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President Biden Issues Executive Order Making Important Changes to How Agencies Weigh the Costs and Benefits of Regulatory Actions

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On April 6, 2023, President Biden signed an executive order entitled “Modernizing Regulatory Review” (the “Order”). The Order makes a number of significant changes to the process by which the White House Office of Information and Regulatory Affairs (“OIRA”) reviews significant regulatory measures. Under executive orders issued by previous presidents, all “significant regulatory actions” are subject to OIRA review, and agencies must perform a cost-benefit analysis of the action before it is undertaken. President Biden’s new Order narrows the definition of what constitutes a “significant regulatory action,” including by doubling the monetary threshold of annual effects on the national economy (raising it from $100 million to $200 million) and adjusting the threshold based on changes in Gross Domestic Product going forward.

The Order also directs the White House Office of Management and Budget (“OMB”) to propose revisions to OMB Circular A-4, which is the primary guidance document governing how executive branch agencies conduct cost-benefit analyses. On April 6, OMB issued its proposed revisions. They include changes to –

- lower discount rates that convert future costs and benefits into current dollars;
- provide greater weight to the distributional effects of a regulatory action; and
- encourage the assessment of even highly uncertain effects of regulatory action.

If finalized, OMB’s proposed revisions would represent the most significant change to how agencies conduct cost-benefit analysis since Circular A-4 was first issued in 2003. In combination with the changes effected by the Order, OMB’s proposal would likely lead to more and faster regulatory action, by, for instance, reducing OIRA oversight and relieving agencies of their obligation to prepare cost benefit analyses for certain regulatory measures. Similarly, many of OMB’s changes could result in agencies more frequently concluding that a regulatory measure is cost-justified. For example, because the costs of new regulations are often incurred in the near-term, while the benefits often accumulate more gradually over longer periods of time, the lower discount rates OMB proposes may mean that agencies will be more likely to find that the benefits of a regulatory action outweigh its costs. This is particularly true for regulations that address longer term phenomena, such as climate change, which is an example OMB discusses in its proposal.

OMB’s proposed changes could also lead to greater litigation vulnerability for certain regulatory measures. In particular, a court may be more likely to find an action arbitrary and capricious if it is based on highly uncertain benefit assessments that are identified by commenters during the notice and comment process. Some of OMB’s revisions to how costs and benefits are weighed could create opportunities for commenters to challenge

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agencies' analyses.

By its terms, the Order only applies to "executive departments and agencies." Independent agencies, such as the FTC, SEC, and FCC, are apparently not covered. That makes sense because they are not subject to the regulatory review process that President Biden's Order is modifying. Independent agencies will thus be largely unaffected by many of the changes the Order is introducing. However, in some instances, independent agencies voluntarily follow the guidance set forth in Circular A-4, or otherwise interact with OIRA regarding cost-benefit analyses, as in connection with the Congressional Review Act. To the extent independent agencies follow the guidance in Circular A-4, their regulatory analyses may therefore be affected by the proposed changes.

Interested parties have until June 6 to submit comments on OMB's proposed changes to Circular A-4.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Administrative Law and Regulatory Practice or Public Policy groups, or the following authors in Washington, D.C.:

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