

Detailed Recommendations for Regulatory Review Executive Order

I. Reviewing the Regulations of "Independent" Agencies

In these difficult times, when economic and energy regulations are of tremendous importance and the subject of fervent policy debates, it is essential that the federal agencies that regulate such matters and are considered to be "independent agencies" should be subject to oversight and coordination by the President, a democratically elected official, and his White House staff. Those agencies would include, among others, the Commodities Futures Trading Commission, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the International Trade Commission, the Nuclear Regulatory Commission, the Pension Guaranty Corporation, the Securities and Exchange Commission, and the Social Security Administration. Other "independent agencies" that do not have a distinct economic or energy focus, such as the Federal Communications Commission and the Federal Trade Commission, also have substantial impacts on government finances and society and should be subject to regulatory review.

At present, however, E.O. 12866 exempts "independent agencies" from regulatory oversight. Sec. 3(b), the order's definition of an "Agency" subject to the Order excludes agencies "considered to be independent agencies, as defined in 44 U.S.C. 3502(10)."¹ This statutory provision, which is cited inaccurately -- it presumably should be 44 U.S.C. § 3502(5) -- states:

[T]he term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;

It appears that this Executive Order exemption for independent agencies is based on a misunderstanding of the President's Constitutional duties and authorities and the nature of

¹ There are more "independent agencies" in the federal government than those named in 44 U.S.C. § 3502(5), and the wording "designated by statute as a Federal independent regulatory agency or commission" in 3502(5) arguably does not cover all independent agencies because many are not expressly designated as "independent agencies" in their organic statutes.

independent agencies. Independent agencies are not Constitutionally or statutorily immune from Presidential and OMB regulatory oversight, and OIRA should review significant regulatory actions of those agencies and, when appropriate, guide the agency's exercise of policy discretion on behalf of the President. The heads of "independent" agencies might feel free to disregard the President's policy advice when they cannot be removed for such disregard; however, that does not diminish the President's Constitutional duty to provide such advice when appropriate, nor the agency's responsibility to seek and consider such advice.

The President's "most important constitutional duty"² as Chief Executive is to "take Care that the Laws be faithfully executed" Art. II, Sec. 3. Presidential control over Executive Branch officers to make sure the laws are faithfully executed is also derived from the Constitutional power to appoint, with the advice and consent of the Senate, all "Officers of the United States" (other than "inferior Officers" or any specifically provided for in the Constitution), and the implied authority to remove such officers for any reason. In other words, many such officers serve at the pleasure of the President, and if the President disapproves of their actions, they can be removed.

The Presidential appointment and removal powers have never been qualified or contested in the case of heads of those agencies that are considered Cabinet-level Departments or non-independent.³ However, such is not the case with many other federal agencies, which has led to use of the term "independent" to describe them. The U.S. Supreme Court has upheld the power of Congress to condition the removal power of the President in the case of many special-purpose agencies established by Congress.⁴ Under their authorizing statute, officers of independent agencies often must have specific qualifications in order to be appointed, serve for specified terms, are members of a body that must have a specific composition, and can only be removed for specific reasons.⁵ These limitations on Presidential appointment and removal powers restrict the President's coercive powers that could be used to direct the regulatory choices of officers of non-independent agencies, and are the hallmarks differentiating "independent" agencies from other executive agencies and departments.⁶

² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992).

³ Executive Branch departments are listed in 5 U.S.C. § 101.

⁴ *See, e.g., Morrison v. Olson*, 487 U.S. 654, 657-58 (1988) (Independent Counsel); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (Comptroller General of GAO); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Federal Trade Commission); *FTC v. Amer. Nat'l Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1987) (Federal Trade Commission).

⁵ Governance by a body, in the form of a Board or Commission, as opposed to a single officer, is often regarded as one of the hallmarks of an independent agency, though not a requirement.

