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Regulatory Roll-Back: Frequently Asked Questions on the President's New "One In-Two Out" Regulatory Policy

By: Jeff Weiss and John Cooney

The President's recent Executive Order on reducing regulation and controlling regulatory costs represents the greatest potential change in federal regulatory policy since President Reagan's 1981 Executive Order on federal regulation first provided for White House oversight of the regulatory process. This post explains what the Order does and why it is so significant, highlights some of the implementation questions that remain open, and identifies some of the deregulatory opportunities it could create for stakeholders that engage the Administration in an ambitious and focused manner.

What does the President's Executive Order Do?

Executive Order 13771, along with related guidance issued by the Office of Information and Regulatory Affairs (OIRA), which is part of the White House Office of Management and Budget (OMB), does three main things:

- First, whenever a federal agency proposes a new rule, it requires the agency to identify two existing rules that will need to be eliminated in order to offset the cost of the new rule, with certain exceptions;
- Second, it mandates that the total incremental cost of all new rules in fiscal year 2017 (October 1, 2016 – September 30, 2017) be no greater than zero, with certain exceptions; and
- Third, it provides that, from fiscal year 2018 onward, the OMB Director will establish annual regulatory budgets capping the total amount of incremental costs that each agency will be allowed when issuing and repealing rules, with certain exceptions. The cap could even be a negative number, thereby requiring a reduction in regulatory costs for a specific agency. OIRA's guidance allows agencies to "bank" cost savings from deregulatory actions for use in future years, a policy that encourages agencies to take deregulatory actions even when they don't have a specific rulemaking to be offset.

The guidance also indicates that certain types of rules do not need to be offset by two deregulatory actions and are not subject to a regulatory cap. These include rules that expand consumption or production options; rules that must be promulgated to allow economic activity to take place, such as regulations that NOAA promulgates to manage fisheries; and rules that are required for national security reasons, such as export control regulations promulgated by the Bureau of Industry and Security.

Why is the Executive Order Significant?

It builds on the work of past administrations, Republican and Democrat. The Order maintains the same structure of centralized OMB oversight of federal rulemaking that has been in place since President Clinton issued his Executive Order on regulatory planning and review in 1993. The guidance also clarifies that the OMB circular, issued under President Bush in 2003, that sets out guidance for agencies on how to analyze the costs and benefits of rules, remains operative.

It had an immediate and pronounced short-term impact. The zero cost cap for fiscal year 2017, coupled with the January 20th "regulatory freeze" memorandum from the President's Chief of Staff to agency heads, had the effect of halting most rulemaking activities through the end of September. As of April 24h, there were only ten draft rules under review by OIRA – an astoundingly low number, as the number is typically well over 100. The Administration also signaled its intent to transform federal rulemaking culture long-term by changing the name of the Unified Agenda of Regulatory Actions – the bi-annual report setting out projected rulemaking activities by federal agencies – to the Unified Agenda of Regulatory *and Deregulatory* Actions.

It makes OIRA more powerful. The most repeated phrase in the OIRA guidance is that many different regulatory decisions to implement the Executive Order will be made by OMB "on a case-by-case basis." At least in the early years of the Trump regulatory program, OIRA will have a great degree of new discretion over agency actions as the ground rules for the process are worked out.

OIRA already exercises immense power over agencies, since it can bring in any of their proposed or final rules that it deems "significant" for review by other agencies that may have equities in a particular rule, followed by policy review and clearance by the White House. Under the Clinton Executive Order, OIRA can deem a rule to be "significant" for

a variety of reasons – for example, if the rule will have an annual effect on the economy of $100 million or more, is inconsistent with something that another agency is doing, or if it raises "novel legal or policy issues," a broad catch-all category that can be contracted or expanded by a White House to suit the President's policy preferences.

For obvious reasons, an agency would usually prefer that OIRA not find its draft rule to be significant, because OIRA review takes time – oftentimes much longer than the 90-day review period set out in the Clinton Executive Order – and changes are typically made to the rule during the review process to accommodate the views of OIRA and other reviewing agencies in the White House and Cabinet. (Although in a bit of irony, an agency is often very happy when OIRA decides to review a draft rule being considered by another agency that could impact its equities.) In rare instances, with White House authorization OIRA can even reject a significant rule and send it back to the agency, as inconsistent with the President's program. This occurrence tends to happen with much greater frequency in Republican administrations, where publicly rejecting a rule would probably constitute a net positive news event for an administration, than in Democratic ones, where publicly rejecting a rule would likely constitute an unnecessary, negative news event for an administration (which is why some significant rules remain under OIRA review for long periods of time).

