HARNESSING REGULATION

The Evolving Role of White House Oversight

George Eads

PRESIDENT REAGAN'S creation of a cabinet-level regulatory appeals group and his issuance of Executive Order 12291 represent the most thoroughgoing attempt thus far to bring the regulatory activities of executive branch agencies firmly under White House control. Not that the President or his aides will dictate each and every decision of those agencies. But the clear intent is that their regulatory programs bear a much heavier presidential imprint than ever before.

In a real sense, the executive order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money. We do not yet have a formal regulatory budget, but enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. Whether the White House will use these controls to view regulation in the context of other federal activities and coordinate the whole—for this is surely what regulatory budgeting means—or whether it ends up acting merely as sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget (OMB) and, more particularly, its new Office of Information and Regulatory Affairs (OIRA). Unfortunately, even at this early stage there are signs that OIRA will choose, or be forced by events to settle for, the sharpshooter's role.

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To some, the new regulatory oversight mechanism should be judged by one measure: If it causes the regulation-issuing process to shut down, it has succeeded. If it does not, it has failed. This view is naive on at least two counts. First, it ignores the fact that, in becoming as important an instrument of government as taxing or spending, regulation has become just as indispensable. Clearly it is here to stay. Second, the view is naive because it also ignores the need to deal with the vast body of existing regulations. Doing this sensibly requires a well-functioning oversight process that can identify the rules needing review, develop information to support its case, and ensure that the agencies adopt the needed reform.

Thus, assessing the performance of the Office of Information and Regulatory Affairs will not be simple. Certainly OIRA will slow the pace of new regulations—probably a good idea. But how will it decide which regulations should be issued? How can it ensure that new regulations intrude on private decisions only to the degree necessary? And perhaps most important, can it establish a rational process for reviewing and reforming existing regulations?

The New Framework

In theory, Executive Order 12291 provides all the tools needed to accomplish these tasks. The order certainly is impressive both in its scope

and in the extent to which it rearranges the power relationships that prevailed under previous administrations.

Substantive Requirements. Certain sections of the order resemble or only modestly extend executive orders issued by Presidents Gerald Ford and Jimmy Carter. The prime example is the requirement that agencies subject proposed "major" rules to formal economic analysis and make these analyses (now to be called "regulatory impact analyses") available for public comment at the time rules are formally proposed.

In many important respects, however, the order moves far beyond the Carter and Ford systems. The Carter administration always took pains to stress that its requirements should not be interpreted as subjecting rules to a "cost-benefit test." Instead, agencies were to identify costs and benefits, to quantify them insofar as possible, and either to choose cost-effective solutions *or* to explain why they had not. Moreover, the burden of proving that proposed rules were *not* cost-effective lay not with the agencies but with senior White House aides. In addition, it was made clear that the administration was not trying to impose new substantive standards on those responsible for issuing rules.

Reagan's program goes much further. Except where expressly prohibited by law, the new executive order *requires* that a cost-benefit test be applied and met. An agency may not even propose regulatory action unless it can demonstrate that the potential benefits to society outweigh the potential costs. (How it is to make this demonstration, especially when many regulatory benefits and costs are nonquantifiable, is not explained.) If the agency proceeds to regulate, it must choose (1) the objectives that maximize net benefits to society and (2) the specific regulatory approaches that minimize net costs to society. Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits, taking into account three factors—the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies. This last requirement is a puzzler. When asked recently how agencies could meet it, OIRA Administrator Miller replied: "Relatively easily . . . by consulting the regulatory calendars that each agency is required to publish twice a year" (see "Deregulation HQ," interview with Murray L. Weidenbaum and James C. Miller III, *Regulation*, March/April 1981). But that does not explain how, in practice, an agency is to calculate the cumulative impact of such regulations and how it is to coordinate its actions with those of other agencies.

