

February 9, 2017

## Regulatory Update

### Trump Administration “Regulatory Cap for Fiscal Year 2017”

#### Overview

On January 30, 2017, President Trump signed an [Executive Order](#) entitled “Reducing Regulation and Controlling Regulatory Costs”. The Executive Order is intended to ensure that “for every one new regulation issued, at least two prior regulations be identified for elimination”. On February 3, the White House issued a [memorandum](#) titled “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017...” The memorandum provides agencies with information on how to implement the “Regulatory Cap for Fiscal Year 2017” established by the Executive Order.

Among the issues addressed, the February 3, memorandum clarifies that the Executive Order applies only to significant rulemakings, and does not require compliance by independent federal agencies such as the Securities and Exchange Commission (SEC), the Federal Energy Regulatory Commission (FERC), and the Federal Communications Commission (FCC).

#### Regulatory Cap for Fiscal Year 2017

Section 2 of the Executive Order imposes 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“Regulatory Cap for Fiscal Year 2017”, requiring covered agencies to “identify at least two existing regulations to be repealed” for each new regulation issued.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, the order directs “all agencies” to ensure that “the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero” unless otherwise provided by law or consistent with advice from the Office of Management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, “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.”

The Executive Order states that elimination of costs associated with existing regulations must be done pursuant to the Administrative Procedure Act and “other applicable law”. This requirement underscores the legal obligation for agencies to undertake a new notice and comment process to repeal an existing regulation. In *Motor Vehicle Manufacturers Association v. State Farm*, the Supreme Court established that an agency repealing a rule must also provide a rational explanation for why the rule is no longer appropriate.<sup>1</sup> The February 3, memorandum allows agencies to proceed with

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<sup>1</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

promulgation of new regulations in Fiscal Year 2017, but when issuing new rules they must, at a minimum, identify the offsetting regulations that will be repealed under the “Regulatory Cap”.

## Scope of Coverage

For the purposes of the Executive Order, “regulation” or “rule” means an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.” The definition set forth in the Executive Order excludes rules issued with respect to a military, national security, or foreign affairs function nor does it encompass regulations concerning agency organization, management, or personnel. The OMB Director may also exempt other categories of regulations.

The memorandum issued on February 3, further delineates what rules are and are not covered by the “Regulatory Cap for Fiscal Year 2017”:

- ***Significant Rulemakings Are Covered:*** The memorandum applies the Regulatory Cap to “significant regulatory actions...issue[d] between noon on January 20 and September 30, 2017.” The memorandum instructs agencies “to follow the standard significance determination process outlined in Executive Order 12866.”<sup>2</sup>
- ***Spending Rules Are Not Covered:*** The Executive Order does not apply to: “Federal spending rules that primarily cause income transfers from taxpayers to program beneficiaries (e.g., rules associated with Pell grants and Medicare spending)”.
- ***Independent Agency Rules Are Not Covered:*** Independent agencies that are not “required to submit significant regulatory actions to [the Office of Information and Regulatory Affairs (OIRA)] for review under EO 12866”<sup>3</sup> are not subject to the “Regulatory Cap for Fiscal Year 2017”.
- ***Regulations “Required by Law”:*** Section 2(b) of the January 24, Executive Order exempts regulations “otherwise required by law” from the offset requirements for Fiscal Year 2017. The memorandum indicates that this exemption is somewhat limited: “Agencies may proceed with significant regulatory actions that need to be finalized in order to comply

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<sup>2</sup> Sec. 3(f) of [Executive Order 12866](#) defines “Significant regulatory action” as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

<sup>3</sup> Executive Order 12866 cites the statutory definition of “independent agency” set forth at [44 U.S.C. 3502](#), which states: “the term ‘independent regulatory agency’ means 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”.

with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance. In the unlikely case where your agency believes other regulatory actions, which are not needed to comply with an imminent statutory or judicial deadline, are required by law, please consult with...OIRA..." Furthermore, agencies promulgating regulations "required by law" should still identify offsetting regulations for repeal: "In all cases, however, agencies should identify additional regulatory actions to be repealed in order to offset the cost of the new significant regulatory action, even if such action is required by law."

- **Emergencies:** The memorandum states: "Emergencies addressing critical health, safety, or financial matters, or for some other compelling reason, may qualify for a waiver from some or all of the requirements of Section 2." An agency seeking an exemption must request a "waiver assessment" from OIRA before submitting the rule to the OMB.

## Repeal of Existing Regulations

The memorandum also clarifies issues regarding what regulations can be counted toward the requirement of Section 2(c) of the January 30, Executive Order that any new Fiscal Year 2017 regulation be "offset by the elimination of existing costs associated with at least two prior regulations."

- **Regulations Overturned by Courts:** The memorandum states that "[g]enerally" regulations voided by courts would not count toward the offsetting regulatory repeal requirements of the Executive Order. However, "[t]here may be individual cases...where we would consider counting such savings, and specifically request comment on this topic."
- **Regulations Repealed by Congress:** The memorandum states that such repeals would generally count toward the offsetting regulatory repeal requirements of the Executive Order: "Acts of Congress that overturn final regulatory actions, such as disapprovals of rules under the Congressional Review Act...operate in a similar manner as agency deregulatory actions for the purposes of the requirements of Section 2 of the EO."

## Other Issues

- **Timing:** The memorandum allows agencies to proceed with a new regulation in Fiscal Year 2017 without finalizing the offsetting regulatory repeals: "To the extent feasible, regulatory actions should be eliminated before or on the same schedule as the new regulatory action they offset. In cases where finalizing an offsetting regulation is not possible, agencies should provide a plan for finalizing the offsetting regulation. The most appropriate place for such a plan is the preamble of the rule being issued."
- **Accounting:** The memorandum states that "[c]osts should be measured as the opportunity cost to society" as defined in [OMB Circular A-4](#).

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