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*AGENCY COMMENTS*

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**“Executive Order of Regulatory Review”**

**Comments to the Office of Management and  
Budget**

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**FR Doc E9-4080**

**March 16, 2009**

**David M. Mason  
Visiting Senior Fellow  
Domestic Policy Studies  
The Heritage Foundation**

March 16, 2009

Kevin F. Neyland,  
Acting Administrator,  
Office of Information and Regulatory Affairs,  
Office of Management and Budget

Re: Request for Comments  
FR Doc E9-4080

Comments of David M. Mason,  
Visiting Senior Fellow, The Heritage Foundation<sup>1</sup>  
Regarding  
OMB Recommendations for a  
New Executive Order on Federal Regulatory Review

## History and Background

The President's Memorandum on Regulatory Review begins by observing that the Office of Information and Regulatory Affairs has reviewed Federal regulations for "well over two decades."<sup>2</sup> While OIRA regulatory review began in 1981, the need for White House staff review of agency actions was recognized by President Roosevelt's "Brownlow Commission," in 1936. The Brownlow Report recommended creation of the Executive Office of the President (EOP) specifically to assist the President in dealing with administrative agencies.<sup>3</sup> Congress agreed and authorized the EOP in 1939.<sup>4</sup> Based on the recommendations of a second Roosevelt study<sup>5</sup> and a Senate review,<sup>6</sup> Congress granted the predecessor of OMB authority to regulate information collection efforts by executive agencies in 1942.<sup>7</sup> Further centralization of authority in the EOP was accomplished by President Truman on the basis or recommendations of the bi-partisan Hoover Commission.<sup>8</sup>

The first formal OMB regulatory review process was established in 1971, referred to initially as "Quality of Life Review."<sup>9</sup> The Quality of Life Review process required a statement

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<sup>1</sup> The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

<sup>2</sup> "Regulatory Review" Memorandum of January 30, 2009.

<sup>3</sup> Report of the President's Committee on Administrative Management (Brownlow Report), GPO, 1937. See also Donald R. Brand, "Progressivism, The Brownlow Commission and the Rise of The Administrative State," in Ronald J. Pestritto and Thomas G. West, eds., *Modern America and the Legacy of the Founding*, Lexington Books.

<sup>4</sup> Reorganization Act of 1939, 3 U.S.C. § 106, 31 U.S.C. §§ 701, 1101.

<sup>5</sup> Report of the Central Statistics Board, GPO, 1939. See also, A.M. Lyons, "A Social History of Paperwork Reform Efforts" pp. 4-5. Available at [www.danj.org/prafdanej.doc](http://www.danj.org/prafdanej.doc). Published in Documents to the People 33 (3), September 2005, Government Documents Round Table (GODORT), American Library Association (ALA).

<sup>6</sup> Special Committee to Study and Survey Problems of Small Business Enterprises, 1941.

<sup>7</sup> Federal Reports Act of 1942, 56 Stat. 1078, PL 77-831, now superseded by the Paperwork Reduction Act.

<sup>8</sup> Reorganization Act of 1949, 5 U.S.C. § 901.

<sup>9</sup> Memorandum for the Heads of Departments and Agencies from OMB Director George P. Schultz, October 5, 1971. Available at: <http://www.thecre.com/ombpapers/QualityofLife1.htm>; see also Executive Order 11541.

including objectives of the regulation, alternatives and “a comparison of the expected benefits or accomplishments and the costs” of the proposed regulation. A similar process was followed by the Ford Administration under the auspices of the Council on Wage and Price Stability.<sup>10</sup> President Carter regularized and expanded the Nixon-Ford regulatory review process. Carter required agencies to publish semi-annual regulatory agendas and required agencies to develop economic analyses of proposed major including an analysis of alternatives and a comparison of economic consequences.<sup>11</sup> President Reagan transferred the regulatory review responsibility to OIRA in 1981.<sup>12</sup>

