E.O. 13422: UNANSWERED AND UNACCOUNTABLE

July 24, 2007

INTRODUCTION

On Jan. 18, 2007, President George W. Bush issued Executive Order 13422 (E.O.), which amends Executive Order 12866[1], Regulatory Planning and Review. The same day, the White House Office of Management and Budget (OMB) issued its *Final Bulletin for Agency Good Guidance Practices*. The two executive directives work in concert to alter the ways federal agencies develop and enforce regulations.

These changes could dramatically impair the ability of agencies to protect the public. The E.O.:

- requires agency regulatory policy officers to be presidential appointees and expands the powers of those officers;
- shifts the criterion for promulgating regulations from the identification of a problem like threats to public health to the identification of a "specific market failure" and,
- in conjunction with the *Final Bulletin*, allows the White House to exert control over agency guidance documents – subjecting a new class of information to political considerations and possible delay.

As of July 24, 2007, agencies are to be in full compliance with all the provisions of the E.O. and the *Final Bulletin*. Agencies and OMB's Office of Information and Regulatory Affairs (OIRA) spent the first half of 2007 preparing and implementing aspects of the directives. But despite great attention paid by Congress, the media and the public, little new information has surfaced. The American people remain in the dark about how these changes will influence the way our government operates.

REGULATORY POLICY OFFICERS

E.O. 12866 created the regulatory policy officer (RPO) within each federal agency.[2] The role of the RPO envisioned in E.O. 12866 was to coordinate and carry out agency responsibilities in regard to regulatory planning and the OIRA review of regulations.

In practice, the role of the RPO evolved differently in order to comport with agency needs and structure.[3] For example, not every agency had an RPO, and some, like the Department of Agriculture, had various officials act as RPOs according to their issue expertise.

[1] Executive Order 12866, Regulatory Planning and Review, 1993, herinafter E.O. 12866.
[2] E.O. 12866, Sec. 6(a)(2).
[3] For more on how the RPO evolved, see OMB Watch's report, *A Failure to Govern: Bush's Attack on the Regulatory Process*. Available at: http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf.

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RPOs as presidential appointees

E.O. 13422 alters agency practice by elevating the status and increasing the responsibilities of the RPO. The E.O. directs agencies to "designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer."[4] Agencies were required to name their RPO by March 19, 2007.

In late July, OMB released a list of RPOs for each agency. Of the 29 RPOs on the list, 27 have been confirmed by the Senate in their agency roles but not in their role as RPOs. The remaining two are political appointees who did not require any Senate confirmation.

OIRA Administrator Susan Dudley framed this as a good government measure because one person will be accountable for major regulatory decisions in each agency.[5] This could not be further from the truth. The responsibilities of these officials have been substantially increased, yet they are not subject to Senate confirmation in their role as RPOs and their actions are not public. Subsequently, the RPOs are not likely to be accountable to Congress or the American people. Given the ability to significantly impact regulatory outcomes, these people should be confirmed by the Senate for these additional job responsibilities – responsibilities not foreseen when they were confirmed for their current positions.

RPOs commencing rulemakings

In addition to requiring RPOs to be presidential appointees, the E.O. grants new powers to the RPOs. RPOs are responsible for initiating a rulemaking and can kill it at any time. The E.O. states "no rulemaking shall commence" without the approval of the RPO. Prior to this, programs within agencies began rulemakings as Congress authorized them. The E.O. also requires the approval of the RPO if a rule is to be included in an agency's Regulatory Plan – an annual description of the most important regulatory actions an agency is pursuing.[6]

Transparency is again a problem. Communications between the RPO and agency staff will occur entirely within the agency. When an RPO decides to stop agency staff from continuing a rulemaking at some stage, the public will have no knowledge of the decision or the rationale behind it. These decisions and rationales should be included as part of the agency's rulemaking record.

This lack of transparency is especially problematic if the interests of the RPO are more closely aligned with those of OIRA and the White House than with those of the agency in which the RPO serves. As an agency official, the RPO should be concerned with public sentiment and need or with scientific consensus on an issue, not with political interests. OIRA's influence during the formation of rules should also be part of the rulemaking record so it is clear what kinds of changes are being made at OIRA's behest.

The point at which "a rulemaking shall commence" is also unclear. OIRA has provided a vague and unhelpful definition and has acknowledged the commencement of a rulemaking may differ

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[4] E.O. 12866, Sec. 6(a)(2).
[5] Cindy Skrzycki, "Bush, Congress Battle to Control Bureaucracy," Bloomberg News, July 17, 2007.
[6] E.O. 12866, Sec. 4(c).

from agency to agency.[7] This ambiguity could allow the RPO to exert influence at any stage in the rulemaking process and could prevent important scientific research or analysis from taking place.

