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PRESIDENT EXPANDS OVERSIGHT OF FEDERAL AGENCY RULEMAKING

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Signaling the Bush Administration's intention to revive presidential oversight of administrative rule-making, John Graham, the head of the Office of Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), recently issued a memorandum addressed to all federal agencies outlining "Principles and Procedures" he will use in determining whether agencies have properly assessed the risks and evaluated the costs and benefits of new regulations. This directive advises agencies to base "major" rules on "objective, realistic and scientifically balanced" risk assessments including an analysis of the costs and benefits of "potentially effective and reasonably feasible alternatives" to produce regulations which "maximize net benefits" as permitted by the authorizing law. The restoration of OIRA to its historic oversight role of providing meaningful supervision of agency rule-making also is evident in the current Bush Administration actions. Sixteen rules have already been returned to the agencies during its first ten months in office (as compared to only thirteen rules returned by the Clinton Administration in its entire eight years).

Background. Although every President since Richard Nixon has said that he would exercise closer control over policy-making by federal administrative agencies, that goal has been elusive for several reasons: (1) the President's authority to manage agency rule-making is not clearly defined; (2) the agency staffs resent and resist outside oversight; (3) OIRA has only limited staff support; and (4) other Administration programs tend to command OMB's attention. Nonetheless, the initial focus of coordinating policy among the agencies has been expanded to include intensive review of the scientific basis, costs, and benefits of proposed rules. President Reagan's 1981 Executive Order (E.O. 12291) expanded the oversight role by requiring that every significant rule (defined as a "major" rule with a likely impact on the economy of at least $100 million) include a cost-benefit study as part of a mandatory Regulatory Impact Analysis (RIA). After

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first determining whether federal action was necessary, cost-benefit analysis was to be the dominant decision-making criterion both in deciding whether a rule should issue and in determining its contents. OIRA enforced this mandate by "suggesting" changes or the need for additional data, and, in exceptional cases, by rejecting the proposed rule and requiring the agency to reconsider its analysis. Critics of the process complained that the oversight was conducted in secret, seemed at times to be a conduit for special pleading by affected interests, and appeared often to be unduly confrontational. *See generally* H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

The oversight process also has been constrained by other limitations. It has no express statutory authority and the constitutional foundations — including the vesting of executive power in the President (Art. II, § 1, cl. 1), the appointments clause (Art. II, § 2, cl. 2), the "take care" clause (Art. II, § 3), and the "opinion" clause (Art II, § 2, cl. 1) — are substantial but indirect. None of the decrees required independent agencies to submit regulatory impact analyses to OIRA, although influential voices have contended that the President's authority could apply. *See* P. Strauss & C. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). Even executive branch agencies can avoid oversight by developing their rules through adjudications or informal interpretations. Moreover, OIRA cannot mandate agency reliance on cost-benefit analysis where the agency's statutory authority requires reliance on other, inconsistent criteria. *See Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) (color additive banned by FDA as a carcinogen even though its use would yield net benefits to the public); *see also EDF v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) (OIRA could not delay issuance of a rule beyond its statutory deadline).

Implementation of E.O. 12291 during the Reagan and George H.W. Bush Administrations was particularly effective in mandating compliance with the President's priorities. (President Reagan also issued an executive order, E.O. 12498, which required agencies to work with OIRA in publishing an annual Regulatory Program that highlighted significant forthcoming regulatory actions.) The agencies' policy-making was coordinated, command-and-control rules often were replaced by less prescriptive measures, and serious cost-benefit analyses both exposed likely consequences and identified more efficient alternatives. On the other hand, the perception of a lack of openness, undue delays, and agency hostility to drafting meaningful RIAs in the midst of informational uncertainty led to unfavorable publicity and challenges that "extra-legal" oversight requirements were being used as end runs around specific statutory requirements. *See* M. Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 305 (1991).

