**COMMITTEE ON SCIENCE AND TECHNOLOGY**

**SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT**

**U.S.HOUSE OF REPRESENTATIVES**

**HEARING CHARTER**

# *Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part II*

Thursday April 26, 2007

10:00 a.m. to 1:00 p.m.

2318 Rayburn House Office Building

**Purpose**

On Tuesday, February 13, 2007 the Subcommittee on Investigations and Oversight of the Committee on Science and Technology held a hearing to receive testimony regarding the President's recent amendment to Executive Order 12866. That order provides guidance to agencies for submitting proposed regulations to the Office of Management and Budget (OMB) for pre-approval.

The amendment (Executive Order 13422) expands this process by requiring agencies to submit proposed significant guidance documents for pre-approval. The Order also requires for the first time that agencies identify in writing the specific market failure or problem that warrants the proposed regulation or guidance; that a Presidential appointee in each agency be designated as regulatory policy officer and that officer must approve each regulatory undertaking by the agency.

The February hearing provided significant testimony highlighting several issues. Three bundles of issues emerged as worthy of further work:

1. How was the Executive Order developed and what are the consequences of changes to the language of E.O. 12866?
2. What does the shift to a "market failure" standard for justifying a regulatory

proposal mean and how will the annual agency costs of regulations statements be used?

3. Will the change in the status and authority of the Regulatory Policy Officers in the agencies have consequences for transparency in the regulatory process?

**Witnesses**

To provide insight into these issues, the Subcommittee has invited the following witnesses:

**Steven Aitken, General Counsel at OIRA**. Mr. Aitken can address how E.O. 13422 was developed. He can also offer up OIRA's take regarding how OIRA interprets the new E.O. In testimony before the House Judiciary Committee, he indicated that the view of OIRA was that most of the changes were simply to bring the language of the Executive Order into alignment with practice.

We will also hear from **Professor Peter Strauss** of Columbia Law School and **Mr. Gary Bass** of OMB Watch. They will address some of the institutional challenges OIRA's role pose to the standing of Congress and the dangers that statute may be trumped by non-statutory Presidential guidance. They will also speak to problems of transparency that come with a larger role for Regulatory Policy Officers.

Then **Dr. Robert Hahn** and **Professor Richard Parker** will also testify. Dr. Hahn is famous for studies, done in residence at the American Enterprise Institute, regarding the costs of regulation. His degree is in economics and he has advocated in the past for more reliance on cost-benefit analysis. Professor Parker of the University of Connecticut Law School will offer his insights into the problems with cost-benefit analysis and regulatory budgeting efforts.

**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 a myriad of other good purposes. Congress obviously cannot pass a law, or amend statute, every time a new threat to air or health arises. 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 the Office of Information and Regulatory Analysis (OIRA) injects itself into the regulatory process there can be a fine line between guaranteeing that a proposed regulation is convincingly demonstrated and efficient in its likely outcome and substituting the President's values and preferences for the goals and purposes Congress enacted in statute. This line 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.

As discussed below, E.O. 12866 was a Clinton-era effort to retain Reagan-initiated White House oversight of agency regulatory processes that had been the product of Reagan initiatives, balanced against the recognition that agencies should 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 (the estimate was that the annual number of regulations for review declined from 2000 to a mere 500 or so). 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 OIRA's assertions of authority had to be tempered by that legal reality.

The Bush Administration has been very aggressive in expanding the role of OIRA. Independent agency action has, in some cases, been by OIRA, which has acted as a very stingy gatekeeper on what proposed regulations can see the light of day. In tone, OIRA has returned to the Reagan-era where OIRA uses its privileged position as "the President's voice" in regulatory matters, to push agencies into rethinking everything they are doing on regulation.

Critics of OIRA's role since 2001 describe a process whereby the values and judgments of OIRA's small staff (dominated by economists) trump the judgments of technical experts in the agencies and supplant the values in statute designed to guide agency regulatory activities. The cumulative effect of OIRA's behavior since 2001 has been to intimidate agencies into running away from pursuing their statutory responsibilities rather than get caught up in the political struggles associated with moving regulation forward. Supporters of this approach are happy to see some office moving to slow agency actions and argue that the net result of OIRA's actions is a more defensible regulation at the end of the day.

How does all this matter for science and the agencies under the Science Committee's jurisdiction?

