

1 encourage litigation in which common law causes of action or
2 the rights of private parties are primarily at issue. In
3 particular, it is a violation of the separation of powers
4 imposed by the United States Constitution for the Executive
5 Branch to seek to establish or implement public policy
6 objectives through litigation activities not expressly or
7 impliedly authorized in Federal statutes or regulations.
8

9 (d) It is incumbent upon Federal agencies, and their officers
10 and employees, to recognize that their authority to undertake
11 substantive activities in any sphere is based on the express
12 or implied authorizations granted, and limitations imposed, by
13 Congress.
14

15
16 Section 2. Definitions.
17

18 For purposes of this order:

19 (a) "Agency" means, unless otherwise indicated, an agency as
20 defined in 5 U.S.C. § 551(1). [5] The term also includes
21 government-owned and contractor-operated facilities excluded
22 under 44 U.S.C. § 3502(1)(D). However, independent regulatory
23 agencies shall not be deemed agencies for purposes of this
24 order:
25

26 (b) "Lobbying activities" means activities described at 2
27 U.S.C. § 1602(7).
28

29 (c) "Official" any "covered executive branch official", as set
30 forth in the Lobbying Disclosure Act, 2 U.S.C. § 1602(3). [6]
31

32 (d) "Regulation by litigation" means any action by a Federal
33 agency to initiate, direct, engage in, encourage or otherwise
34 support, either directly or indirectly:

35 (i) litigation that is not aimed at ensuring compliance
36 with specific legal requirements set forth in Federal
37 statutes and regulations, or at obtaining specific
38 administrative remedies prescribed by such Federal
39 statutes and regulations;

40 (ii) litigation in which common law causes of action or
41 the rights of private parties are primarily at issue; or

42 (iii) litigation which seeks to establish or implement
43 public policy objectives through legal action not
44 expressly or impliedly authorized in Federal statutes or
45 regulations; [7]

1 Section 3. Prohibition of Regulation By Litigation

2
3 (a) No agency shall initiate, direct, engage in, encourage or
4 otherwise support regulation by litigation, either directly or
5 indirectly, except as provided in this Order. [8]

6
7 (b) Except as provided herein, no Federal agency shall expend
8 taxpayer or other public funds to participate in, pursue,
9 direct or encourage litigation: (i) that is not directly
10 authorized by a Federal statute or by a regulation promulgated
11 pursuant to the APA or functionally equivalent agency-specific
12 procedural statutes; or (ii) in which punitive damages, as
13 opposed to regulatory fines, are sought, unless a Federal
14 statute expressly or impliedly authorizes the agency to seek
15 such punitive damages.

16
17 (c) Except as provided herein, no Federal agency shall seek to
18 establish or implement public policy objectives through
19 litigation activities not expressly or impliedly authorized by
20 and embodied in Federal statutes or regulations.

21
22 (d) No Federal agency shall enter into any contingency fee
23 arrangement with a private attorney or law firm to conduct
24 litigation on behalf of, or in the interest of, the Federal
25 Government or the public, unless Congress has clearly
26 authorized the agency to enter into such a contingency fee
27 arrangement. [9]

28
29
30 Section 4. Prospective Application of Policy on Regulation By
31 Litigation

32
33 (a) All regulation by litigation shall be presumed contrary
34 to this Order.

35
36 (b) Notwithstanding the presumption against regulation by
37 litigation, a Federal agency or officer or employee of a
38 Federal agency may initiate or continue regulation by
39 litigation in extraordinary cases.

40
41 (c) In the event an agency wishes to continue agency
42 participation in the regulation by litigation the agency has
43 identified in section 5(d), the agency shall submit to OMB,
44 within 30 days following the execution of this Order, a
45 request to continue the action or agency claims. The report

1 shall detail the circumstances that necessitate the regulation
2 by litigation. In the event OMB fails to act on the agency's
3 request to continue participation in the regulation by
4 litigation within 45 days following the submission of the
5 agency's request to OMB, the agency may pursue the regulation
6 by litigation, as outlined in the agency's request.

