

Regulatory Reform Agenda Opens Door For Public Input

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Law360, New York (May 4, 2017, 12:13 PM EDT) -- The first 100 days of the Trump administration have witnessed a significant push for regulatory reform, propelled in large measure by the issuance of executive orders. Two EOs in particular, 13771 and 13777, which require, respectively, federal agencies to eliminate two regulations for every new regulation implemented, and agencies to seek public input in identifying regulations that are ripe for repeal, replacement or modification, have the potential to greatly influence federal regulatory policy.

While the current administration is in the early stages of implementing these EOs, their significance — heavily weighted by the manner in which they are implemented — cannot be overstated. Agencies' regulatory agendas will be shaped early on by economic accounting. Astute members of the public are already providing comments to various agencies to assist in the evaluation of regulations susceptible to promulgation or elimination. And there remain, as always, uncertainties associated with ongoing, and potentially future, challenges to the legality of these actions. The White House and agencies will be making important decisions regarding the implementation of these EOs that will determine their impact and longevity. This article highlights some of the key issues associated with these EOs, though many factors will define their success.

The Executive Orders and Implementation Guidance

On Jan. 30, 2017, President Donald Trump issued Executive Order 13771, which requires each federal agency to eliminate two regulations for every new regulation implemented (with a few exceptions for certain types of regulations, such as those involving national security).[1] The order also provides that the incremental costs of a federal agency's new regulations must be fully offset by the cost savings associated with the coinciding deregulatory actions. Thus, for example, agencies cannot easily comply with the order by eliminating two minor regulations in order to make way for a major, cost-intensive regulation.

The Office of Management and Budget issued interim guidance on the implementation of EO 13771 on Feb. 2,[2] followed by more robust guidance on April 5.[3] A threshold definitional matter addressed by this April 5 guidance concerns the nature of the regulatory actions subject to the two-for-one exercise. As a point of reference, the EO itself refers strictly to regulations: "[W]henver an executive department



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or agency ... publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.”[4]

However, the April 5 guidance arguably expands the types of agency actions subject to the EO, and that are therefore eligible for the directed two-for-one accounting. Importantly, while an “EO 13771 regulatory action” is defined in the April 5 guidance to include regulations and significant agency guidance documents, the definition of an “EO 13771 deregulatory action” is much broader, encompassing informal, formal and negotiated rulemaking, guidance and interpretive documents, some actions related to international regulatory compliance, and certain information collection requests.[5] There is also a critical, and related, request that agencies consult with the Office of Information and Regulatory Affairs (OIRA) regarding any actions the agency believes should qualify as a deregulatory action.[6] This provision, and others in the April 5 guidance, that request or require consultation with OIRA, may serve to enhance the profile and role of OIRA in early stages of regulatory development or agency actions (deregulatory or otherwise).

OMB’s guidance also provides that benefits are not to be considered when analyzing whether a regulation’s incremental costs are fully offset by the cost savings of eliminated regulations.[7] OMB also states, however, that “agencies must continue to assess and consider both benefits and costs and comply with all existing requirements and guidance,” including EO 12866, which requires agencies to take actions that maximize net benefits.[8] These two guidance points may provide points of tension, as alleged in a lawsuit described in more detail below.[9]

In addition, as reflected in OMB’s April 5 guidance, the selection by an agency of a particular deregulatory action to offset a regulatory action is not merely a mathematical exercise, but must account for qualitative relationships between the two. For example, according to that guidance, “[W]here the costs of an EO 13771 regulatory action will be incurred entirely or to a large degree by a certain sector or geographic area, the agency should prioritize EO 13771 deregulatory actions that affect the same sector or geographic area, to the extent feasible and permitted by law.”[10]

The second order governing the Trump administration’s regulatory reform agenda is Executive Order 13777, issued on Feb. 24, 2017.[11] EO 13771 and EO 13777 are closely intertwined. The former provides substantive requirements for deregulation, while the latter provides the procedural framework for identifying particular targets for repeal or replacement. Specifically, EO 13777 requires each federal agency to establish a “regulatory reform task force” and designate a regulatory reform officer (RRO) to evaluate existing regulations and “make recommendations to the agency head regarding their repeal, replacement or modification.”[12] EO 13777 further directs each agency’s task force to focus particularly on regulations that:

1. eliminate jobs, or inhibit job creation;
2. are outdated, unnecessary or ineffective;
3. impose costs that exceed benefits;
4. create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
5. are inconsistent with the requirements of Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that

provision, in particular those regulations that rely in whole or in part on data, information or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

6. derive from or implement executive orders or other presidential directives that have been subsequently rescinded or substantially modified.[13]

EO 13777 emphasizes public participation, requiring that each agency's task force seek input "from entities significantly affected by federal regulations, including state, local and tribal governments, small businesses, consumers, nongovernmental organizations, and trade associations." [14] EO 13777 also highlights the importance of each agency's task force in shaping the agency's compliance with the two-for-one policies of EO 13771, explaining that "[w]hen implementing the regulatory offsets required by Executive Order 13771, each agency head should prioritize, to the extent permitted by law, those regulations that the agency's regulatory reform task force has identified as being outdated, unnecessary or ineffective." [15]

Opportunities for Public Input

In the wake of EO 13771 and EO 13777, U.S. Environmental Protection Agency Administrator Scott Pruitt issued a brief memorandum on March 24, 2017, setting forth the EPA's steps to comply with EO 13777. [16] Specifically, Pruitt named the EPA's RRO and members of the task force, and directed various offices within the EPA to provide recommendations, by May 15, to the task force regarding specific regulations to be considered for repeal, replacement or modification. Pruitt also called for "dedicated public meeting[s]" with each office's "particular stakeholders."

