

Echols, Mabel E.

From: Steve Venckus
Sent: Tuesday, March 31, 2009 6:58 PM
To: FN-OMB-OIRA-Submission
Subject: Comments on revising EO 12866
Attachments: EO 12866 Recommendations by Section.doc; EO 12866 Recommendations by Topic.doc

Thank you for this opportunity to comment. My comments are attached.

Steve Venckus

4/1/2009

Comments Organized by Section Number

General Suggestions

- Have OIRA form a task force to review the informal rulemaking provisions of the APA, the collection of information provisions of the PRA and the Reg Flex Act. The task force would provide a report to the President recommending changes to these statutes that would increase public participation, reduce the burden on agencies, and optimize the use of technology.
- Consider reexamining use of the word “shall” in the EO -- it is used 93 times. The editor of Black’s Law Dictionary, Bryan Garner, notes that the word “shall” seems likely to persist, but in law it is declining because of increased recognition of its hopeless ambiguity as actually misused by lawyers. See Garner, A Dictionary of Modern Legal Usage, 939-41 (2nd Ed. 1995) Garner, A Dictionary of Modern American, 597 (1998); also Garner offers examples of how differently people, including Supreme Court justices, interpret “shall” in Legal Writing in Plain English (Univ. of Chicago Press 2001) at 105-106.

Agency or OIRA staff convinced by plain language advocates and Garner’s examples may find it particularly difficult to explain the use of “shall” in the following two paragraphs of the EO:

§1 (b)(12): “Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”

§ 6 (b)(5): “All information provided to the public by OIRA shall be in plain, understandable language.”

I believe “should” is the best replacement word in these two paragraphs if the President wants to recognize that certain information may be explained elsewhere in the same document in plain understandable language, but that to conform to the language of a specific discipline (e.g., chemistry) a regulation or OIRA statement may contain information somewhere in the document in a language understood by fewer people. “Must” would be better than “shall” here, but not as good a replacement as “should.”

- Current provisions concerning the role of the Vice President are vague, and should be clarified.

Section 1(b) – Principle of Regulation

- 1(b)(1) and (2) – No recommended changes.
- (b)(3) – May benefit from some editing and clarification.
- (b)(4) – Risk assessment has undergone a lot of development since 12866 was first written. This may need some further discussion.
- (b)(5) – No recommended changes.
- (b)(6) – Please see the attached *Revised E.O. 12866 Recommendation Matrix*. (6) agrees that some costs and benefits are hard to quantify. I would clarify what is meant by a reasoned determination. Maybe an entire Section of the new EO should be devoted to this area.
- (b)(7) – No recommended changes.
- (b)(8) and (9) – No recommended changes.
- (b)(10) – We need better coordination with other affected Federal agencies. Perhaps a requirement for early consultation. This could include making changes to the ROCIS database that identifies the other affected agencies and alerts them.
- (b)(11) – No recommended changes.
- (b)(12) – This is a great place to pump some life into Plain Language principles and create a Plain Language task force.

Section 2 - Organization

- 2(a) – No recommended changes.
- 2(b) – Add that OIRA will strive for timely reviews.
- 2(c) – No problem as long as VP has time to carry out this function.

Section 3 - Definitions

- Advisors – Add the Homeland Security Council, National Security Council, and Council on Environmental Quality.
- (b) Agency – No recommended changes.

- (c) Director – No recommended changes.
- (d)(2) – Clarify what military or foreign affairs means.
- (e) Regulatory action – Include Social Media tools such as blogs and wikis.
- (f) Significant Regulatory Action – (1) Please see the attached *Revised E.O. 12866 Recommendation Matrix*.
- (f) (2) and (3) – No recommended changes.
- (f)(4) – Clarify what are novel legal and policy issues? If OMB wants a catch all, then they can add a new subparagraph (5), which could include anything OIRA desires to review. Also, please see the attached *Revised E.O. 12866 Recommendation Matrix*.

Section 4 – Planning Mechanism

- With regard to 4(b), I question whether we need to publish the agenda twice each year. 5 USC 602 states that "[d]uring the months of October and April of each year, each agency shall publish" an agenda. However, the agenda requirement in 5 USC 602 only covers rules likely to have significant economic impact on a substantial number of small agencies.

Perhaps the twice-yearly agenda should include only what is statutorily required; other planned rulemakings could be viewed continuously online, or be published once per year (or both).

Alternatively, we could publish all rulemakings twice per year in an abbreviated format. I suspect that most information currently provided in the agenda is not information the public wants, or else is not provided in a format/context that helps the public understand it. We might consider paring it down to abstract, timeline, and economic significance.

- Agencies policy meeting – Have these been taking place? Prefer to have the chair be VP or his designee; WH Chief of Staff or Director of OMB. If the meetings aren't going to happen don't put them in the EO.
- (b) Unified Regulatory Agenda – Do we need it twice a year? If the Agenda is available on line, it should be kept up to date. Perhaps it can be linked to Regulations.gov and the public can sign up for emails about changes to their favorite rules. Perhaps we need to publish a report on progress on the Agenda twice a year?
- (c) Regulatory Plan – Again, do we need it in its current form? Make it a report that can be run from Regulations.gov at any time. Once a year, agencies need to identify their "most important significant regulatory actions" and provide the additional information. (I have no comment on the additional categories for the Reg Plan.) I like the phrasing - "most important". That gives us discretion as to which rules to add to the plan. Please see

the attached *Revised E.O. 12866 Recommendation Matrix* regarding 4(c)(1)(B).

