

Policy Backgrounder

Showerheads—and the Future of Regulation

The President issued a series of documents on the next steps in deregulation, including the deregulatory effort led by the Department of Government Efficiency (DOGE). Overall, the effort aims to reduce public review and comment on the development of regulations, and, as an Executive Order repealing an earlier environmental regulation demonstrates, represents a major change in administrative law.

Key Insights

- A Presidential Memorandum aims to assist the DOGE regulatory effort by providing a list of Supreme Court decisions for agencies to review in deciding which current regulations are presumptively unlawful and should be repealed. The list is broad and includes decisions affecting matters such as labor law and civil rights as well as regulatory policy.
 - This Memorandum and a series of Executive Orders reduce the long-established practice of “notice and comment” rulemaking in favor of a Request for Information in which individuals may offer suggestions (but agencies are not obligated to incorporate them) and in one case, a blanket statement that “notice and comment” is not required because the President is ordering a rule repealed.
 - This is a very different policy from the provision of the Administrative Procedure Act permitting regulation without notice and comment in cases where it is “impracticable, unnecessary, or contrary to the public interest.”
 - These actions and substantive regulations repealed under them will likely face significant litigation, leading to uncertainty if regulations are repealed before final court decisions.
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Next Steps in Deregulation

Besides the regulatory freeze and repeal on Inauguration Day of many regulations issued under the Biden Administration, the President had earlier issued two major Executive Orders on regulation, one sharply curtailing the powers and autonomy of independent regulatory agencies and the other extending the work of the Department of Government Efficiency (DOGE) to the regulatory sphere. Now, the President has issued a series of new Executive Orders and a Presidential Memorandum that have the potential to change administrative law dramatically, specifically in environmental law but also throughout all categories of Federal regulations.

“Repeal of Unlawful Regulations”

A Presidential Memorandum “[Directing the Repeal of Unlawful Regulations](#)” is designed to give guidance to Departments and agencies in identifying regulations for repeal as part of the DOGE regulatory effort. Stating that “[u]nlawful, unnecessary, and onerous regulations impede” economic growth and prosperity, the Memorandum cites a number of Supreme Court decisions that it believes “recognize appropriate constitutional boundaries on the power of unelected bureaucrats and that restore checks on unlawful agency actions.”

The list of decisions gives clues as to the extent of the Administration’s goals. Beyond the cases the Court decided last year, [Loper Bright Enterprises v. Raimondo](#) and [SEC v. Jarkesy](#), and [West Virginia v. EPA](#), all of which sharply restricted agencies’ power, it also includes the 2020 case [Cedar Point Nursery v. Hassid](#) (restricting access to private land under the Takings Clause for unionization efforts), [Carson v. Makin](#) (holding that a “nonsectarian” requirement for tuition payments in certain school districts violates the Free Exercise Clause of the First Amendment), and [Roman Cath. Diocese of Brooklyn v. Cuomo](#) (overturning a New York regulation early in the pandemic that restricted attendance at worship services). Given this, the Administration likely seeks to use the DOGE effort to focus on regulations that agencies might have issued beyond Congress’ intent or powers to delegate and but also on issues such as labor law, public health restrictions, and the future of affirmative action outside the higher education context (the somewhat narrow holding of [Students for Fair Admissions v. Harvard](#)).

The further instructions in the Memorandum, however, represent a new and radical direction in regulatory law. The President wrote that “agency heads shall finalize rules without notice and comment, where doing so is consistent with the ‘good cause’ exception in the Administrative Procedure Act [which] allows agencies to dispense with notice-and-comment rulemaking when that process would be ‘impracticable, unnecessary, or contrary to the public interest.’”

While the Memorandum is couched in legal language, for example stating that notice and comment is “‘unnecessary’ where repeal is required as a matter of law to ensure consistency with a ruling” of the Supreme Court, the President is essentially stating that his determination makes notice and comment rulemaking both “unnecessary” and “contrary to the public interest,” granting agencies “ample cause and the legal authority to immediately repeal unlawful regulations.”

