Responding to President Obama's Call for Recommendations to Improve Regulatory Review
February 18, 2009

On Jan. 30, President Obama issued a memorandum to the heads of executive departments and agencies, directing agencies to send recommendations to the Office of Management and Budget (OMB) regarding a new regulatory executive order. He sought input on a range of topics from his agencies but did not specifically call for public input. Yet on January 21, the president issued another memo to federal agency heads in which he noted that he believes in three principles: openness, public participation, and collaboration. In keeping with President Obama's belief in participatory government, OMB Watch has prepared these recommendations for a new executive order that can lead to more timely and responsive rulemaking in a more transparent and participatory manner.

A critical element to address in reforming the regulatory process is the relationship between the Office of Information and Regulatory Affairs (OIRA) and regulatory agencies. This relationship should be defined first and foremost with deference to the expertise and experience of the regulatory agencies. Regulatory decisions should come from the expert agencies, and OIRA should not mandate one-size-fits-all approaches to promulgating rules. Embracing this deference to agency decision making also respects the statutory mandates that agencies must follow in carrying out their regulatory responsibilities. In addition, it will allow the flexibility needed for agencies to properly follow legal requirements under agency rulemakings.

If the Obama administration embraces this concept of deference to agencies, a new executive order will be very different from past executive orders and could fundamentally transform the rulemaking process so that it operates more efficiently in the 21st century. It should also lead to less intense disagreements over key elements of the process such as the use of cost-benefit analysis. This is because the agencies will have the authority to decide when and if to use such tools, consistent with their statutory obligations and expertise on specific issues. And OIRA's role would shift to providing the principles to guide use of such tools for agencies that decide to use them.

OMB Watch was part of a nearly two-year project that made regulatory reform recommendations to stem the tide of increasing delay and conflict over the formulation of critical health, safety, and environmental protections. We support those recommendations.[1] We recognize that the project report does not offer sufficient details in some areas. As a complement to those

[1] A copy of the report is available on our website at http://ombwatch.org/files/regulatoryreformrecs.pdf; copies of memos the project's Steering Committee sent to the transition team are at http://ombwatch.org/files/regs/PDFs/RegReformTransitionMemo12-5.pdf, and http://ombwatch.org/files/regs/PDFs/RegReformTransitionMemo12-24.pdf.

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recommendations, OMB Watch offers the recommendations below regarding four major topics for reform in a new executive order, should President Obama choose to issue one.

The Role of OIRA and the Agencies in Rulemaking

There needs to be a fundamental restructuring of the relationship between agencies and OIRA based on the fundamentals of agency expertise and statutory authority for decision making. OIRA's role should be as a facilitator, coordinator, and manager and should not usurp the responsibilities of agency heads who have the direct statutory authority for agency regulatory decision making. White House offices do not, and should not, duplicate the expertise of the agencies and, therefore, should not be involved in the review of each significant regulatory proposal. OIRA staff should not be issuing *de facto* decisions of approval or disapproval over, or modification of, individual regulations as if they have an implied right to make final decisions on the substance of a regulation. This means that significant rules would no longer be sent to OIRA for clearance.

Moreover, regulatory review is a fundamentally different responsibility than other OMB clearance procedures. When OMB reviews agency budgets, it is in the context of a statutory requirement to prepare a budget submission to Congress. That submission is considered and publicly debated through the congressional process and ultimately voted on by our elected leaders in the House and Senate. Regulations, on the other hand, do not go through such a thorough vetting process.

This is not to suggest that OMB or OIRA should have no role in the regulatory process. The president does have the right and ability to oversee broad policy directions and identify government-wide structural and management issues that may enhance the quality of the rulemaking process. A new executive order should use OIRA to that advantage without having OIRA clearance of each regulation.

Instead, OIRA should:

- Hold agencies accountable for their priorities and regulatory actions and coordinate those actions among federal agencies. Taking this approach, OIRA should communicate to the agencies that the *Unified Agenda* is a serious planning tool that can be used to enhance policy goals and hold agencies accountable. The *Agenda* can become a tool for achieving policy consistency government-wide and spotting interagency policy conflicts before significant resources are spent on individual rules. A mechanism like the Regulatory Working Group may serve to resolve interagency conflicts, and OIRA could facilitate that dialog among agencies and clarify presidential priorities.

