

March 31, 2009

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Kevin Nyland, Acting Administrator
Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Attn: Mabel Echols
Room 10102, NEOB,
725 17th Street, NW.
Washington, DC 20503

RE: Executive Order on Federal Regulatory Review

Dear Administrator Nyland:

Change to Win hereby submits these comments on the process and principles for regulation that should be incorporated into the new Executive Order on Federal Regulatory Review.

Introduction

Change to Win (CtW) is a partnership of seven unions with six million members in multiple industry sectors throughout the 21st Century economy. These workers – and millions more like them without any union representation – have a direct and vital stake in strong regulatory standards and vigorous enforcement of legal mandates addressing wages and hours, workplace safety and health, health and retirement benefits, and numerous other workplace rights. As consumers and residents of the planet, of course, the members of Change to Win's affiliated unions are deeply concerned about food and drug safety and health, adequate regulation of the financial industry, and a clean environment.

Workplace safety and health is a particular area of concern for Change to Win, and for OIRA as well. As with the regulatory areas listed above, there is a wide variety of workplace safety and health hazards for which current OSHA and MSHA regulations are either missing entirely or severely inadequate. CtW or one or more of its affiliates have participated directly in the majority of significant OSHA rulemakings, and have been the leading worker advocates in critical OSHA rulemakings such as cotton dust, diacetyl (popcorn lung), ergonomics, noise, blood-borne pathogens, and construction site safety. These also include the recent abject failures by OSHA to regulate combustible dusts. Without cataloguing the many unregulated hazards, suffice it to say that OSHA itself (though the Regulatory Agenda and other actions) as well as other authoritative bodies have identified many unregulated hazards over the last twenty-five years, and most of those hazards remain unregulated.

Congress has established essential regulatory programs in all of these areas in order to protect Americans from corporate or other misconduct, as well as from the abuses and excesses inherent in a “free market” economy. Yet, 30 years of ideology-driven deregulation and budget cuts to federal agencies have produced a severe drought of tough regulatory standards and vigorous, adequately resourced enforcement. Few regulations to protect the public interest have emerged, and for the few that did, OIRA, more often than not, served as a bottleneck. The obstacles created by EO 12291 (1981) and its successors (including EO 12866 in 1993), in our view, have played a major role in frustrating the agencies’ own inadequate efforts.

The deregulatory philosophy that has guided OIRA’s role over the last three decades must now end. The new Executive Order must, first and foremost, ensure that regulatory agencies receive the support they require in order to move ahead on urgently needed rules. Change to Win recommends that the Executive Order incorporate the following principles:

Statutory Purpose as Touchstone: Good rulemaking should effectuate the statutory purposes of the statutes upon which the rulemaking is based; regulatory review should not be used to frustrate the intent of Congress in passing the legislation. The fact that protective measures may entail net costs to businesses and employers should not be used as a means of negating Congress’ intent in passing this and similar legislation: to achieve a high level of protections for workers, the public and the environment.

Cost-Benefit Analysis Inappropriate: Cost-benefit analysis often inherently conflicts with the statutory mandate given by Congress to the regulatory agencies. In reality, the history of this ostensibly technical layer of review has often entailed both multi-year delays in adopting public protections and the diversion of scarce agency staff time toward justifying its conclusions rather than fulfilling its statutory responsibilities. Given its orientation, imprecise nature, and its origins and past practice, it is an inherent obstacle to, rather than a tool for, good regulations.

Deference to Agency Expertise: The knowledge, expertise and experience needed to develop proper regulations reside in the agencies, and it is the regulatory agency, not OIRA, that should weigh all factors appropriate to that agency and consistent with the relevant underlying statutes. Regulations should come to OIRA with a presumption of validity and deference should be given to the expertise of the agency issuing the regulations. OIRA should not second-guess the decisions made by the agencies entrusted by Congress to develop regulations.

