Insight

Getting to $0

SAM BATKINS | FEBRUARY 28, 2017

With the landmark signature of Executive Order (EO) 13,771, the Trump Administration has made a bold move to limit regulatory costs. But is the EO's goal of achieving $0 in regulatory costs for the remainder of the fiscal year (through October 1) possible? According to American Action Forum (AAF) research, the administration need only be as restrained as the Bush Administration was in 2006 to accomplish the goal of no net costs. With the regulatory freeze still mostly in effect, the days of $164 billion in regulatory costs could come quickly to an end.

State of Play

Getting to $0 in net regulatory costs, or lower, by October 1 is predicated on an effective date of January, 30 2017, when President Trump signed EO 13,711. Otherwise, the administration will need to quickly repeal the incredible $41.2 billion in regulatory costs imposed by the Obama Administration from Election Day to Inauguration Day. Furthermore, there were an additional $38 billion in regulatory costs issued from the start of Fiscal Year 2017 to Election Day. Combine that with the last-minute rules that were snuck through during the first week of the Trump Administration, and there are nearly $80 billion in regulatory costs already on the table for FY 2017. Supporters might be hopeful for the implementation of EO 13,771, but few believe it can find more than $70 billion in immediate savings.

The more realistic scenario is that the order is effective on January 30, 2017; since then there have been virtually no new regulatory burdens. From that point, it's merely a matter of identifying "at least two existing" regulations for repeal during the implementation of any new regulation. Given the historic pace of regulatory action under President Obama, achieving $0 in net regulatory burdens might seem like an impossible task. Although statutory and judicial deadlines might complicate implementation, the recent past, and some initial deregulatory moves, could make the goal of EO 13,771 a reality.

For example, in 2006, the Bush Administration implemented 56 major regulations, imposing total costs of $14.5 billion. This might sound like a significant sum for a conservative administration, but it is less than half the number of major rules President Obama imposed in 2016 and 8 percent of the costs. From January 1 to October 1 of 2006, the entire federal government actually reduced annual costs by $368 million. In other words, had EO 13,771 been applied in 2006, it would have met its goal by the end of the fiscal year. It wasn't until October 26, when the EPA published $5.4 billion in new particulate matter standards, that the net cost reductions turned into net burdens. Removing independent agency actions, as the order contemplates, made the figures from 2006 look even rosier, with $466 million in net costs reductions. Published paperwork did increase during this time, with 17 million hours.

2006 is a lone example highlighting how the first nine months of the year can produce regulatory savings; the Trump Administration might want to examine the pace and substance of rulemaking that year. With the regulatory moratorium, and possibility to "bank" savings through the Congressional Review Act (CRA), getting to $0 is not inconceivable with 2006 as a guide.

Deregulatory Acts to Bank

Fortunately for the administration, there are already $305 million in regulatory recessions it could use, along with more than 40 million hours of reduced paperwork. These gains occurred before the EO, but since they are so recent, the administration does have some control over their future. It's not clear if these savings, largely stemming from a "Food Stamps" revision, would count toward the one-in, two-out process or the $0 goal, but if they did, at least the Department of Agriculture would start with a negative regulatory balance.

In addition, the administration can use CRA resolutions of disapproval toward the goal of EO 13,771. The administration's guidance makes clear, "We will consider Acts of Congress that overturn final regulatory actions, such as disapprovals of rules under the Congressional Review Act, to operate in a similar manner as agency deregulatory actions."

Currently, Congress has introduced roughly 30 resolutions of disapproval. If they were to pass everything on their agenda, they could generate more than $2.4 billion in annual regulatory savings for EO 13,771, with 7.6 million fewer paperwork hours as a byproduct. Although no resolution has been introduced, nullifying new greenhouse gas standards for trucks would save another $2.6 billion in burdens. These savings could be achieved without first performing the laborious task of identifying two prior regulations for repeal, arguably the most challenging aspect of the order.

Complications

In 2006, regulators were tame with both the output of major regulation and their magnitude. By 2007, however, there were $13 billion in annual regulatory costs, a reversal from the previous year. Broadly, 2006 stands as an outlier. It will be difficult to replicate the conditions that year to produce few new regulatory burdens.

First, the federal government has created new agencies since and they have more delegated responsibility. In 2006, the newly-created Department of Homeland Security published just two major rules; in 2016, this figure jumped to five. In 2006, there was no Consumer Financial Protection Bureau. Although its status as an executive agency remains in limbo with a pending court case, it has produced roughly two major rules annually. During the last decade, regulators under both political parties, have grown more active and Congress has continued to delegate responsibility to federal agencies. The status quo in 2006 would represent a sharp departure from the regulatory norm of the last eight years, but that does not mean a return to 2006 levels of output is impossible.