The Trump Executive Order and related guidance build upon and significantly raise the stakes of the OIRA "significance determination" for the following reason: **only rules that OIRA finds to be "significant" are subject to the annual agency regulatory caps and, if such rules impose costs, the requirement to be offset by two deregulatory actions**. In election years and in tough economic times, OIRA tends to find a larger number of rules to be "significant" under the "novel legal or policy issues" catch-all provision, which will make it even more difficult to promulgate rules during those times. In addition, the OMB Director has discretion under the new policy to allow one agency to transfer cost savings it realized from issuing deregulatory actions to a second agency, which would enable the second agency to promulgate a significant rule that would otherwise be prohibited. Whereas OIRA career staff have traditionally been the ones to determine whether a rule is significant – without much interference from their political leadership – some agencies will likely seek to elevate many of these determinations to the political level, given that the stakes will now be much higher.

The increased import of the "significance determination" will likely encourage agency gamesmanship, including: agencies' looking for ways to chop up proposed rules into smaller pieces to avoid a significance determination, as well as asking for a larger annual regulatory cap than necessary, knowing that putting forward a high number may be a good negotiating tactic ahead of annual regulatory cap discussions with the OMB Director, in which the initial number put forward by the agency will almost always be reduced.

For this reason, the OIRA guidance – which OIRA can update at will, without clearing it with the agencies – attempts to narrow or close potential loopholes that could render the cap illusory or otherwise hamper the push towards deregulation. For example:

- Even if a statute does not allow an agency to consider costs during rulemaking, the agency will still be required, as a matter of internal Executive Branch policy, to offset any new rule with two deregulatory actions and fit that new rule under its annual regulatory cap. Rules issued without consideration of costs will have a substantial impact by crowding out other rules that an agency might otherwise issue.
- Agencies cannot change how they have historically accounted for benefits and costs, or revise any analyses from recent rulemakings without new evidence.
- Agencies are not permitted to indicate that the basis or rationale for a deregulatory action was to offset a new rule, since such a statement would undermine the Administration's ability to defend the deregulatory action in court.
- Rules required by statute or by a court also must be offset by two deregulatory actions and fit under the regulatory cap. Moreover, such rules must strictly adhere to what the statute or court requires and go no further: agencies are prohibited from coupling discretionary provisions onto such mandatory rules, in an effort to circumvent the caps, similar to what happens with "must pass" legislation in Congress.
- Agency guidance documents can also be deemed "significant" by OIRA, which would make them subject to the offset requirement and the relevant agency cap. This closes a significant potential loophole.
- Even if a rule was previously listed in last year's Unified Agenda as a "non-significant" rule, the relevant agency will need to submit the rule to OIRA again in the year of its issuance for a new significance determination. This is important for at least two reasons:
    - A draft *final* rule may turn out to be significant even if a draft *proposed* rule was not, because the agency's response to public comments on the proposed rule might produce a final rule that

would be more expensive than the agency estimated, for instance.

- It is also possible that a final rule could be significant even if the proposed rule was not, if the regulator posed a question to potential commenters in the proposed rule and, as a result of that question, inserted additional text into the draft final rule that would not be subject to public comment. This could have been done for very good reasons. However, it also could have been done to artificially reduce the cost of the proposed rule (so as to avoid a significance determination and OIRA review), while allowing the agency in any subsequent judicial action to rebut a claim that interested parties were denied due process since the agency technically requested comment on the concept.

The regulatory budget makes the regulatory process fairer for small agencies. While the agency-specific caps will restrict the number and types of rules that are promulgated, they will also introduce an element of fairness into the system of OIRA planning and review that is currently lacking. The reality is that every administration is very sensitive to, and keeps careful track of, the number of rules it promulgates and their total cost, both as a general matter and as compared to previous Administrations. In essence, there is already a de facto regulatory budget managed by every White House covering all non-independent executive agencies and departments. Since large, powerful regulators with broad jurisdictions (e.g., EPA, Interior) tend to promulgate a high percentage of the overall rules and more expensive rules than small regulators do, they take up most of this unofficial budget at the expense of smaller agencies, whose rules are more likely to be postponed in order to manage overall costs, particularly in a President's first term or in times of economic distress when the unofficial budget contracts. Planning a regulatory budget in advance and instituting agency-specific caps make it less likely that small regulators will see their rules crowded out by larger ones.

What Deregulatory Opportunities Does the Order Potentially Create?