Oversight Procedures. The oversight mechanism is also being drastically changed. Under Carter, the various oversight functions were deliberately parceled out among many offices. OMB monitored compliance with the regulatory analysis requirement and, beginning in late 1979, became increasingly important in monitoring regulatory paperwork as well. The Council on Wage and Price Stability (CWPS) and, in the case of particularly important regulations, the interagency Regulatory Analysis Review Group (RARG) maintained quality control of agency analysis by filings for the public record. The Regulatory Council compiled calendars of future proposed regulations, spotted and resolved regulatory conflicts, and encouraged the adoption of innovative regulatory techniques. Finally, several of the President's closest advisers followed important regulations from the close of the public comment period until the issuance of the final rule.

The Reagan executive order consolidates most White House oversight functions in OMB's Office of Information and Regulatory Affairs. In effect, OIRA has become the gate through which all important regulations must pass—not just once, but twice—on their way to becoming law. The order gives OIRA extremely broad powers. It can overrule agency determinations on whether a proposed rule is to be considered "major." In the case of a major rule, it must receive the draft regulatory impact analysis at least sixty days before the agency publishes the Notice of Proposed Rulemaking. If it finds the analysis weak or believes that important alternatives have been neglected, it can delay publication of the Notice of Proposed Rulemaking until the agency has adequately responded to its concerns. There is no requirement that a record be kept of these initiatives or of the agency's response. The agency may appeal only to the President's Task

Force on Regulatory Relief or to the President himself.

It is important to note that all this is to take place *before* a regulation has been formally proposed. In that respect, the new process is like the behind-the-scenes preparation for the President's financial budget.

The Carter and Reagan systems also differ in the use made of the formal public comment period. Under Carter, it was during this period that RARG (for ten or so key regulations a year) or CWPS prepared and filed comments on agency proposals. In the case of RARG filings, a draft was written by analysts at the Council of Economic Advisers (CEA) and CWPS and circulated to all RARG members—including the agency whose proposal was under review—who then met formally to discuss the issues involved. Comments and dissents were incorporated into the draft, and the final report was placed on the public record at the close of the comment period. The Reagan plan dispenses with public filings by executive office agencies such as CWPS and interagency groups such as RARG. Any views that OIRA or any other agency may have on a proposed rule presumably will already be reflected in the proposal when it is published. Moreover, as noted earlier, the executive order does not provide the public with an opportunity to learn what these views were and how they differed from the views of the agency proposing the regulation.

After formal public comment, while the agency was drafting its final rule, the Carter procedures provided for monitoring by top presidential advisers—the CEA chairman, the OMB director, the President's assistant for domestic policy, as well as his inflation adviser and science adviser. They (or their aides) met regularly to track important rulemakings, assign responsibility for White House–agency liaison, and decide whether to involve the President. (The President was kept informed but, for a variety of reasons, rarely asked to mediate disputes with the agencies.) Under the Reagan system, OIRA fulfills this monitoring function, getting one more shot at the agency's proposal. Thirty days before the rule is to be issued, the agency must transmit the final regulatory impact analysis to OIRA. If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President's task force or the President himself. Only in the event of disagreement on the final rule is the substance of these discussions to go into the rulemaking file, where it will be available to courts that may review the matter.

Another important difference between the two systems should be noted. During the so-called post-comment period, the Carter White House carefully limited its contacts with the agency so as to minimize the possibility of ex parte contacts that might "taint" the rulemaking. Thus the task of keeping in touch with the agency was informally assigned to a single person—usually the one who had been following the rulemaking most closely. And the White House offices having the most frequent contact with industry were excluded from agency–White House deliberations to avoid their becoming a conduit for information not on the public record. The Reagan administration's decision to broaden the circle of individuals potentially involved during this period to include a number of cabinet officers (as members of the President's Task Force on Regulatory Relief) will make the policing of outside contacts substantially more difficult. It will be impractical to ensure that these individuals, who have only sporadic involvement in rulemaking and who, in the course of their normal duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Additional Responsibilities. The process described above applies to new rules. But the vast body of regulation already in place also needs attention. The Carter system required that agencies periodically review existing rules and eliminate or revise those that were outmoded. But it never created a formal "sunset" procedure to give this requirement force. Reagan's executive order does. It allows OIRA to designate existing rules for analysis and to establish schedules for such review. Revising a rule requires, of course, that a new rule be proposed, at which point the procedural and analytical standards of Reagan's executive order apply.

