



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**To: Committee on Regulation  
Attendees at March 7 Committee on Regulation Meeting**

**From: Reeve T. Bull**

**Date: March 5, 2012**

**Re: Analysis of the Transparency Provisions of Executive Order 12866 and OMB's Peer Review Bulletin as They Relate to Recommendations in the Wagner Report**

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In her report for the Administrative Conference of the United States on the use of science in the administrative process, Professor Wendy Wagner offers various proposals for enhancing the transparency and effectiveness of agencies' use of scientific studies. Administrative Conference Research Director Jeffrey Lubbers asked me to prepare a memorandum considering existing mechanisms for ensuring transparency in agencies' use of science so as to facilitate the determination of whether the added value of the proposed reforms exceeds their costs. In this memorandum, I analyze two existing mechanisms for promoting transparency in agencies' use of science: (a) the transparency provisions of Executive Order 12866 and (2) recent memoranda from the White House and Executive Office of the President (including the 2004 Office of Management and Budget ("OMB") Peer Review Bulletin, President Obama's 2009 Memorandum on Scientific Integrity, and Office of Science and Technology Policy Director John Holdren's 2010 memorandum providing further guidance on the Obama Scientific Integrity Policy) that direct agencies to implement various pro-transparency reforms. I then consider potential interstices in the existing policies and examine Professor Wagner's proposals for filling some of those gaps.

### **I. Executive Order 12866**

#### **A. Existing Transparency Provisions**

Executive Order 12866, which creates a process for the Office of Information and Regulatory Affairs ("OIRA") to review significant regulatory actions proposed by agencies, implements a mechanism for ensuring that the public receives notification of the changes that occur in a proposed regulation as a result of OIRA review. Specifically, for regulations reviewed by OIRA, "[a]fter [a] regulatory action has been published in the Federal Register or otherwise issued to the public," an agency must "[i]dentify for the public . . . the substantive changes between the draft submitted to OIRA for review and the action subsequently announced" as well as "[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."<sup>1</sup> OIRA, for its part, must "make available to the

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<sup>1</sup> Exec. Order No. 12866 § 6(a)(3)(E), 58 Fed. Reg. 51735, 51741-42 (Oct. 4, 1993).



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public all documents exchanged between OIRA and the agency during the review by OIRA” “[a]fter the regulatory action has been published in the Federal Register or otherwise issued to the public.”<sup>2</sup> Thus, pursuant to the Executive Order, following publication of a regulatory action, the public should be apprised of any changes an agency has made at the behest of OIRA and will be able to access any documents calling for those changes.

### **B. Limitations of Existing Transparency Provisions**

Professor Wagner identifies four limitations of the transparency provisions created by Executive Order 12866. First, in her study there was little evidence that these transparency provisions were being followed and that OIRA and individual agencies were producing the required documentation memorializing changes proposed by OIRA in an accessible way.<sup>3</sup> Second, she asserts that the transparency provisions apply only to significant regulatory actions that the agency reviews, and she therefore argues that those provisions would not apply when OIRA reviews a non-significant regulatory action.<sup>4</sup> Third, she states that the Executive Order requires only an indication of what changes took place and fails to require any explanation for why such changes occurred.<sup>5</sup> Finally, she notes that the Executive Order requires such public disclosure only after a final rule is published, notwithstanding the fact that the public may benefit from learning of changes earlier in the process.<sup>6</sup>

In addition to the limitations Professor Wagner identifies, the Executive Order requires only that OIRA release *written* communications exchanged during the review of a proposed decision, failing to require any memorialization of *oral* communications (though agencies presumably must still acknowledge any changes to their proposed rules deriving from such oral exchanges). Further, the Executive Order’s pro-transparency provisions apply only to the OIRA regulatory review process and do not require that agencies notify the public of input that may have influenced a regulatory decision received from the White House, Executive Office of the President, Office of the Vice President, or other agencies.

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<sup>2</sup> *Id.* § 6(b)(4)(D).

