Environmental Client Advisory

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Executive Order 13422

INTRODUCTION

On January 18, 2007, President Bush signed Executive Order 13422 ("the EO" or "the Order"), which promises changes to the Federal agency rulemaking process, and to Federal agency guidance in particular. The EO has sparked concern that the White House has increased its control over the agencies and their rulemaking process, thereby increasing the Administration's control over the domestic government. See "Bush Directive Increases Sway on Regulation" New York Times, January 30, 2007. This advisory discusses the Order, the possible effects it may have on agency rulemaking and guidance practices, and the potential ramifications for clients.

EXECUTIVE ORDERS

The EO amends Executive Order 12866, signed by President Clinton. Executive Order 12866 replaced Executive Orders 12291 and 12498 signed by President Reagan. The Reagan-era Executive Orders sought to establish a certain level of White House control over agency regulations, including the requirement that agencies conduct cost/benefit analyses. Executive Order 12866 expanded the role of the Office of Information and Regulatory Affairs ("OIRA") (within the White House's Office of Management and Budget ("OMB")) by granting OIRA authority to review existing and new significant agency regulations. The purpose, in part, was to coordinate review of agency rulemaking to ensure consistency with the President's priorities as well as consistency among the regulatory agendas of other agencies. In effect, Executive Order 12866 granted the White House, through OIRA and the OMB, significant oversight power in the agency regulatory process.

Executive Order 13422 expands the White House presence in regulatory rulemaking in two significant ways. First, the Order provides for OIRA review not only of agency regulations and rules, but also agency *guidance* documents. It requires guidance documents to go through the same OMB process as regulations under 12866. Second, the Order requires each agency to designate a Presidential Appointee within the agency to be its Regulatory Policy Officer with authority to approve or deny the commencement or inclusion of any agency regulation.

The EO also requires the agency, in writing, to identify the "specific market failure (such as externalities, market power, lack of information)" it intends to address through the regulation or guidance. In addition, the agency must estimate the aggregate costs and benefits of all its regulations on a yearly basis. Previously, the agency was merely to identify the "problem" it intended to address and the significance of that problem, and was only required to estimate costs and benefits for each regulatory action on an individual basis. Requiring identification of specific market failures, and aggregate costs and benefits are

requirements seen by many to be anti-regulatory.

On the same day the President signed the Order, the OMB issued its "Final Bulletin for Agency Good Guidance Practices" ("Bulletin"). This document was issued to "establish policies and procedures for the development, issuance, and use of significant guidance documents by the Executive Branch departments and agencies. . . ." Accompanying the Bulletin, OMB issued a Memorandum for the Heads of Executive Departments and Agencies ("Memorandum"), which explains, in more detail, how the Bulletin and the Order are intended to operate.

GUIDANCE

The Order's focus on guidance documents is, in large measure, a response to what the OMB views as "problematic guidance practices" — the recent tendency of agencies to avoid legal requirements attendant to formal rulemaking such as notice and comment, as well as judicial review, through the use of guidance (i.e. "back door regulation"). The Order requires that each agency provide OIRA with advance notification of any significant guidance documents, along with a draft, a brief explanation of the need for the guidance, and how the guidance will meet the need. The OIRA Administrator has the authority to determine whether a guidance is significant and to require additional consultation before the agency is allowed to issue the document.

Guidance is defined generally 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." Significant guidance document means "a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

1. 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 and safety, or State, local, or tribal governments or communities;

2. Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or

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

IMPLICATIONS

The EO has already generated much discussion. Business groups, such as the United States Chamber of Commerce, have commended the Order as a measure that will force agencies to cut down on overly prolific regulations, and inject transparency into the regulatory process. On the other hand, critics argue that the Order will increase the scope of judicial review,

significantly delay the regulatory process to the detriment of needed regulations, and allow the White House to dictate what traditionally have been agency decisions on health and safety issues. Environmentalists argue that by requiring agencies to identify the "specific market failure," the Order shifts the focus away from identifying threats to public health and safety and will delay the regulatory process by adding yet another hurdle for agencies to clear.

The Order is widely viewed as a response to the rules and guidance practices of the Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA"). These agencies may be more reluctant to rely on guidance for fear that these documents will become open to judicial review (e.g. if OMB treats guidance like regulatory actions, courts may do the same).

Whether the Order's requirements will slow down the regulatory process, as EPA has argued, is hard to determine. On one hand, it is not inconceivable that EPA or OSHA's regulatory priorities will clash with OMB and OIRA's, especially given the Order's emphasis on "specific market failures." The result may be an inter-agency battle that ultimately slows down not only the promulgation of regulations, but also the guidance which helps to implement the regulations.

Whatever the outcome, it is important for clients to be aware of the EO, and the potential changes it may bring with respect to agency guidance. Clients should generally expect less guidance, or at a minimum more carefully vetted guidance, to come from EPA and OSHA.

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ENVIRONMENTAL LAW PRACTICE

Kelley Drye's Environmental Law Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

FOR MORE INFORMATION

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