



Trump's two-for-one regulation order will lead to court battles

BY RICHARD PIERCE, OPINION CONTRIBUTOR - 02/22/17 12:00 PM EST

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I have agreed to spend half a day with the lawyers for a regulatory agency that wants to comply with President Trump's Jan. 30 executive order on reducing regulation but that is struggling to figure out how to comply. Here is a summary of what I will tell them.

The order imposes two duties. Any time you issue a new rule or propose to issue a new rule you must identify at least two existing rules that you will repeal, and any time you issue a rule that imposes any costs you must repeal at least two existing rules that impose aggregate costs at least as large as the costs that will be imposed by the new rule. The order recognizes, as it must, that you can comply with the order only to the extent permitted by law, but it does not explain how you can comply with the order without acting in ways that courts are likely to characterize as unlawful.

The definition of "rule" in the order is extremely broad. It includes interpretative rules and policy statements — often referred to as guidance documents — as well as substantive rules. Even though guidance documents rarely impose costs and almost always are issued to help the firms you regulate understand how to comply with the substantive rules

you have previously issued, you cannot issue any guidance document unless you are prepared to repeal two pre-existing guidance documents. I realize that the practical effect of this requirement may be to preclude you from providing new guidance to the firms you regulate even when they ask you for guidance, as they often do.

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If you decide that it is necessary or desirable to issue a new substantive rule to further the goals of any of the statutes you implement, you cannot do so unless you repeal substantive rules that impose costs equal to, or greater than, the costs the new rule would impose.

The first logical step you should take to comply with this requirement is to identify and to repeal existing rules that are obsolete or that impose costs that exceed the benefits they create. I realize that you may not be able to identify any such rules because you have been complying continuously with the orders of Presidents Obama, Bush and Clinton to identify and to repeal rules that are obsolete or that impose costs that exceed their benefits.

The next logical step you should take is to identify and to try to repeal existing rules with net benefits that are lower than the net benefits of the new rule you want to issue. I realize that, even if you can identify rules of that type, you will probably fail in your efforts to persuade courts to uphold your decisions to repeal the rules after you have spent years implementing the demanding and resource-intensive notice and comment process that statutes and court decisions require you to use when you try to repeal a substantive rule.

Each of the existing substantive rules you issued reflected tens of thousands of hours of analysis by your staff. Each was subjected to cost-benefit-analysis by the Office of Management and Budget (OMB). Each was determined to yield benefits that are, on average, seven to eight times the costs the rule imposes. And, each was upheld by a court. Any attempt to repeal such a rule is likely to be rejected by a reviewing court as arbitrary, capricious and not in accordance with law.

Your best option in this difficult situation may be to do nothing even though you are certain to conclude that you should issue some new guidance documents and new substantive rules to further the purposes of the statutes you are required to implement. Any action you try to take that is consistent with the executive order is likely to fail. If you opt to do nothing, you will be complying with the executive order, but courts may decide that you are not complying with the statutes that you are required to implement.

If you want to have some idea of how your world will look in this situation, I urge you to read "[The Endgame of Administrative Law](#)." In that study, published in the forthcoming edition of [Harvard Law Review](#), Yale University historian and law professor Nicholas Parrillo describes each of the situations in which courts have ordered agencies to take actions that they could not, or would not, take because of some combination of inadequate resources and conflicting responsibilities. He describes the ugly and mutually-frustrating results of every battle between insistent courts and reluctant agencies. You can expect to spend a lot of time engaged in mutually-frustrating battles with courts of the type Professor Parrillo describes over the next few years.

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