

INSIGHTS

White House Issues Interim Guidance Memo on Implementation of "Two-for-One" Executive Order On Regulations, Invites Public Comment

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On February 2, 2017, the Acting Administrator of the Office of Information and Regulatory Affairs ("OIRA") issued a guidance document (the "Interim Guidance") intended to help clarify President Trump's January 30, 2017 Executive Order titled "Reducing Regulation and Controlling Regulatory Costs" (the "Order"), an Order most discussed for its demand that each federal agency repeal two regulations for any new rule issued. As discussed below, however, we believe that the most meaningful part of the Order is the regulatory cost cap, which will require departments and agencies to fully offset the cost of any new regulation by reducing the cost of existing regulatory requirements. The Interim Guidance is timely, as significant questions have arisen about how the Order will be implemented in practice.

The Order

By way of background, the January 30th Order contains two core principles, effective immediately and applicable for the balance of the federal government's 2017 fiscal year¹: first, Section 2(a) of the Order, the "two-for-one" directive that for every new regulation issued, two existing regulations shall be repealed; and second, in Section 2(b) and (c), a "regulatory budget" or "cost cap" concept directing that any new regulations issued in fiscal 2017 shall not result in additional incremental costs not offset by eliminating existing costs, unless otherwise required by law.

The Order uses the same definition of the term "regulation" that has long been used in other Executive Orders going back to the Reagan Administration. It not only includes conventional rules and regulations but any "agency statement[s]" that "implement, interpret, or prescribe law or policy." This means that it potentially covers agency guidance and interpretive documents, applicability determinations, letter rulings, and administrative judicial opinions. As with the prior Executive Orders, the Order does not apply to regulations directed internally at the federal government (such as organizational restructuring) rather than the public, nor to rules involving military, national security, or foreign affairs.

The "two-for-one" concept seems to have attracted the most attention from commentators, with a number of logical questions about implementation being posed: How does an agency decide whether an eliminated rule (or guidance) qualifies? Does removing two tiny rules or scrapping two old guidance documents to make room for one large new rule qualify? Does the Order apply to non-discretionary rulemakings required by statute? Are there really enough

obsolete, burdensome, non-mandatory regulations available for elimination to begin to cover the many future rulemakings that have already been mandated by Congress or court order?

The regulatory budgeting component of the Order attracted less media attention but also raises a number of questions. How to estimate regulatory costs and cost savings, whether regulations that purport to save people money, like energy efficiency requirements, can be used to offset regulatory costs, and how to account for rules finalized during the first three to four months of the fiscal year – these questions are equally significant.

One issue of critical concern that immediately arose is whether so-called “independent agencies” are covered by the Order. The Order itself simply refers to “executive departments or agencies” but provides no elaboration on what those terms mean. On January 30th, however, a White House spokeswoman told the press that independent federal agencies like the Consumer Financial Protection Bureau, the Securities and Exchange Commission, and the Commodity Futures Trading Commission are not covered by the Order. As discussed below, the Interim Guidance further clarifies this issue.

The Interim Guidance

As expected, OIRA will play a key role in implementing the Order. OIRA is the office within the Office of Management and Budget (“OMB”) that deals with regulatory issues, and the Interim Guidance was issued by the Acting OIRA Administrator. It gives departments and agencies substantial discretion over the implementation of the Order’s “two-for-one” requirement but sends a strong signal that OIRA will play close attention to the regulatory cost cap and budgeting requirements.

This is not a surprise. Anyone who has been involved with federal regulatory issues can imagine how an agency could easily “game” the two-for-one requirement, and OIRA has little interest in policing such behavior. For good reasons, OIRA is much more interested in the cost imposed by regulations than in any effort to count the number of them.

The Interim Guidance is presented as a general restatement of the requirements of the Order with some clarifications, followed by guidance in a “frequently asked questions” format. The guidance starts by narrowing the coverage of the Order to a very significant degree by applying it only to “significant regulatory actions,” referencing a term defined in Section 3(f) of Clinton-era Executive Order 12866, which includes regulatory actions likely to have an annual effect on the economy of at least \$100 million or cause other material adverse effects to any sector of the economy. OIRA has discretion to treat virtually any regulatory action as “significant” if it raises important policy issues or may set a precedent for other regulatory decisions.