7
8 (d) Every agency seeking to engage in new or expanded
9 regulation by litigation not identified in section 5(d) shall
10 report to OMB prior to initiating such action. The report
11 shall detail the circumstances that necessitate the regulation
12 by litigation. OMB shall have 45 days following the
13 submission of the report to respond to the agency, during
14 which time the agency shall not initiate or expand the
15 regulation by litigation in question. In the event OMB does
16 not respond to the agency's request within 45 days, the agency
17 may pursue the regulation by litigation, as outlined in the
18 agency's report to OMB.

19
20
21 Section 5. Retrospective Application of Policy on Regulation
22 By Litigation

23
24 (a) Within ___ days following the execution of this Order,
25 each Federal agency shall issue guidelines in the Federal
26 Register establishing procedures for the submission and review
27 of public comment on regulation by litigation by the agency.
28 The guidelines shall state that any member of the public or of
29 the regulated community may file comments notifying the agency
30 of any enforcement, compliance or other action that the
31 commenter believes meets the definition of regulation by
32 litigation as set forth in this Executive Order.

33
34 (b) Each Federal agency shall report to OMB each notice of
35 alleged regulation by litigation the agency receives from the
36 public and/or the regulated community under the procedures
37 established in section 5(a), and shall indicate in that report
38 what actions the agency intends to take in response to the
39 notice. OMB shall have 45 days to respond to the agency's
40 report. During this 45-day period, the agency shall take no
41 further action in furtherance of the alleged regulation by
42 litigation. This bar against further agency action will not
43 prevent the agency from taking such immediate or expedited
44 actions as are necessary in the event of emergency or
45 seriously escalating conditions. In the event OMB does not
46 respond to the agency's request within 45 days, the agency may

1 pursue the regulation by litigation, as outlined in the
2 agency's report to OMB. [10]

3
4 (c) When an agency receives a comment from the public in
5 response to the notice procedures established under section
6 5(a), each agency shall submit to OMB on the first day of
7 every calendar quarter a report setting forth: (i) the number
8 of such comments the agency has received; (ii) the number
9 matters or legal actions that such commenters have alleged
10 constitute regulation by litigation; (iii) a brief description
11 of the matters at issue; and (iv) a statement of the agency's
12 plans to dispose of the legal actions the commenters have
13 identified.

14
15 (d) Within 15 days following the execution of this Order,
16 each Federal agency shall identify all pending regulation by
17 litigation to which the agency is a party and shall publish a
18 list of such regulation by litigation in the Federal Register.

19
20 (e) Except as provided in sections 4(c), 4(d) and 5(b), within
21 30 days following the execution of this Order, each agency,
22 through the appropriate Federal officials, shall terminate all
23 the agency's claims in the regulation by litigation identified
24 in section 5(d), either through filing notices of voluntary
25 dismissal or other appropriate procedures. [11]

26
27 (f) Each agency shall publish in the Federal Register within
28 30 days following the execution of this Order a notice of
29 termination of all agency claims in the regulation by
30 litigation identified in section 5(d) for which the agency is
31 not seeking OMB review.

32
33
34 Section 6. Conduct of Compliance Monitoring, Investigations
35 and Enforcement Activities.

36
37 (a) Except as provided herein, no Federal agency, nor any
38 officer or employee of a Federal agency, shall, acting in his
39 or her capacity as an officer or employee, participate in the
40 planning, conduct or prosecution of any legal proceeding, in
41 any court or jurisdiction, that is not expressly or impliedly
42 authorized in statutes enacted by Congress or regulations
43 issued pursuant to the Administrative Procedure Act or
44 functionally equivalent agency-specific procedural statutes.
45 [12]

