

ALERT

“Deregulatory Review” EO Could Provide Opportunity to Streamline Government Contracting Rules

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President Trump issued an Executive Order this week that broadly targets federal regulations and guidance for review and rescission, amid a flurry of activity focused on limiting the size and reach of government. The February 19 Order, titled “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Regulatory Initiative,” directs all federal agencies, in coordination with the Office of Management and Budget (OMB) and the agency’s Department of Government Efficiency (DOGE) team lead, to review every regulation subject to their jurisdiction, including guidance documents as defined in Executive Order 13422, “Further Amendment to Executive Order 12866 on Regulatory Review and Planning,” for consistency with the law and Administration policy.

Although directed at agencies, the EO’s required review process presents an opportunity for the private sector to identify regulations across agencies that are stale, burdensome, or otherwise should be revisited. The EO includes an aggressive timeline of 60 days for this review, including coordination with the U.S. Department of Justice. While this alert focuses primarily on procurement regulations, any regulated entity should quickly consider whether to suggest regulations for review. *(Our colleagues in the Telecom, Media & Technology group have also provided analysis of this EO.)*

The EO focuses on the following categories of regulations:

- Unconstitutional regulations and regulations that raise “serious constitutional difficulties, such as exceeding the scope of the

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power vested in the Federal Government by the Constitution;"

- Regulations based on "unlawful delegations of legislative power;"
- Regulations that are based on "anything other than the best reading of the underlying statutory authority or prohibition;"
- Regulations that implicate matters of "social, political, or economic significance" that are not clearly authorized by statute;
- Regulations that impose "significant costs upon private parties that are not outweighed by public benefits;"
- Regulations that harm the national interest by "significantly and unjustifiably impeding technological innovation, infrastructure development, disaster response, inflation reduction, research and development, economic development, energy production, land use, and foreign policy objectives;" and
- Regulations that impose "undue burdens on small business and impede private enterprise and entrepreneurship."

The EO exempts from this review broad categories of regulations that may overlap with the regulations targeted for review – specifically regulations "related to a military, national security, homeland security, foreign affairs, or immigration-related function," management of Executive branch employees, or anything else that OMB exempts.

Agencies must provide a list of all regulations in these categories to OMB's Office of Information and Regulatory Affairs (OIRA), to be put on a "Unified Regulatory Agenda" for rescission or modification. The Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda) provides uniform reporting of data on regulatory and deregulatory activities under development throughout the federal government. The Unified Agenda historically has been compiled by the Regulatory Information Service Center within the General Services Administration along with OIRA.

Finally, the EO instructs agencies to curtail enforcement of regulations that fall within the review criteria: "Subject to their paramount obligation to discharge their legal obligations, protect public safety, and advance the national interest, agencies shall preserve their limited enforcement resources by generally de-prioritizing actions to enforce regulations that are based on anything other than the best reading of a statute and de-prioritizing actions to enforce regulations that go beyond the powers vested in the Federal Government by the Constitution." And to further preserve resources, the EO directs agencies, in consultation with OMB, to terminate enforcement proceedings "that do not comply with the Constitution, laws, or Administration policy."

Takeaways:

The categories of regulations covered by the required review and those exempted are broad and leave quite a bit of leeway for interpretation by those charged with implementation of the EO. Although the EO covers all agencies and all regulations, the impact on federal procurement regulations and contractors remains to be seen: Many procurement-related regulations are driven by legislation like the Competition in Contracting Act (CICA) and Federal Acquisition Streamlining Act (FASA), as well as yearly National Defense Authorization Acts,

and many regulations may fall within the exemptions. Nonetheless, the EO could provide a mechanism for the Government to streamline the procurement process in a way that we have not seen in more than 30 years, when "Reinventing Government" and other reform initiatives led to the Government's expanded procurement of "commercial" products and services. Federal government contractors – as well as potential contractors that may have previously avoided the government market because of concerns about Uncle Sam's unique, sometimes overly burdensome contracting requirements – should consider using this initiative as an opportunity to make their voices heard, for example by identifying procurement requirements that "impede innovation" or impose "undue burden" or cost.

Contractors and prospective contractors should also consider providing proactive comments to their agency customers on the types of regulations they believe should be included on the Unified Agenda for rescission or revision, even if a regulation also may be covered by an exemption. For example, even if some agencies' cybersecurity regulations would likely fall within the exemptions for national security, homeland security, and military-related functions, industry has a strong interest in revision to the regulations to eliminate inconsistencies and unnecessary differences in reporting and response obligations across government agencies. Similarly, although the Defense Federal Acquisition Regulation Supplement (DFARS), the FAR supplements for the military services, and the Homeland Security Acquisition Regulation (HSAR) relate to the military, national security, and homeland security, a case can be made that not all of their provisions directly affect those areas, and some may impede technological innovation or impose undue burdens on small businesses. In short, the EO may provide a unique opportunity for contractors and other interested stakeholders to provide input on streamlining and improving the procurement system.

To stay informed on all of the Executive Orders and announcements from the Trump Administration, please visit our dedicated resource center below.

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