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In mid-January, as national attention focused on congressional reorganization and the never-ending controversies surrounding the Iraq war, the White House rewrote key chapters of the book on federal regulations. In one fell swoop, Executive Order 13422 made economic criteria the primary basis for regulation, placed fresh restrictions on agencies, amplified the role of the White House Office of Management and Budget (OMB), and extended the already protracted process of rulemaking. US Chamber of Commerce spokesman William Kovacs hailed the moves as the "first truly significant attempt...to hold federal bureaucrats to account and insist they act with discretion when imposing new and expensive burdens on businesses and consumers." But government watchdogs contend that the new order further politicizes the regulatory system, subverts agencies' abilities to fulfill their legal mandates, and erodes Congress's role in setting regulatory standards.

In brief, four important changes were enacted, affecting the federal agencies responsible for public health, safety, and environmental regulation. First, agencies must justify proposed new regulations to OMB's Office of Information and Regulatory Affairs (OIRA) by identifying and assessing the specific "market failure" or other problem that needs fixing. Second, within each agency, a presidential appointee will serve as regulatory policy officer, with broad control over rulemaking. Third, agencies must estimate the cumulative annual costs of compliance for rules they expect to publish over a budget year. And fourth, OIRA now will review not only formal rules but also "significant" guidance documents, agency missives that clarify regulations.

The House Science and Technology Committee held oversight hearings on the executive order in February. Among those testifying was Sally Katzen, OIRA administrator under former President Clinton. Katzen argued that the administration had offered no explanation of the problems that prompted the new order. Furthermore, the order follows other recent controversial White House directives concerning information quality, peer review standards for regulatory science, risk assessments, and guidance practices. Together, Katzen asserted, these measures represent "a steady and unwavering effort to consolidate authority in OMB and further restrict agency autonomy and discretion."

The most recent executive order states that "no rulemaking shall commence nor be included" for consideration without the approval of an agency's regulatory policy officer, unless specifically authorized by the agency head. This means that presidential appointees could quash efforts such as new US Food and Drug Administration rules for the use of nanotechnology in medical devices, for example, or FCC (Federal Communications Commission) requirements that lights at federally licensed communications towers be changed to make the towers less deadly to migratory birds—before the public even learns that such regulations are being considered. "At any point in the process, the regulatory policy officer will be able to intervene," said Rick Melberth of OMB Watch, a Washington, DC–based nonprofit organization.

David Vladeck, of Georgetown University School of Law and a member of the OMB Watch board of directors, decried the apparent sea change in regulatory philosophy signaled by the market failure "super-mandate." It "appears nowhere in statute," he testified, "and it cannot be reconciled with the dominant thrust of the health and safety statutes, which are designed to prevent deaths and injuries by avoiding market failure, rather than waiting until it is too late and market failure is evident."

In his comments to the committee, the Chamber of Commerce's Kovacs stated that agencies issue some 4000 new regulations annually, as well as thousands of guidance documents. More than 110,000 regulations currently exist, he said, with compliance costs estimated to be as high as $1.13 trillion (a figure disputed by Katzen). Kovacs lauded the expansion of White House scrutiny of guidance documents, which have been used to accomplish "backdoor regulation," he said.

"There's a grain of truth to this," Melberth conceded, as agencies are looking for faster ways of doing their job. But Congress specifically exempted guidance documents from the external appraisals required for formal rules, he said, adding that saddling the system with additional layers of review—including scientific and technical review—that substitute OMB for agency expertise only delays actions required by law.

Likewise, Vladeck and others expressed wariness over the new requirement that agencies aggregate the annual compliance costs of new rules, saying that doing so would open the door for OIRA to cap the compliance costs agencies may impose. "Nothing in the statutes Congress has enacted gives OIRA the right to ration protections... through regulation," Vladeck testified.

A Congressional Research Service report published 5 February characterized the executive order as a "clear expansion of presidential authority over rulemaking" that meshes with the administration's view of the "unitary executive." It concluded that the ultimate impacts will depend on how the changes are implemented.

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