

A New “Golden Era” of Public Service? The Obama Administration Takes Early Steps To Vest Federal Civil Servants With Increasing Responsibility and Authority

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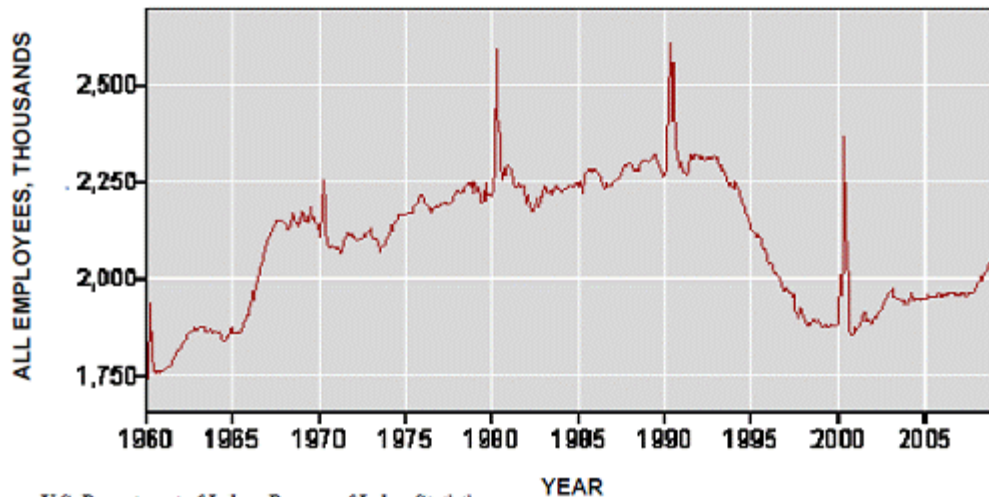
Introduction

Since the beginning of the modern administrative state, which academics generally attribute to the New Deal of the 1930s,² we have seen cycles of growth and decline in the size of the federal workforce.³ These cycles appear to have at least a loose correlation to a broadly-shared national perception about the importance of public service. Among his many roles, a president may also serve as a head hunter-in-chief, and this might be a role President Obama is assuming aggressively, both as part of his philosophy of governing and to some extent out of sheer necessity.

In addition to facing a global economic crisis and ongoing military and diplomatic challenges, President Obama also oversees a federal workforce that has receded to levels generally prevalent 40 years ago, and whose most experienced members are nearing retirement age. Not only must the Obama Administration find professionals to implement its major policy objectives; it must also ensure that the government replenishes the skilled workforce necessary to carry on existing functions, not the least of which include administering Social Security and Medicare in an era of unprecedented usage.

The Shrinking Federal Workforce

Currently, there is a substantial “graying” of the federal agency workforce. Fifty-eight percent of federal workers are over age 45, compared with forty-one percent in the private sector.⁴ An astonishing seventy-six percent of those serving in the Senior Executive Service will be eligible to retire in 2012⁵ - a “cycling out” of the generation of civil servants who entered public service in the 1960s.⁶ Numbers also suggest that the federal workforce has not been replenished. After a rapid build up of federal employment between 1960 and 1967, the growth rate slowed significantly during the next 25 years, flattening out during the 1980s. (See Figure 1.⁷) During the 1990s, the federal workforce declined as quickly as it had increased during the 1960s, before a slight build-up post-9/11. Commentators confirmed the demonstrable trend: The private sector had become the favored destination for many well-educated professionals.⁸

Federal Government Employment, 1960-2009Seasonally Adjusted, Excluding U.S. Postal Service
Employment, Hours, and Earnings from the Current Employment Statistics survey (National)

Source: U.S. Department of Labor, Bureau of Labor Statistics

Incentives for professionals to remain in federal service also declined. Until recently, private sector professional pay scales in Washington and New York were magnitudes higher than public sector salaries, particularly for those just out of college.⁹ In October 2006, CNN.com reported that nearly 40 percent of federal government employees said they were dissatisfied with their pay.¹⁰ Working conditions have not been particularly enticing for federal workers either, even the prominent ones. While much was made over former Bush Administration Interior Secretary Dirk Kempthorne's remodeling of his private bath, an incoming senior Commerce Department official was met with a large rat in her private bath on her very first day. Dating back a decade, in a report to Congress, the National Commission on Public Service concluded that a decline in attitudes of federal employees regarding their jobs was creating a "quiet crisis."¹¹ In addition, the scape-goating of public employees as "bureaucrats" was very much part of the political discourse throughout the 1980s, 1990s, and into the 2000s.