<sup>3</sup> Wendy Wagner, *Science in the Administrative Process: A Study of Agency Decisionmaking Approaches* 84 (Feb. 27, 2012). As Professor Wagner notes in the introduction to her report, her study focused on five programs in three agencies, and her fact-finding was based on documents that were already publicly available (not through a Freedom of Information Act request) and on information provided through dozens of interviews, primarily with agency staff. If there nevertheless is vigorous compliance with Sections 6(a)(3)(E)(ii)–(iii) and 6(b)(4)(D) of the Executive Order by OMB and/or the agencies that was not revealed through this fact-finding, this documentation would be most welcome by Professor Wagner as she prepares her final report.

<sup>4</sup> Wagner, *supra* note 3, at 84.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



### C. Proposed Solutions

Professor Wagner argues that excessive invocation of the Freedom of Information Act (“FOIA”) deliberative process privilege compromises the transparency of OIRA’s regulatory review.<sup>7</sup> In response, Professor Wagner recommends that the President issue an Executive Order either (a) directing OIRA to refrain from invoking the deliberative process privilege except in exceptional circumstances involving a threat to a compelling national interest (e.g., ensuring national security, shielding personal privacy, protecting trade secrets) or (b) requiring either agencies or OIRA to maintain a log of all changes made to a proposed rule during regulatory review and an explanation for such changes.<sup>8</sup> The proposed Executive Order would also require OMB to place all communications between OIRA and agencies regarding changes to non-economically significant rules in the public record.<sup>9</sup>

It appears that Professor Wagner’s proposed recommendations for limiting the invocation of the deliberative process privilege and requiring a log of changes made at the behest of OIRA are intended to be mutually exclusive, though they need not be so in theory.<sup>10</sup> Were OIRA and individual agencies to adopt the second option of requiring a log of revisions made during regulatory review as well as implementing the independent recommendation for communicating revisions made during the review of non-economically significant rules, they would resolve many of the issues identified in the preceding section. Specifically, OIRA would be required to document any changes it proposes for non-economically significant as well as significant rules, agencies or OIRA would be required to provide an explanation for any changes in addition to merely identifying such changes, and the public would be apprised of any changes prior to the promulgation of a rule. Her recommendation would not, however, solve the issues of OIRA and agencies’ non-compliance with the law (if agencies and OIRA are not honoring the existing transparency requirements, they would be even more likely to ignore enhanced requirements) or

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<sup>7</sup> *Id.* at 81.

<sup>8</sup> *Id.* at 84–85.

<sup>9</sup> *Id.* at 86.

<sup>10</sup> Specifically, the two options appear directed at different problems. An Executive Order severely limiting the invocation of the deliberative process privilege would simply require agencies to produce documents that they could otherwise withhold in response to a FOIA request. An Executive Order requiring a log of changes to rules implemented at the behest of OIRA, by contrast, would require the agency to take *affirmative steps* to release certain information to the public (though the agency could still presumably shield information protected under the deliberative process privilege in this publicly released material). In short, the first option addresses the type of information an agency may withhold (either in response to a request or in documents that the agency chooses to distribute without any specific request to do so) whereas the second option addresses the distinct issue of what type of information the agency must take affirmative steps to release.



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address the lack of any requirement for acknowledging changes made in response to communications with bodies other than OIRA. The Committee may thus wish to extend the recommendations to cover these additional limitations on transparency, such as proposing legislation to limit deliberative process privilege or extending the Executive Order requirements on logs and explanations to changes made as a result of communications with other agencies, as well as to changes proposed by OIRA (Professor Wagner does, of course, urge limiting deliberative process privilege for interagency communications in Recommendation 12).

Ultimately, in analyzing Professor Wagner's proposal, the committee should determine whether the President's goal of scientific integrity can be accomplished without heightened transparency of OIRA's review of agency regulatory projects. Of course requiring OIRA and agencies to document any changes suggested by OIRA shortly after they occur and to provide justifications for those changes in all rules reviewed by OIRA (whether or not they qualify as significant regulatory actions) may be inconvenient and even costly for the agencies. Indeed, regulatory agencies and OIRA's alleged failure to honor even the existing transparency provisions suggests that such requirements might impose a substantial burden on agencies. However, this apparent noncompliance<sup>11</sup> is read by some commentators to signal the more worrisome possibility that important information is being intentionally hidden from public view. The Committee should also consider other benefits that such reforms would create as identified by Professor Wagner, not the least of which is a more complete public record upon which the public can understand and participate in science-intensive rulemakings.

