

Trump Administration Executive Order Strives to Reduce Regulation and Control Regulatory Costs

Summary

On January 30, 2017, President Trump signed an Executive Order (EO) that combines two regulatory reform measures: a regulatory "one-in, two-out" approach with a regulatory "budget".

The "one-in, two-out" section of the order requires agencies to remove two rules for every new one they publish. The regulatory budget would allow the president to cap regulations at a certain dollar amount per year. If agencies want to issue new rules, they would be required to offset the costs by deleting old ones.

While the EO requires federal regulatory agencies to follow this approach, it provides significant discretion to the Director of the Office of Management and Budget (OMB) to flesh out procedures for implementation and monitoring.

This Executive Order could have important implications for regulations that impact the real estate sector. NAR will continue to monitor and provide input as the details of this EO are refined and released.

Analysis

While this EO contains innovative approaches to reduce regulatory burden and cost, the document also includes significant caveats that will limit its scope and impact.

First, the EO cannot override regulations that are promulgated in response to statutory requirements. If an agency is required by law to issue a rule, the order cannot prevent it from doing so. For example, National Ambient Air Quality Standards must be revisited and new regulations developed every five years. To prevent these type of required regulations, Congress would need to either change that specific provision or repeal the Clean Air Act.

The mandates of the order will therefore be most applicable to discretionary rulemaking, or rules agencies voluntarily promulgate. The Trump Administration has made it clear, though, that the intent of the EO to scale back regulations and discourage discretionary regulating.

Second, the order provides significant authority to the Director of the Office of Management and Budget (OMB) to flesh out procedures for implementation and monitoring. The EO does not stipulate whether all rules will be counted or only major or high-impact ones. It does not lay out how the costs of rules will be calculated, nor does it delineate the retrospective review process.

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The OMB Director will also have the authority to exempt rules as he/she sees fit. The OMB Director will require agencies to conduct reviews, standardize the mechanism by which regulatory costs are determined, decide which regulations will be included in the regulatory agenda and set the amount agencies can spend on rules each year. How all of these factors are determined will impact the capacity for the EO to reduce regulatory burdens.

Finally, the EO directs agencies to repeal regulations pursuant to the Administrative Procedure Act (APA), which means rules must undergo a lengthy review before they can be repealed.

The APA lays out a clear process for the repeal of a rule. This process includes the agency developing a rule stipulating which rule is proposed to be repealed, soliciting public comment and review, developing a cost/benefit analysis of the impact of the repeal, etc. This process is time consuming and burdensome in its own way and is no guarantee that the rule will be repealed. In addition, some industry sectors may actually support the existing rule, especially if they have invested significant resources in compliance and monitoring.

Conclusion

While this EO may not have an immediate impact on reducing regulatory burden, it will be valuable in focusing attention on the regulatory costs to the U.S. economy. The EO will also force agencies to do a better job reviewing and measuring the success or failure of old regulations and encourage better cooperation between Congress and the federal regulatory agencies.

In addition, this EO will work in concert with broad regulatory reform legislation currently moving through Congress that will improve transparency and accountability during the rulemaking process.

Many details remain to be ironed out about the scope and impact of this EO and the document will be updated as necessary to reflect the most up-to-date information.