfort than the Bush Administration displayed.

(d) Open and transparent government. The Administration seeks to maximize two-way information flows. Agencies are directed to put their data on the Web so that the public may find and use it. The agencies also are encouraged to rely on "crowd sourcing" – the wisdom of groups.

3. The Obama Administration has implemented an important structural change within the White House staff, by placing extraordinary reliance on "czars" to coordinate policy, including issuance of regulations, in specific areas. This practice takes the initiative, if not the formal responsibility, for policy development away from members of the Cabinet, who can be called to testify by Congress, and concentrates effective authority in unconfirmed Presidential advisers who, under the doctrine of Executive Privilege, cannot be forced to testify about the advice they gave the President.

4. Within hours of his inauguration, President Obama directed agency heads to extend the effective date of any final rule issued by the Bush Administration that had not yet taken effect. A series of policy reversals ensued, including:

— the Secretary of the Interior suspended a Bush Administration rule that

accelerated a new five year plan for offshore oil and gas leasing on the Outer Continental Shelf and to withdraw oil and gas leases that had been offered for lands in Utah near two National Parks.

— the Administrator of EPA suspended the Bush Administration's Aggregation rule under the Clean Air Act's New Source Review Program, which would have changed the manner for calculating whether industrial facilities seeking to upgrade their operations would need to obtain pre-construction permits.

— President Obama issued a Memorandum directing the new Administrator of EPA to reconsider the decision of her predecessor to deny a request for a Clean Air Act waiver requested by California and 13 other states, which would permit them to attack global warming by issuing tailpipe emissions standards for new motor vehicles that are more stringent than federal requirements. State of California Request for Waiver under 42 U.S.C. § 7543(b), the Clean Air Act, 74 Fed. Reg. 4905 (Jan. 28, 2009).

EPA promptly granted the waiver and thereby forced domestic auto manufacturers, two of which were de facto wards of the government, to negotiate a peace treaty with the Administration. In order to preserve the efficiencies from being able to sell the same cars in all 50 states, the manufacturers were forced to agree to higher Corporate Average Fuel Economy standards for their fleets of new cars and to more stringent limitations on tailpipe emissions of Green House Gases (GHG). This action unblocked the climate change issue at the federal level.

II. Regulatory Initiatives at the Agency Level

A. Environmental Policy

(1) Council on Environmental Quality

On February 18, 2010, the President's Council on Environmental Quality (CEQ) issued two important "draft guidance documents" that will apply to most projects in which federal funding is involved or for which a federal approval is required.

(a) Mitigation Guidance. The Mitigation Guidance would direct federal agencies to change their environmental mitigation and monitoring practices under the National Environmental Protection Act. It would require the agencies to follow more rigorous practices with regard to the review of environmental mitigation that is adopted to reduce the impact that a proposed action will have on the

environment, as identified in an Environmental Impact Statement or an Environmental Assessment. Each federal agency would be required to adopt new internal procedures to ensure that mitigation actions adopted through the NEPA process are carried out and would impose affirmative obligations on agencies to monitor implementation of these measures and their success in mitigating environmental harms.

– The Mitigation Guidance will significantly increase the responsibilities of project proponents and action agencies. Compliance will require increased monitoring, recordkeeping, and reporting for federally approved projects, which can be costly.

— The Mitigation Guidance also states that its requirements already exist under CEQ's current NEPA rules. Thus, even if the Guidance is never finalized, project opponents will be able to cite this assertion in litigation as reflecting CEQ's interpretation of its existing rules and thus seek to persuade a reviewing court to apply these heightened requirements.

(b) Climate Change Guidance. CEQ's Climate Change Guidance would, for the first time, direct most federal agencies to consider in the NEPA assessment process the effect the emissions of GHG caused by the federal action would have on the environment to consider opportunities to reduce those emissions in assessing options for the project.

— The Guidance would apply only to large projects. While no brightline rule would be specified, CEQ recommends that the agencies apply the Guidance only to projects that are anticipated to cause annual direct emissions of 25,000 metric tons or more of GHG emissions, or approximately 2.5 million gallons of fuel per year.

