Regulatory Reform: A Closer Look at Opportunities and Challenges

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Clark Hill's previous Alerts on the major regulatory reform initiatives launched by the Trump Administration covered the key points of those executive orders and directives (see Regulatory Restructuring Initiatives Keep Coming and other reviews referenced therein). After assessment of the collective orders, this analysis offers more in-depth commentary on the implications of these changes, and the opportunities and challenges they present for regulated entities.

Multiple reform programs are in motion, creating a complicated playing field.

Executive Order ("EO") 13771 on Reducing Regulation and Controlling Regulatory Costs directed agencies to roll back at least two rules for every new one adopted and meet a regulatory budget of zero net cost increases for fiscal year ("FY") 2017, with a net cost limit ("regulatory cap") to be established for FY 2018 and each year beyond. In a February 2 Interim Guidance document - updated in the April 5, 2017 Memorandum: Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs' - the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") provided additional detail on the workings of EO 13771, including limiting its application to "significant" rules and explaining the basics of cost savings calculations to be used in supporting rule revocations. On February 24, President Trump issued EO 13777 on Enforcing the Regulatory Reform Agenda, which added structural and enforcement mechanisms for EO 13771, requiring each federal agency to designate a Regulatory Reform Officer and Task Force responsible for compiling lists of rules to be rescinded, and setting forth an expanded set of criteria for agencies to use in this effort.

On March 7, in response to a January 24 Presidential Memorandum, the Commerce Department published a Request for Information, soliciting recommendations from the public designed to reduce burden on domestic manufacturing (see New Administration Orders Federal Agency Action to Reduce Regulatory Burden on Manufacturing). Other recent directives have called for the Treasury Department to study and report on measures needed to improve efficiency and accountability in regulation of the financial system (see Extraordinary Opportunity for Bankers to Impact Federal Policy and Regulations), for EPA to revise or eliminate a major jurisdictional rule promulgated by the prior Administration (see President Trump Orders Revisit of "Waters of the United States" Rule), and for agencies to revisit existing policies in order to promote energy independence and economic growth (including rescission of a list of climate-change EOs, rollback of EPA's Clean Power Plan, and reversal of previously issued guidance calculating the "social cost of carbon"). It is our understanding that at least one additional regulatory EO will soon be issued, to clarify the procedures to be used in assessing the benefits and costs of regulation.

Any subset - or even one - of these changes would be a substantial challenge for agencies and regulated entities to manage, but all of them coming together, with differing criteria, deadlines, and mechanisms add up to an overwhelming mass of opportunities and issues. While these initiatives offer a variety of options that regulated entities could pursue in seeking revocation of existing rules, they also require strategic consideration of the possibilities and limits of each, in order to maximize chances for success.

With so many initiatives under way, how can an interested party move its top agenda items to the front of the line?

Companies and associations across the country are compiling long lists of rules they believe should be rescinded or revised. Competition will be fierce to win the backing of agencies and the OIRA decision makers who are charged with administering the regulatory reform program. A few observations are worth noting:

- *Agencies are already short of staff and resources, and the proposed federal budget ensures that things will only get tougher.* Any regulated entity that wants to enhance its prospects must do the work necessary to present a complete package, showing the cost savings that will be achieved if the proposed changes are adopted.
- *Regular rulemaking requirements under the Administrative Procedure Act and EO 12866 on Regulatory Planning and Review, which necessitates a benefit/cost justification, remain fully in force.* Any proposed rule revocation will have to substantiate, using credible data in the administrative record, why a regulation that previously was determined to meet a benefit/cost test now fails it and is no longer in the public interest. The chances that opponents of the deregulation will challenge it in court are extremely high, and developing a sound legal strategy early in the process is essential to strengthen defensibility.
- *In all likelihood, interested parties will need to develop a multi-pronged strategy* to expand support and win preeminence over competing regulatory rollback candidates.

How will cost "savings" be calculated?

The OIRA Guidance provides some detail on how cost "savings" will be counted for purposes of EO 13771 and other regulatory reform programs. Costs will be measured based on methodologies set forth in OMB Circular A-4, cost savings will be based on "opportunity costs to society," and revocation proposals may not rely on the original agency Regulatory Impact Analysis ("RIA") or include sunk costs of investments already made to comply with a rule. Although only significant rules are subject to EO 13771's requirements (at least for now), rules proposed for revocation need not be significant. Outright repeal and revision of existing rules, as well as streamlining of reporting and similar requirements, may all be considered deregulatory, but in all cases, savings must be verifiable. Applying these points is not simple, and things only get more difficult going beyond them.

