

NATIONAL ISSUE

LEGISLATING BY EXECUTIVE ORDER?

Contractors Are Target Of Aggressive White House

By Laura M. Litvan
Investor's Business Daily

President Clinton has found a powerful tool to influence industry — a pen tucked away in his desk drawer.

Since coming to the Oval Office, Clinton has signed a series of executive orders targeting the roughly 300,000 firms that do business with the federal government. The orders cause companies to change policies on everything from environmental practices to union activities.

Businesses can go along or risk losing their piece of the \$180 billion Uncle Sam spends on goods and services each year.

The White House maintains that the law and the Constitution give it the authority for these orders.

Yet Clinton's use of executive orders has raised eyebrows among some in industry. They complain that Clinton is enacting big policy changes without much outside scrutiny. Unlike new regulations or laws — which require plenty of public comment — executive orders are simply drawn up and signed.

"Some of these things would be extremely difficult to get through Congress," said Joseph Mayhew, assistant vice president for environmental policy at the Chemical Manufacturers Asso-

Executive Edict

Average number of executive orders issued annually by selected presidents

Washington	1
Jefferson	0.5
Lincoln	12
Hoover	22
F. D. Roosevelt	286
Kennedy	7
Nixon	63
Carter	7
Reagan	51
Bush	27
Clinton	51

Sources: Congressional Research Service
Investor's Business Daily

ciation.

One draft order just caused a showdown between the White House and the GOP. The order would have encouraged use of union labor on federal construction contracts. Republican lawmakers saw it as a gift to the AFL-CIO, and so blocked confirmation of Labor Secretary Alexis Herman.

Her confirmation went through only after the White House agreed last week to issue a presidential memorandum instead. Unlike an order, the memo will expire when Clinton's term ends.

President Clinton isn't the first president to pursue broader objectives

through executive orders — which presidents use to issue directives to executive branch agencies.

President Johnson issued an order in 1965 requiring government contractors to have affirmative action policies. And President Carter in 1978 authorized agencies to disqualify contractors who wouldn't abide by his wage and price controls.

However, no recent president has been as aggressive in trying to shape federal contractor policies through executive orders as Clinton has. An *IBD* review of executive orders issued since 1960 shows that Clinton, with 10 orders on contracting, outranks other recent presidents.

The only other president who came close to Clinton was Richard Nixon. He issued four contracting orders. President Reagan issued an order to reduce the amount of paperwork and clauses in government contracts.

Clinton's orders typically affect businesses by forcing federal agencies to change their buying habits. As a result of his orders, agencies must:

- Buy "environmentally preferable" goods whenever possible, with the Environmental Protection Agency helping to set the standards. The order also said all office paper purchased must be 20% post-consumer, recycled content. This increases to 30% at the end of next year.

- Increase buys of alternative-fueled

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vehicles by exceeding congressionally set requirements by 50%.

■ Set goals for reducing purchases of goods containing toxic substances.

■ Give more weight to contractors doing business in troubled inner-city communities.

■ Buy only computers that meet the EPA's "Energy Star" standards. Generally, these computers have the ability to "power down" when not in use, saving energy.

Other orders apply more directly to federal contractors.

A 1996 order, for instance, said that firms could be barred from federal contracts if they employ illegal aliens.

A 1995 order told agencies not to do business with firms that permanently replace workers who strike for economic reasons, like wages. This order was later overturned after the U.S. Chamber of Commerce challenged it in court.

The U.S. Court of Appeals for the District of Columbia found last year that the order was pre-empted by the National Labor Relations Act, which gives employers the right to hire permanent replacements.

Some of these orders appear to have had a minimal effect. For example, many major U.S. computer makers already offered products meeting the EPA's "Energy Star" standards when that order came out.

But others have forced companies to make bigger changes.

For instance, when the order telling agencies to cut back on goods containing toxic chemicals came out, many firms stopped using solvents containing chlorine and turned to more costly alternatives, said the Chemical Manufacturers Association's Mayhew.

Companies use chlorine solvents to clean machinery and electronic goods that can't be exposed to water, he said.

Generally, when companies make

such a change, they make it company-wide, Mayhew said. So the president's move affects both government and commercial markets, he said.

Some orders have caused changes in the contracting rules agencies use to buy goods, which in turn affects which companies can reap the rewards.

For instance, a recent White House report on the order pertaining to "environmentally preferable" goods said that 1,100 government specifications had been rewritten to give new "preference language" for recycled materials.

At some agencies, the end result has been dramatic.

At the General Services Administration's Federal Supply Center — the supply base for nondefense agencies — many paper goods now come only with recycled content, said Tom Daily, chief of the supply center's environmental programs. Index cards, file folders and toilet tissue all contain recycled materials as a result of the executive order. The agency also buys carpet that contains plastic fiber made from recycled soda pop bottles.

Some of those changes may be good for the environment, but they also could run against the administration's efforts to streamline procurement.

For instance, the process of defining what is "environmentally preferable" leads to all kinds of new standards. Contractors who want an upper hand in bidding on contracts need to track those changes.

Daily said his agency worked with the EPA on one pilot project in this area. The GSA and the supply center rated office cleaning products on environmental matters. This rating "matrix" includes many factors, like the prospect for skin irritation and the amount of fragrance in products.

"Developing criteria for 'environmentally preferable' is a lot more difficult than people thought when they first

wrote the executive order," Daily said.

Just how far can a president go in changing policy? Legal experts say there's no hard and fast rule. A president gets his authority for the orders either directly from a statute — when Congress tells the administration to do something — or through the Constitution. Any other order is like a simple memo from the boss to workers.

Without statutory or constitutional authority, "it's just a management tool, really," said Charles Cooper, a former assistant attorney general in the Reagan administration.

If the president oversteps his legal bounds — as the courts said Clinton did with the striker replacement order — businesses can sue once the order is acted upon. A business can say it unlawfully would be excluded from bidding, said Robin Conrad, vice president of the National Chamber Litigation Center in Washington.

She said business groups will be watching to see how the new memo encouraging labor agreements on construction projects plays out. Then they'll decide whether to challenge it.

It may never get that far. GOP lawmakers will try to pass a bill overturning the president's new memo. Sen. Tim Hutchinson, R-Ark., just introduced a bill barring agencies from requiring labor agreements on construction projects. "I think this is our prerogative — not the president's," he said.

Still, the administration is ready to try a whole new tack. Vice President Al Gore told the AFL-CIO in a speech April 18 that the White House will try to change the Federal Acquisition Regulation, the rulebook for contract bidding.

If the changes become final, he said, agencies could buy only from firms with "satisfactory employment and labor practices."