— The Guidance would not apply to federal resource management decisions. Actions by such agencies as the Bureau of Land Management and the National Forest Service thus would not be covered.

(2) Environmental Protection Administration

EPA has so many major regulatory initiatives underway, that a substantial bottleneck has developed as the top level of agency decisionmakers struggle to understand and sign off on all the regulatory matters competing for their attention.

(a) Climate Change. The Obama Administration has followed a strategy of using existing EPA statutory authority to regulate GHG emissions, even though the general provisions of the Clean Air Act admittedly are not well suited to the task. By demonstrating that GHG regulation is unavoidable, the Administration hopes to persuade Congress and major emitting industries that it would be preferable to have regulation occur under targeted legislation that is tailored to their specific industrial sector and that provides for flexibility and staggered implementation dates to ease implementation difficulties.

EPA is pursuing several major regulatory initiatives under this strategy:

– In October 2009, EPA issued a rule that required the largest emitters of various GHGs to report their emissions periodically. In April, EPA is expected to issue an additional rule that will require additional industrial sectors to begin reporting. These data will provide the raw material from which EPA will fashion future control rules.

– In December 2009, pursuant to the order of the Supreme Court in *Massachusetts v. EPA*, the agency determined under the Clean Air Act that GHG emissions endanger human health and welfare. 74 Fed. Reg. 66,495 (Dec. 15, 2009). This conclusion requires EPA to issue regulations restricting GHG emissions from mobile sources (cars and trucks) and stationary sources (industrial facilities). The costs of these rules will be enormous.

– EPA and the National Highway Traffic Safety Administration issued a joint proposal to establish the "tailpipe" rule, which will regulate GHG emissions from automobiles and light trucks. 74 Fed. Reg. 49,454 (Sept. 28, 2009). EPA utilized its authority to establish GHG emissions standards under the Clean Air Act, and NHTSA exercised its authority to raise the Corporate Average Fuel Economy standards for model years 2012 to 2016 to 35.5 miles per gallon. The proposal reflected a negotiated agreement between the Administration, automobile manufacturers, and California (as the lead for a coalition of 13 states) that would establish a single GHG standard of nationwide application and thus permit manufacturers to sell their vehicles throughout the country.

As issued on April 1, 2010, the joint final rule required manufacturers to include in their calculations of emissions the pollution from electric generating plants necessary to provide the power to run "zero emission" electric vehicles.

– EPA issued a proposed "tailoring rule" that will determine which industrial facilities must apply for permits to limit GHG emissions and when those requirements will be phased in. 74 Fed. Reg. 55,292 (Oct. 27, 2009). The rule is expected to be finalized in April 2010. On February 22, 2010, the EPA Administrator informed several Senators that under the final rule, GHG emission limitations will phase in, starting in 2011 for the largest industrial facilities; and that between 2011 and 2013, the threshold for being subject to the permitting requirement will be set at a high level. Thereafter, the threshold will be lowered.

This flurry of rules and proposed rules has given the Executive Branch substantial leverage with industry by showing that some form of GHG regulation is inevitable and that companies would be better off negotiating a sector-by-sector resolution tailored to their specific needs, as automobile manufacturers did. These agreements would be codified in legislation and made permanent.

(b) Important EPA Initiatives in Other Areas. EPA also is engaged in other substantial regulatory activities concerning the coal industry that indirectly affect GHG emissions from electric utility generating plants by altering the economics of coal as a fuel.

As noted, EPA is expected to release a proposal in late April or early May seeking comment on whether to regulate coal combustion byproducts from electricity generation as a hazardous waste or as a non-hazardous solid waste. The hazardous waste option would increase disposal costs many times over.

On March 30, 2010, EPA proposed to reverse the Bush Administration's Aggregation rule for determining when industrial facilities must submit plans to expand the capacity of their plants for pre-construction review and to obtain permits under the Clean Air Act. If this rule is finally promulgated, more plants will be required to install state-of-the-art pollution controls as a condition of obtaining the required permits.

