Wednesday, March 11, 2009
Submitted by e-mail to oira_submission@omb.eop.gov

Mr. Kevin F. Neyland
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503
Attn: Mabel Echols, Room 10102

Dear Mr. Neyland:

This is in response to your request for comments on the principles and procedures governing regulatory review within the Federal government, to assist the Director of OMB in responding to the President's request for recommendations for a new Executive Order on Federal Regulatory review. The effort in which you are engaged is of significant importance to the public, and I am very pleased that the President and your office are proceeding in a prompt, deliberate and thoughtful manner.

Each of us responding to your request brings a different set of experiences to the table. My observations are based upon a 35 year career in Federal service devoted to legislative and regulatory policy – including service as a counsel for administrative law for the Department of Labor, as that Department's representative to the White House and Congress on regulatory reform issues during the Clinton Administration, as project coordinator of the only two occupational health care rules issued by the Mine Safety and Health Administration since its inception, and as a senior advisor to Chairman of the House Education and Labor Committee George Miller on mine safety and health matters.

In providing recommendations to the President, I hope you will emphasize some of the basics, for they often get lost in the noise.

* The power of regulation is delegated by the Congress to agencies or officials it has authorized to execute the laws it enacts. This approach frees the people's elected representatives from having to constantly revisit difficult policy decisions as new implementation issues and circumstances arise, and they have a strong institutional interest in seeing the regulatory process work.

* In order to pass Constitutional muster (non-delegation doctrine), the Congress must establish explicit tests which specific regulatory agencies have to apply in carrying out their mandates; e.g., tests that trigger agency action, tests that constrain agency action, and the extent of the deference to which an agency head is entitled during judicial review. Regulators will not out there running amok without Presidential direction.

* The Congress has also established requirements on public participation in the process, and procedures for judicial review of agency compliance with those procedural

requirements. The courts have ruled on them, and here too the regulators will not be out of control without Presidential direction.

The process of White House regulatory review is of recent vintage. After the Congress created the EPA and OSHA, a broad backlash developed to laws that reached so broadly into the economy. Unable to initially change the composition of the Congress, those concerned focused their attention on implementation decisions, including regulations. Executive orders became one tool in that arsenal (along with a litigation assault, appropriation riders, budget restrictions, and papering agency officials with self-serving studies and experts have been others). When the Congress changed hands in 1994, an effort was made to roll back the regulatory requirements directly; but thanks to a veto threat, and determined Senate minority efforts, this direct assault was halted. Nevertheless, the pressures it generated provided the impetus for even more centralized control; whether the goal was to save the regulatory programs from these pressures, or to deliberately stifle the programs.

OIRA and the Executive Orders on regulatory policy, in short, are not a permanent part of the American landscape. Rather, they are merely tools that have been developed by both Democratic and Republican administrations to deal with the pushback by the business community to the broad new environmental requirements of the 1960s and 1970s. Some would argue that these tools have been effective in ensuring that agencies act properly and don't lose the practical perspective that the Congress itself brings to problems. Some argue that the tools tend to conflict with the legal obligations of the regulatory agencies, and in practice prevent the agencies from fulfilling the mission set for them by the Congress, forcing it to spend valuable time on matters it thought it had delegated. In any event, it has now been a long time since the agency officials appointed by the President were given the opportunity to act on their own.

I believe we should give the agency officials of the new Administration that opportunity once again, on a trial basis, and let's see if what we have learned over the past two decades will enable us to move forward without all the overlay. Toward this end, in an open letter to President-elect Obama on November 10, 2008 (copy enclosed as part of these comments), published in The Pump Handle, I proposed the following two principles be adopted by his Administration:

> 1) The President should select to run regulatory agencies only those individuals who will commit to go where the facts take them, and who will not wilt in the face of sustained, organized and well-funded opponents.
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> 2) The President should trust his appointees to do their jobs without direct oversight by the White House staff. Specifically, the White House should dispense with any direct White House role in the regulatory activities of Federal agencies for a test period of a year[1].

