BNA, INC.

DAILY REPORT FOR EXECUTIVES

BNA Employee-Owned Since 1947

REPORT

Government Operations

Regulatory Review

Former Office of Management and Budget General Counsel Alan Charles Raul sees President Obama's executive order subjecting new regulations to cost-benefit analysis and reviewing existing regulations as potentially aligning him (and OMB) more closely with those who want to see federal regulations strictly justified to preserve free enterprise and innovation.

Moreover, Raul says the application of the president's regulatory review principles to independent agencies is potentially very important if those agencies comply with the president's wishes (or if Congress mandates that they do so). The 120-day retrospective review of existing significant regulations should empower businesses to communicate where they see opportunities to rationalize existing rules.

Obama Review of Regulatory Burden to Be Weighed in Cost-Benefit Analysis

By Alan Charles Raul

Alan Charles Raul is a partner in the Washington office of Sidley Austin LLP. Raul served as general counsel of the Office of Management and Budget in the administrations of Presidents Ronald Reagan and George H. W. Bush.

Businesses typically contend that federal agencies should not adopt costly new rules where the resulting benefits to society would not be commensurate with the corresponding costs that would be imposed on businesses, governments, and the public. So companies regulated by the federal government are watching closely the outcome of President Obama's executive order on ''regulatory review.''

In brief, the president not only made a commitment to subject new regulations to cost-benefit analyses, he

 ISSN 0148-8155

ordered agencies to undertake a retrospective 120-day review of all *significant* existing regulations ''to determine whether any such regulation should be modified, streamlined, expanded or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.'' Importantly, the president has encouraged independent agencies—such as the Federal Communications Commission, Federal Trade Commission, Securities and Exchange Commission and presumably the new Consumer Financial Protection Bureau under the Dodd-Frank Wall Street Reform and Consumer Protection Act—to comply voluntarily with these principles.

Ultimately, the impact of President Obama's new executive order streamlining or eliminating federal regulations will depend on the good faith implementation by federal agencies, and the rigor of White House (and perhaps congressional) oversight.

However, the fact remains that regulated entities can choose to take the president at his word and consider actively engaging with the administration to promote more aggressive cost-benefit analysis and reconsideration of existing regulations.

Background of Latest Review. On Jan. 18, 2011, Obama issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' (12 DER AA-1, 1/19/11)[1] and authored an article on the need to issue more balanced regulations that was published on the same day in the *Wall Street Journal*, ''Toward a 21st Century Regulatory System.'' [2]

On Feb. 2, the director of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), Cass Sunstein, issued guidance on the president's new mandate to all departments and agencies—including independent agencies (24 DER A-12, 2/4/11). [3]

The new executive order leaves in place, and builds on, President Clinton's 1993 Executive Order 12866 (''Regulatory Planning and Review'').[4] In that order, President Clinton continued the process of centralized White House review of regulations that was formally established in 1981 by President Reagan. In practice, the significance of this succession of executive orders is to empower OMB (specifically, OIRA) to force agencies to justify their regulations as necessary, cost-effective and minimally burdensome on the regulated entities. Cost-benefit analysis is the tool—or cudgel, some would say—that OMB uses to rein in excessive regulation. Businesses typically argue that agencies should not adopt costly new rules where the resulting benefits to society would not be commensurate with the corresponding costs that would be imposed on businesses, state and local governments, and the public.

Paean to Business and Innovation. Writing in the *Wall Street Journal*, Obama recognized that, on occasion, ''rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs.'' He did not mince words about the role of business in promoting social well-being. He said: ''For two centuries, America's free market has not only been the source of dazzling ideas and path-breaking products, it has also been the greatest force for prosperity the world has ever known. That vibrant entrepreneurialism is the key to our continued global leadership and the success of our people.''

Obama described the purpose of his new executive order as follows: ''[W]e are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens . . . . We're also getting rid of absurd and unnecessary paperwork requirements that waste time and money. We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation.''

He closed out his article stating, ''This is the lesson of our history: Our economy is not a zero-sum game. Regulations do have costs; often, as a country, we have to make tough decisions about whether those costs are necessary. But what is clear is that we can strike the right balance. We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another.''

Review, Cost-Benefit Analysis; Evaluating Effects. Obama's new order does not really change any of the substance from President Clinton's earlier mandate for cost-benefit analysis, regulatory planning, science-based regulation, conduct of risk assessments, and choice of least burdensome regulatory alternatives. While Obama does not mention the concept of choosing regulation only where it is necessary because of a so-called ''market failure,'' his express endorsement of the principles of the Clinton order would seem to approve that proposition.[5] According to a 1996 guidance document for conducting economic analysis under Executive Order 12866,[6] ''market failures'' are typically deemed to exist if ''[a]n externality occurs when one party's actions impose uncompensated benefits or costs on another'' (such as environmental costs), or where there is asymmetric or inadequate access to relevant information, or where market power or natural monopolies are present.

