

Trump issued an Executive Order (EO) requiring agencies to repeal at least two regs for every new reg and also capping the combined compliance costs of all the regulations issued in a given year. To see what the legal effect is, we need to tease out several scenarios. Of course, we can never be 100% sure of how courts will rule on a new issue, but the law seems pretty clear on some of these issues.

**Scenario 1. Silent Exercise of Discretion.** The agency has discretion over whether to issue a regulation. The agency doesn't issue a regulation due to the Executive Order, but they never give any explanation. Really not much anyone can do about that due to the difficulty of challenging agency inaction in court, absent a deadline. (Eric Biber has a [paper](#) on this set of issues that goes much deeper into the details.) As Scenario 4 shows, there may be a way to put the agency on the spot, making it at least give an explanation.

**Scenario 2. Missing a Deadline to Regulate.** An example would be listing a species under the Endangered Species Act. EPA must list a species after getting a petition and has a limited amount of time to rule. I can't imagine a court accepting the excuse that the agency is waiting to find the right two regs to repeal or has used up its regulatory budget. Thus, applying the EO here would be contrary to law and hence exempted from the EO, as a [new guidance](#) from OMB confirms. There are actually dozens if not hundreds of deadlines scattered across various regulatory statutes, so this is not an uncommon scenario. That's a good thing, since these mandated regs are probably the *only* health, safety, or environmental protections we will see in the next four years. The barriers are probably too high for anything else to get through. (Which is the whole point, after all.)

**Scenario 3. Explicitly Repealing a Rule Solely to Create an Offset.** Suppose the agency's formal justification for repealing existing rules 1 and 2 is simply to make room for new rule 3. Given that statutes generally tell agencies what factors they can consider in implementing a particular provision, getting rid of a rule will have to be based on the same factors. (This [paper](#) has a detailed discussion of the kinds of issues that would arise under this scenario and scenario 4.)

Now we get to some trickier situations:

**Scenario 4. Denying a Rulemaking Petition.** Denial of a petition is often subject to judicial review, in which case the agency is going to have to give some explanation. If there's a deadline, the agency doesn't have much maneuvering room. (Scenario 2) But if there's no deadline to make a decision, Congress presumably meant to give the agency leeway in setting priorities. Can the agency say it is denying the petition because it doesn't have the necessary offsets under the EO? Not clear. There's a really interesting issue, not

completely resolved by the courts, about just how broad the discretion may be. But in the absence of a deadline to issue a regulation, it's really hard to get a court to intervene in a meaningful way, so this may be more of a theoretical than practical problem.

**Scenario 5. Pretextual Explanation for Repealing a Rule.** Let's say that the agency makes it clear in other ways that it is repealing a rule in order to create an offset, but the official explanation for the repeal gives other justifications that are good enough to pass judicial scrutiny. Can the court look past the official justification to the (invalid) actual motivation? The answer is probably no, since courts are very reluctant to probe an administrator's actual intentions. But there's a little bit of wiggle room here that might allow a court to take into account really clear evidence of the agency's true motives.

In short, there are going to be a lot of interesting administrative law issues under the Executive Order. But it does seem clear that there are some legal limits on how and when agencies can implement it.