- (c)(2) Use the Internet – Change to agencies must update their entries by _____. OMB can then run a report.
- (c)(3) Is this happening now? Seems like a good idea. Require agencies to identify any conflicts up front.
- (c)(4) (5) and (6) – No recommended changes.
- (c)(7) – This should be tied into any improvements with the Agenda publication. Perhaps Regs.gov can "turn on" the Reg Plan entries at a certain date once all the review is finished.
- (d) – I really like this but they have to make it work. Information has to be passed down to sub-agencies.
- (e) – I like the conferences. There has to be a summary of the meetings posted on the Internet.

Section 5 - Existing Regulations

- This needs some recurring reporting. Once at the start of the Administration doesn't go far enough in my mind. Tie it into the 5 USC 610 review but make it broader than just impacts on small entities.
(b) and (c) no comment.
- Create a Regulatory Ombudsman in each Agency that is independent of the chain of command and can report to OIRA.
- Require each Agency to annually publish its Petition process and POCs. This could also be built into Regs.gov. Also, OIRA could provide a list of the Agency and sub-agency Petition contacts on its website

Section 6 - Centralized Review of Regs

- (a)(1) – No recommended changes. If anything, encourage more transparent participation early in the process. Add a requirement to consider using social media (Web 2.0) tools to seek meaningful input from affected sectors of industry early in the process. Add that OIRA will create a task force to study the use of social media in rulemaking development and report to the Vice President in three months from date EO is signed. Also, include a requirement to use Regulations.gov for rulemaking dockets.
- (a)(2) – No recommended changes. Having the General Counsel as the RPO is a good fit.

- (a)(3)(A) – Rewrite this section to reflect the current practice of submitting NSD requests. This process has worked well over the past few years.
- (a)(3)(B) – No recommended changes.
- (a)(3)(C) – Please see the attached *Revised E.O. 12866 Recommendation Matrix*.
- (a)(D) – Consider a time frame for OIRA to act in emergency situations.
- (a)(E) – Add that all documents required for public disclosure be placed in the Regulations.gov docket.
- (a)(E)(ii) and (iii) – Consider removing these requirements since it has a chilling effect on the deliberative process. I realize this would reduce the transparency but there has to be an environment for complete exchange of ideas and concerns during the review of significant regulatory actions.
- (a)(F) – Another great opportunity to put some life back into the Plain Language efforts.
- (b) (1) – No recommended changes.
- (b)(2) – There must be a commitment to live by these deadlines so agencies can act accordingly.
- (b)(3) – No recommended changes.
- (b)(4) – No recommended changes; these are important safeguards.
- (b)(4)(C) – Post the log on the OMB website.
- (b)(5) – Yet another opportunity to promote Plain Language.

Sections 7-11

- No recommended changes.

Comments Organized by Topic

Recommendations for a new Executive Order on Regulatory Review based on questions taken from Presidential Memorandum dated 1/30/2009:

- Suggestions for the relationship between OIRA and the agencies:
 - Provide dedicated desk officers at the component agency level, not just the department level, to allow expertise to develop.
 - Encourage early and frequent communication between desk officer and agency personnel, without having to channel communications through higher level agency/departmental personnel, who would be kept informed of these communications.
 - Require desk officer to explain, in writing, why rules not meeting the economically significant threshold are deemed significant by OIRA.
 - Establish an internal OIRA website to pass tips and observations about rulemaking for general usage within the Federal government.

- Provide guidance on disclosure and transparency:
 - A denial of non-significance should include justification. The often-used response of "significant, other" without justification from OMB is inconsistent with the concept of transparency, and leaves the requesting agency to guess about information and meanings that might be crucial to writing an APA-compliant preamble.
 - Require agencies and departments to publicize their internal review process and/or timeline, and to identify where projects fall within that timeline at any given point.
 - Require regulatory agencies, and the departments into which they fall, to publish their "top ten" regulatory initiatives for each year (fiscal, calendar, or other).
 - Provide guidance on discussing open rulemakings with Congressional members and staffs.

- Encourage public participation in agency regulatory processes:
 - Explore using social media tools, such as blogs and wikis, during the regulatory process.
 - Encourage live meetings, pod casts, or in-person public meetings to draw interested persons into the process.
 - Encourage the public to use the internet to participate in rulemakings.
 - Clearly set forth ex parte communications guidelines.

- Identify methods of ensuring regulatory review does not produce undue delay:
 - Provide agencies and departments with limits on how long a rulemaking can stay open between NPRM and Final Rule (to avoid staleness). This would include a requirement to default to an SNPRM if the deadline is passed.
 - Provide limits on the length of time an Interim Rule can remain in effect before being superseded by a Final Rule.

- Delegate authority to issue non-significant rules to the lowest possible level in the regulatory agency.
- Identify the best tools for achieving public goals through the regulatory process:
 - Establish limits on the use of good cause exemptions from the notice and comment requirements.
 - Explore the use of social media tools.
 - Continue to refine www.regulations.gov to make the site as user-friendly as possible.
 - Since revocation of Executive Orders 13258 and 13422, guidance documents are no longer addressed. Recommend that limitations on guidance documents be specifically addressed.