For his part, President George W. Bush outsourced many governmental functions, aggressively pursuing a policy of "competitive sourcing" and subjecting "as many of the government's approximately 850,000 'commercial' jobs as possible to privatization."¹² These policies created friction between the Administration and public employees, their unions, and congressional Democrats.¹³ Moreover, some of these functions would seem to be among the most central to the federal government's mission. For instance, a share of the interrogations in Iraq, and often a large measure of the security functions overall, were undertaken by private contractors.¹⁴ Part of this trend might have been necessitated by the reliance on an all-volunteer military to fight two wars, but, in some sense the message was clear: A Blackwater employee would most likely make several times as much as if he or she had stayed in the active duty military.¹⁵

Presidents Do Make a Difference in Macro Public Service Trends

Presidents can and do set the tone for public service. The last two eras of significant growth in the civilian, non-postal, non-Census workforce occurred during the 1930s and 1960s.¹⁶ These were times when the nation was led by activist chief executives who generally made a call to public service a centerpiece of their administrations. And, whether as a credit to these chief executives' oratorical powers or the irresistible lure of an opportunity to help meaningfully address issues of transcendent importance, the Franklin Roosevelt and Kennedy/Johnson Administrations undoubtedly presided over the last century's two major expansions of public service.

Presiding in a time of severe economic crisis, President Roosevelt virtually created the modern administrative state,¹⁷ and then faced the challenges of World War II. Aside from the creation of a host of new agencies and regulatory bodies, such as the Federal Deposit Insurance Corporation and Securities and Exchange Commission, Roosevelt presided over the "com[ing] of age" of the public enterprise form of government, including, most famously, the Tennessee Valley Authority.¹⁸

During the 1960s, President Kennedy set the stage for a growth in public service, calling on Americans to "ask not what your country can do for you - ask what you can do for your country."¹⁹ While the challenges facing the nation in 1960 - including civil rights, the Cold War (and the "missile gap"), the space program, and a call for a national project to bring freedom and prosperity to all parts of the world - differed markedly from those of the 1930s, a generation of Americans appeared to have become engaged. President Kennedy's rhetoric was matched by a large expansion of federal agencies and authority (carried forward under President Lyndon Johnson), which brought engineers, lawyers, teachers, and other professionals in large numbers into the public sector through the Peace Corps, NASA, the Pentagon, and many other New Frontier and Great Society institutions.

By contrast, the period during the 1970s and 1980s has been described as a "quiet crisis" for the federal civil service.²⁰ President Ronald Reagan entered office stating: "Government is not the solution to our problems; government is the problem."²¹ President Reagan continued making the same point well into his second term.²² Perhaps as a result, one commentator contends that "[b]y the end of the 1980s, the gap between federal and private pay had widened, attacks on government by the media and political candidates were at an all-time high, the Office of Personnel Management had been weakened by a director who believed that mediocre was good enough for government, and the public had lost confidence in its elected and appointed leaders."²³ This trend continued through the 1990s, with President Clinton declaring in his 1996 State of the Union Address that "[t]he era of big government is over."²⁴ President Clinton ultimately presided over eight consecutive years of declining federal employment.²⁵

By the time President George W. Bush took office in 2000, the federal workforce had shrunk to levels not seen since the mid-1960s. As explained above, President Bush then aggressively pursued a policy of "competitive sourcing" and privatized some 850,000 federal jobs.²⁶ The pendulum had fully swung. As a noted commentator on the public workforce recently explained, from the patriotic call to service in the 1960s to almost three decades of disparagement in the 1980s, 1990s, and early to mid-

2000s, the ranks of the federal civil service have become depleted, discouraged, and aged.²⁷

Under the Obama Administration, there is at least an attempt to reverse these trends and revitalize a spirit of public service. Beyond the rhetoric of wanting to “make government cool again,” President Obama has also shown a substantive interest in federal personnel issues by, for instance, inviting Office of Personnel Management head John Berry to participate in Cabinet meetings.²⁸ As explained below, several factors may be converging in the Obama Administration to revitalize the federal sector, among them an oratorical emphasis on the values of public service, an increase in the scope of authority and entrustment of responsibility, and concerted attention to specific managerial and workforce recruitment and development

A New Era of Professional Public Service?