The Clinton Order. President Clinton addressed some of these concerns when he replaced the Reagan orders with E.O. 12866. This order agreed with the foundations of the Reagan orders and retained the use of regulatory impact and cost-benefit analyses as important decision-making tools. It directed the independent agencies to publish "regulatory plan[s] of the most significant regulatory actions that . . . [they] reasonably expect[] to issue in proposed or final form in the fiscal year and thereafter" (*id.* § 4), but otherwise independent agency participation in the OIRA program was voluntary. (*Id.* §§ 3(b) & 5) In addition, it codified procedures implemented in a 1986 OIRA memorandum that set forth specific limits and disclosure requirements on external contacts with OIRA (*id.* § 6(b)(4)) requiring, for example, that "a representative from the issuing agency shall be invited to any meeting between OIRA personnel and [any] person(s) . . . not employed by the executive branch of the Federal Government regarding a regulatory action under review." (*Id.* §§ 6(a)) These adjustments reduced the complaints about the OIRA review process and removed it from the editorial pages.

On the other hand, the Clinton order deliberately recast OIRA's role from that of a stern taskmaster to one of a "cooperative" partner; the process was to become consultative. *See* S. Dudley & A. Antonelli, *Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?*, 20 REGULATION 17-23

(1997). Its promise of rigorous oversight was not met, possibly because the Clinton administration had few doubts about the efficacy of agency regulations. In any event, OIRA-initiated changes generally were limited to marginal issues. Few rules (only 13 of the 6,218 reviewed) were returned to the agencies for re-evaluation during the next eight years. In addition, compliance with cost-benefit and other requirements such as federalism or small business impact analyses declined sharply as the agencies realized that no one appeared to be checking their performance. *See* Public Interest Comment Series, *Comments on OMB's Draft Report to Congress on the Costs and Benefits of Federal Regulations*, RSP 2000-2 Mercatus Center, George Mason University (Jan. 2000); R. Hahn & R. Litan, *An Analysis of the Third Government Report on the Costs and Benefits of Federal Regulations* (American Enterprise Institute 2001). The role of OIRA had shifted from a serious substantive reviewer of regulations to a cheerleader unwilling to hold agencies accountable for serious risk assessment or cost-benefit analysis; presidential oversight ceased to be a factor. *See* R. Pierce Jr., S. Shapiro & P. Verkuil, ADMINISTRATIVE LAW AND PROCESS 333 (3d ed. 1999) ("OMB seems not to have played a significant role in reviewing agency rules during the Clinton Administration.").

The OIRA Directive of September 20, 2001. OIRA's new administrator, John Graham, seems to have both the background and commitment to return presidential oversight to a potent policy check on administrative rule-making. Before going to OIRA, he headed Harvard University's distinguished Center for Risk Assessment and was one of the leading scholars in this emerging field. He arrived with a mandate from OMB Director Mitchell Daniels "to work with the agencies to implement vigorously the principles and procedures in E.O. 12866 until a modified or new Executive Order is issued." OMB, Memorandum M-01-23, *Improving Regulatory Impact Analyses* (June 19, 2001). It directed agencies to follow OIRA's guidelines for regulatory analysis prior to sending a rule to OIRA for review. And now, Graham has followed up with a directive to the agencies detailing the principles and procedures OIRA will apply. OMB, REGULATORY REVIEW: PRINCIPLES AND PROCEDURES, Sept. 20, 2001.

This *Principles and Procedures* initiative demonstrates the intensity of Graham's commitment to regulatory analysis based on sound science and rigorous peer review, and specifically commits him to using his authority to enforce agency compliance. Agency economists, engineers, and scientists (as well as agency attorneys), he admonishes, should be consulted in preparing RIAs. In particular, he urges that "each agency consider adopting or adapting" the basic congressional standard of quality for scientific information articulated in the 1996 amendments to the Safe Drinking Water Act, 42 U.S.C. §§ 300g-1(b)(3)(A) & (B). They require:

> (1) use of the best available data as well as peer-reviewed science and supporting studies;
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> (2) identification insofar as practicable of (a) each population affected by risk effects; (b) what that expected risk is for each group including appropriate upper and lower bound estimates; (c) the uncertainties in such estimates; (d) relevant peer reviewed studies that relate to studies that support or challenge the estimates; and (e) the methodologies used to reconcile inconsistencies in the scientific data.

