

CRS Report for Congress

Changes to the OMB Regulatory Review Process by Executive Order 13422

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Summary

Executive Order (E.O.) 12866 on “Regulatory Planning and Review,” issued in September 1993, describes the principles and procedures by which the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) reviews hundreds of significant proposed and final agency regulations on behalf of the President before they are published in the *Federal Register*. On January 18, 2007, President George W. Bush issued E.O. 13422, making the most significant amendments to E.O. 12866 since it was published. The changes made by this new executive order are controversial, characterized by some as a “power grab” by the White House that undermines public protections and lessens congressional authority, and by others as “a paragon of common sense and good government.”

The most important changes made to E.O. 12866 by E.O. 13422 fall into five general categories: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation, (2) a requirement that each agency head designate a presidential appointee within the agency as a “regulatory policy officer” who can control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year, (4) an expansion of OIRA review to include significant guidance documents, and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases.

This report discusses each of these changes, noting areas that are unclear and the potential implications of the changes, and provides background information on presidential review of rules. It concludes by noting that the significance of the changes made to the review process by E.O. 13422 may become clear only through their implementation, and notes some areas of potential congressional interest. 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.

The report will be updated as necessary to reflect legislative or executive branch actions relevant to the implementation of the executive order.

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Executive Order (E.O.) 12866 on “Regulatory Planning and Review,” issued by President William Clinton in September 1993, describes the principles and procedures by which the Office of Management and Budget’s (OMB’s) Office of Information and Regulatory Affairs (OIRA) reviews hundreds of significant proposed and final agency regulations on behalf of the President before they are published in the *Federal Register*.¹ As a result of these reviews, OIRA can have a significant — if not determinative — role in the development of a broad array of public policies, from the homeland security rules governing boarding of passenger aircraft to the amount of arsenic allowed in public water systems.²

On January 18, 2007, President George W. Bush issued E.O. 13422, making the most significant amendments to E.O. 12866 since it was published.³ The changes made by this new executive order are controversial, characterized by some as a “power grab” by the White House that undermines public protections and lessens congressional authority,⁴ and by others as “a paragon of common sense and good government.”⁵ This report describes the changes made to the regulatory planning and review process by the new order, noting the potential impact of those changes and areas that are unclear. First, though, the report provides a brief background

¹ Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, Oct. 4, 1993.

² U.S. General Accounting Office, *Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, p. 3, available at [<http://www.gao.gov/new.items/d03929.pdf>]. See also CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland; and CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by T.J. Halstead.

³ Executive Order 13422, “Further Amendment to Executive Order 12866 on Regulatory Planning and Review,” 72 *Federal Register* 2763, Jan. 23, 2007. Five years earlier, E.O. 13258 reassigned certain responsibilities from the Vice President to the President’s chief of staff, but otherwise did not change the OIRA review process. See Executive Order 13258, “Amending Executive Order 12866 on Regulatory Planning and Review,” 67 *Federal Register* 9385, Feb. 28, 2002.

⁴ Public Citizen, “New Executive Order Is Latest White House Power Grab,” available at [<http://www.citizen.org/pressroom/release.cfm?ID=2361>].

⁵ Attributed to William Kovacs, Vice President of Environment, Energy, and Regulatory Affairs, U.S. Chamber of Commerce, in John Sullivan, “White House Sets Out New Requirements for Agencies Developing Rules, Guidance,” *Daily Report for Executives*, Jan. 19, 2007, p. A-31.

section on the regulatory planning and review procedures established by E.O. 12866 and its predecessors. The report ends by offering some concluding observations.