This is a radical departure in administrative law. The structure of the [Administrative Procedure Act](#) generally requires notice and comment rulemaking to adopt or repeal rules, to provide public input (including business input) to guide agencies in their work. When the system works well, the “unelected bureaucrats” who draft and finalize regulations collect public comment and must reflect that public comment in the final regulations or explain why it has not been taken – or risk litigation against the new rule. Here, the Administration simply directs the repeal of regulations it believes are inconsistent with Supreme Court decisions, without business or other public input and without the possibility of judicial review to determine whether a particular regulation is in fact inconsistent with a Supreme Court decision.

Substantive administrative law has generally developed in a manner similar to the common law, with courts deciding cases on the facts presented and the text of the law and regulations, making distinctions between cases. The Chief Justice’s opinions in both *Loper Bright Enterprises* and *Jarkesy* clearly contemplated that courts would hear future cases related to those decisions giving those courts (and ultimately the Supreme Court) the power to refine those decisions and the law.

Here, though, the Administration simply names the cases and instructs agencies to repeal the regulations based on them, both removing them from the Code of Federal Regulations quickly (unless enjoined by a court) and shifting the ground of future regulation and litigation from the understanding of, for instance, agency powers under *Loper Bright Enterprises*, to the question of whether a regulation was validly repealed and the appropriate remedy if it was not. For instance, the Memorandum could be used to expand the reach of *Students for Fair Admissions* to include other areas of civil rights law by analogy, without waiting for the Court to decide.

The Order assumes that its determination of the understanding of these cases thus determines what is “unlawful.” In this way, it presumes to speak for the courts. All Administrations argue that their regulatory agencies have the (or at least “a”) proper understanding of the law; this goes further by simply repealing regulations by Executive fiat. In the meantime, the Federal courts could easily become overwhelmed with litigation challenging these repeals and leaving the ultimate decision uncertain as to whether they should remain in force, creating uncertainty for business and other regulated entities, and implementing potentially sweeping changes to US law (for instance, on environmental or civil rights law) with little opportunity for judicial review and a reduced record on which to conduct that review.

“Anti-Competitive Regulatory Barriers”

An Executive Order “[Reducing Anti-Competitive Regulatory Barriers](#)” states that “Federal regulations should not predetermine economic winners and losers. Yet some regulations operate to exclude new market entrants. Regulations that reduce competition, entrepreneurship, and innovation . . . should be eliminated.” The Order directs agency heads to work with the Chairman of the Federal Trade Commission (FTC) to identify regulations that “create, or facilitate the creation of, *de facto* or *de jure* monopolies” or “unnecessary barriers to entry for new market participants,” “limit competition between competing entities,” “unnecessarily burden

the agency's procurement processes, thereby limiting companies' ability to compete" or "otherwise impose anti-competitive restraints or distortions on the operation of the free market." Agencies should recommend rescinding or modifying these regulations.

In this process, however, the FTC will invite some public comment, not in the form of notice and comment rulemaking but a Request for Information open for 40 days during which the public may make recommendations on regulations that fall into this category. The FTC will then produce a consolidated list of regulations for repeal for the Office of Management and Budget; the FTC will then get a second chance to include any regulations not on the first list from agencies.

The scope of this deregulatory effort is unclear; incumbent holders of Federal contracts issued under these regulations may well seek to have them not included on the list or to sue to prevent their rescission. An alternative danger is that some regulations which have led to long-term incumbent contract holders may not be included, and the government may not explain why.

Zero-Based Regulatory Budgeting

An additional Executive Order, "[Zero-Based Regulatory Budgeting to Unleash American Energy](#)," focuses specifically on environmental and energy regulation. It opens boldly stating that "our vast regulatory structure often serves to constrict liberty, not promote it" and criticizes what it views as "an energy landscape perpetually trapped in the 1970s" (with a focus on conservation and presumed scarcity).

The Order requires covered agencies (EPA, Energy, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the [Bureau of Land Management](#), the [Fish and Wildlife Service](#), and others) to adopt a "sunset" provision in "regulations governing energy production to the extent permitted by law." The scope of the Order is broad: it covers activities under the [Mining Act](#) of 1872; exploration on the [Outer Continental Shelf](#); and significant conservation laws such as the [Bald and Golden Eagle Protection Act](#), the [Migratory Bird Treaty Act](#), the [Endangered Species Act](#), and others. It also requires EPA and the Army Corps of Engineers to identify specific regulations that could be covered by this Order, in principle including regulations under statutes such as the [Clean Air Act](#) and [Clean Water Act](#).

