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Please find attached comments in response to OMB's Federal Register notice of February 26, 2009.

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Dear Acting Administrator Neyland,

Thank you for the opportunity to comment on the possible revision of Executive Order 12866. I write this comment both from the perspective of an academic who has studied the regulatory process extensively and (perhaps more importantly) a former OIRA desk officer.

I think that OIRA review is largely misperceived by outside interest groups. Much of the focus of the debate on OIRA review is on cost-benefit analysis. As I will discuss below, cost-benefit analysis is important, but it may very well not be the most important function of OIRA. OIRA serves as the principal means by which the President exercises oversight over the regulatory state. It has evolved into an essential way for the President to make policy and to ensure that federal agencies carry out his preferences.¹

This comment is divided into three parts. First, I discuss the role of OIRA as the President's eyes and ears in regulatory oversight. Second, I discuss the role of cost-benefit analysis in the regulatory process. In the third section, I respond to the specific areas on which you requested comments.

Executive Review

Federal agencies are notoriously mission focused. This should not be surprising as people do not decide to spend their career at EPA unless they care about protecting the environment. However, this leads inevitably to myopic decisionmaking when agencies formulate policy. To those who question agency myopia, I could relate dozens of stories from my years as an OIRA desk officer. One example would be the Department of Labor official who cheered when he saw that worker injury numbers had gone up because it would make it easier to justify a regulation.

Agency myopia leads to regulations that ignore the concerns of other agencies and the impacts on other sectors of the economy. Only the President is positioned to force agencies to cooperate with their sisters in the executive branch. Only the President, accountable to the entire electorate, can direct agencies to consider the impacts of their actions on the economy. Finally the President has his own policy preferences, which he was elected to implement. Regulations are one tool with which to implement these preferences. It is important to have an office that can push agencies to move faster on completing regulations that are presidential priorities and OIRA is uniquely positioned to perform this function (reviving the use of "prompt letters" created by John Graham would be an important component of using OIRA to push presidential priorities).

The President therefore has an interest in influencing agency regulations. Indeed, one may argue from an accountability standpoint, he has an obligation to do so. Over the past three decades, OIRA's primary role has been to assist the President in this endeavor. While OIRA's role as enforcer of cost-benefit analysis has gotten the most attention from

¹ Elena Kagan, *Presidential Administration* 114 HARVARD LAW REVIEW 2245 (2001).

outside groups, its role as aide to the President in regulatory oversight has been at least as crucial. I have detailed elsewhere an explanation of how evidence shows that when presidential preferences and cost-benefit analysis conflict (they often don't of course), then OIRA's institutional location forces it to favor presidential preferences.²

As such, OIRA is a crucial component of Presidential management of the executive branch. OIRA helps implement presidential policies and prevents agencies from taking actions that would embarrass the President (again, the stories I could tell). The President, fairly or not, gets credit or blame for any actions that agencies take under his watch. If the President wishes to exercise influence over this set of actions, any revision of Executive Order 12866 must keep OIRA as a watchdog over agency regulations.

Cost-Benefit Analysis

Cass Sunstein, the presumptive appointee as OIRA Administrator, knows much more about the theory of cost-benefit analysis (CBA) than I do. What I can offer insight on is the role that CBA plays in regulatory decisionmaking. Too often CBA is done after a decision is made and then used to justify that decision. This is in contrast to the ideal situation, where it is part of decisionmaking and the selection of alternative policies. As it is, many of the alternatives that are discussed in agency analyses are strawmen that are easily dismissed as inferior to the selected policy.

Even in this capacity, cost-benefit analysis assists in presidential oversight. By requiring agencies to conduct cost-benefit analysis, Executive Order 12866 forced agencies to provide information about the impact of their actions that would otherwise be absent from regulatory documents. This information helps the President understand the impact of agency decisions. It helps public commenters provide meaningful input on agency proposed rules. It informs judges charged with evaluating the legality of agency final rules.

So cost-benefit analysis should remain part of the regulatory process. Requirements that agency regulations have benefits that exceed costs (as was true under Presidents Reagan and Bush (41)), or requiring that agencies use market failures to justify regulations (as was done under President Bush (43)) run contrary to many agency statutes and therefore end up being meaningless. Requiring agencies to show that benefits justify costs (as is done in Executive Order 12866) and that the lowest cost alternative for a particular policy goal is selected is well within agency capabilities and would better allow CBA to be useful to political overseers and the public.

In order for cost-benefit analysis to fulfill its full potential in assisting in oversight of agency rulemaking, several changes could be made. Requiring cost-benefit analysis earlier in the regulatory process would be one such change. Requiring analysis of distributional impacts would also be very helpful. Redistribution of welfare is an important function of regulations (even though this is rarely acknowledged). A clearer

² Stuart Shapiro, *Unequal Partners: Cost Benefit Analysis and Executive Review of Regulations* 35 ENVIRONMENTAL LAW REPORTER 10433 (2005).

acknowledgement of the redistributive impacts of regulations would assist assessment of the wisdom of regulatory choices.