OIRA has still more powers. President Reagan has abolished the Regulatory Council, transferring to OIRA the job of publishing the Regulatory Calendar and of identifying and eliminating duplicative, overlapping, and conflicting rules. OIRA will also implement the Federal Regulatory Flexibility Act of 1980, which

addresses the regulatory problems of small business, and the Paperwork Reduction Act of 1980, which seeks to limit the paperwork that agencies impose along with their regulations. Finally, OIRA is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and an industrial sector basis—"for purposes of compiling a regulatory budget."

Can OIRA Handle the Task?

If it wants to conduct effective regulatory oversight, OIRA must show everybody involved—the agencies, the Congress, the courts, the regulatees, and the public—that it can use its powers responsibly. Its assertion of authority must be matched by competence in exercising that authority. Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample. But they are not. Furthermore, to a large extent they are ill-suited to the task of regulatory analysis.

Staff Resources. According to the Miller/Weidenbaum interview in *Regulation*, OIRA will have about ninety slots and will, in addition, be aided by OMB's regular staff. But the numbers give a misleading picture. Few if any of the ninety slots are new, because OIRA is a combination of three existing units: the Office of Regulatory and Information Policy (RIP) within OMB, the Office of Government Programs and Regulations from the now-abolished Council on Wage and Price Stability, and the Office of Statistical Policy (OSP) from the Department of Commerce. Moreover, of these, only the twenty-person CWPS staff is experienced in the techniques of regulatory analysis. The forty-five RIP analysts are primarily trained to monitor paperwork burdens and oversee the agencies' technical compliance with the executive order. The Statistical Policy Office's twenty-five analysts may be helpful to OIRA in standardizing techniques for cost-and-benefit accounting, but they are not regulatory specialists and are not likely to become so. As for drawing support from elsewhere in OMB, while some of OMB's 250 budget examiners may be available from time to time, their training and professional inclination equips them to monitor direct federal expenditures, not the indirect costs of regulation.

In short, because the influence of regulation pervades the entire economy, OIRA's duties are considerably broader than those of the conventional financial budgeters, while its resources are far smaller. But its analytical horsepower is significantly less than that of the offices whose functions it has assumed.

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Analytical Capabilities. Considering the stress the Reagan program lays on formal cost-benefit analysis of regulations, taken both individually and in groups, the meagerness of OIRA's analytical resources cannot help but undermine its credibility. Even more serious is the likelihood that OIRA will miss opportunities for reform. Important issues may fall between the cracks because no one knows enough about their significance to challenge them, or because none of the parties involved has the incentive to raise them or the capability of analyzing them properly.

For example, during a 1980 proceeding of the Environmental Protection Agency (EPA), an opportunity arose to broaden the definition of "source" for purposes of new source reviews in areas of the country not meeting national ambient air quality standards. The importance of broadening the definition was brought to the attention of White House staff very late in the rulemaking process—and not, incidentally, by industry. The contemplated change would have been helpful to industry, especially steel, because it would have allowed a plant to make replacement investments free of EPA's new source reviews so long as its emissions were not significantly increased. The change also would have reduced total emissions. But EPA's more restrictive definition was a valuable weapon for forcing steel firms onto compliance schedules, because it permitted the agency to

hold any modernization investment "hostage." Thus EPA was opposed.

The White House analysts worked up estimates showing the favorable impact of the change on steel industry investment. However, after heated discussions between senior White House officials and EPA's leadership, EPA prevailed. (Subsequently, with the advent of the Reagan administration, EPA announced that it would repropose the regulation to permit the issue to be reexamined.)

In this instance, having a highly competent analytical staff strategically located within the White House with sufficient resources to prepare a well-documented analysis helped ensure that an important issue that otherwise might have slipped by at least got considered. It might be argued that, under Reagan, no agency will ever try to slip a regulatory change past the White House. My experience in several administrations suggests otherwise.

