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March 16, 2009

The Honorable Peter Orszag
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Request for Comments, Federal Regulatory Review, 74 Fed. Reg. 8819 (Feb. 26, 2009)

Dear Mr. Orszag:

These comments are submitted on behalf of the California Attorney General, Edmund G. Brown Jr., regarding recommendations that the Office of Management and Budget ("OMB") should give the President for a new Executive Order on regulatory review. We are pleased that President Obama's Administration is taking this immediate and positive step. Allowing public comment on these important issues is a positive step toward transparency and the "smarter, better" government envisioned by President Obama. We look forward to a new era of working cooperatively with the federal government.

These comments make three points. The new Executive Order should: (1) define a neutral, objective role for OMB; (2) clarify that OMB's regulatory review is advisory only and cannot override an agency's statutory mandate; and (3) direct that any required cost-benefit analysis be pragmatic and flexible.

1. The New Executive Order Should Define a Neutral, Objective Role for OMB.

Under prior administrations, the effect of OMB review has sometimes been to slow down, weaken, or block important environmental and health and safety regulations. Going forward, the President and OMB affirmatively should ensure an appropriate role for the agency in the regulatory process. For example, OMB could return to its original task of assisting agencies in developing their budgetary needs and priorities. Whatever role OMB plays should be a neutral and objective one.

2. The New Executive Order Should Clarify that OMB's Regulatory Review is Advisory Only and Cannot Override an Agency's Statutory Mandate.

The great majority of federal environmental and public health and safety laws do not require agencies to base their decisions on a cost-benefit determination. *See* Sidney A. Shapiro and Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 Harv. Env't'l L. Rev. 433 (2008) (only two of the twenty-two major federal environmental, health and safety statutes rely on a cost-benefit test as the statutory standard). In practice, however, OMB's review of federal regulations has sometimes served to undermine or override the criteria for decision-making set forth in the statutes themselves. Because Congress delegated the exercise of expert judgment to the federal agencies, regulatory decisions should be developed through the exercise of that expert judgment. The Executive Order should clarify that OMB will assist federal agencies in their rulemaking processes but that OMB does not have authority to override those agencies' actions by mandating cost-benefit analyses.

3. The Executive Order Should Direct Any Required Cost-Benefit Analysis to be Pragmatic and Flexible.

To the extent that OMB continues to use cost-benefit analysis, the Executive Order should improve the process so that it is pragmatic and flexible rather than prescriptive. *See* OIRA Circular A-4 (describing current prescriptive regime). For example, OMB's guidance could recognize that agencies have considerable discretion in how they conduct cost-benefit analyses so that they can best effectuate their statutory obligations. Any analyses could also account for benefits that are not easily quantified. In addition, the Executive Order and OMB could encourage agencies to conduct after-the-fact studies to determine what regulations actually cost regulated industries. The development of follow-up data will help to prevent claims of high compliance costs from weakening standards that would otherwise serve the public interest, resulting in better environmental and public health protection and fewer externalized costs.

We are encouraged and optimistic that the Obama Administration will reverse this disturbing trend. We appreciate this opportunity to comment on regulatory reform and look forward to working with you in the future.

Sincerely,



Kathleen A. Kenealy
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General