

Distributional Language in Regulatory Executive Orders

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In brief...

To achieve the goals outlined in Biden's Modernizing Regulatory Review Memorandum, federal agencies will likely build on the distributional language of the executive orders highlighted in this commentary.

For decades, presidents have used their executive power to guide the regulatory process. President Biden continues this trend with his [Modernizing Regulatory Review Memorandum](#), which charges federal agencies with amending the regulatory review process to address the unique challenges that our country faces today. The memorandum directs agencies to provide “concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.” In particular, it seeks “procedures that take into account the distributional consequences of regulations... to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”

The following timeline examines some key regulatory executive orders that provide a blueprint for distributional impact analysis in regulatory review. We see that early regulatory EOs are concerned with the net economic impact of regulations on society. However, beginning with Clinton’s EO 12866, regulatory EOs have evolved to include various impacts of regulations on vulnerable populations. To achieve the goals outlined in Biden’s memorandum, federal agencies will likely draw on the distributional language highlighted below.

Laying the Foundation for Regulatory Impact Analysis

Executive Order	Distributional Language
<p><i>November 27, 1974</i></p> <p><u>EO 11821:</u></p> <p>Inflation Impact Statements</p> <p><i>President Ford</i></p>	<p>Ford introduces economic analysis to the regulatory process by requiring that all major regulations and proposals emanating from the executive branch of the government be accompanied by “a statement certifying that the inflationary impact of such actions on the Nation has been carefully considered.” He empowers the director of the U.S. Office of Management and Budget (OMB) to develop criteria for identifying major regulations and proposals.</p> <p>Expired on December 31, 1977.</p>
<p><i>March 23, 1978</i></p> <p><u>EO 12044:</u></p> <p>Improving Government Regulations</p> <p><i>President Carter</i></p>	<p>Carter requires prospective and retrospective regulatory analysis. Agencies are now required to assess the costs and benefits of “<i>existing and future regulations</i>” to determine whether alternatives are more appropriate. Carter directs agencies to ensure that rules do not “impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments.”</p> <p>Revoked by EO 12291.</p>
<p><i>February 17, 1981</i></p> <p><u>EO 12291:</u></p> <p>Federal Regulation</p> <p><i>President Reagan</i></p>	<p>Reagan introduces Regulatory Impact Analysis (RIA), which must be prepared for all major rules.</p> <p>The EO defines a “major rule” as any regulation that will:</p> <ul style="list-style-type: none"> - have “an annual effect on the economy of \$100 million or more” - have a significantly negative effect on “competition, employment, investment, [or] productivity;” or - significantly increase costs for “consumers, industries, government agencies, or geographic regions.” <p>RIAs must include a description of the potential costs & benefits and a description of who is likely to bear said costs & benefits. Reagan emphasizes that regulations must “maximize the net benefits to society.”</p> <p>Revoked by EO 12866.</p>

As noted in the details above, each of the previous actions either expired or were revoked by later actions. The executive orders listed below are still in effect today.

Incorporating Distributional Impact Analysis

Executive Order	Distributional Language
<p><i>September 30, 1993</i></p> <p><u>EO 12866:</u></p> <p>Regulatory Planning and Review</p> <p><i>President Clinton</i></p>	<p>In addition to continuing his predecessors' focus on regulatory impact analysis and net benefits, Clinton asserts that equity is a factor that should be considered in cost-benefit analysis.</p> <p>Agencies must choose regulations “that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).”</p> <p>Agencies must also design their regulations in the most cost-effective manner and, “in doing so, [they] shall consider... distributive impacts, and equity.”</p>
<p><i>February 11, 1994</i></p> <p><u>EO 12898:</u></p> <p>Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations</p> <p><i>President Clinton</i></p>	<p>Clinton mandates every “federal agency [to] make achieving environmental justice part of its mission by identifying and addressing” regulations that may have a disproportionately negative effect on the health and environment of minority and low-income populations.</p> <p>The administrator of the Environmental Protection Agency (EPA) must “convene an interagency Federal Working Group” that shall “provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.”</p> <p>“Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.”</p>

	<p>“Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.”</p> <p>“Each Federal agency... shall collect, maintain and analyze information on the race, national origin, [and] income level ... for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations.”</p>
<p><i>April 21, 1997</i></p> <p><u>EO 13045:</u></p> <p>Protection of Children from Environmental Health Risks and Safety Risks</p> <p><i>President Clinton</i></p>	<p>Clinton expands the environmental justice mission by requiring agencies to consider environmental risks to children.</p> <p>“Each Federal agency... shall make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children and... shall ensure that its policies, programs, activities, and standards address disproportionate” environmental health or safety risks to children.</p> <p>All regulatory actions submitted to the Office of Information and Regulatory Affairs (OIRA) for review must include “an evaluation of the environmental health or safety effects of the planned regulation on children.”</p>
<p><i>November 6, 2000</i></p> <p><u>EO 13175:</u></p> <p>Consultation and Coordination with Indian Tribal Governments</p> <p><i>President Clinton</i></p>	<p>Clinton aims “to reduce the imposition of [regulations] upon Indian tribes.”</p> <p>“When formulating and implementing policies that have tribal implications, agencies shall:</p> <ul style="list-style-type: none"> - ...respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.... - encourage Indian tribes to develop their own policies to achieve program objectives...

	<ul style="list-style-type: none"> - where possible, defer to Indian tribes to establish standards; and... - in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.” <p>“Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”</p>
<p><i>August 13, 2002</i></p> <p><u>EO 13272:</u></p> <p>Proper Consideration of Small Entities in Agency Rulemaking</p> <p><i>President G.W. Bush</i></p>	<p>G.W. Bush encourages the consideration of small entities in the regulatory review process.</p> <p>“Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act... Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Act.”</p>
<p><i>January 18, 2011</i></p> <p><u>EO 13563:</u></p> <p>Improving Regulation and Regulatory Review</p> <p><i>President Obama</i></p>	<p>Obama emphasizes the need for distributional impact analysis in the regulatory review process. He asserts that “our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”</p> <p>“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.”</p>
<p><i>April 15, 2016</i></p> <p><u>EO 13725:</u></p> <p>Steps to Increase Competition and Better Inform Consumers and Workers to Support</p>	<p>Obama promotes competitive business practices that will improve the consumer experience for “Americans in every walk of life.”</p> <p>He explains that “certain business practices...stifle competition and erode the foundation of America’s economic vitality. The immediate results of such conduct—higher prices and poorer service for customers, less innovation, fewer new businesses being launched, and</p>

<p>Continued Growth of the American Economy</p> <p><i>President Obama</i></p>	<p>reduced opportunities for workers—can impact Americans in every walk of life. Competitive markets also help advance national priorities, such as the delivery of affordable health care... and improved access to fast and affordable broadband. Competitive markets also promote economic growth, which creates opportunity for American workers and encourages entrepreneurs to start innovative companies that create jobs.”</p> <p>“Executive departments and agencies can contribute to [competitive markets] through, among other things, pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition.”</p> <p>“Agencies shall identify specific actions that they can take in their areas of responsibility to build upon efforts to detect... anticompetitive behavior [and] to address undue burdens on competition.”</p>
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Helpful Links: <https://www.archives.gov/federal-register/executive-orders/disposition>
<https://regulatorystudies.columbian.gwu.edu/distributional-effects-regulatory-impact-analysis>
<https://regulatorystudies.columbian.gwu.edu/project-worth-watching-oira>