Every year the Federal government funds billions of dollars of research at the Environmental Protection Administration, the Department of Labor, the Department of Transportation, the Department of Agriculture, the Department of the Interior, the Department of Energy and the National Oceanic and Atmospheric Administration that

contribute directly or indirectly to regulatory considerations. Even the National Institutes of Health and the National Science Foundation fund science that finds its way into regulatory proposals. Experts at agencies--often Federal scientists--charged with regulatory responsibilities survey the relevant scientific literature to determine where there may be dangers to the public or the public interest. In determining the need for a regulation, the agency uses science funded with public dollars, as well as that from private sources, to make reasoned assessments of risks and propose responses. This is all to be done consistent with statutory responsibilities as established by Congress.

OIRA has been using its circulars to force agencies to analyze and reanalyze the information underlying and supporting proposed regulations. Now, with the amended Executive Order, OIRA is putting in place an economic criteria—market failure—for regulation and guidance that may have nothing to do with the values established in statute. This effort is coming with no consultation or input from Congress. Further, by making the regulatory policy officer a more empowered gatekeeper, with political allegiance to the President, it raises the chances that the agencies themselves will find it hard during the Bush years to get regulatory proposals started or completed simply to submit them to OIRA for review. Congress did not empower agencies to protect public health and safety simply to then sit on its hands to see all Congress appropriates for regulatory-relevant science and the legal authority seated in agencies be trumped through a sweeping Executive Order.

**Bush Amendments to E.O. 12866**

The Bush Administration has amended this Executive Order two times. 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. This second occasion for amendment has come with limited warning, little discussion and with much broader implications. The attached CRS report goes into detailed discussion of the major changes, and some of their implications. Below is a summary of the key observations.

1. Elevating “Market Failure”:
First, the amendment establishes a new standard that must be met by any proposed guidance or regulation. Originally, the first principle guiding submissions to OIRA seeking approval of a proposed regulation was that “[e]ach 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.“

Under the amended language, “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 allege that this new standard of ”market failure” supplants the values that exist in statute for regulatory action. They also worry that OIRA will use this standard to summarily dispense with proposals that they deem to be unconvincing in their articulation of a market failure. However, there is permissive language allowing for other kinds of analysis. The core question will rest on how OIRA applies this language in practice.

There is a fundamental problem with “market failure”: there is no objective test for when market failure is present or when an identified “imperfection” in the operation of a market is sufficient to justify regulatory intervention. Economists offer a model of an ideal, perfect market (perfect information, perfect competition, rational action by all actors, no externalities, no agency problems, predictable transaction costs) and no market in the real world ever works like these theoretical markets. So deciding that a particular “failing” is worthy of intervention is really in the eye of the economist. It is a little like the saying about lawyers: if you don’t like the advice yours is giving you, get a new one. The same with economists and market failure.

2. Presidential Appointees as Regulatory Policy Officers

The amendment directs that each agency shall name a regulatory policy officer who shall 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 takes the expert staff of agencies out of the picture. The language of the amendment charges 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 this Executive order.“

This political appointee appears to serve as a kind of gatekeeper’s gatekeeper. The officer will compose an annual plan and “no rulemaking shall 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 and now they have total discretion over the initiation of work that could lead to a regulation. (CRS states that these Regulatory officers are largely drawn from political appointees already so this may not be a notable change; however, the source on that is OIRA and they do not keep a master list of these officers so it is hard to know how to evaluate this assertion.)

Chairman Miller has raised questions about the transparency of activities carried out by the Regulatory Policy Officer. For example, will meetings between the RPO and outside parties on matters that may be considered for guidance or regulation be subject to the same sorts of disclosure that OIRA now routinely makes? Will a decision by an RPO to bar an agency from moving forward with a proposed regulation ever be subject to public disclosure? If a proposal has been drafted and sent forward to the RPO who sends it

back with new guidance, will that exchange be public the way OIRA's response to proposed regulation would be?

Further, we have found in our own survey of agencies, that many agencies have been relying or have now named their General Counsel as RPO. Will the General Counsel make a claim of attorney-client privilege in response to FOIA requests (and even Congressional requests) related to any work on a proposed regulatory action?

3. Aggregate Regulatory Costs and Benefits

The original language of 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." The Bush Administration amendment expands this requirement to direct 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 allege that this will elevate cost-benefit analysis in the regulatory process. Cost-benefit analysis is a very controversial analytical tool 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, to protect the lives and health of citizens, the quality of the air or water) are impossible to accurately value. However, the costs of steps to implement a regulation 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 costs used in estimating the costs of a regulation turn out to be overstated. And of course because you are using "dollars" to estimate costs, it provides the illusion of a precision that does not--perhaps cannot--exist.

