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Ms. Jessica Hertz
Office of Management Budget
Washington, D.C.

Dear Jessica,

Thank you for asking me to comment the regulatory review process now under E.O. 12866. I have read the comments posted as of March 4 and found them very helpful. Here are some reactions.

First, repeal of E.O. 13422 was a positive step. That executive order put the White House too close to the day-to-day regulatory process inside agencies. That said, I support the proposals for OIRA to take on a stronger role in consulting with agencies on their agendas and over the techniques to use to achieve regulatory goals. This exercise would include a stronger role is pushing agencies to act in areas where net benefits appear large. To do this, OIRA ought to have a mandate to seek the cooperation of agencies with overlapping authorities for related problems.

Second, however, I agree with Richard Revesz and Michael Livermore who argue that independent agencies should not be brought under this planning umbrella unless they voluntarily agree to participate. Requiring their participation would be violation of the goal of isolating agencies from day-to-day political oversight—a goal that justified creation of these agencies in the first place. True, some research shows that independent agencies respond to external political shifts in Congress and the Presidency, but that is quite different from the President asserting direct control over their agendas and policy choices. In contrast, some agencies operating under the President should be added to the mandate of OIRA. I am thinking, in particular, of the Department of Homeland Security.

Third, I also support downplaying the emphasis on formal cost-benefit analyses (CBA) as an ideal standard for regulation. Of course, agencies have always be able to argue that their statute does not permit the use of CBA to make policy. I would go further, however, and claim that in may cases CBA will not produce the best policies even when it is permitted. It is often a flawed benchmark. I do not wish to be misunderstood. I favor technocratic analysis that measures both costs and benefits in the most accurate way

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possible and that uses these data to make intelligent policy choices. Problems arise, however, when the search for a single "best" policy forces analysts to make controversial assumptions simply to produce an answer that "maximizes" social benefits. Two related problems that are often conflated.

Suppose, first, that the regulatory issue is one where net benefit maximization is a plausible public goal. The program is designed to correct a failure in private markets and the law's distributive consequences are not a major concern. Here, the main problems are measurement difficulties that cannot be solved by better analysis or consultation with experts. I am thinking mainly of debates over the proper discount rate for future benefits and costs and the vexing problems of measuring the value of human life and of harm to the natural world. This memo is not place to develop the nature of these debates. Suffice it to say that the disputes turn on deep philosophical questions—for example, valuing future generations versus balancing capital and labor in the production of goods and services, acknowledging the value of extra years of life versus "life" itself, taking risk preferences into account, and giving ecosystems and natural objects a place in the calculus. These issues do not have "right" answers. They should not be obscured by efforts to put them under the rubric of a CBA. Rather they should be resolved by high level political appointees in the agencies and the White House in a transparent way.

Of course, sometimes a policy is much better than another under a wide range of assumptions. Sensitivity tests can explore this possibility. There is no need to resolve difficult conceptual and philosophical issues if the preferred outcome is unaffected. Such tests should be a routine part of the analytic toolkit and of the options presented to the ultimate policymakers.

Other policies are not candidates for net benefit maximization. These policies are often ones where measurement raises conceptual problems, but the difficulties with CBA run deeper. These policies raise important issues of distributive justice, individual rights, and fairness. Even if everything could be measured precisely, CBA would be an inappropriate metric. Efforts, such as those surveyed by Matthew Adler, to add distributive weights to CBA are fundamentally misguided. They suppose that technocrats can resolve distributive justice questions. Rather the distributive consequences of policies should be part of the public debate over policies, and technocrats can help by outlining the distributive consequences of various policies. The main analytic problem, however, is familiar to students of tax incidence. The nominal cost bearer may pass on some of the costs to others. Distributive impacts are not always easy to measure.

In short, a revised executive order should require both up-front consultation on the agenda and ongoing review of major regulations above some minimum level of importance. Both consultation and review would be mandatory for executive agencies, but the E. O would not require formal CBAs. OIRA has a small staff and cannot do everything. I would favor both strengthening the analytic capacities of the agencies, most of which already have policy offices, and shifting OIRA's mandate more toward helping agencies set their agendas and improve their analytic capabilities. OIRA would no longer

act as a rigid gatekeeper but would be able to pick and choose the issues on which to focus in consultation with the rest of the White House policy staff and the agencies.

Fourth, it does not seem to me that OIRA is the best place to locate any push toward more participatory processes, such as those favored by Philip Harter in his comments. It may indeed be true that consensual, negotiated procedures could be used more productively. I am a skeptic about the general value of participatory processes over and above those in the notice and comment provisions of the Administrative Procedures Act. However, I may be too pessimistic, and in any case, experimentation is valuable. Acting as a clearing house or a bully pulpit for such activities, however, does not seem a good use of OIRA's scarce resources.

However, it could help along a difference dimension—implementation of regulatory policies. It could put together a library of innovation tools for achieving regulatory goals that go beyond the much criticized command-and-control model. This library could be accessed by agency policymakers looking for innovative ways to achieve goals or to those contemplating amendments to existing laws. An example here is the cap-and-trade provisions in President Obama's proposed budget.

Finally, the White House should consider the need for legislative reform. There may be a window of opportunity to amend regulatory laws that are overly wasteful and ineffective compared to the alternatives. Furthermore, some more general legislative changes should be considered. First, as OMB Watch proposes, the administration should support seek repeal of the Data Quality Act, a short statute inserted with no debate into a larger law that may or may not act as a constraint on agency release of information. Second, consider creating an independent regulatory review body, perhaps inside the GAO or the NAS, that could review and comment on proposed and adopted regulations free of political interference. OIRA is a mixture of expertise and politics. As such, it is an important part of any President's efforts to control the agenda of the executive branch. However, it is not a neutral arbitrator. A reformed OIRA can serve an important function, but a more independent source of review could provide a useful check.

I hope these comments are helpful.

Sincerely,