

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216
One Hundred Eleventh Congress

March 30, 2009

BY FACSIMILE AND POST

The Honorable Peter R. Orszag
Director
The Office of Management and Budget
Washington, D.C. 20503

Dear Director Orszag,

I recently read with interest of your initiative to review the Office of Management and Budget's procedures to oversee the development and review of federal regulations. I support OMB's role in the federal regulatory process. I also applaud you for your February 26, 2009 solicitation of public comment to assist you as you consider this important topic.

In addition to the public input which you will receive, I also want you to have the benefit of my views as Ranking Member of the Committee on the Judiciary. The Judiciary Committee, as you know, has jurisdiction over the Administrative Procedure Act. Since its inception over 50 years ago, the Act has preserved a role for the American people in the regulatory process, and – to the extent that changes must be made in the APA and related statutes – the Committee is committed to ensuring that public participation remains viable and effective.

During the 109th Congress, the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary conducted extensive oversight of the rulemaking process. This effort included symposia on the rulemaking process, studies by academic experts, and numerous hearings. My staff and I have reviewed the report for this effort as well as many of the comments provided in response to the ongoing effort to review the current regulatory review process. As we in government proceed with legislative and administrative reforms of the regulatory review process over the next four years, I believe it is important that certain principles be upheld. I look forward to working with you and other members of the Administration in a cooperative spirit toward these goals.

Economic Growth

The American people are facing difficult economic times, and governmental actions must not further exacerbate the current recession. Poorly considered regulations cannot be allowed to increase costs borne by Americans or to prevent entrepreneurs from creating new jobs. To this end, I urge the Administration to avoid the adoption of costly regulations without a careful examination that demonstrates that the public benefits justify the very real compliance costs. This analysis, moreover, should ensure that the least restrictive means possible to solve the problem is adopted. Indeed, this analysis should be completed before agency employees even draft a proposed regulation. Important economic analysis must contribute at conception to the framework within which regulation is considered. It cannot be left as an afterthought, to be completed at the agency's convenience. Consistent with this view, during this difficult economic time, agencies should be required to develop thoughtful Regulatory Flexibility analyses for every rulemaking, and they should be discouraged from resorting to Interim Final Rules that are exempt from this requirement.

Transparency

The American people are entitled to know about regulations before they are adopted, and they must have a meaningful opportunity to influence the final product. Many of the recent reforms adopted by President Bush thus should be continued and expanded. Agency rulemaking dockets, including all comments on rules, should be on the Internet and easy to locate. Guidance documents should continue to be subject to OMB review. Guidance documents and other sub-regulatory actions should be easily accessible to the public before they are effective.

While the Executive branch has adopted numerous procedures over the past 25 years in the name of transparency, not all of these reforms have fulfilled their goals. In part, this is because members of the public and their representatives are rarely involved when an agency first begins the regulatory process. Too often, by the time the agency publishes a notice of proposed rulemaking, the agency officials have already made up their mind about the final rule. Public participation should be meaningful, and agencies should identify the relevant supervisors for each rule and ensure that these individuals are available to interested parties, able to explain the agency's proposals, and responsive to public input.

Furthermore, agencies should be transparent with their scientific data. While some protection should exist for the deliberative policy process, agencies should disclose the scientific data they expect to consider before the final policy decisions have been made and sent to the Federal Register, and agencies should make every effort to avoid the use of confidential data to justify decisionmaking.

Finally, agencies should make every effort to oppose actions, such as lawsuits by interest groups, that seek to impose substantive or procedural restrictions on the

rulemaking process through the courts. This is particularly important when lawsuits provide select members of the outside community a significant and outsized role in the regulatory process. The truncated deadlines that result from consent decrees and settlement agreements, for example, too often limit the opportunity for broader public engagement. At a minimum, OMB should be required to approve all agency consent decrees and settlement agreements that call for the issuance of new regulations, and this approval should be withheld until after the agency has sought public comment on the proposed resolution of the case.

Scientific Integrity

The Administration should make certain that scientific merit undergirds technical regulations. Any outside consultants retained by the agency should be disclosed immediately in the rulemaking docket, as well as the specific scientific questions that the agency will ask that consultant. Moreover, technical rulemakings should incorporate peer review by disinterested parties outside of the agency. In order to ensure that agency officials have not pre-selected panel members to obtain a favorable evaluation, OMB and the Office of Science and Technology Policy should play a central role in the selection of panel members.

Further, OMB should ensure that agencies standardize their approach to risk-based decisionmaking and fully embrace risk analysis. Incomplete scientific evidence must be put into its larger context, so the public and its leaders can evaluate the effects of changes in assumptions on decisions and any needs for more research to close uncertainty gaps. Moreover, OMB needs to continue to ensure that scientific agencies throughout the federal government reach consensus before agencies impose significant costs.

Finally, agencies must develop effective mechanisms to ensure that inaccurate scientific information is corrected quickly. As our scientific understanding proceeds, we should not retain regulations that were based on incorrect or flawed knowledge. With the Data Quality Act and its implementing guidelines, the Administration currently has a process to ensure the integrity of regulatory science. This process must not be allowed to fall into disuse because of an unwillingness to admit error.

Accountability

Any effective regulatory system must ensure that the American people have ultimate control over the decisions made in their name. Some of this effort must come through the legislative process and the Congressional Review Act. Nevertheless, review of new regulations by OMB is essential as well. Regulatory policies and priorities appropriately may change as the Presidency changes, and the President must have the procedural tools to ensure that his values and priorities are implemented by the administrative state. This is doubly true for independent agencies that regulate such a large part of the American economy, including, for example, the Securities and Exchange Commission (SEC). Several individuals have asserted that the actions of the SEC have

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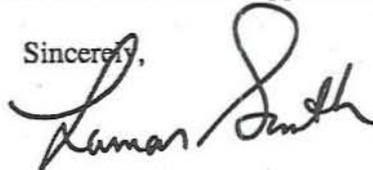
contributed to America's existing financial difficulties. If the President believes additional regulation is necessary to prevent a recurrence of these events, then the President must be accountable for any future regulations by that agency. It is not sufficient to appoint some experts from the financial industry and then trust that they will lead the agency to wise policies without further consultation. Instead, agencies such as the SEC should be brought under the umbrella of OMB review.

In addition, agencies should be held accountable for providing real outcome measures that tell the American public what they are trying to accomplish and for achieving those outcomes. These outcome measures should be derived from measures agencies are now required to use as a result of the Government Performance and Results Act.

Academic Research

Finally, I would like to work with your office to ensure that additional research on the regulatory process continues. Congress has now re-authorized and funded the Administrative Conference of the United States. In its previous incarnation, this agency provided invaluable research on the administrative state, the regulatory process, and suggestions for further reform. Now that the Congress has provided funds for the resumption of this important work, OMB must ensure that the new agency is staffed and continues to be funded at operational levels commensurate with the tasks placed before it. I look forward to learning of your efforts toward this end at the earliest opportunity.

Sincerely,

A handwritten signature in black ink, appearing to read "Lamar Smith". The signature is fluid and cursive, with the first name "Lamar" written in a larger, more prominent script than the last name "Smith".

Lamar Smith
Ranking Member
Committee on the Judiciary

cc: Hon. John Conyers, Jr.