

January 11, 2018

Regulatory Update

Update on Trump Administration Deregulatory Efforts

Overview

Since taking office, President Trump and his Administration have worked toward regulatory reform that includes the review, revision, and repeal of existing regulations, with a focus on rules promulgated by the Obama Administration. Congress has played a key role in this effort, through the use of the Congressional Review Act to repeal rules finalized in the waning months of the prior Administration, as well as one rule issued by the Consumer Financial Protection Bureau (CFPB) in 2017.

President Trump signed a series of executive orders in the early months of his presidency that are propelling the deregulatory efforts of federal agencies. These executive orders: set a cap limiting regulations in Fiscal Year 2017 to zero net cost; provide agencies with a framework for limiting new regulations and identifying existing rules to repeal or revise; direct review and revision or repeal of the “Waters of the United States” rule issued by the Obama Administration; and require review and reform of energy and climate-related regulations.

Executive Order 13771

On January 30, 2017, the President signed an executive order titled “Reducing Regulations and Controlling Regulatory Costs” ([E.O. 13771](#)). The Order established a “Regulatory Cap for Fiscal Year 2017”, requiring covered agencies to “identify at least two existing regulations to be repealed” for each new regulation issued. Furthermore, it directs “all agencies” to ensure that “the total incremental cost of all new regulations, including repealed regulations” finalized in Fiscal Year (FY) 2017 would be “no greater than zero” unless otherwise provided by law or consistent with advice from the Office of Management and Budget (OMB) Director. In addition, the Executive Order specified that “any new incremental costs associated with new regulations, to the extent permitted by law” must be “offset by the elimination of existing costs associated with at least two prior regulations.”

Following the end of FY 2017 on September 30, 2017, the OMB released a report titled “[Regulatory Reform: Two-for-One Status Report and Regulatory Cost Caps](#)”. The report summarized progress by agencies in complying with the requirements of E.O. 13771. For FY 2017, OMB stated that

federal agencies: “issued 67 deregulatory actions and only 3 regulatory actions”; and “[s]aved \$8.1 billion...in regulatory costs, or \$570 million per year.”

The report also sets the regulatory cost caps for FY 2018, including caps for individual agencies. The overall cost cap requires federal agencies to finalize regulatory and deregulatory actions that produce net annual cost savings of \$686.6 million.

Executive Order 13777

On February 24, 2017, the President signed an executive order titled “Enforcing the Regulatory Reform Agenda” ([E.O. 13777](#)). The Executive Order directed agencies to establish 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.”

Executive Order 13778

On February 28, 2017, the President signed an executive order titled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” ([E.O. 13778](#)). The Executive Order directs the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to review the [final rule](#), promulgated by the Obama Administration, titled “Clean Water Rule: Definition of ‘Waters of the United States’”. The EPA and USACE issued the original final rule on June 29, 2015. The rule sought to define which wetlands, rivers, streams, lakes, ponds and other bodies of water are subject to federal regulation under the Clean Water Act.

Pursuant to E.O. 13778, the EPA and USACE have developed two separate rulemakings to repeal and replace the Obama Administration “Waters of the United States” (WOTUS) rule:

- On July 27, 2017, the EPA and USACE published a [Notice of Proposed Rulemaking \(NPRM\)](#) titled “Definition of ‘Waters of the United States’ – Recodification of Pre-existing Rules”. The NPRM would “rescind the definition of ‘waters of the United States’ in the Code of Federal Regulations to re-codify the definition of ‘waters of the United States,’ which currently governs administration of the Clean Water Act.” The [Unified Agenda of Regulatory and Deregulatory Actions](#) projects publication of the final rule repealing the WOTUS rule by April, 2018.
- The Unified Agenda also includes a pending NPRM titled “Second Action: Definition of ‘Waters of the U.S.’”. The EPA and USACE are developing “this proposed rule to follow the first step which sought to recodify the definition of ‘waters of the United States’ that existed prior to the 2015 rule”. This second rulemaking would be “a substantive re-evaluation and revision of the definition of ‘waters of the United States’ in accordance with”

E.O. 13778. The [Unified Agenda](#) projects publication of this “replacement” NPRM by May, 2018.