Regulatory Planning and Review Under E.O. 12866

Centralized review of agencies' regulations within the Executive Office of the President has been an important part of the federal rulemaking process for more than 35 years. Although each of his three predecessors had some type of review process, the most significant development in the evolution of presidential review of rulemaking occurred in 1981, when President Ronald Reagan issued E.O. 12291.⁶ The executive order established a set of general requirements for rulemaking, and required federal agencies (other than independent regulatory agencies) to send a copy of each draft proposed and final rule to OMB before publication in the *Federal Register*.⁷ It also required covered agencies to prepare a cost-benefit analysis for each "major" rule (e.g., those with at least a \$100 million impact on the economy). As a result of this order, OIRA became the central clearinghouse for covered agencies' substantive rulemaking, reviewing between 2,000 and 3,000 rules per year. In 1985, President Reagan expanded OIRA's influence further by issuing E.O. 12498, which required each covered agency to submit a regulatory plan to OMB for review each year that covered all of their significant regulatory actions underway or planned.⁸ Regulatory reviews under these executive orders were highly controversial, with complaints about the lack of transparency of the review process, unlimited delays in the completion of the reviews, OIRA serving as a conduit for influence by regulated parties, and executive branch displacements of congressional delegations of rulemaking authority.⁹

On September 30, 1993, President Clinton issued E.O. 12866, which revoked E.O. 12291 and E.O. 12498 and established a new process for OIRA review of rules. The order limited OIRA's reviews to actions identified by the rulemaking agency or OIRA as "significant" regulatory actions, defined as those that were "economically significant" (e.g., those with at least a \$100 million impact on the economy) or that (1) were inconsistent or interfered with an action taken or planned by another agency; (2) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (3) raised novel legal or policy issues. As a result of this change, the number of rules that OIRA reviewed dropped from between 2,000 and 3,000 per year to between 500 and 700 per year. For each significant draft rule, the executive order

⁶ Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

⁷ Independent regulatory agencies include the Federal Communications Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission, and are created by Congress to be more independent of the President than other agencies (e.g., commission members may generally be removed by the President only for cause).

⁸ Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, Jan. 8, 1985.

⁹ See, for example, Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (1981), pp. 193-247.

requires the issuing agency to provide to OIRA the text of the draft rule, a description of why the rule is needed, and a general assessment of the rule's costs and benefits. For draft rules that are "economically significant," the executive order requires a detailed cost-benefit analysis, including an assessment of the costs and benefits of "potentially effective and reasonably feasible alternatives to the planned regulation."

E.O. 12866 also differs from its predecessors in other respects. For example, the order requires that OIRA generally complete its reviews of proposed and final rules within 90 calendar days. It also requires both the rulemaking agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. For example, agencies are to identify for the public (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced, and (2) changes made at the suggestion or recommendation of OIRA. OIRA is required to, among other things, provide agencies with a copy of all communications between OIRA personnel and parties outside the executive branch, and to maintain a public log of all regulatory actions under review and of all the documents provided to the agencies. Finally, E.O. 12866 required all agencies (including independent regulatory agencies) to prepare a regulatory plan listing the most important regulatory actions that the agency expects to issue in the next fiscal year. Agency heads were required to approve this plan personally.

Changes Made by E.O. 13422

The most important changes made to E.O. 12866 by E.O. 13422 fall into five general categories: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation, (2) a requirement that every agency head designate a presidential appointee within the agency as a "regulatory policy officer" who can control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year, (4) an expansion of OIRA review to include significant guidance documents, and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases. Each of these changes is described more fully in the following sections.

Identification of Market Failure

E.O. 12866 begins with a statement of regulatory philosophy and principles that sets the tone for agency rulemaking covered by the order. The principles say that, "to the extent permitted by law and where applicable," agencies should (among other things) assess alternatives to direct regulation, design regulations in the most cost-effective manner possible, and base regulations on the best information available. As originally written, the first such principle was that "[e]ach agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."

E.O. 13422 changes that language somewhat, stating the following:

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, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

The new language appears to (1) elevate “market failure” to greater prominence as a rulemaking rationale (removing the “where applicable” caveat and placing it before and on par with the more general statement of problem identification); (2) more clearly define what constitutes a market failure (e.g., “externalities, market power, lack of information”);¹⁰ (3) require a more precise delineation of why the agency is issuing the rule (the “specific” market failure or the “specific” problem); (4) require that the delineation be in writing; and (5) make clear that the purpose of this requirement is to facilitate a determination of whether the rule is needed.