The Regulatory Philosophy. The Obama order also does not specifically mention the ''regulatory philosophy'' embedded in the Clinton order.

President Clinton incorporated this statement of the animating philosophy for regulatory review: ''Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such

[1] http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

[2] http://on.wsj.com/gdoMWc.

[3] http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

[4] http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

[5] In a 2009 executive order, Obama did formally revoke President George W. Bush's revision to the Clinton executive order (21 DER A-10, 2/4/09; http://www.reginfo.gov/public/jsp/Utilities/EO_13497.pdf). The Bush order had expressly required the identification of a ''market failure'' to justify the need for new regulations. The Bush order had also considerably strengthened the hand of OMB. Significantly, however, the ''market failure'' discussed in the above text above is derived from Clinton-era guidance from OMB and thus is presumably unaffected by Obama's revocation of the Bush amendment to the Clinton order. It would appear reasonable to infer that President Obama's new regulatory review order is something of a repudiation of his own 2009 order.

[6] http://www.whitehouse.gov/omb/inforeg_riaguide.

  DER ISSN 0148-8155

as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.''

It would be difficult to argue, however, that Obama's omission of the words ''regulatory philosophy'' in his new order was intended to create any space between his approach to regulatory review and the philosophy to sound rulemaking embodied in the earlier orders of Presidents Clinton and Reagan.

Accounting for 'Human Dignity.' The only marginally new element of the Obama order concerns how intangible impacts and harms will be weighed in Obama-mandated cost-benefit analyses. Whereas the Clinton order spoke of the need to consider ''distributive impacts'' and ''equity,'' Obama has expanded this list of intangible factors as follows: ''Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including *equity, human dignity, fairness, and distributive impacts*.'' In essence, ''human dignity'' is now an express element to be factored into regulatory cost-benefit analysis. Though some fear this will become a ''fudge factor'' permitting agencies to balance an intangible against heavy tangible costs, it is hard to argue that ''human dignity'' should not be taken into account in deciding what and whether regulation is appropriate. The question really becomes whether the regulatory agency can articulate a compelling, qualitative rationale for how ''dignity'' is accounted for in a proposed regulation. In other words, how does ''human dignity'' relate to the risks the regulation would abate, or how does ''human dignity'' relate to the benefits the regulation would generate? Naturally this is difficult, but the executive orders presuppose that it is not impossible, and that it is worth attempting as rigorously as possible.

Application to Independent Agencies In Clinton's executive order, he incorporated independent agencies only insofar as the annual ''regulatory plan'' was to be included in the government's ''unified regulatory agenda.'' This extension of some centralized (OMB) regulatory review to independent agencies went beyond the Reagan order, which did not purport to apply to them at all.

The Clinton order contemplated that independent agencies would provide at least the following information to OMB for publication in the *Federal Register*:

- a statement of the agency's regulatory objectives and priorities and how they relate to the president's priorities;
- 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;
- a summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- a statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency.

There is no significant evidence that independent regulatory agencies have complied with the spirit of these Clinton cost-benefit and regulatory review principles.

Retrospective Analysis Encouraged in Guidance. Obama's new order does not expressly impose regulatory review or the dictates of cost-benefit analysis on independent agencies. However, in his explanatory guidance, OIRA Director Cass Sunstein states the following: ''Executive Order 13563 does not apply to independent agencies, *but such agencies are encouraged to give consideration to all of its provisions*, consistent with their legal authority. In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules.''

It is important to note that Director Sunstein's guidance memorandum was specifically addressed to independent agency heads, who will have to decide whether or not to flout the president's wishes on cost-benefit analysis of new and existing (significant) regulations.

It is also worth noting that Congress has begun to focus on the impact of regulations issued by independent agencies. At a Jan. 26, 2011, hearing, Chairman Cliff Stearns (R-Fla.) of the House Committee on Energy and Commerce, Subcommittee on Investigations and Oversight Subcommittee expressed concern about the costs of regulations issued by independent agencies (18 DER A-14, 1/27/11). A release issued by the Committee noted the following with respect to such agency rules:

> In the hearing, Sunstein confirmed that rules issued by independent agencies, such as the FCC, CFTC, CPSC, FERC, FTC, SEC, FDIC, the Federal Reserve, the NRC, among others, have apparently been placed beyond the purview of the President's review, and thus will not be affected by this initiative. ''These agencies promulgate major rules that cost billions of dollars, yet are not subject to the President's Executive Order,'' concluded Stearns. ''In light of this, I plan to look into legislation to make sure that these agencies do not enact regulations that harm job creation. In addition, the Oversight and Investigations Subcommittee will continue to hold these independent agencies accountable for the rules and regulations they promulgate.'' During the hearing, Sunstein also promised that any new regulations related to the massive new health care law will be subjected to review by OIRA, and promised to keep the subcommittee informed of the details of that review.'' [7]

