



Administration Takes an Initial Step in its Regulatory Reform Agenda

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On January 30, 2017, President Trump issued an Executive Order on “Reducing Regulation and Controlling Regulatory Costs.” Through this Executive Order, the President is seeking to require departments and agencies to minimize the costs imposed on private parties for compliance with federal regulations. Central to this effort is the adoption of a “2 for 1” rule requiring identification of two existing rules to be revoked for each new regulation proposed or issued, as well as establishment of agency-specific “incremental cost allowances” that are aimed at limiting the potential incremental costs that an agency can impose upon the private sector through the issuance of new regulations.

This Executive Order is generally addressed to federal “executive departments and agencies” without defining those terms. President Trump’s comments at the signing ceremony suggest that the Executive Order does not apply to independent agencies (such as the Federal Energy Regulatory Commission (FERC)). Even if there is no explicit compliance obligation, however, an independent agency may comply voluntarily with the requirements of the order.

Overview

Key elements of the Executive Order are:

- **Scope and Exclusions:** The Executive Order applies to “regulations” and “rules” which are defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.” The Executive Order specifically excludes (i) regulations issued with respect to a military, national security, or foreign affairs function of the United States; (ii) regulations related to agency organization, management, or personnel; and (iii) any other category of regulations exempted by the Director of the Office of Management and Budget (OMB).

Notably, the definition of a regulation or rule under this Executive Order is broader than the definitions of a regulation or rule in existing executive orders concerning regulatory review (which, for example, exclude “formal” rules—those rules that can only be issued after completion of trial-like procedures that extend beyond merely notice and comment, such as formal hearings before an administrative law judge with witness cross-examination).

- **2 for 1 - Identification of Regulations for Repeal:** The Executive Order requires an executive department or agency that is proposing a regulation for notice and comment or that otherwise promulgates a new regulation to identify at least two existing regulations to be repealed, unless prohibited by law.
 - *Form and Costs:* In furtherance of this requirement, any new incremental costs associated with new regulations must, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.
 - *Administrative Procedure Act (APA) Procedures Apply to Repeal:* Agencies rescinding or modifying rules pursuant to the 2 for 1 provision must do so pursuant to notice and comment requirements of the APA.
- **Net Zero Impact of Regulations for Fiscal Year (FY) 2017:** For FY 2017 (October 1, 2016 through September 30, 2017), the Executive Order directs that each agency ensure that the total

incremental cost of all new regulations, including repealed regulations, be no greater than zero. However, implementation of this net zero impact requirement is subject to written advice issued by OMB and a general caveat as to actions otherwise required by law.

- **Regulatory Budget Cap for FY 2018 and Beyond:** Under the Executive Order, OMB is directed to use the Presidential budget process to identify the “total amount of incremental costs” that will be allowed for each agency in issuing new regulations and repealing regulations for each fiscal year starting in FY 2018. Within the applicable fiscal year, an agency’s new regulations may not exceed an agency’s incremental cost allowance, unless required by law or approved, in writing, by OMB.
- **Forecasting and Regulatory Plans for FY 2018 and Beyond:** As part of the development of Regulatory Plans (issued by federal agencies pursuant to E.O. 12866), agencies are directed to identify, for each regulation that increases incremental costs, two offsetting regulations as well as to provide the agency’s best approximation of the total costs or savings associated with each new regulation or repealed regulation.
- **Mandatory Notice in Unified Regulatory Agenda:** Unless approved in advance in writing by OMB, all new rules must first have been identified in the publication of the Unified Regulatory Agenda, which is issued twice each year.
- **OMB Guidance:** The Executive Order directs OMB to issue guidance to agencies with regard to implementation of the order, including with regard to: (i) estimating regulatory costs of new regulations and measuring the costs of existing regulations considered for elimination; (ii) determining what qualifies as new and offsetting regulations; (iii) issues relating to accounting for costs over different time periods or with respect to different agencies; and (iv) granting waivers to individual agencies, such as in the case of emergencies or due to overriding requirements of applicable law.

Implications

The driving focus of this Executive Order is the reduction in the costs imposed on the private sector for regulatory compliance. In choosing to implement this effort through OMB, President Trump is relying upon OMB’s unique position with oversight over most, but not all, federal regulations. While the broad outlines of this effort are established, key elements have been reserved to the issuance of OMB guidance. Moreover, any revocation or modification of existing regulations in compliance with the Executive Order still must comply with the requirements of the APA. In particular, the APA requires an agency to comply with public notice and comment requirements and to provide a “reasoned explanation” for changing course. Failure to take these steps provides grounds for legal challenges in the federal courts to vacate the revocation or modification of the existing regulation as “arbitrary and capricious” under the APA.

The path taken by OMB in its guidance and implementation of the Executive Order will have significant implications with respect to the scope of agency rules that are covered, the application of the 2 for 1 standard, and the basis for measuring incremental compliance costs of new and existing regulations. Moreover, it remains to be seen how federal departments and agencies (including independent regulatory agencies such as FERC) will interact with OMB in the evaluation of their individual compliance with the 2 for 1 rule, their compliance with the APA in any revocation or modification of existing regulations, and the application of the “incremental cost allowances” for measuring regulatory compliance costs imposed upon the private sector through an agency’s regulatory actions.

For more information

Van Ness Feldman continues to monitor the ongoing actions of the new Administration and the implications of these actions for regulated businesses. The professionals at Van Ness Feldman possess unique expertise in federal regulation and government affairs. The firm can provide specialized and

practical strategic counseling on the issues touched upon in this Alert. For further information, please contact [Joe Nelson](mailto:jn@vnf.com) at 202.298.1894 or jbn@vnf.com; [Jonathan Simon](mailto:js@vnf.com) at 202.298.1932 or jxs@vnf.com; or any member of the firm's [Energy](#), [Environmental](#), or [Government Relations](#) practice areas.

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