- Help identify regulatory gaps and inconsistencies with the president's policy priorities. When gaps are identified and the president wishes an agency to act, that deviation from an agency's agenda should be done through the agency head and by some mechanism with full public engagement. This responsibility can serve as an oversight function parallel to the oversight exerted by congressional committees. However, this should not be construed as a recommendation to engage in approval or disapproval of agency regulatory plans; rather this

is an oversight role and a means to educate the president on difficulties in achieving his agenda.

- Help to achieve consistency in regulations in policy areas that cut across agencies, such as food safety. Having identified such a cross-cutting area through the *Unified Agenda* as one in which multiple agencies are taking action, OIRA should ensure that regulatory outcomes are consistent with each other. This should not be mistaken for review and approval of all individual rules proposed but rather as a responsibility to coordinate regulatory activities before agencies have expended time and resources developing regulations that conflict with other agency actions.

- Facilitate interagency comments on significant proposed and final rules. This interagency comment process should not be an excuse for delaying regulatory decisions, especially if OIRA has successfully coordinated agencies at the planning stage. Nor should the interagency comment process be an excuse for delaying regulations through *de facto* vetoes over the types and quality of the underlying information. (An example of this interagency veto power is the new EPA Integrated Risk Information System (IRIS) assessment process, explained in more detail below in the section on delay.)

- Prepare an annual report on the state of regulation. This report would provide a numerical picture of regulation within the agencies as well as information about progress towards the president's policies and priorities. The report should include data such as: number of proposed and final rules published by each agency (sorted by major and non-major), length of time it took to publish the proposed and final rule, number of comments received by rule, number of petitions for rulemaking and the list of such rules, number of FTEs devoted to rulemaking in each agency, amount of money targeted to research and rule-writing, and other data about the development of rules. In addition, the report should include information about enforcement of regulations, including the amount of money spent, number of FTEs, and number of entities regulated.

  This annual report should replace the requirement, contained in the Regulatory Right-to-Know Act, that OMB report annually the costs and benefits of all regulations. This change will require congressional approval. We believe the cost-benefit report is an inappropriate use of resources for both agencies and OMB particularly when the report is built on a wide range of assumptions underlying each cost-benefit analysis and a number of factors that cannot adequately be accounted for in the analysis. OMB and agency resources would be better used to compile the annual state of regulation as described here.

- Return to its statutory mandate with regard to information management and especially its paperwork clearance process. Even though OIRA was created by the Paperwork Reduction Act (PRA), much of its activities have been guided by regulatory review executive orders. Yet more is needed to fully implement the PRA (which needs reauthorization). Currently, agencies are sometimes prevented from responding in a timely way to emergency situations because of limitations under the PRA. For example, under the Troubled Assets Relief Program (TARP), questionnaires regarding the use of funding provided under TARP and executive compensation are needed (e.g., TARP Intermediation Snapshot), but they have

only recently been sent to OIRA for its review and approval. The clearance process has slowed down agency actions that require speed.

Another example: When the Election Assistance Commission (EAC) wants to collect information regarding voter suppression through post-election surveys, it must get 50 different clearances from OIRA because there are 50 different states with differing election laws, thereby requiring different surveys. Additionally, the EAC needs emergency relief to get its surveys out quickly in response to election protection issues. OIRA should explore how to make the clearance process for information collection requests more flexible to meet agency needs, utilizing existing provisions in the law for experimentation.

The president should also work with Congress to develop alternatives to this clearance process, allowing greater flexibility and responsiveness to pressing issues. One example might be to create an annual burden-hour budget for each agency that allows the agencies to pursue information collection without OIRA approval up to the budget limit or for emergency or time-critical situations only.

- Help agencies address a range of other information resources management issues to help government to operate in the 21st century. OIRA must spend more time working with the E-Government office to coordinate policy and the use of interactive technologies to improve agency dissemination practices as required under the PRA.

If a new regulatory review executive order is premised on these roles, the executive order will be fundamentally different than either President Reagan's or President Clinton's executive orders. It would no longer have individual regulations sent to OIRA for review. Without the approval/disapproval authority, the relationship with the agencies would dramatically change.

Transparency in rulemaking

Studies, research, analyses, data, etc., both from within government and from outside sources, serve as the informational foundation agencies need to build regulations that can withstand legal challenge, intellectual scrutiny, and public debate. Because these inputs inform decision making, the public and government officials should have access to them.

