

The Trump Administration's (De)Regulatory Program: What It Means for Business

by Creighton R. Magid

The Trump Administration has, through executive action, sought to bring far-reaching changes to the nation's regulatory infrastructure. These efforts may be cheered by those who view the country as being over-regulated, and met by concern by those who view regulation as an essential means of protecting health, safety, the environment, and other public objectives. Regardless of one's view of the new Administration's approach to regulation, it is important for business to understand what is taking place and the opportunities and threats arising from the White House's actions.

January 20 Regulatory Freeze Memorandum

One of the first actions of the new Administration was the issuance of a memorandum by Chief of Staff Reince Priebus to the heads of executive departments and agencies, directing the agencies and departments to suspend transmittal of any newly proposed or final rules for publication in the *Federal Register* until the new Administration had an opportunity to review them. The memorandum also directed agencies to withdraw any proposed or final regulations that had been sent for publication but not yet published in the *Federal Register* and to postpone by 60 days (from January 20th) the effective date of any rules that had been published but were not yet effective as of January 20th. The Memorandum did give agencies the discretion to determine if any regulations should be excluded, and specifically exempted "emergency situations" or "urgent circumstances relating to health, safety, financial or national security matters." The Memorandum also exempted regulations subject to statutory or judicial deadlines.

The White House's request was not unusual; similar freezes were issued by several prior administrations to allow incoming administrations to put new appointees in place to review and potentially change not-yet-effective rules, including so-called "midnight regulations" issued at the very end of a prior administration.

As a result of the January 20 regulatory freeze, agencies have held up proposed and final rules subject to the freeze, including regulations actively supported by businesses

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(to, for example, preempt more draconian state regulation).

In addition to the White House's administrative freeze, efforts are underway in Congress to strike down a number of regulations in the environment and financial under the Congressional Review Act ("CRA"), which provides Congress a legislative approach to rescinding prior regulations finalized as far back as June 2016.

January 30 "2 for 1" Executive Order and February 2 Interim Guidance

On January 30, President Trump issued an Executive Order quickly nicknamed the "2 for 1 Order" because it requires executive departments and agencies to eliminate two existing regulations for every new regulation issued. The Order actually is considerably broader than the nickname implies. In addition to the "2 for 1" requirement, the Order requires that the incremental "costs" of any new regulations be offset by the cost savings of regulations being eliminated. For the remainder of the current fiscal year, the cost savings or repealed regulations must equal or exceed the costs of any new regulations. For each fiscal year beginning with FY2018, the White House's Office of Management and Budget ("OMB") will establish an "incremental cost allowance" for each agency and department; the budget may allow an agency or department to implement new regulations that, in total, have a greater cost than the total cost reductions from eliminated regulations, or it may require an agency or department to realize cost savings from repeal of regulations that exceed the cost of new regulations.

The 2 for 1 Order also authorizes OMB to approve each regulation for inclusion in the Unified Regulatory Agenda, a prerequisite to issuance in the *Federal Register*, and to allow agencies to exceed their yearly budget allowance under certain circumstances. OMB has therefore become a far more significant player in the regulatory process than it was previously and has been further inserted into the strategic operations of federal agencies.

There are major exceptions to the 2 for 1 Order. It does not apply to regulations issued with respect to the military, national security, or foreign affairs, or to regulations concerning internal agency organization, management or personnel. The Order also allows OMB to exempt other categories of regulations. In addition, the 2 for 1 Order does not purport to change statutory law, including the Administrative Procedure Act ("APA"). Agencies will still need to issue – or keep – regulations as required by statute and could not repeal prior regulation except in accordance with that law or the APA.

Interim Guidance issued by OMB on February 2 helped to put some meat on the bones of the January 30 Executive Order, at least with respect to FY2017. (The Interim Guidance promises further guidance for FY2018 and beyond "soon.")

The Interim Guidance clarifies that the 2 for 1 Order only applies to "significant regulatory actions," defined by a Clinton-era executive order to mean regulatory actions

that have an annual effect on the economy of at least \$100 million; have material added impacts on the economy, jobs, the environment, public health or safety, or on state, local or tribal communities; or that raise novel legal issues. Emergencies addressing critical health, safety or financial matters may qualify for a waiver for some or all of the requirements.

New guidance or interpretive documents (such as industry guidance documents issued by the Food and Drug Administration (“FDA”) for labeling medical products or foods) may or may not be considered “regulations” subject to the Executive Order; the Interim Guidance says that such documents “will be addressed on a case-by-case basis.”

Importantly, the Interim Guidance explains how “costs” are to be calculated when determining offsets for new regulations. Costs are to be measured as the “opportunity cost to society,” based on analyses already required by OMB Circular A-4. This means measurement of costs beyond direct administrative burdens and includes more indirect costs of compliance, such as time and expense of operating equipment. “Meaningful burden reductions,” such as repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements could qualify. On the other hand, consumer cost savings or other benefits of new or repealed rules – for example, energy efficiency cost savings – are not to be considered for offsets. Nor can agencies include in cost saving calculations the “sunk costs” – those already incurred by regulated entities – of repealed rules. This means that previously incurred costs, such as the cost of installation and operation of safety or pollution control equipment prior to repeal, cannot be used to offset the costs of new regulations. Benefits of regulations – whether energy cost savings, improved health, or more pristine rivers – are *not* considered in the calculus.

The Interim Guidance also clarifies that independent regulatory agencies such as the Consumer Product Safety Commission, Federal Communications Commission and the Federal Energy Regulatory Commission (“FERC”), which are not required to submit major rules to OMB, are exempted from the 2 for 1 Order. Nevertheless, they are “encouraged” to identify existing regulations that, if repealed or revised, would fully offset new significant regulatory measures.