Critics also view this as a potential first step towards a regulatory "budget" that could be used to stop future regulations based on some "capping" of that budget.

4. Review of Significant Guidance Documents

Under the amendment each agency is to provide OIRA with advance notice of all proposed significant guidance documents. OIRA may then decide which guidance it deems to be "significant" from its perspective and ask for the proposed guidance and a brief explanation of need. "The OIRA administrator shall notify the agency when additional consultation will be required before issuance of the significant guidance document."

There is no time limit on how long OIRA may take in moving on these guidance proposals.

The impact on agency conduct may be very, very significant and could potentially

sweep up thousands of such proposals each year. Guidance is issued to communicate to an effected public how an agency intends to interpret or enforce statutory directions. The business community relies on guidance to ensure that conduct will comply with agency intentions for application of law.

**Conclusion**

While the language of the Amendment to Executive Order 12866 is alarming to many, the fundamental issue is how does OIRA intend to implement it? The re-emergence of the "gatekeeper" approach to OIRA under President Bush--an event that has not so far received the kind of institutional push-back from Congress which that role drew in the 1980s--suggests that the rule as amended will be used very aggressively to stall agency action. But how OIRA intends to apply this language in practice is a subject worth some study.

Two other issues loom large from the Committee on Science and Technology's perspective. First, what will these changes imply for the science-based regulatory agencies? Will we increasingly find that the "science" that matters is no longer that of climate, biological or medical researchers, but narrow applications of cost-benefit analysis and market failure theory drawn from economics? Should the Science Committee, uniquely positioned to examine and evaluate research, undertake a more rigorous review of the validity and utility of these economic approaches to regulation?

Second, what does this new amendment imply for the institutional prerogatives of the legislative branch? Agencies exist in statute and are given mandates under the law. Should Congress passively accept an Executive Order that, just as an example, places Presidential appointees in a position where they can arbitrarily block career agency officials from carrying out the purposes of the law Congress charged them with?

The growth of power at the Office of Information and Regulatory Affairs has gone largely unexamined in recent years. This new Executive Order invites Congress as a body, and many, many Committees that are affected, to undertake a vigorous and thorough review of the changes in that office since 2001. One possible response is to offer legislative language that will enhance the transparency of the actions by Regulatory Policy Officers; that is an option that Chairman Miller is actively considering.

Appendix:

Other Regulatory Tools that OMB has used to Expand its Powers:

Data Quality: There were 2 recent acts of legislation that affected OMB's oversight of data. They are the Data Access Law and the Data Quality Law. Both of these laws were inserted into omnibus appropriations bills, and neither was fully debated in Congress.

The entire Data Access Law consists of the following short passage:

"Office of Management and Budget Salaries and Expenses

…Provided further, That the Director of OMB amends Section___.36 of OMB Circular A-110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act: Provided further, That if the agency obtaining the data does so solely at the request of a private party, the agency may authorize a reasonable use fee equaling the incremental cost of obtaining the data…"[11]

The purpose of the law was to increase public access to data conducted with funding from federal grants. Another purpose of the law was to overturn *Forsham v. Harris*,[12] which stood for the principle that data generated by a privately controlled organization which received grant funds from a federal agency were not 'agency records' accessible under the Freedom of Information Act.

The Data Quality Act ("DQA"), was inserted into the FY 2001 Consolidated Appropriations Act.[13] The Data Quality Act instructed OMB to establish guidelines to Federal agencies for "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Through its guidelines,[14] OMB directed agencies to establish "administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency." To date, there appears to have been over 100 DQA petitions filed with numerous Federal agencies. OMB does not compile a list of DQA petitions, so ascertaining the exact number of petitions filed is cumbersome. OMB Watch (www.ombwatch.org) keeps track of the individual petitions filed at each agency, and maintains a comprehensive list of DQA petitions.

