TRUMP ADMINISTRATION ASSERTS CONTROL OVER INDEPENDENT AGENCIES

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The Trump administration has taken two actions that will dramatically increase White House control over federal commissions, boards, and officials that were previously considered independent. These actions are likely to impact a wide range of industries and sectors of the American economy, including energy, financial services, transportation, healthcare, and many others.

First, President Trump issued an Executive Order (EO) to increase presidential supervision over the "so-called independent agencies." The EO, entitled "Ensuring Accountability for all Agencies," is a fundamental change to historical practice where independent agencies like the Securities and Exchange Commission, National Labor Relations Board, and Federal Energy Regulatory Commission fell outside the White House's regulatory oversight. This EO sets forth new requirements that would formally subject the actions taken by these and other independent agencies to White House control for the first time. The new requirements include:

Regulatory Review

Section 1 of the EO extends to "independent regulatory agencies" the pre-existing requirement that Executive Departments and agencies submit for review all proposed and final significant regulatory actions to the Office of Information and Regulatory Affairs in the Executive Office of the President, before publication in the Federal Register.

Agency Performance

Section 4 of the EO requires the Director of the Office of Management and Budget (OMB) to establish "performance standards and management objectives" for independent agency heads, and to periodically report to the president on these agencies' progress in meeting the standards.

Funding

Section 5 of the EO requires the OMB director to "adjust" the independent regulatory agencies' "apportionments" as necessary to advance the president's policies and priorities. The EO contemplates that OMB may prohibit spending on particular activities.

Regular Consultation With the White House

Section 6 of the EO requires independent regulatory agencies to establish a White House liaison within each agency, who will regularly consult and coordinate with the Executive Office of the President on policies and priorities.

Singular Legal Interpretations

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Section 7 provides that the president and the attorney general shall set forth the authoritative and binding interpretations of the law for the entire executive branch.

These requirements are largely aimed at "independent regulatory agencies" as defined by 44 U.S.C. 3502(5), which identifies nineteen independent agencies and includes a catchall clause for "any other similar agency designated by statute."[1] A 2019 opinion from the Justice Department's Office of Legal Counsel notes that there are potentially several other agencies (beyond those listed) that would fall into the catchall clause, including the United States International Trade Commission.

In a related move, the administration also asserted greater authority to fire certain federal commissioners and other officials "at will" who could previously only be terminated by the president "for cause." For nearly a century, the prevailing view was that although the president enjoys absolute authority to remove the singular head of an executive agency, Congress could condition the removal of multimember heads of "independent" boards or commissions that Congress designed to be balanced along partisan lines and in which it vested quasi-judicial and quasi-legislative power. That view dates back to the 1935 Supreme Court case of *Humphrey's Executor v. United States*; however, many believe that this view may no longer be favored by the current Supreme Court.

The Solicitor General of the United States recently informed Congress that the federal government will "no longer defend the[] constitutionality" of "certain for-cause removal provisions that apply to members of multimember regulatory commissions"—specifically the Federal Trade Commission, National Labor Relations Board, and the Consumer Product Safety Commission—that were permitted under *Humphrey's Executor*. Instead, the Department of Justice "intends to urge the Supreme Court to overrule [*Humphrey's Executor*], which prevents the President from adequately supervising principal officers in the Executive Branch who execute the laws on the President's behalf, and which has already been severely eroded by recent Supreme Court decisions."

These two steps—the "Ensuring Accountability for all Agencies" EO and the Justice Department's rejection of *Humphrey's Executor*—would dramatically increase White House control over federal commissions, boards, and officials which were previously considered independent and insulated from such control.

Article II of the U.S. Constitution vests the president with somewhat opaque "executive" powers. These powers include ensuring that the laws of Congress are "faithfully executed," which requires some degree of oversight of the officers who actually execute them. The Constitution also permits the president to "require the Opinion" of executive department heads on any subject relating to their duties. While other presidents have not required this level of consultation by independent agency heads, some view the more hands-off approach to regulatory review to be a matter of executive discretion rather than a lack of legal authority. Together, these recent steps by the Trump administration highlight the likely hallmarks of the new legal frontier—one that will test the limits of the president's constitutional powers.

KEY TAKEAWAYS

Possible Regulatory Delays While Independent Agencies Adjust to the New Normal

The increased coordination and consultation that is now expected from the White House could result—at least initially—in some delays to the normal decision-making processes of independent regulatory agencies. These agencies will now need to build in an additional layer of review to ensure that certain policy decisions are aligned with those of the administration.

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Fewer Open Interagency Disputes

President Trump intends to interact with independent agency heads in the same way as other federal agency heads. Subject to congressional or judicial intervention, it is expected that independent agencies will follow the White House's lead, particularly given that President Trump has asserted authority to terminate board and commission members without cause. This will likely result in fewer—if any—open interagency disputes, like that which arose in the Bostock case, where the Justice Department and Equal Employment Opportunity Commission took conflicting legal positions on the scope of Title VII. The White House will aim to resolve more policy disputes in the interagency process, perhaps without the regulated community even learning of such disputes.

The Likely Rise of Executive Deference Arguments

Look for the White House to argue that this EO is entitled to deference from the courts, as it relates to the president's core constitutional powers. While the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* put an end to *Chevron* deference for agency interpretations of the law, it did not address a different strain of deference where core presidential power is concerned. That form of deference—traditionally invoked to support the executive branch's preferred national security policies—may well be increasingly invoked by the president and attorney general. President Trump may also assert that the EO should take precedence over existing regulations to the contrary, as the administration has maintained in other contexts.

Increased Opportunities for Engagement

In making these changes, the White House's stated goal is to increase the public accountability of agencies that have historically exercised significant regulatory control over the American people. By requiring these agencies to coordinate with the White House at an unprecedented level, there may now also be an increased opportunity for regulated parties to be heard on important policy matters.

FOOTNOTES

[1] Notwithstanding that definition, the EO explicitly does not apply to the Board of Governors of the Federal Reserve System or to the Federal Open Market Committee in its conduct of monetary policy; it does apply to the Board of Governors' supervision and regulation of financial institutions.

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