

MEMORANDUM

TO: Michael Fitzpatrick, OIRA Associate Administrator, and Kevin Neyland, OIRA Deputy Administrator and Acting Administrator

FROM: Authors of *Advancing the Public Interest through Regulatory Reform*: Gary D. Bass, Michael Bird, Caroline Smith DeWaal, N. Bruce Duthu, David J. Goldston, Mark Greenwood, Francesca Grifo, John Irons, Edwin S. Jayne, Sylvia Johnson, David Michaels, Richard W. Parker, Beryl Radin, Reece Rushing, J. Robert Shull, Peter W. Strauss, Wesley Warren

DATE: March 31, 2009

RE: Comments on the relationship between OIRA and federal agencies

Thank you for meeting with us on March 6th and for the opportunity to comment on ways to reform the current state of the federal regulatory system. We are writing to emphasize a point from our paper which we did not fully discuss in that meeting: the urgent need to restructure the relationship between OIRA and the agencies.

We believe this issue is critically important to the regulatory process and a key issue to address in the regulatory executive order. Restructuring this relationship is equally critical to reforming the process.

Our report, released in November 2008, calls for such a restructuring. The report states, "There needs to be a fundamental restructuring of the interaction between OIRA and the agencies, placing greater priority on agency expertise and statutory authority for decision-making." It goes on to state, "The locus of decision making authority should reside in the federal agencies given the legal mandate to promulgate regulations."

On Dec. 24, we submitted to then President-Elect Obama's transition team a memo providing more detail on our joint views on the OIRA-agency relationship. Similarly, these comments emphasize and elaborate on some of the report's recommendations as they relate to the OIRA-agency relationship. In each communication we have tried to convey the core first principle that rulemaking authority, including decisions about its content, should reside with the agencies, not OIRA.

What we call for is more than just a change in practices. Since it was created by the Paperwork Reduction Act, OIRA has reflected the personality of the administrator. As a result, regulatory policy has shifted from administrator to administrator and from administration to administration. While some shifting is inevitable, we acknowledge the importance of reforms which will change underlying factors that influence the role regulation plays in government – reforms which must extend beyond the Obama administration. The modern-day regulatory executive orders that began with President Reagan gave significant power to OIRA. Depending on the administration, there have been different degrees of centralization and control over the agency regulatory decision-making. However, throughout the years, there was one consistent theme: OIRA, either by perception or reality, was in the driver's seat. We think now is the moment to try a different approach, stressing OIRA's role as a coordinator or facilitator of sound agency process rather than a second-guesser of particular rulemaking actions.

The role we suggest is more in keeping with Congress's design for the administrative state. Congress delegates regulatory authority to the agencies. Moreover, agencies possess substantive expertise relevant to the regulatory matters before them – expertise sometimes seldom found elsewhere in government. Taken in tandem, these provide a rational reason for the Obama administration to craft a new role for OIRA, one that is focused on assisting agencies in setting regulatory priorities through interactive, transparent means rather than on the review of

each significant rule. Actions undertaken in this new role will implicitly support other recommendations made in our report to strengthen the integrity of science in the rulemaking process at the agency level.

We propose a restructured relationship that places greater priority on agency expertise and statutory authority for decision-making. While we have differing views on the unitary executive theory that underlies centralized regulatory review, we reached consensus on pragmatic approaches for constructive changes to OIRA's role. The role for OIRA would focus on three key functions: (1) implementation of its own statutory responsibilities; (2) transparent resolution of interagency disputes on regulations; and (3) implementation of presidential policies, where those are clear.

First, Congress created OIRA to administer policies for strengthening federal information resources and to approve agency requests to collect information from the public. OIRA should carry out these responsibilities in a way that does not unduly burden agencies and should be especially mindful that protracted approval periods slow agency efforts to gather valuable information. OIRA and agencies should also work together to consider alternative approaches to the paperwork clearance process that would provide agencies flexibility especially in regard to requests needed to address emerging problems. Other statutory responsibilities, such as those in the Unfunded Mandates Reform Act, need to be followed. But even those regulatory review requirements are significantly smaller in scope than OIRA's current approach to regulatory review.