Both the 1930s and 1960s witnessed charismatic presidents issuing not just a call to government service, but a call to participate in major, if not transformative, governmental initiatives. Regardless of one's political views on these initiatives, the opportunities to participate in implementing them galvanized many to enter public service during the Franklin Roosevelt and John F. Kennedy (and on into the Lyndon Johnson) Administrations. For its part, the Obama Administration is in the process, through a series of regulatory and policy changes, of returning serious responsibility for both day-to-day government, as well as the economic recovery program, broadly defined, to those who have long been castigated as “bureaucrats.”

This shift is not, however, solely the result of the federal ownership stake in financial institutions and certain automakers. Taking President Obama at his word that he has no ambition to run banks and or build cars, he does in fact have a goal of having federal servants govern and administer far more actively than they have in years.²⁹ That step, alone, might do as much to return the luster to federal service as any pay raise in hard times ever will.

Perhaps the most direct indication of the Obama Administration's effort is its recently announced decision to return some 140,000 jobs from private contractors to the federal workforce.³⁰ Moreover, President Obama has paid a great deal of attention to the professional federal workforce, issuing a series of memoranda and public statements addressing its needs, importance, and issues.³¹ An even more tangible indication of this shift can be seen in the changes in law, regulations, and policy that the Administration is promoting. As a fundamental matter, President Obama is set to invest an extraordinary amount of confidence in the federal workforce to make good decisions, with far less influence from the private sector.

The Obama Administration and Expanded Responsibilities for the Public Sector

Since the Obama Administration has taken office, it has revived or placed new and significant responsibilities with government agencies and their employees. For example, on March 20, 2009, President Obama issued an Executive Memorandum setting forth the conditions for allocating monies appropriated by the American Recovery and Reinvestment Act (“ARRA”), a.k.a., the stimulus package. The President set forth his determination to invest authority over key spending decisions and priority-setting with agency experts, with minimal input from outside influences,

explaining, “[w]e must ... empower executive department and agency officials to exercise their available discretion and judgment to help ensure that Recovery Act funds are expended for projects that further the job creation, economic recovery, and other purposes of the Recovery Act.”³²

The Administration has taken steps to limit outside influence and focus ARRA authority in executive agencies. On July 24, 2009, the Office of Management and Budget (“OMB”) announced the White House’s plan to extend to all persons (not just federally-registered lobbyists) restrictions implemented in March on oral communications with federal officials regarding ARRA projects. However, this broader communication restriction applies only after competitive grant applications for stimulus funding are submitted. While this revision relaxed communication restrictions applicable to registered lobbyists, it continued the special disclosure requirements relating to communications on ARRA projects and policy by registered lobbyists.³³ Even after the Administration refined these guidelines, their tenor remains, as does the message that the Administration is looking for less outside guidance.

Another hallmark of the new Administration has been a renewed focus on the importance of science in decision-making. Apparently as a reaction to at least the perception that under President Bush, empirical research occasionally took a backseat to politics and preferred policy outcomes, President Obama distributed another Executive Memorandum titled “Scientific Integrity.” Stating that, “science and the scientific process must inform and guide decisions of my Administration on a wide range of issues,” the President charged his director of the Office of Science and Technology Policy to coordinate and develop protocols for development and use of scientific information in the policy-making process with all agency and executive department heads.³⁴

Consistently, the Administration appears poised to rely on the work product of agency scientific and technical experts. One concrete example of this new approach is the Environmental Protection Agency’s (“EPA”) recent proposal to find that carbon dioxide, methane, and other so-called greenhouse gases constitute “air pollution” (under the Clean Air Act (“CAA”)) that may reasonably be anticipated to endanger public health and welfare.³⁵ Based on a technical support document prepared by EPA scientists, this finding is a legal predicate to CAA-based greenhouse gas emissions regulations, such as for new vehicles.

