

Recent Regulatory Developments Offer Unique Opportunities to Shape the Law

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The federal regulatory landscape that companies face has changed dramatically in the past year. The new Administration has pursued an ambitious reform agenda aimed at reducing regulatory burdens and complexity—which opens a number of avenues for businesses to influence executive branch regulatory policy. In addition, the Supreme Court and lower federal courts have focused on claims of regulatory overreach and shown a willingness to reconsider a number of administrative law precedents that grant federal agencies broad discretion. Given the sea change that these developments could usher in, corporate counsel should proactively pursue new opportunities to influence federal regulatory policy to advance their companies’ interests.

Executive Branch

The current Administration has shown an unprecedented willingness to roll back outdated and unwarranted regulations. In his first week in office, the President announced a “One In, Two Out” regulatory policy that requires agencies to identify two existing regulations to be eliminated for every one new significant regulation that is adopted. Additionally, agencies must strive to reduce the overall costs imposed by their regulatory actions and they must designate high-ranking officials who are responsible for advancing the Administration’s reform agenda.

Agencies have already shown an enthusiasm for complying with these requirements. The Office of Information and Regulatory Affairs (OIRA) reported that, in 2017, agencies eliminated sixty-seven regulations, while only issuing three significant regulations. As the push continues, however, agencies will require more assistance from private industry and individuals to identify areas where regulatory burdens can appropriately be reduced. The policy therefore presents a rare opportunity for corporations to propose regulatory changes to policymakers who are eager for ideas and inclined to act on the suggestions.

Corporations should therefore work proactively to identify and communicate unnecessary and burdensome regulations to the relevant agencies. In doing so, the arguments most likely to resonate with the Administration are claims that an existing regulation is outdated, ineffective, or eliminates jobs. In addition, attorneys within the Executive Branch have been tasked with ensuring that regulatory enforcement is consistent with due process and fair notice principles. When faced with enforcement activity that is inconsistent with those principles, companies should forcefully raise that objection with the agency’s legal officers.

Judicial Branch

The judiciary has also taken a renewed interest in regulatory issues. In recent years, the Supreme Court has signaled that it might be willing to pay new attention to old administrative law

doctrines including agency deference and the nondelegation doctrine. And, in general, the Court has taken a less permissive approach to agency action that pushes the outer boundaries of statutory authority. While these developments are consistent with general trends in the law, they will likely be accelerated by the appointment of Justice Gorsuch, who was a vocal critic of regulatory overreach during his service on the court of appeals.

Two cases that the Supreme Court will decide next Term illustrate this development. The first, *Weyerhaeuser Company v. United States Fish and Wildlife Service*, is the latest in a string of environmental cases that test federal agencies' ability to stretch the limits of their statutory authority. While the precise statutory question—which concerns the scope of the Endangered Species Act—will be of greatest interest to companies who face environmental law issues, the case also provides an opportunity for the Court to address more broadly the scope of the judiciary's deference to executive agencies' interpretation of their governing statutes.

The second, *Gundy v. United States*, presents the Supreme Court with an opportunity to breathe new life into the nondelegation doctrine, which the Court has not employed to invalidate a federal statute in over 80 years. Rooted in the separation of powers, the doctrine prohibits Congress from delegating its legislative authority to the Executive Branch. The precise statutory provisions at issue in *Gundy*—which grant the Attorney General authority to set registration and reporting requirements for convicted sex offenders—are unlikely to be of interest to corporate counsel. But, in the course of deciding the case, the Supreme Court will likely address broad legal principles that apply beyond that narrow context. In particular, the Court could cast doubt on all manner of statutory provisions that purport to delegate power to federal regulators. If so, a flood of litigation could ensue.

Justice Gorsuch is certain to play an active role in the outcome of these two decisions. During his tenure on the U.S. Court of Appeals for the Tenth Circuit, then-Judge Gorsuch expressed a willingness to invoke the nondelegation doctrine in a case presenting the same issue as *Gundy*. Gorsuch has also raised thoughtful questions about the legitimacy of *Chevron* deference, in which courts defer to an agency's reasonable interpretation of an ambiguous statute. While his critique was primarily based on the text of the Administrative Procedure Act and separation of powers concerns, Gorsuch also noted that granting broad deference to agencies can often violate the regulated parties' right to due process and fair notice of the law. He is likely to raise similar questions in *Weyerhaeuser*.

The trends underway at the Supreme Court will have ripple effects far beyond the four corners of these specific cases. Thus, in addition to participating in the Executive Branch's regulatory reform efforts, companies should monitor and participate in cases that will shape the legal doctrines that are likely to govern their regulatory litigation in the future.

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These recent developments will significantly impact companies of all stripes over the coming years. As the regulatory landscape evolves, companies who actively participate in those changes are most likely to experience the greatest benefits. It is thus critical that business leaders work

closely with sophisticated in-house and outside counsel to anticipate these developments and play a role in their advent.