

MEMORANDUM

FROM Elizabeth Barr Fawell
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RE: President Trump Issues Executive Order Authorizing Agencies to Provide Regulatory Relief to Support Economic Recovery in Response to COVID-19

On May 19, President Trump issued an Executive Order (EO) authorizing federal agencies to provide regulatory relief to support the economic response to the COVID-19 outbreak. ^{1/} Specifically, the EO allows agencies to rescind, modify, waive, or provide exemptions from regulatory and other requirements that may impede economic recovery, consistent with applicable law and protection of the public health and safety. Since March, federal agencies have responded to the COVID-19 outbreak by taking hundreds of administrative actions, many of which provided flexibility regarding regulatory requirements, in an effort to address the spread of the virus and its impacts. With focus shifting to overcoming the effect the virus has had on the economy, the EO notably requires agencies to review those regulatory standards that they have temporarily rescinded or otherwise modified and determine which, if any, would promote economic recovery if made permanent. The EO also requires agencies to more broadly review current and prospective regulatory priorities and identify those that may inhibit economic recovery. Finally, the EO recommends that agencies provide compliance guidance to businesses and commit to fairness in administrative enforcement and adjudication.

Summary of the Executive Order

The EO directs all agency heads to use any emergency authorities that President Trump has previously invoked in response to the COVID-19 outbreak or that are otherwise available to them to support the economic response to the COVID-19 outbreak. All action taken must be “consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility.”

^{1/} *Executive Order on Regulatory Relief to Support Economic Recovery* (May 19, 2020), available at <https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/>.

President Trump first announced the EO in a May 19 briefing for cabinet members, where he explained that he is “instructing agencies to use the emergency authorities to speed up regulation cuts, or new rules that will create jobs and prosperity and get rid of unnecessary rules and regulations.”^{2/} While the EO is directed to all agencies, during the cabinet briefing President Trump specifically referenced the Department of Transportation as an example of an agency that would benefit from the regulatory processes outlined in the EO. The key sections of the EO are summarized below.

Rescission and Waiver of Regulatory Standards

Section 4 of the EO requires the heads of all agencies to identify the regulatory standards that may inhibit economic recovery, and consider taking action to temporarily or permanently rescind, modify, waive or exempt persons or entities from those requirements. Additionally, agency heads are directed to consider exercising temporary enforcement discretion or grant extensions for the purpose of promoting job creation and economic growth.

Compliance Assistance for Regulated Entities

Section 5 of the EO requires the heads of the agencies to provide compliance assistance for regulated entities by:

- Accelerating procedures by which a regulated person or entity may receive a pre-enforcement ruling as to whether proposed conduct in response to COVID-19 is consistent with the law; ^{3/} and
- Considering whether to formulate and make public policies of enforcement discretion that decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards.

With respect to enforcement discretion policies, the EO notes that the Department of Health and Human Services and other agencies have issued guidance intended to stem the transmission of COVID-19 and instructs all agencies to consider a situation in which a person or entity makes a reasonable attempt to comply with such guidance to be a rationale for declining enforcement. The EO also states that non-adherence to guidance shall not by itself form the basis for an enforcement action by a federal agency.

Fairness in Administrative Enforcement and Adjudication

^{2/} *Remarks by President Trump in Cabinet Meeting* (May 19, 2020) available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-17/>.

^{3/} A “pre-enforcement ruling,” which President Trump defined in a previous Executive Order, is a written, formal communication from an agency in response to an inquiry from a person or entity concerning compliance with legal requirements, that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance, letter rulings, advisory opinions, and no action letters. See *Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (Oct. 2019) available at <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/>.

Under Section 6, the heads of all agencies must consider principles of fairness in administrative enforcement and adjudication, and revise their procedures and practices in light of them. The EO enumerates these principles, which include prompt and fair enforcement, independent adjudicators, and proportional penalties, among others.

Review of Regulatory Response

Section 7 directs agencies to review those regulatory standards that have been suspended or modified in response to the virus, as well as any actions they take pursuant to section 4 of the EO, and determine which would promote economic recovery if made permanent. The agencies must then report the results of this analysis to the Director of the Office of Management and Budget and the Assistants to the President for Domestic and Economic Policy. These officials will also monitor compliance with the EO.

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We will continue to monitor the White House's response to COVID-19. If you have any questions, please don't hesitate to contact us.