EPA is holding up issuance of permits under the Clean Water Act for entities that wish to pursue mountain-top mining of coal deposits. EPA regards this practice as environmentally destructive and causing major adverse effects on water quality. The issue is politically sensitive for the Administration, because the Senators who represent coal-producing states may be a critical voting block on climate change initiatives. On March 26, 2010, however, EPA announced a proposed determination under the Clean Water Act to veto or significantly restrict a permit issued by the Army Corps of Engineers that would have permitted mountain top mining at an Arch Coal facility in West Virginia. On April 1, 2010, EPA issued guidance under the Clean

Water Act for use in the permitting process involving proposed surface mines. The Army Corps of Engineers separately announced plans for a rulemaking to expand the scope of NEPA review of coal mine projects. The net effect of these initiatives will be to make it more difficult and time consuming to locate future surface mines.

In December 2009, EPA issued a new rule that tightens controls on run-off of storm water from construction sites. The construction permit rule will require that water run off from these sites must be significantly cleaner than previously was required. In addition, it is possible that the rule will be interpreted to impose storm water discharge requirements on facilities even after construction has been completed. Such an interpretation would constitute a substantial expansion of Clean Water Act requirements to address "non-point" source run-off.

In early April, EPA is expected to release an Advanced Notice of Proposed Rulemaking seeking comment on the mandatory phase out of the remaining PCBs in electrical equipment and natural gas pipelines in the United States.

By April 15, EPA is required by court order to start a process under the Clean Air Act to establish Maximum Achievable Control Technology for all boilers in the United States. Small emitters such as schools and churches will be covered, as well as large industrial facilities such as Portland cement plants. The costs of this rule also will be quite significant.

B. Energy Policy

(1) Department of Energy.

The principal regulatory actions of the Department of Energy have concerned the provision of financial support for alternative energy projects with money provided by the 2009 Stimulus bill, the American Recovery and Reinvestment Act.

(a) Within the last month, the Administration has announced two funding initiatives that provide significant insights into its policy concerning alternative fuels.

– On February 22, 2010, the Department of Energy announced $1.37 billion in loan commitments to BrightSource Energy to support the construction and start-up of three utility-scale solar plants in the Mojave Desert in California that would, if successful, generate approximately 400 megawatts of electricity. This mega-project would, by itself, nearly double the capacity of this type of renewable energy in the United States.

This action suggests that the Administration's priority will be on funding large-scale projects utilizing existing technology, rather than on laboratory development of possible technologies or funding prototype-scale projects to demonstrate the commercial feasibility of new technologies.

– On February 16, 2010, the President announced that the Department of Energy has committed $8.33 billion in loan guarantees for the construction and operation of two new nuclear reactors in Burke, Georgia. The project would utilize a new generation of nuclear reactors and would be the first commercial nuclear power plant constructed in the United States in 30 years.

The approval is a significant step by the Department of Energy to restart the domestic nuclear industry, which the Administration has concluded must play a substantial role in reducing emissions of GHG from the electric utility sector.

(b) On February 3, 2010, the Department of Energy withdrew its application to the Nuclear Regulatory Commission that sought permission to dispose of radioactive wastes from nuclear electric generating plants in the Yucca Mountain facility in Arizona. The Obama Administration has not articulated an alternative long-term strategy for dealing with these nuclear wastes. Accordingly, nuclear generating plants will have to continue storing these wastes on-site, an undesirable option that ultimately will limit the extent to which the country can rely on generation of electricity by nuclear facilities.

(c) On the enforcement front, the Department has focused on policing compliance with the self-certification testing by companies that participate in the EnergyStar energy conservation program. It has initiated actions against firms found not to have testing data to support their energy efficiency claims.

(2) Department of the Interior.

As noted, shortly after taking office, the Secretary of the Interior suspended a Bush Administration proposal concerning oil and gas development on the Outer Continental Shelf. On March 31, 2010, President Obama and the Secretary announced a new Five Year Plan for oil and gas exploration and development that would open vast areas of the OCS to energy development.

Under the proposal, Interior would seek Congressional authorization to:

- end a longstanding moratorium and seek to issue leases on 167 million acres of the Atlantic Ocean from the northern tip of Delaware to Central Florida;

- issue permits on parcels in an area of the eastern Gulf of Mexico that is adjacent to fields in which many successful wells have been drilled; and

- allow drilling in nearly 130 million acres in the Arctic Ocean north of Alaska.