Congress has endorsed or required prospective OMB review of agency action, including cost-benefit analysis, in at least eight major statutes, including the Paperwork Reduction Act, the Regulatory Flexibility Act,<sup>13</sup> the Unfunded Mandates Reform Act,<sup>14</sup> Small Business Regulatory Enforcement Fairness Act,<sup>15</sup> The Congressional Review Act,<sup>16</sup> the Regulatory Right to Know Act,<sup>17</sup> the Truth in Regulating Act,<sup>18</sup> and the Information Quality Act.<sup>19</sup>

Thus, the need for EOP oversight of agency action has been recognized for seventy years, and specific processes for prospective regulatory review, including some form of cost-benefit analysis, have existed for nearly four decades. These mechanisms have been developed and improved in Administrations and Congresses controlled by both parties over this entire period. OMB should make specific recommendations for changes in the regulatory review process with this extensive history and the compelling reasons for a strong centralized administrative review process in mind.

### **Relationship between OIRA and the agencies**

The American Presidency is not a collective executive.<sup>20</sup> The President alone has the responsibility to “take care that the laws be faithfully executed.”<sup>21</sup> The purpose of a regulatory review function is to assist the President in this task. As my colleague James Gattuso has noted,

a strong, system of centralized regulatory review, anchored in presidential authority, does not necessarily imply either more or less regulation. It simply

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<sup>10</sup> Executive Order 11821.

<sup>11</sup> Executive Order 12044. See also Kagan, Elena, “Presidential Administration,” 114 Harv. L. Rev. 2245, 2276-2277 (2001); Katzen, Sally, “Cost-Benefit Analysis: Where Should We Go From Here?,” 33 Fordham Urb. L.J. 1313, N 3.

<sup>12</sup> Executive Order 12291

<sup>13</sup> 5 USC 601 et. seq.

<sup>14</sup> PL 104-4, 109 Stat. 48, 2 USC 1531 et. seq.

<sup>15</sup> PL 104-121.

<sup>16</sup> 5 USC 801 et. seq., PL 104-121, Title II, Subtitle E.

<sup>17</sup> 31 USC 1105 note, enacted as Title VI, §624 of the FY 2001 Treasury Appropriation, PL 106-554.

<sup>18</sup> 5 U.S.C. 801.

<sup>19</sup> PL 106-554.

<sup>20</sup> James L. Gattuso, “The Rulemaking Process and the Unitary Executive Theory,” Testimony before the Subcommittee on Commercial and Administrative Law House Judiciary Committee, May 6, 2008 (available at: <http://www.heritage.org/Research/Regulation/tst050708a.cfm>); *Sierra Club v. Costle*, 657 F.2d 298, 405

<sup>21</sup> United States Constitution, Article II, Section 3. (case quote?)

means that the president's priorities -- whatever they are -- will be more accurately represented in decision making.<sup>22</sup>

As the D.C. Circuit has observed:

Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as the White House.<sup>23</sup>

The relationship between OIRA and agencies must be shaped with an understanding of the purpose of regulatory review and of the necessary supremacy of the President within the executive branch. This does not mean that the President, or OIRA, is above the law. Further, in the vast majority of cases discretionary decisions will be made by agencies rather than by the President or the EOP. When there are disputes, however, it is the President (or the Vice President)<sup>24</sup> who decides.

Within this context, OIRA and executive agencies should certainly strive to establish collegial and cooperative relationships. One of the most important means of improving those relationships would be to expand the size of the OIRA staff. There are nearly 5,000 regulatory agency staffers per OIRA staffer.<sup>25</sup> Even if OIRA's role was limited to a merely advisory function,<sup>26</sup> giving OIRA more resources would facilitate a deeper and fuller cooperation with regulatory agencies.

