Changes to the OMB Regulatory Review Process by Executive Order 13422

Curtis W. Copeland
Specialist in American National Government

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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; provides background information on presidential review of rules; discusses three congressional hearings on the executive order in 2007; and notes congressional efforts to block the implementation of the order. It concludes by pointing out that the significance of the changes made to the review process by E.O. 13422 may become clear only through their implementation. 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. It also describes three hearings in 2007 examining the new executive order, and notes recent congressional efforts to block the implementation of the order. The report ends by offering some concluding observations. First, though, the report provides a brief background section on the regulatory planning and review procedures established by E.O. 12866 and its predecessors.

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

[1] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 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, September 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, January 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, February 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. See also Margaret Kriz, "Thumbing His Nose," *National Journal*, July 28, 2007, pp. 32-34.

[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*, January 19, 2007, p. A-31.

[6] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981.

[7] Independent regulatory agencies include the Federal Communications Commission, the Nuclear Regulatory (continued...)

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 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.

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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, January 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.

Changes Made by E.O. 13422

E.O. 13422 took effect when it was signed by the President on January 18, 2007.[10] 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");[11] (3) require a more precise delineation of why the agency is issuing the rule (the "specific" market failure or the "specific"

[10] Several press accounts have suggested that E.O. 13422 did not take effect until July 24, 2007. (See, for example, Cindy Skrzycki, "Fighting for the Right to the Rules," *Washington Post*, July 17, 2007, p. D2.) However, although some of the requirements of a related OMB good guidance practices bulletin took effect on July 24, 2007, OMB memorandum M-07-13 (issued April 25, 2007) states that the executive order took effect immediately. To view a copy of this memorandum, see http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf.

[11] 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.

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."[12] Therefore, the "market failure" language in E.O. 13422 can arguably be read to apply to all significant rules (between 500 and 700 per year) what had previously applied only to economically significant rules (about 70 per year).

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.

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. One such commentator, 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."[13] 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. Critics of the executive order 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 contend, however, that market failure is not the only basis on which regulatory agencies can justify action, and that the executive order did not eliminate the requirement in E.O. 12866 that directs agencies to issue "such regulations as are required by law, [or] are necessary to interpret the law."[14]

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."[15] On the other hand, supporters of

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

[13] Public Citizen, "New Executive Order Is Latest White House Power Grab."

[14] Testimony of Steven D. Aitken in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Changes to OMB Regulatory Review by Executive Order 13422*, February 13, 2007, available at http://judiciary.house.gov/media/pdfs/Aitken070213.pdf.

[15] Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, January 30, 2007, p. A1.

this provision 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.[16]

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 (RPO) who reported to the agency head.[17] The RPO 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 RPOs were commonly agency general counsels (which are usually presidential appointees with Senate confirmation) or some other presidential appointee within the agencies.

E.O. 13422 retained the above general statement of the RPO's duties, but also required 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. Because most of the RPOs were already presidential appointees, it is not clear how this requirement will affect the regulatory process. If agencies are permitted to continue with the same officers they have always had, then the effect may be minimal. On the other hand, if agency heads are required to designate new presidential appointees to serve in this capacity, then the effect may be more significant.

The new executive order also appeared to change the RPOs' reporting relationship. As originally issued, E.O. 12866 required the policy officers to report to the agency heads who designated them, but E.O. 13422 eliminated this requirement. Although it was initially unclear to whom these presidential appointees would report, OMB's April 2007 guidance on the order states that they should continue to report to the agency heads.[18]

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[16] Testimony of Paul Noe in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Changes to OMB Regulatory Review by Executive Order 13422*, February 13, 2007, available at http://judiciary.house.gov/media/pdfs/Noe070213.pdf.

[17] 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.

[18] See OMB memorandum M-07-13, p. 11.

