

EXECUTIVE ORDER EXPANDS PRESIDENTIAL POWER OVER INDEPENDENT REGULATORY AGENCIES

On February 18, 2025, President Trump issued an executive order, “Ensuring Accountability for All Agencies” (the “**All Agencies EO**”), aimed at increasing Presidential supervision and control over executive agencies. The All Agencies EO requires all executive agencies—including independent regulatory agencies—to submit “all proposed and final significant regulatory actions” to the Executive Office of the President for review prior to publication in the Federal Register. The All Agencies EO also empowers the OMB Director to adjust apportionments of Congressionally appropriated funds to independent regulatory agencies as necessary to advance the President’s policies and priorities. It is likely that the All Agencies EO will face legal challenges, primarily because many of the agencies covered by the order are expressly designated as “independent” by statute.

This briefing focuses on the All Agencies EO’s impact on the Federal financial regulatory agencies.

WHICH INDEPENDENT REGULATORY AGENCIES DOES THE EXECUTIVE ORDER COVER?

General Coverage. Pursuant to the All Agencies EO, the Office of Information and Regulatory Affairs (“**OIRA**”), a division of the Office of Management and Budget (“**OMB**”) within the Executive Office of the President, will now begin reviewing certain independent regulatory agency actions.¹ The order generally ties the scope of this OIRA review authority to the definition of “independent regulatory agency” in the Paperwork Reduction Act,² which includes (but is not limited to) bodies such as the Securities and Exchange Commission (“**SEC**”), the Commodity

¹ Exec. Order, “Ensuring Accountability for All Agencies,” Feb. 18, 2025, Section 1, <https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/>.

² 44 U.S.C. §§ 3501 et seq. (“**PRA**”); see PRA at § 3502(5) (definition of “independent regulatory agency”).

Futures Trading Commission (“**CFTC**”), the Board of Governors of the Federal Reserve System (“**Federal Reserve Board**”), the Federal Deposit Insurance Corporation (“**FDIC**”), the Office of the Comptroller of the Currency (“**OCC**”) and the Consumer Financial Protection Bureau (“**CFPB**”).

"Monetary Policy" Exclusion. Notwithstanding its general coverage, the All Agencies EO states that it “shall not apply to the [Federal Reserve Board] or to the Federal Open Market Committee in its conduct of monetary policy” and that it “shall apply to the [Federal Reserve Board] only in connection with its conduct and authorities directly related to its supervision and regulation of financial institutions.”³ The distinction between the Federal Reserve Board’s “conduct of monetary policy” and its “supervision and regulation of financial institutions” may appear straightforward. In fact, however, the Federal Reserve Board’s prudential regulation of banks and bank holding companies significantly overlaps with its conduct of monetary policy. For example, depository institution reserve requirements under Regulation D⁴ are for the express purpose of “facilitating the implementation of monetary policy” by the Federal Reserve Board.⁵

Other prudential regulatory policies, such as the Federal Reserve Board’s capital adequacy standards under Regulation Q,⁶ are not generally considered monetary policy tools in the same way that open market operations and reserve requirements are, but prudential policies do influence the *transmission* of monetary policy to the broader economy. For example, a general reduction in minimum capital requirements may result in an increase in the availability of credit, stimulating the economy and dampening the effects of an anti-inflationary monetary policy. While the All Agencies EO purports to insulate the Federal Reserve Board’s conduct of monetary policy from Presidential supervision and control, the interplay between monetary policy and prudential regulatory policy may result in more mixed signals and greater economic uncertainty.

WHAT TYPES OF REGULATORY ACTIONS DOES THE EXECUTIVE ORDER COVER?

The All Agencies EO requires submission of “all proposed and final *significant* regulatory actions” (emphasis added) to OIRA.⁷ Instead of providing a definition of what constitutes a “significant” regulatory action, the order simply amends Executive Order 12866,⁸ issued during the Clinton Administration (“**EO 12866**”), which governs OIRA’s regulatory planning and review function, and broadens its scope to include independent regulatory agencies. EO 12866 defines four categories of “significant regulatory action,” including any action likely to result in a rule that may—

- have an annual effect on the economy of US\$100 million or more or adversely affect in a material way the economy, a sector of the economy,

³ All Agencies EO at Section 2(b).

