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IN-HOUSE COUNSEL

Corporate Counsel and Trump's Regulatory Reform Agenda

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Special to the Legal

Since taking office on Jan. 20, President Donald Trump has issued two executive orders designed to implement what his chief strategist Stephen K. Bannon has described as “deconstruction of the administrative state.” While “deconstruction” is perhaps too strong a word for what the administration has proposed thus far, corporate counsel would be well advised to keep abreast of the developments of the regulatory reform effort in Washington to prepare their clients to take advantage of this important, limited-time opportunity.



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Executive Order 13771, titled “Presidential Executive Order on Enforcing the Regulatory Reform Agenda” (Jan. 30), requires that “for every one new regulation issued, at least two prior regulations must be identified for elimination.” It also requires that the “total incremental costs of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero” unless otherwise required by law or approved

by the director of the director of the Office of Management and Budget (OMB).

Executive Order 13777, titled “Presidential Executive Order on Enforcing the Regulatory Reform Agenda” (Feb. 24), requires federal agencies to designate a regulatory reform officer (RRO) and establish a regulatory reform task force.” The mission of the task force is to “evaluate existing regulations (as defined in Section 4 of Executive Order 13771) and make recommendations to the agency head regarding their repeal, replacement or modification, consistent with applicable law.” Among the substantive considerations for identifying regulations for repeal, replacement or modification are regulations

that “eliminate jobs, or inhibit job creation” and/or “impose costs that exceed benefits.” Initial reports from the task forces are due to agency heads within 90 days of the date of the order.

Congress is also pursuing its own regulatory reform agenda. The Searching For And Cutting Regulations That Are Unnecessarily Burdensome Act (Scrub Act) (HR 998), is intended to address outdated, duplicative, and unnecessary regulations that have accumulated over the years. This bill differs from EO 13777 in that it creates a separate “retrospective regulatory review commission” to identify regulations for elimination instead of relying solely on the agencies to do so. The Regulatory Integrity Act of 2017 (HR 1004) proposes to restrict the ability of agencies to advocate on behalf of regulations. Finally, the OIRA Insight, Reform, and Accountability Act (HR 1009), would codify and revise the central regulatory review process currently spelled out in OMB policy. The White House has endorsed all of these bills.

Most recently, on April 5, the OMB issued a guidance document to the agencies to attempt to answer many of the questions raised by EO 13771. Much of this guidance document is dedicated to advising agencies how they should measure the costs of new, proposed regulations and the cost savings of old

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regulations targeted for elimination. The guidance document also describes with more particularity the regulatory and deregulatory actions to which EO 13771 applies. Moreover, the guidance makes it clear that the requirements of EO 13771 do not extend to statutorily required rulemaking reflecting the explicit instructions of Congress, nor does it apply to independent regulatory agencies.

With the infrastructure of the new regulatory reform process taking shape, the real work begins. How accurately federal agencies target regulations for elimination and estimate the costs of their regulatory and deregulatory actions on the regulated community will largely depend on how engaged the regulated community is in the process. While Trump’s actions will undoubtedly have a chilling effect on the issuance of new regulations, the effort to eliminate costly, nonessential regulations that are already on the books is an entirely different endeavor. Unless this effort is driven by the business community with the guidance of corporate counsel early in the reform effort, the opportunity to shrink the Code of Federal Regulations will be lost. •



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