E.O. 13422 also appears to significantly enhance the role of the agency RPO as part of the regulatory planning process. 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."[19] 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 RPO'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."[20]

The executive order's use of the word "designate" suggests that agency heads must select RPOs 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.[21] Therefore, in most cases, agency heads must select presidential appointees who are subject to Senate confirmation.[22]

Even in agencies with presidential appointees who are not subject to Senate confirmation, one could argue that it is up to Congress to decide whether the position of RPO should be occupied by an appointee who is Senate confirmed. The Supreme Court has held that "any appointee

[19] Notably, E.O. 13422 speaks in terms of a regulatory policy "office" as opposed to a regulatory policy "officer," suggesting that agencies may provide staff to assist the policy officers in their duties within the agencies. However, the acting OIRA Administrator has said that "office" was a typographical error, and should have said "officer."

[20] 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*, February 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*, February 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."

[21] U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, November 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.

[22] At a February 13, 2007, hearing on E.O. 13422, the acting OIRA administrator confirmed that most RPOs are Senate-confirmed presidential appointees. For a copy of his testimony, see http://www.whitehouse.gov/omb/legislative/testimony/oira/aitken_02132007.pdf.

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.[23] 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.

Therefore, one could argue that it is the role of Congress to prescribe, in law, whether the RPO 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 RPO 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 RPOs, which would extend 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). In guidance on the implementation of E.O. 13422, OMB said independent regulatory agencies were encouraged, but not required, to designate RPOs to meet the regulatory planning requirements.[24]

Designation of RPOs

As noted previously, agencies were required to designate their RPOs under the executive order by March 2007. In July 2007, OMB published a list of the designated RPOs in 29 cabinet departments and agencies.[25] However, because OMB did not have a list of the RPOs before the executive order was published, this listing does not indicate how many RPO changes were made through this designation process. All but two of the 29 RPOs that OMB listed were presidential appointees requiring Senate confirmation.[26] Many of the designees were general counsels, deputy secretaries, or assistant secretaries, but in some cases the agency heads designated themselves (e.g., at the General Services Administration and the Office of Personnel Management). A *Bureau*

[23] *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

[24] See OMB memorandum M-07-13, p. 11.

[25] The OMB list can be found at http://www.whitehouse.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf.

[26] The two agencies with RPOs who were not in Senate-confirmed positions were at the United States Access Board and the National Capital Planning Commission.

of National Affairs article noted that the RPOs had varied backgrounds, but some had previously been employed at OMB or in regulated industries. For example, the article said that the RPOs at the Environmental Protection Agency (EPA) and the Department of Agriculture (USDA) both served in high-level positions at OMB, while the RPO at the Department of Transportation (DOT) previously worked with Koch Industries, "a leading operator of oil pipelines which has been prosecuted for environmental violations."[27]

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.[28] 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.[29] 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.[30] The listed items include

[27] Ralph Lindeman, "Mix of Backgrounds Characterizes Agency Policy Officers Under Bush Executive Order," *BNA Daily Report for Executives*, July 17, 2007, p. A-23.

[28] Public Citizen, "New Executive Order Is Latest White House Power Grab."

[29] 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.

[30] To view the most recent regulatory plan (published in December 2006), see http://frwebgate.access.gpo.gov/cgi-bin/ (continued...)

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 narrative information about expected costs or benefits. Also, some items that are listed in agencies' regulatory plans are never issued as final rules, and some significant 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. On the other hand, as noted previously, agencies are only required to develop rule-specific and aggregate estimates of costs and benefits "to the extent possible." It is unclear whether the agencies or OIRA will ultimately determine what is "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.[31] 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 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;

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getdoc.cgi?dbname=2006_unified_agenda_&docid=f:ua061002.pdf.

[31] 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, January 25, 2007.

> (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.[32] 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 RPOs ensure compliance with this requirement 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.[33]

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.[34] Therefore, it is not clear how guidance can be expected to have the

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[32] 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.

[33] Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," p. 3434.