Allowing the RPO to approve an agency's Regulatory Plan also allows the official to exert political influence without public knowledge. The Plan serves as an agenda for the public and agency staff and describes important rules the agency is considering at various stages. Even if a rulemaking has already commenced, the RPO could prevent the rule from being named in the Plan as an important upcoming action. Subsequently, public visibility of the rule declines, and it could be de-emphasized by agency staff. Again, there will be no public disclosure of this decision, a decision formerly in the hands of the agency head.

THE MARKET FAILURE CRITERION

Section One of E.O. 12866 is the "Statement of Regulatory Philosophy and Principles." It is a broad Clinton administration statement outlining when regulation is necessary and how agencies should go about developing and promulgating rules.

E.O. 13422 altered the first principle of regulation to state, "Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action."[8]

The revision places an added emphasis on identifying a market failure before regulating. The new language will likely further institutionalize an anti-regulatory approach by using a market failure criterion in place of actually identifying threats to public health and safety. These critical public health decisions about the content of regulations should be made by agency experts considering the scientific, technical and economic factors important to sound regulatory decisions.

Not only does the market failure criterion become a primary consideration, but the agency's description of the problem will be used to "enable assessment of whether new regulation is warranted."[9] This section likely forces the agency to consider inaction as an option and may provide OIRA with another justification for halting or delaying regulations.

A number of questions and concerns are associated with the market failure criterion. Do market failures exist when invaluable public goods, such as civil rights, are threatened? Even if a regulation proves cost-effective, will agencies be able to regulate absent a market failure?

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[7] In an April 25 memo instructing agencies on how to comply with the E.O. and the *Final Bulletin*, the White House included the following definition of "commence" as it pertains to agency rulemaking: "The point at which a rulemaking commences may vary from one agency to the next, depending on each agency's procedures and practices, and may vary from rulemaking to rulemaking. As a general matter, a rulemaking commences when the agency has decided as an institutional matter that it will engage in a rulemaking. At the latest, the rulemaking will commence when the rulemaking receives a Regulation Identification Number (RIN)."
The memo is available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf

[8] E.O. 12866, Sec. 1(b)(1).

[9] *Ibid.*

Presumably, federal agencies are also perplexed as to how to interpret this change in language. Few statutes require agencies to consider economic factors before enforcing law; some, such as the Clean Air Act, prohibit economic considerations. The elevation of a market failure criterion will likely create situations in which administration goals come in direct conflict with statutory language.

GUIDANCE DOCUMENTS

Agencies issue guidance documents in order to clarify regulatory obligations to industry, explain complex technical issues or otherwise offer clarification or guidance on agency policies. Agencies produce thousands of guidance documents every year.

Because the regulatory process has become so encumbered over the past several decades with increased analytical burdens, agencies have turned more frequently to guidance documents as a way of providing direction to regulated communities without being subjected to a lengthy and onerous rulemaking process. Unlike a regulation, guidance is not legally binding and therefore imposes no mandates on regulated entities.

E.O. 13422 requires review of guidance documents by OIRA.[10] The *Final Bulletin* requires internal review of significant guidance documents by senior agency officials as well as public notice-and-comment on guidance documents deemed "economically significant."

The OIRA review of guidance documents is troubling because it allows the White House to exert direct control over a specific class of information previously left to agency discretion. Rather than addressing the delays in the regulatory process that lead agencies to increasingly rely on guidance, the E.O. submits guidance to this same cumbersome process.

OIRA exerts this control over "significant" guidance documents. Significant guidance documents are those which "may reasonably be anticipated to:

- Lead to an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [Executive Order 12866]."[11]

"Economically significant" guidance documents are those which exceed the $100 million economic impact threshold.[12] OIRA may also review any other guidance document it wishes to review.

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[10] E.O. 12866, Sec. 9.

[11] E.O. 12866, Sec. 3(h)(1).

Agencies will now comply with the guidance document review provision. However, the public will have little knowledge of what effects the White House and agency review processes have on agency guidance.

The White House has instructed agencies to alert OIRA of upcoming significant guidance documents “no less than 10 days prior to intended dissemination.” Agencies must provide OIRA with a brief description of each guidance document, its intent, and why it is important. Upon reviewing the material, OIRA will determine whether the agency should submit the complete content of the guidance.[13]

OIRA’s review process considers a number of factors. OIRA has indicated it will “review the guidance to ensure that it is consistent with the philosophy and principles of Executive Order 12866, as amended, and will also coordinate review among appropriate Executive branch departments and agencies.” OIRA also plans to ensure that draft guidance documents comply with the requirements of the *Final Bulletin*.

OIRA has given itself a timeframe to complete this process, but has also included a potentially dangerous caveat: “OIRA will complete its consultative process within 30 days or, at that time, advise the agency when consultation will be complete.”[14] OIRA is not planning to hire additional staff to manage the influx of guidance.[15] It is unclear how OIRA plans to review and approve guidance in a timely fashion.

