

March 5, 2009

The Honorable Peter Orszag, Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503
Re: Plans to Rewrite Executive Order on OMB Regulatory Review

Dear Director Orszag:

Thank you for the opportunity to comment on the initiative to replace Executive Order 12,866. I applaud President Obama's willingness to launch a thorough reconsideration of OMB's role in regulatory review, and was delighted to see that the revision is being undertaken with the benefit of both public comment and interagency consultation. This is in stark contrast to the tightly closed process that led to the promulgation of Executive Order No. 12,291 in 1981. Given that cost-benefit analysis has been the centerpiece of OMB oversight since 1981, it is no small irony that the executive order process has itself never been subject to cost-benefit review. After 28 years in operation, I do not believe anyone has persuasively demonstrated that the system has paid off. No one has shown that we have achieved greater net social benefits than the United States likely would have enjoyed under a more pluralistic, less centralized regulatory system.

It is my recommendation that OIRA get out of the job of routinely reviewing individual regulations.¹ Instead, it should focus on a role ideally suited to OMB's place in our bureaucratic structure - coordination. OIRA should lead a series of government-wide efforts to examine on a systematic basis an entire range of federal regulations, across agency boundaries, that are relevant to some particular set of social goals in order to determine whether existing regulations fit together as a whole, whether their distributional impacts are fair, and whether portions need updating (or, indeed, repeal). No single-mission agency can perform this job. The coordination function, urged also in an excellent article by attorney Nicholas Bagley and NYU Dean Ricky

¹ A more extended treatment of the following analysis appears in PETER M. SHANE, *MADISON'S NIGHTMARE: EXECUTIVE POWER AND THE THREAT TO AMERICAN DEMOCRACY* (University of Chicago Press, 2009).

Revesz,² was mentioned in the original Reagan order on federal rulemaking, but never played seriously by OMB. A good starting model might be the Regulatory Analysis Review Group, which President Carter created in his Council of Economic Advisers.

A number of the other comments you have received regarding the executive order process tout the importance of cost-benefit analysis. The real question, however, is not whether cost-benefit analysis is useful, but whether OMB should be micro-managing the analytic process that occurs at the agency level. The argument that agencies will regulate excessively or inefficiently left to their own devices - that is, in a more pluralistic policy making environment -- rests on a series of dubious and unproven assumptions. It has variously been theorized that agencies left on their own will overregulate in order to expand their resources and aggrandize their authority. They will respond too precipitously to perceived health and safety risks. They will fall sway to ideologically driven bureaucrats. Or they may be "captured" by pro-regulatory forces. But there is no proof that any of these things is systematically the case.'

Moreover, the process of centralized review as it is currently organized quite probably hurts the country more than it helps. Given what we know about the OMB review process in operation and OMB's own estimates of the costs and benefits of regulation, OIRA review - if it continued in its current mode - would have to reduce the net costs of regulations that agencies propose by somewhere between 7 and 37 per cent on average in order to justify in economic terms the 12866 model of White House involvement. Unless the current process reduces the net costs of regulation somewhere in that range, the combination of direct costs imposed by the review process - the salaries for increased staff, for example -- and the indirect costs of delaying the implementation of socially beneficial regulations would exceed the amount saved by piling White House cost-benefit review on top of the cost-benefit review that agencies already conduct. This is demanding a fairly impressive rate of return for the process, even assuming that the costs of delay are low and the overall price tag of the rules is high.

I base my conclusions on the following analysis. Prominent economist Paul Portney, in a 1984 paper, estimated the direct costs of the current model of OMB-OIRA oversight at \$17-25 million, which, in Fiscal Year (FY) 2001 dollars, would have amounted to \$29.9 - 47.4 million.'

² Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260,1310-1312 (2006).

³ *Id.*, at 1282-1304.

⁴ Stuart Shapiro, *Assessing the Benefits and Costs of Regulatory Reforms: What Questions Need to Be Asked* (AEI-Brookings Joint Center for Regulatory Studies, Regulatory Analysis 0701, Jan. 2007), available at <http://www.aei-brookings.org/publications/abstract.php?pid=1146>, quoting Paul Portney, *The Benefits and Costs of Regulatory Analysis*, in V. KERRY SMITH, ED., ENVIRONMENTAL POLICY UNDER REAGAN'S EXECUTIVE ORDER (1984). (I have derived all inflation-adjusted figures using NASA's New Start Inflation Index Calculator, available at

This sounds like a large figure, but OMB, in a draft 2007 report to Congress on the costs and benefits of federal regulations, estimated the annual costs in FY 2001 dollars of the major rules adopted in FY 2006, to be \$ 3.7-4.2 billion.⁵ Assuming the direct costs of the program have remained the same since 1984, the high \$47.4 million estimate of direct costs entailed in regulatory review would amount to just over 1 per cent of the low estimate of the annual costs associated with the FY 2006 major rules. In other words, if we assume a 10-year lifespan for the new rules and if centralized oversight reduces the costs of what would otherwise have been the agencies' regulatory proposals by about one-tenth of one per cent over the life of the rules, a very low target, the system would pay for its own direct costs.

