Call Me, Maybe: Two-for-One Executive Order on Reducing Regulation Delegates Implementation to the OMB

While there is a simple elegance that will appeal to many in US President Donald Trump's recently issued executive order on reducing regulations, its actual implementation is a lot messier. So much so that the White House has provided agencies with precious little guidance, instructing them to call the Office of Management and Budget ("OMB") with questions. However, the OMB's ability to answer the anticipated questions, such as whether the executive order is prohibited by law in a particular case or how to define and calculate costs in a sound way, likely will be impaired by a lack of clear legal standards.

Following a memorandum that ordered a temporary moratorium on executive agency regulatory actions, President Trump issued a "two-for-one" executive order on January 30, 2017, aimed at "Reducing Regulation and Controlling Regulatory Costs."[1] The order requires that to issue a new regulation, an agency must identify two prior regulations to be repealed, regardless of whether the old regulations are related to the new regulation. The cost associated with a new regulation must be offset by the cost savings associated with eliminating the two prior regulations such that the total incremental cost of all new regulations in fiscal year 2017 is no greater than zero. The White House issued interim guidance on February 2, 2017, to address the requirements of the executive order, but this guidance leaves many ambiguities on how an agency would comply and refers agencies to call the OMB for clarification. This Legal Update analyzes the regulatory actions that would be subject to the executive order and discusses the issues in implementing the order.

What Actions Are Subject to the Order?

The executive order does not apply to independent agencies, which include regulators such as the Consumer Financial Protection Bureau, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Housing Finance Authority and the Securities and Exchange Commission. The interim guidance expressly provides that the order only applies to executive agencies but nonetheless encourages independent agencies "to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions."[2]

The "two-for-one" order generally targets "regulations," which it defines as "agency statement[s] 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," which would include informal guidance and rules. However, the interim guidance seeks to narrow the language of the executive order by specifying

that the order only applies to "significant regulatory actions," which are defined under Section 3(f) of the 1993 Executive Order 12866 as regulatory actions likely to result in a rule that may involve one of the following: (1) have at least a $100 million annual effect on the economy, or adversely affect the economy, productivity, competition, jobs, environment, public health or safety, or State, local, or tribal governments or communities; (2) interfere with the actions of another agency; (3) materially alter grants or loan programs; or (4) raise new legal or policy issues arising out of legal mandates.[3] Not subject to the order are regulations that only impact other federal agencies; that are issued with respect to military, national security, or foreign affairs functions; and that are related to agency organization and management. Regulatory actions that address "critical health, safety, or financial matters, or [ ] some other compelling reason" may qualify for individual waivers from the order, subject to the review of the OMB. Federal spending rules providing for income transfers from taxpayers to program beneficiaries are also generally exempt from the order, but if the rules impose reporting or recordkeeping requirements on non-federal entities, the responsible agency is required to account for such costs.

The Ninth Circuit's February 9, 2017 decision upholding a temporary restraining order against Trump's immigration ban in *State of Washington v. Trump*[4] introduces additional uncertainty over whether the "two-for-one" order applies to "regulations" or "significant regulatory actions." The Ninth Circuit noted that "[t]he Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order…and that proposition seems unlikely." It is unclear whether the interim guidance may narrow the scope of the executive order.

When Would Compliance with the Order Be "Prohibited by Law"?

The "two-for-one" order would apply to an executive agency's significant regulatory action not otherwise excluded by the interim guidance "unless prohibited by law." Executive orders are not immune from the separation of powers principle, and the order appears to acknowledge limitations of its reach by providing that "the heads of all [executive] agencies are directed that the total incremental costs of all new regulations, including repealed regulations, to be finalized [for fiscal year 2017] shall be no greater than zero, *unless otherwise required by law* or consistent with advice provided in writing by the Director of the [OMB]."[5] It is unclear where this limit lies and who makes the ultimate determination. While the White House's interim guidance interprets the "unless otherwise required by law" provision as a situation in which rules must be finalized in order to comply with an *imminent* statutory or judicial deadline, there may be other scenarios in which a regulatory agency is legally obligated to act in a manner inconsistent with the order. If Congress passed a statute directing implementation of a particular regulation, for example, repealing such a regulation arguably violates the statutory mandate. In a 1952 Supreme Court case discussing the authority of executive orders, Justice Jackson explained that "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[6]

Two public interest firms and one union filed suit on February 8, 2017 seeking to have the order and interim guidance declared unconstitutional. The organizations argue that the order directs agencies to focus on costs while ignoring benefits to people whom Congress enacted statutes to protect. According to the suit, the order is "arbitrary, capricious, an abuse of

discretion, and not in accordance with law." No statute authorizes an agency to withhold regulation on the basis of an arbitrary cost limit or to base its actions on a requirement of zero net cost across multiple regulations. Furthermore, the order mandates agencies to repeal regulations already determined through the notice-and-comment rulemaking process to advance the purposes of underlying statutes.

