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Will Obama's Regulatory Reform Change EPA?

Law360, New York (February 3, 2011) -- The business community and others favoring a strong economy have for years complained that too many burdensome federal regulations (rules) are damaging the economy. This criticism has been applied to many federal agencies' rules, and the U.S. Environmental Protection Agency is usually at the head of the pack.

The press has recently been reporting that the Obama administration is tilting in a more "pro-business" direction, and President Barack Obama's new "Improving Regulation" executive order (EO) has caused quite a stir in this regard.[1] The president even took the unusual step of authoring a Wall Street Journal op-ed piece to tout his new EO. The takeaway messages from his op-ed piece are:

1) Federal agencies must be sensitive to the goals of "promoting economic growth" and "vibrant entrepreneurialism" in crafting their rules, and — while recognizing the need to protect health, safety and the environment — all new rules must "strike the right balance" with respect to jobs and the economy.

2) Rules already on the books must be modified or revoked if they "stifle job creation and make our economy less competitive," and federal agencies must "root out" rules that are "not worth the cost."

So the op-ed piece sounded like it had been drafted by the Chamber of Commerce. And the question many EPA watchers have raised is: Will this new EO really make any difference at the EPA? Will the Obama EPA now start being more sensitive to economics and refrain from imposing rules (and "root out" existing rules) that are not worth the cost?

I think the bottom line is that some Obama EPA rules in the future might reflect a greater consideration of these economic concerns. But if this happens, it will not be because of the new EO.

The New EO Changes Almost Nothing

EPA Rules Long Subject to White House Control

For decades, the White House has exercised review and veto authority over federal agencies' rules. This process has been managed by the president's Office of Management and Budget (OMB). Concerns over economic and job impacts of federal rules have always been at the forefront of this process.

The assumption has been that White House-level leavening is needed to restrain the tendency of personnel in each federal agency to wear "blinders" to issues outside that agency's domain/purview. The EPA was created in 1970, and from the very beginning, its rules have been subject to this process.

Evolution of Process

This White House review process became formalized in the 1980s under President Ronald Reagan. He vested the supervisory function in an OMB component called the Office of Information and Regulatory Affairs (OIRA).

The process became more elaborate under President Bill Clinton, who issued EO 12866 in 1993. The Obama EO explicitly reaffirms Clinton's 1993 EO, and all of the 1993 EO's provisions remain intact. Thus the two major "takeaways" of Obama's Wall Street Journal op-ed piece describe the 1993 EO just as accurately as his new EO.

The Obama EO reaffirms the 1993 EO's basic "principles." Among the "principles" are that regulations are to be crafted "in the most cost-effective manner to achieve the regulatory objective," and "only upon a reasoned determination that the benefits of the intended regulation justify its costs."

The 1993 EO also requires agencies to prepare detailed analyses — including cost-benefit analyses — of the impacts of their "significant" rules (most EPA rules are significant). Even where a statute might prohibit the EPA from basing a standard on a cost-benefit analysis (I will discuss this issue further below), the 1993 EO requires such an analysis for information purposes. These requirements remain intact under Obama's new EO.

The 1993 EO also further formalized the OIRA review process with detailed procedures and made it more "transparent." Federal agencies and advocates on all sides of an issue — industry, environmental groups, state/local agencies — can approach OIRA to take their "last shot" in seeking changes to an EPA rulemaking. Nothing in the new Obama EO changes this process.

So Why So Much Concern from Business Interests?

If these principles and procedures have been spelled out in EOs for decades, why are so many EPA (and other agencies') rules still deemed overly burdensome and insensitive to economic concerns? There are at least three reasons.

First, the EPA and other agencies issue so many new rules each year that the OIRA process simply cannot act as a leavening force very often. While the EPA has over 17,000 employees, OIRA has fewer than 100, and OIRA covers all federal agency rulemakings. OIRA must pick and choose its battles, and usually only the most truly significant (and expensive) rules draw much OIRA attention.

Second, for many of the EPA's most significant statutory authorities, the EPA is prohibited from undertaking any balancing of costs and benefits in setting standards. All previous EOs, and Obama's new EO, recognize this and qualify their requirements "to the extent permitted by law."

Third, even when Congress has authorized the EPA to balance costs and benefits, the criteria the agency may use can be extremely subjective. If the agency decides for whatever reason that it wants a particular result, it is reasonably easy to craft a cost-benefit analysis that will show benefits exceeding costs.

New EO Adds Words that Could Facilitate a Tilt Away from Economic Concerns

While the new EO adds nothing to the 1993 EO that would promote a tilt toward economic concerns, the new EO includes words that could allow the EPA to justify a tilt in the other direction.

The 1993 EO provides that, in considering benefits, agencies should estimate benefits that are "difficult to quantify." The 1993 EO states that such benefits include "distributive impacts" and "equity." The new EO adds "human dignity" and "fairness" to these benefits. This could make it even easier to write a cost-benefit analysis concluding that benefits outweigh costs.