Regulations.gov is the primary venue for public review of the supporting documents in a rulemaking and of communications between or among an agency issuing a regulations and others. However, Regulations.gov is both incomplete and inconsistent. It is incomplete because neither executive policy nor statute *requires* disclosure of analyses or communications. It is inconsistent because, when agencies choose to disclose such information, they format information differently and supply different types of information.

OIRA now customarily discloses some information in its review. For example, it provides a list of all rules undergoing OIRA review, updated daily; a list of all rules on which review has been concluded in the past 30 days; letters to agencies regarding OIRA regulatory actions; and data on regulatory reviews dating back to 1981. This information is posted on RegInfo.gov. The

website does not provide the actual documents sent to OIRA for review, even after the review process is completed.

OIRA also is supposed to disclose all substantive communications with any party outside the executive branch concerning regulations under review. If OIRA personnel meet with outside parties regarding a rule under review, OIRA is supposed to disclose the subject, date, and participants of the meeting. The Bush administration began the practice of disclosing on the OMB website a participant list for meetings held with outside persons or groups. On occasion, materials presented by meeting participants were also made available online, but that has been largely inconsistent.

We believe President Obama should make improving transparency in the rulemaking process a high priority and recommend that a new executive order on regulation contain disclosure requirements covering communications within government; *ex parte* communications; and agency analyses, studies, and research. Additionally, the tools for disclosure need to be significantly improved. Specifically:

- OIRA should develop an online regulatory tracking system that is searchable and indexed by major search engines, updated regularly, and allows the public to see a rule's progress through the regulatory process from its initiation to its final publication. Neither Regulations.gov nor the *Unified Agenda* provide adequate mechanisms to follow a rule's status or trace its origins once it is substantially revised; nor does RegInfo.gov. This tracking system should assign a Regulatory Identification Number (RIN) to a proposed rule, and that RIN should attach to the rule throughout its lifecycle; if a rule changes substantially and requires a new RIN number there should be a regulatory tree showing the connection between RIN numbers, indicating one RIN died while another started up. To the extent possible, information collection requests associated with the rule should also be linked into this lifecycle perspective.

- An agency developing a regulation should disclose in the online rulemaking docket all written communications regarding the regulation between or among federal officials from different agencies and offices, including White House offices, not just OMB. These communications should include letters, memos, e-mails, and other forms of written communications received from other agencies or from White House offices. Disclosure should begin upon creation of the rulemaking docket for the regulation and occur as soon as possible after the time of the communication.

- An agency developing a regulation should disclose in the online rulemaking docket all substantive communications, written or oral, between any federal official and any nongovernmental entity regarding a regulation. Disclosure should begin upon creation of the rulemaking docket for the regulation and occur as soon as possible after the time of the communication. When the communication occurs between a nongovernmental entity and an official outside of the agency developing the regulation, including White House officials, the government official should provide the agency developing the regulation with any written communications or, for oral communications, the date of the communication, a participant list, and a summary of the communication. These communications, such as meetings with

OIRA staff, should also be logged into the rulemaking record available through Regulations.gov or the general tracking system mentioned above.

- An agency developing a regulation should disclose in the online rulemaking docket all research – studies, analyses, data, and the like – used during regulatory decision making. The agency should also disclose all research consulted, regardless of whether it was used to inform a decision. The agency should clearly identify the source of the research in the docket and who funded the research.

- Federal advisory committees can be important sources of information in the rulemaking process, both to solicit scientific and technical information and to gather the perspectives of various stakeholders affected by regulations. An executive order on regulation should emphasize to federal agencies the importance of these committees in providing independent advice and the importance of following the prescribed law. Too often, agencies look for ways to avoid the Federal Advisory Committee Act (FACA); this should end. Congress has begun addressing reforms to close loopholes in the FACA and to increase the transparency of the process. The order should also emphasize the importance of the transparency of the process as an aspect important to government accountability and effectiveness.

These recommendations embody several principles. First, the public and affected parties have a right to review communications regarding the regulations that ultimately impose requirements on society.

Second, disclosure requirements for executive branch communications should be limited to written communications in order to limit the burden on agencies and allow for the free exchange of ideas through oral communication among government officials.

Third, the decision about when a rulemaking commences is properly an agency decision. The rulemaking docket should be created when the rulemaking begins, and disclosure should begin upon creation of the rulemaking docket but no later than the time of the rule's first appearance in the *Unified Agenda*.

Fourth, the basis of an agency's reasoning should be made available so the public and affected parties can better understand and evaluate regulatory decisions. Having a transparent FACA process, for example, provides the public with information to help judge the effectiveness of rulemaking.

