COMMITTEE ON SCIENCE AND TECHNOLOGY
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT
U.S.HOUSE OF REPRESENTATIVES

HEARING CHARTER

The Role of Science in Regulatory Reform

Thursday April 30, 2009
10:00 a.m. to 12:00 p.m.
2318 Rayburn House Office Building

Purpose

On Thursday, April 30, 2009 the Subcommittee on Investigations and Oversight of the Committee on Science and Technology will hold a hearing regarding President Obama's call for updating the Federal regulatory review process. In one of his first orders, Mr. Obama withdrew the Bush Administration's controversial Executive Order 13422 and also directed the Office of Management and Budget (OMB) to develop a set of recommendations for a new approach to regulatory review within 100 days.[1] The new Executive Order would replace the Clinton-era Executive Order 12866, published on September 30, 1993 and currently in force, which provides guidance to agencies for submitting proposed regulations to OMB for pre-approval.

In his Memorandum, the President noted that "a great deal has been learned" about regulation, its uses and the process of regulatory review since the publication of E.O. 12866. In what he called "this time of fundamental transformation," the President said that the regulatory review "process – and the principles governing regulation in general – should be revisited." OMB issued a request for public comment regarding regulatory reform that would:

- "offer suggestions for the relationship between [the Office of Information and Regulatory Affairs ("OIRA")] and the agencies;
- "provide guidance on disclosure and transparency;
- "encourage public participation in agency regulatory processes;
- "offer suggestions on the role of cost-benefit analysis;
- "address the role of distributional considerations, fairness, and concern for the interests of future generations;

[1] 74 FR 5977 (2009).

- "identify methods of ensuring that regulatory review does not produce undue delay;
- "clarify the role of the behavioral sciences in formulating regulatory policy; and
- "identify the best tools for achieving public goals through the regulatory process."

E.O. 13422 required that agencies identify in writing to OIRA the specific market failure or problem that warranted the proposed regulation or guidance; that a Presidential appointee in each agency be designated as Regulatory Policy Officer; and that that officer approve each regulatory undertaking by the agency. The Subcommittee held two hearings on E.O. 13422 in the previous Congress, on February 13, 2007 and on April 26, 2007, and Chairman Miller sponsored an amendment aimed at blocking OIRA from using funds in its 2008 appropriation to implement the Order.[2]

This hearing marks the third by the Subcommittee to examine the role of the Office of Information and Regulatory Affairs (OIRA), the office at OMB that has evolved into the center for Executive review of regulations. Prior hearings focused on how the Bush Administration was using OIRA to block, hinder or weaken regulatory proposals from statutory agencies. This hearing will receive testimony from experts in the public interest and academic world who track the activities of OIRA or the results of its interventions. In particular, it will look at the following issues:

1. The nature of OIRA's role in the regulatory process, particularly in the way it uses or challenges scientific information, and its relationship to Federal regulatory agencies;
2. The standard of transparency that should be expected of OIRA in the regulatory process; and
3. The role of cost-benefit analysis in the regulatory process.

Witness List

Caroline Smith DeWaal: Director, Food Safety Program, Center for Science in the Public Interest

Rick Melberth, Ph.D.: Director, Federal Regulatory Policy, OMB Watch

Wesley Warren: Director of Programs, National Resources Defense Council

Cary Coglianese, Ph.D: Associate Dean and Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Law School

Rena Steinzor: Professor of Law, University of Maryland.

[2] H.AMDT.461 to H.R.2829, Making appropriations for financial services and general government for the fiscal year ending September 30, 2008, and for other purposes. The amendment was accepted by voice vote and was in the version of H.R.2829 that passed the House, but it was removed in the Senate and was not included the final legislation, H.R.2764, the Consolidated Appropriations Act, 2008.

Key Issues

Regulatory authority is the main tool Congress has used to charge Executive agencies with responsibilities to protect the environment, public health, the safety of the workplace, the use of public lands and myriad other good purposes. Congress obviously cannot pass a new law every time a new threat to the environment or to human health emerges. Instead, Congress puts into place general purposes, general authority and a set of values that the agency should use in carrying out the law.

When OIRA injects itself into the regulatory process, it can become unclear whether the Office is acting to guarantee that a proposed regulation is convincingly demonstrated and efficient in its likely outcome, or is simply substituting the President's values and preferences for the goals and purposes Congress wrote into law. The line between the former and the latter can be crossed either in the guidance to agencies from OIRA or by the way OIRA conducts itself.

