

May 16, 2017

## Energy Update

### Memorandum Interpreting the “Promoting Energy Independence and Economic Growth” Executive Order

#### Overview

On May 8, 2017, the Office of Management and Budget (OMB) issued a [memorandum](#) titled “Guidance for Section 2 of Executive Order 13783, titled ‘Promoting Energy Independence and Economic Growth’”. [E.O. 13783](#) directs federal agencies to review, and potentially suspend, revise or repeal, existing regulations that “burden domestic energy production.”

Section 2 of the Executive Order is titled “Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources”. The Executive Order requires the “heads of agencies [to]...review all existing regulations, orders, guidance documents, policies, and any other similar agency actions...that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.” Exempted from this directive are “agency actions that are mandated by law, necessary for the public interest, and consistent with” the Executive Order. To carry out this requirement, agencies must submit plans for conducting the mandated regulatory review to the Director of the OMB within 45 days (May 12, 2017). Within 120 days (July 26, 2017), agencies are required to provide to the OMB Director, the Vice President, and other officials, “a draft final report...[that] shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.” The agencies must submit final reports within 180 days (September 24, 2017). To carry out the recommendations outlined in these reports, agencies must “as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law.”

Other provisions of E.O. 13783 require agencies to review and take action to “suspend, revise, or rescind” a variety of specific regulations, including: the Environmental Protection Agency’s (EPA) Clean Power Plan, the Department of Interior’s moratorium on coal leasing on federal lands, the EPA’s regulations for new oil and gas sector sources of methane emissions, and other greenhouse gas regulations. The May 8<sup>th</sup> OMB memo does not address these provisions of the Executive Order, and is instead limited to providing guidance on implementing the general regulatory review directed by Section 2.

#### Application of the Executive Order

The memorandum states that its “guidance” applies “to all Executive Departments and Agencies, except for independent regulatory agencies”, citing the definition of independent agencies found in [44 U.S.C. 3502](#).

Independent agencies include the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC) and the Nuclear Regulatory Commission (NRC). The memorandum adds however that “[i]ndependent regulatory agencies are encouraged to provide a plan and report in response to EO 13783, especially those independent regulatory agencies that directly regulate the development or use of domestically produced energy resources.”

The memorandum declares that agencies are not required to review regulations or other actions that are: “(1) Mandated by law; (2) Necessary for the public interest; and (3) Consistent with the policy set forth in Section 1 of EO 13783”. Section 1 of the Executive Order describes a series of policy objectives related to the “clean and safe development” of affordable domestic energy resources.<sup>1</sup> The memorandum further states that if an agency finds that a regulation or other action meets these requirements for exemption from the Executive Order, “the agency should identify those actions in the written statement to the OMB Director, along with a brief explanation of the basis for this determination, no later than May 12, 2017.” Also, if an agency determines it has not issued any regulations or executed other actions that “potentially burden the development or use of domestically produced energy resources”, it should “state that in a written statement to the OMB Director, along with a brief explanation of the basis for this determination, no later than May 12, 2017.”

## Plan

For any agency that determines that it has issued covered regulations or other regulatory actions, the Executive Order requires it to, by May 12<sup>th</sup>, submit to the OMB, Vice President, and other White House offices, its plan for implementing the review of its energy-related actions. The memorandum details what must be included in each plan, including a description of how the agency will:

- “Identify agency actions or categories of actions that potentially burden the development or use of domestically produced energy resources;”
- “Seek input from entities significantly affected by those agency actions;”
- “Classify those agency actions;”
- “Review those agency actions, including any quantitative analysis (e.g., costs, lost production) the agency plans to perform; and”

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<sup>1</sup> Section 1 of E.O. 13783 states: “Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security. (b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources. (c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. (d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic. (e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.”

- “Develop recommendations that could alleviate or eliminate the potential burden.”

## Report

The next step for agencies in implementing the Executive Order is submission of “draft final reports” by July 26, 2017. The memorandum states that the draft final reports should include:

- “The identification and classification of agency actions that potentially burden the development or use of domestically produced energy resources;
- “How the agency plans to seek input from entities significantly affected by agency actions that potentially burden the development or use of domestically produced energy resources;”
- “Recommendations, consistent with law, that could alleviate or eliminate aspects of agency actions that burden domestic energy production or use;”
- “The expected timeframe for when the recommendation would be implemented;”
- “How the agency will track implementation, including points of contact;”
- “To the extent feasible, preliminary estimates by agency action of the costs and cost savings, increased production, or other beneficial effects, that may be achieved by implementing each recommended action; and”
- “Whether those actions have been identified as part of activities undertaken in compliance with [EO 13771](#) or [EO 13777](#).”

The President signed the Executive Order titled “Reducing Regulation and Controlling Regulatory Costs” ([E.O. 13771](#)) on January 30, 2017. This Executive Order is intended to ensure that “for every one new regulation issued, at least two prior regulations be identified for elimination”, and directs “all agencies” to ensure that “the total incremental cost of all new regulations, including repealed regulations, to be finalized [in Fiscal Year 2017] be no greater than zero” unless otherwise provided by law or consistent with advice from the OMB Director.

On February 24, 2017, the President signed the Executive Order titled “Enforcing the Regulatory Reform Agenda” ([E.O. 13777](#)), which establishes mechanisms intended to reduce regulations, including by implementing E.O. 13771. Among the requirements of E.O. 13777 are mandates for federal agencies to appoint “Regulatory Reform Officers” and establish “Regulatory Reform Task Forces”. As described in a White House [press release](#), the Executive Order directs each agency’s Regulatory Reform Task Force to: “evaluate existing regulations and identify candidates for repeal or modification”; and “focus on eliminating costly and unnecessary regulations.”

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