Another problem is the lack of transparency of the reviews. The entire process – the determination of which guidance documents are significant, the submission of draft material to OIRA, and OIRA’s review and edits – will occur behind closed doors.

Neither agencies nor OIRA are attempting to provide methods for the public to see what edits OIRA makes during its review of guidance. Furthermore, there will be no way for the public to know when a draft guidance document is submitted to OIRA or how long it has been under review. OIRA would be able to delay the issuance of guidance indefinitely without public scrutiny. As with the review of regulations, OIRA should make publicly available the information regarding the submission and review of agencies' guidance documents so the public, agency personnel, and the regulated communities can trace the path of these important policies.

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[12] Because guidance documents are non-binding statements, it is unclear how agencies are to determine the extent to which they may impact the economy, or whether they may have any impact at all. This creates a largely speculative analysis to be conducted by the agencies, even assuming reasonably anticipated effects.

[13] OIRA Administrator Susan Dudley described these requirements in an April 25 memo to agencies. The memo is available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf.

[14] *Ibid.*

[15] In fact, President Bush’s FY 2008 budget request to Congress calls for a 14 percent cut in funding for OIRA. The president’s request for funding for the Executive Office of the President is available at http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/eop.pdf.

RECENT EVENTS

The White House has been given ample opportunity to clarify the issues identified by many commenters. The House of Representatives has held three oversight hearings, and both the House and Senate have considered legislation which would mitigate the impact of the E.O. and the *Final Bulletin*. Elected officials, media outlets, former government officials, and public interest organizations have all been vocal in questioning the need for the changes and expressing concern over their effects. However, little light has been shed on the potential impact of the changes.

Congressional Oversight

On Feb. 13, the House of Representatives held back-to-back hearings examining the effects of the E.O. and the *Final Bulletin*.

In the first hearing, held by the House Committee on Science and Technology's Subcommittee on Investigations and Oversight, Chairman Brad Miller (D-NC) focused on the significant consequences of the changes and how centralizing executive power over the federal agencies will affect Congress's ability to protect public health and safety.[16]

Three witnesses agreed that the amendments would lead to:

- significant delay in issuing regulations and guidance documents the regulated community needs to comply with legal requirements;
- additional burdens on agencies already experiencing budget and personnel cuts;
- an increase in the analyses required in the regulatory process; and
- additional power for OIRA over the substance, timing and review of critical public protections.

The House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law held the second hearing.[17] Panel members focused on what Congress could do to mitigate the effects of the changes. Rep. William Delahunt (D-MA) addressed the pattern of presidential encroachment on congressional powers the amendments represent, calling it "institutional combat."

The second hearing also featured the release of a Congressional Research Service (CRS) report on the E.O.[18] The CRS report found many of the E.O.'s provisions generate more questions than answers and stated, "The ultimate impact of these changes to the regulatory review process is unclear, and will likely depend on how the changes are implemented by OIRA and the agencies." The report drew one clear overarching conclusion: "The changes made by this executive order represent a clear expansion of presidential authority over rulemaking agencies. In that regard, E.O. 13422 can be viewed as part of a broader statement of presidential authority presented throughout the Bush Administration."[19]

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[16] A list of witnesses, statements and a webcast are available at http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269.
[17] A list of witnesses, statements and a webcast are available at http://judiciary.house.gov/oversight.aspx?ID=269.
[18] Curtis W. Copeland, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, Congressional Research Service, Feb. 5, 2007.
[19] *Ibid.*, at 14.

Miller's subcommittee held a second hearing, the third oversight hearing overall, on April 26.[20] Miller wanted to discover how the administration, in its seventh year in office, determined that the regulatory process needed changes and who was responsible for the various requirements in the amendments. Steven D. Aitken, who was serving as acting administrator of OIRA when the E.O. and *Final Bulletin* were issued, described generally the process for issuing executive orders but refused to disclose internal deliberations or identify who participated in the order's creation. Ultimately, the hearing did little to answer questions surrounding the E.O. and the *Final Bulletin*.

Congressional Appropriations Legislation

On June 28, the House passed the Financial Services and General Government Appropriations Act, FY 2008.[21] The bill contains an amendment that would forbid the White House from expending any funds in implementing the E.O. and the *Final Bulletin*.

The amendment states, "None of the funds made available by this Act may be used to implement Executive Order 13422."[22] Reps. Miller and Linda Sanchez (D-CA), who chaired the oversight hearing of the Judiciary Committee, offered the amendment. It passed by voice vote June 27 during debate of the bill.