Second, the role of the OIRA desk officers would change, shifting them away from making "Yes/No" decisions on individual rules. Instead, in the context of particular rulemakings, the officer may help facilitate comments from other agencies, pose questions about the regulatory proposal or the underlying research, or convene interagency dialog as a collegial effort. The officer should not act as a person with an implied right to make final decisions on the substance of a rule or the regulatory priorities within an agency. By embracing a role in which it assists agencies, OIRA would exhibit more respect for both the congressional delegation of authority to the agencies and those agencies' relevant expertise. It would also change the perceived role of OIRA, which may help OIRA in implementing the statutory requirements under the Paperwork Reduction Act.

Third, we emphasize the need for clarity on the last function to avoid the tendency of OIRA, or an organization of its nature, to engage in mission creep based on implied presidential policies. OIRA should be concerned with agency structures and general regulatory performance. Just as in budgetary matters, coordination at the stage of priority setting is a pivotal occasion for the implementation of presidential policies. Whether reviving the Regulatory Working Group is appropriate or not, priority setting requires greater transparency and public involvement, which OIRA should facilitate. But it is also necessary to make clear that OIRA's role is limited and does not usurp the role of the political leaders who lead the agencies with direct statutory responsibility for regulatory decisions. We believe this approach recognizes that the White House (a collection of various offices that often may be involved in reviewing agency rules) does not, nor should it, have the expertise that resides within the agencies; it acknowledges that the White House has the ability to identify government-wide management issues that should be raised with agencies that may improve the rulemaking process, and to see the big picture of what rules and activities agencies are undertaking.

Like the fiscal budgetary process, the development of the annual regulatory plan provides an appropriate setting for presidential coordination and policy direction. It permits prospective shaping and coordination of general effort, rather than retrospective critique of particular actions that may seem to be in the interest of special interests. Although it has been present in the governing executive orders since the Reagan administration (EO 12498), our impression is that this stage has been under-developed by prior administrations, and is not well-integrated into current e-rulemaking efforts. We encourage its active development and increased transparency and integration.

In addition to priority setting, OIRA should focus on holding agencies' accountable. After an agency's priorities have been set through its regulatory plan and identified in the Unified Agenda, OMB should track whether the agency is meeting its plans and seek explanations when it is not. Thus, "prompt letters" may be appropriate, but OIRA should use them to hold agencies accountable for activities that are part of their work plans, not reinventing their work plans.

OIRA should be cautious in raising issues that an agency should address beyond those identified in the Unified Agenda. Letters and calls from OIRA cause agency wheels to spin, often altering planned activities, even if that was not OIRA's intent. To the extent that an agency shifts its agenda as a result of OIRA's inquiries, it means the agency is displacing work on other priorities. When the White House wants an agency to shift priorities from the regulatory plan, the proper method is a vehicle that ensures public engagement.

Much as OIRA ought to respect the will of Congress in delegating authority to agencies, both OIRA and agencies ought to respect congressional prerogatives on the preemption of state law. As our report states, "Too often, agencies have used federal regulation to inappropriately preempt state positive law (proscriptive requirements enacted by legislatures or set by regulatory bodies) and, in some cases, state tort law." The report recommends, "The president should instruct agency heads to avoid preemption of state laws when there is no express authority to do so."

The President, OIRA, and agencies should also be more thoughtful about the issue of scientific uncertainty. Using the absence of certainty as a pretext for avoiding or delaying regulation must stop. Our report identifies three reasons to avoid such inaction:

- "Pushing for certainty may result in completely stopping regulation in policy areas that rely on scientific information."
- "Federal laws often recognize that the government has a responsibility to protect citizens from harms they cannot control. Some statutes explicitly call for some margin of protection."
- "Regulation is not an irreversible course of policy...As evidence grows, standards can be made more or less stringent if necessary."

In conclusion, a healthy relationship between rulemaking agencies and OIRA is critical to a well-functioning regulatory system that adequately responds to public need. We believe this relationship would be improved if OIRA engaged less in rule-by-rule review and instead focused on assisting agencies in gathering the opinions of other agencies and contributing to regulatory priority setting. The Obama administration has an opportunity to redefine federal regulatory policy for the better – not just for itself, but for future administrations.