OIRA has quietly grown into the most powerful regulatory agency in Washington. The Reagan Administration used OIRA to push further and further into the process of vetting regulations. A string of Executive Orders in the 1980s, many issued during David Stockman's tenure at OMB, forced agencies to let OIRA be a full partner – some thought dominant partner – in moving regulations forward. Several House Chairs fought a very bitter struggle to push OIRA back out of the business of interfering with the conduct of agencies as they carried out the law. That fight met only mixed success.

E.O. 12866, discussed in greater detail below, was a Clinton-era effort to retain Reagan-initiated White House oversight of agency regulatory processes balanced against the recognition that agencies must have primacy in the regulatory process. The thrust of E.O. 12866 was to pare back the array of regulatory actions that would be swept up into OIRA's review, and it was estimated that the reviews done by OIRA fell from approximately 2,000 to approximately 500. Clinton's OIRA, while still assertive, was cognizant that it was ultimately the agencies that were charged by Congress with carrying out public purposes and that OIRA's assertions of authority had to be tempered by that legal reality.

The Bush Administration moved very aggressively to supplant the agencies' authority with a centralized command-and-control system whereby OIRA acted as a very stingy gatekeeper on what proposed regulations could see the light of day. In tone, OIRA returned to the Reagan era, using its privileged position as "the President's voice" in regulatory matters to push agencies into rethinking everything they were doing on regulation.

Critics of the role OIRA began in 2001 to assert that the values and judgments of OIRA's small staff – which is dominated by economists – trumped the judgments of technical experts in the agencies and supplanted the values in statute designed to guide agency regulatory activities. OIRA used its circulars to force agencies to analyze and reanalyze the information underlying and supporting proposed regulations.

Additionally, under the now-revoked E.O. 13422, OIRA put in place very clear economic criteria for regulation and guidance that, depending on the case, may have had nothing to do with the values established in statute. Finally, having neither consulted nor received input from Congress, the Bush Administration made the Regulatory Policy Officer a more empowered gatekeeper, with direct political allegiance to the President.

Many (including staff of regulatory agencies) assert that the cumulative effect of OIRA's behavior under the Bush Administration was to intimidate agencies into running away from their statutory responsibilities in order to avoid getting caught up in the political struggles that were associated with moving regulation forward. Supporters of the Bush-era approach, happy to see an office moving to slow agency actions, argued that the net result of OIRA's actions was, at the end of the day, more defensible regulation.

The question facing the President and the country is, What kind of OIRA should we have? If the Clinton era order is dated and not as transparent as it could be, and the Bush era approach is too much "centralized command-and-control" and raises questions about whether the Executive is undermining agencies' abilities to carry out the law, what should the new Administration do with OIRA? Getting the answer to this question right is the difference between a government that follows the law -- acting effectively and efficiently to protect the public's health and safety -- and crippling the ability of agencies to carry out the laws passed by Congress.

Background

Brief History of OMB: What is now known as the Office of Management and Budget ("OMB") was originally created in the Budget and Accounting Act of 1921.[3] The Act created the Bureau of the Budget ("BOB") in the Treasury Department. Congress created BOB to unify the budget process and enable the Executive branch to send a single budget to Congress. Previously, the Executive branch transmitted budgets to Congressional committees independently of one another, and the budget process was consequently highly fragmented. Created at the same time, the Congress's General Accounting Office (now the Government Accountability Office) was to give Congress an ability to independently check the budgetary information from the Executive as well as to examine the way programs were being funded and managed.

In 1939, Congress moved BOB from the Treasury Department to the Executive Office of the President.[4] FDR, largely through executive order, expanded BOB's functions to include broad management oversight of Federal operations.

[3] 42 Stat. 22, Ch. 18, Sec. 207. OMB currently resides at U.S.C. Title 31, Chapter 5 (31 U.S.C. Sec. 501).

[4] 53 Stat. 1423, Sec. 1.

In 1970, BOB went through another major reorganization, which saw it transformed into OMB.[5] At this time, the Federal management oversight functions of OMB were expanded, and they have continued to be expanded until the present day.