Different Role for OIRA: OIRA can play a valuable role in rulemaking by coordinating regulatory activities on issues that cut across multiple agencies (e.g., food safety that could be regulated by OSHA, FDA and Agriculture) and by ensuring that the regulations that are issued are consistent with and promote the Administration’s policy goals, such as rebuilding the middle class. OIRA must focus on addressing the severe backlog of long-needed regulations at regulatory agencies, including Department of Labor agencies such as OSHA and MSHA, while also anticipating and preparing to move the new regulations that will be needed to implement the President’s economic recovery program. OIRA

should take steps to eliminate or at least minimize the myriad of regulatory obstacles (e.g., Paperwork Reduction Act, Information Quality Act, etc.) that are used to block regulatory actions, and to facilitate best practices in the rulemaking process.

These principles are critical to a fundamental restructuring of the relationship between federal agencies and OIRA, and hence a restructuring of the regulatory process to better serve the public interest.

Statutory Purpose v. Cost-Benefit Analysis

It is the job of Congress to address pressing public issues by weighing the evidence, various viewpoints, and the costs and benefits of adopting legal mandates. Once Congress makes its judgment and passes legislation, it is the job of the Executive branch to execute that statutory mandate by filling in the regulatory details and enforcing the law. The touchstone of an agency's regulatory authority and substantive guidance is legally prescribed by the underlying statute it is interpreting and enforcing.

Consequently, CtW opposes the use of cost-benefit analysis (CBA), because it substitutes a different calculus for the development of regulations – costs and benefits as determined by OIRA – for the one that was made by Congress and contained in the authorizing statute. For instance, in adopting the Occupational Safety and Health Act, Congress already made basic choices regarding the costs and benefits of workplace safety and health regulation. The use of CBA was not such a choice, and in fact, is now prohibited in the establishment of both safety and health standards to protect workers on the job.

Moreover, many of the factors considered in any cost-benefit analysis cannot be accurately quantified, and are malleable based on political viewpoint. These defects have permitted CBA to be used to impose long delays and to defeat, not advance, the achievement of statutory objectives. We urge OIRA to reject any institutionalized role for CBA.

Deference to Agency Expertise

Deference should be given to agencies not only because of their legal mandate from Congress, but also because the knowledge, expertise and experience needed to develop proper regulations reside in the agencies, not in OIRA. Agencies develop and make decisions about proposed rules based on a rulemaking record that often consists of detailed scientific studies involving complex medical or engineering issues, and hundreds and thousands of pages of comments. These records themselves are often the outgrowth of extensive proceedings over many years, in which various parties have compiled and submitted information to the agency, and/or participated in public proceedings.

It is virtually impossible for an agency as small as OIRA, with a staff as limited in their professional disciplines, to adequately evaluate rulemaking records such as these, much less challenge the underlying data and the agencies' decisions which flow from these data sources. Attempting to independently evaluate and second-guess the merits of a proposed regulation

based on OIRA's own judgment is, at best, duplicative and inefficient, and at worst, counterproductive.

It is not enough to simply attempt to draw a line between "significant" and other regulations, and to allow centralized review only for that subset of "significant" rules. Such lines of demarcation are typically based on economic criteria alone – criteria which often fail to acknowledge major issues of significance such as the socialized costs of the failure to regulate (i.e. the consequent savings from the implementation of the regulations themselves), or the nonquantifiable impacts of either the regulation or the failure to regulate. The pressure in such situations is then concentrated on the quantifiable costs – for how else is an agency to answer the question whether or not this is a significant rule in the first place? This entire inquiry introduces untenable distortions into the regulatory process.

Accordingly, there should be no overriding "second opinion" by OIRA on individual agency actions. While it is wholly legitimate for OIRA to seek to assure that executive agencies carry out the President's broad policies and priorities, reviewing the details of individual rules is not the best or most appropriate mechanism for fulfilling this function.