The general principle that a covered agency describe the need for a new regulation is procedurally established in Section 6 of E.O. 12866. For rules that are significant, but not economically significant (e.g., do not have a \$100 million impact on the economy), agencies are required only to provide a “reasonably detailed description of the need for the regulatory action.” For economically significant rules, however, more detailed cost-benefit analyses are required. OMB Circular A-4 (which describes how those studies should be done) says agencies “should try to explain whether the action is intended to address a significant market failure or to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy.”¹¹ Therefore, the “market failure” language in E.O. 13422 can arguably be read to apply to all rules what had previously applied only to economically significant rules.

Also, although the order requires agencies to make this determination in writing, E.O. 13422 does not indicate where this written determination should appear (e.g., in the *Federal Register* notice for the proposed or final rule), or, additionally, whether it should be made available to the public in the rulemaking docket. Conceivably, therefore, agencies could satisfy the requirements of the order by preparing a written determination of the need for a rule without providing it to anyone outside government.

¹⁰ According to OMB Circular A-4, an “externality occurs when one party’s actions impose uncompensated benefits or costs on another party. Environmental problems are a classic case of externality. For example, the smoke from a factory may adversely affect the health of local residents while soiling the property in nearby neighborhoods.” It says “[f]irms exercise market power when they reduce output below what would be offered in a competitive industry in order to obtain higher prices,” such as when a monopoly exists. Inadequate information can occur when the public is unaware of the dangers associated with the use of a product. To view a copy of this circular, see [<http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>].

¹¹ To view a copy of this circular, see [<http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>].

Some commentators have criticized this provision in E.O. 13422 as an attempt to bypass Congress by establishing standards for regulatory initiation that are not consistent with statutory requirements. For example, Public Citizen said the requirement “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.”¹² For example, some statutes (e.g., the Clean Air Act) require agencies to establish regulations based solely on what is required to protect human health. These critics contend that requiring agencies to identify a “specific market failure” or a “specific problem” constitutes a new standard for regulatory initiation. Supporters of this provision may contend, though, that the requirement to identify a “problem” is sufficiently broad to cover all statutory bases, and therefore is not inconsistent with them.

Public Citizen has also criticized this provision as “yet another layer added to the agency analysis” that “places yet another hurdle for agencies to issue regulations in pursuit of protecting the public.” Similarly, Gary Bass, executive director of OMB Watch, said that President Bush, by requiring agencies to show a market failure, “has created another hurdle for agencies to clear before they can issue rules protecting public health and safety.”¹³ On the other hand, supporters of this provision may contend that requiring agencies to identify the specific problem being addressed in a regulation is not onerous, and can help ensure the effectiveness of the resultant rules.

Finally, although stated in terms of a requirement (“[e]ach agency shall”), this and other principles of regulation in the executive order are preceded by more permissive language, stating that agencies “should” adhere to the principles “to the extent permitted by law and where applicable.” Given this language, concerns about the usurpation of congressional standards for rulemaking and unnecessary delay may be exaggerated. Ultimately, though, the extent to which these changes are significant may be revealed only through how they are implemented by OIRA and the agencies.

Regulatory Policy Officers as Presidential Appointees

As originally written, E.O. 12866 required the head of each covered agency (other than independent regulatory agencies) to designate a regulatory policy officer who reported to the agency head.¹⁴ The policy officer is required to “be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.” According to agency officials, these regulatory policy

¹² Public Citizen, “New Executive Order Is Latest White House Power Grab.”

¹³ Robert Pear, “Bush Directive Increases Sway on Regulation,” *New York Times*, Jan. 30, 2007, p. A1.

¹⁴ Although the regulatory planning sections apply more broadly, the executive order generally defines an “agency” as “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502 (1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502 (10).” The order does not define “agency head,” but agency policy officers in Cabinet departments have typically been designated by the secretary.

officers were most commonly each agency's general counsel (which are usually presidential appointees with Senate confirmation) or some other presidential appointee within the agencies.