[34] 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.

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."[35] 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 that are submitted to OIRA for review. 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, 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.[36] 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."[37] 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

[35] Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," p. 3435.

[36] 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.

[37] Public Citizen, "New Executive Order Is Latest White House Power Grab." Notably, in guidance on the implementation of the executive order (OMB memorandum M-07-13, p. 8), OMB said it would complete its review of agency guidance documents within 30 days "or, at that time, advise the agency when consultation will be complete."

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.[38] 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.[39] One administrative law scholar has referred to formal rulemaking as a "discredited" procedure that allows regulated entities to slow down the rulemaking process.[40]

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.[41]

Congressional Hearings on E.O. 13422

On February 13, 2007, two House subcommittees held oversight hearings on E.O. 13422—one by the House Committee on Science and Technology's Subcommittee on Investigations and Oversight,[42] and the other by the House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law.[43] On April 26, 2007, the Subcommittee on Investigations and Oversight held a second hearing on the executive order.[44]

Investigations and Oversight—February 2007

At the Investigations and Oversight Subcommittee hearing in February 2007, Chairman Brad Miller questioned whether the new executive order creates "an almost insuperable bias in favor of agency inaction," and whether the order "shift(s) to the President powers that the framers of our Constitution intended to be exercised by Congress." However, Ranking Member F. James

[38] 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.

[39] 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.

[40] Testimony of Peter Strauss, Betts Professor of Law, Columbia Law School, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, hearing on Executive Order 13422, February 13, 2007, available at http://judiciary.house.gov/media/pdfs/Strauss070213.pdf.

[41] 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.

[42] To view a copy of the hearing charter and the witnesses' prepared statements, see http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269.

[43] To view this hearing and obtain copies of the witnesses' prepared statements, see http://judiciary.house.gov/oversight.aspx?ID=269.

[44] To view this hearing and obtain copies of the witnesses' prepared statements, see http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777.

Sensenbrenner, Jr. said "I am inclined to think that the issues that will be brought up today have less to do with their policy implications, and more to do with *who* issued them," and said he believed the executive order and the related OMB guidance bulletin simply formalize many of the principles established in previous administrations. (Emphasis in original.) Three of the four witnesses at the hearing noted areas of concern about the new executive order:

- Sally Katzen, a professor of law, OIRA Administrator during the Clinton Administration, and one of the original authors of E.O. 12866, noted three areas of concern about E.O. 13422: (1) its issuance "without any consultation or explanation," (2) its issuance "on the heels of OMB's imposing multiple mandates/requirements on the agencies when they are developing regulations," and (3) its effect of "making it more difficult for agencies to do their jobs because regulations are disfavored in this Administration."[45]
- David C. Vladeck, associate professor of law and director of the Institute for Public Representation at the Georgetown University Law Center, said the new order (1) "usurps congressional authority by directing agencies to justify regulatory actions on the basis of market failure," (2) "unwisely expands OIRA's authority to guidance," (3) "resurrect's the discredited concept of a regulatory budget," and (4) "further politicizes the regulatory process" through the new RPO designation process.[46]
- Rick Melberth, director of federal regulatory policy at OMB Watch, recommended that Congress (1) explore the legality of the executive order amendments and their implementation, (2) oversee the issuance of OIRA guidance on the market failure principle, and (3) "look at limiting agencies' and OIRA's spending on the specific elements of the amendments."[47]

The fourth hearing witness, however, welcomed the issuance of E.O. 13422. William L. Kovacs, vice president of the U.S. Chamber of Commerce, said the order was "[f]ar from being radical," and merely instructs federal agencies to (1) state the reason for the regulation, (2) identify the aggregate cost of the regulation to assist the identification of agency priorities, and (3) have an agency RPO ensure that these requirements have been followed. He also said the order "corrects the abuse of guidance documents by federal agencies seeking to avoid public participation in the rulemaking process," and that the order and the OMB guidance bulletin "are part of a long effort by Congress and several Administrations to improve the transparency and quality of government data and provide effective parameters to guide the regulatory activities of federal agencies."[48]

[45] For a copy of Ms. Katzen's written statement, see http://democrats.science.house.gov/Media//File/Commdocs/hearings/2007/oversight/13feb/katzen_testimony.pdf.

