



USPTO Breaks Trump’s “One-In Two-Out” Order

- **Context:** Obama holdover Michelle K. Lee appears to continue to run the USPTO, more than six weeks after President Trump’s Inauguration: delivering remarks at PPAC and PTAB Bar Association on March 2, 2017, appearing as a speaker at industry events (e.g. AUTM), signing notices published in the Federal Register, and signing newly issued U.S. Patents.
- **Thesis:** Lee’s USPTO is undermining President Trump ‘One-In Two-Out’ Executive Order. <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>
- **Background:** Trump’s ‘One-In Two-Out’ Order (formally “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs”) <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling> mandates that whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed. Moreover, under the ‘One-In Two-Out’ Order, the costs of any new regulations must be offset by the elimination of existing costs of at least two prior regulations. The ‘One-In Two-Out’ Order broadly defines the term "regulation" or "rule" to mean “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.”
 - The White House Office of Management & Budget (OMB) issued guidance on implementing the ‘One-In Two-Out’ Order. <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> The OMB Guidance explains, under the heading “Coverage:”

Q: Which new regulations are covered?

A: The EO’s requirements for Fiscal Year 2017 apply only to those significant regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between noon on January 20 and September 30, 2017. ***This includes significant final regulations for which agencies issued a Notice of Proposed Rulemaking before noon on January 20, 2017.***

- USPTO is disregarding Trump's 'One-In Two-Out' Order and OMB Guidance: At the quarterly PPAC (Patent Public Advisory Committee) meeting on March 2, 2017, USPTO Deputy CFO Frank Murphy (listed on the agenda as Acting CFO) stated that USPTO is moving forward with its proposed \$710 million fee increase, despite the Trump's 'One-In Two-Out' Order.
https://www.uspto.gov/sites/default/files/documents/20170302_PPAC_Budget_Update.pdf
 - PPAC Member Bernie Knight (former General Counsel of USPTO) asked Mr. Murphy whether the \$710 million fee increase is subject to Trump's 'One-In Two-Out' Order. Mr. Murphy responded that he does **not** believe the \$710 million fee increase is subject to Trump's 'One-In Two-Out' Order because, in his view, it is not a "new" regulation but rather is an "amendment" to an old regulation.
<https://livestream.com/uspto/PPAC20170302/videos/150784711> (at 1hr 2min mark)
 - Mr. Murphy also responded that, even if the \$710 fee increase were subject to Trump's 'One-In Two-Out' Order, the USPTO would look to eliminate two regulations in *other* agencies within the Commerce Department, not the USPTO's own regulations.
- USPTO's interpretation is wrong: OMB Guidance does not distinguish between "new" regulations and "amended" regulations. A proposed regulation that would go into effect in FY2017 is "new" and is covered by the 'One-In Two-Out' Order so long as it is a significant regulatory action and was published in a "Notice of Proposed Rulemaking before noon on January 20, 2017."
<https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017>
 - Here, the USPTO's proposed fee increase was published in a Notice of Proposed Rulemaking on October 3, 2016 (i.e., before noon on January 30, 2017) and itself admits that it is "significant for purposes of Executive Order 12866" (i.e., having an annual effect on the economy of \$100 million or more). 81 FR at 68179. Therefore, under the OMB's definition, the USPTO fee increase is a "new regulation" to which the Trump 'One-In Two-Out' Order applies.
- Goring Someone Else's Ox. More troubling is the likely fight that will occur between the USPTO and other Commerce Department agencies (NIST, Census, ITA, NOAA, BEA, BIS, NTIA), as the USPTO seeks to gore the ox of these other agencies, without offering any of the USPTO's own regulations for repeal.
- Undermining the Trump White House. The public would be shocked that the USPTO, or any agency, can increase fees by \$710 million through rulemaking and claim that this is not a rule subject to the "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs."
- Question: Is Obama holdover Michelle Lee seeking to undermine President Trump?