Additionally, the Administration decided to exercise the discretion granted by Congress in ARRA to withdraw, without public notice and comment, Bush-era Interior Department guidance concerning when, under the Endangered Species Act (“ESA”), federal agencies are required to consult with experts at the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) over the impacts of agency actions. In part, through its definition of “indirect effects,” the consultation rule had limited consideration of the effects of greenhouse gas emissions on threatened and endangered species.³⁶ The withdrawal of consultation rule vests the scientists and policymakers at FWS and NMFS with a much greater role in determining the nation’s response to climate change, with implications for the licensing and approval of many types of private sector activity. While considerable debate exists over these policies’ wisdom and scientific underpinning, there is no doubt that, as to those in the civil service, these executive decisions signal a new era of prominence and responsibility.

The Obama Administration might also be set to substantially re-order the agency regulatory review process under Executive Order (“EO”) 12866, pursuant to which the OMB ensures regulations are consistent with applicable law and “the President’s priorities.”³⁷ Under EO 12866, most agency rules must be submitted to OMB for review and approval prior to final issuance. In preceding administrations (and particularly in the last Bush Administration), the OMB review and approval processes served as an executive branch filter on agency rulemaking and decision-making. This process became a point of friction with agency personnel and many advocacy groups.

President Obama has asked OMB Director Orszag to develop recommendations on a number of matters, including the relationship between OMB’s Office of Information and Regulatory Affairs (“OIRA”) and the agencies.³⁸ This request comes in response to complaints, particularly with regard to science-based rules, that OIRA, which conducts these regulatory reviews, and OMB do not have the expertise required to appropriately analyze and assess proposed regulations. The ordered review indicates that the Administration might be considering significantly diminishing OMB’s and OIRA’s regulatory roles, in favor of decision-making by agency officials and scientists themselves. While President Obama has nominated Cass Sunstein, a well-respected Harvard University law professor, to head OIRA, it remains to be seen if (and if so, how), the Administration will continue to provide for a strong and impartial OMB/OIRA review process as a check on aggressive agency regulatory agendas.

The Troubled Asset Relief Program (“TARP”) and the subsequent Financial Stability Plan (“FSP”) put in place by the Obama Administration are also good examples of federal initiatives requiring professionals with specialized skill sets. Both programs dramatically enhance the Treasury Department’s role in securing the nation’s financial and economic health and require highly-skilled and dedicated employees to address important financial problems with complex solutions. Through both programs, the Treasury Department, in conjunction with the Federal Reserve and the Federal Deposit Insurance Corporation, has orchestrated the movement of \$2 trillion dollars in an attempt to stabilize the financial sector, increase the availability of credit, and address underlying factors like “legacy” or “troubled” mortgage-backed assets. Many of the programs have come with new “strings,” including stress tests for large banking institutions, and other transparency and accountability measures (e.g., corporate compensation requirements), intended to promote lending, increase integrity, and protect the taxpayer investment in the various TARP/FSP programs.

The Obama Administration also has repeatedly stated that financial system recovery and prevention of future problems can only be sustained through major reform of the financial services regulatory regimes. This summer, the Administration released an expansive plan for restructuring aspects of the financial system regulatory structure and enhancing the existing authorities of financial system regulators.³⁹ Several major aspects of the plan have been met with opposition by those who fear the steps would take government involvement in the financial system too far. First, the plan seeks to expand the authority of the Federal Reserve by tasking it with systemic risk regulation. Basically, the Federal Reserve would be responsible for supervising and regulating the safety and soundness of firms whose combination of size and interconnectedness might pose risks to the broader systems (Tier 1 Firms). Second, the plan would grant government intervention and resolution authority over such firms should they come to pose an imminent threat to financial stability. Third, the

plan would create a new government agency to regulate consumer financial services products. The plan includes a host of other reform measures aimed generally at increasing transparency and accountability in financial markets, from regulation of hedge funds to standardized derivatives.

The types of people needed to make a success of these ambitious financial regulatory programs are the very ones who, in general, have chosen Wall Street and financial sector careers over public service in recent years. The Obama Administration is working to fill the senior ranks at Treasury and other financial regulatory agencies. The question is whether his call to service and initiative to raise the status of public servants will result in his being able to fill the remaining ranks of these agencies with the types of professionals necessary to make this new regulatory and financial system stabilization a success.