[46] For a copy of Mr. Vladeck's written statement, see http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/vladeck_testimony.pdf.

[47] For a copy of Mr. Melberth's written statement, see http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/Melberth_testimony.pdf.

[48] For a copy of Mr. Kovac's written statement, see http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/kovacs_testimony.pdf.

Commercial and Administrative Law—February 2007

At the Commercial and Administrative Law Subcommittee hearing in February 2007, Chairman Linda T. Sanchez said she was "concerned that the main thrust of this new Order appears to shift control of the regulatory process from the agencies—the entities that have the most substantive knowledge and experience—to the White House." On the other hand, Ranking Member Chris Cannon said the changes were "useful refinements" to the existing regulatory review process, and could be expected to lead to improved governance.

The first witness was Steven D. Aitken, then Acting Administrator of OIRA, who said both the new executive order and the OMB guidance bulletin "share the goal of improving the way that the federal government does business." The bulk of his testimony focused on the guidance provisions; there, he said that only some agency guidance documents would be subject to interagency review, and that many agencies may already be doing what the order requires. Mr. Aitken also said that (1) RPOs in many federal agencies were already presidential appointees, and that by requiring the designation of presidential appointees for this position the President was ensuring that, in most cases, the initiation of rulemaking would be authorized by individuals in Senate-confirmed positions; (2) the requirement that agencies aggregate the costs and benefits of their upcoming rules shifts the burden of summing up rules from the public to the agencies; and (3) the concept of market failure has always been part of E.O. 12866, is not the only basis on which agencies can justify their regulations, and does not affect other statutory provisions that may prompt the issuance of a rule.[49]

One other witness at the hearing—Paul Noe, of C&M Capitolink, LLC, and former counselor to former OIRA Administrator John Graham—indicated that E.O. 13422 comprised "important and salutary steps toward good governance," and did not represent a threat to federal rulemaking. For example, he said the provisions in the order involving RPOs "only codifies prior practice in both the Bush and Clinton Administrations," and he characterized the requirement for aggregate cost and benefit estimates as a sensible "toting up of already required information."[50]

Two other witnesses at this hearing were less sanguine about the effects of the executive order. Sally Katzen repeated the concerns that she voiced at the earlier hearing, and concluded by saying that "the message [of the executive order] is that agencies should not be doing the job that Congress has delegated to them."[51] Another witness, Peter Strauss of Columbia Law School, said that the RPO provisions in the executive order "threatens a dramatic increase in presidential control over regulatory outcomes, to an extent Congress has not authorized and in my judgement must authorize." He also said that the provisions regarding formal rulemaking "threatens redeployment of a discredited, remarkably expensive rulemaking procedure that delivers substantial controls over the timing and cost of rulemaking into the hands of private parties—notably, I fear, those whose dangerous activities proposed regulations are intended to limit." Professor Strauss, noting that the President could veto any freestanding legislation designed to undo the executive order, suggested that a "do not spend" rider on an appropriations bill was more likely to be effective in preventing the order from taking effect.[52]

[49] For a copy of Mr. Aitken's written statement, see http://judiciary.house.gov/media/pdfs/Aitken070213.pdf.

[50] For a copy of Mr. Noe's written statement, see http://judiciary.house.gov/media/pdfs/Noe070213.pdf.

[51] For a copy of Ms. Katzen's written statement, see http://judiciary.house.gov/OversightTestimony.aspx?ID=726.

[52] For a copy of Mr. Strauss' written statement, see http://judiciary.house.gov/media/pdfs/Strauss070213.pdf.