Agency parochialism is not the only thing that a strong White House analytical capability can help prevent. Sometimes there are important issues lurking in a rulemaking that only the White House has the incentive to raise. An example occurred during EPA's rulemaking on premanufacturing notification procedures for new chemicals and new chemical uses (which is still pending). White House analysts became concerned that the proposed procedures would adversely affect innovation in the chemicals industry and suggested a RARG review. EPA voted no, contending that this was not the proceeding in which to address the innovation issue and that the information needed to make a finding was not available. The chemical industry, for its part, seemed indifferent, possibly because the procedures in question would have an ambiguous effect on industry profits. By slowing the rate of innovation of new chemicals and increasing the cost of developing new uses for chemicals, the procedures could substantially enhance profits on the sale of *existing* products and differentially affect innovation in large and small firms.

Nevertheless, RARG launched a review, and the resulting report, filed by CWPS in March 1981, shed important light on an issue of national importance. It might be argued that in the Reagan administration the agencies themselves will see to it that all significant issues are raised and properly analyzed, or that OIRA, though thinly staffed and overworked, will be able to single out the issues of importance that the agencies let drop. I have my doubts. Or it might be argued that the agencies will forget about such "trivialities" as premanufacturing notification once the Reagan oversight process really gets rolling. Again I am doubtful. Congress may be in an antiregulatory mood right now, but it will be interesting to see how long the mood lasts if a new chemical harms someone and if the harm might have been prevented by tight regulation.

The matter of adequate resources is thus critical in determining how successful OIRA will be in shaping the regulatory process. Effective and credible oversight requires a staff that is familiar with both agency programs and the affected industries, and that also has the ability to set priorities and ask cross-cutting questions (including whether proposed "reforms" of one agency may increase costs elsewhere). Merely requesting industries, trade associations, and other interests to submit "hit lists" of regulations they would like to see eliminated (as Vice President Bush did on March 25) may be good politics. But it is no substitute for developing independent judgments as to which regulations make sense and which do not. Either OIRA's analytical resources will have to be greatly increased, or its objectives greatly trimmed—and maybe both.

Can the Agencies Do Their Part?

Of course, OMB will have help with regulatory oversight, just as it does with financial budget oversight. Indeed, the overwhelming bulk of the responsibility for preparing cost-benefit analyses must necessarily fall on the agencies themselves. A central White House staff can never know enough about the detailed workings of regulatory programs to prepare a large number of regulatory analyses from scratch; it generally will have to rely on raw material generated by the agency, and the quality of this material is crucial. A major paradox of the Reagan program is that while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies than did the Carter procedures. Unfortunately, however, it is likely to weaken the agencies' incentive to perform

this role in a way consistent with both presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management.

Improving Analytical Capabilities. Initially, the regulators typically responded to both President Ford's and President Carter's executive orders by preparing analyses designed solely to support regulatory options they had already chosen and to "prove" that their proposals actually generated few if any costs. Only gradually did they start to use these analyses for the intended purpose: to help decision makers identify the likely impacts of a *range* of possible regulatory actions. In general, it was not until an agency had been through a number of RARG or CWPS reviews that it began to appreciate the breadth of information that could be generated during a rulemaking. Indeed, one of the most important (and perhaps least appreciated) objectives of the RARG and CWPS efforts was to improve agency analytical skills. Through the collegial RARG process, the distinction between "good" and "bad" analysis was slowly being transmitted throughout the bureaucracy.

Even so, by the end of the Carter administration, very few agencies were good at regulatory analysis and some did not yet understand what it meant. There is little reason to think this situation has improved since then, and some reason to think it has worsened: because of budget cuts and hiring freeze, a number of the best analysts have returned to the private sector.

The prospects would be bleak enough if the agencies had only to analyze the impact of individual proposed or existing regulations. But each of them must also develop priorities for its entire regulatory program and understand how its proposed rules and those of other agencies accumulate to influence an industry or sector. I am not aware of any agency qualified to do this competently at the present time.

