DOGE and the Deep State

Our recent discussions of the history of Presidential Regulatory Reform and "Reinventing Government" efforts have suggested that the Regulatory Reform structure laid out in President Trump's 2017 and 2025 Executive Orders and the implementing OMB Guidance may finally come close to achieving the goals of not only this President but his predecessors beginning with President Reagan:

- Recognizing that regulation is a cost to be justified, not an assumed public good, and that the cost of regulation should be justified by its benefits
- Maintaining centralized White House-level oversight and leadership
- Removing regulatory restrictions that unduly slow or restrict innovation and development
- Streamlining, improving, and expediting the regulatory process so as not to delay critical decisions or the implementation of important policies

Given the current pace of global change and our competitors' ability to efficiently adapt to it, these objectives are no longer optional. Successful implementation of this Administration's regulatory reform system, which seeks to address this critical need, should be a high priority.

THE NEW REGULATORY REVIEW SYSTEM – ITS ESSENTIAL ELEMENTS

The enhanced regulatory review system established by the President's Regulatory Reform order (E.O. 14192, implemented by OMB Guidance M-25-20) and by E.O. 14219 (Ensuring Lawful Governance and Implementing the President's DOGE Deregulatory Initiative) changes the prior regulatory review process in at least the following ways:

- It augments the traditional cost-benefit analysis by requiring consideration of two additional issues—consistency with *Administration Policy* and with *The Best Reading of Applicable Law*, makes clear that the analysis must conclude that public benefits exceed private costs, and provides cost accounting mechanisms to assure that agency regulatory actions do not impose additional costs;
- It broadens the scope of review to include not only new regulations but also existing regulations and policies ("guidance");
- It tasks the DOGE Team embedded in each agency (established under E.O. 14158 and empowered by E.O. 14219) with assuring conformity with the improved regulatory framework—as well as overseeing a broad range of other government efficiency issues;
- It modifies the *Unified Agenda* requirement (which has been in place since the Carter administration) to change it from a non-binding informative forecast to a "gatekeeper" designed to assure conformity with the Order and Implementation Guidance and their deregulatory objectives; and
- It meshes the mandatory *Unified Agenda* requirement with OIRA's 12866 review to provide the regulated communities and other stakeholders with advance notice and a pre-NPR process to present information and views regarding feasibility, regulatory policy and cost impact, legal basis, etc. An OIRA conclusion that the rule as proposed (a) is not in conformity with the Unified Agenda notice, (b) is inconsistent with Administration policy,

> or (c) is not based on the best interpretation of applicable law triggers a consultative process overseen by the White House. E.O. 14219 directs agencies, when evaluating potential new regulations, to assess conformity with the best reading of the underlying statutory authority, and to weigh costs to private parties that are not outweighed by public benefit or that impede the public interest in innovation, infrastructure development, or a number of other public goods. The process is further expedited by OIRA Guidance Memorandum M-25-36, which streamlines review for regulations classified as "deregulatory."

THE PROSPECTS

As noted above, every administration since President Reagan's has acknowledged the need for regulatory reform meeting objectives that have remained relatively consistent from administration to administration. The current Administration's system, though grounded in a particularly strong opposition to "burdensome regulations," would appear to respond to long-standing and commonly held regulatory reform objectives. It would reassert executive control of the executive branch by seeking to provide binding and effective mechanisms to assure that regulatory actions—and, in particular, *new regulations*—would not be inconsistent with Administration policy, would not be contrary to the best reading of the law, and would not impose private sector costs that are not outweighed by public benefits.

As noted in previous comments [link], the rulemaking process followed in the Endangerment Finding revocation seems to confirm that the new, enhanced deregulatory mandate has potential—at least in the case of high-profile issues that have high priority status. The history of the pending MTVLO regulations, on the other hand, suggests that important regulations can "fall through the cracks" and completely escape meaningful executive branch review from a regulatory reform perspective.

We can begin to see this divergence by comparing the Unified Agenda notices for the two proposals. The Endangerment Finding review was classified by the submitting agency (EPA) as "Major," "Economically Significant," and "Deregulatory"—which meant that OIRA engagement commenced at the Pre-NPR stage, paused during the public review process, recommenced when the Final Rule was submitted for OIRA final review, and ended when OIRA concluded that the rule was "Consistent with Change." During OIRA's engagement, it held 59 12866 meetings with concerned stakeholders representing a broad range of interests. The "deregulatory" classification provided for expedited review of the proposal, and despite the major public interest, the regulations were finalized expeditiously.

The MTVLO regulations, on the other hand, were classified by EPA as "Substantive, Non-significant," which means that the regulation was not required to be submitted to OIRA for prepublication review, and, unless there is a change in that classification, the MTVLO regulations may never be subjected to the enhanced review provided by E.O. 14192 and E.O. 14219, the draft final regulations will not be required to be submitted for final OIRA review, there will not be an opportunity for additional 12866 meetings, and the final regulations can be published without a determination by OIRA—or perhaps by anyone—that they are as represented in the Unified Agenda notice and are consistent with Administration policy, the best reading of applicable law, or that public benefits outweigh private costs.

The takeaway is that the *Unified Agenda* notice and the classifications it includes may well be dispositive regarding the question of whether a proposal will or will not receive the regulatory review that the enhanced regulatory review system is intended to provide. Though it seems clear that the drafting of these notices should be a function of the embedded DOGE teams, it appears that the lead role in preparing the notice for the MTVLO regulations was filled by the career technical staff in the Carolina Research Park that has been responsible for the technical analyses in support of the NPR

The remedies for misclassifications on Unified Agenda notices are not clearly specified anywhere, though it is clear that communications on that subject are not part of rulemaking records, and executive branch communications are not barred.

The MTVLO regulations are a test of whether the Administration's regulatory reforms will have broad effect and applicability or whether they have a major hole that opens them to evasion. They should be of interest not only to those who are directly concerned with offshore loading operations but also to those who support regulatory reform and a more efficient government. Now is probably the time to address this important issue.

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