The EPA Says the New EO Will Not Change Its Approach

On the heels of the new EO, the EPA issued a statement indicating that the Obama EPA has already been doing what the new EO requires. The administrator's spokeswoman, Betsaida Alcantara, said on Jan. 18, 2011, that the new EO "formalizes what we at EPA have been doing under this new administration: using common sense and transparency to review regulations ... In fact, the EPA's rules consistently yield billions in cost savings that make them among the most cost-effective in the government."

The administrator's spokeswoman also lauded the EPA's current efforts to regulate greenhouse gas (GHG) emissions, which many in the U.S. business community view as representing massive excess, as follows: "[The] EPA is confident that our recent and upcoming steps to address GHG emissions under the Clean Air Act comfortably pass muster under the sensible standards the president has laid out."

The EPA's Mind-Boggling Agenda and Limited Resources

The 1993 EO says that agencies are to review and adjust rules already on the books, and the new EO repeats that requirement. But in the almost two decades since the 1993 EO was issued, the EPA has done precious little of that.

The principal problem is that several statutes that the EPA administers impose so many mandatory obligations to issue new rules with statutory deadlines that the agency can barely keep up with its current statutory obligations. The problem is compounded when new rules that the EPA issues are reversed by reviewing courts — as they often are — and the agency is forced to go back to the drawing board.

There is no reason to assume that this situation will change. In fact, all the talk from Congress these days seems to be in the direction of budget cuts for federal agencies, so the EPA may end up with fewer resources to do more work.

Tilt Toward Economics Possible Where Statute Leaves Discretion

Where a statutory provision leaves the EPA sufficient leeway, a push from the White House for more sensitivity to economic concerns could make a difference in the outcome of an EPA rule. This can be illustrated by the EPA's June 2010, proposal for regulations relating to "coal combustion residues" (CCRs) under the Resource Conservation and Recovery Act (RCRA).

When electric utilities combust coal, ash is produced as a residue (hence CCR). Partly as a result of the major CCR spill from a TVA plant in 2008, the EPA has been considering new RCRA rules that would impose more protective controls on utilities' CCR disposal. The most critical issue is whether a new rule would regulate CCRs under RCRA's Subtitle C regime for hazardous waste, or under RCRA's Subtitle D regime for nonhazardous solid waste.

Industry and business groups have been vigorously advocating a Subtitle D rule, while public interest and environmental groups have been just as vigorously advocating a Subtitle C rule. In this situation, the relevant RCRA provisions authorize the EPA to consider and balance the costs of alternatives and many other factors.

The rulemaking package the EPA initially submitted for OIRA review in 2009 would have proposed a Subtitle C regime. After months of vigorous debate within the Obama administration (and unprecedented lobbying from all sides before OIRA), however, the White House forced the EPA to issue a "co-proposal" in which detailed regulatory schemes were proposed separately under Subtitle C and Subtitle D. The proposed rulemaking package was neutral on which scheme was favored.

Here, the Obama administration used the OIRA process to produce a more cost-sensitive EPA rulemaking package. This shows that in the future, if the Obama administration continues to adhere to a more business/jobs-friendly regulatory tilt, the process could make a difference.

But again, it is critical to understand this could probably not have happened had the governing statutory provision not been drafted in a manner that gives the EPA so much leeway. It should also be noted that all of this happened under the 1993 EO — nothing in the new Obama EO would have made this result more likely.

Tilt Toward Economics Not Likely Where Statutes Tie the EPA's Hands

Strict statutory language and/or judicial decisions from the D.C. Circuit may often tie the EPA's hands and greatly temper any ability to balance costs vs. benefits. There are many examples, but perhaps one of the best involves the Clean Air Act (CAA) requirements respecting hazardous air pollutants (CAA §112).

Under CAA § 112, the EPA must set "floor" levels of emission control for each industrial category or subcategory. In setting these "floor" levels, the EPA is not allowed under the CAA to balance costs and benefits of these often very expensive controls. Even if the resulting "floor" emission limits under this approach are far more stringent than necessary to protect health, the EPA has no authority under the current CAA to make adjustments. Congress in this situation has simply demanded "technology for technology's sake."

Perhaps such a legislative policy could be deemed rational in a robust economy, where one might assume that every pound of emission reduced is justified no matter how costly. One might wonder, however, whether this approach remains rational when the national economy is so fragile.

At the very least, this provides a good example of the type of rule where Obama's goals of "rooting out regulations that are not worth the cost," or are "just plain dumb," may not be achieved without legislation.

Conclusion

If the administration is serious about minimizing adverse economic impacts from new rules, and OIRA and others in the White House devote serious time and attention to this, we may start seeing some new EPA rules that reflect more balance. This could happen, of course, regardless of whether the new EO had been issued.

One might wonder, however, whether the EPA could even go the other direction in some rules now that the new EO specifies "human dignity" and "fairness" as benefits that may be quantified. In any event, many EPA rules must continue to be issued with no economic balancing unless and until Congress amends certain statutory provisions.

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http://www.us.oup.com/us/catalog/general/subject/Law/?view=usa&ci=9780195398816.

[1] "Improving Regulation and Regulatory Review," EO 13563. 76 FR 3821 (Jan. 21, 2011). http://edocket.access.gpo.gov/2011/pdf/2011-1385.pdf.