At its core, the Trump Executive Order and related OMB guidance incentivize agencies to find ways to cut costs since, in general, taking deregulatory action that reduces overall costs will provide the only path forward if they want to promulgate new rules that impose costs. Several types of actions, some of which are mentioned in the guidance and which have not typically been high priorities for most agencies, could assist agencies in meeting their obligations under the Order in cases where such actions would reduce costs:

- *Engaging in international regulatory cooperation.* A good example is FDA's recent mutual recognition arrangement with the European Union. The agreement provides that each side will recognize the other side's good manufacturing practice inspections of pharmaceutical plants. This recognition will reduce unnecessary costs for industry, which will not need to undergo duplicative inspections, while also conserving agency resources. The Administration could also seek to align U.S. and foreign regulatory approaches more closely through trade agreements. For a company, being able to sell the same product or service in multiple markets while only needing to comply with the U.S. regulation would necessarily reduce its total costs;
- *Participating in the development of, and using, international standards.* Some agencies continue to develop many of their own standards and test methods. This is contrary to U.S. law and policy, which requires agencies to use standards developed in the private sector as the default, rather than developing agency-unique standards, and to participate actively in their development. Greater agency use of such private sector standards would reduce costs for agencies and the public;
- *Using private sector conformity assessment* – for example, testing, inspection, and certification bodies, procedures, and systems – as the basis for agency requirements, rather than creating government-unique ones;
- *Using stakeholder-driven regulatory tools*, such as negotiated rulemaking and convening official agency rulemaking committees to issue recommendations to the agency on specific rules. These tools usually only work in cases where all of the major stakeholders are supportive of a rule;
- *Rules that expand consumption or production options.* Agencies could regulate to allow actions that are not currently allowed (e.g., allowing unmanned aircraft systems to fly over people) or to reduce compliance costs by allowing stakeholders to use more than one method for demonstrating compliance with rulemaking requirements; and
- *Reductions in paperwork and reporting burdens.* A significant percentage of paperwork and reporting burden reduction can take place through regulatory

change, so there could be additional opportunities to reduce such burdens, including through digitization.

Are There Major Issues That the Order Does Not Address?

Perhaps the biggest challenge the President's new policy presents for agencies is that, to promulgate a deregulatory action that revises or eliminates an existing rule, an agency would need to put new evidence on the record, since the existing administrative record supports the existing rule and would be cited by opposing litigants in any subsequent court action as grounds for the rule to be remanded or vacated.

Developing a new evidentiary record may require substantial investment in time and money that agencies and relevant stakeholders may not be able or want to undertake, especially in cases where some or all the industry already has undertaken expensive measures to comply with the existing rule – costs which cannot be recovered. In these circumstances, the deregulatory action would provide a cost advantage to new entrants.

The OIRA guidance also punted – necessarily, in our view – on several key issues that arise from the Order, relegating their resolution to a "case-by-case" decision and future guidance by OIRA. This includes: how to allocate costs regarding rules promulgated by more than one agency; and if and how to adjust the regulatory caps subsequently in instances where a rule whose costs or savings were counted in one fiscal year is later remanded or vacated in another, possibly much later, fiscal year.

Several other issues can only be addressed by Congress and/or the White House:

Can OMB manage the increased workload generated by the Order without obtaining a significant budget increase in staffing for OIRA? OIRA's mandate has now expanded into regulatory budgeting, which will incentivize new agency deregulatory actions that will also need to be reviewed. It will be very difficult for OIRA to handle these new responsibilities at current staffing levels, without significantly slowing down the regulatory process. Congress has kept OMB and OIRA on a tight appropriations leash for many years as a method of reducing Presidential power. Keeping the budget lean in an environment where OIRA has been granted much new policy authority over agency rules might have the intended effect of slowing the regulatory state.

Will independent agencies ultimately be covered by the Order? Where multiple federal agencies are regulating the same product, service, or substance, it is sensible public policy that they should take a coordinated and consistent regulatory approach. Placing independent agencies under OIRA review would be one way of ensuring that happens.

While the Executive Order does not carve out independent agencies from its scope, however, the current OIRA guidance does. This is likely due to the fact that the proposal to place independent agencies under OIRA's regulatory review program has always been very controversial politically. If it is going to happen, it should ideally be accomplished by Congress. It was Congress that structured these agencies to be independent of the President in the first place. OIRA review of independent agency rules would necessarily compromise their independence to varying degrees, depending on whether OIRA's analysis is binding on the agency before it can promulgate a rule or merely advisory. At the very least, a Senate-confirmed OMB Director and OIRA Administrator should make this decision. Given that regulatory reform legislation is being debated in Congress and there is no confirmed OIRA Administrator, the White House's decision to punt on this issue in the current guidance makes sense.

