Federal Regulation Freeze and Reform – Including Dental Amalgam Rule

February 2017

As expected, President Trump ordered a suspension of federal rulemaking upon taking office. There are multiple steps to finalizing an agency rule, including (1) pre-publication adoption, (2) transmittal to the Office of the Federal Register for processing, (3) a public inspection period, (4) publication in the Federal Register, and (5) passage of the effective date stated in the rule (many are effective a minimum of 30 days after publication in the Federal Register but others may become effective upon publication or beyond 30 days).

On January 20, President Trump directed federal agencies, via a memo from his Chief-of-Staff Reince Priebus, to send no regulation to the Office of the Federal Register until new political management (i.e., an individual appointed or designated by the President) has had an opportunity to review and approve the regulation. The memo also ordered agencies to immediately withdraw regulations previously sent to the Office of the Federal Register but not yet published in the Federal Register. This includes EPA's Dental Amalgam rule — which was finalized in December but not scheduled for publication in the Federal Register until January 24. Finally, agencies were directed to temporarily postpone for 60 days the effective date of any rule published in the Federal Register but not yet effective. Rules in this final category will likely be withdrawn. The memo makes an exception for "critical health, safety, financial or national security matters," and asks agencies to identify any regulations that can't be delayed for other reasons, such as court order.

Then, on January 30, President Trump issued Executive Order 13771, which establishes a "regulatory cap" for FY2017. The operative language provides that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."

The Office of Information and Regulatory Affairs subsequently issued guidance, explaining that the order applies to "significant regulatory actions" issued between January 20 and September 30, 2017. This guidance also states that agencies should generally determine "significance" and calculate costs and cost savings based on existing principles and executive orders. Accordingly, a "significant regulatory action" is generally one that is likely to result in a rule with an annual impact on the economy of $100 million or more, or raise some novel issue. For example, EPA classified the Dental Amalgam Rule as a "significant" regulatory action because it raised novel legal or policy issues. Therefore, if EPA chooses to finalize the rule after the review period, the agency will need to identify two regulations for repeal or revision to offset its incremental costs.

Regarding the Dental Amalgam rule, while EPA made major changes to soften the rule, as we read it, those POTWs who are Control Authorities will still be responsible for ensuring that all

dentists that install or remove amalgam fillings (1) install separators and (2) send notice of the same to the POTW. We think POTWs will spend a lot of time chasing dentists for little or no benefit. Thus, we are opposed to EPA finalizing this unnecessary rule and plan to ensure that the Trump Administration is aware of our views about the lack of need for this rule. But, in light of Executive Order 13771, we believe EPA will not finalize the rule to avoid triggering the offsetting process.

We will now see a number of months with significantly reduced federal rulemaking followed by a transition period where EPA (and all other federal agencies) will begin a process of reviewing their rules to see which rules can be deleted or revised to be more reasonable. We are compiling a list of federal rules that are unnecessary or which warrant revision and plan to send that information to new Trump EPA management. Please let us know if you have thoughts about federal requirements that should be targeted.