

# The Regulators' New Marching Orders

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## In brief...

President Biden has moved quickly to put his stamp on regulatory policy and practice. While his Inauguration Day actions acknowledge longstanding regulatory review practices, they also foreshadow a move away from the bipartisan emphasis on evidence-based policy and signal a much more progressive, and less humble, approach to regulating.

By: Susan E. Dudley | January 27, 2021

President Biden signed several actions addressing regulations on his first evening in office: executive orders [revoking several Trump regulatory process orders](#), and “[Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#),” as well as a memorandum on “[Modernizing Regulatory Review](#).” His chief of staff also issued a memorandum [freezing regulations](#) pending review.

None of these was unexpected, though combined they signal a sea change in regulatory policy and process.

## Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation

Presidents need not seek public comment or consent from other branches of government to issue executive orders, as long as the action is supported by a statutory delegation or the president’s own constitutional authority. Likewise, they can revoke orders with the stroke of a pen, and that’s what President Biden did with Trump’s regulatory process orders on Inauguration Day.

Biden’s [E.O. 13992](#) revokes “harmful policies and directives” that it finds hinder the federal government’s flexibility to confront challenges including “the pandemic, economic recovery, racial justice, and climate change.” Not surprisingly, it repeals [E.O. 13771](#), which capped the costs of new regulations and required agencies to eliminate two regulations for every new one issued. It also removed several other Trump orders, two of which were less obviously inconsistent with the Biden agenda, and might have been useful to the incoming team. Trump’s [E.O. 13777](#) established teams in each agency responsible for reviewing the stock of existing regulations. Every president [has struggled](#) to motivate agencies to focus attention on evaluating regulatory impacts, not only to clean out the “[sludge](#)” of regulations that [accumulate](#) over time,

but to determine [what works](#) and what doesn't. Trump's order had the potential to incentivize and reward such evaluation. Also revoked is [E.O. 13891](#), which required agencies to [seek public input](#) when developing significant new guidance and to make all their guidance available online "in a single, searchable, indexed database that contains or links to all guidance documents in effect." Law and policy experts have worried about lack of [transparency and abuse](#) of guidance for decades and generally supported the Trump initiative. Since Biden's order directs OMB and agencies to "promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing" the revoked orders, agencies have already begun to walk back from the transparent practices they [had adopted](#) in response to the order, including the posting of guidance documents in a central location.

## Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

Biden's [E.O. 13990](#) "directs all executive departments and agencies to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with...important national objectives [related to environmental protection, environmental justice, and the creation of the well-paying union jobs] and to immediately commence work to confront the climate crisis." This order gets specific about which Trump-era regulations to revise (two of which I discuss [elsewhere](#)), as well as actions to take on national monuments and wildlife refuges. It wisely reestablishes an interagency working group on quantifying the [social cost of carbon](#) but provides unusual specificity for an executive order on [how](#) that figure should be calculated. The order signals a much [more progressive approach](#) to regulation than previous Democratic administrations and [diverges from past regulatory practices](#) that focus on balancing competing factors. It also hints that certain groups will be more welcome to engage in regulatory policy than others, directing agencies to consult with "State local, Tribal, and territorial officials, scientists, labor unions, environmental advocates, and environmental justice organizations."

## Modernizing Regulatory Review

This [memorandum](#) begins by reaffirming the basic principles set forth in [E.O. 12866](#) (Clinton 1993) and [E.O. 13563](#) (Obama 2011), noting that "when carried out properly, that process can help to advance regulatory policies that improve the lives of the American people." This is [reassuring](#) because these orders reflect the [nonpartisan goal](#) of trying to understand the effects of regulatory policies before they are issued, and to ensure those policies do more good than harm. This ex-ante regulatory impact analysis is a key element of what I've called "[regulatory humility](#)."

[Regulatory humility] requires a disciplined approach to understanding regulatory impacts and tradeoffs; maintaining practices that encourage accountability; a commitment to learning, feedback, and evaluation; an openness to diverse views and inputs; reliance on flexible regulatory tools; and an appreciation that even the most well-intentioned and intelligent regulators will lack essential information on how policies will work in practice. Agencies need to balance competing considerations, and conduct a holistic, evidence-based

assessment of all regulatory impacts. The time-tested principles in President Clinton's E.O. 12866 and President Obama's E.O. 13563 show us how.

However, other parts of the Memorandum exude confidence— even hubris— regarding the federal government's ability to act swiftly to address a series of challenges. While it emphasizes some considerations that are worth focusing on more rigorously, especially how regulatory actions affect different populations, the order exhibits no concern for the potential [unintended consequences](#) of acting too aggressively.

Combined, these orders and memorandum foreshadow a move away from the bipartisan emphasis on evidence-based policy, and from regulatory humility, [which](#) “calls for a recognition that even the smartest regulators with the most altruistic motives may not have the information needed to achieve their goals without generating unintended consequences that undermine the desired outcomes, cause other negative effects, or both.”

No one would give President Biden's predecessor high marks for humility. But neither should we be comfortable with a regulatory regime that never doubts its own righteousness. It's something to keep an eye on in the months to come.