Choosing Least Burdensome Alternatives. In addition, it should be recalled that existing statutes also subject all agencies—including independent agencies—to some obligations to conduct cost-benefit analyses for major rules, and to choose the least burdensome alternatives among the viable regulatory options. Examples of ''regulatory'' statutes that apply to independent agen-

[7] http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8169.

cies include the Regulatory Flexibility Act,[8] the Paperwork Reduction Act, [9] and the Congressional Review Act.[10]

Congress may also consider legislation that would require major rules to be affirmatively approved in law before they can go into effect (14 DER A-15, 1/21/11). This would reverse the current presumption under the Congressional Review Act, which exposes major rules to expedited congressional consideration for possible invalidation under a joint resolution of disapproval (which would then, of course, require presidential signature to actually reject the rule). The bill, known as the REINS Act,[11] would provide that new major rules cannot take effect unless Congress passes a joint resolution approving the regulation within 90 days of the rule's submission to Congress. ''Major rules'' are regulations that judged by OMB to impose annual economic costs in excess of $100 million or otherwise have significant economic or anticompetitive effects.

Obama's Review of Significant Existing Regulations. Obama has provided regulated entities a chance to communicate their view of possible opportunities for improvement of or relief from significant existing regulations to all federal agencies (including independent ones who follow the president's wishes). ''Significant'' regulations are essentially those that could have an impact of $100 million or more on the economy, or have a materially adverse impact on a sector of the economy (or productivity, jobs, competition, etc.), or raise novel or policy issues.

The president's executive order describes the 120-day retrospective review as follows:

> For *existing rules*, (a) to facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.
>
> (b) Within 120 days of the date of the order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Long-Standing Rules, Public Participation. OIRA's guidance explains the process for retrospective review and public participation:

> Agency plans should not, of course, call into question the value of long-standing agency rules simply because they are long-standing. Many important rules have been in place for some time. The aim is instead to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Agencies should explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not. Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken. Agency review processes should facilitate the identification of rules that warrant repeal or modification.
>
> ***
>
> Public participation. Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before preliminary plans are written, for example, the public might be asked to provide comments on how such plans might be devised and to help identify those rules that might be modified, streamlined, expanded, or repealed.

Conclusion. Obama has recently placed himself squarely in the camp of those who believe that federal regulations must be rigorously justified, and that excessive regulation can stifle free enterprise and innovation. His new executive order (and *Wall Street Journal* article) will help empower OMB to rein in overly burdensome regulations, and provide a more meaningful basis for regulated entities to express their concerns to the regulatory agencies and the White House.

Moreover, the application of the president's regulatory review principles to independent agencies is potentially very important if those agencies comply with the president's wishes (or if Congress mandates that they do so). The 120-day retrospective review of significant regulations should empower business to communicate where they see opportunities to rationalize existing rules.

Finally, the success of the president's new initiative to promote cost-effective/less burdensome regulations will depend on the good faith and details of implementation by federal agencies, and the stringency of OMB review. Regulated entities certainly have an opportunity, however, to hold the executive branch accountable to the president's sound regulatory principles.

---

[8] 5 U.S.C. §§ 601-612 (*see also* CRS Report: *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, Feb. 12, 2008, http://assets.opencrs.com/rpts/RL34355_20080212.pdf).

[9] 44 U.S.C. § § 3501et seq. applies the Paperwork Reduction Act to independent regulatory agencies, except that under 44 U.S.C. § 3507(f) the body heading the independent agency may vote to void any disapproval by the Director of OMB. Note that the cost-benefit provisions of the Unfunded Mandates Reform Act do not apply at all to independent regulatory agencies. 2 U.S.C. § § 658(1), 1502(1).

[10] 5 U.S.C. §§ 801-808 (*see also* CRS Report: *The Congressional Review Act and Possible Consolidation into a Single Measure of Resolutions Disapproving Regulations*, Jan. 26, 2009,http://assets.opencrs.com/rpts/R40163_20090126.pdf).

[11] *See* website of Rep. Geoff Davis discussing the REINS Act – ''Regulations from the Executive in Need of Scrutiny,'' which was reintroduced in the 112th Congress on Jan. 20, 2011 as H.R. 10, http://geoffdavis.house.gov/Legislation/reins.htm ; Sen. Demint press release, Sept. 22, 2010, http://demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=8e6f5487-9dd9-42a0-8a5a-9560e3c6ddfe; (*see also* J. H Adler, ''The Regulations from the Executive In Need of Scrutiny (REINS) Act,'' Jan. 14, 2011, http://www.fed-soc.org/publications/pubid.2074/pub_detail.asp).

  DER ISSN 0148-8155