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PRESIDENTIAL EXECUTIVE ORDER ON REGULATION SUGGESTS U.S. RULEMAKINGS WILL BE EXAMINED MORE CLOSELY

To Our Clients and Friends:

Last Tuesday, January 18, President Obama signed an Executive Order outlining several ways in which federal agencies should more closely scrutinize both existing regulations, and new rules under consideration. The Executive Order identifies several issues that parties should consider bringing to the attention of agency officials when participating in rulemakings.

The Executive Order enumerates numerous substantive considerations that agencies should make in the rulemaking process. Agencies should, for example, base their conclusions on "the best available science," "take into account benefits and costs, both quantitative and qualitative," and "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." Section 1(a). Where appropriate, agencies should consider qualitative values such as "equity, human dignity, fairness, and distributive impacts." Section 1(c). The Order emphasizes the need for agencies to coordinate efforts with other agencies to avoid regulation that is redundant or inconsistent, and to promote innovation. Section 3.

The Order requires agencies to adopt flexible approaches toward regulation when feasible: "These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible." This is preferred, the Order states, because it can "maintain flexibility and freedom of choice for the public." Section 4.

The Order also mandates that agencies adhere to several procedural measures during rulemakings, with particular emphasis on public participation in the rulemaking process. Before proposing a rule, agencies ordinarily should seek the views of those likely to be affected. Section 2(c). Once a rule is proposed, all aspects of the rule should generally be available for comment for at least 60 days, including "relevant scientific and technical findings." Section 2(b). Agencies should also conduct a periodic analysis of existing rules; within 120 days of the Order's issuance, agencies are to develop and submit to the White House Office of Information and Regulatory Affairs ("OIRA") a plan for the periodic review of regulations. Section 6.

Businesses and business associations should keep these principles and standards in mind when discussing regulatory proposals with agency officials and when submitting rulemaking comments. In rulemakings that involve scientific evidence, for instance, commenters should emphasize the quality of the scientific evidence they present. Likewise, economic evidence and other information bearing on a rule's costs and benefits should be given careful consideration and emphasis where appropriate in rulemaking comments.

By its terms the Order applies to all executive agencies except for independent regulatory agencies such as the Securities and Exchange Commission and Consumer Product Safety Commission. Section 7(a). Parties participating in rulemakings before independent agencies should nonetheless consider invoking the Order's principles in written submissions and meetings with officials at those agencies.

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The Order also expressly states that it provides no private right of action for parties who believe an agency has failed to follow the Order's prescriptions. Section 7(d). However, in circumstances where an agency does not appear to be giving due weight to the factors expressed in the Executive Order, interested parties should consider bringing their concerns to the OIRA staff, who are responsible for reviewing regulations prior to agency adoption.



Gibson Dunn's Administrative Law and Regulatory Practice Group has an exceptional capacity to represent clients seeking to challenge or defend government regulation or bring about appropriate regulatory action. The group comprises lawyers from an array of practice groups in the firm, many of them with high-level government experience. The Group is available to assist in addressing any questions you may have regarding the Executive Order and its application to pending rulemakings or existing regulations. Please contact the Gibson Dunn attorney with whom you work, or any of the following:

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