1 (b) All compliance monitoring, investigations and enforcement
2 actions undertaken by a Federal agency shall be conducted
3 strictly pursuant to the express or implied authorizations
4 contained in statutes enacted by Congress or regulations
5 issued pursuant to the Administrative Procedure Act or
6 functionally equivalent agency-specific statutes. [13]
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9 Section 7. Educational and Outreach Activities.
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11 (a) No Federal agency shall engage in education, information,
12 outreach, voluntary compliance, or voluntary partnership
13 activities, unless, and then only to the extent that, such
14 activities are: (i) expressly or impliedly authorized by
15 Congress; or (ii) narrowly circumscribed and directly aimed at
16 educating members of the regulated community about how to
17 comply with specific Federal statutes or regulations
18 promulgated pursuant to the APA or functionally equivalent
19 agency-specific procedural statutes within the agency's
20 subject matter jurisdiction. Under no circumstances shall an
21 agency official or employee, acting in his or her official
22 capacity, engage in lobbying activities. [14]
23
24

25 Section 8 Modification and Dissolution of Orders and
26 Injunctions [15]

27 (a) Agency cease-and-desist orders. Each federal agency that
28 issues a significant number of cease-and-desist orders over
29 which it retains jurisdiction should have a procedure
30 available whereby a respondent may request the agency to
31 modify or vacate a cease-and-desist order that has become
32 final. The factors considered by the agency in ruling upon
33 such a request should include: The applicability of this
34 Executive Order to the cease-and-desist order; the period of
35 time the order has been in effect; changed conditions of fact
36 or law during that period; the respondent's compliance with
37 the order; the likelihood of further violations of the order;
38 the hardship which the order imposes on the respondent; the
39 extent of the respondent's compliance with requirements of law
40 that are related to those covered by the order; the interests
41 of other persons or parties affected by the order; the
42 importance of the order to the agency's overall enforcement
43 program; and the public interest in the enforcement of the
44 law.
45

1 (b) Court-enforced orders. Each federal agency that obtains a
2 significant number of injunctions in the federal courts or
3 issues a significant number of cease-and-desist orders which
4 are enforced by federal courts that retain by statute
5 exclusive jurisdiction over the orders should have a procedure
6 available whereby a respondent may request the agency to join
7 or concur with it in moving the court to modify or vacate such
8 an injunction or order or, in the case of an order issued by
9 the agency, to remand the proceeding to the agency for that
10 purpose. The factors considered by the agency in acting upon
11 such a request should include those stated in paragraph (a).
12
13

14 Section 9. Exception for Qui Tam Actions and Citizen Suits.
15

16 (a) Nothing in this Order shall be deemed to invalidate *qui*
17 *tam* actions and citizen suits. For purposes of this Order:
18 (i) a "qui tam action" means a lawsuit expressly authorized by
19 a Federal statute in which a private party sues as plaintiff
20 and in which the remedies sought include damages or other
21 remedies that would inure to the benefit of the Federal
22 Government, a State, local or tribal government, or members of
23 the public not named as plaintiffs; and (ii) a "citizen suit"
24 means a lawsuit expressly or impliedly designated as a
25 "citizen suit" in a statute.
26
27

28 Section 10. General Provisions.
29

30 (a) This order is intended only to improve the internal
31 management of the Executive branch, and it is not intended to,
32 nor does it, create any right or benefit, substantive or
33 procedural, enforceable at law by a party against the United
34 States, its agencies, its officers or any person. [16]
35

36 THE WHITE HOUSE
37
38 _____,
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44

A N N O T A T I O N S

[1] The literature on "regulation by litigation" identifies four distinct problems:

(i) Federal agency involvement in 'regulatory litigation.' Federal agency officials and employees expend taxpayer dollars to encourage and participate in litigation against private-sector industries to achieve regulatory goals and results that have not been authorized by Congress. Oftentimes agencies expend limited budgetary resources to engage in such litigation activities to the detriment of resource allocations for lawful activities that have been authorized by congressional enactment or implementing regulation pursuant to the APA.

(ii) State and local government involvement in 'regulatory litigation.' State governments have entered into contingency fee agreements with private law firms to prosecute lucrative damages actions against entire industries. In most instances the selected law firms are political contributors to State governors, firms are often exempted from the requirement that they keep records of their hours of work, and the law firm selection process is not open to public scrutiny or government procurement protections. (See John Fund and Martin Morse Wooster, "The Dangers of Regulation Through Litigation" (American Tort Reform Foundation, 2000) at 12-14.)