For example, while it seems likely the compliance costs an agency estimated before a rule went into effect will have turned out differently in real life, how

will an association or company tease out the costs that could be avoided if a rule were rescinded or revised? Trade associations have their own challenges with seeking compliance cost information from their members, and even if a deregulatory initiative makes companies more willing to do the work necessary to compile this kind of data, it would be a major undertaking. Will the exercise devolve into merely counting the benefits of eliminating monitoring, record-keeping, duplicative reporting, and other administrative costs, as seems to be the principal result of Canadian and U.K. regulatory reform efforts to date, or will it go further? Are there ways to show larger, operational cost savings, for example? This is an issue that will require clear-headed planning in teeing up any regulatory change that is contemplated.

Timing is a consideration.

As regulatory attorneys know too well, it usually takes at least 18 months for a rule to move from proposal to final stage. In the same way, a rule revocation requires a proposal based on a justification for the reversal, a notice and comment process, and a final rule with response to comments, and it will likely take just as long. The simplest rollbacks will involve low-hanging fruit with easy-to-quantify elimination of administrative requirements, and the competition to move these first candidates will be strong. More complex rule changes will take longer to build a defensible record, and will not be ready in time for the initial wave of agency recommendations to OIRA. We can expect to see tension among several critical forces: the need to assemble an appellate-ready record, high expectations in the regulated community (reinforced by White House claims that 70%+ of regulations will be eliminated), and incentives to finalize rules quickly enough that they can be defended by the current Administration. These will be interesting times for administrative law practitioners.

How will court-ordered or statutory deadlines change the dynamics?

Some agencies - and particularly EPA - are subject to a number of statutory or court-ordered deadlines for finalizing rules, such as the Toxic Substances Control Act ("TSCA") chemical prioritization scheme established by the Lautenberg Chemical Safety Act of 2016 or the financial assurance rule required under the Superfund program, which has a late 2017 final rule deadline. (The Department of Energy's obligatory energy efficiency rulemakings are another example.) The OIRA guidance emphasizes that these deadlines must be met, but that agencies must still satisfy the EO 13771 requirements of identifying two rules that will be revoked and complying with the allowable regulatory budget. While EO 13771 provides for OIRA waivers, the OIRA guidance provides little reason to believe waivers will be granted except in emergencies or compelling circumstances. It appears that all waiver requests to date have been denied.

With agencies having no choice but to put these mandatory rules first, at EPA at least there seems little chance any discretionary rules - even those that industry favors because they standardize compliance obligations or level the playing field among competitors - will make it through the near-term bottleneck, and a longer-range strategy may be necessary. At other agencies, the situation may be more open to industry-friendly, pro-regulatory initiatives.

Banking and trading arrangements are intriguing possibilities yet to be fully delineated.

The OIRA guidance clarifies that regulatory savings may be used across an agency to offset the cost of a new rule, but also indicates that agencies may request OIRA approval to transfer savings from another agency when the original agency lacks recouped cost credit to support a rule. It appears that agencies can "bank" cost savings from one fiscal year to the next. The challenges for OIRA in assuming the oversight role in banking and trading schemes seem substantial, and this is an area that should be watched closely.

The status of independent agencies is unclear.

The OIRA guidance states that EO 13771 applies only to agencies that must submit significant regulatory actions to OIRA for review under EO 12866; that is, independent agencies are exempt from the one in/two out and related requirements - at least unless and until action is taken to change the reach of EO 12866 or a different view prevails. An obscure Reagan-era Office of Legal Counsel opinion lays out the argument for extending OIRA review to independent regulatory commissions, and it is possible the Administration will decide to take an aggressive position on this point. In any event, the OIRA guidance encourages independent agencies to follow the deregulatory principles outlined in the new directives. Some independent agencies, with Republican leadership or majority Board or Commission control, may elect to join those clearly covered by the EOs and begin targeting regulations for revocation or revision. Accordingly, entities subject to regulation by independent agencies should be considering whether any existing rules would qualify for regulatory reform efforts.

OIRA's April 5 revised guidance document clarifies some issues that have been raised in comments and discussions, and we can expect to see soon another document that provides direction for FY 2018 and beyond. Many questions remain, however, and it seems likely that each agency will take its own approach to meeting its obligations under the new directives, creating many variables and complicating the path forward for those interested in reducing regulatory burden. Without a doubt, these regulatory reform initiatives offer opportunities as well as challenges for regulated parties.

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 proceeding, including appellate challenges.

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