[1] Other than in through the normal budgetary and legislative coordination processes.

I continue to believe a test period is the right approach. The President has his hands full, and his appointees should be given the leash to do their jobs. On the other hand, a flat-out repeal of the existing system, at this time, could become an effective tool in anti-government fundraising campaigns for the mid-term elections. Giving his appointees a chance to operate without red tape, and evaluating the results, is a balanced approach suitable for the times. Of course agency heads who report to the President would be expected to keep the White House of their agenda, their progress, and their problems through normal channels.

While this re-decentralization test is underway, I recommend some additional actions to enable the Administration to get a better fix on the regulatory system – including a good sense of what improvements lie within your power to effectuate in a reasonable time, and what improvements should be the subject of active discussion with the next Congress.

> 3) In consultation with the agencies and Congressional appropriators, OMB should develop a long-term plan to ensure that the regulatory programs, and their rulemaking enforcement arms, aren't inadvertently swept under the bus during critical funding decisions by the Administration or the Congress.
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> 4) In consultation with the agencies and the Department of Justice, compile a list of judicial decisions which have significantly impacted regulatory development or enforcement policies, and determine if efforts should be made to challenge the application of such decisions in various forums where they are not binding.
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> 5) In consultation with the agencies and their oversight committees, and with the Administrative Conference of the United States or some equivalent group which can bring legal scholars and practitioners together, and after evaluating the results of the above four recommendations, prepare a regulatory legislative agenda for the next Congress. This agenda should include recommendations with respect to specific program statutes, as well as for substantive and procedural statutes that apply broadly and significantly impact the Federal regulatory process.

Since the President has asked you for advice on a specific list of issues, I am providing a few comments on how my five recommendations would apply to the items on his list.

* The relationship between OIRA and the agencies. The agenda I have recommended includes plenty for OIRA to do during the coming year. In addition, OIRA could help eliminate substantial red tape for government agencies by reviewing practices under the Paperwork Reduction Act that provide no significant benefits and using its broad authority under that Act to help eliminate such requirements (e.g., the need for approval to request comments from meeting participants). OIRA can help agencies with urgent projects to borrow expert personnel from other agencies, encourage agency regulatory personnel to meet amongst themselves on a regular basis, promote coordination in the timing of major regulatory actions by agencies in light of exigent events, and continue its strong efforts to require electronic docketing. I have always wanted to see OIRA make

an effort to recreate itself as a resource to both the President and the agencies, rather than as a gate-keeper, and this is a good opportunity to try out this approach.

* Disclosure and transparency. Other than for economically significant rules, OMB has never explained in any detail the basis for determining that a rule warrants its review, and this is frankly inexcusable. Also, it was my experience as a Congressional aide during the prior Administration that neither OMB nor the agencies regularly publish those changes in documents that result from OMB review, although required by Executive Order; and when we were provided the documents, we were forced to compare them line by line. Leaving aside the public's interest in the matter, these documents need to be included in the record if the agencies are to address legal challenges. I think OMB has done an admirable job in recent years of making public the bare bones of information on meetings with outside groups, and of including agency staff in those meetings, but I see no need for such meetings at all, even if from senior congressional sources, when requestors can (and should) be referred to the agency heads who make the rulemaking decisions based on their records.

* Encouraging public participation in agency regulatory processes. Here are a few thoughts on various aspects of this issue.

First and most important, the Administration should not require agencies to take more procedural steps that the law requires. If an APRM or outreach meetings or public broadcasts would be useful, an agency should use them, but the last thing we need is to add formal requirements in this regard. (To that extent only, I would have to disagree with the recommendation of CPR for an alternative to cost benefit analysis, at least pending further review of the concept.) Agencies should be compiling a list of blogs, Facebook pages, electronic reporting services and interested members of the public that it should use to inform people of regulatory actions. Many have websites that are far too crowded and dated, in large part because of funding deficiencies or policies that require standardization; these problems should be the focus of active OMB attention.