The Plan would continue to ban oil and gas exploration and development in:

- the Pacific Ocean from the Mexican border to Canada;

- the Atlantic Coast from the tip of Delaware to the Canadian border; and

- the Bristol Bay area of Alaska.

The first offshore exploration lease may be awarded as early as 2012 in an area 50 miles off the coast of Virginia.

Proposed OCS plans usually require 18-24 months to become final. Given this regulatory cycle, it is inevitable that decisions on offshore drilling in the Outer Continental Shelf will become bound up in, and help determine the outcome of, the pending major legislative proposals in the energy and climate change areas. The proposed Five Year Plan represents a carefully considered Administration decision about where to try to build Congressional support for these other initiatives.

C. Bank Regulation

While Congress has been debating the Obama Administration's comprehensive financial regulatory reform bill, the bank supervisory agencies have completed few significant rulemakings. The notable exception is the Board of Governors of the Federal Reserve System, which has issued new consumer protection rules to help persuade Congress that it should not be stripped of consumer protection responsibility in the regulatory reform bill.

The agencies instead have focused their efforts on examining banks for possible safety and soundness problems and on taking enforcement actions to pursue violations of law detected in the examination process.

— The regulators have worked quietly through the non-transparent supervisory process to review the capital status of insured depository institutions. Federal banking agencies have closed a large number of institutions for insufficient capital and quietly required many other

institutions to increase both the quality and quantity of their capital.

— The bank regulatory agencies took more than 1,000 enforcement actions in 2009. This level of activity represents twice as many enforcement actions as in 2008, and almost three times the number that were initiated in 2007. More than one-half of the enforcement actions were undertaken by the Federal Deposit Insurance Corporation, suggesting that the legal violations were discovered in a forensic review of institutions that the government had closed.

The federal bank regulatory agencies continue to hire new employees, and their level of enforcement activity is expected to continue at a high level. This reflects the amount of improper activity that accompanied the bank lending bubble.

D. Export Controls and Foreign Corruption

The Obama Administration has intensified prosecution of violations of U.S. export control and anti-corruption laws, especially the Foreign Corrupt Practices Act. The initiative is led by a task force of the Departments of Justice, State, Commerce and Treasury. The crackdown has led to several major enforcement cases, including the recent guilty plea by BAE Systems and a $400 million fine for violating the FCPA and the International Traffic in Arms rules. In addition, Crédit Suisse recently announced that it will pay in excess of $500 million and enter into a deferred prosecution agreement for its dealings with the Iranian regime in violation of sanctions imposed under the International Emergency Economic Powers Act.

– FCPA enforcement efforts focus on industries that are particularly at risk for foreign bribery, including oil and gas, pharmaceuticals, medical devices, and government procurement.

– Investigations for violation of export control regulations have expanded beyond exporting companies themselves and increasingly focus on carriers, third-party logistics providers, and freight forwarders. For example, DHL recently was assessed a $9.4 million civil penalty for shipments into countries subject to U.S. sanctions.

– The Obama Administration's enforcement policy has emphasized the use of sting operations to detect violations. The Department of Justice also is emphasizing prosecution of individuals in FCPA cases, to eliminate the possibility that companies will regard the government's enforcement actions as a mere cost of doing business.

E. Communications Policy

For the last year, the Federal Communications Commission has been consumed with preparing the "National Broadband Plan," required by the American Recovery and Reinvestment Act, to propose how the country should address broadband deployment to bring high-speed Internet access to all Americans. This is one of the most significant policies under consideration by any regulatory agency. It will help shape the structure of one of the most dynamic sectors of the economy. The Plan was adopted by the Commission on March 16th.

The Plan addresses several challenging questions, including:

- defining broadband (what is it, how fast is it, what technologies are encompassed);
- where do we have broadband now/where is it missing;
- is it our national policy to make broadband available everywhere;
- how would we do that (e.g., by expanding the Universal Service program to encompass broadband?);
- what laws/regulations/requirements ought to govern broadband;
- what are some of the key national policies or goals to be accomplished with ubiquitous broadband (enhancing national security, public safety, telemedicine, education, etc.).

