

Presidential Memorandum Directs Evolution in Regulatory Review

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Among the flurry of executive actions signed by President Biden last week on inauguration day was a presidential memorandum aiming to revise the regulatory review process. Titled “[Modernizing Regulatory Review](#),” the memo is directed at the heads of executive departments and agencies and has dual focuses that show the Biden Administration’s commitment to strengthening key tenets of regulatory review while enhancing the focus on equitable and other considerations in the process. Though it garnered less attention than other actions issued simultaneously, this memo signals President Biden’s ambitious regulatory agenda and may have far-reaching effects that pervade the regulatory process.

First, the memo reaffirms the principles articulated in two previous Executive Orders (EOs)—[12866](#) and [13563](#), issued by Presidents Clinton and Obama, respectively—that have governed the White House Office of Management and Budget’s (OMB) review of agency actions. EO 12866, issued in 1993, provides for centralized regulatory review by directing agencies to submit “significant regulatory actions” to the Office of Information and Regulatory Affairs (OIRA) within OMB for review. EO 13563, likewise, sought to modernize the regulatory process by encouraging inter-agency coordination of regulatory activities and requiring consideration of anticipated costs as well as benefits—including those difficult to quantify, such as “human dignity”—of proposed rulemakings using best available methods supported by objective data.

Second, the memo seeks to ensure that “the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations” by directing OMB to develop a slate of recommendations to improve the process. Specifically, OMB’s assignments include:

- Revising OMB Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366 (Oct. 9, 2003), the guidelines governing economic impact analysis of agency regulatory actions, to bring them in line with modern scientific and economic analytical developments and ensure the review process “fully accounts for regulatory benefits that are difficult or impossible to quantify, and

does not have harmful anti-regulatory or deregulatory effects”;

- Developing procedures to factor in “the distributional consequences of regulations” to ensure appropriate benefits and avoid “inappropriate[] burden” of regulatory actions on “disadvantaged, vulnerable, or marginalized communities”;
- Considering a more proactive role for OIRA to work with agencies to advance regulatory initiatives with potentially significant benefits; and
- Identifying measures to “promote the efficiency, transparency, and inclusiveness of the interagency review process” and provide for the review of guidance documents.

Each of these items potentially could lead to important changes in how the Administration reviews regulatory actions. For instance, highlighting the “distributional consequences” of agency actions could shift the calculus of whether a regulation’s benefits outweigh its costs based on who is expected to bear the brunt of those costs. This measure may dovetail with President Biden’s proclaimed commitment to furthering equity, including environmental justice. Additionally, staking out a more affirmative role for OIRA could lead to better coordination of regulatory initiatives and approaches across agencies, though the memorandum provides little clarity on what form such a “proactive role” may take in practice. Lastly, although the memo is fairly open-ended as to what the prescribed “efficiency, transparency, and inclusiveness” measures may entail, it will bear close attention to see how OMB squares this directive with agency actions under Trump Administration directives, including [EO 13891](#) that also targeted enhanced transparency and centralized review of agency guidance documents.

Exactly how the memorandum will be implemented should start to come into focus as the Senate considers President Biden’s nominee for OMB Director, Neera Tanden, and a nominee to lead OIRA is named. On its face, however, the memorandum appears to stake out the Biden Administration’s position on centralized regulatory review as striking a balance between ardent defenders of the cost-benefit analysis engrained in EO 12866 and progressive advocates who have pushed for a greater focus on unquantifiable benefits in regulatory actions.

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