Encouraging the public to participate does not mean opening the record again and again and again in order to accommodate yet another request from a group opposed to the rulemaking. It isn't required by law. Unfortunately, regulatory agencies do not operate like courts, where a judge can control delays through sanctions; rather, the Administration and its agencies need to learn to say no.

I was the author of the Labor Department's policy on negotiated rulemaking, and it was my experience that the potential benefits were undermined by OMB and agency leadership approval to commit prior to seeing a final product, inhibited by the application to working groups of FACA requirements, and complicated by statutory and funding matters. On the other hand, EPA has had much success with related consensus building processes, and accordingly I think this is a matter worthy of study pursuant to my 5th recommendation.

FACA requirements may also play an unintentional role in discouraging agency leaders from calling together various individuals to discuss issues – the valuable process you are following in developing this Executive Order. The matter deserves study.

Also, it would help a lot of the public had a simple but accurate explanation of existing laws and regulations readily available. Legislative histories and preambles should be available on-line for all programs, but succinct versions should also be available. This kind of look-back will require special funding to complete, but would help to facilitate information exchange with busy members of the public.

* The role of cost-benefit analysis. Like anybody else who has tried to quantify benefits, I am firmly of the view that a balancing analysis is unworkable. Rather than inform decisionmaking, it freezes it in place. In any event, this is a matter that only the Congress can decide (as it would conflict with some existing statutes).

This does not mean that both cannot be considered, and in some cases both must be considered (under legal requirements referring to feasibility or risk). I do not, however, see the need for one-size fits all requirements in this regard, unless they are necessary to stave off harmful legislation in the near term. Of course this is a matter on which there are many strongly held views, and on which members of the Congress would benefit from further information from experts, so I think the best course of action is to include such questions in the study pursuant to my 5th recommendation.

* The role of distributional considerations, fairness, and concern for the interests of future generations; the role of behavioral sciences. I don't think this is the time to add new requirements.

* Methods for ensuring that regulatory review does not produce undue delay. I have seen outrageous assertions about anticipated costs or lack of benefits submitted by economists hired by those commenting on regulatory matters. These comments are often hundreds of pages long, and the agency is forced to waste valuable time going through and refuting them in detail in order to satisfy the Congress and the courts. Unfortunately, that is the primary reason many such comments are submitted: to delay the process (and, of course, provide the basis of letters, editorials, testimony and other pressure tactics). Delay has always been a tactic of lawyers, and unfortunately it has come to the regulatory process with a vengeance. Consideration should be given to an oath to be submitted with any expert comment to the effect that the reasoning and conclusions of the submitter were not pre-determined, and a requirement for peer review should be considered in some cases.

* The best tools for achieving public goals through the regulatory process. I hate to be accused of channeling Bill Clinton, but K.I.S.S. That was the goal of those who crafted the Administrative Procedure Act, and we've all done a good job of gumming up the works in the last few decades. Let's try going back to basics for a while and see what we can do with all of our experience and some new energy and commitment.

Thank you again for the opportunity provided to submit these comments. I have been waiting for years for an Administration willing to tackle public misperceptions created by those who benefit from a non-functional system, and if I can be of further assistance in your efforts, please do not hesitate to ask.

Sincerely yours,

Peter D. Galvin
Enclosure

Friday, November 10, 2008

Dear President-Elect Obama:

I want to encourage you to take three easy steps early in your Administration as a down-payment on reforming the Federal regulatory process.

I am referring not to the dozens of specific regulatory determinations nor Executive Order policies of the Bush Administration that warrant amendment or repeal, but rather to the process itself. Dozens if not hundreds of critical Federal functions are implemented through rulemaking, and as we know from the recent credit crisis, more such regulations will soon have to be authorized or issued. The process to actually issue rules has become mired in 25 years of accumulated red tape. In the early days of the Contract on America we came within a whisker of having the whole system wiped out, and we have paid a heavy price to keep it on life support. As Clinton appointees will testify, a committed Administration cannot succeed unless the rulemaking process is revitalized.

