Deregulation in D.C.: What You Need to Know About Trump Regulatory Repeal

If your organization is subject to onerous federal regulations—and whose isn't nowadays?—you may be wondering how to find the right opportunity to suggest regulatory reforms to the Trump administration and Congress. Here's what you need to know to get started.

Not for Sissies

Figuring out how to seek modification or repeal of a particular regulation can require an understanding of how that regulation was created. Newly confirmed cabinet secretaries can change certain regulations with the stroke of a pen, but are required to enforce other agency rules until they are removed through proper procedures—which could take years. Understanding the difference can involve some extremely arcane rules. For example, there are important distinctions between advisory opinions, agency guidance and rules produced by notice and comment rulemaking. As the late Supreme Court Justice Antonin Scalia famously wrote in his 1989 *Duke Law Journal* article, "[a]dministrative law is not for sissies."

Trump Administration

The administration's deregulatory efforts are being guided by three documents. First, the Jan. 20, 2017, memorandum from White House Chief of Staff Reince Priebus instituted a moratorium on any new federal regulations for 60 days (with an exception for emergency situations). The purpose is to provide Trump administration officials time to review any regulations that were proposed by the Obama administration but have not yet taken effect.

The second document is President Trump's Jan. 30, 2017, Executive Order requiring that, for every new regulation issued, at least two prior regulations must be identified for elimination. Although the exact details of how this will work are unclear, it is almost certain to provide plenty of opportunity for organizations and individuals to propose the repeal of specific rules. The Jan. 30 Executive Order also directed that the total cost of all regulations to be finalized in 2017 must be zero.

The third—and arguably most important—document is the president's Feb. 24, 2017, Executive Order requiring all agency heads to establish a Regulatory Reform Task Force and a 90-day time frame to undertake a comprehensive regulatory review. Each agency task force is responsible for (1) improving implementation of regulatory reform initiatives and (2) identifying regulations for repeal, replacement, or modification. Each agency head must also designate a "Regulatory Reform Officer" ("RRO") to oversee the implementation of regulatory reform.

In addition to this broad framework for regulatory reform, President Trump has issued specific directives focused on particular projects, industries and rules, including the Dakota Access and Keystone XL pipelines, environmental reviews of high-priority infrastructure projects, domestic manufacturing, the financial system, the Fiduciary Duty Rule and the "Waters of the United States" rule.

Congress

Meanwhile, the new Congress has been employing the Congressional Review Act ("CRA") to block recent Obama administration regulations on a variety of topics. The CRA allows a joint resolution by Congress to prevent newly created agency regulations from taking effect. Passed in 1996 as part of the Republican "Contract with America," the CRA had been used only once prior to 2017. Congress has used the act at least nine times this year on regulations relating to methane, background checks, drug testing, wildlife management and education.

Because the CRA applies only to new regulations, and the Trump administration is unlikely to promulgate regulations that the Republican-controlled Congress will want to block, the use of the CRA will diminish quickly. But Congress is looking at a number of broad reforms that could impact the way agency rulemaking occurs in the future. The House of Representatives recently passed two: the Reins Act, H.R. 26, which would require an affirmative act of Congress to approve any regulation that would have a $100 million or greater impact on the economy; and the Regulatory Accountability Act, H.R. 5, which would re-write the Administrative Procedure Act to change the way that agencies enact rules that impose large costs, including requiring advanced notice of rulemaking, which would allow more public input and access to data, and restricting the use of "interim final rulemaking" and good faith exemptions from notice and comment rulemaking.

Regardless of how the regulations that burden your organization came into existence, and which branch of government is the appropriate one to fix or repeal them, now is a great time to ask for regulatory reform in Washington, D.C. And, if you don't have the stomach for the arcane aspects of administrative law, we're happy to help.

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