⁴ 12 CFR Part 204.

⁵ 12 CFR § 204.1(b).

⁶ 12 CFR Part 217.

⁷ All Agencies EO at Section 1.

⁸ Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

- create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or
- raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866.⁹

Presumably, these four categories will now be used by OIRA in determining which independent regulatory agency actions are subject to review.

HOW WILL INDEPENDENT REGULATORY AGENCIES BE SUPERVISED UNDER THE EXECUTIVE ORDER?

General Supervision. The All Agencies EO gives the OMB Director broad performance management and budgetary authority over independent regulatory agencies. Specifically, the All Agencies EO requires the OMB Director to establish “performance standards and management objectives” for independent regulatory agency “heads” and periodically report to the President on the heads’ “performance and efficiency” in achieving such standards and objectives.¹⁰

The All Agencies EO also requires “independent regulatory agency chairmen” to consult with and coordinate policies and priorities with the directors of OMB, the White House Domestic Policy Council and the White House National Economic Council,¹¹ and requires each independent regulatory agency to hire a White House Liaison.¹² Further, the All Agencies EO provides that independent regulatory agency chairmen must submit agency strategic plans to the OMB Director for “clearance” prior to finalizing such plans.¹³

Agency Apportionments. With respect to the OMB Director’s budgetary authority over independent regulatory agencies, the All Agencies EO empowers the OMB Director to review independent regulatory agencies’ expenditure obligations “for consistency with the President’s policies and priorities” and, in consultation with independent regulatory agency chairmen, to adjust their agencies’ apportionments “by activity, function, project, or object, as necessary and appropriate, to advance the President’s policies and priorities.”¹⁴ Generally speaking, an “apportionment” is an OMB approved plan to use funds appropriated by Congress to meet obligations incurred by an agency in respect of specified time periods and programs.¹⁵ The All

⁹ EO 12866 at Section 2(f).

¹⁰ All Agencies EO at Section 4. The “head” of an independent regulatory agency is defined as “those appointed to supervise independent regulatory agencies and in whom the agencies’ authorities are generally vested, encompassing the chairman, director, or other presiding officer, and, as applicable, other members, commissioners, or similar such officials with responsibility for supervising such agencies.” All Agencies EO at Section 2(d).

¹¹ All Agencies EO at Section 6(a). The order defines “independent regulatory agency chairman” to mean, “with regard to a multi-member independent regulatory agency, the chairman of such agency,” and, “with regard to a single-headed independent regulatory agency, such agency’s chairman, director, or other presiding officer.” All Agencies EO at Section 2(c).

¹² All Agencies EO at Section 6(b).

¹³ All Agencies EO at Section 6(c) (citing the Government Performance and Results Act of 1993 which, as amended by the GPRA Modernization Act of 2010, requires certain Federal executive agencies to prepare a strategic plan covering a multiyear period).

¹⁴ All Agencies EO at Section 5.

¹⁵ See OMB Circular No. A–11, § 120.1 (2016).

Agencies EO states that the OMB Director may “adjust” independent regulatory agencies’ apportionments and that “[s]uch adjustments to apportionments may prohibit independent regulatory agencies from expending appropriations on particular activities, functions, projects, or objects, so long as such restrictions are consistent with law.”¹⁶

The OMB Director’s ability under the All Agencies EO to adjust previously approved apportionments significantly expands the OMB’s budgetary authority over independent regulatory agencies in general. It should be noted, however, that because only Congressionally appropriated funds are subject to apportionment, the apportionment process does *not* apply to the Federal Reserve Board, the FDIC, the OCC and the CFPB, all of which are effectively “self-funded” and receive no appropriations from Congress.¹⁷ In contrast, the SEC, the CFTC and most other independent regulatory agencies rely on Congressional appropriations and *are* subject to the OMB apportionment process, as modified by the All Agencies EO.