While the 2 for 1 Order suggested that it may not cover regulations required in accordance with law or judicial order, the Interim Guidance indicates that the 2 for 1 Order does, indeed, apply to those mandated by law. However, the Interim Guidance exempts those regulations issued under “imminent” statutory or judicial deadline from immediately identifying two deregulatory offsets at the time of issuance. Rules struck down by court after January 20 generally will not qualify for offsets, while those resulting from Acts of Congress, such as through the CRA process, are considered the equivalent to agency deregulatory actions, and can be considered for offsets.

Cost savings from repeal of a rule by one agency component may offset costs of a new regulation issue from another component. OMB may approve transfer of cost savings across agencies. All actions to be repealed and their offsetting costs are to be identified no later than the date of issuance. Cost caps have no effect on consideration of

regulatory benefits in making regulatory decisions, which agencies must still consider other their respective mandates.

The Interim Guidance also made it clear that agencies cannot use previous regulatory cost impact analyses in determining the cost of regulations, meaning that the time and effort required may, in itself, stymie the issuance of new regulations.

While the Interim Guidance did clarify some issues regarding the implementation and scope of the 2 for 1 Order, it left many issues unresolved. These include:

- How broadly will the exemption for military and national security regulations be construed? For example, are all Defense and Homeland Security regulations exempt? Are cybersecurity and privacy regulations, or critical infrastructure regulations exempt as pertaining to national security?
- What constitutes public health and safety “emergencies” for purposes of an exemption? For example, are food safety or vehicle safety regulations exempt?
- How will the White House “encourage” independent regulatory agencies to identify and repeal existing regulations to offset new regulations?
- Does the 2 for 1 Order apply to independent non-regulatory agencies, such as NASA?
- Will OMB attempt to establish a consistent way for all agencies to measure costs for all programs?
- Will OMB determinations regarding agency budgets and requests for exemptions follow objective and established criteria, or will all such determinations be *ad hoc*?

There also remains uncertainty as to whether the 2 for 1 Order will be modified by the White House – or even if it will survive repeated challenges. On February 8, for example, Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America filed suit alleging that the 2 for 1 Order, by not allowing agencies to consider consumer cost savings or public benefits of new or repealed rules as offsets to regulatory costs incurred or to count the “sunk” costs of repealed regulations, is inconsistent with Congress’s directive in the APA regarding the decision-making process to be used in promulgating new rules. While that particular lawsuit faces considerable hurdles with respect to ripeness and justiciability, it indicates that critics of the 2 for 1 Order will be challenging every aspect of agency implementation.

The Implications for Business

The White House’s actions almost certainly will slow the pace of new regulations. Even apart from the time that will be required to identify regulations that might potentially be repealed, agencies and departments will have to conduct entirely new cost analyses. This will require time and administrative resources that might otherwise be devoted to promulgating new regulations or guidance. Some might be cheered by a regulatory slowdown (or even regulatory paralysis), but businesses *seeking* regulatory intervention (regulatory action often either preempts or removes the basis for lawsuits, for example, or is useful in putting competitors at a competitive disadvantage) will have to become more patient.

The directive to eliminate regulations and to condition the issuance of new regulations on offsetting cost reductions expands the strategic chessboard. Previously, businesses could weigh in on behalf of or in opposition to a specific proposed regulation. Now, companies seeking regulatory action will not only have advocate for a new regulation, but also identify potential regulations that could be eliminated. (Business might think, too, about providing assistance to agencies in calculating costs.) On the flip side, companies flourishing because of existing regulations will need to advocate for the *retention* of their preferred regulations, lest those regulations be targeted for elimination as cost offsets. (In short: welcome to the new Regulatory Hunger Games.)

Washington being Washington, it is also likely that agencies (at least at levels below those filled with political appointees) will become increasingly creative in attempting to deal with the White House's de-regulatory bent. Expect an increasing array of regulations to be characterized as being related to "national security" or "foreign affairs" (and thus exempt from the 2 for 1 Order). Also expect agencies to take action unofficially, through such mechanisms as agency-industry working groups. Already, the FDA has issued a "Constituent Update" suggesting that the food industry should work with the FDA to develop "industry" guidance documents to assist in compliance with food laws and regulations.

The 2 for 1 Order also makes clear that OMB will wield enormous power over agencies and departments. Therefore, businesses seeking to have a say in new regulations (or the elimination of existing ones) should pay attention not only to the agency promulgating the regulations, but also OMB.

Other Considerations

The regulatory freeze and the 2 for 1 Order are not the only sources of regulatory slowdown. In some cases, resignations and/or unfilled vacancies leave agencies without a quorum for taking action. (For example, FERC, an independent agency charged with regulating the interstate transmission of natural gas, oil and electricity, as well as natural gas and hydropower projects, has only two of 5 commissioners in place, with one of the remaining two scheduled to depart on June 30. Until at least three commissioners are in place, FERC will be unable to authorize the construction of natural gas infrastructure, resolve contested rate proceedings, or engage in rulemaking.)

Congress, too, seems anxious to get into the act of reducing regulation. In early January, the House passed the Regulatory Accountability Act, which would amend the APA to require agencies to evaluate several additional criteria during the rulemaking process. The Act also would reverse the so-called *Chevron* doctrine compelling courts to defer to agency interpretations of its own regulations. The Act is likely to be introduced in the Senate soon.

Of course, everything in this paper is subject to an important caveat: the new Administration remains highly unpredictable, and many issues have yet to play out. For business, developments in the regulatory arena are well worth watching. Stay tuned.