Conclusion

Shifts in perceptions of the value of the federal workforce over the past century have been, in large measure, due to differences in presidential governing philosophies and the exigencies of the day. Our point here is not to ascribe a normative preference for one approach over another. Indeed, it may be that our democratic system somehow ultimately manages to produce the type of government it needs to meet the challenges it faces. What is clear is that the current Administration is focusing on enhancing the government's regulatory and oversight capabilities, largely through efforts to revive a sense that public service is once again important. Indeed, President Obama's success in recruiting and maintaining an executive branch team to support his ambitious endeavors might play a significant part in determining whether his presidency succeeds or fails. This trend bears understanding, no matter which side of the divide one stands on.

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¹ The authors would like to thank Michael P. McGinn for his research support.

² Academics generally attribute the beginning of the modern administrative state - defined in terms of an expanded federal role in the American economy, increased regulatory activity, and the rise of public enterprises (such as the Tennessee Valley Authority) - to the programs and policies of the Franklin D. Roosevelt administration, while giving a nod to the roots of these developments in the progressive era of the late 19th and early 20th centuries. See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 408-09 (1989-1990); Jerry Mitchell, *Public Enterprises in the United States, in Public Enterprise Management: International Case Studies* 69 (Ali Farazmand, ed., Greenwood Press 1996).

³ The references herein are generally to the non-military, non-national defense federal workforce. This discussion of trends also does not consider the decennial surge in short-term, census-related federal employment.

⁴ Partnership for Public Service, Issue Brief – Brain Drain at 1 (May 6, 2008), available at <http://www.ourpublicservice.org/OPS/publications/viewcontentdetails.php?id=126> (last viewed May 14, 2009).

⁵ Public Service in the 21st Century: An Examination of the State of the Federal Workforce, Before the House Committee on Oversight and Government Operations Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia (hereafter, “Public Service Hearings”), 111th Congress (April 22, 2009) (Testimony of Max Stier, President, Partnership for Public Service at 3), available at <http://federalworkforce.oversight.house.gov/documents/20090422150049.pdf>. (last viewed May 14, 2009).

⁶ *Id.* at 2.

⁷ Bureau of Labor Statistics, Employment, Hours, and Earnings from the Current Employment Statistics Survey (National), Seasonally Adjusted Federal Government Employment, Except U.S. Postal Service, 1960-2009 (table created May 14, 2009), available at <http://www.bls.gov/data/#historical-tables>.

⁸ See Paul C. Light, *The New Public Service* 3–5 (Brookings Institution 1999); Carol Chetkovich, *What's in a Sector? The Shifting Career Plans of Public Policy Students*, 63 Pub. Admin. Rev. 660, 660 (Nov. - Dec. 2003).

⁹ See, e.g., Partnership for Public Service, *Elevating Our Federal Workforce*, at 3 (Dec. 3, 2008) (noting that a “highly-recruited new college graduate” is eligible for a position only up to the GS-7 level, currently with a starting salary of \$39,330 in the Washington, D.C. area), available at <http://www.ourpublicservice.org/OPS/publications/download.php?id=130> (last viewed August 18, 2009).

¹⁰ Laura Morsch, *Government Salaries Versus Private Sector Salaries*, CNN.com (October 11, 2006) available at <http://www.cnn.com/2006/US/Careers/10/11/cb.government/index.html> (last viewed Aug. 18, 2009).

¹¹ Ting Yuan, *Determinants of Job Satisfaction of Federal Government Employees*, Public Personnel Management (September 22, 1997).

¹² Evan M. Berman et al., *Human Resource Management in Public Service, Paradoxes, Processes, and Problems*, at 20 (Sage Publications, 2d Ed. 2006).

¹³ *Id.*

¹⁴ See, e.g., Robert O'Harrow Jr. and Ellen McCarthy, *Private Sector has Firm Role at the Pentagon*, Wash. Post. at E01 (June 9, 2004).

¹⁵ See Light, *supra* n.8, at 7.

¹⁶ See *supra* Figure 1; see also Hugh Rockoff, “By Way of Analogy: The Expansion of the Federal Government in the 1930s,” in *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century*, at 128 Fig. 4.2 (Michael D. Bordo, et al., eds., The University of Chicago Press 1998).