The guidance also clarifies some timing issues – agencies may comply with the Order by issuing two “deregulatory” actions for each “new significant regulatory action,” which deregulatory actions must be “identified” (but not necessarily implemented) before the agency issues a new rule, and the determination of whether the incremental costs of a new rule have been fully offset appears to be measured as of September 30, 2017 rather than at the time of promulgation.

In the FAQ section of the Interim Guidance, a number of additional clarifying directions are provided:

- **Guidance:** Despite the breadth of the Order’s definition, “new significant guidance or interpretive documents” will be covered by the Order only on a “case-by-case basis” as determined by OIRA. In other words, new guidance may or may not require removals or offsets; and the removal of existing guidance may or may not qualify as offsets.
- **Independent Agencies.** The Interim Guidance confirms the reports that the Order only applies to the agencies covered by EO 12866, excluding statutory “independent agencies,”² but the guidance encourages those independent agencies to voluntarily follow the Order’s approach to deregulatory actions and cost offsets.
- **Congressional Action:** If by action of Congress (but not the courts), an existing rule is removed, that removal appears to count toward future “two-for-one” and regulatory budget determinations. The Interim Guidance explicitly states that regulations that Congress disapproves under the Congressional Review Act can be used as offsets, i.e., that regulatory costs eliminated by Congress can be considered for purposes of an agency’s regulatory budget; but that regulations overturned in court cannot.
- **Deregulatory Actions Short of Outright Repeal:** The Interim Guidance’s focus on “deregulatory actions” raises the immediate question of whether relief from some but not all components of a regulation would count toward “two-for-one” and costs savings determinations under the Order or whether imposing a less burdensome replacement rule would qualify as an offset. The Interim Guidance suggests that these determinations will be made on a case-by-case basis as well.
- **Energy Efficiency Regulations:** The Environmental Protection Agency (“EPA”) and the Department of Energy (“DOE”) have issued regulations that purport to save people money by requiring them to purchase more efficient products. Some economists, including former OIRA economists, have been skeptical of these claims, and the Interim Guidance addresses this issue explicitly. It says that cost savings from energy efficiency rules will not ordinarily be deemed to offset the costs of a new rule under the Order.
- **No Double-Counting:** In contrast to the past practice of some agencies, the Interim Guidance makes clear that cost savings “should be counted only once” and can only be tallied for “the regulatory action” that actually eliminates a requirement that imposes costs to society.
- **Waivers for Emergencies and Other Legal Requirements.** The Interim Guidance indicates that OIRA can waive the requirements of the Order where necessary for an agency to respond to an emergency. Perhaps more importantly, the guidance also clarifies that agencies “may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance,” although the agencies are nonetheless directed to eventually make that effort.

While there remain numerous questions about how the Order will actually be implemented going forward, especially given that most existing and new rules to some degree result from statutory or judicial mandates that agencies cannot override, the Interim Guidance nonetheless provides important clarifications that answer some of the most immediate questions. In the meantime, OIRA has requested public comment on the Interim Guidance by February 10, 2017,

offering the public and the regulated community an opportunity to seek additional clarifications.

The strength or weakness of the Order is wrapped up in its implementation, a task that will ultimately fall to OIRA. The staffing of OIRA is a work in progress although transition staff has included experts in regulatory budget approaches. Clients are well advised to make their positions known to OIRA staff on the process of implementing the Order as well as on the costs necessitating an offset.

Strategically, a company or business group that is advocating any sort of regulatory reform should carefully consider how it will likely be treated for purposes of an agency's regulatory budget. In particular, it would be very helpful to quantify the cost savings that would result from the proposed reform – and to quantify it in a way that would pass muster with OIRA. Please contact us to discuss practical recommendations for approaching OIRA and other OMB offices.

¹ The federal government's fiscal year 2017 runs from October 1, 2016 to September 30, 2017.

² The "independent agencies" excluded from EO 12866 and, therefore, the Order are listed in the Paperwork Reduction Act, 44 U.S.C. § 3502, as "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission."