



Legal Effect of Failure to Meet Statutory Rulemaking Deadlines*

Raymond Natter
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Last year, the Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act; a massive law that affects every type of financial product and service offered in our economy. One notable feature of this Act is extensive new rule writing requirements imposed upon the Federal financial regulatory agencies. According to a report issued by the Davis Polk law firm, the Act has approximately 400 rulemaking requirements imposed on 22 agencies or Departments. The Davis Polk report states that as of July 22, 2011, these agencies finalized 41 new rules, but failed to promulgate 130 rules within the statutorily mandated time limits.

The legal effect of missing a statutory deadline for issuing a regulation depends on a number of factors. The first question is whether the statutory deadline is mandatory or simply advisory. If Congress intended to impose a hard deadline for regulatory action, but the agency nevertheless failed to issue the final regulation within the prescribed time, the agency may still be excused if the delay is considered reasonable. Some of the factors that a court will consider when determining if a delay is reasonable include: (i) statutory indications for the need for timely administrative action; (ii) whether the regulation is in the sphere of health and safety in which a delay is less tolerable because human health and welfare are at stake; (iii) the demands on the agency to implement other rules that have a higher priority; and (iv) the nature and extent of the interests that are prejudiced by the delay.

In practice, these principles have resulted in adverse court decisions when agency delay has been egregious, and not when the agency is making its best efforts to comply. For example, in 1990, following the Exxon Valdez grounding, Congress passed the Oil Pollution Act, which required the Coast Guard

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to promulgate implementing regulations by August 18, 1991. When no final rule was in place by 2000, the court ordered the Coast Guard to take prompt action to implement the statute, noting that a nine-year delay was unreasonable, the delayed regulations were intended to implement important environmental concerns, and that the Coast Guard did not show that expedited rulemaking would interfere with higher priority activities.

Another example is the failure of the EPA to promulgate regulations within the time limits mandated by the 1990 amendments to the Clean Air Act. In a 2006 decision, the reviewing court stated that it would not impose a deadline on the agency if the agency can establish that it is using the utmost due diligence in discharging its rulemaking responsibility. However, in this instance the court ordered the agency to promulgate the required regulations by June 15, 2009.

On the other hand, the courts have found delay to be reasonable when an agency cannot complete a required rulemaking due to budgetary constraints or manpower demands. Even claims that meeting a statutory deadline is “impossible” have usually been unsuccessful. The general rule is that when Congress has demanded that a rule be issued by a certain date, the fact that a better rule would be issued if the agency delays the regulation beyond the deadline is not controlling. As one court stated, “if the schedule set by the . . . (legislation) . . . is unreasonable, the remedy lies with Congress, not with the courts.”

With respect to the Dodd-Frank Act, many regulations have not been issued within statutory deadlines, and this list is expected to grow. However, it is unlikely that a court would intervene in a rulemaking that fails to meet a deadline under this Act until the delay becomes lengthy, and it appears to the court that the agency involved is not using its utmost efforts to quickly promulgate the regulation. Further, in light of the massive rule writing burden imposed by this Act, and with respect to at least some of the agencies, significant budgetary and manpower constraints, the courts will probably be reluctant to interfere in the agency process for quite some time.

Raymond Natter is a partner with the law firm of Barnett Sivon & Natter, P.C.