The problem, however, is that there are also indirect costs, and the most obvious of these is the cost of delay. OMB's estimate, in FY 2001 dollars, of the annual benefits associated with the its major rules in FY 2006 was \$ 6.3 to 44.8 billion.⁶ Any reduction of benefits attributable to delays in issuing rules that result from the centralized process of regulatory review should obviously count as a cost of regulatory oversight. There is, of course, very frequently some considerable delay between an agency's proposal of any rule and the promulgation of the rule in its final, legally binding form. The question is how much of this delay, for major rules, can be reasonably attributed to the OMB/OIRA review process that recent presidents have imposed.

A recent study of administrative rulemaking during both the second Clinton and first Bush 43 Administrations provides a reasonable basis for estimating this delay.⁷ The two administrations had remarkably similar records with regard to the time elapsed between proposed and final rules. In both cases, the mean lapse for all rules between proposal and promulgation was roughly 11 months, while the mean lapse for rules reviewed by OMB was 17-20 months.⁸ This suggests as a reasonable estimate that the 12,866 process added six months to the process for the typical rule under review.

<http://cost.jsc.nasa.gov/inflation/nasa/inflateNASA.html>, and am using the FY 2001 baseline because OMB currently uses 2001 dollars to state the annual costs and benefits of the regulation it reviews.)

⁵ Office of Management and Budget, Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations 2, 11 (Mar. 9, 2007), available at http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf.

⁶ Id.

⁷ Stuart Shapiro, Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations (Sept. 29, 2006), available at SSRN: <http://ssrn.com/abstract=933678>.

⁸ Id. at 31.

If this is the case, then the cost of OMB review for the rules it reviewed in FY 2006 could have been in the order of \$ 3.2 - 22.4 billion, or half of the benefits estimated for any single year the rules would be in effect. Assume, again, that these regulations remain in place, on average, for 10 years. OMB review would then have to reduce the costs of the rules by \$ 320 million to \$ 2.2 billion per year to compensate society for the benefits foregone. Given the annual cost estimate for these rules of \$ 3.7-4.2 billion, we can get a conservative estimate of the cost savings OMB would need in order to break even, by comparing the lower estimate of the costs that OMB imposes through regulatory delay (\$ 320 million) with its high estimate of the overall cost of the rules (\$ 4.2 billion). Making this comparison, the 4.2 billion price tag would have to have been over 4.5 billion without the review, in order for the cost of the review to be justified in light of the foregone benefits of 6 months' delay in implementing these significant rules. In other words, the review process would have had to shave off up to 7 per cent of the total cost of the rules for the review itself to be cost justified. This assumes that the costs of delay are low and the overall price tag of the rules is high.

We can do the same exercise at the other end of the range in order to get a more generous estimate of the cost savings OMB would need to achieve in order to justify the review process. If OMB is correct in its high estimate of benefits but at the low end of the cost range, then the annual cost of 6 months' delay in implementation would have been \$ 2.2 billion and, in order for the review to be cost justified, the pre-review cost of the regulations would have had to have been \$ 2.2 billion higher than the estimated \$3.7 billion in post-review regulatory costs. This would have required a cost reduction based on OMB review of up to 37 per cent. Routine gains in cost reduction in this range of magnitude seems utterly implausible, unless there some reason to think that agencies are not just overregulating - they are regulating recklessly.

In light of this analysis, it seems imperative that either OIRA somehow streamline its review role to avoid the delays in socially beneficial regulation or rethink its role so that the benefits of its involvement are increased. The latter course certainly seems the more plausible. Instead of trying to replicate in a small, centralized office the analytic exercise that agencies are already undertaking, OIRA should focus on an institutional role that no other agency can play -namely, the coordinating role I identified above.

Rethinking the executive order on regulatory review could not occur at a more opportune time. The Bush Administration performance on economic, health and safety regulation was, in my view, disastrous. President Obama has the opportunity to redesign the role of the White House in regulatory policy making so that OMB becomes a genuine partner to agencies seeking to advance the public interest through wise regulatory initiative. I hope these comments are of help to you in that process.

Sincerely,



Peter M. Shane

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