Investigations and Oversight—April 2007

At the Investigations and Oversight Subcommittee hearing in April 2007, Steven D. Aitken (by then, former Acting Administrator of OIRA) testified that many of the requirements in E.O. 13422 were not new, and were sometimes misunderstood. For example, he said that the order did not require agencies to submit all significant guidance documents to OIRA for review, but only to *inform* OIRA of upcoming documents so that there could be an *opportunity* for review. He also said that agency RPOs would continue to report to agency heads even though the requirement in E.O. 12866 had been deleted. However, Chairman Miller said that the RPO provisions in the order were "especially troubling," and that given their new authority, RPOs could "smother regulatory efforts in the crib before an agency can even begin considering a regulatory action."[53] He also asked Mr. Aitken to describe how the executive order was developed, but Mr. Aitken declined to do so, citing a "deliberative process" privilege within the executive branch.

Other witnesses at the hearing offered differing perspectives on the executive order. For example, Robert W. Hahn and Robert E. Litan of the AEI-Brookings Joint Center for Regulatory Studies generally supported the issuance of E.O. 13422. Although they agreed with critics that the designation of presidentially appointed RPOs would "politicize" the rulemaking process by taking away some discretion from civil servants, they characterized that result as "a good thing" that would make the President more accountable for regulatory policies. Their one complaint about the order was that it did not go far enough, excluding independent regulatory agencies from its requirements. On the other hand, Gary Bass from OMB Watch said the executive order "threatens public protections by further centralizing executive control over the regulatory process, removing agency discretion over legislative implementation, codifies regulatory delay, and substitutes free market criteria for public values of health, safety, and environmental protections." He urged Congress to overturn the order or limit its implementation.

Congressional Actions to Block the Implementation of E.O. 13422

Congress has revoked executive orders in the past, both directly (e.g., declaring that a specific order shall not have any legal effect) and by reversing certain provisions in the orders.[54] However, if the President chooses to veto such legislation, enactment into law would require a two-thirds majority in both houses of Congress. Therefore, some (e.g., Professor Peter Strauss) have suggested including language prohibiting the implementation of the executive order in "must pass" legislation (e.g., an appropriations bill), thereby making a presidential veto less likely.[55]

[53] Ralph Lindeman, "House Panels Seek Ways to Curb Impact of Executive Order on Regulatory Activity," *BNA Daily Report for Executives*, April 27, 2007, p. A-39.

[54] CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by T. J. Halstead. The most recent direct congressional revocation appears to have involved E.O. 12806, an order by President George H.W. Bush to the Secretary of the Department of Health and Human Services to establish a human fetal tissue bank for research purposes. Congress revoked the order by simply stating that "the provisions of Executive Order 12806 shall not have any legal effect." See P.L. 103-43, 107 Stat. 133, 121. For other examples, see House Committee on Rules, Subcommittee on Legislative and Budget Process, 106th Cong., 1st sess., *Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?* (October 27, 1999), pp. 124-127.

[55] Testimony of Peter L. Strauss, in U.S. Congress, House Committee on Science and Technology, Subcommittee on Investigations and Oversight, *Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part II*, (continued...)

On June 27, 2007, during House floor consideration of H.R. 2829, the Financial Services and General Government (FSGG) Appropriations Act, 2008 (which funds OMB, among other agencies), Representative Brad Miller and Representative Linda Sanchez offered a "general provision" amendment stating that "None of the funds made available by this Act may be used to implement Executive Order 13422." In introducing the amendment, Mr. Miller said the executive order "claims powers for the President over agency rulemaking that is [sic] consistent neither with statutes passed by Congress nor with the Constitution." He also said that the order "lets political appointees overrule the professionals at each agency in secret with no accountability to anyone." Representative Jose Serrano said he supported the amendment, saying that Representative Miller had "raised some very serious issues that need addressing." Representative Ralph Regula said he opposed the amendment, saying it needed additional study, but did not call for a recorded vote. The amendment was agreed to as Section 901 of H.R. 2829 as passed by the House. If this provision were part of the final FSGG appropriations act, neither OMB nor any other agency funded by the act could use its FY2008 appropriations to implement the order. However, this provision would not affect agencies that are funded by other appropriations acts.