Two major questions concerning the DQA remain unresolved. The first is whether the DQA applies to agency rulemaking. It is clear that the DQA applies to agency action outside the rulemaking process (for instance, agency dissemination of information through websites). However, there is no guidance in the actual legislation as to the applicability of the DQA to rulemaking. There appears to be a consensus position across the Federal agencies that the DQA doesn't apply to rulemaking, as the rulemaking process already allows for public comment. Furthermore, the DQA contains no reference to the Administrative Procedure Act. Nevertheless, industry petitioners have successfully used the DQA petition process to influence agency rulemaking. One instance involves the chemical atrizine. As a result of a DQA petition, the EPA included a sentence in a scientific assessment of the risks of atrazine that stated hormone disruption cannot be considered a "legitimate regulatory endpoint at this time."[15] Atrazine is banned in Europe precisely because of the evidence that it is an endocrine disruptor. By attacking the science underlying potential rulemaking, the petitioners were able to avoid agency rulemaking altogether.

Another major question concerning the DQA is whether DQA petitions are judicially reviewable. Thus far, the major case on the issue held that DQA petitions are not judicially reviewable.[16] However, further challenges in different circuits are planned, and the issue may not be fully settled. Judicial review of DQA petitions would cause massive delays to the petition process.

DQA Based Regulations: OIRA developed two important new regulations based on the Data Quality Act: OMB Peer Review Guidelines[17] and OMB Risk Assessment Bulletin (Proposed). OMB's Peer Review Guidelines dictate that "important scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government." The guidelines apply to all "scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the Federal government." OMB's guidelines establish minimum peer review standards for Federal agencies. Varying requirements for peer review are established based on the potential influence of the scientific information, with "highly influential scientific assessments" receiving the strictest peer review requirements. OMB asserts its legal authority to impose the Peer Review Guidelines flows from the Data Quality Act's direction to OMB to provide guidance for Federal agencies for "ensuring and maximizing the quality, objectivity, utility and integrity of information" which is disseminated.

OIRA recently proposed a Risk Assessment Bulletin.[18] This has not yet been published in its final form. The Risk Assessment Bulletin establishes "quality standards for risk assessment disseminated by federal agencies." Much like the Peer Review

Bulletin, the Risk Assessment guidelines have varying levels of quality standards. There is one set of standards for general risk assessments and another set of stricter standards for influential risk assessments. Influential risk assessment is defined as "a risk assessment the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." OMB again asserts legal authority to issue the bulletin arises from the Data Quality Act. This Risk Assessment proposal was soundly rejected by the National Academy of Sciences in their January review. That step seems to have killed the proposal.

Analysis

The effect of the Data Quality Act, Peer Review Bulletin and Risk Assessment Bulletin is to impose an additional layer of regulatory administration on agencies that, for the most part, already have strong internal guidelines (at least for peer review and risk assessment). The result of this will likely be greater delay in agency dissemination of information, and a chilling effect that might discourage agencies from attempting to disseminate information in the first place. The bulletins also represent another step in OMB's continuing effort to insert itself into agency affairs. In addition, the possibility remains that OMB will attempt to use its authority under the Data Quality Act to insert itself into the agency rulemaking process. This could potentially reek havoc on the rulemaking process, and create years of new legal challenges related to the rulemaking process. Needless to say, that would cause significant slowdown of an already slow rulemaking process.

[1] 42 Stat. 22, Ch. 18, Sec. 207. OMB currently resides at U.S.C. Title 31, Chapter 5 (31 U.S.C. Sec. 501).

[2] 53 Stat. 1423, Sec. 1.

[3] 84 Stat. 2085, Sec. 102(a), restated 88 Stat. 11, Sec. 1.

[4] 44 U.S.C. Chapter 35, P.L. 96-511, restated P.L 104-13, 109 Stat. 163.

[5] 44 U.S.C. Sec 3503.

[6] P.L. 104-13, 109 Stat. 163.

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

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

[9] 44 U.S.C. Chapter 35, P.L. 96-511, restated P.L. 104-13, 109 Stat. 163.

[10] 44 U.S.C. Chapter 35, P.L. 104-13, 109 Stat. 163.

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

[12] 445 U.S. 169 (1980).

[13] P.L. 106-554, 114 Stat. 2763(A).

[14] 67 FR 8452 (2002).

[15] *Data Quality Law is Nemesis of Regulation*, Washington Post,, August 16, 2004.

[16] Salt Institute v. Michael O. Leavitt, 440 F.3d 156 (2006).

[17] 70 FR 2664 (2005).

[18] Notice of proposal at: 71 FR 2600. Text of the proposed bulletin is not published in the Federal Register.

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

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

[21] 44 U.S.C. 3502(1).

[22] 67 FR 8460 (2002).