The next major change to OMB occurred with the 1980 Paperwork Reduction Act.[6] This act created the Office of Information and Regulatory Affairs ("OIRA") within OMB.[7] OIRA's original charge was primarily to reduce the Government paperwork burden on the public and to develop policies and standards with regard to information management. One focus of this was to eliminate duplicative or unnecessary paperwork and information collection.

Other major laws affecting OMB are the Congressional Budget Act of 1974, and the Budget Enforcement Act of 1990. The Budget Enforcement Act expired in 2002.

OIRA and Executive Order 12866: The Office of Information and Regulatory Affairs was created with the 1980 Paperwork Reduction Act.[8] Under the enabling act, OIRA was charged with reducing the Government paperwork burden on the public and developing policies and standards with regard to information management. Throughout the years, OIRA's functions have been expanded through legislation and executive action. The major surviving changes include the Paperwork Reduction Act of 1995[9] and Executive Order 12866 (1993). In addition, during the administration of George W. Bush, OIRA came to oversee implementation of the Data Access Law[10] and the Data Quality Law,[11] including the peer review practices of agencies.

The effect of these and other changes to OIRA was to guarantee OIRA the central role in the promulgation of virtually all Federal regulations.

Executive Order 12866 requires the following from all agencies:

1. Assess the economic costs and benefits of all regulatory proposals;
2. Complete a Regulatory Impact Analysis ("RIA") for all major rules (any rule that will have an impact of $100 million or more, or that OMB designates as major). The RIA must describe the costs and benefits of the proposed rule and alternative approaches, and then justify the chosen approach;
3. Submit all major proposed and final rules to OMB for review;

[5] 84 Stat. 2085, Sec. 102(a), restated 88 Stat. 11, Sec. 1.

[6] 44 U.S.C. Chapter 35, P.L. 96-511, restated P.L 104-13, 109 Stat. 163.

[7] 44 U.S.C. Sec 3503.

[8] 44 U.S.C. Chapter 35, P.L. 96-511, restated P.L. 104-13, 109 Stat. 163.

[9] 44 U.S.C. Chapter 35, P.L. 104-13, 109 Stat. 163.

[10] P.L. 105-277, 112 Stat 2681.

[11] P.L. 106-554, Sec. 515, 114 Stat. 2763.

4. Wait until OMB reviews and approves the rule before publishing proposed and final rules;
5. Submit an annual plan to OMB to establish regulatory priorities and improve coordination of the Administration's regulatory program (this requirement also applies to independent agencies);
6. Periodically review existing rules.

Most of these requirements actually originated in earlier administrations (particularly the Reagan Administration). The initiatives of the Reagan years had turned OIRA into a kind of "gatekeeper" that stood between the agencies and the ability to put regulations out for comment, or to finalize them. However, the Clinton Administration intended to set a different tone and, drawing on what it felt to be the best of the ideas of the Reagan years, drafted a new Executive Order to organize and guide the work of OIRA.

Sally Katzen, an attorney by training with experience in the Carter Administration's management system, took the lead in drafting E.O. 12866. That process involved comment and review from all the agencies, as well as participation by OMB General Counsel, White House Counsel and Domestic Policy Staff, and even the President himself. What Katzen attempted to do has been described as the "hot tub theory" of managing regulation: Rather than being a gatekeeper, OIRA would work with agencies to put out the best regulations possible. The economics of a proposal were important, but not to the exclusion of other values. Indeed, there was recognition that not everything valued by society could have a dollar value assigned to it. In addition, some statutes require agencies to consider economic costs only in choosing among alternatives for achieving the goal of a regulation, not in deciding whether to issue the regulation or not.

Clinton's approach changed regulatory oversight. First, it set up a 90-day period for OMB review of proposed rules and created a mechanism for the timely resolution of disputes between OMB and agency heads. There would be no "paralysis by analysis" if these commitments were kept. Second, it created new public disclosure requirements which mandated that all documents exchanged between OMB and the agency during regulatory review be made available to the public at the conclusion of the rulemaking. Last, the Order created a process for meetings between OMB officials and people outside the Executive branch regarding pending reviews that attempted to shine a more public light on such meetings.

These aspects of E.O. 12866 made the OMB regulatory review process much more transparent and limited OMB's ability to "kill" agency rulemaking by endless OMB review. The E.O. also focused OMB review to include only major rulemaking instead of all rulemaking, reducing the number of regulations reviewed each year from more than 2,000 under Reagan to about 500 under Clinton.