E.O. 13422 retains the above general statement of the policy officer's duties, but also requires each agency head to "designate one of the agency's Presidential Appointees" to be that officer, to do so within 60 days of the date of the executive order (i.e., by March 19, 2007), to advise OMB of the designation, and to "annually update OMB on the status of this designation." Although the agency head is still permitted (within the parameters of White House and OMB control) to select the individual for this position, the requirement that the individual be a presidential appointee limits the agency head's discretion (compared to the unlimited authority that agency heads enjoyed before this amendment) and strengthens the relationship of the agency policy officers with the President. However, if most of the regulatory policy officers are already presidential appointees, it is not clear how this requirement will affect the current set of regulatory policy officers.

E.O. 13422 also appears to significantly enhance the role of the agency regulatory policy officer as part of the regulatory planning process. Specifically, the order states that "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office." Notably, this provision speaks in terms of a regulatory policy "office" as opposed to a regulatory policy "officer," suggesting (but not requiring) that agencies may provide staff to assist the policy officers in their duties within the agencies. In any event, this change appears to represent an elevation in the duties and responsibilities of the agency policy officer when compared to the role previously ascribed to that officer (i.e., to "be involved" in the regulatory process, to "foster the development" of sound rules, and to "further" the order's principles). Unless specifically authorized by the agency head, the presidential policy officer must approve the listing of all significant forthcoming regulatory actions in the regulatory plan and approve the initiation of all rulemaking actions. (Previously, only the agency head could approve the regulatory plan, and there was no language in the order prohibiting rulemaking in the absence of the regulatory policy officer's approval.) As characterized in the *New York Times*, "[t]he White House will thus have a gatekeeper in each agency to analyze the costs and the benefits of new rules and to make sure the agencies carry out the president's priorities."¹⁵

¹⁵ Robert Pear, "Bush Directive Increases Sway on Regulation." Newspaper editorial writers have offered various opinions regarding this issue. For example, see David McNaughton, "Reverse Regulation: With Another Nonsense Order, President Bush Quashes Legitimate Rule-making by Inserting Political Overseer," *The Atlanta Journal-Constitution*, Feb. 2, 2007, p. A10, which cited Emory University Law Professor William Buzbee as saying that this provision "makes it even more likely that regulatory decisions will be made by someone more sympathetic to political pressure and ideology than to the federal agency's legal duty." Also, see Jim Wooten, "Vouchers, Transit Alert, Sen. Obama," *The Atlanta Journal-Constitution*, Feb. 2, 2007, p. A11, which approved of this provision and said "[t]here's nothing radical about applying cost-benefit analysis to proposed laws and regulations."

The executive order's use of the word "designate" suggests that agency heads must select regulatory policy officers from among current presidential appointees within the agencies. (Neither the President nor agency heads are authorized to create presidential appointee positions; only Congress can do so.) The order is silent as to whether the designated presidential appointee would be subject to Senate confirmation. Senate confirmation of presidential appointees is generally considered a way to strengthen congressional influence over agency decision making, because (among other things) nominees often agree during the confirmation process to appear subsequently before relevant congressional committees. According to the most recent listing of "Policy and Supporting Positions" (known as the "Plum Book"), most major regulatory departments and agencies have few (and in some cases, no) presidential appointees who are not Senate confirmed.¹⁶ Therefore, in most cases, agency heads must select presidential appointees who are subject to Senate confirmation.

Even in agencies with a number of presidential appointees not subject to Senate confirmation, one could argue that it is up to Congress to decide whether the position of regulatory policy officer should be occupied by an appointee who is Senate confirmed. The Supreme Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" in the Constitution.¹⁷ Given the enhanced power and authority of the policy officer to control day-to-day rulemaking activities within federal agencies ("no rulemaking shall commence"), the policy officer could be considered an officer of the United States under the appointments clause of the Constitution. Article II, Section 2, clause 2 of the Constitution states the following:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

¹⁶ U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, Nov. 22, 2004. For example, the Department of Transportation had 32 positions subject to presidential appointment with Senate confirmation (PAS positions) in 2004, but none without Senate confirmation (PA positions). The Environmental Protection Agency had 14 PAS positions, but no PA positions; the Department of Labor had 19 PAS positions, but no PA positions. On the other hand, the Department of Homeland Security had 18 PAS positions, but also had six PA positions. This CRS report did not consider noncareer ("general") Senior Executive Service positions to be "presidential appointee" positions. However, some have argued that, because some type of White House approval for their appointment is required, these noncareer SES positions could be considered a type of "presidential appointee" positions. If so, then the agency heads would have a wider range of "presidential appointee" positions from which to designate regulatory policy officers.