EPA offices are currently in the process of hosting meetings to solicit public feedback. The dates and locations of these meetings are posted on the EPA's website. [17] The EPA is also managing a docket dedicated to collecting public comments through May 15. [18] Pursuant to the deadline set forth in EO 13777, after receiving public comment and recommendations from the EPA's various offices, the task force must then provide its recommendations to the agency head — Pruitt — by May 25. [19] While the ability of the public to petition an agency for action — ostensibly to include deregulatory action — has traditionally been an important part of administrative law and procedure, these EOs direct a new and ongoing process of regulatory evaluation that arguably provides enlarged platforms for stakeholders to help shape the balancing of agencies' regulatory priorities.

Implementation — Moving Forward with the Unknowns

It is far too early to know how the Trump administration's new regulatory reform agenda will unfold. For one thing, EO 13771 is already subject to a facial challenge in federal court brought by Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America, AFL-CIO. [20] The plaintiffs allege that the mandate that agencies focus on costs without simultaneously considering benefits is arbitrary and capricious and that rulemaking pursuant to EO 13771 "cannot be undertaken without violating the statutes from which the agencies derive their rulemaking authority and the Administrative Procedure Act." [21] The defendants have moved to dismiss, arguing that the challenge is premature on the grounds that no agency has yet taken any concrete action and that the plaintiffs can therefore "only speculate about the effect (if any) on them from [EO 13771] and its implementing guidance." [22] Fourteen states have filed an amicus brief in support of dismissal. [23]

Aside from the pending facial challenge, the manner in which the agencies — working closely with OIRA — implement EO 13771 may potentially yield unintended litigation consequences that could affect the administration’s overall stated deregulatory objectives. Pursuant to EO 13771, any new regulatory action will actually entail three new agency actions — one regulatory action and two deregulatory actions. As final agency actions are generally subject to judicial review pursuant to the Administrative Procedure Act, an agency’s promulgation of a regulation could conceivably yield two additional deregulatory actions subject to challenge. This depends heavily on the nature of the deregulatory actions determined by the agencies, and OIRA, as qualifying for offset purposes under the EO.

Relatedly, there is significant uncertainty regarding how the two-for-one process will play out in the event that part, but not all, of a regulatory implementation plan is entangled in protracted litigation. For example, it is conceivable that an agency will take two deregulatory actions in order to make room for a new regulation, only to have the new regulation blocked in court. Conversely, an agency may have to identify backup sources of regulatory cuts in the event one or both of the agency’s two deregulatory actions is successfully challenged in court. Indeed, OMB’s April 5, 2017, guidance implementing EO 13771 contemplates the possibility that a deregulatory action is remanded or vacated by a court. In such a case, the agency is directed to contact OIRA to determine how such court action affects the agency’s obligations under the executive order.

The inherent uncertainties associated with litigation and implementation may not mature or be resolved for months, if not years. In the meantime, agencies are developing processes and practices in accordance with the EOs that may have lasting impacts on regulatory accounting and effects.

Conclusion

Because the implementation of EO 13771 and EO 13777 is in its infancy, the effects of these orders are still largely unknown. That said, these EOs signify a potentially large shift in federal regulatory policy. The establishment of regulatory reform task forces, the directives to create and expand opportunities for public engagement, and the involvement of OIRA in early phases of agency regulatory (and deregulatory) decision-making, provides ingredients for significant redirection of agency policies and output. Early framing of key terms in these EOs, and the interplay between stakeholders, OIRA, the agencies and the courts, will ultimately determine their regulatory impact.

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[1] Executive Order 13771: Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

[2] Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of Jan. 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 2, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2->

executive-order-january-30-2017.

[3] Memorandum: Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs” (April 5, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation>.

[4] Executive Order 13771, *supra* note 1, at § 2(a).

[5] Memorandum, *supra* note 3, at Q4.

[6] *Id.*

[7] *Id.* at Q21.

[8] *Id.* at Q32; Executive Order 12866: Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[9] Interestingly, OMB’s guidance for EO 13771 suggests that some regulations may be off limits to EO 13771’s cost considerations. OMB explains that “if a statute prohibits consideration of cost in taking a particular regulatory action, EO 13771 does not change the agency’s obligations under that statute.” That said, OMB goes on to explain that “agencies will generally be required to offset the costs of such regulatory actions through other deregulatory actions taken pursuant to statutes that do not prohibit consideration of costs.” Thus, rather than wholly exempting statutorily required agency actions from the two-for-one construct, EO 13771 still requires offsetting deregulatory actions while narrowing the pool from which the agency can draw. The pool of potential deregulatory actions may be particularly narrowed for agencies, like the EPA, with a large number of statutorily mandated regulations.

[10] Memorandum, *supra* note 3, at Q35.

[11] Executive Order 13777: Presidential Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

[12] *Id.* § 3(d).

[13] *Id.*

[14] *Id.* § 3(e).

[15] *Id.* § 3(f).

[16] Memorandum from E. Scott Pruitt, EPA Administrator, to Acting Deputy Administrator, et al. (March 24, 2017), available at https://www.epa.gov/sites/production/files/2017-04/documents/regulatory_reform_agenda.pdf.

[17] <https://www.epa.gov/laws-regulations/regulatory-reform>.

[18] Docket ID No. EPA-HQ-OA-2017-0190.

[19] Executive Order 13777, *supra* note 11, § 3(g).

[20] *Public Citizen Inc. v. Trump*, No. 1:17-cv-00253 (D.D.C. filed Feb. 8, 2017).

[21] *Id.* at D.E. 1 ¶ 6.

[22] *Id.* at D.E. 9-1 at 12.

[23] *Id.* at D.E. 12.