SMARTER REGULATION: PROGRESS AND UNFINISHED BUSINESS

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When I assumed the role of OIRA Administrator over two years ago, the President instructed me to pursue an agenda of "smarter regulation". This phrase is not simply a "feel-good" slogan; it has profound implications. It means that we are not uniformly pro-regulation or anti-regulation in our decision making. We seek to accelerate the adoption of good rules, modify existing rules to make them more effective and less costly, and rescind outmoded rules whose benefits do not justify their costs. The policy principles we use at OMB were actually defined by President Clinton in 1993 in Executive Order 12866. But as you all know, distinguishing a good rule from a bad one based on general principles is not always an easy task.

THREE INITIATIVES

In order to accomplish smarter regulation, we have launched three major initiatives. They do not involve any new legislation; no executive orders and no campaigns for regulatory relief. They involve more openness in deliberation, better regulatory analysis, and higher quality technical information for use by regulators. Let me say a few words on each initiative.

First, OIRA has practiced an unprecedented degree of openness about how we do our work. I supervise a staff of about 55 career public servants whose responsibilities include reviewing roughly 500 rulemakings and 2,000 information-collection requests each year. We have an open-door policy for visitors interested in our work and we have made aggressive use of public-comment procedures to learn about the views of the public. By consulting OMB's web site, you can learn each day which rules are under formal review at OMB, which have been cleared or returned, and even which groups have recently lobbied Dr. Graham: their names, organizations, the date of the meeting and topic of the discussion. I believe this expanded openness has already reduced some of the mystery and suspicion about OMB's "regulatory czar" and the entire regulatory process. While openness is good government, it has also been a useful tactic in helping shift the public debate on regulation. The debate is moving away from process toward substance, from "who met with whom"? to "is this option more cost-effective than that option?". I believe that is a good development for public policy. While I am an advocate of more openness at OMB, there are limits to openness. For example, I have no intentions of compromising the ability of my career staff to have candid discussions with professionals from the regulatory agencies. I agree with these leaders in the field of Administrative Law, such as Supreme Court Justice Breyer that we need more professionalization of the regulatory process. I am particularly interested in the development of scientific and technical expertise to accompany legal expertise – both at OMB and at the agencies.

Second, we have also established more rigorous standards for what we expect from agencies in the way of regulatory analysis. These tougher expectations began with stricter enforcement of OMB's existing analytic guidance, which was crafted by OMB and CEA under President Clinton. In my first six months, we returned more than 20 rules to agencies for reanalysis; by way of comparison, this was more than the total number of the returns in the entire eight years of the Clinton Administration. Once we established that we cared about analysis, the agencies began to respond and returns have become less frequent. Believe me, we have much more work to do on analytic quality but a favorable trend line is apparent. Most recently, we issued a final

revised guidance for regulatory analysis that calls for innovations that are already commonplace in the academic community. I am talking about basic things such as cost-effectiveness analysis, formal probability analysis, and careful consideration of qualitative and intangible values.

Third, we have sought to expand the "information policy" function at OIRA to include the technical quality of information that agencies disseminate to the public. Following enactment of the new Information Quality Act in 2000, we expanded OIRA's staffing in science and engineering while maintaining our historical strengths in economics, statistics and policy analysis. This new staffing mix at OIRA responds to the changing nature of regulation: the rise of social regulation – especially health, safety and environmental regulation – and the decline of classic economic regulation which began in the 1970s. We are now in the process of helping agencies develop peer-review procedures for technical information, thereby better assuring quality before release. Agencies have also established formal correction mechanisms that the public can use to fix poor quality information that has been placed on agency web sites or written into rulemaking documents. OIRA sees information policy as a form of quasi regulation – since government information affects market decisions. We need greater quality control, through checks and balances, in the field of information policy.

RESULTS

Are these initiatives making any difference in regulatory outcome? It is too early to make any definitive assessment of this Administration's regulatory record. But the preliminary evidence suggests that we are making a difference.

The flow of costly new regulations during this Administration – measured by major rules on the private sector or state and local governments – has slowed considerably. My staff estimates that this flow, expressed as an annualized average, was about $8.5 billion under Bush 41 and $5.7 billion during President Clinton's two terms. (That includes a whopping $12 billion in President Clinton's last year.) Note that these figures exclude "budgetary rules" whose impacts are felt through appropriations. By comparison, our annual average for the last two years is running just under $1 billion per year. (By the way, some students of regulation are surprised to learn that costly regulatory action was greater under Bush 41 than under President Clinton. Please keep in mind that Bush 41 (1) faced a heavily Democratic Congress, (2) made new major regulatory commitments under the Clean Air Act and the disabilities act, and (3) had no success in winning Senate confirmation of a leader for OIRA.) There is no question that the Bush 43 has been far more selective than previous Administrations in imposing unfunded mandates on the private sector and our state and local partners.