To be acceptable to OIRA, the risk assessment is to be "objective, realistic, and scientifically balanced." In addition, "in choosing among alternative regulatory approaches, [the] agencies should select those approaches that maximize net benefits." The directive further reminds the agencies that under the Congressional Review Act, 5 U.S.C. §§801-08, as well as the Clinton E.O. 12866, they are required to prepare an RIA "regardless of the extent to which an agency is permitted by law to consider risks, costs or benefits in issuing a regulation." No longer will an agency be able to slough off its RIA responsibilities with unrealistic or irrelevant boiler-plate recitations or by blandly asserting that such factors need not be studied

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because the agency was not required to consider or be bound by them in making its decision. As former White House Counsel Boyden Gray and others have pointed out, requiring agencies to prepare and publish a careful risk assessment (including a cost-benefit analysis) will expose shoddy decision-making for what it is. *See* B. Gray, *The Clean Air Act Under Regulatory Reform*, 11 TUL. ENV. L.J. 235 (1998); Amicus Curiae Briefs for Mercatus Center in *Whitman v. American Trucking Assn* (filed July 1 & Sept. 11, 2001), 531 U.S. 457 (2001).

To emphasize the importance of meaningful RIAs, Graham's directive notes that OIRA has already returned two draft rules for "improved analysis" because of "analytical problems"; he is careful to say that a return "does not necessarily imply that either OIRA or OMB opposes the draft rule." Indeed, the description of its new return procedure may, as a practical matter, be Graham's most important message. As of early November, OIRA has returned sixteen rules for agency reconsideration. (All return letters are now posted on OIRA's web page: http://www.whitehouse.gov/ombinforeg/index.html). Sooner or later, the agencies will understand that OIRA means business. Thus, in addition to satisfying the requirements of Clinton's E.O. 12866, agencies must consider impact assessments required by other executive and statutory directives.

The Graham directive also assigns a critical role to "independent peer review by qualified specialists." Explaining that peer reviewers should be selected on the basis of their technical expertise, it directs that reviewers must make full disclosure of prior technical and policy positions as well as all sources of funding, and that the reviews shall be conducted in an "open and rigorous manner." When these requirements are satisfied, OIRA will give "a measure of deference" to an agency's RIA. While the peer reviewer disclosure requirements are desirable, they need to be drawn carefully to avoid burdensome reporting requirements for dated or irrelevant information.

Finally, the Graham directive announced an innovation he calls "prompt letters" which are generated by OIRA from its review of an agency's regulatory agenda (prepared semi-annually since 1981). These letters, which agencies generally are expected to answer within 30 days, "prompt" agencies to consider regulatory action, to accelerate a current rule-making, or to rescind or modify an existing rule. These prompt letters should facilitate dialogue between the executive office of the president and agencies with regard to regulatory priorities.

Conclusion. As John Graham implements the new directives, he may find it useful to reassess some details. First, a new executive order may not be required. In general, the Clinton order is adequate for the task, although some modifications may be desirable (e.g., its time frames for review are unduly inflexible; its involvement of the Vice President to resolve agency-OIRA disputes may not suit this administration; etc.). Second, the transparency of the process could be improved by maintaining an accessible record summarizing why specific RIAs and cost-benefit analyses were appropriate or deficient. Third, OIRA should examine the proliferation of separate impact statements required by other executive orders and statutes; they often overlap, require redundant explanations, or are simply confusing. Finally, OIRA should issue prompt letters judiciously focusing on outdated regulations, government-wide priorities and tradeoffs, and continuing issues of coordination. Overall, however, the Graham directive is an important step in revitalizing presidential oversight of agency rule-making.

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