



## Latest White House Power Grab Puts Public at Risk Problems of the Jan. 2007 Executive Order and Bulletin on Guidance

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The White House released a double whammy attack on the public interest on Jan. 18, 2007: (1) a new executive order increasing burdens on the regulatory process, and (2) a final bulletin creating new burdens on agencies ability to inform the public. Together, this double whammy is an enormous challenge to the ability of the federal government to protect and inform the public.

### **Market Failure... and New Excuses for Failing the Public**

The White House already demanded, under Exec. Order No. 12,866 (1993), that agencies state the reason for a new regulation in an economic impact assessment. The new Bush executive order now changes the language, putting the spotlight on “market failure” as the chief rationale — and adding that the purpose of the justification is “to enable assessment of whether any new regulation is warranted.”

#### **Exec. Order No. 12,866**

Each agency shall identify

the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action)

as well as assess the significance of that problem.

#### **Revised Text**

Each agency shall identify in writing

the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action,

as well as assess the significance of that problem,

to enable assessment of whether any new regulation is warranted.

Market failure is an economics term describing situations in which private markets, left to themselves, fail to bring about results that the public needs. This order, however, will be enforced by Susan Dudley, the radical extremist that the White House is setting up for a recess appointment to become the administrator of the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget. Based on an evaluation of Dudley’s record in a report released last year, Public Citizen has concluded that, in her hands, the market failure provision will become a barrier to the protections that the public needs.

### **Deputy Dudleys in Every Agency**

Although Congress delegates power directly to the agencies themselves, thereby diffusing authority throughout the executive branch and preventing any single office from becoming all-powerful, the White House has claimed yet more power to control agencies and distort regulatory policy with political goals. The new executive order commands every agency to designate a presidential appointee to serve as the “Regulatory Policy Officer.” Agencies will not be allowed to add new regulatory initiatives to their annual plans without the approval of the new officer.

## Putting Industry Costs Above the Public Interest

The new order requires agencies to develop annual plans for upcoming rulemakings that identify “the combined aggregate costs and benefits of all ... regulations planned for that calendar year to assist with the identification of priorities.” This new requirement will make cost/benefit analysis the central factor in setting priorities for needed protections of the public interest. These cost/benefit analyses are notoriously biased against regulation, especially long-term goals such as preventing global warming or cancers that manifest years after exposure to toxic substances.

## From Guidance to Darkness

The executive order and the new bulletin on guidance work together to create a new bureaucratic bottleneck that would slow down agencies’ ability to give the public information it needs.

Guidance	Significant Guidance
agency policy other than a rulemaking which sets forth <ul style="list-style-type: none"><li>• a policy on a statutory issue</li><li>• a policy on a regulatory issue</li><li>• a policy on a technical issue</li><li>• an interpretation of a statutory issue</li><li>• an interpretation of a regulatory issue</li></ul>	guidance which <ul style="list-style-type: none"><li>• leads to an annual effect of \$100 million or more or materially and adversely affects the economy</li><li>• creates inconsistencies with another agency’s activities</li><li>• materially alters budgetary impact of grants, entitlements, etc.</li><li>• raises novel legal or policy issues</li><li>• implicates the president’s priorities</li></ul>

The bulletin requires significant guidance to be approved by a senior-level agency official, and the executive order adds another layer of review by the White House itself. By requiring White House approval of important guidance, the White House will insert its political agenda and pro-business bias into every level of agency policy, so that our federal government will handcuff itself instead of the companies that violate the law and put the public in danger.

The bulletin also requires the agencies to create a Web page listing all significant guidance and creating a public challenge process, for industry to demand changes to the policy statements, interpretations, and so on that it opposes.

## So Much for the New Congress

The upshot of this whole executive order is that the White House is already working to undermine not just agencies but also the new Congress’ ability to protect the public. Whatever gains might come to consumers and other public interest sectors in the 110th Congress are already vulnerable to being rendered meaningless by the powers the White House is giving itself.