Areas in which OIRA requested comments

1. Relationship between OIRA and the agencies.

The relationship between OIRA and regulatory agencies has varied from cooperative to combative. While as a desk officer, I tended toward the cooperative approach, one cannot rule out a little combat. Agencies naturally do not like having their decisions second-guessed, and also do not like being directed to take particular actions. However if one accepts the premise that agencies will focus myopically on their missions, and that the President has a role in exercising oversight, then disagreements will occur. One should not take these disagreements as sign of a problem but rather a healthy indicator of democratic oversight. I do not see the need for fundamental change in the nature of the relationship between OIRA and regulatory agencies.

2. Disclosure and transparency and encouraging public participation.

In OIRA's early days the opaque nature of its actions was a genuine concern. OIRA would meet with outside parties without agencies being present and no one outside of the meeting would have any idea what transpired. Decades of reform, particularly under Administrators Katzen and Graham have vastly increased the transparency of OIRA review. The OIRA website contains a wealth of information. I do not see that additional changes are necessary and indeed such changes may compromise the ability of OIRA to successfully advise the President on regulatory matters.

OIRA could take actions to increase the overall transparency of the regulatory process. In contrast to the OIRA website, regulations.gov is not user friendly. E-rulemaking holds the possibility of improving the transparency of the regulatory process but to date that potential is largely unfulfilled. OIRA should have as a high priority, e-rulemaking experiments that would make agency rulemaking more transparent and that may help agencies get better information. The academic literature is littered with ideas for such experiments.³

3. The role of cost-benefit analysis.

See discussion above. The most fervent advocates of cost-benefit analysis would like to see such analysis be the primary determinant of regulatory decisions. Such an approach is unwise as well as impractical. It would also require divorcing cost-benefit analysis from presidential oversight. Cost-benefit analysis is best used to inform agency decisions and to facilitate agency oversight.

³ See for example, Noveck, Beth Simone. 2004. The Electronic Revolution in Rulemaking *Emory Law Journal* 53:433.

4. The role of distributional considerations.

As mentioned above, cost-benefit analysis would be greatly enhanced by more attention to distributional considerations. Nearly every significant regulation redistributes welfare and the absence of analysis of distributive effects is a glaring omission. I am no expert on the methodology for distributional analysis, so rather than making specific suggestions I will just voice support for the comments submitted by Professor Matthew Adler.

5. Methods of ensuring the regulatory process does not result in undue delay.

I have spent some time studying the time it takes agencies to promulgate final rules. In one study (as yet unpublished), I found that the time between the first mention of a rule in the Unified Agenda and its finalization had a mean of 776 days and a median of 589 days ($n = 314$). The skewed distribution results from a small number of rules that take an inordinately long time to finish. Some rules fall in this category because of public controversy, others because they simply fall off of the agency's radar screen.

While interesting, the raw data doesn't answer the question of whether the delays are too long or are justified. In an analysis of the Bush Administration peer review guidelines, I used data from the OIRA reports to Congress to determine that the cost of delaying an economically significant rule was \$340 million/year.⁴ This means that the benefits of any regulatory procedure have to be significant in order to justify such a delay.

I think that the benefits of OIRA review, particularly the gain in democratic accountability that it provides passes such a test. I think that cost-benefit analysis has the potential to pass such a test since it can be used to improve rules and to facilitate oversight. Therefore, it is my belief that the core functions of OIRA justify the delay they impose on the regulatory process.

However, if OIRA is truly concerned about speeding up the regulatory process, there are many possible ways to do so. Requirements like the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act, provide voices to particular constituencies but do little to improve regulations. They also force agencies to spend more time writing regulations. Executive Orders requiring analysis of federalism impacts, impacts on families, and impacts on the energy supply do little besides clutter up the preambles to regulations. Newer regulatory reforms such as regulatory peer review have considerable potential to add delay without creating a substantive benefit. There are many opportunities to speed up the regulatory process and examining these regulatory procedures, which receive little attention is a good place to start.

6. Use of the behavioral sciences.

The discipline of economics has profited greatly over the past few decades from the subfield of behavioral economics. I am no expert in behavioral economics but as with

⁴ Evaluating the Benefits and Costs of Regulatory Reforms: What Questions Need to be Asked? *Evaluation and Program Planning* (August 2008).

distributional concerns it seems foolish to ignore recent advances that could help make cost-benefit analysis more robust.

7. The best tools for achieving public goals through the regulatory process.

The regulatory process has become unnecessarily complicated over the past 25 years. OIRA review is often wrongly blamed for a significant portion of the problems with the regulatory process. Executive review is a crucial tool for achieving public goals through the regulatory process because it increases the accountability of federal agencies. Any attempt to weaken executive oversight over agency regulatory activities compromises the ability of the regulatory process to serve the public interest.

Cost-benefit analysis complements executive oversight by forcing agencies to discuss and disclose the full range of the impacts of their decisions. As long as cost-benefit analysis is not used as the sole decision criteria for regulatory decisions, it can serve an important function in the regulatory process. Incorporating distributional analysis and behavioral economics can only help in this role.

However, it is also important to free the regulatory process from unnecessary burdens. The Bush (43) Administration added numerous procedures to the regulatory process without evidence that regulations would be improved by these procedures. President Obama has already removed Executive Order 13422. Repealing regulatory peer review, disavowing the risk assessment guidelines and ensuring that judicial review is not available for information quality requests would all help as well. Then, you can turn to working with Congress on clearing the regulatory process of unnecessary statutory requirements.

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