Finally, making all this information available online is critical to achieving true transparency in the 21st century.

Public participation in rulemaking

We believe the most effective way for the public to participate in the regulatory process is through an effective electronic rulemaking system. An executive order on regulation should make e-rulemaking an important priority and call for improving the quality of information and the ease of use of the site. We fully support the American Bar Association's 2008 study on the

status and future of e-rulemaking.[2] Specifically, we strongly support efforts to improve data and information standards, to allow for multiple access points through agency websites, to restructure management and governance, and to redesign the Regulations.gov interface.

OIRA should make RegInfo.gov more user-friendly in order to enhance the public's use of the site to track and comment on information collections. Also, it should be integrated with Regulations.gov. As noted above, this process is cumbersome in emergency situations. It has also been used as a political tool to control information that agencies may need to produce effective rules in a timely manner. The public, and especially regulated entities, should have easier access to this information and about OIRA's review process.

Delay

Currently, regulations take far too long to complete. We recognize the complexity of most significant rulemakings and the years agencies need to research an issue, prepare a notice of proposed rulemaking, and advance to the final stage. The significance of the many scientific, technical, social, economic, and practical aspects of rulemaking means that rules cannot and should not be hurried, except in emergency situations. Layered on this complex process of protecting the public, however, are many assessments, directives, and legislative requirements, many of which are unnecessary and simply add unneeded delay.

There are many ways to pinpoint and eliminate major causes of delay in the rulemaking process. The administration can seek input from the public and agencies on factors that unnecessarily slow down rulemakings. Or the administration could establish a commission comprised of non-governmental and government experts to identify sources of delay and make recommendations for reform. Whatever approach is employed, it is important to quickly address potential sources of delay, which are numerous and spread throughout government.

Although it may be difficult to find consensus on what is considered unnecessary delay, it is clear that layering of analytical and procedural requirements has turned many requirements into paperwork tread mills. While some of these requirements will require congressional action to permanently fix, an executive order on regulation can militate against onerous implementation. Here are several top areas to address in reducing delay:

- Develop improved implementation requirements for a number of statutes that pose delay. For example, both the Data Quality Act (DQA) and the Small Business Regulatory Enforcement Flexibility Act (SBREFA) not only serve as a potential source of delay but also provide an opportunity for conflicted interests to undermine the basis for regulation. DQA allows nongovernmental entities to challenge agency science and force agencies into an endless loop of reanalysis and scientific defense. The DQA should be eliminated. In the meantime, an executive order or other directive to agency heads can refocus implementation to address the real issue of improving data quality through regular inspection of information being disseminated to the public. For certain regulations, SBREFA solicits the input of representatives from the business community well before the public review process required

[2] Section of Administrative Law and Regulatory Practice of the American Bar Association, *Achieving the Potential: The Future of Federal e-Rulemaking*, November, 2008, at http://ceri.law.cornell.edu/erm-comm.php.

by the APA. This creates a process to allow business interests to trump the public interest. It also creates unnecessary delay. The administration should take steps to end the imbalance caused by SBREFA. Until Congress modifies the law, SBREFA panels that are required should have equal balance between workers and owners of small businesses.

- Other requirements slow rulemakings while they are in their infancy. For example, OMB guidelines on peer review potentially delay the completion of scientific studies that often serve as the basis for regulation. Those guidelines should be removed. Peer review and risk assessments are tools that agencies should use according to the professional standards required of the disciplines and as statutory mandates require. For example, new OMB-imposed procedures that slow or permit other agencies to veto risk assessments conducted under EPA's Integrated Risk Information System preemptively delay toxic exposure standards health agencies may wish to set in the future.

- A new order should state that scientific uncertainty should not be an excuse for not regulating where the science demonstrates, within an acceptable confidence level, that there are effective regulatory options. Scientific understanding is constantly evolving, and even the best evidence rarely leads to full certainty. Federal laws often recognize that the government has a responsibility to protect citizens from harms they cannot control, and some explicitly call for a margin of protection. The notion that officials must pinpoint risk (e.g., using dose-response data to find a precise exposure threshold at which harm occurs) before taking action runs counter to many of these statutory requirements.

Regulations are essential governmental functions. President Obama has the opportunity, through the development of a new regulatory executive order, to reverse the three decades-long process of treating public protections, and the agencies responsible for providing them, as government intrusions. Ultimately, he has the opportunity to change the way we think about and provide regulatory protections to the American people.