In this Administration, we have slowed the flow of costly rules without slowing the flow of inexpensive rules. The total number of federal rules, which are dominated by rules that do not meet the $100 million-impact threshold, has not changed significantly. In fact, we do not regard the number of rulemakings per se as a meaningful performance indicator. We have been particularly amused by references to the increased number of pages in the FEDERAL REGISTER that occurred in 2002 over 2001, which some see as evidence that the burden of federal regulation is soaring. It turns out that this increase was due almost entirely to the pages

devoted to the Microsoft settlement. We do not believe that page counts in the REGISTER are meaningful as a performance indicator.

Students of regulation will notice that, despite the recession that we inherited, we have avoided the clumsiness of a complete moratorium on new rules. We are permitting – indeed encouraging – agencies to pursue new rules – even costly ones – when they have substantial benefits.

For example, we prompted FDA to add a mandatory label for the trans-fat content of foods. This rule, begun under the previous Administration, allows consumers to make more heart-healthy choices while encouraging food processors to reduce trans-fat content. The longrun result, FDA expects, will be less heart disease and fewer hospital admissions and premature deaths from heart attacks. FDA estimates this rule's ratio of benefits to costs to be about 100 to 1. The rule will cost consumers about $50 per quality-adjusted life year saved. By way of comparison, coronary artery bypass surgery and angioplasty cost on the order to $50,000 to $500,000 per QALY saved, depending upon the patient group.

Another example is our ambitious rulemaking effort with EPA to slash by 90% the amount of diesel exhaust from off-road engines used in mining, agriculture and construction. These gains can only be accomplished through a dramatic reduction in the sulphur content of diesel fuel and installation of new control equipment on engines. Although this proposed rule will be costly, EPA estimates that the benefits – driven primarily by cardio-pulmonary gains from less particle exposure – will outweigh costs by a ratio of 5 to 1 or even 10 to 1.

UNFINISHED BUSINESS

Thus, I am encouraged to report that this Administration has begun to exert some control over major federal regulations, at least those in the purview of Cabinet agencies and EPA. However, the list of unfinished business is much longer than the accomplishments. I will offer just a brief checklist of the most important challenges.

First, the sea of existing federal regulations needs to be renovated. But it is hard to know where to start! Since 1981 OMB has cleared 36,219 rules, including 1,966 rules that passed the $100 million test. Most of these rules have never been evaluated to determine if they are working!

As a modest step toward housekeeping, last year we requested public nominations of regulatory programs that are in need of reform, pursuant to the “Regulatory Right-to-Know Act.” Within 90 days, we were inundated with 316 unique reform nominations from over 1700 commenters. In our Final 2003 Report to Congress issued last month, we reported what agencies decided to do with these reform ideas. Fortunately, we learned that 109 of the reform ideas were already being addressed by agencies. Another 156 reform ideas were referred to agencies and I am pleased to report that agencies have decided to pursue 45 of them. We also referred another 51 ideas to independent agencies for their evaluation. We recognize that this is a modest housekeeping effort.

The advantage of look-backs is that we can identify promising opportunities for deregulation. The DOT's proposed deregulation of the airline ticketing industry is a good example where less regulation promises better quality services and lower prices for travelers. More thought needs to be given to how regulators, OMB, and Congress should modernize the huge existing stock of regulations.

Second, homeland security has emerged as a new growth area for federal regulation. Since 9/11, federal agencies have adopted over 60 new rules as part of the Administration's homeland security effort, though few of them have passed the $100 million test for "economic significance." The new Department of Homeland Security has many new regulatory initiatives under development, as does the Congress. At OMB, we have been humbled by the challenge of analyzing these ideas. How should agencies quantify the benefits of rules aimed at reducing the probability of (or damages from) future terrorist acts? How should agencies quantify the costs of homeland security rules, whether they come in the form of time losses at airports or intrusions into privacy or freedoms of foreign students and visitors to our country? Quite frankly, the agencies and OMB need help on how homeland security ideas should be evaluated. We reached out for public comment on this issue as part of our last Report to Congress in an effort to promote benefit-cost thinking about homeland security.

Finally, Congress is searching for new ways to demonstrate greater political accountability in the arena of regulation. As you know, many federal regulations – both the general area and the specifics – are specified in statute. Although legislators may respect what we are doing at OMB, some regard our "smart-regulation" agenda as too "technocratic;" they believe more democratic accountability is desired. OMB does not pretend to have answers in this area. I do believe it is constructive for Congress to begin to ask more fundamental questions about the role of the Congress relative to the federal agencies and the courts. It may be constructive for this dialogue to include the independent agencies as well as the Cabinet and EPA.

As we move forward with the President's "smart-regulation" agenda, I will be seeking your comments – as individuals and as the ABA – about what reforms make sense. We currently have out for comment a major initiative on how to promote more rigorous peer review of regulatory science. Please do not hesitate to schedule a visit to OIRA or drop us a note on how we can do a better job.

Thank you very much for the opportunity to speak today. I look forward to comments and questions.