Alternatively, if the President were to issue an Executive Order embracing only the first option's proposed limitation of the invocation of the deliberative process privilege, such a reform may not resolve all of the issues identified in the preceding sub-section. For example, in and of itself, requiring agencies to claim deliberative process privilege only in exceptional cases might lead agencies to change only their practices regarding the documents they produce in response to a FOIA request. Stronger requirements may thus be necessary, such as combining both recommendations (e.g., instructing agencies to resist applying deliberative process privilege except in unusual settings but also requiring a log and explanation of changes generated by OIRA or perhaps by all agencies outside of the originating agency). It could be that legislative action is even ultimately required.

The Committee also should consider Administrative Conference Recommendations 80-6 and 88-9, which essentially provided that interagency communications related to matters of policy need not immediately be placed on the public record whereas interagency

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<sup>11</sup> See *supra* note 3.



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communications related to factual matters should be publicly revealed.<sup>12</sup> In this light, the first option's across-the-board limitation of the deliberative process privilege is in some tension with these prior Conference recommendations to the extent the changes made by OIRA can be fairly characterized as purely policy changes that do not have any bearing on the agency's characterization of the "facts" (and OIRA's judgments in this respect are accurate).

## II. Recent Presidential Memoranda

### A. Transparency Provisions in Recent Memoranda

In the last several years, the Administrations of Presidents George W. Bush and Barack Obama have issued a number of memoranda designed to improve the use of science in agency decisionmaking. These include: (a) a December 16, 2004 memorandum from OMB Director Joshua Bolten to the heads of departments and agencies containing the "Final Information Quality Bulletin for Peer Review" (hereafter "Peer Review Bulletin"); (b) a March 9, 2009 memorandum from President Barack Obama to the heads of executive departments and agencies concerning "Scientific Integrity" (hereafter "Scientific Integrity Memorandum"); and (c) a December 17, 2010 memorandum from Office of Science and Technology Policy Director John Holdren to heads of executive departments and agencies concerning "Scientific Integrity" (hereafter "Holdren Memorandum"). Though these memoranda address various aspects of agencies' use of peer review and performance of scientific studies, they also contain a number of provisions designed to ensure transparency.

Specifically, the Peer Review Bulletin urges agencies to adopt the following pro-transparency measures when conducting peer review:

- Each agency should post a document on its website describing its plans for upcoming peer reviews, update that document every six months, and accept public comment on this peer review plan<sup>13</sup>

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<sup>12</sup> Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5,207 (Feb. 2, 1989) (largely reiterating the relevant portions of Recommendation 80-6 but additionally providing that written policy guidance received by an agency during regulatory review should be included in the public file of a rulemaking after a notice of proposed rulemaking or final rule in the matter to which the communication relates is released).

<sup>13</sup> Memorandum from Joshua B. Bolten, Director of the Office of Management and Budget, to Heads of Departments and Agencies concerning "Issuance of OMB's 'Final Information Quality Bulletin for Peer Review'" at 41-42 (Dec. 16, 2004).



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- Agencies should solicit public nominations for members of proposed peer review panels<sup>14</sup>
- Agencies should instruct peer reviewers to prepare a report describing the nature of their review as well as their findings, which each agency should post on its website along with all materials related to the peer review<sup>15</sup>
- Agencies should provide an opportunity for the public to submit comments for consideration by peer reviewers<sup>16</sup>
- Each agency should, following completion of peer review, prepare a written report explaining its agreement or disagreement with the conclusions of the peer reviewers and identifying the actions it has taken or will take in response to the peer review process, which report it should then disseminate on its website<sup>17</sup>

