Insight

Biden's Day One Regulatory Actions Offer a Surprise

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EXECUTIVE SUMMARY

- President Biden's day one executive actions dealing with regulatory policy included a memorandum aiming to change how the White House reviews regulations.
- Those changes are aimed toward emphasizing the benefits of regulation and opens the door to a less-balanced review of benefits and costs.
- One of the president's other actions unwound most of the significant regulatory executive orders of the Trump Administration.
- The tone of the actions is clear: Regulations will be a primary method of the Biden Administration's agenda implementation.

INTRODUCTION

President Biden wasted no time using executive action to reverse the most significant of the Trump Administration's executive orders (EOs) dealing with regulatory policy. Within hours of taking office, the president had rescinded EOs that had established the regulatory budget, regulatory review teams at federal agencies, and improved transparency of guidance documents. These actions were all expected.

There was one surprise, however, as the president issued a memorandum that will likely have a noticeable impact on how the White House reviews regulations. It also signals that the Biden Administration plans to lean heavily on regulation to advance its policy agenda.

REGULATORY REVIEW MEMORANDUM

The memorandum, "Modernizing Regulatory Review," instructs the director of the Office of Management and Budget (OMB) to work with federal agencies to develop recommendations for changing how OMB's Office of Information and Regulatory Affairs (OIRA) reviews regulations from executive agencies.

OIRA has conducted regulatory reviews for decades. Its primary function in this role is to ensure that agencies properly assess a regulation's costs and benefits to society. The Biden memorandum appears to be based on an unfounded premise that this review is more concerned with costs than benefits. There is little evidence of this, as administrations of both parties have largely been able to issue regulations reflecting their priorities without restraint. For example, the Obama Administration – which viewed increased regulation as necessary – issued $890 billion in regulatory costs during its two terms. The Trump Administration, on the other hand, prioritized limiting regulatory costs and issued $40.4 billion in net new costs over its four years. Since regulatory review is implemented through executive order, rather than statute, administrations can largely bend its processes toward their goals.

Regardless, the Biden memorandum seeks recommendations that focus more on bolstering the benefits side of the equation than the costs. A key part of the memorandum is to develop recommendations that would revise OMB's Circular A-4, the nearly 20-year-old document standardizing how agencies conduct benefit-cost analysis, to fully account "for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects." There is no mention of costs that are similarly difficult to quantify. Another component of the memorandum directs the OMB director to "consider ways that OIRA can play a more proactive role in partnering with agencies to explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits."

The implication of the memorandum is clear: agencies should focus on regulatory benefits, and OIRA needs to rejigger its existing procedures to help them. While regulations should be more beneficial to society to justify costs, the seeming shift of priorities toward benefits rather than a balanced analysis appears aimed directly at justifying a significant ramp up in federal regulatory activity over the next four years.

EXPECTED ACTIONS

Though the regulatory review memorandum was something of a surprise, most of the executive actions issued on day one were not. Included in the cache of orders issued by the new president was the "Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation."

As the name implies, this order revoked several EOs issued during the Trump Administration dealing with regulatory policy. The foremost of these is EO 13,771, which established the regulatory budget and the Trump Administration's guiding regulatory principle of "one in, two out." This EO was essential to the success of the Trump Administration in limiting new regulatory costs, as it incentivized agencies to find existing regulations to modify or rescind in order to issue new significant regulations. Similarly, the new Biden EO revoked EO 13,777 , which created regulatory review teams at agencies to find candidate existing regulations.

The new EO states that revoking these Trump EOs is necessary to prevent the new administration from limitations in its ability to respond to the COVID-19 pandemic, economic recovery, racial injustices, and climate change. These justifications seem tenuous considering the wide exemption capabilities written into the Trump EOs. In reality, the objection is to requiring agencies to consider existing rules when issuing new regulations.

The new EO also revoked two Trump EOs aimed at making regulatory compliance more transparent. The first of these, EO 13,891, required agencies to post all effective guidance documents on an agency website so that it was easy to find. It also stated that any guidance not on the website would be considered invalid. The second, EO 13,892, asked agencies to be lenient when taking enforcement actions that stemmed from guidance documents or unannounced policy interpretations. Critics of these EOs suggest they incentivized bad behavior from businesses, though there is scant evidence to support this view.

CONCLUSION

President Biden's day one regulatory executive actions set a clear tone for his administration. Regulations will be a major – if not the primary – means of implementing the administration's agenda.