Insight

What Does President Trump's One-In, Two-Out Executive Order Do?

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Today, President Trump fulfilled one of his campaign pledges and signed an executive order to establish a "one-in, two-out" system for regulations. This regulatory regime requires that for each new regulation put forward, agencies must find at least two to repeal, with an eye toward bringing net regulatory costs to $0 for the fiscal year. It incorporates past regulatory reform concepts – including some from countries like the United Kingdom (UK) – and establishes a basic framework for a regulatory budget system in the future. The order has the potential to be historic in scope, but its relative brevity on some issues means the ultimate impact will be a matter of how the administration implements the order.

The Executive Order's Framework

The order has two main stages: a "regulatory cap" for Fiscal Year (FY) 2017 and regulatory budgets for subsequent years. For FY 2017, it directs agencies to pair "any new incremental costs associated with new regulations" with commensurate cost savings from repealing "at least two existing regulations." It also directs the Office of Management and Budget (OMB) to establish a uniform set of procedures for determining "regulatory costs." For the subsequent years, it directs agencies to incorporate this process into their annual "Regulatory Plans" and gives OMB the duty of establishing an annual regulatory cost cap for each agency, much as it would set a certain spending level in its fiscal budget request. The order also only allows regulations to go forward if they are explicitly included in the "Regulatory Plan," similar to the ALERT Act.

The basic concept may seem drastic, but certain provisions of the order itself will limit how much and how quickly the administration can implement it. For instance, it requires that whenever agencies repeal old rules they "shall do so in accordance with the Administrative Procedure Act (APA) and other applicable law." Under the APA, an agency must generally publish a notice of proposed rulemaking, take public comments, and consider those comments before finalizing that rule. This is a process that takes months, if not years. Although there are exceptions, it is difficult to see the administration taking some sort of shortcut for this process – particularly for any major rescissions – without facing a legal challenge.

In addition, certain statutorily and judicially mandated rules may be off limits due to the "other applicable law" provision. The order also explicitly excludes rules:

- "issued with respect to a military, national security, or foreign affairs function of the United States;"
- "related to agency organization, management, or personnel."

Beyond those exemptions, the order grants the OMB Director a great deal of flexibility in exempting further categories of rules and particular procedural requirements.

The Executive Order and Regulatory Reform

Some may find this to be a draconian, haphazard approach, but it is neither a novel idea nor as dramatic as it may seem. Since 2010, the UK has implemented a similar system; it started with a one-in, one-out approach and has since expanded to a one-in, three-out approach. Canada has also implemented a fairly extensive regulatory budget. As the American Action Forum (AAF) previously noted, there does not seem to be dramatic downturn in health and safety in either of those countries because of a regulatory budget.

The nature of such executive reforms is hardly a new item domestically either. If anything, much of its implementation will build on reform frameworks from the Obama Administration. Although the previous administration generally saw its “retrospective review” impose net regulatory costs, it did make some notable rescissions; it eliminated an extraneous Driver-Vehicle Inspection Report leading to savings of $1.7 billion and 46 million paperwork hours annually. Significant savings are there. It’s simply a matter of how rigorously regulators look for them.

Congressional reform measures will likely help bolster and clarify some issues of this order. As AAF has found, potential cost savings from Congressional Review Act resolutions introduced this week could create roughly $40 billion in savings by rescinding Obama Administration rules that this order may not immediately affect. These resolutions are just a part of a full set of legislative proposals on the horizon that could change the basic mechanics of the regulatory state. Finally, the regulatory budget program establishes an executive branch regime to work in concert with the framework Congress is considering in its overall budget process reform proposals.

Conclusion

President Trump checked off another item on his regulatory “To-Do List” today. Building on the inaugural regulatory moratorium, establishing this program may help to constrain regulatory costs in the future. With more than $1.1 trillion in regulatory costs since 2005, there ought to be some savings for regulators to capture. And although this is a historic executive order, its expansiveness and effectiveness will largely depend on how the administration implements it.