Section 626 of the Consolidated Appropriations Act of 2012 requires the Federal Trade Commission to comply with Executive Order 13563 before releasing the final report of the Interagency Working Group on Food Marketed to Children. This Q&A provides legal background on EO 13563 and its application to the IWG report. It does not address what the FTC should do or is likely to do in response to the new congressional mandate.

**Question:** What is EO 13563?

**Answer:** EO 13563 is an executive order issued by President Obama that applies to executive agencies when they are drafting regulations. The order mandates that executive agencies incorporate certain considerations—including public participation, agency coordination, assessment of regulatory benefits and burdens, and scientific evidence—when developing most regulations. EO 13563 supplements the Clinton-era EO 12866, which requires executive agencies to conduct a cost-benefit analysis of available alternatives before promulgating regulations.

**Question:** Does EO 13563 apply to agency reports and recommendations?

**Answer:** No. EO 13563 applies to regulations, which are defined (in section 3(d) of EO 12866) as those agency actions that have the force and effect of law. The IWG report contains recommendations, not regulations.

**Question:** Does EO 13563 normally apply to the FTC, which is the IWG’s lead agency?

**Answer:** No, it does not generally apply to the FTC because the FTC is an independent agency. EO 13563 incorporates the definition of “agency” used in EO 12866 Section 3(b), which explicitly exempts agencies such as the FTC that are not subject to presidential control. This means that, absent some specific law to the contrary, the FTC decides how much it needs to comply with the requirements in these executive orders. That said, Section 626 of the Appropriations Act, which requires the FTC to comply with EO 13563, is a very specific law.

**Question:** Does Congress have the authority to defund, or place conditions on the funding of, the IWG?

**Answer:** Yes. Congress has the authority to amend its original mandate to the IWG, and it can use its spending power to add conditions to the IWG’s funding.
Question: Can Congress bar the FTC from finalizing the IWG report unless the FTC has complied with EO 13563, even though EO 13563 by its terms applies only to executive agencies when they are drafting regulations?

Answer: Yes. Congress technically has the power to require the FTC to comply with EO 13563 as a condition of funding the IWG’s work. But as a practical matter, this requirement is perplexing because it means the FTC must conduct a cost-benefit analysis of a report containing recommendations for voluntary changes. The purpose of the cost-benefit analysis mandated in EOs 13563 and 12866 is to weigh the foreseeable outcomes of new regulations—in other words, changes that aren’t voluntary. A report with recommendations that are unenforceable, and that industry is therefore free to ignore, simply has no ascertainable cost. Moreover, there are balance-of-power issues raised by the legislative branch of government purporting to impose an executive branch order—on an independent agency, no less. Whether or not the congressional mandate makes sense, however, it is clear that the FTC must comply with EO 13563 in order to release the final IWG report.

Question: What would the FTC have to do to comply with EO 13563 before completing the draft report?

Answer: As a matter of course, the FTC has already complied with all of EO 13563 except the cost-benefit analysis requirement. The FTC is in the awkward position of having to figure out how to implement a condition imposed by Congress that doesn’t square easily with the work of the IWG. There are, nonetheless, several viable ways the FTC could interpret Congress’s directive—ranging from a determination that there are effectively no costs to a voluntary regime, all the way to a detailed analysis based on the assumption that the food and beverage industry universally adopts the IWG’s recommendations.

For more information, contact Samantha Graff at Public Health Law & Policy: (510) 302-3377 or sgraff@phlpnet.org.