How Would an Agency Subject to the Order Measure Cost?

Putting aside challenges to the "two-for-one" order's validity, agencies subject to the order would have significant difficulty calculating regulatory cost as directed. The sound bite that the total incremental cost of all new regulations in fiscal year 2017 shall be no greater than zero has a nice rhetorical ring to it. Indeed, interested businesses might well think that cost is defined to be their actual or anticipated costs to comply with the regulations. That would be a mistake. The interim guidance explains that cost "should be measured as *the opportunity cost to society*," defined by OMB Circular A-4. What does that mean?

OMB Circular A-4, issued September 17, 2003,[7] does not actually define "opportunity cost to society." Instead, the publication provides guidance for conducting a cost *and benefit* analysis as required by Executive Order 12866 issued by President Clinton in 1993, which applies to rulemakings that establish new rules as well as those that rescind or modify existing rules. OMB Circular A-4's only reference to "opportunity cost" defines the concept in terms of "willingness-to-pay," or the measure of "what individuals are willing to forego to enjoy a particular benefit," as well as the amount of compensation individuals are "willing-to-accept" to forego the benefit. Determining the value of a benefit is implicit in both the "willingness-to-pay" and "willingness-to-accept" analyses.

OMB Circular A-4 provides a general framework for conducting a comprehensive cost-benefit analysis and identifies factors an agency should consider in its analysis. The Circular instructs an agency to define the scope of its analysis, determine an appropriate baseline (an assessment of how society would function without the proposed rule), and evaluate alternatives to regulation. When measuring costs and benefits, an agency should attempt to calculate opportunity cost, monetize quantitative estimates where possible, and present descriptions of unquantifiable effects. Overall, Circular A-4 emphasizes the calculation of social costs and benefits in a way that the "two-for-one" order does not address.

The plain language of the "two-for-one" order presents another challenge for impacted agencies to reach a zero sum in cost because "the total incremental costs of all new regulations, *including repealed regulations*…shall be no greater than zero." This would mean that even if an agency puts aside the benefits analysis directed by OMB Circular A-4 and only focuses on regulatory costs, the agency is required to calculate the cost of repealing existing regulations in addition to the cost of enacting a new regulation. It is difficult to imagine a situation in which this cost is zero.

President Trump, of course, is not the first President to focus on the cost of regulations. Indeed, in the 1993 Executive Order 12866, President Clinton wrote:

> "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."

The OMB issued its Circular A-4 during the Bush Administration. The profound difference in this case is the imposition of the 2-for-1 requirement based on a formula that will be difficult to administer.

The test of "opportunity cost to society" is a soft, amorphous and inherently subjective analysis that appears to bear little relationship to the actual dollar cost of a business to comply with a regulation. This calculation has to be made on the "front end" in determining the costs of the new regulation and on the "back end" in determining the costs of the two regulations to be repealed. Perhaps this is the desired goal, but the ability of an agency actually to make these calculations in real life will be challenging at best and hard to validate.

Conclusion

The Interpretative Guidance does provide one definite solution for agencies facing issues in complying with the "two-for-one" order: call the OMB. An agency uncertain about whether the order applies to its proposed action is instructed to discuss its issues with the OMB. An agency should also consult with the OMB before issuing new guidance or regulatory interpretations. The Guidance directs agencies to consult with the OMB in determining which actions may qualify as deregulatory actions in offsetting costs of a new regulation and to confer with the OMB for on any issues in calculating and quantifying costs. Given the ambiguities of the order and the challenges of complying with the zero-cost provision, the OMB is likely to receive many calls over the next year.

For more information about this topic, please contact any of the following lawyers.

Laurence E. Platt
+1 202 263 3407
lplatt@mayerbrown.com

Joy Tsai
+1 202 263 3037
jtsai@mayerbrown.com

Endnotes

[1] This "two-for-one" executive order follows another executive order mandating the freeze of any new regulations for an indefinite period with certain exceptions. A discussion of the "regulatory freeze" executive order is available at https://www.mayerbrown.com/How-Solid-Is-the-Freeze-Some-Agencies-May-Be-Excluded-from-the-White-House-Regulatory-Moratorium-01-25-2017/.

[2] https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017.

[3] https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

[4] http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf.

[5] https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

[6] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

[7] https://georgewbush-whitehouse.archives.gov/omb/circulars/a004/a-4.html.