Relationships with agencies could be improved through earlier informal consultation on major rulemakings. If the first contact between an agency and OIRA on a major regulation is after the agency has already decided to initiate a rulemaking in the context of a sixty day review of a preliminary cost-benefit analysis, relations are bound to be prone to strain. As discussed further below, agencies and OIRA should be communicating about cost benefit analysis and its elements from the time a proposed regulation appears in the semi-annual regulatory agenda. Further, regulatory agencies' internal cost-benefit analysis capabilities should be strengthened. The executive order should require each agency to establish a regulatory review function, separate from policy offices, and designate an official or office with specific responsibility for regulatory review.<sup>27</sup> In the ideal rulemaking, the agency CBA will be so convincing that OIRA will have no comments. Steps towards this ideal can be taken from both sides by earlier OIRA

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<sup>22</sup> Gattuso, "The Rulemaking Process and the Unitary Executive Theory."

<sup>23</sup> *Sierra Club*, 657 F.2d at 406.

<sup>24</sup> Executive Order 12866.

<sup>25</sup> James L. Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation Backgrounder #2116, March 25, 2008. Available at: <http://www.heritage.org/Research/Regulation/bg2116.cfm>

<sup>26</sup> Committee on the Judiciary, U.S. House of Representatives, *Imperial Presidency Report*, January 2009.

<sup>27</sup> Gattuso, "What is the Bush Administration's record on Regulatory reform?" Testimony before the Subcommittee on Energy Policy, Natural resources and Regulatory Affairs, House Committee on Government Reform," November 17, 2004. Available at: <http://www.heritage.org/Research/HomelandSecurity/tst111604a.cfm>

involvement in identifying cost and benefit issues an agency should explore and by strengthening agencies' abilities to do so.

### **Disclosure and transparency**

OIRA practices are a model of transparency that should be emulated by other executive agencies. A publicly-available web site discloses both the fact and timing of OIRA review, details of meetings,<sup>28</sup> and the substance of its comments.<sup>29</sup> Neither the semi-annual regulatory agenda nor the individual web pages of most agencies provide this level of detail, specificity and timeliness. The Executive Order should urge agencies to more complete and timely information on the progress of rulemakings, including detailed and regularly updated schedules for action. Providing fuller information would also encourage public participation in rulemakings.

### **Encouraging public participation**

The order should recognize that public participation in rulemakings will generally be through organized interests. While occasional rulemakings will generate broad public attention, the vast majority of rulemakings will be too technical or too specialized to generate lay interest or helpful lay input. In this regard, there should be no discrimination between economic and ideological interests. A self-description as representing "public" or "consumer" interests should not confer special status: it is the agency itself that is ultimately charged with determining and protecting the public interest.

A focus on organized public input does not mean agencies should reduce emphasis on web-based or other disclosure tools. Rather, agencies should be encouraged to provide richer and deeper disclosures, or detailed data sets and studies for instance. Organized interests will frequently be capable of analyzing and intelligently commenting on highly specialized data, and should be allowed to do so.

Agencies should also be encouraged to incorporate public input by using measures of public preferences, such as willingness to pay (WTP), and incorporating informed public assessments of risks and relative valuations.<sup>30</sup> The administration should also encourage Congress, which is more responsive to public perception than agencies, to provide input on relative risks and priorities<sup>31</sup> perhaps by encouraging Congress to consider or approve its annual regulatory plan.

The executive order can assure public responsiveness by retaining the "presumption against command and control regulation," and preference for economic incentives, informational remedies and performance standards included in EO 12866.<sup>32</sup>

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<sup>28</sup> <http://www.whitehouse.gov/omb/oir/meetings.aspx>

<sup>29</sup> <http://www.reginfo.gov/public/jsp/EO/letters.jsp>

<sup>30</sup> Richard H. Pildes and Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 128.

<sup>31</sup> Id. At 126.

<sup>32</sup> Id. At 128.