There is also the issue of how strictly EO 13,771 treats "repeal" versus a more flexible "amend" approach. As a hypothetical, legally EPA cannot decide to remove requirements for carbon monoxide pollution when it chooses to implement new particulate matter rules. The EO cannot supersede past statutes, although some critics fail to understand this part of the document.

For example, in 2014 the Department of Transportation amended its "Driver-Vehicle Inspection Report" (DVIR). The agency didn't remove DVIR altogether, but it did remove "no defect" reporting. In other words, if a driver completes a trip without incident, there is no need to notify the agency. This slight change was estimated to save $1.7 billion in annual costs and 46 million hours of paperwork.

EPA has also found various ways to eliminate costs without altering past statutory mandates or the regulatory objective. For instance, in 2015 it amended its "National Pollution Discharge Elimination System" (NPDES) reporting. Broadly, the regulation moved to electronic reporting from paper-based reporting. Although there were some up-front costs, EPA estimated ten-year savings for the industry of $156 million and nearly 200,000 fewer paperwork burden hours.

For those who believe all of the "low-hanging fruit" has been picked from the regulatory modernization tree, for the reporting and recordkeeping equation alone, on paper there are still 1,977 regulatory requirements that cannot be submitted electronically or roughly 38 percent of all reporting requirements. With a robust retrospective review effort, finding

more cost-cutting alternatives is entirely possible.

What is likely to occur under EO 13,771 is a robust retrospective review of the current stock of federal rules to identify cost savings within existing programs. The guidance for the EO makes clear, "Agencies are also strongly encouraged to use program evaluation and similar techniques to determine the actual cost and other effects of eliminating regulatory actions." This will require considerable effort from agencies, and perhaps even increased analytical staff somewhere in the federal government, but there is hope from the previous administration that retrospective review can achieve cost savings.

Although AAF was critical of the net result of President Obama's retrospective review effort, there were successes. For instance, examining every deregulatory effort under President Obama's EO yields $7.6 billion in fewer annual costs, $26.8 billion in lower total costs, and 140 million fewer paperwork hours. These gains were more than offset with new regulatory burdens that turned cost savings into net costs, but there was still effort on the part of regulators to identify rules to revise. In fact, the Obama Administration reduced regulatory costs at least 77 times during the life of his EO. Would it be impossible to match that output annually under a Trump Administration?

Another complication is enforcement. Because this is an EO and not a law, Congress is largely on the sidelines. It can hold oversight hearings and support the effort, but little else. There is the possibility that the administration's enforcement of EO 13,771 becomes lax; agencies might continue imposing new rules, identifying at least two to amend, but then never repealing the old measures. The administration could also choose to grant waiver after waiver from the requirements until "getting to $0" for the remainder of the fiscal year is unlikely. As with all enforcement, ensuring the success of EO 13,771 will require leadership and an adequately staffed Office of Information and Regulatory Affairs (OIRA) to ensure compliance.

Finally, even conservative critics of a regulatory budget have noted that benefit-cost analysis relies on prospective estimates from federal agencies. Sometimes these estimates prove somewhat accurate and other times, they miss the mark. Unlike budgetary figures, with data on money leaving and coming into the federal government, there are few "hard" numbers in benefit-cost analysis. However, if the fiscal world is the sole barometer for absolute success, prepare for disappointment.

Regulatory costs and benefits will never be as accurate as tax figures, nor should we expect them to be. The perfect should not be the enemy of the good. Although regulatory costs are hardly measured with absolute precision, the public, OIRA, and regulatory agencies generally know the difference between rules that will impose billions in annual costs and

measures that generate a few thousand dollars in burdens. Thus, if an agency tried to "game the system" by repealing a few trivial past rules in return for a measure with costs approaching $1 billion, would it be difficult to spot the ruse? If OIRA didn't, surely members of the public would notice this bureaucratic sleight-of-hand. Regulatory analysis isn't perfect; it never will be. But our understanding of regulation and its effects will improve because of EO 13,771. Increased analytical staff, improving the accuracy of benefit-cost analysis, and enhanced retrospective review will all serve as a helpful outgrowth of the EO.

Conclusion

EO 13,771 has ushered in a new era for regulatory policy. Now, regulators must balance the imposition of new rules against removing some of the past burden of old regulations. Regulators across the globe already engage in some form of this regulatory budgeting, but achieving $0 in net costs by October will be a challenge. However, a regulatory freeze, a robust retrospective effort, and a measured pace of regulation for next few months could make "getting to $0" by the end of the fiscal year a reality.