¹⁷ *Supra* n.2.

¹⁸ Mitchell, *supra* n.2, at 69.

¹⁹ Quoted in *The Oxford Dictionary of Quotations* at 295 (Oxford University Press, 3d Ed. 1980).

²⁰ Light, *supra* n.8, at 3.

²¹ President Reagan, First Inaugural Address (Jan. 20, 1981), available at <http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm> (last visited Aug. 18, 2009). In full, President Reagan stated: “In this present crisis, government

is not the solution to our problem; government is the problem. From time to time we've been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people. Well, if no one among us is capable of governing himself, then who among us has the capacity to govern someone else? All of us together, in and out of government, must bear the burden. The solutions we seek must be equitable, with no one group singled out to pay a higher price."

²² See, e.g., Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* at 1, Columbia University Press (2000) (quoting President Reagan in 1989 as saying, "Every once in a while, somebody has to get the bureaucracy by the neck and shake it loose and say, stop doing what you're doing").

²³ Light, *supra* n.8, at 3.

²⁴ The Public Papers of the Presidents of the United States: William Jefferson Clinton 1996 (Book I), at 79 (U.S. Government Printing Office 1997). In full, the President stated: "We know big Government does not have all the answers. We know there's not a program for every problem. We know, and we have worked to give the American people a smaller, less bureaucratic Government in Washington. And we have to give the American people one that lives within its means. The era of big Government is over." *Id.*

²⁵ See *supra* Fig. 1.

²⁶ See Berman et al., *supra*, at n.12.

²⁷ See, e.g., Mike Causey, *Obama puts spirit back in civil service*, The Wash. Times (May 18, 2009), available at <http://washingtontimes.com/news/2009/may/18/causey-obama-puts-spirit-back-in-civil-service/> (describing the government reform policies of the Carter, Reagan, Clinton, and George W. Bush administrations); Public Service Hearings, *supra* n.5, (Testimony of Max Stier); *id.* (Testimony of Gregory J. Juneman, President, Int'l Ass'n of Professional and Technical Engineers, at 1), available at <http://federalworkforce.oversight.house.gov/story.asp?ID=2392> (last viewed Aug. 18, 2009).

²⁸ See *id.*

²⁹ Indeed, according to the Washington Post, the federal government has already added some 9,000 jobs compared with a year ago. Alec MacGillis, *Spending Stimulus Money Takes Money*, Wash. Post, at A12 (June 12, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061102877.html> (last visited Aug. 18, 2009). These new positions include high-level personnel and auditors to oversee spending of public money allocated under the massive stimulus package. *Id.*

³⁰ Tyler Schenk-Wasson, *Reversing the Outsourcing of Government Work*, AllGov.com, (May 14, 2009), available at http://www.allgov.com/ViewNews/Reversing_the_Outsourcing_of_Government_Work_90514 (last visited Aug. 18, 2009).

³¹ See, e.g., Office of Management and Budget, Analytical Perspectives, Budget of the United States Fiscal Year 2010, at 10–11 (Feb. 26, 2009) (discussing the need for and challenges of building a professional federal workforce), available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/spec.pdf> (last visited Aug. 18, 2009).

³² 74 Fed. Reg. 12531, 12541 (Mar. 25, 2009).

³³ See Memorandum for the Heads of Executive Departments and Agencies from OMB Director Peter R. Orszag, M-09-24, Updated Guidance Regarding Communications with Registered Lobbyists About Recovery Act Funds (July 24, 2009).

³⁴ 74 Fed. Reg. 18596, 18597 (April 23, 2009).

³⁵ 74 Fed. Reg. 18886 (April 24, 2009).

³⁶ See 73 Fed. Reg. 76272, 76286 (Dec. 16, 2008) (definition of “effects of the action”).

³⁷ 58 Fed. Reg. 51735 (Oct. 4, 1993).

³⁸ 74 Fed. Reg. 8819 (Feb. 26, 2009).

³⁹ For an expanded review of the Administration's regulatory reform plan, see *The Obama Plan for Financial System Regulatory Reform: A Review of the Roots of the Financial Crisis and the Foundations of Regulatory Responses*, Bloomberg Law Reports: Administrative Law, Vol. 1, No. 2 (Aug. 2009).