Bush Amendments to E.O. 12866: The Bush Administration amended this Executive Order twice. The first amendment, in 2002, simply removed the Vice President from the process, replacing that office with that of the White House chief of staff. The second occasion for amendment, the now-revoked Executive Order 13422, came with limited warning and little discussion, and it carried much broader implications. Below is a summary of the major changes.

1. Elevating "Market Failure":

First, the amendment established a new standard that had to be met by any proposed guidance or regulation. Originally, the first principle guiding submissions to OIRA seeking approval of a proposed regulation was: "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."

The amended language read, "Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of the problem, to enable assessment of whether any new regulation is warranted."

Critics of OIRA alleged that this new standard of "market failure" supplanted the values that exist in statute for regulatory action. They also felt that OIRA could use this standard to summarily dispense with proposals it deemed to be unconvincing in their articulation of a market failure. However, there was permissive language allowing for other kinds of analysis.

2. Presidential Appointees as Regulatory Policy Officers

The amendment directed each agency to name a Regulatory Policy Officer who would be a Presidential appointee. While Regulatory Policy Officers had been required in the Executive Order as originally propounded in 1993, the notion that the officer must be a Presidential appointee took the expert staff of agencies out of the picture. The language of the amendment charged this officer with being "involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in [the] Executive order."

This political appointee appeared to have the function of a kind of gatekeeper's gatekeeper. The officer was to compose an annual plan and "no rulemaking [was to] commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office." Previously such officers were to be involved in the rulemaking process; with the amendment, they were to have total discretion over the initiation of work that could lead to a regulation. (The Congressional Research Service, reporting on the amendment, stated that these regulatory officers had largely been drawn from political appointees already, so that the change might not be a notable one; however, the source of this assertion was OIRA itself, and because OIRA kept no master list of these officers, evaluating the assertion was problematic.)

3. Aggregate Regulatory Costs and Benefits

The original E.O.12866 required a "summary of planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of anticipated costs and benefits." E.O. 13422 amended it to expand this requirement by directing that each agency provide the "best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities."

Critics alleged that this would elevate cost-benefit analysis in the regulatory process. Cost-benefit analysis is an analytical tool that is very controversial in guiding regulatory behavior. While the call to make sure that the benefits of a regulation exceed its costs has a simple appeal, the reality is that many of the benefits regulations are designed to capture (the survival of a species, protecting the lives and health of citizens, the quality of the air or water) are impossible to place an accurate value on. The costs of steps to implement a regulation, however, are usually easy to specify with precision. The result is a process that tends to be very complete in its enumeration of costs and incomplete in its ability to set values on the benefits. Retrospective studies have found that the estimated costs of a regulation turn out to be overstated. And, of course, using "dollars" to estimate costs provides the illusion of a precision that does not – perhaps cannot – exist.

Critics also viewed this as a potential first step towards a regulatory "budget" whose capping might be used to stop future regulations.

4. Review of Significant Guidance Documents

Under E.O. 13422 each agency was obliged to provide OIRA with advance notice of all proposed significant guidance documents. OIRA could then decide which guidance it deemed "significant" from its perspective and ask for the proposed guidance and a brief explanation of need, as provided in: "The OIRA administrator shall notify the agency when additional consultation will be required before issuance of the significant guidance document." There was no time limit on how long OIRA could take in moving on these guidance proposals.

The potential impact on agency conduct appeared very, very significant in that it might sweep up thousands of such proposals each year. The amendment required that guidance be issued to communicate to an affected public how an agency intended to interpret or enforce statutory directions. The business community relies on such guidance to ensure that conduct will comply with agency intentions for application of law.

Conclusion

With his decisions to revoke Executive Order 13422 and to initiate a thoroughgoing review of the Federal regulatory process, the President has called into question the direction in which that process was going during the previous administration. During a public comment period that was announced on February 26, 2009[12] and closed on March 31, 2009, OMB received 187 comments on "how to improve the process and principles governing Federal Regulatory review" from industry, nonprofit advocacy groups, academics and academic institutions, labor unions, trade associations, state and local officials, a foreign government and private individuals.[13] It is apparent that the President's action has rekindled debate on such basic issues as the role of science versus that of economics in regulation and the role of Congress versus that of the White House in setting the parameters of the regulatory process.

[12] 74 FR 8819 (2009).

[13] Links to these comments were available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp as of April 24, 2009.