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ALERT

"One In, Two Out" Executive Order Will Have Uncertain Impact on Rulemaking

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WHAT: On January 30, 2017, President Trump issued an executive order (EO) intended to reduce federal regulations and their associated costs to the public. The basic requirement is that executive agencies must repeal at least two existing regulations to offset the costs of any newly promulgated regulations. For Fiscal Year (FY) 2017, these agencies must achieve a "net zero" increase in costs attributable to new regulations. For FY 18 and beyond, the executive agencies will receive what is in essence a "cost budget" for regulatory changes in each fiscal year. The EO delegates to the Office of Management and Budget (OMB) Director, who has yet to be confirmed, the responsibility to provide guidance to agencies on meeting the EO's requirements.

WHEN: Immediately.

WHAT DOES IT MEAN FOR INDUSTRY: For many government contractors, the EO's immediate impact will be limited, and the long-term impact depends on the ultimate OMB guidance:

(1) The EO expressly exempts regulations related to "military," "national security," or "foreign service," potentially exempting many, if not all, regulations issued by the Department of Defense (DOD), Department of Homeland Security (DHS), and Department of State (State).

(2) The EO exempts rulemaking otherwise required by law, likely excluding rulemaking required by provisions of the annual National Defense Authorization Act and other similar legislation.

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(3) The EO applies only to executive branch agencies, leaving out the many independent agencies, such as the General Services Administration (relevant for federal procurement), National Archives and Records Administration (relevant to federal cybersecurity requirements), Small Business Administration, and a host of other federal agencies that include the Federal Communications Commission, Federal Election Commission, Environmental Protection Agency, Federal Trade Commission, and the Securities and Exchange Commission. (Of course, agencies might voluntarily comply with the EO's requirements even if not required by the EO's text.)

(4) For what is left of rulemaking not exempted or excluded from this EO, companies can expect slower federal rulemaking—even beyond the "regulatory freeze" imposed on executive agencies since Inauguration Day. Within the year, companies may see regulations specifically repealed or otherwise streamlined under the "one in, two out" rubric.

FURTHER ANALYSIS: News accounts have referred to this EO as "one in, two out"—meaning that for each new regulation, an agency must eliminate two existing regulations—but the EO's requirement is more nuanced.

For FY17, covered agencies are subject to two requirements: (1) the "net zero" requirement, meaning the cost of any regulatory changes finalized during the fiscal year must on balance be no greater than zero, and (2) the "one in, two out" requirement, where any time an agency issues a new regulation, it will also have to identify two existing regulations for proposed elimination. But the EO's text is unclear when agencies must begin repealing any regulations after proposing them for elimination. So the EO may allow a lag between "in with the new" and "out with the old."

For FY18 and beyond, the OMB Director will assign each covered agency an "incremental cost allowance" that an agency cannot exceed during the year. The "allowance" appears intended to function as a budget for "incremental costs" of rulemaking. Agencies will be required to spread out that budget across all rulemaking during the fiscal year. Notably, the allowance may be negative: agencies may need to eliminate more regulatory costs than they propose during a fiscal year, potentially limiting or preventing rulemaking for certain agencies. In addition to the cost allowance, agencies must still observe the "one in, two out" rule during these later years.

At the outset, it remains to be seen how OMB will direct agencies to calculate costs and to identify the "two rules" required for repeal. Many regulations are the product of years of interrelated rulemaking. They thus may not have provisions that can be easily identified as discrete "rules" for deletion.

Another key issue is whether the OMB Director will consider the exemptions for "military, national security, or foreign affairs" functions to apply to *any* regulation from executive agencies that carry out those functions, namely DOD, DHS, and State, or if the determinations will be made on a more targeted basis. For example, OMB could treat the exemption for "military" activities as applying to DOD's procurement activities in three different ways: (1) exempting the entire DFARS, (2) exempting only the provisions addressing contingency contracting, or (3) not automatically exempting anything at all. And of course, many of new DFARS rules are required by NDAAs and thus are presumably exempt from the EO because they are "required by law."

As another example, the Federal Acquisition Regulatory (FAR) Council includes procurement executives of one executive agency (DOD) and two independent agencies (GSA and NASA). It remains to be seen how OMB will treat FAR rulemaking as subject to the EO in whole, in part, or not at all.

Another key uncertainty involves small businesses. The administration's public comments have emphasized removing regulations that hinder small business growth, but the EO makes no explicit mention of small businesses—particularly whether and how the EO will interact with SBA rules and any other regulations focused on small business growth, e.g. FAR requirements for small business plans. Indeed, many SBA rules that impose costs are nonetheless seen as beneficial to small businesses.

At bottom, this EO has injected uncertainty into the timing, scope, and developments involving federal rulemaking. But even as the OMB Director provides further details on these new rulemaking limits, companies should keep in mind that federal agencies will continue to issue some new regulations required by Congress or as approved by the Trump administration's upper reaches. These new regulations, when issued, will still require review and analysis of the impacts on your organization.