## The Role of Cost Benefit Analysis (CBA)

CBA is required by statute for certain economically significant or major rules.<sup>33</sup> For other rules, CBA is an important tool to clarify regulatory choices and consequences. Only rarely will CBA result in a conclusion that absolutely no regulatory action should be taken. It is important, however, to probe even this question because every action by the government, as by private actors, has opportunity costs. The regulatory capacity of the government itself is limited, even if it is presumed that the regulatory costs that can be imposed on the private sector are not. Thus, wise regulatory choices include assessing costs, including opportunity costs. Doing so will insure that government and private resources save more rather than fewer lives.<sup>34</sup>

The order also should require agencies to identify incremental costs and benefits.<sup>35</sup>

Many rules are complex and have multiple elements. If 90% of the benefits of a particular rule are derived from one element or increment and 80% of the costs are imposed by a different element or increment, a waste of resources may result. Agencies should be required to identify costs and benefits from elements or increments of a rule in order to provide decisionmakers and the public with a clearer picture of the choices involved.

In the normal case, as discussed further in the next section, CBA will simply better define the choices regulators must make in any case. CBA may be most valuable in deciding among regulatory alternatives, rather than in deciding whether or not regulation is necessary or appropriate. Advocates of better regulation should support this result as insuring that necessarily limited regulatory resources produce the greatest benefits. Though he did not refer specifically to CBA, the president's recent guidance on appliance energy efficiency standards mandates that in exercising its discretion the Department of Energy should promulgate standards producing the greatest energy savings first.<sup>36</sup> While this guidance is fundamental common sense, the Department will have difficulty in determining which standards will produce the greatest energy savings without some form of CBA. The President's directions in this regard are a clear example of opportunity costs and a greatest net benefit standard. The executive order on regulatory review should incorporate these principles more generally.

Agencies should continue to use a statistical value for life (VSL) in order to assess the relative benefits of regulatory proposals. The point of placing a statistical value on life is not to express a social judgment that lives are worth "only" a selected amount, but to provide a means of understanding what sort of actions (including no action) are more likely to preserve or improve lives. Agencies currently use varying VSL figures. OMB should consider whether the statistical value varies depending on factors such as the individual characteristics of protected

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<sup>33</sup> Supra, notes 12-17.

<sup>34</sup> John Shanahan and Adam Theirer, "Can We Save Even More Lives?: Understanding the Opportunity Costs of Regulation," Heritage Foundation FYI #11, February 28, 1994. Available at: <http://www.heritage.org/Research/Regulation/FYI11.cfm>

<sup>35</sup> Angela Antonelli, "The Dole-Johnston Bill: A Setback for Regulatory Reform?," Heritage Foundation Issue Bulletin #210, June 28, 1995. Available at: <http://www.heritage.org/Research/Regulation/IB210.cfm>

<sup>36</sup> Memorandum on Appliance Energy Efficiency Standards, February 5, 2009. Available at: [http://www.whitehouse.gov/the\\_press\\_office/ApplianceEfficiencyStandards/](http://www.whitehouse.gov/the_press_office/ApplianceEfficiencyStandards/)

persons and the particular risks involved. OIRA should establish a research program to gather more information on whether VSL differs across different risks.<sup>37</sup>

Independent agencies should be required to prepare cost-benefit analyses and submit them to OIRA for comment.<sup>38</sup> While the independent status of agencies may justify separate treatment for certain purposes, most independent agencies submit their regulatory agendas as part of the semi-annual regulatory agenda, and there would be no threat to agency independence to require sound procedural rulemaking. This is especially important given the increasing role economic regulatory agencies, most of which are independent, will play in the course and wake of the current economic crisis.

### **Distributional, fairness and future considerations**

Distributional considerations can be addressed adequately only through sound CBA. The Analysis must identify not only the aggregate and elements of costs and benefits for a regulation and alternatives, but must disaggregate costs and benefits and identify who bears the costs and who reaps benefits.<sup>39</sup> Such an analysis may even provide a basis for choosing a higher total cost alternative if, for instance, a lower cost alternative imposed significantly greater burdens on low income persons. If a regulation has the effect of producing a significant transfer of wealth (net benefits) from one sector or group to another or to the general public, agencies should consider alternatives with more balanced burdens or steps to ameliorate burdens imposed on discreet groups for the benefit of other groups or of the public at large.