¹⁷ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

Therefore, one could argue that it is the role of Congress to prescribe, in law, whether the regulatory policy officer position should be subject to Senate confirmation. In fact, to take this argument further, even if the agency head designated a person in a Senate-confirmed position for this new position, one could argue that this person would have to undergo another confirmation process because the scope of the person's responsibilities had been changed significantly.

One other element of this process is also unclear, and may represent a change in the scope of presidential influence in rulemaking. As noted previously, the requirement that each agency head appoint one of the agency's presidential appointees as the regulatory policy officer does not apply to independent regulatory agencies. However, E.O. 12866 requires independent regulatory agencies to develop regulatory plans, and the requirement in E.O. 13422 that the "Regulatory Policy Office" approve items included in the plan and the commencement of all rulemaking amends that section of E.O. 12866. Therefore, this provision could arguably be read to require that independent regulatory agencies have presidential appointees as regulatory policy officers, thereby extending the reach of the President and presidential review into agencies that had not previously been subject to such scrutiny (and commensurately lessening the agencies' relationships with Congress, which created them).

Estimate of Aggregate Regulatory Costs and Benefits

As part of the above-mentioned regulatory planning process, agencies have been required to provide a "summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits." E.O. 13422 adds to this provision the requirement that each agency provide its "best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities."

At first impression, the changes established by this provision appear relatively straightforward, simply requiring agencies to tally up the costs and benefits of the individual rules listed in the regulatory plan. However, upon closer examination, some aspects of this provision appear unclear. For example, the regulatory plans that agencies develop are supposed to be published at the start of each fiscal year in October, and are required to reflect the most significant proposed and final rules that they expect to publish "in that fiscal year or thereafter." Therefore, the requirement in E.O. 13422 that agencies develop estimates of aggregate costs and benefits for regulations planned "for that calendar year" seems inconsistent with the previous focus on fiscal years.

More substantively, some critics of the order have suggested that this provision is intended to elevate the role of cost-benefit analysis in the development of regulatory priorities. They argue that cost-benefit analysis is inherently biased against regulation, particularly with regard to such issues as global warming and long-term exposure to carcinogens, so the effect of this provision would be to reduce

regulatory activity.¹⁸ Other critics have said this provision is a prelude to the development of a regulatory budget in which the costs associated with an agency's rules could be capped and no new rules could be issued unless other costs were reduced or eliminated.¹⁹ Proponents of this provision, on the other hand, may argue that such aggregate estimates are needed to reveal the cumulative impacts of rulemaking. Individually, regulations on a particular industry may not be significant, but the aggregation of the impact of multiple rules may reveal cumulative effects that are not otherwise apparent.

Also, agencies' regulatory plans are published as part of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, and contain information about the most significant regulatory actions that agencies expect to undertake in the coming year.²⁰ The listed items include both proposed and final rules that the agency expects to issue during that period. For forthcoming proposed rules, agencies often have not developed cost or benefit estimates because the specifics of the proposed rules have often not been developed. Even for forthcoming final rules, agencies frequently provide only general information about expected costs or benefits. Also, some items that are listed in agencies' regulatory plans are never issued as final rules, and some agency rules never appear in agencies' regulatory plans. Therefore, the requirement in the executive order that agencies provide aggregate cost and benefit information may prove difficult to implement in a meaningful fashion. However, as noted previously, agencies are required to do so only "to the extent possible."

OIRA Review of Significant Guidance Documents

Another controversial provision in E.O. 13422 has been the expansion of OIRA review from agencies' draft regulations to also include significant agency guidance documents.²¹ Specifically, the new executive order adds the following to E.O. 12866:

Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance

¹⁸ Public Citizen, "New Executive Order Is Latest White House Power Grab."