(iii) State and local government enactment of prejudicial laws aimed at depriving industry targets of litigation defenses. A number of State governments have enacted laws expressly aimed at depriving private industries of legal defenses that have existing at common law for decades, and even centuries. (See Fund, annotation 1, *supra*, at 13.) Arguably, such laws constitute bills of attainder in violation of the United States Constitution, as well as State constitutions.

(iv) Regulation by juries through imposition of exorbitant punitive damage awards. The imposition of punitive damages awards plays two key roles in enabling certain government officials to skirt the constitutional requirement of separation of powers by imposing legislative-type regulation through the

1 judicial system. First, the lack of proportionality
2 between the exorbitant awards and any proven actual
3 damages serves as a "tax" on private-sector economic
4 activity that has not been proscribed as unlawful by
5 any legislature. Second, punitive damage awards fund
6 over-priced, and unjustified legal fees claimed by
7 the law firms, which in turn perform a prosecutorial
8 function that State legislatures have expressly
9 declined to authorize State prosecutors to perform.

10
11 Only the first of the above problems can be remedied through
12 an Executive Order. The remaining three can be addressed only
13 through tort reform legislation or through action at the state
14 and local levels. The basic approach of this Executive Order
15 is to prevent agencies from engaging in "regulation by
16 litigation" by preventing them from engaging in any
17 overreaching activities regardless of the mechanism used
18 (e.g., litigation, lobbying, education, information, outreach,
19 voluntary compliance, or voluntary partnerships).

20
21 **[2]** Under the separation of powers doctrine of the United
22 States Constitution, a Federal agency is authorized to
23 implement only those laws enacted by the legislative branch.
24 Agency regulations are valid only to the extent that they are
25 in keeping with congressional authorizations. The separation
26 of powers doctrine is violated when an administrative agency
27 engages in making or implementing its own substantive
28 policies. Accordingly, if Congress declines to enact a law
29 authorizing the agency to implement a given policy position, a
30 Federal agency lacks the authority to pursue its own policy
31 objectives in derogation of the will of Congress.

32
33 **[3]** The Executive Order most directly relevant to this
34 proposed Order is Executive Order 12866 ("Regulatory Planning
35 and Review"). Executive Order 12866 is not directly
36 referenced in the text.

37
38 **[4]** Such other statutes and Executive Orders include, e.g.,
39 the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* (which
40 requires Federal agencies to demonstrate that proposed
41 information collection requirements would further agency
42 activities authorized by Congress), the Data Quality Act, 44
43 U.S.C. § 3516 note, and Executive Order 13132 on Federalism.

1 [5] The draft Order adopts a modified version of the APA
2 definition of "agency" at 5 USC § 551. Section 551(1)
3 provides:

4 For the purpose of this subchapter -

5 (1) "agency" means each authority of the Government of
6 the United States, whether or not it is within or subject
7 to review by another agency, but does not include -

8 (A) the Congress;

9 (B) the courts of the United States;

10 (C) the governments of the territories or possessions of
11 the United States;

12 (D) the government of the District of Columbia; or except
13 as to the requirements of section 552 of this title -

14 (E) agencies composed of representatives of the parties
15 or of representatives of organizations of the parties to
16 the disputes determined by them;

17 (F) courts martial and military commissions;

18 (G) military authority exercised in the field in time of
19 war or in occupied territory; or

20 (H) functions conferred by sections 1738, 1739, 1743, and
21 1744 of title 12; chapter 2 of title 41; subchapter II of
22 chapter 471 of title 49; or sections 1884, 1891-1902, and
23 former section 1641(b)(2), of title 50, appendix.

