

## President Bush Increases Political Control Over Executive Agency Policy Initiatives

On January 18, 2007, President Bush signed Executive Order 13422 that amends established procedures within the Executive Branch for planning and reviewing agency policy, places more political control over policy implementation, including procurement regulations and guidance, and creates a new opportunity for the public to weigh in on policies issued in the form of agency guidance. E.O. 13422 implements three key changes: 1) mandates that one of the agency's Presidential Appointees serve as the agency Regulatory Policy Officer (RPO); 2) further consolidates the White House's regulatory review function by vesting approval authority in the agency Regulatory Policy Office; and 3) extends the planning and review process set forth in the Order to agency guidance documents.

President Clinton established the internal agency regulatory review process in 1993 through E.O. 12866 (1993 Executive Order) in order to simplify regulations and minimize the potential for uncertainty and litigation in this area. The 1993 Executive Order provided twelve principles for agencies to apply in promulgating regulations. These principles include, for example, identification of the problem the regulation is intended to address, use of qualitative and quantitative cost/benefit measurements in determining the need for regulatory action, assessment of alternatives to regulatory action, selection of the appropriate type of regulatory action, and consideration of the cost of enforcement and compliance. Through a prior amendment to E.O. 12866, the President consolidated authority over rulemaking within the White House by transferring the regulatory advisor function of the Office of the Vice President to the Executive Office of the President and the Director of the Office of Management and Budget (OMB). Accordingly, OMB reviews agency rulemaking for consistency with applicable law, the President's priorities, and the principles set forth in the Executive Order, as well as coordinates regulatory action to prevent interagency conflicts. Within OMB, the Office of Information and Regulatory Affairs (OIRA) reviews individual regulations and assists the President and his regulatory advisers plan regulatory action. E.O. 13422 further strengthens the President's control over agency policy implementation by requiring that each agency's RPO be a Presidential Appointee and prohibiting the commencement of rulemaking without the approval of the agency's Regulatory Policy Office unless specifically authorized by the head of the agency.

Substantively, E.O. 13422 has a far-reaching effect because it extends the scope of the 1993 Executive Order to agency policy initiatives and actions defined as guidance documents that do not rise to the level of regulation. For example, before issuing guidance documents, agencies must now consider and base decisions on the best reasonably obtainable information concerning the need for and consequences of the intended guidance document. Moreover, agencies must now avoid issuing guidance documents that are inconsistent, incompatible, or duplicative of those of other agencies, tailor guidance documents to impose the least burden on society, and draft guidance documents to minimize the potential for uncertainty. In addition, E.O. 13422 requires each agency to include in its annual Regulatory Plan an estimate of the combined aggregate costs and benefits of all its regulations planned for the calendar year to prioritize action.

More importantly, OMB must review agency guidance documents and each agency must submit to OIRA advance notification of any significant guidance documents, which the Executive Order defines as a guidance document disseminated to regulated entities or the general public that may be reasonably intended to:

- A. Lead to an annual effect of \$100 million or more or adversely affect in a material way the

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- 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 the Executive Order.

In sum, E.O. 13422 provides the President with far greater oversight of administrative policy implemented through agency action and is not limited to planning of regulations intended to have the force and effect of law. Although the Office of Federal Procurement Policy within OMB is currently responsible for coordinating and implementing procurement policy, these rules ensure that agencies, including the Department of Defense and the General Services Administration, cannot avoid regulatory oversight by imposing policy decisions through guidance documents.

Regulated industries, including government contractors, should welcome the President's action. Companies have the opportunity to discuss policy initiatives with OMB from a perspective that may differ from the more parochial concerns of the agency. More importantly, as the agency's Regulatory Policy Officer must be a political appointee, there is a greater likelihood that the RPO will be sensitive to larger policy objectives of the Administration in the regulatory planning review process.

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