¹⁹ OMB Watch, "Undermining Public Protections: Preliminary Analysis of the Amendments to Executive Order 12866 on Regulatory Planning and Review," available at [<http://www.ombwatch.org/article/articleview/3685/1/132?TopicID=3>].

²⁰ To view the most recent regulatory plan (published in December 2006), see [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_unified_agenda_&docid=f:ua061002.pdf].

²¹ On the same day that E.O. 13422 was issued, OMB also issued a "Final Bulletin for Agency Good Guidance Practices" that mirrored, in many respects, the provisions in this section of the executive order. Unlike the order, however, the bulletin requires agencies to include certain standard elements in their significant guidance documents, to list those documents on the agencies' websites, and to publish a notice in the *Federal Register* soliciting public comments on economically significant documents. To view a copy of this bulletin, see [<http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>]; and Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," 72 *Federal Register* 3432, Jan. 25, 2007.

documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency's compliance with the requirements of this section. Upon the request of the Administrator, for each matter identified as, or determined by the Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document.

E.O. 13422 defines a "guidance document" as "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." It says a "significant" guidance document is one that is

disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

(A) 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;

(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or

(D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

These categories are essentially the same as those used in E.O. 12866 to define significant rules, the only difference being the use of the prefatory phrase "may reasonably be anticipated to" instead of "is likely to result in a rule that may."

The implications of these amendments to the scope of presidential review of agency actions are potentially significant. Agencies issue thousands of guidance documents each year that are intended to clarify the requirements in related statutes and regulations.²² Therefore, the requirement that agencies provide OIRA with advance notification of significant guidance documents may represent a major expansion of the office's (and, therefore, the President's) influence, particularly when coupled with the ability of OIRA to determine which guidance documents are "significant" and the ability of OIRA to conclude that "additional consultation will be required" before a document is issued. Also, the requirement that presidentially appointed regulatory policy officers ensure compliance with this requirement

²² For example, the Occupational Safety and Health Administration indicated in 2000 that it had issued 3,374 guidance documents since March 1996. See U.S. Congress, House Committee on Government Reform, *Non-Binding Legal Effect of Agency Guidance Documents*, 106th Cong., 2nd sess., H.Rept. 106-1009 (Washington: GPO, 2000), p. 5.

arguably represents another extension of the President’s authority in regulatory agencies.

As is the case with other aspects of E.O. 13422, though, several aspects of these provisions are unclear. For example, although the order refers to guidance “documents,” the definition of the term is not limited to written materials. In a related OMB bulletin on agency guidance that was issued the same day as the executive order amendments, OMB said that the bulletin’s definition of a guidance document (which is the same as in the executive order)

is not limited only to written guidance materials and should not be so construed. OMB recognizes that agencies are experimenting with offering guidance in new and innovative formats, such as video or audio tapes, or interactive web-based software. The definition of “guidance document” encompasses all guidance materials, regardless of format.²³

Therefore, a wide range of agency communications with the public — even oral statements by agency officials and staff — may be considered guidance “documents,” as long as they are statements of “general applicability and future effect.”

However, given the definition provided in the executive order, it is unclear what could constitute a “significant” guidance document. Guidance documents, unlike regulations, cannot have a binding effect on the public.²⁴ Therefore, it is not clear how guidance can be expected to have the effects delineated in the definition (e.g., “lead to an annual effect of \$100 million or more” or “materially alter the budgetary impact” of entitlements or grants). Arguably, because no guidance document can, by itself, have such an effect, the requirement that agencies provide OIRA with advance notification of any significant guidance documents could have little or no impact on regulatory agencies. On the other hand, OMB has said that “there are situations in which it may reasonably be anticipated that a guidance document could lead parties to alter their conduct in a manner that would have such an economically significant impact.”²⁵ Ultimately, because OIRA is given the authority to determine which documents are “significant,” the scope and impact of this section’s requirements may be as broad as OIRA determines that it needs to be.

Also unclear is the extent to which certain transparency provisions in E.O. 12866 will apply to guidance documents. For example, will agencies be required to disclose the changes to their significant guidance documents made at the suggestion and recommendation of OIRA (just as they are with regard to rules)? Will OIRA be required to list publicly the significant guidance documents that are under its review,

²³ Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” p. 3434.

