Insight

Implications of the Regulatory Relief Executive Order

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EXECUTIVE SUMMARY

- President Trump issued a new executive order that asks agencies to identify possible deregulatory actions and to employ enforcement discretion in order to help the economy recover from COVID-19.
- The most meaningful part of the executive order is the provision on enforcement discretion, which will more immediately provide regulatory relief than unwinding or permanently waiving regulations through a notice-and-comment rulemaking process.
- While the executive order cites COVID-19 and the economic recovery from the pandemic as its impetus, the order sets out policies likely to remain in place through the remainder of the Trump Administration.

INTRODUCTION

President Trump issued an executive order (EO) on May 19 that directed agencies to further consider waiving, repealing, or modifying regulations in an effort to stimulate the economy in the wake of COVID-19. The EO, Regulatory Relief to Support Economic Recovery, asks agencies to identify possible deregulatory actions and to utilize enforcement discretion in order to help the economy recover.

While the EO cites COVID-19 and the economic recovery from the pandemic as its impetus, the order sets out policies likely to remain in place through the remainder of the Trump Administration – whether that is eight months or lasts a second term.

PROVISIONS OF THE EO

The EO establishes as administration policy that "agencies should address this economic

emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety."

It requires agencies to identify regulations that may inhibit the economic recovery from COVID-19 and, within applicable law, take appropriate action to waive, repeal, or modify them. Agencies are also directed to consider using temporary enforcement discretion, such as granting extensions of time for compliance or, presumably, issuing warnings rather than citations for minor violations. The EO also establishes "principles of fairness" that should be followed in agency enforcement and adjudication. Those principles are as follows.

(a) The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

(b) Administrative enforcement should be prompt and fair.

(c) Administrative adjudicators should be independent of enforcement staff.

(d) Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.

(e) All rules of evidence and procedure should be public, clear, and effective.

(f) Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

(g) Administrative enforcement should be free of improper Government coercion.

(h) Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

(i) Administrative enforcement should be free of unfair surprise.

(j) Agencies must be accountable for their administrative enforcement decisions.

Finally, the EO directs agencies to review the regulations they have waived or modified directly due to the COVID-19 national emergency and consider whether those actions should be made permanent.

IMPLICATIONS OF THE EO

While the EO asks agencies to identify regulatory burdens that could be alleviated, there is

little new in this regard. The Trump Administration has focused agencies on finding removable regulatory burdens since its first regulatory EO issued upon entering office. The reference to the economic recovery simply provides more rationale for continuing those efforts. Outside of such actions that can reasonably cite some emergency authority, however, these regulatory changes must still require the usual notice-and-comment process.

The most meaningful part of the EO is the section pertaining to agency enforcement and adjudication discretion, which is referred to as compliance assistance. The administration directs agencies to employ pre-enforcement rulings where businesses can ask an agency for a determination if some proposed conduct in the business's response to COVID-19 is allowable. The EO also encourages agencies to consider declining enforcement against persons and entities that made good-faith attempts to comply with a requirement or guidance. Additionally, the "principles of fairness" listed above provide another level of legal cover for regulated entities and will likely shift scarce agency resources toward the more pronounced and straightforward cases of noncompliance. These provisions will more immediately provide regulatory relief than unwinding or permanently waiving regulations through the rulemaking process.

These provisions will also be long-lasting. While COVID-19 and the economic recovery are the basis for these policies, agency discretion is not limited to COVID-19 related actions, nor is it limited to the timeframe of possible enforcement actions that occur while the national emergency remains in effect. Instead, the duration is for the entirety of the "economic recovery" from the pandemic, which will likely last years. This means the expanded use of enforcement discretion provided by agencies is likely to continue through the remainder of the Trump Administration, regardless of how long it may last.

CONCLUSION

President Trump's latest EO cites COVID-19 and the economic recovery as providing the need for reduced regulation and increased enforcement discretion from agencies. In reality, however, the EO extends and expands existing deregulatory priorities. For regulated entities making good-faith efforts to comply with requirements, it will provide immediate relief by giving them assurance that regulatory agencies will work with them rather than rigidly enforce provisions made all the more difficult to achieve by the current emergency.