The Scientific Integrity and Holdren Memoranda are less specific and apply generally to all scientific activities undertaken by agencies, but they set forth a number of broad-brush recommendations that agencies should bear in mind when developing scientific analysis and integrating it into proposed regulations. The Scientific Integrity Memorandum declares that “there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking,” and it asserts that “each agency should make available to the public the scientific or technological findings or conclusions considered or relied on in policy decisions.”<sup>18</sup> The Holdren Memorandum is slightly more specific, stating that “agencies should expand and promote public access to scientific and technological information by making it available online in open formats.”<sup>19</sup> It further provides that agencies should establish principles for disseminating scientific and technological information to the public, which should include “a clear explication of underlying assumptions; accurate contextualization of uncertainties; and a description of the probabilities associated with optimistic and pessimistic projections, including best-case and worst-case scenarios where appropriate.”<sup>20</sup> Finally, the Holdren Memorandum encourages agencies to develop public communications policies that, inter alia, allow “[f]ederal scientists [to] speak to the media and the public about scientific and

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<sup>14</sup> *Id.* at 37.

<sup>15</sup> *Id.* at 38.

<sup>16</sup> *Id.* at 40.

<sup>17</sup> *Id.* at 41.

<sup>18</sup> Memorandum from Barack H. Obama, President of the United States, to Heads of Executive Departments and Agencies concerning “Scientific Integrity” at 1 (Mar. 9, 2009).

<sup>19</sup> Memorandum from John P. Holdren, Director of the Office of Science and Technology Policy, to Heads of Executive Departments and Agencies concerning “Scientific Integrity” at 2 (Dec. 17, 2010).

<sup>20</sup> *Id.*



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technological matters based on their official work, with appropriate coordination with their immediate supervisor and their public affairs office.”<sup>21</sup>

### **B. Limitations and Proposed Solutions**

Professor Wagner’s recommendations go beyond the aforementioned memoranda in a number of ways. First, unlike the Peer Review Bulletin, her recommendations are usually not limited in their applicability to agencies’ utilization of scientific peer review but rather apply to agencies’ use of science more generally. Second, Professor Wagner’s recommendations contain proposals that go beyond those contained in the Peer Review Bulletin and that, though they are generally consistent with the principles of the Scientific Integrity and Holdren Memoranda, are much more specific than the recommendations contained in those documents.

Specifically, Professor Wagner’s draft recommendation includes the following proposals that would build upon the provisions of the aforementioned memoranda:

- Agencies should provide a bibliography listing all sources consulted during their review of the underlying literature and provide copies of such documents where consistent with applicable copyright law<sup>22</sup>
- Agency staff should be acknowledged as authors on those reports to which they make a significant contribution<sup>23</sup>
- Agencies should adopt formal policies permitting staff members who disagree with particular findings and decisions to dissent therefrom<sup>24</sup>
- When agencies determine not to employ some form of expert review of their scientific activities, they should offer an explanation for their failure to do so<sup>25</sup>
- When undertaking a decision based on science, agencies should provide a formal analysis that identifies the policy question at issue, offers an overview of the existing scientific evidence, applies the chosen model to the evidence, and explains how the scientific analysis informs the underlying policy question<sup>26</sup>
- Agencies should avoid applying the deliberative process privilege to documents and communications that reflect the scientific decisionmaking process<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Wagner, *supra* note 3, at 93, 95.

<sup>23</sup> *Id.* at 98.

<sup>24</sup> *Id.* at 100.

<sup>25</sup> *Id.* at 102.

<sup>26</sup> *Id.* at 103–05.

<sup>27</sup> *Id.* at 108–09.



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- Agencies should provide publicly available flowcharts illustrating their general processes for scientific decisionmaking<sup>28</sup>

None of these proposed reforms is inconsistent with the Peer Review Bulletin or the Scientific Integrity and Holdren Memoranda, and, in large measure, the recommendations appear to build on those policies in logical and productive ways. Nevertheless, the committee will want to analyze each proposal to determine whether it creates sufficient benefits to justify creating a presumptive “best practice,” such that agencies must either follow the recommendation or justify their failure to do so. For instance, requiring agencies to explain their refusal to utilize expert review may spur adoption of that useful process, but it also might force agencies to expend resources unnecessarily on providing formal explanations for declining to employ expert review even in instances where the issue may not be sufficiently important to justify using that process. Since the best practices are framed as presumptions and thus can be rebutted in individual circumstances, the Committee may also wish to consider whether the recommendations are drafted in a way to provide the most useful guidance to the agencies.

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<sup>28</sup> *Id.* at 113.