²⁴ See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, “Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Agencies Use Them to Bind the Public?” *Duke Law Journal*, vol. 41 (1992), p. 1311.

²⁵ Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” p. 3435.

and to disclose its meetings with outside entities regarding those documents? Because E.O. 13422 did not change those sections of E.O. 12866, it is reasonable to presume that the transparency provisions applicable to rules are not applicable to agencies' significant guidance documents.

Supporters of the expansion of presidential review to significant guidance documents have said the change will standardize and make more transparent the process by which federal agencies develop, issue, and use guidance documents.²⁶ Critics contend that the potentially broad scope of this provision may result in fewer guidance documents being issued, with the policy officer or OIRA review serving as a “bureaucratic bottleneck that would slow down agencies’ ability to give the public information it needs.”²⁷ Another possible effect of this requirement, given the number of guidance documents that agencies currently issue, is that OIRA staff may be inundated with such documents to review (on top of the hundreds of significant proposed and final rules and the thousands of paperwork clearances they produce each year) — at least until it is clear to the agencies what is and is not covered.

Use of Formal Rulemaking Procedures

E.O. 13422 also amends Section 6 of E.O. 12866 by adding the following sentence: “In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations.” Virtually all agency regulations are currently issued under informal rulemaking procedures under 5 U.S.C. 553, in which agencies publish proposed rules in the *Federal Register* for public comment, and subsequently publish a final rule reflecting any changes made as a result of those comments. Formal rulemaking, as the name implies, is a much more rigorous, trial-like, on-the-record procedure in which interested persons testify and cross-examine witnesses, and the agency may take depositions and issue subpoenas. It is generally considered a more time-consuming and expensive process than informal rulemaking. Also, according to 5 U.S.C. 556(d)(1), “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” Formal rulemaking was criticized in the 1970s, and has fallen into disuse since then.²⁸ The Administrative Conference of the United States recommended that Congress should not require procedures beyond informal rulemaking, and should never require trial-type procedures for resolving questions of policy or fact.²⁹

²⁶ John Sullivan, “White House Sets Out New Requirements for Agencies Developing Rules, Guidance,” citing Paul Noe, partner at C&M Capitolink, who was a counselor to former OIRA administrator John Graham.

²⁷ Public Citizen, “New Executive Order Is Latest White House Power Grab.”

²⁸ For a discussion of formal rulemaking, see Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: American Bar Association, 2006), pp. 58-59.

²⁹ ACUS Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 *Federal Register* 19782, 1972; Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition*, pp. 309-310.

The executive order does not indicate, and OIRA has not explained, why this provision was added to E.O. 12866. Agencies have always had the ability to employ formal rulemaking when they conclude that it is in the agencies' best interest to do so. Therefore, the statement that agencies "may also consider whether to utilize formal rulemaking procedures" seems to grant discretion where discretion was already allowed. On the other hand, an agency's "consultation with OIRA" may result in greater use of formal rulemaking if OIRA can convince the agency that it is in their best interest to do so. If that occurs, agency rulemaking could become even more "ossified" than it already is.³⁰

Concluding Notes

The amendments made by E.O. 13422 to E.O. 12866 are the most significant since the latter order was issued in 1993, but the characterizations of the changes by interested parties are dramatically different. Jeffrey Rosen, general counsel at OMB, reportedly characterized the new executive order as "a classic good-government measure that will make federal agencies more open and accountable."³¹ On the other hand, Gary Bass, executive director of OMB Watch said the changes made to the regulatory review process were "bad, bad, bad," and predicted that they would hamper the government's ability to respond to regulatory crises such as E.coli outbreaks on fresh vegetables.³² One Member of Congress was quoted as saying that the 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."³³

However, 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. Will, for example, OIRA insist that agencies identify a "specific market failure" before issuing proposed or final rules, or will that provision be interpreted more broadly to require simply a clear statement of the rules' intentions? Will agency heads continue to have discretion in the appointment of regulatory policy officers (albeit less than before since they must now select from current presidential appointees), or will the White House direct the agency heads in those appointments? Will the requirement that agencies provide estimates of aggregate costs and benefits be used as a prelude to greater control and the development of regulatory budgets, or

³⁰ Several observers have commented on the "ossification" of the rulemaking process as a result of numerous statutory and executive order requirements. See, for example, Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, vol. 41 (June 1992), pp. 1385-1462; Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," *47 Administrative Law Review*, vol. 47, winter 1995, pp. 59-93; Paul R. Verkuil, "Rulemaking Ossification — A Modest Proposal," *Administrative Law Review*, vol. 47 (summer 1995), pp. 453-459.

