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Regulated Entities: It's Time to Play Love It or Leave It with Federal Regulations

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Amidst the flurry of Executive Orders ("EOs") that tends to accompany any new administration, one EO may have flown under the radar. But for the regulated community—which, these days, includes most businesses in some form or another—this EO could be both a source of opportunity and of angst.[1]

EO 14219, titled "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" (the "Deregulation EO"), was issued on February 19.[2] Consistent with the president's long-stated goal to streamline and minimize federal agency regulation, the Deregulation EO sets forth a series of directives to federal agencies aimed at reducing regulations and minimizing the administrative state. This client alert summarizes the Deregulation EO and opines on the opportunities for the regulated community to seek reform or deregulation, on the one hand, or to prioritize existing or new regulations, on the other.

1. **The Deregulation EO**

The Deregulation EO directs all agency heads to review their existing regulations within 60 days for consistency with law and the administration's policy aims, in conjunction with the Department of Government Efficiency ("DOGE") and the Office of Management and Budget ("OMB"), and, as necessary, the Attorney General. The agencies are required to identify for deregulation their regulations that fit within any of seven categories:

1. Those that are unconstitutional or those that raise serious constitutional questions, such as the scope of power vested in the federal government by the Constitution:

   This category is aimed at regulations that exceed the power of the federal government;

2. Regulations that are based on unlawful delegations of legislative power:

   This category stems from the constitutional Nondelegation Doctrine, which has seen renewed interest in recent years by courts and commentators.[3] The Nondelegation Doctrine is the

principle that Congress cannot delegate its legislative or lawmaking powers to other entities—including Executive Branch agencies. Historically, to pass constitutional muster, when Congress did delegate to an agency, it was required to do so by providing "intelligible principles" to the agency to guide it in its rulemaking—a relatively lax standard. But in recent years, the Nondelegation Doctrine seems poised to grow some teeth;

3. Regulations that are based on anything other than the best reading of the underlying statute:

   This category aligns with the Supreme Court's decision last term in *Loper Bright* that overruled the *Chevron* doctrine—the principle that if an agency's interpretation of an ambiguous statute was reasonable, even if not the best reading, the reviewing court should defer to the agency. In *Loper Bright*, the Court held that reviewing courts should not defer to an agency's interpretation of an ambiguous statute, but may only view such interpretations as persuasive[4];

4. Those that implicate matters of "societal, political, or economic significance that are not authorized by clear statutory language":

   This principle appears aimed at the "major questions doctrine," announced in 2022 by the Supreme Court's decision in *West Virginia v. EPA*, 597 U.S. 697. There, the Court held that an agency may not resolve through regulation a question of "vast economic and political significance" without a clear statutory authorization;

5. Regulations that impose significant costs on private parties that are not outweighed by public benefits;

6. Those that harm the national interest by "significantly and unjustifiably impeding technological innovation, infrastructure development, disaster response, inflation reduction, research and development, economic development, energy production, land use, and foreign policy objectives"; and

7. Regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.

These last three categories appear to be aimed at the business interests this administration has expressed an intention to prioritize. The directive to conduct such a comprehensive review of existing regulations and sort them into the categories listed above could be a significant undertaking for agency heads and staff, who may be simultaneously working on directives under other EOs and adjusting to the realities of reduced personnel. And as such, there may be opportunities for affected businesses to provide input, as addressed below.

2. **The Effect of the Deregulation EO**

Upon the expiration of the 60-day review period, the Office of Information and Regulatory Affairs ("OIRA") is directed to consult with the agency heads to develop a "Unified Regulatory Agenda" to rescind or modify any regulations agencies have identified as fitting within the seven categories. In other words, the agencies are directed to deregulate, to the extent their existing regulations fall within any of these seven classes.

Further, the Deregulation EO stresses that agency heads should deprioritize regulatory enforcement

of any regulations that "are based on anything other than the best reading of the statute" or those that go beyond the powers of the federal government (classes (1) and (3) above). Agency heads, in consultation with OMB, also are directed to review ongoing enforcement proceedings on a case-by-case basis and to terminate those that "do not comply with the Constitution, laws, or Administration policy." While it might initially seem that agencies would be reluctant to categorize their own regulations into the categories mentioned in the EO (*e.g.*, unconstitutional; based on unlawful delegations of legislative power; based on other than the best reading of the underlying statute), new personnel within various agencies are likely bringing different perspectives about existing regulations, and may have specific ideas already about the particular regulations that they believe should be rescinded.

Finally, the Deregulation EO directs agencies to promulgate new regulations, consistent with the process set forth in EO 12866 for submitting new regulations to OIRA for review, and to consult with DOGE about such new regulations. OIRA is directed to consider the factors set forth in EO 12866 as well as the seven principles set forth in the Deregulation EO. The Deregulation EO also directs the OMB to issue implementation guidance as appropriate.

3. **Takeaways for the Regulated Community**

Many businesses are subject to federal regulation, in some capacity. While the EO does not contemplate involvement by the regulated community in the 60-day review of agency regulations, nothing prevents affected industries from taking the apparent opportunity that now exists to identify and offer perspective to particular agencies and/or to OIRA about specific regulations that are problematic to their business, whether because of costs, technical compliance difficulties, or policy differences, and explaining why a regulation fits into one of the seven categories outlined in the Deregulation EO. [5]

Furthermore, if a business is subject to an ongoing enforcement proceeding (or the threat of one), the administration directive that agencies terminate such proceedings on a case-by-case basis provides a similar opportunity for companies to convey their thoughts to the relevant agency about the lawfulness and/or priority goals of the regulation at issue in that proceeding.

On the other hand, if there are regulations that are particularly beneficial to a given industry, or in which significant time or capital has been invested to further compliance, the industry may want to ensure these regulatory schemes are preserved. For these regulatory schemes, businesses may also want to reach out to the relevant agency proactively to explain why such regulations are consistent with the Deregulation EO, in an attempt to avoid the uncertainty or costs that could accompany any roll back.

While the EO does not clarify whether the coming deregulation process will follow the standard notice and comment rulemaking process of the Administrative Procedure Act—which requires a notice of proposed rulemaking in connection with the repeal of an existing regulation—that process will afford further opportunity for industry to submit comments on any regulations that an agency intends to repeal.

The *Loper Bright*, *Corner Post*, *Jarkesy*, and *Ohio v. EPA* cases demonstrate that a changing administrative state brings both opportunities and risks.[6] Staying proactive in addressing the regulatory regime applicable to a company's industry is the best way to "take the bull by the horns"—whether that is in an effort to jettison existing, burdensome regulations, or to retain efficient, functional regulations.

Download This Alert

[1] *See, e.g.*, Estimating the Impact of Regulation on Business | The Regulatory Review.

[2] Available at Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Regulatory Initiative – The White House

[3] *E.g.*, Move Over Loper Bright — Nondelegation Doctrine Is Administrative State's New Battleground | Carlton Fields

[4] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

[5] *Nb.* There presently are various legal challenges to many of the administration's EOs, so any action by a regulated entity should be carefully considered (perhaps in conjunction with the relevant agency) to withstand an Administrative Procedure Act or other legal challenge.

[6] Legal Experts to Lay Out Recent SCOTUS Decisions' Impact on Business - PA Chamber

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