Constructive Role for OIRA

For the reasons discussed, CtW does not believe that it is an appropriate role for OIRA to engage in a highly centralized review of individual regulations. However, there are many functions that OMB and OIRA could assume, and improvements that could be instituted, that would be highly beneficial to the regulatory process:

Coordinate Cross-Cutting Agency Action: There are times when an underlying problem cuts across agency lines (such as chemical regulation), with several agencies having jurisdiction over different aspects of the issue. In such instances, OIRA could help to coordinate policy and ensure consistent regulatory activity, for example, by utilizing the Unified Regulatory Agenda for joint planning, initiating collaborative efforts and multi-party rulemaking proceedings, and by reviewing regulatory proposals to identify interagency conflicts in requirements. In addition, although we do not see any significant benefit from OIRA's systematic use of "prompt" letters, OIRA could ensure agencies are fulfilling their responsibilities by reviewing proposals or recommendations made by competent governmental authorities (and authoritative nongovernmental organizations) to which the primary regulatory agencies have failed to respond. Where those other authorities have found that the agencies have failed to act, OIRA should request that agencies provide reasoned explanations for their lack of response. The willingness of a recalcitrant Department of Labor or EPA to simply ignore stern recommendations from the Chemical Safety Board, for instance, provides an obvious example of the need for such oversight.

Identify and Advocate for Adequate Resources: OIRA's location within OMB provides it with an unusual opportunity to strengthen agency regulatory programs. Agency budgets legitimately require careful scrutiny, even in the best of times, and there is always the risk that agency resources for rulemaking will be shortchanged. OIRA's

understanding of the complexity of rulemaking efforts could certainly assist the agencies in arguing for the requisite resources. The Executive Order should reflect a conscious decision to provide the support and resources necessary to address the regulatory backlog and to move ahead on new priorities.

Remove Serious Obstacles and Minimize Delays: The most immediate and effective measure OIRA could take to reduce obstacles and delays is to cease acting as gatekeeper. By shifting its attention away from centralized review of the underlying merits of regulatory proposals, and toward facilitating and energizing the regulatory process, OIRA would remove barriers to timely and effective rulemaking. We also urge OIRA to use its resources and authority to assist agencies to determine other causes of regulatory delays, such as redundant “peer review” rules, and to identify ways to eliminate the sources of delay wherever possible. In addition, though external to the Executive Order per se, laws such as the Paperwork Reduction Act, Information Quality Act, and Small Business Regulatory Enforcement Fairness Act pose potentially formidable obstacles to efficient rulemaking. Indeed, they were conceived for that purpose. OIRA should seek to ensure that nothing in the Executive Order allows these other mandates to impose any additional requirements, and it should recommend remedial action to the Congress to limit these obstacles in the future. This is particularly urgent as the agencies are seeking to cope with the President’s Recovery program and the regulatory gaps that hinder the protection of workers employed in that program.

Facilitate Best Practices: OMB and OIRA clearly have expertise in conducting economic analyses. Virtually every agency performs some form of economic analysis as part of their rulemaking record, whether required by the underlying statute or as part of building a sufficient rulemaking record. OIRA could certainly facilitate the identification and sharing of methodologies and best practices for conducting economic analyses. These collaborative efforts could examine, for instance, the actual socialized costs of human and environmental injury to taxpayers and communities, elements that have rarely been adequately examined as part of regulatory actions. Best practices can also include across-the-board measures to improve transparency and public participation in rulemaking, agencies’ information-gathering techniques, or use of different procedures such as negotiated and mediated rulemaking.

For far too long, employers and corporate interests have been permitted to take advantage of the public regulatory process to promote a private agenda. OIRA could play a critical role in reversing the damage and neglect of the last 30 years. We understand the value of exploring innovative approaches to regulatory policy, including new “Regulatory Tools” as identified in the President’s request. However, information alone is not a substitute for actual protection. And, where new approaches to regulatory policy offer potentially valuable assistance to those agencies, OIRA should certainly recommend them to the relevant agencies for consideration. However, OIRA should not serve as a laboratory for social philosophical experimentation.

Change to Win appreciates the opportunity to comment on these issues, and offers its assistance to OIRA as a resource.

Sincerely,

A handwritten signature in blue ink that reads "Christopher R. Chafe". The signature is written in a cursive style with a large initial "C".

Christopher Chafe, Executive Director