³¹ Robert Pear, "Bush Directive Increases Sway on Regulation."

³² John D. McKinnon, "White House Flexes Muscles Over U.S. Regulations," *Wall Street Journal (Europe)*, Feb. 1, 2007, p. 12.

³³ Robert Pear, "Bush Directive Increases Sway on Regulation."

will such estimates be relatively easy to develop and reveal cumulative effects that have heretofore been hidden? Will the requirement that OIRA be notified of forthcoming significant agency guidance documents prove to be a major expansion of presidential influence over regulatory agencies, or will “significant guidance document,” as defined in the order, be a contradiction in terms resulting in virtually no such documents being covered by the order’s requirements? And finally, will OIRA require agencies to enter into more formal rulemaking procedures, or will agencies continue to be allowed to use such procedures in rare circumstances? As noted previously with regard to individual elements, the scope and effect of these changes to E.O. 12866 are likely to become apparent only through their application by OIRA and the agencies.

These uncertainties notwithstanding, the issuance of these amendments to E.O. 12866 are important if for no other reason than that the President deemed them necessary. It is reasonable to conclude that the President had some purpose in mind that led to the issuance of the new executive order. Notably, although E.O. 13422 requires agencies to provide written rationales for why they are issuing regulations, no such rationale was offered in conjunction with this or any of the other new requirements in the order. For example, it is unclear what “market failure” or other specific problem led to the issuance of the requirements that agencies have regulatory policy officers who are presidential appointees, or that agencies submit significant guidance documents to OIRA for review? To date, other than broad statements about openness and accountability, neither the President nor OMB has described why these changes were made to E.O. 12866.³⁴ However, neither the President nor OMB are required by law to offer such an explanation.

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 — from declining to provide access to executive branch documents and information to presidential signing statements indicating that certain statutory provisions will be interpreted consistent with the President’s view of the “unitary executive.”³⁵

³⁴ The closest OMB has come to an explanation for these changes is in a footnote in the final bulletin on agency good guidance practices that was issued the same day as the executive order. In the bulletin, OMB said that “E.O. 13422 addresses the potential need for interagency review of certain significant guidance documents by clarifying OMB’s authority to have advance notice of, and to review, agency guidance documents.” See footnote 12 in the “Final Bulletin for Agency Good Guidance Practices,” available at [<http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>].

³⁵ For a discussion of the Bush Administration’s use of signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead. More generally, see Adriel Bettelheim, “Executive Authority: A Power Play Challenged,” *CQ Weekly*, Oct. 30, 2006, p. 2858. For a discussion of the unitary executive principle, see Christopher S. Yoo, Steven G. Calabresi, Anthony J. Colangelo, “The Unitary Executive in the Modern Era, 1945-2004,” 90 *Iowa L. Rev.* 601 (Jan. 2005); and Robert v. Percival, “Presidential Management of the Administrative State: The Not-So Unitary Executive,” 51 *Duke Law Journal* 963 (Dec. 2001).

Some public interest groups and others have suggested that Congress hold hearings on the changes made to the regulatory planning and review process by E.O. 13422.³⁶ If Congress elects to do so, potential topics for review could include the intended purpose of the changes, how OIRA intends to implement them, the scope of their likely effects, and the implications of the changes for the balance of power between Congress and the President in controlling regulatory activity based on statutory authorities.

³⁶ See, for example, [<http://www.citizen.org/pressroom/release.cfm?ID=2361>], in which Public Citizen said that “Congress must immediately arrange hearings to hold the president accountable for this affront to the rule of law.”