I know you enter office with a very full plate. What I am therefore proposing are actions that will move the ball forward during your first year or two while freeing you the Congress for the critical challenges we face.

First, you should select to run regulatory agencies only those who will commit to go where the facts take them, and who will not wilt in the face of sustained, organized and well-funded opponents. This is a tough town, and many earn their living by blowing up problems well out of proportion in order to obtain, and retain, paying clients. They seduce newcomers through a strategy of repeated requests for limited delays, endless meetings with coalitions that will never reach consensus, convince vulnerable or cash-hungry members of Congress to derail important efforts through though back-door appropriations amendments, hire scientists and economists to sign off on junk science masquerading as fact, raise spurious legal arguments that cow agency lawyers, and otherwise bring tremendous pressure to bear on your appointees. The proponents of new rules can sometimes be just as difficult. You need the right people in every one of these slots or you will surely pay a steep price down the road.

Second, you need to trust your appointees to do their jobs without direct oversight by the White House staff. Specifically, I would urge you to dispense with any direct White House role in the regulatory activities of Federal agencies for a test period of a year. Intensive engagement by the White House isn't required by statute. The practice was started to deflect conservative criticism about "out of control government bureaucrats", and each successive Administration has imposed additional controls of one sort or another to deal with further political pressures. When added to the highly technical and financial findings required of particular program agencies by law, and a cave-in to the small business lobby that gives them a special opportunity to delay proposed rules, the resulting "paralysis by analysis" makes it impossible for agencies to update scores of outdated rules. It is not uncommon for an Administration appointee to be to unable to see through from beginning to end even a single rulemaking of any significance. And as if

that isn't enough, the White House is constantly being forced to meet with lobbyists who want to influence the agency process – putting the White House on the hook for highly technical decisions based on years of study and subject to court challenge and Congressional oversight. Your appointees are selected by you, and confirmed by the Congress, to tackle this or that problem under special parameters set by the Congress for tackling exactly such problems, and if they don't show enough political savvy to avoid creating an avoidable problem you can always can them. But some problems are unavoidable, and you need to empower them to take care of business.

Third, I would ask your budget director to develop for you a long-term plan to ensure that the regulatory programs, and their rulemaking enforcement arms, aren't swept under the bus yet again during funding decisions by the Administration or the Congress. You should also support bi-partisan efforts in the last Congress to refinance the Administrative Conference of the United States, a small body of legal scholars and agency regulatory officials who can provide valuable recommendations on specific cross-cutting regulatory issues. We're not talking major money here -- pennies and nickels compared to big ticket items – but these agencies are heavy on personnel costs and most have been hallowed out from years of freezes and 1% cuts. Sometimes programs have Congressional champions who are in a position to get the job done, but that is pretty much limited to very senior members; appropriations subcommittees are now given targets from on high and they are being forced to make impossible choices. These problems are well recognized, but require leadership to address. Those who want Federal regulatory agencies to remain crippled will criticize any funding commitment as inconsistent with your pledges on the budget because that provides them a convenient argument to mask their real goals. However, keep in mind that the default option here is to wait for the public to scream once Americans die or are fleeced because one or another part of your Administration is simply unable to look after its basic responsibilities. You may ultimately decide that you have no real choice, but your team should at least give you a less gloomy alternative to consider.

Those three steps will do an enormous amount of good. I have confidence that when time permits, and with your support, the new Congress will find some time to take care of a few critical areas where your regulators will not be able to make headway without statutory change. In that regard, I encourage you both to ensure that every person who is patriotic and brave enough to speak out when they see a violation of Federal regulatory requirements is protected from employment retaliation.

Best wishes for a successful term.

Pete Galvin
Former Co-Counsel for Administrative Law, US Department of Labor
Former Senior Labor Policy Advisor to Education and Labor Committee, US House of Representatives