In particular, the FCC will have to determine how demands for wireless broadband communications should be accommodated, in anticipation of a 30-fold increase in mobile traffic. The FCC recommended creation of market-based mechanisms to allow spectrum to flow the uses that the market values most highly. The exceptions provided to this policy will be critical in determining the actual outcome of the spectrum redeployment effort.

The FCC also recommended construction of a nationwide, 100% interoperable, easy-to-use broadband wireless public safety network for first responders, to be built by local agencies pursuant to federal design and performance criteria. This network will be too expensive for state and local agencies to construct without substantial federal financial assistance. Up to $15 billion in federal funding over a decade may be necessary to help build the network.

F. Food and Drug Safety

The Obama Administration has adopted three broad regulatory initiatives in the food and drug areas.

(1) Transforming Food Safety. The Food and Drug Administration will set standards for food safety, expand its laboratory capacity, and develop a pilot technology to track and trace foods, and increase the number of its inspectors in foreign facilities. FDA has adopted a new process to assess the risks of imported foods as they enter the country and target shipments that pose the greatest risk for closer attention. Priorities include imports of seafood and fresh produce, and foods and drugs produced in China. These steps will allow the agency to better hold companies responsible for their global supply chains.

(2) Protecting Patients. FDA will devote additional resources to supporting the safety of drugs, medical devices, vaccines (especially vaccines against flu viruses), and the nation's blood supply. It also will expand its capacity to address medical product safety challenges as they arise.

(3) Advancing Regulatory Science. FDA will increase its core scientific capacity and attempt to identify improved pathways to product development and approval for new technologies that offer opportunities to prevent and attack diseases.

In response to public criticism about the scientific and regulatory rigor of the medical device approval process, FDA is adopting a more conservative and demanding regulatory approach that will, for many products, make approval more difficult, costly, and time-consuming. A major review is underway of FDA's premarket notification program for medical devices, which will serve as a vehicle for future regulatory changes.

FDA has increased its enforcement efforts by giving firms less time to respond to an inspection, issuing warning letters more quickly or taking prompt action without warning if egregious violations are discovered; and enhancing after-the-fact assessment to ensure that companies make appropriate changes once violations are found. It also is carefully reviewing unapproved drug claims that companies make on their websites and other forms of product advertising.

G. Health Care

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, contains hundreds of provisions for which the responsible agencies will have to issue implementing regulations. Over the next few months, the Department of Health and Human Services will have to develop an extensive regulatory agenda to determine how the various issues can be clustered into specific rulemakings and the order in which the rulemakings should be conducted.

The initial evidence demonstrates that the health care reform legislation will be a mother lode of regulatory activity. Within hours after the President's signature of the law, the White House issued two directives to the Secretary of HHS requiring the issuance of specific rules. On March 24, 2010, the President issued an Executive Order directing the Secretary to issue regulations that will establish government-wide principles to ensure that federal funds will not be used for abortion services under the new law.

On the same day, the White House stated that HHS would issue regulations that will interpret an "ambiguity" in the statute and require that insurers must accept new child customers who have pre-existing medical conditions.

These early developments confirm that the health care bill will be a prolific source of new regulatory activity.

H. Justice Department – Enforcement

The Department of Justice has moved aggressively to increase civil and criminal enforcement efforts in all its litigating sections. Several divisions have already demonstrated, through the actions they have filed, clear policies concerning where they are concentrating their resources.

(1) Antitrust. Antitrust enforcement has focused on the health care, high-tech, agriculture, and transportation industries. The division also has emphasized criminal enforcement to attack price fixing and other cartel-like behavior in East Asian countries that do not have competition laws.

As demonstrated by its antitrust action against Intel, the Department's chief priority is to challenge unilateral action by single, dominant firms under Section 2 of the Sherman Act that produce anticompetitive effects that are disproportionate to the benefits to consumers.

The Federal Trade Commission's priority antitrust target has been "reverse payment" settlements between brand name pharmaceutical and generic drug companies that are designed to bottle up competition and prevent entry by multiple low-cost manufacturers.