The appropriations bill funds the entire Executive Office of the President. Therefore, the amendment would stop the Office of Management and Budget and OIRA from expending any money in carrying out the E.O. Most notably, OIRA would not be allowed to review agency guidance documents. The "defunding" provision would only apply for FY 2008.

The Senate also considered defunding language for its version of the FY 2008 appropriations bill. Language that would have prevented the use of funds in implementing both the E.O. and the *Final Bulletin* was included when an appropriations subcommittee considered the bill. However, the language was later removed when it reached the full Appropriations Committee.

Because the House version includes defunding language and the Senate version does not, the language will need to be reconciled during a conference period before the bill can be sent to the president. It is unclear whether the defunding provision will remain in the bill. The president has vowed to veto the appropriations bill for other reasons.

CONCLUSIONS

The full effects of the regulatory changes issued by the Bush administration will likely be visible only after several months of experience with the changes. However, it will be difficult to measure these effects since so much of the regulatory – and now guidance document – review process is not documented and disclosed. Many of the fears expressed by critics of these changes could be alleviated if the White House, OIRA and the agencies provide sufficient transparency to allow the public to know what occurs within the halls of government.

[20] A list of witnesses, statements and a webcast are available at http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777.
[21] H.R. 2829.
[22] H.R. 2829, Sec. 901.

WHAT OTHERS ARE SAYING…

on the changes at large.
"The executive order allows the political staff at the White House to dictate decisions on health and safety issues, even if the government's own impartial experts disagree. This is a terrible way to govern, but great news for special interests."[23]

-Henry A. Waxman, Democratic Congressman, California's 30th District

"The cumulative effect of all these changes is to seize for the President and OIRA power over regulatory efforts consistent neither with statute nor with the Constitution."[24]

-Brad Miller, Democratic Congressman, North Carolina's 13th District

on the regulatory policy officers.
"I would have thought conferring this kind of authority and externally effecting such a striking reorganization of roles within an agency would be Congress's business, not something the President is authorized to do on his own."[25]

-Peter L. Strauss, Betts Professor of Law, Columbia Law School

"Bush's anti-regulatory second-guessers in the agencies will be well-placed to prevent conscientious federal employees from protecting Americans from insufficiently tested drugs, carelessly handled food, and unsafe drinking water."[26]

-*Boston Globe* editorial

on the market failure criterion.
"By giving special emphasis to market failures as the source of a problem warranting a new regulation, the Administration is saying that not all problems are equally deserving of attention; those caused by market failures are in a favored class and possibly the only class warranting new regulations."[27]

-Sally Katzen, Adjunct Professor and Public Interest/Public Service Fellow, University of Michigan Law School; former administrator, White House Office of Information and Regulatory Affairs

on the review of guidance.
"The executive order vastly expands the range of agency actions that OMB can review, and thereby stifle. Not only will future rulemakings go through a complicated and time-consuming

[23] Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, Jan. 30, 2007, p.A1.
[24] Hearing of the House Committee on Science and Technology Subcommittee on Investigations and Oversight, "Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part II," U.S. Congress, Apr. 26, 2007.
[25] Hearing of the House Committee on Science and Technology Subcommittee on Investigations and Oversight, "Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part II," U.S. Congress, Apr. 26, 2007.
[26] "A specific governing failure," *Boston Globe*, Feb. 7, 2007.
[27] Hearing of the House Committee on Science and Technology Subcommittee on Investigations and Oversight, "Amending Executive Order 12866: Good Governance or Regulatory Usurpation?," U.S. Congress, Feb. 13, 2007.

review, but even agency explanations of existing rules – guidance documents – will be caught in this process."[28]

-Wesley P. Warren, Director of Programs, Natural Resources Defense Council

in support of the changes.

"This is a classic good-government measure that will make federal agencies more open and accountable."[29]

-Jeffrey A. Rosen, General Counsel, White House Office of Management and Budget

"It's surprising to us someone would think it was a bad idea, when it's a good government measure,"[30]

-Susan Dudley, Administrator, White House Office of Information and Regulatory Affairs

"E.O. 13422 and [OMB's *Final Bulletin* for Agency Good Guidance Practices] are part of a larger government effort to ensure and maximize the quality, utility, integrity, and objectivity of information disseminated by the federal government."[31]

-William L. Kovacs, Vice President, U.S. Chamber of Commerce

[28] Wesley P. Warren, "Politics Gets Its Nose Into the Rulemaking Tent," *The Environmental Forum*, March/April, 2007, p. 50.
[29] Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, Jan. 30, 2007, p.A1.
[30] Cindy Skrzycki, "Bush, Congress Battle to Control Bureaucracy," Bloomberg News, July 17, 2007.
[31] Hearing of the House Committee on Science and Technology Subcommittee on Investigations and Oversight, "Amending Executive Order 12866: Good Governance or Regulatory Usurpation?," U.S. Congress, Feb. 13, 2007.