24
25 The definition of "agency" under the draft Order further
26 exempts independent regulatory agencies. CRE recognizes that
27 there also may be legitimate grounds for exempting certain
28 other agencies from all or part of this Executive Order, e.g.,
29 because they have a longstanding practice of using outside law
30 firms to achieve goals well within their congressionally-
31 established jurisdiction, and because their use of such law
32 firms has not raised significant "regulation by litigation"
33 concerns to date. CRE requests comments identifying such
34 agencies that arguably should be exempted.
35

36 [6] The Executive Order defines "official" as any "covered
37 executive branch official" under the Lobbying Disclosure Act,
38 2 U.S.C. § 1602(3). The Lobbying Disclosure Act provides:

39 (3) Covered executive branch official

40 The term "covered executive branch official" means -

41 (A) the President;

42 (B) the Vice President;

43 (C) any officer or employee, or any other individual
44 functioning in the capacity of such an officer or
45 employee, in the Executive Office of the President;

46 (D) any officer or employee serving in a position in
47 level I, II, III, IV, or V of the Executive

1 Schedule, as designated by statute or Executive
2 order;

3 (E) any member of the uniformed services whose pay
4 grade is at or above O-7 under section 201 of title
5 37; and

6 (F) any officer or employee serving in a position of
7 a confidential, policy-determining, policy-making,
8 or policy-advocating character described in section
9 7511(b)(2)(B) of title 5.

10
11 2 U.S.C. § 1602(3).
12

13 [7] This definition of regulation by litigation is based on
14 the language of §1(c) in the previous draft Executive Order,
15 which the Center for Regulatory Effectiveness first released
16 for public comment in January 2001.
17

18 [8] Note that prospectively prohibited regulation by
19 litigation includes agency officials' "encouragement" and/or
20 "support" of private litigation. The requirement that
21 agencies terminate regulation by litigation, however, is
22 limited to only those actions in which the agency is a party,
23 and then only as to the agency's claims, not the claims of
24 private parties.
25

26 [9] This is primarily a problem at the State level, i.e., a
27 number of State governments have entered into contingency fee,
28 profit-sharing agreements with private law firms. (See Fund,
29 annotation 1, *supra*, at vi.) If Federal agencies do not
30 engage in this practice, this sentence could be stricken from
31 the Executive Order. On the other hand, this sentence could
32 be kept in to encourage States to adopt similar prohibitions,
33 as well as to prevent Federal agencies from engaging in this
34 practice in the future.
35

36 [10] This provision authorizing the agency to proceed with
37 litigation in the event OMB does not respond to an agency
38 request that is prompted by a public comment parallels the
39 provision allowing the agency to proceed in the event OMB does
40 not respond to a request to continue litigation which the
41 agency itself has identified as regulation by litigation under
42 sections 4(d) or 5(d).
43

44 [11] See annotation 8, *supra*.
45

1 [12] This provision would limit agency involvement in
2 litigation to the enforcement actions aimed at correcting
3 noncompliance with specific statutory and regulatory
4 requirements.
5

6 [13] See annotation 12, *supra*.
7

8 [14] On a number of occasions Federal agencies have been
9 censored for using congressionally appropriated funds to
10 pursue policy goals through the establishment of "voluntary
11 programs" or educational campaigns, despite the fact that
12 Congress had declined to enact legislation supporting such
13 activities.
14

15 [15] New section added to CRE's draft EO on in June 2003. The
16 text is Recommendation No. 71-8 of the Administrative
17 Conference of the United States, 1 C.F.R. s 305.71-8.
18 Authority: 5 U.S.C. 591-596. SOURCE: 38 FR 19782, July 23,
19 1973; 57 FR 61760, 61768, Dec. 29, 1992, unless otherwise
20 noted. ([http://www.law.fsu.edu/library/admin/](http://www.law.fsu.edu/library/admin/acus/305718.html)
21 [acus/305718.html](http://www.law.fsu.edu/library/admin/acus/305718.html)).
22

23 [16] Although this Executive Order is intended to prevent
24 Federal agencies from engaging in litigation, it is not
25 intended to itself become the subject of litigation. Authority
26 to enforce this Executive Order rests jointly with OMB and
27 Congress.
28