

Crowell Tells Businesses To Take Lead On Regulatory Agenda

By Vidya Kauri

Law360, New York (May 9, 2017, 9:36 PM EDT) -- Businesses must engage with the White House and Congress now if they want to influence the new regulatory agenda in Washington, D.C., instead of waiting for the government to propose and articulate new policy goals, according to a Tuesday publication from Crowell & Moring LLP.

The 500-strong international law firm published its third annual regulatory outlook, sending a strong message to businesses that will be influenced by the Trump administration's views on energy, the environment, taxes, employment, competition and health care, among other issues, that they should be investing in resources to lobby for legislative and regulatory reforms they want to see.

Even though President Donald Trump is known for wanting to minimize government's regulatory authority, Crowell & Moring said he is likely to use executive orders and other "fast action" authority to cut regulations. Businesses should therefore be ready to speak up early on potential changes, track new proposals and calculate their financial impact, and lobby White House advisory panels, the firm said.

"The best advice we can give to our clients is neither to overreact to some of the more sweeping remarks that have characterized the first 100 days of this new administration, nor to sit back and wait for things to happen. The opportunity to engage with Washington is now," said Angela Styles, chair of Crowell & Moring and the former administrator for federal procurement policy within the Office of Management and Budget at the White House.

The firm's regulatory forecast provided an overview of regulatory changes that Trump has been able to effect so far and an indication of what may be coming down the pipeline in the near future.

In the areas of energy and the environment, for example, the forecast said that Trump's promises to rein in the Environmental Protection Agency and promote coal production do not necessarily mean a complete reversal of former President Barack Obama's objectives. For example, both administrations have prioritized improving the power grid and easing regulatory burdens on infrastructure development, according to the report.

Moreover, the repealing of any Obama-era rules will necessarily entail new rulemaking processes that could be subject to protracted litigation, Crowell & Moring warned.

An additional concern is that the federal government could push regulatory authority down to the states

in areas such as health care and the environment, which means that there will be questions around the extent to which states can enforce new rules and businesses will have to “bone up” on state programs, the firm said.

“Simply counting on the states to perform federal statutory mandates doesn’t make those mandates go away — it just shifts costs to state budgets, potentially invites diverse and conflicting interpretations of the law, and is certain to spur litigation for years to come,” Larry Eisenstat, chair of the firm’s energy group, said.

While changes to health care laws are already underway, Crowell & Moring said that health insurance issuers should consider exiting certain unprofitable exchange markets and offer insurance plans with lower premiums to attract new, healthy customers.

The White House is also expected to roll back pro-employee regulations, or at least ease up on enforcing them, according to Crowell & Moring’s report.

Trump signed a joint resolution in March disapproving Obama’s Fair Pay and Safe Workplaces executive order, and it is unlikely that Obama’s revised Fair Labor Standards Act overtime rule, which raised the minimum salary an employee must earn to be exempt from overtime pay, will be implemented in its current form, the report said.

“Employers may face morale and operational problems if workers were notified of wage increases in anticipation of the new rules,” it cautioned.

Tax is an area where there has been a lot of talk from the administration, including proposals that conflict with congressional leadership positions. However, there has been little action beyond an executive order to repeal two regulations for each new one introduced — an order that applies to all federal agencies — and another instructing the Treasury Department to review all “significant” tax regulations issued since the beginning of 2016 and produce a report that identifies rules deemed to pose undue financial burdens on taxpayers, add unnecessary complexity to the tax code or exceed the statutory authority of the Internal Revenue Service.

A new federal law for auditing partnerships is expected to remain on the books, even though regulations to interpret the statute were stopped in their tracks following an executive order from Trump halting most rulemaking activities.

Partnerships ought to be reviewing their agreements, identifying the powers a partnership representative can have during audits and clarifying tax obligations of buyers and sellers of partnership interests, the report said.

It is evident that the Trump administration will have a business-friendly attitude toward mergers, but a de-emphasis on federal enforcement of antitrust issues could lead to states and international jurisdictions becoming more aggressive, Crowell & Moring said.

--Editing by Aaron Pelc.