OIRA Timeline and Disclosure. Although the All Agencies EO amends President Clinton’s EO 12866, it does not modify the 1993 order’s timeline or disclosure provisions, which now apply to Executive Office review of independent regulatory agency actions in the same manner. Under EO 12866, OIRA is generally required to complete (or waive) its review of proposed and final rules within 90 calendar days,¹⁸ and to disclose information about how each OIRA regulatory review was conducted, including disclosure of (i) substantive changes made between the draft being sent to OIRA and the final action being published and (ii) which changes were made upon OIRA’s recommendation.¹⁹

Interpretations of Law. Finally, the All Agencies EO includes “rules of conduct” asserting Presidential authority over all “interpretations of law” by executive branch personnel, including independent regulatory agency employees:

The President and the Attorney General, subject to the President’s supervision and control, shall provide authoritative interpretations of law for the executive branch. The President and the Attorney General’s opinions on questions of law are controlling on all employees in the conduct of their official duties. No employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General’s opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.²⁰

¹⁶ All Agencies EO at Section 5(b).

¹⁷ The Federal Reserve Board funds itself primarily from interest earnings on its government securities portfolio, the FDIC funds itself primarily from deposit insurance premiums paid by insured depository institutions, the OCC funds itself primarily through assessments on national banks and federal savings associations, and the CFPB is funded primarily by way of transfers from the Federal Reserve System.

¹⁸ EO 12866 at Section 6(b)(2). Note that the 90 day period may be reduced to 45 if OIRA has previously reviewed and there was no material change in underlying facts and circumstances. For preliminary regulatory actions prior to a Notice of Proposed Rulemaking, the order gives OIRA 10 working days to respond to a submitted draft.

¹⁹ See EO 12866 at Section 6(b)(4); CRS Report RL32397, “Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs,” p.10 (March 21, 2011).

²⁰ All Agencies EO at Section 7.

Notably, the All Agencies EO does not provide for an approval process in which the President and the Attorney General review agencies' legal interpretations in advance. Nor does it suggest how executive branch employees, when issuing regulations or guidance or advancing positions in litigation based on their interpretation of the law, are supposed to know the President's or the Attorney General's "opinion" on the matter. In the absence of an approval process for agency legal interpretations, rules of conduct that flatly prohibit interpretations later found to "contravene" the President's or the Attorney General's opinion—violation of which would presumably have disciplinary consequences—may have a chilling effect on the work of lawyers throughout the executive branch.

To the extent that the President's or the Attorney General's opinion on a matter of law is known, the All Agencies EO is likely to result in consistent legal interpretations across executive branch agencies. For example, President Trump's February 10, 2025 executive order²¹ pausing enforcement of the Foreign Corrupt Practices Act ("FCPA") requires the Department of Justice ("DOJ") to pause investigations and enforcement actions while developing new FCPA guidelines and policies that reflect the President's priorities.²² Although the FCPA executive order was directed to DOJ, measures in the All Agencies EO requiring the independent regulatory agencies to align their legal interpretations and policies with those of the Administration are likely to encourage a similar assessment process and potential reforms affecting FCPA enforcement at the SEC.

CONCLUSION

The All Agencies EO seeks to expand Presidential supervision and control over the entire executive branch, including the Federal financial regulators and other agencies designated as "independent" by Congress. While OIRA, created in 1981 pursuant to the Paperwork Reduction Act,²³ has always had the power to review executive agencies' substantive regulatory actions prior to their publication in the *Federal Register*, the authorizing statute generally places *independent* regulatory agencies outside the scope of OIRA's review function.

The All Agencies EO makes arguments for its constitutional validity on the basis of the so-called "unitary executive theory," but the President's authority to exercise the asserted degree of control over the Federal financial regulators and other independent regulatory agencies is likely to face judicial headwinds. In the meantime, it remains to be seen how involved in the supervision of independent regulatory agencies the Trump Administration really intends to be. Depending on the Administration's next steps and the extent of the likely legal challenges, banks, asset managers and other financial sector firms should prepare for a period of heightened legal and compliance uncertainty.

²¹ Exec. Order, "Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security," Feb. 10, 2025.

²² See our briefing, "DOJ's New Direction: Predictions for Corporate Enforcement Priorities in the Trump Administration," <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2025/02/dojs-new-direction-predictions-for-corporate-enforcement-priorities-in-the-trump-administration.pdf>.

²³ See PRA, 44 U.S.C. § 3503.

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