Future considerations should also be considered by incorporating them explicitly into CBA. If obligations to the future demand action, they demand the most resource-efficient choices. Specific regulatory proposals involving long term impacts or benefits should be evaluated using a market-based discount rate. Failing to discount may cause agencies to select proposals with lower net benefits, wasting resources that could improve future outcomes.<sup>40</sup>

### **Avoiding undue delay in regulatory review**

As discussed above, the best way to avoid delay in regulatory review is by better planning and earlier and more robust contact between OIRA and agencies. This process logically starts with the annual Regulatory Plan. Agencies should understand, and OIRA should ensure, that the plan incorporates the administration's goals and priorities, not merely an agency wish list. Where the President has special regulatory priorities,<sup>41</sup> those should be fully reflected in individual agency priorities and, if sufficiently important in the plan introduction. Where

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<sup>37</sup> Cass R. Sunstein, "Valuing Life: A Plea for Disaggregation," 54 Duke L.J. 385, 418.

<sup>38</sup> James L. Gattuso, "Red Tape Rising," Heritage Foundation, 2008.

<sup>39</sup> Pildes and Sunstein at 127.

<sup>40</sup> David Weisbach and Cass R. Sunstein, "Climate Change and Discounting the Future: A Guide for the Perplexed," AEI Center for Regulatory and Market Studies, Working Paper 08-19, August 2008

<sup>41</sup> See. e.g. Memorandum for the Heads of Executive Departments and Agencies: Endangered Species Act, March 3, 2009. Available at: [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/)

Presidential goals are cross-cutting in nature, such as an emphasis on science,<sup>42</sup> OIRA should communicate those goals in time for agencies to incorporate them in agency plans.

As soon as it appears that a contemplated regulatory action may require cost benefit analysis or OIRA review pursuant to statutes or the executive order, OIRA and the agency should begin identifying major elements of costs and benefits, means of assessing them, and alternatives that should be considered. Fully incorporating CBA from the outset in an agency's plan will not only avoid delay at the review stage, it will produce better analysis and better regulations.

### **The role of behavioral sciences in formulating regulatory policy**

*Nudge*<sup>43</sup> should be required reading for every regulator.

### **Best tools for achieving public goals through the regulatory process**

As discussed in the “public participation” section, market-based mechanisms, including choice structures, incentives and performance standards are preferable to command and control regulation because market mechanisms allow agencies to achieve public goals in the most resource-effective manner.<sup>44</sup>

The executive order should require agencies to prepare means of measuring regulatory performance retrospectively. Retrospective reviews are required by statute,<sup>45</sup> but results have been disappointing, in part because means to assess regulatory performance are lacking.<sup>46</sup> A proper cost-benefit analysis can provide the basis for a retrospective review to determine whether projected costs and benefits were achieved, indicating whether revisions to the regulation may be in order at some future date. New regulations should be accompanied by specific, measurable outcome expectations. Such goals should be defined and measurable, and should be subject to regular review akin to the GPRA process of overall agency performance.<sup>47</sup>

*David M. Mason*

David M. Mason

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<sup>42</sup> Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity, March 9, 2009. Available at: [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/)

<sup>43</sup> Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decision About Health, Wealth, and Happiness*, Yale, 2008.

<sup>44</sup> The Coase Theorem suggests establishing property rights and reducing transaction costs to promote this result.

<sup>45</sup> Regulatory Flexibility Act, 5 USC 601.

<sup>46</sup> Government Accountability Office, *Reexamining Regulations*, GAO 07-791; available at: <http://www.gao.gov/new.items/d07791.pdf>.

<sup>47</sup> Henry Wray, “Performance Accountability for Regulations,” in *21<sup>st</sup> Century Regulation*, Mercatus Center, 2009.

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