Executive Order 13783

On March 28, 2017, the President Signed the Executive Order titled “Promoting Energy Independence and Economic Growth” ([E.O. 13783](#)). The Order directs a number of actions to repeal or revise Obama Administration policies targeting greenhouse gas (GHG) emissions and climate change. It also requires federal departments and agencies to “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.” E.O. 13783 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.”

EPA: On October 25, 2017, the EPA released its “[Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783](#)”. In its report, the EPA announced new deregulatory initiatives and recapped actions that are underway, such as the repeal of the Clean Power Plan (see below). An EPA [press release](#) summarizes four new initiatives:

- “New Source Review reform (NSR) – EPA is establishing an NSR Reform Task Force to review and simplify the NSR application and permit process.”
- “National Ambient Air Quality Standards (NAAQS) reform – EPA plans to use the newly formed Ozone Cooperative Compliance Task Force to review administrative options to meaningfully improve air quality as it relates to ozone. EPA will also work to streamline the approval of state air pollution plans, and eliminate EPA’s backlog of state pollution plans.”
- “Robust Evaluations of the Employment Effects of EPA regulations – Regulations impose high costs on American workers, particularly in the energy sector. Five environmental statutes state that EPA conducts continuing evaluations of potential shifts in employment that may result from implementation of these statutes. The agency historically has not conducted these assessments. EPA intends to conduct these evaluations consistent with the statutes.”
- “Reestablishing the Smart Sectors Program – EPA recently relaunched the Smart Sectors program to re-examine how it engages with American businesses to reduce unnecessary regulatory burdens, while protecting human health and the environment.”

An appendix to the report provides “summaries of the actions that EPA has taken on (1) rules that were identified specifically for review in E.O. 13783; and (2) other energy-related rules identified for review by EPA pursuant to E.O. 13783.” These include:

- The [NPRM](#) to repeal the Clean Power Plan [final rule](#);
- The efforts to address the “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources” [final rule](#); and
- The [NPRM](#) to repeal the WOTUS [final rule](#).

The EPA is also working toward developing rules to replace the WOTUS (see above) and Clean Power Plan rules.

On October 23, 2015, the Obama Administration EPA published the [final rule](#) establishing the Clean Power Plan. The regulations would restrict GHG emissions from the power sector. States would play the central role in implementing the Clean Power Plan, however the program would be enforced by the EPA, which could step in to establish a Federal Implementation Plan (FIP) for any state that failed to meet the requirements of the regulations. The Clean Power Plan would direct states to take actions reducing GHG emissions from existing power plants by 32 percent below 2005 levels by 2030. The Supreme Court issued a stay on enforcement of the rule on February 9, 2016.

As part of its implementation of E.O. 13783, the EPA, on October 16, 2017, published an [NPRM](#) titled “Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units”. Public comments on this proposed rule to repeal the Clean Power Plan are due by January 16, 2018.

On December 28, 2017, the EPA published an [Advanced Notice of Proposed Rulemaking \(ANPRM\)](#) titled “State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units”. In the ANPRM, the EPA is solicits comments on how “to limit greenhouse gas...emissions from existing electric utility generating units (EGUs) and...information on the proper respective roles of the state and federal governments in that process, as well as information on systems of emission reduction that are applicable at or to an existing EGU, information on compliance measures, and information on state planning requirements under the Clean Air Act (CAA).” According to the [Unified Agenda](#), the EPA plans to publish an NPRM for potential replacement of the Clean Power Plan by June, 2018.

DOE: As described in a [press release](#), the Department of Energy’s (DOE) “Final Report on Regulatory Review Under Executive Order 13783” includes the following recommendations: (1) “streamline natural gas exports;” (2) “review national laboratory policies;” (3) “review National Environmental Policy Act (NEPA) regulations; and” (4) “review the DOE Appliance Standards Program.”

