A new administration will often articulate its approach to the management of executive agencies through the issuance of an executive order. President Clinton issued **E.O. 12866** in the fall of 1993 and set forth both the process of regulatory review and a regulatory philosophy meant to guide executive agencies. E.O. 12866 placed an emphasis on cost-benefit analysis and data with which the Office of Information and Regulatory Affairs (“OIRA”) was to review agency action. President Obama, less than two weeks after taking office, announced his intent to adhere to the “fundamental principles and structures governing contemporary regulatory review set out in Executive Order 12866.” The reinstatement of E.O. 12866 and eventual issuance of the substantially similar **E.O. 13563** foreshadowed the Obama Administration’s focus on data and analysis principles that often resulted in industries submitting an ever-increasing amount of information to executive agencies.

A great deal of attention has been placed on agency regulation by President Trump, who has vowed to cut corporate-focused regulations by “75 percent – maybe more.” Although President Trump has yet to release an official approach to managing the administrative state, the new Administration has taken initial steps that seems aimed at reducing regulations. Further, Congress has taken up the mantle of deregulation by passing two measures in the House that could severely hamper agencies wishing to issue major rulemaking. However, without an articulated policy of managing executive agencies, it is unclear whether these measures would actually reduce regulation, or simply shift agency focus from major rulemaking to...
major guidance, leaving industries without a clear sense of the new playing field.

**Executive Actions: Making Old New Again**

Shortly after President Trump was sworn in, the White House Chief of Staff issued a “regulatory freeze” memorandum to all executive departments and agencies, freezing new or pending regulations. This memorandum is nearly identical to memoranda issued by Presidents Obama, George W. Bush, Ronald Reagan, and Jimmy Carter, and provides the incoming Administration the opportunity to review pending regulations until new Cabinet members are confirmed and can decide whether to issue or discard them. For regulations that have been published but have not taken effect, the effective date is temporarily postponed for 60 days from January 20, 2017, and the memorandum encourages agencies to propose a rule to delay the effective date for regulations beyond the 60-day period.

Although President Obama issued most of his priority regulations well in advance of January 20th, allowing them to survive the initial freeze, President Trump’s memorandum allows the Administration to consider several regulations that were not yet effective. These regulations include several Department of Energy efficiency regulations negotiated with industry and the 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation just issued on January 5th, leaving manufacturers across multiple industries unsure whether the new regulations will still apply after the 60-day freeze ends on March 21, 2017.

On January 24, 2017, the Trump Administration released a memorandum requiring the Secretary of Commerce to reach out to industry stakeholders concerning the “impact of Federal regulations on domestic manufacturers” and solicit comments from the public on actions the Federal government could take to streamline and reduce regulatory burdens in issuing permits to manufacturers. Wilbur Ross, President Trump’s Secretary of Commerce nominee, was recently approved by the Senate Commerce Committee post-confirmation hearing and a full-Senate vote is expected soon. However, it is unclear when such outreach to manufacturing stakeholders will begin in light of competing policy interests facing a newly-confirmed Secretary Ross. Additionally, because the memorandum asks for comments on a plan to make the permitting process easier for U.S. manufacturers, it may be a lengthy process before any new regulation is enacted.

On January 30, 2017, President Trump again indicated his intent to stringently limit regulation by issuing the “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs.” The order, citing the need to “manage the costs associated with governmental imposition of private expenditures to comply with Federal regulations,” requires that for every new regulation issued in FY 2017, at least two prior regulations be identified for elimination. The order further requires that the cost of any new regulations in FY 2017 be offset by the eliminated costs of the two regulations to be rescinded. This new “two-for-one” plan mirrors similar deregulatory efforts in Europe (e.g. Britain’s “One In, Two Out” policy). Additionally, the order requires the Office of Management and Budget to identify the total amount of incremental costs that will be allowed, meaning the additional cost imposed upon industry due to the regulation, for each agency in issuing and repealing regulations for the next fiscal year during the Presidential budget
process. Notably, the concept of a “regulatory budget” is not new in American politics. In 1980, President Carter’s Economic Report of the President discussed the benefits and drawbacks to developing a regulatory budget, including noting the difficulty in reconciling the inapposite approaches used in the expenditure process – which is proactively guided – and the regulatory process – which is often reactive to statutes passed or needs identified.