Essentially, under the principle of "zero-based regulating," agencies will be required to issue a sunset rule no later than September 30 inserting into every covered regulation a Conditional Sunset Date no later than one year after the rule takes effect (in other words, no later than September 30, 2026). Unless extended – which can be for no more than five years for any regulation – the regulations would automatically sunset on that date. New regulations (other than deregulatory regulations) must have a Conditional Sunset Date no longer than five years from adoption. The Order also requires coordination with agency DOGE Team Leads.

Agencies would also be required to "offer the public an opportunity to comment on the costs and benefits of each regulation, such as through a request for information, prior to a rule's expiration" and can extend the Conditional Sunset Date "if the agency finds an extension is warranted" but for no longer than five years.

The structure of the Order is strongly deregulatory, presuming that regulations should be ended rather than amended and perpetuated, in revised form. In theory, the new structure permits agencies to revise regulations based on more recent scientific and economic information. In practice, however, the Order does not agencies receive this new information through formal notice and comment regulations that would bind the agency and permit opponents to sue in court for not having included particular information in making its decision or its reasons for not including it. And it forces reconsideration of key environmental and conservation regulations on a regular basis, thus introducing greater uncertainty into regulations even on largely settled issues such as conservation of bald eagles and other wildlife.

Showerheads

A separate Executive Order, “[Maintaining Acceptable Water Pressure in Showerheads](#),” focuses on just one regulation, a previous effort by the [Obama](#) and [Biden](#) Administrations to promote water conservation through regulating the flow of water in showerheads, which the Order describes as the “Obama-Biden war on showers.” The Order highlights that those Administrations “promulgated multi-thousand-word regulations defining the word ‘showerhead’” and notes that “the Oxford English Dictionary defines ‘showerhead’ in one short sentence.”

The Order specifically directs the repeal of the 2021 regulation and declares that “[n]otice and comment is unnecessary because I am ordering the repeal.” Once again, the President is taking a highly negative and unprecedented view on the principles of the Administrative Procedure Act.

While lengthy, presumably that 13,000-word definition resulted from a process involving comments from multiple stakeholders, including both US and foreign businesses impacted by the regulation. By removing it, the Administration is introducing not only deregulation but potential uncertainty. Without a water conservation regulation on showerheads, presumably companies may sell what they wish. Other companies, however, have likely planned business operations around the existing regulation, introducing uncertainty for them. Preventing opportunity for notice and comment denies all businesses the opportunity to comment on the effort, potentially skewing incentives in favor of companies that support repeal – the opposite effect from the claimed purpose of the other Order to promote competition and not use regulation to favor certain market participants.

Conclusion

The Constitution gives Congress power to enact laws, the President the responsibility to “[take Care](#)” that those laws be “faithfully executed,” and the courts the power to interpret the laws, to “say what the law is,” in the [words](#) of Chief Justice John Marshall. The structure of this deregulatory effort is quite different: in essence, it is designed to reserve for the Executive Branch itself, as much as possible, the power to determine what is “lawful.” This is ironic given that one criticism of administrative law has been that it concentrates power in the Executive Branch rather than Congress or the courts. As such, this effort will surely produce much

litigation that will determine the future course of, and very likely the extent of, administrative and regulatory law.

Notice and comment benefits all stakeholders in the regulatory process, notably business. It promotes transparency because comments (other than protected commercial information) are publicly available, and agencies must consider and publicly respond to those comments. This new system reduces that transparency, contrary to the spirit of the Administrative Procedure Act which insisted offering all stakeholders the opportunity for public comment produces better regulation and even better *deregulation*, as opposed to private negotiation or ignoring the interests of certain stakeholders and relying on a favored few of whatever political or economic persuasion. While some industries and businesses may welcome deregulation, the new process will also reduce the opportunity for all businesses to participate, with uncertain results for industries and the economy, and significant changes (including weakening of protections) to regulations governing regulated industries, from technology to health and safety.

About the Authors



David Young, President, CED



John Gardner, Vice President, Public Policy, CED

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