In the wake of this action, on July 12, 2007, the Director of OMB sent a letter to the chairmen and ranking members of the House and Senate Appropriations Committees stating that "If the President were presented with a bill that contained a restriction on the implementation of Executive Order 13422, the President's Senior Advisors would recommend that he veto the bill." The Director urged the rejection of any provision that would interfere in any way with the implementation of the executive order "because it involves a matter that directly affects the operation of [OMB] and involves the President's authority to manage the Executive Branch." That same day, a group of 64 trade organizations covering a range of industries (reportedly organized by the U.S. Chamber of Commerce) sent a letter to the chairman and ranking member of the Senate Committee on Appropriations urging them to oppose any language in the FSGG appropriations bill that would bar funding for E.O. 13422.[56] The letter characterized the executive order as a "good government" measure, and said the requirements "are merely an attempt to instill principles of accountability and transparency into the regulatory process."[57]

As reported by the Senate Subcommittee on Financial Services, the FSGG appropriations bill contained a provision stating that no funds in the measure could be used to implement either E.O. 13422 or the OMB bulletin on guidance documents. However, one of the "manager's package" amendments to the legislation that was adopted when the bill was reported by the full Senate Appropriations Committee on July 12, 2007, deleted this provision from the legislation. Aides to Senator Richard Durbin were quoted as saying that the Senator would attempt to reinstate the House language inhibiting the implementation of the executive order when the bill was considered in conference.[58] However, the FSGG appropriations bill was later folded into the Consolidated Appropriations Act for FY2008 (H.R. 2674), and congressional leaders decided to avoid conference procedures on the bill—instead reaching agreement between the House and the

(...continued)

hearings, 110th Cong., 1st sess., April 26, 2007.

[56] Ralph Lindeman, "Senate Appropriations Committee Declines To Bar Spending on Rulemaking Exec Order," *BNA Daily Report for Executives*, July 16, 2007, p. A-19.

[57] To view a copy of this letter, see http://www.uschamber.com/issues/letters/2007/070712_financial_services.htm.

[58] Rebecca Adams and Michael Crittenden, "Congress and White House: A Regulatory Rumble," *CQ Weekly*, July 23, 2007, p. 2162.

Senate by exchanging amendments between the two chambers. President Bush signed the bill into law on December 26, 2007.[59] The legislation did not contain any language regarding E.O. 13422.

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."[60] 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.[61] 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."[62]

Although observers have taken very different positions on the desirability of the changes made by E.O. 13422, several things about the order are not clear. First, it is unclear why the changes to the existing regulatory review process were made. 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 RPOs who are presidential appointees, or that agencies submit significant guidance documents to OIRA for review. Although the acting OIRA Administrator indicated that the executive order's guidance provisions were intended to "reinforce" the OMB guidance bulletin and improve the quality of agency guidance documents through interagency review, he did not describe any recent instances of poor quality guidance that led to this provision in the order. Also, his comments indicating that other parts of the executive order were consistent with existing practices (e.g., provisions regarding "market failure" and formal rulemaking) raise questions regarding why changes to the executive order were believed necessary. Neither the President nor OMB is required to explain why executive orders are issued, or why existing OIRA review processes are changed. And sound public policy rationales can be envisioned concerning why the changes were made. Providing those rationales might have gone a long way toward quieting some of the concerns that have been voiced regarding the changes.