In either case, the success or failure of covering independent agencies will depend on ensuring sufficient agency budgets are made available to support the new analytical requirements with which these small agencies would need to comply. OIRA would need to add significant numbers of additional staff to handle the increased workload of reviewing rules promulgated by the independent agencies. The independent agencies themselves may also need to be given additional funds if they are required to comply with President Trump's Executive Order. A recent example is Congress' failure to provide additional budget resources for regulatory development to independent agencies that were required to issue hundreds of rules required by the Dodd-Frank Act. Enhanced responsibilities and a flat budget are a prescription for delay and less than optimal regulatory analysis.

Given the President's push to shrink the size of government, it seems doubtful that the requisite resources will be provided. It is also unclear whether sufficient funding could be reallocated from other parts of the independent agencies to their regulatory shops to comply with the Order, without compromising the agencies' ability to perform their core functions.

How does the Administration plan to address the cumulative burden of regulations in specific sectors? The OIRA guidance appears to incentivize agencies to focus on specific sectors of the economy. In particular, it encourages agencies, in cases where they are promulgating a rule that affects a specific sector, to prioritize deregulatory actions in that sector. This guidance is welcome, particularly for small and medium sized businesses. Based on past experience,

however, the guidance is unlikely to yield meaningful results without a concerted push from the White House and OMB.

Tackling cumulative burden has been a difficult task for past administrations, even where it was a priority, since it is typically a cross-agency issue, and agencies indicate that it is too difficult and too expensive to make progress for that reason. OMB could help by pulling in rules for review as significant if they adversely affect a specific sector in a material way, even if the rules themselves do not reach the $100 million threshold. The White House could also convene sector- or issue-specific task forces with the relevant regulators and stakeholders to map out the combined burden of regulations, guidance, and permitting, and propose a unified and streamlined approach through issue- or sector-specific retrospective reviews. The Memorandum issued by President Trump on January 24, which addresses streamlining permitting and reducing regulatory burdens for domestic manufacturing, is a promising example of this type of approach. The Obama Administration's focus on Single Window deployment – which provided streamlined electronic filing options for over three hundred forms that are required to import or export specific products – is another.

In addition, OMB should consider leveraging its efforts to develop cross-cutting reform proposals under the President's Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch with a push to reduce cumulative regulatory burdens in specific industry sectors. OMB's guidance for that Order calls on agencies to look for ways to streamline reporting burdens and reduce duplication of activities across multiple parts of the same agency. The guidance also indicates that OMB will work with agencies and stakeholders to develop reform proposals involving the work of two or more agencies – including to address situations where multiple federal agencies are interacting with State and local governments in redundant or otherwise sub-optimal ways – and could seek to merge agency programs or activities where there is duplication.

One particular sector that could potentially benefit from OIRA focus is the U.S. port and supply chain ecosystem. Simplification and coordination of federal and State regulatory and permitting requirements in that sector is badly needed to enable the infrastructure improvements that will support a truly 21st century U.S. supply chain and would reinforce the Administration's focus on promoting exports and U.S. competitiveness.

Conclusion

The President's new Executive Order on regulation could enable ambitious initiatives to eliminate unnecessary costs, including initiatives that would streamline regulation, permitting, and information collection, promote the use of private sector standards, and encourage U.S. regulators to engage in cooperation with their foreign counterparts as a normal course of business. Strong and sustained engagement by the private sector with the Administration – especially by providing specific reform ideas, backed up by data and analysis – will be essential to ensure that implementation of the Order supports such initiatives.

Venable will continue to monitor this issue as rules begin to appear on OIRA's dashboard; as OIRA issues additional guidance about the implementation of the President's Order, as well as the companion Executive Order on enforcing the regulatory reform agenda; and as new executive actions and policies are announced. Please contact the authors if we can provide you with additional information and assistance in engaging with the Administration on these initiatives.

Jeffrey G. Weiss
Partner
+1 202.344.4377
jgweiss@Venable.com

Jeff Weiss is a partner at Venable, a former Associate Administrator at OIRA, and a former lead lawyer and international trade negotiator on regulatory and standards issues at USTR.

John F. Cooney
Partner
+1 202.344.4812
jfcooney@Venable.com

John Cooney is a partner at Venable, and previously served as Deputy General Counsel for Litigation and Regulatory Affairs at OMB, during which time he served as counsel for OIRA.

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