



## Undermining Public Protections

### ***Preliminary Analysis of the Amendments to Executive Order 12866 on Regulatory Planning and Review***

On January 18, President Bush issued amendments to Executive Order (E.O.) 12866, which further centralize regulatory power in the Office of Management and Budget (OMB) and shift it away from the federal agencies given this power by legislative enactments. Among the changes to the E.O.:

- It shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of "...the specific market failure (such as externalities, market power, lack of information)...that warrant new agency action."
- It requires guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them.
- It also requires "significant" guidance documents (those that are estimated to have at least a \$100 million effect on the economy, among other criteria) to go through the same OMB review process as "significant" regulations.
- It makes the agencies' Regulatory Policy Officer a presidential appointment and gives that person the approval authority for any commencement or inclusion of any rulemaking in the Regulatory Plan unless specifically authorized by the agency head.
- It requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities," which will be overseen by the Regulatory Policy Officer.

### **By-Passing Congress With New Policies**

Through amending the regulatory process, the President is institutionalizing an anti-regulatory approach by using a market failure criterion in place of actually identifying threats to public health and safety. It diminishes standards Congress may have required agencies to use, such as the best control technology, by elevating a new market failure standard that Congress never required. This standard has been advocated by Susan Dudley, Bush's current nominee as administrator of the Office of Information and Regulatory Affairs (OIRA). Dudley's extreme views on the use of free market standards were well-documented during her failed confirmation last year. Despite the failure to confirm her, the administration has used the Executive Order as a backdoor means to implement the Dudley philosophy.

The market failure criterion is yet another layer added to the agency analysis. The agency must comply with the statutory criteria (such as best available technology) as well as an analysis demonstrating market failures. If the agency meets OMB's standards for assessing "whether any new regulation is warranted," then the agency must also comply with other standards in the E.O., including cost-benefit analysis.

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This new standard decidedly favors the regulated community and places yet another hurdle for agencies to issue regulations in pursuit of protecting the public.

### **More White House Control; More Delay**

By requiring agency guidance documents to come under OIRA review, and to treat “significant” guidance in the same way as “significant” regulations, the E.O. amendments will lead to further delay in providing information to the public about compliance with regulations, as well as with general guidance on agency policies.

It may be true that more and more agencies are using guidance as a means of avoiding the regulatory process. But that should be a signal to Congress and the public that the rulemaking process is seriously flawed. Agencies are looking for faster ways of doing their job and have turned to guidance. The solution is certainly not to require guidance to go through the same regulatory process that agencies were trying to avoid in the first place.

In the end, this will simply result in more delay and more White House control over the substantive work of the agencies. It will inevitably lead to a usurpation of agencies' powers.

### **The Foxes Controlling the Hen Houses**

The Bush administration has regularly appointed industry representatives or allies to oversee agency regulatory activities. Often this has been dubbed “foxes in the hen house.” The E.O. amendments add a new dimension by having the foxes control the hen houses.

The amendments require each agency to have a Regulatory Policy Office run by a political appointee and that “no rulemaking shall commence nor be included” for consideration without the political appointee’s approval. This will further politicize the rulemaking process and provide more White House control over the agency rulemaking process.

A similar approach was attempted by President Reagan through his E.O. 12498, the Regulatory Planning Process, which was issued January 4, 1985. Under E.O. 12498, agencies were to get approval from OMB prior to starting a rulemaking – a pre-rulemaking review. Many in the business community thought this would be a wonderful approach for choking off agency ideas before they ever really got going. That approach, however, proved too cumbersome and difficult to administer; in short order, it failed.

The new Bush E.O. amendments have the same objective, but put the chokehold in the agencies, instead of at OMB. To ensure that the process works, OMB grants authority to these new political appointees to be the eyes and ears for OMB.

### **Laying the Groundwork for a Regulatory Budget**

The E.O. amendments also require regulatory proposals that are to be submitted to the Regulatory Policy Officer to include “aggregate costs and benefits” during the calendar year. Most experts agree that aggregating all costs and benefits is like comparing apples and oranges – and in the end has little value except to create large numbers intended to scare the public.

Another possible reason to require such information is to begin laying the groundwork for establishing a regulatory budget. This concept, proposed by conservatives since the Reagan

administration, has been criticized by Congress and never approved. Yet the amended E.O. begins to move in this direction.

### **Pre-Rulemaking Review**

The amendments to the E.O. allow OIRA to play an active role during the pre-rulemaking stage when agencies are formulating annual plans for regulatory activities. By having OIRA involved in agencies' planning process, OIRA can quash any contemplated regulatory or guidance issues before they get proposed for the Regulatory Plan. Under the amended E.O., OMB can now engage the agency, along with other government personnel (as provided for in one amendment), in reaching a "common understanding" on regulatory efforts.

### **Conclusion**

The revised Executive Order that results from these amendments is a further threat to public protections from an administration committed to elevating special interests over public interests. It codifies regulatory delay, further removes agency discretion over legislative implementation, and centralizes control over the regulatory process into a small executive office. It substitutes free market criteria for the public values of health, safety, and environmental protections, and substitutes executive authority for legislative authority.

We can only speculate as to why the President has issued these amendments at this time in his presidency. With Congress now in control of Democrats, it is unlikely that further anti-regulatory efforts will be supported or ignored by a compliant Congress. It is a surprising action to take in light of the Dudley nomination now pending before the Senate. It may be an admission by the administration that the nomination is not likely to succeed, and that the President has decided to advance the Dudley philosophy through the back door.

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