**Legislative Measures: At Cross-Purposes?**

Removing any existing regulations may become more difficult if two bills passed by the House of Representatives pass through the Senate. Clearing out old regulations is, itself, a regulatory process. Section 551(5) of the Administrative Procedure Act provides that revocation of a rule is accomplished through the same rulemaking process by which the rule was first promulgated. Therefore, if a major rule was promulgated through notice and comment, notice-and-comment rulemaking is required to remove the regulation. Under two bills passed by the House this month, that prospect could become increasingly difficult.

First, an additional hurdle to deregulation could be created by the Regulations from the Executive in Need of Scrutiny Act of 2017 ("REINS Act"). The REINS Act passed the House on January 5, 2017 and requires that any “major rule” must be affirmed by a joint resolution of Congress within 70 session days of final publication in order to take effect. The Act defines a “major rule” as having: 1) an annual effect on the economy of $100 million or more; 2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This means that any major rulemaking the Trump Administration would like to remove would be required to go through the rulemaking process and then be affirmed by a joint resolution of Congress before the removal takes effect. This would likely delay, or significantly delay, any deregulation of major rules.

Second, interpretations of law issued by agencies reflecting new Presidential priorities could be subject to more stringent judicial review. On January 11, 2017, the House passed H.R.5, the Regulatory Accountability Act of 2017. Title II of the Act, previously known as the Separation of Powers Restoration Act, modifies the scope of judicial review of agency statutory and regulatory interpretations to authorize courts reviewing such interpretations de novo. This, in effect, invalidates the deference previously provided to agencies’ interpretations of their authorizing statutes and own regulations as established by *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984) and *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Chevron* and *Auer* deference has been used to uphold changes in agency interpretation post-policy shifts between administrations. See *Barnhart v. Walton*, 535 U.S. 212, 225 (2002). Justice Scalia upheld such a shift in interpretation due to policy changes by stating “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Id.* at 226 (Scalia, J., concurring).

However, should the Regulatory Accountability Act of 2017 pass the Senate and become law, a court would be required to review any challenged agency
interpretation de novo, leaving the agency reinterpreting its regulations in accordance with new Presidential priorities without the benefit of judicial deference. This could leave the new administrative state facing challenges to new (de)regulation without a significant weapon in its arsenal.

**Less Major Regulation, More Ambiguity**

Although both pieces of legislation have been read in the Senate and referred to committee, it is not clear whether either or both will come to vote in the Senate, let alone pass. Notably, both the **REINS Act** and the **Separation of Powers Restoration Act** were introduced into the 114th Congress, passed the House, but never received a full vote in the Senate. If they do pass, the Trump Administration will likely have to adjust its plans to deregulate and either promulgate “non-major rules,” rescind prior agency guidance, or issue its own guidance. The use of guidance may be further encouraged as it may allow agencies to avoid any potential REINS Act issues.

It is not clear if the Administration’s January 30, 2017 executive order on Reducing Regulation and Controlling Regulatory Costs will constrain agency use of guidance. The order defines “regulation” and “rule” broadly and does not require that the agency statement issued have the force of law. Arguably, this may mean that the Two-for-One policy, cost-offsetting requirements, and regulatory budget process will apply to agency guidance as well as rulemakings.

The Administration’s executive orders raise many unanswered questions. As one example, if a new regulation must be proposed to rescind an older regulation, does the Two-for-One policy then require an additional two regulations be rescinded? This would, of course, require its own rulemakings to do so and could trigger the process anew. Until these questions are answered, there is significant potential for conflict between newly-issued guidance and a prior administration’s regulations. And given that any conflict would result in the regulation taking precedence over the guidance, the Trump Administration may be more hampered in its efforts to deregulate than it may wish. More worryisome is that agencies may be left confused about the actions that they may and may not take, leading to conflict between agencies and the Administration. Unfortunately, in any such conflicts, it is industry and the public that is placed in the middle – unsure of which rules apply and what guidance is binding (or even if the guidance is binding). Such ambiguity ultimately results in less confidence in the agency and could result in more constraints on industry rather than less. Further, the lack of a clear, regulatory framework places greater compliance costs on industries and could hamper the industrial growth the Trump Administration has promised to stimulate.

Ultimately, any efforts to deregulate will require both Agency action and the cooperation of Congress. It will be important for the Trump Administration to articulate a clear regulatory philosophy and get Congress onboard in order to be successful.

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