
Deregulatory Statistics and Priorities are Highlighted in White House Fall 2017 Regulatory Agenda

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On December 14, 2017, the White House released its [Fall 2017 Unified Agenda](#), containing the collected Agency Statements of Regulatory Priorities and individual agency plans. Statistics released with the agenda report emphasized a greater pace of deregulatory action than had been directed by the Administration in Executive Order 13771 of January 30, 2017 on [Reducing Regulation and Controlling Regulatory Costs](#). That directive called for repealing two regulations for every new rule promulgated and imposing a net zero regulatory cost increase for Fiscal Year ("FY") 2017, which ended Sept. 30, 2017.

According to the agenda report, instead of a two to one ratio, in FY 2017, federal agencies released 22 deregulatory actions for every new rule adopted (67 deregulatory actions and three new regulations), with a reported cost savings of \$8.1 billion in lifetime net regulatory cost savings, averaging \$570 million per year. Since January 2017, agencies have withdrawn or delayed 1,579 planned regulatory actions; of these, 635 were withdrawn, 244 "made inactive," and 700 were delayed. For FY 2018, the Administration expects that agencies will issue at least three deregulatory actions for each new rule and will cut more than \$9.8 billion in lifetime costs for regulations (\$686.6 million per year).

The Administration's priorities for FY 2018 focus on continued efforts to modify or eliminate regulations, revising or eliminating guidance documents, and streamlining information collection. Other points in the Introduction to the Fall 2017 Regulatory Plan reinforce the role of the Office of Information and Regulatory Affairs ("OIRA") in ensuring that new agency actions use the least burdensome regulatory approach, conduct rigorous benefit cost analyses, and proceed only when benefits substantially outweigh costs. The Introduction to the Plan also announces publication of a previously non-public "Inactive List," which is said to identify 600 regulations that agencies may pursue in the future. (A quick look at this list indicates 444 rules from the Fall 2017 Unified Agenda and 495 from the Spring 2017 publication, but it is possible that overlaps explain the differing total number cited in the report.)

The Introduction serves notice that the Administration will look closely at the use of "sub-regulatory actions," such as guidance documents, enforcement statements, and even "FAQs," to make sure they do not impose new or additional legal requirements. Agencies have been encouraged to look at existing guidance and other documents to determine whether they should be withdrawn, modified, or subjected to the notice and comment process.

Individual agency priority statements vary considerably in format and approaches to regulatory reform requirements. The Department of Interior statement, for example, frames its entire 13-page discussion in terms of regulatory reform, with each section identifying deregulatory actions and regulatory cost savings with specificity. The Department of Energy's two-page explanation is more general, noting its intention to implement seven regulatory actions and 16 deregulatory actions which are set forth in the Department's Regulatory Agenda. The Agenda indicates that several energy efficiency standards that previously were expected in FY 2018 are now on a longer term schedule without specific target dates.

The Environmental Protection Agency's ("EPA") statement of priorities takes a rule-by-rule approach, noting the agency's expectation of finalizing more than 30 deregulatory actions and fewer than ten regulatory actions in FY 2018, with cost savings to outweigh costs of new regulatory actions. The Regulatory Agenda reflects a delay in issuance of a proposed rule defining Waters of the United States, from December 2017 to May 2018, with a final rule expected by June 2019. EPA's statutorily required implementation of amendments made in 2016 to the Toxic Substance Control Act will now proceed through a stakeholder process in FY 2018 aimed at adopting a process for prioritizing chemicals for action and will consider whether changes to previously issued procedural regulations are necessary.

A senior Administration official confirmed that the two-for-one Executive Order requirement does "not at this time" apply to independent agencies, but some have moved in the direction of regulatory reform nonetheless. For example, the Federal Trade Commission's statement of priorities identifies, as regulatory reform initiatives that are underway, efforts to reduce occupational licensing requirements, eliminate outdated or unnecessary rules, and increase agency transparency. The statement of the Consumer Financial Protection Bureau ("CFPB"), on the other hand, does not reflect an emphasis on regulatory reform; this is not surprising, since the Bureau's submission is dated September 28, 2017, before the departure of Director Richard Cordray, a holdover appointee from the previous Administration. With the Director of the Office of Management and Budget now also in charge of the CFPB on an interim basis, change seems likely; so far Acting Director Mulvaney has put in place a 30-day freeze on CFPB rulemaking efforts, and interested parties must keep a close eye on the evolving situation.

The Unified Agenda is dense reading, with many more features – such as indicators as to whether an action is regulatory or deregulatory – than was previously the case. Interested parties should examine carefully the timelines for regulatory and deregulatory actions of interest and make plans to engage. Equally important, parties that submitted recommendations for regulatory reform should take a close look to see what desired changes are not on an agency's agenda; getting attention for those initiatives will require a much higher level of effort and focused strategy, given the ambitious plans the agencies have already announced for their actions in the coming year.

Clark Hill is experienced in working with interested parties to develop informed strategies and effective implementation in complex regulatory matters at all stages of the process, including appellate challenges. For more information, please contact Karen C. Bennett, Jane C. Luxton, Kenneth von Schaumburg, William J. Walsh, or another member of Clark Hill's Environment, Energy & Natural Resources or Administrative Law Practice Groups.