Also unclear is the effect of the changes made by E.O. 13422 on federal rulemaking agencies, the rules that emerge from the rulemaking process, and on the transparency of that process to the public. In some cases, that lack of clarity is because of the discretion given to agencies and OIRA in the review process (e.g., that agencies take certain actions "to the extent possible" or "where applicable"). In other cases, the effects are unclear because the order does not appear to change

[59] For more on this legislation, see CRS Report RL34298, *Consolidated Appropriations Act for FY2008: Brief Overview*, by Robert Keith.

[60] Robert Pear, "Bush Directive Increases Sway on Regulation."

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

[62] Robert Pear, "Bush Directive Increases Sway on Regulation."

existing practices (e.g., that agencies be allowed to use formal rulemaking). In still other cases, the new requirements seem to be based on false presumptions (e.g., that agencies' regulatory plans contain estimates of costs and benefits that can be aggregated) or seem to have an indefinite scope (e.g., what qualifies as a "guidance document" or a "significant guidance document").

Ultimately, the degree to which E.O. 13422 changes existing practices will likely depend on how the order is 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 RPOs (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 these policy officers continue to report to the agency heads (as OMB says they should), or will they now report to the White House or OMB? 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 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 have the discretion to use such procedures only in rare circumstances?

Third, it is unclear what impact the changes brought about by E.O. 13422 will have on the balance of power between the President and Congress in this area. Congress has a vested interest in the regulations that emerge from the rulemaking process, having created each regulatory agency, confirmed agency heads, and enacted the legislation underpinning each proposed and final rule. Therefore, presidentially initiated changes that may affect these congressional directives (e.g., the requirement that each agency identify a specific "market failure" or "problem" before issuing a rule) are naturally of potential interest to Congress. Another area of the executive order that may affect presidential-congressional balance of power involves the RPOs, particularly their new authority to control regulatory planning and output (unless the agency head objects), the fact that the order no longer requires them to report to the agency head, and the lack of clarity as to whether they must be reconfirmed by the Senate because of their new authorities. Finally, OMB's statements notwithstanding, it is unclear whether the executive order intended to require that independent regulatory agencies have presidential appointees as RPOs. Doing so would extend 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 to be more independent of the President).

These three areas of uncertainty notwithstanding, the issuance of these amendments to E.O. 12866 are important if for no other reason than that the President deemed them necessary. The changes made by E.O. 13422—particularly the expansion of OIRA review to guidance documents and the requirement that RPOs be presidential appointees with enhanced power—represent a clear expansion of presidential authority over rulemaking agencies. In that regard, the executive order 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."[63] In fact, in his February 2007 testimony on the order, the acting OIRA Administrator cited the "basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy" as justification for the extension of OIRA review to agency guidance documents. Also, in his July 2007 letter conveying the Administration's objections to legislation restricting the implementation of the executive order, the OMB Director said he was doing so because the legislation "involves the President's authority to manage the Executive Branch."

Cornelius M. Kerwin, author of the textbook *Rulemaking: How Government Agencies Write Law and Make Policy*,[64] was quoted as saying that this dispute between Congress and the President over E.O. 13422 appears to be a classic example of an "inter-branch conflict."[65] Similarly, Cindy Skrzycki, the author of *The Regulators*,[66] said, "The Bush administration and the Democratic-controlled Congress are fighting over who will have the most influence over writing rules on health and safety issues. While the dispute is not as dramatic as the ones over fired prosecutors and wartime surveillance, the stakes are high."[67]

Author Contact Information

Curtis W. Copeland
Specialist in American National Government
cwcopeland@crs.loc.gov, 7-0632

[63] 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*, October 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 (January 2005); and Robert v. Percival, "Presidential Management of the Administrative State: The Not-So Unitary Executive," 51 *Duke Law Journal* 963 (December 2001).

[64] Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, third ed., (Washington: CQ Press, 2003).

[65] Cindy Skrzycki, "Fighting for the Right to the Rules," *Washington Post*, July 17, 2007, p. D2.

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