Paradoxically, the obligatory cost-benefit test may well be a hindrance to obtaining good analysis. Considering the state of the art in estimating both benefits and costs, the requirement amounts to an invitation to fraud. It would be much more sensible merely to require that agencies identify (and quantify, to the extent possible) whatever costs and benefits they consider likely to flow from the proposed regulations. This, coupled with the lifting of all statutory bars to considering and balancing costs and benefits (such as the bars contained in the Delaney Amendment and the Clean Air Act), would be a powerful spur to sensible regulation. Unfortunately, not even the regulatory reformers in the Republican-controlled Senate seem willing to face this issue squarely. Instead, their major proposal would merely codify the procedural requirements of the executive order, tightening the procedural straightjacket that the courts have been increasingly imposing upon "informal" rulemaking.

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But there is also a practical problem. Suddenly imposing a strict cost-benefit test on this gradual learning process means that sensible new regulations, or revisions in existing regulations, may be stalled for lack of acceptable supporting analysis.

Improving Incentives. A great deal depends on how OMB chooses to interpret the requirements of the new executive order. If OIRA acts as an understanding teacher, showing tolerance for agencies as they struggle to learn and providing them with the resources needed to upgrade their analytical skills, then improvement can continue. If OIRA operates as a stern judge, however, virtually all regulations that come to its attention will fail its test—and not necessarily because they are not cost-beneficial.

Finally, progress could stop entirely if a harassed and overextended OIRA yields to the worst temptation: to give each analysis only cursory review and then either permit rulemakings to proceed if the analysis reflects politically desired results or bounce it back if it

does not. The power of this temptation is suggested in the *Regulation* interview. When pressed on whether OIRA would apply the full procedural treatment to a rule purporting to *reduce* regulatory burdens by several hundred million dollars, Miller replied: "If OMB . . . were convinced on the basis of evidence, *however sparse*, that such a reduction would occur, a waiver would be granted immediately" (italics added). But he would give the full "treatment" to a rule that would raise costs, possibly even by only a small amount—if OMB chose to call the rule "major." This may seem an appealing short-run strategy for getting regulatory proposals changed without a lot of bother. But it runs serious risks of court intervention and, more to the point here, it undermines agency incentives to do serious analysis. Indeed, it returns regulatory analysis to the primitive stage of justifying predetermined outcomes.

Intervening Too Early?

Only occasionally, and usually only at an agency's request, did officials in the Carter White House concern themselves with actually shaping a regulatory proposal before it was opened to public comment. This approach had its drawbacks. As more than one expert has noted, agencies often tend to structure regulatory proposals in ways that severely limit their scope for final rulemaking. Yet RARG and CWPS, by carefully monitoring developing proposals, were able to ensure that rulemaking discretion was not unduly narrowed. And by zeroing in on agenda-setting actions—first-of-a-kind rulemakings, policy statements, and so on—the White House could further increase the range of options left open.

While the Reagan scheme's concentration on the pre-proposal stage permits—at least in theory—consideration of the broadest possible range of options, it is questionable how much this will help in practice. A major problem is that agencies use the Notice of Proposed Rulemaking in different ways. Sometimes agencies use it to identify options having a reasonable chance of adoption—in which case considerable effort has been expended before the formal notice is issued and a regulatory impact analysis would make sense. Other times, however, agencies use the NPRM as a tool for gathering data on the industries they intend to regulate and on the possible consequences of various regulatory options. After analyzing the data produced, they repropose the regulation. In this case, there is little point in doing a regulatory analysis before the second NPRM is issued. All that the agency and OIRA would have to work with would be sweeping claims of what the regulation *might* do if the agency went as far as it conceivably could under its authority. And the numbers submitted by interested parties would represent "worst case" scenarios—useful for attracting headlines but not for understanding what the effect of the actual regulation would be.

(It should be noted that some agencies employ a device called the Advanced Notice of Proposed Rulemaking, or ANPRM, to gather the information required to frame intelligent regulatory options. This should be encouraged. And if OIRA's formal powers do not now extend to ANPRMs, the temptation to extend them should be resisted. OIRA will have more than enough to do if it concentrates only on genuine NPRMs and ignores the fishing expeditions.)