Other agencies issuing reports on E.O. 13783 actions include: the Department of Interior (“[Review of the Department of the Interior Actions that Potentially Burden Domestic Energy](#)”); the Department of Transportation (“[Agency Recommendations to Alleviate or Eliminate Actions That Burden Domestic Energy Production](#)”); and the Department of Commerce (“[Final Report Reviewing Agency Actions as Required by Executive Order 13783, ‘Promoting Energy Independence and Economic Growth’](#)”).

Congressional Review Act

Congress enacted the “Congressional Review Act” (CRA) as part of the “Contract with America Advancement Act” ([P.L. 104-121](#)) in 1996 and it is codified at [5 U.S.C. 801-808](#). The CRA established an expedited process for Congress to repeal recently promulgated regulations through passage of joint resolutions signed into law by the President. Prior to 2017, Congress used the CRA once successfully. Last year, Congress passed, and the President signed into law, 14 resolutions that repealed final rules promulgated by the Obama Administration, as well as one resolution to rescind a rule issued by the Consumer Financial Protection Bureau (CFPB) in 2017:

Regulation	Enacted
Securities and Exchange Commission: “Disclosure of Payments by Resource Extraction Issuers” (81 FR 49630)	February 14, 2017 (P.L. 115-4)
Department of Interior: “Stream Protection Rule” (81 FR 93066)	February 16, 2017 (P.L. 115-5)
Social Security Administration: “Implementation of the NICS [National Instant Criminal Background Check System] Improvement Amendments Act of 2007” (81 FR 91702)	February 28, 2017 (P.L. 115-8)
Department of Defense, General Services Administration, and National Aeronautics and Space Administration: “Federal Acquisition Regulation; Federal Acquisition Circular 2005–90; Introduction” (81 FR 58562)	March 27, 2017 (P.L. 115-11)
Department of Interior: “Resource Management Planning” (81 FR 89580)	March 27, 2017 (P.L. 115-12)
Department of Education: “Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State Plans” (81 FR 86706)	March 27, 2017 (P.L. 115-13)
Department of Education: “Teacher Preparation Issues” (81 FR 75494)	March 27, 2017 (P.L. 115-14)
Department of Labor: “Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants” (81 FR 60298)	March 31, 2017 (P.L. 115-17)
Fish and Wildlife Service: “Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska” (81 FR 52248)	April 3, 2017 (P.L. 115-20)
Department of Labor: “Clarification of Employer’s Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness” (81 FR 91792)	April 3, 2017 (P.L. 115-21)
Federal Communications Commission: “Protecting the Privacy of Customers of Broadband and Other Telecommunications Services” (81 FR 87274)	April 3, 2017 (P.L. 115-22)
Department of Health and Human Services: “Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients” (81 FR 91852)	April 13, 2017 (P.L. 115-23)

Department of Labor: “Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees” (81 FR 92639)	April 13, 2017 (P.L. 115-24)
Department of Labor: “Savings Arrangements Established by States for Non-Governmental Employees” (81 FR 59464)	May 17, 2017 (P.L. 115-35)
Consumer Financial Protection Bureau: “Arbitration Agreements” (82 FR 33210)	November 1, 2017 (P.L. 115-74)

The CRA includes time limits for when Congress can use its expedited processes to repeal regulations. The deadline for acting on Obama Administration rulemakings passed last spring.

The CRA also prohibits agencies from reissuing regulations “in substantially the same form...or [that are] substantially the same as” rules rescinded by Congress under the law.

Conclusion

In 2017, the Trump Administration and Congress engaged in a broad and significant effort to review, revise, and repeal existing regulations. While the Congressional Review Act will be limited in its use in 2018 and beyond, agencies will continue the work begun last year to implement the deregulatory executive orders signed by the President.

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