(2) Civil Rights. The division has been active in investigating alleged employment discrimination against immigrants and discrimination in favor of immigrants and against unionized domestic workers, but no pattern has yet emerged to define the Administration's policy. To date, the division has shown that

enforcement of the fair housing laws will be a priority, especially in the servicing (as opposed to the origination) of mortgage loans.

(3) Criminal. The FBI and prosecutors in the U.S. Attorneys' Offices have devoted substantial additional resources to prosecuting mortgage fraud and other crimes that have been uncovered in investigating the abuses of the subprime mortgage market. Further, as noted above, Justice has been very active in pursuing allegations of foreign corruption under the FCPA.

I. Labor Relations

The Obama Administration has undertaken several regulatory and enforcement steps that are responsive to the policy priorities of organized labor. The effectiveness of these initiatives has been hampered by the Administration's inability to obtain confirmation of its appointees to the regulatory agencies. However, the President's announcement on March 27th of the recess appointment of two members of the National Labor Relations Board and four members of the Equal Employment Opportunity Commission will accelerate regulatory activity in the labor field

In his first month in office, the President exercised his administrative authority over federal procurements to issue four significant Executive Orders that facilitated union organizing. The Orders required federal agencies to:

- consider use of union-only project labor agreements for large federal construction projects;
- insert in all government contracts a clause requiring the contractor to notify employees of their rights to organize under law, under pain of debarment;
- declare unallowable the costs incurred by government contractors in responding to union organizing; and
- prevent termination of workers upon replacement of one service contractor by another.

The Department of Labor also has:

- re-invigorated enforcement of its regulations, including compliance with the wage and hour laws, affirmative action requirements, and workplace safety;
- vowed tougher enforcement of the Davis-Bacon rules, which require payment of generally higher wages on projects that receive federal funding, including all projects pursuant to the American Recovery and Reinvestment Act; and
- implemented the new E-Verify initiative, by which federal contractors must

utilize a government computer program to confirm that all new hires and all existing workers assigned to a "covered federal contract" have legal authorization to work in the United States.

J. Transportation Policy

The Department of Transportation has moved with unexpected speed to implement a series of regulatory and enforcement initiatives.

(1) The National Highway Traffic Safety Administration has been aggressive in pursuing the Toyota debacle and has required recalls of millions of vehicles with faulty accelerators. As noted, NHTSA also has jointly issued with EPA a proposed rule that would reduce GHG emissions by requiring automobile manufacturers to substantially increase the average fuel economy standards for cars sold in model years 2012 to 2016.

(2) The Federal Aviation Administration has instituted a series of investigations to review the performance of airlines, notably regional carriers, to comply with agency directives protecting passenger safety, such as those governing maintenance procedures. The agency has imposed record fines on airlines found to be non-compliant.

(3) The Secretary of Transportation moved quickly to preempt Congressional action and adopted a rule imposing a maximum limit of three hours that a plane may wait on the tarmac before take off. The rule provides for a maximum fine of $27,000 per passenger (several million dollars for a large plane) for each violation.

(4) The Obama Administration is a strong supporter of public transit and has sought to shift funding from highway construction to other forms of transportation. For example, with the money made available by the American Recovery and Reinvestment Act, the Administration has shifted priorities for funding programs to emphasize high-speed rail. This initiative is evidenced by the Administration's grant of more than $1 billion to begin the project to construct a high-speed rail corridor across Florida.

(5) The Department of Transportation has acted forcefully to exercise its authority to grant antitrust approval to mergers and other cooperative projects in the airline industry. For example, the Department approved the Delta-Northwest merger, over strong Department of Justice objections that required White House mediation. The Department also has tentatively approved joint pricing and marketing actions by American Airlines and British Airways, despite Department of Justice reservations.

(6) The Department of Transportation, in cooperation with the Department of Housing and Urban Development, is pursuing a "Livability" Program that would decrease reliance on the automobile as a means of transportation. The goal of the Program is to develop livable/environmentally sustainable communities that would provide non-auto transportation alternatives, be affordable, energy-efficient, minimize adverse effects on land and water, and protect the environment. These Programs have some features of anti-sprawl programs, restated to have a positive rather than a negative agenda; and what used to be called "transit-oriented development," which emphasizes the advantages of building high-density, mixed-use housing and retail within walking distance of transit stations.

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