Less Chance for Public Participation

During the Carter administration, some outside groups complained that they were unable to comment formally on CWPS's and RARG's contributions since those contributions were not filed until the end of the comment period. This view is echoed by Murray Weidenbaum in the *Regulation* interview. He dismisses RARG's influence by noting that its comments were filed "literally minutes before the comment period closed—which restricted somewhat their capacity for stimulating public dialogue." In practice, however, the filing schedule did not prove to be a serious problem. We found that, with months or often years elapsing between the close of public comment and the time a rule is made final, there was ample time for public discussion of and even formal public comment on a RARG intervention. In one case, an agency reopened a comment period expressly to receive comments on RARG's analysis. In another case, a "public interest" group prepared a detailed analysis of a RARG filing and CWPS prepared a rebuttal; both documents were placed

in the record, even though the comment period had closed. In short, under Carter, there was liberal opportunity for public comment on White House interventions up until the very last stage of rulemaking, and comments were liberally offered. And the filings performed a useful educational role for the public and the Congress.

Contrast this with the information blackout under the Reagan process. A record of the critical pre-proposal discussions between the agency and OIRA is not required, and no document reflecting the administration's views need be placed on public file. A record of agency-OIRA discussions after the comment period will be put into the file, if at all, only when the rule becomes final. And nothing ensures that this record will be in any way complete. No wonder that a Washington attorney (William Warfield Ross) has advised his fellow attorneys that "there may be highly significant conversations going on between agency heads and the White House" before or during rulemaking proceedings about which they know nothing. His conclusion: "Now more than ever, . . . the race will be to the swift, to the enterprising and to those with access to the levers of power, not only in the Congress and the regulatory agencies, but also in the presidential office" (*National Law Journal*, April 27, 1981).

Whither Regulatory Oversight?

The Reagan initiatives can best be viewed as a logical and significant extension of experimentation begun by President Nixon and carried forward by his successors, the exact form reflecting each President's character, view of regulation, and attitudes toward bureaucracy. Each successive experiment has borrowed from the previous ones and would not have been possible but for the earlier efforts. Reagan's version of regulatory oversight borrows much of its procedure from Nixon's "quality of life review" and many of its analytical requirements from Ford's inflation impact statements. It draws on the capacity for analysis nurtured by Carter and will rely heavily on what is perhaps his administration's most important innovation in this area—the Regulatory Calendar. However, it discards the concept of public filings in favor of behind-the-scenes discussions between agencies and OMB—a loss whose importance has yet to be understood. And while the Regulatory Council and RARG brought about greater interagency cooperation, not by commanding it, but by showing agencies that reform could be in *their* interest, OIRA seems inclined to abandon this approach—another important loss.

So, an experiment it certainly is. It is bound to be tested in the courts and, over the course of the Reagan administration, is likely to undergo major changes. For this reason it would be especially unfortunate if either its current structure or its current procedures were embodied into law. Let it first prove itself by operating under the more flexible arrangement of the executive order. Most important, Congress should avoid writing into law the developing "common law" of hybrid rulemaking in the mistaken notion that slowing the regulatory process to a crawl is somehow the same thing as deregulation. If Congress feels compelled to act, let it take on a task that the Carter administration certainly would have tackled had it won a second term—designing major changes in the substantive standards agencies apply in rulemaking. This does *not* mean legislating a mandatory cost-benefit test for all regulations. Congress should merely remove the statutory language that prevents agencies from considering costs and from undertaking both intra- and interagency balancing of objectives. This, combined with permitting tolerably flexible administrative procedures, would be sufficient to produce all the regulatory reform that one would reasonably want.

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For regulation to be a useful tool in promoting society's goals, it needs to be harnessed. But the oversight process must be professionally run and adequately staffed. It must not mimic the Queen of Hearts in *Alice in Wonderland*, constantly running hither and yon shouting, "Off with his head." ■