⁶ An example of an "agency" that is neither a department nor an "independent agency" is the U.S. Environmental Protection Agency. EPA is often referred to as an "independent agency" -- indeed, it refers to itself as such on its website -- however, it bears none of the indicia of an "independent" agency. It was not established by Congressional mandate -- it was established by a Presidential Reorganization Plan -- and its single Administrator serves at the pleasure of the President, not subject to any restrictions

It is important to recognize, however, that even in the case of those agencies recognized as "independent" due to Congressional limitations on the Presidential appointment and removal authority, all such agencies are still subject to the President's Constitutional authority and duty to "take Care that the Laws be faithfully executed." The Constitution does not recognize or make an exception in this regard for "independent" agencies. And the courts have recognized that the Presidential "take care" duty extends to advising agency heads concerning policy choices in the interpretation of all statutes where *Chevron*-type deference applies. The Supreme Court stated in *Chevron*:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices

Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865-66 (1984).⁷

While *Chevron*, on its facts, applied only to EPA, a non-independent agency, the applicability of the *Chevron* principle to an agency identified as an "independent agency,"⁸ the National Archives and Records Administration ("NARA"), has been subsequently recognized by the U.S. Circuit Court for the District of Columbia in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988).

Burke involved the issue of whether the NARA Archivist had the statutory authority to determine, on his own, the need to withhold Presidential documents from public scrutiny in the face of an assertion of a constitutionally-based right or privilege. Former President Nixon had asserted such a privilege. The Archivist had recently promulgated regulations that appeared to place sole responsibility for determining the validity of such privilege in NARA. NARA had sent those regulations to OMB for approval under E.O. 12291 (the regulatory review Executive order that preceded E.O. 12286). OMB, concerned with the idea of the Archivist making decisions regarding constitutional privilege, requested an opinion on that matter from the Office of Legal Counsel ("OLC") at the Department of Justice. OLC opined that the Archivist was required to honor all claims of executive privilege, whether by a former or incumbent President,

on the Presidential appointment or removal power. EPA regulatory proposals have always been subjected to OIRA review under E.O. 12866 (and previously under E.O. 12291).

⁷ The agency whose regulations were being challenged in *Chevron* was EPA.

⁸ 843 F.2d at 1475 n.1. See 44 U.S.C. §2103(a). The Presidential power of appointment of the Archivist is qualified by the governing statute, although the President's removal power is largely unqualified: "The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualification required to perform the duties and responsibilities of the office of Archivist. The Archivist may be removed from office by the President. The President shall communicate the reasons for any such removal to each House of the Congress."

and that a challenge to executive privilege and release of papers under the NARA statute and regulations could only be brought in federal court. NARA viewed OMB's approval of its regulations -- which still provided for sole NARA decision-making authority -- after E.O. 12291 review as nevertheless conditioned upon acquiescence in the OLC opinion, although OMB insisted that the OLC opinion was only advisory and OMB's approval of the NARA regulations was not conditioned on NARA acceptance of the opinion, but that the Archivist would be expected to follow it.

The Court of Appeals first decided that it "must" consider whether the government's construction of the NARA statute as not permitting the Archivist to make determinations of executive privilege was entitled to *Chevron* deference. In addressing this issue, the court stated:

Of the Executive Branch officers, the President, of course, embodies the ultimate political legitimacy and therefore his views as to the manner by which his appointees will interpret a statute may not be lightly disregarded [Citations and footnote omitted.] Since the incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretations of statutes, it seems anomalous for the Judiciary to refuse deference merely on the grounds that it can be shown that the agency's interpretation was one pressed by the President upon reluctant subordinates. *Cf. Chevron*, 467 U.S. at 865-66 Indeed, even the inquiry might raise separation of powers concerns.

843 F.2d at 1477-78. The court also stated that it assumed that OLC's views reflected the incumbent President's. 483 F.2d at 1478 n.6.

However, the court then proceeded to determine that *Chevron* deference was inappropriate in this case because the OLC opinion was not grounded in interpretation of the statute and Congressional purpose, but rather, in an interpretation of the Constitution, and the Judiciary does not accord *Chevron* deference to an Executive Branch interpretation of the Constitution. However, speaking to the qualifications of the Archivist to evaluate a claim of executive privilege, the court added that "we see no reason why the incumbent President cannot ensure adequate consultation with his Justice Department -- perhaps OLC -- to enable the Archivist to make appropriate determinations." 843 F.2d at 1479.⁹

⁹ The D.C. Circuit's decision in *Burke* is also in accord with its views on Presidential authority stated in its 1981 decision in *Sierra Club v. Costle*, which involved a challenge to regulations issued by EPA, a non-independent agency. The court stated:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution; [footnotes omitted] They [sic] also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator

Under *Chevron* and *Burk*, therefore, it is clear that the President, through Executive order, has the Constitutional duty,¹⁰ to "take Care that the Laws be faithfully executed" by requiring that OMB/OIRA review regulations proposed by independent agencies that contain policy choices in order to determine consistency with the President's policies. Although the President might not be able to enforce his policy views and statutory interpretations on such agencies through Constitutional removal power -- he does have the Constitutional authority to require "independent" agencies to submit significant regulations to OIRA when proposed in order to provide OIRA with the opportunity to provide its views, as the agent of the President, on the regulations and their rationale.

II. Maintaining OIRA oversight to meet OMB's statutory and Constitutional responsibilities

OMB has multiple statutory responsibilities that necessitate that it review and guide the rulemaking of federal agencies, including those regarded as "independent," with regard to matters such as costs and benefits, significant alternatives, and the need for information collections. A number of laws also require the agencies, sometimes excluding independent agencies, to provide information on regulatory costs and benefits and rationale to the public and to Congress. In the case of such laws, the President, through OIRA, must exercise oversight of the regulatory analyses in order to fulfill the Constitution duty to "take Care that the laws be faithfully executed."¹¹

The order in which regulatory analysis statutes are discussed below is not intended to indicate that certain ones are more important than others. Also, the discussion does not necessarily encompass all laws for which OIRA oversight should be considered essential.

1. The Congressional Review Act ("CRA", 5 U.S.C. §§ 801 *et seq.*)

The CRA provides special procedures for Congressional review, and possible rejection, of regulations. The Act covers the regulations of all agencies as defined in 5 U.S.C. 551(1)¹², with the exception of "rules that concern monetary policy proposed or implemented by the Board

exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981).

¹⁰ See also the Supreme Court's statement in *Lujan v. Defenders of Wildlife*, fn. 2, *supra*.

¹¹ Since many of these laws specifically preclude judicial review; or, if not, do not require the kind of "agency action" that could be challenged in court under the Administrative Procedure Act, OMB is the only entity that can oversee faithful execution of these laws.

¹² 5 U.S.C. § 804(1). The definition of "agency" in 5 U.S.C. § 551(1) covers every agency, "whether or not it is within or subject to review by another agency. . . ." Exclusions are specified for Congress, the courts, governments of territories and possessions of the U.S. and government of the District of Columbia.

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of Governors of the Federal Reserve System or the Federal Open Market Committee."¹³ Thus, with this one exception, all agencies, including "independent agencies" are covered by the CRA.

There are special provisions for GAO reports to Congress on "major rules" and for the delay of the effectiveness of "major rules". The Act defines "major rule" as one determined to be major by OIRA under the definition of "major." 5 U.S.C. § 804(2). The definition states:

(2) The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in --

- (A) an annual effect on the economy of \$100,000 or more;
- (B) a major increase in costs or price for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. [Emphasis added]

In other words, agencies must provide OIRA with sufficient information for OIRA to make a determination to Congress as to whether a rule is "major", with the only exception being Federal Reserve monetary policy rules. For this reason alone, all agencies, including independent agencies, must send their rules, along with their estimates of monetary impacts and impacts on competition, employment, investment, productivity, and international trade, to OIRA for a determination of whether the rule is "major." This requirement also clearly implies that OIRA should be able to analyze such impact information independently in order to provide Congress with its own opinion on impact, not just act as a conduit for the submitting agency's opinion.

2. The Government Performance and Results Act ("GPRA", 31 U.S.C. §§ 1101 et seq.)

This statute requires OMB to require all agencies, including independent agencies (31 U.S.C. § 1101(1)) to, among other things, prepare annual "performance plans" that set agency performance goals and express those goals in "an objective, quantifiable, and measurable form" (with few exceptions). 31 U.S.C. § 1115. Each year, every agency must send to Congress a "program performance report" that is based on those performance measurements. 31 U.S.C. § 1116. Analysis of the costs and benefits of the agencies regulations is clearly an important component of performance measurement, and the President, through OIRA, has the Constitutional authority and duty to see that the agencies' performance analyses based on their regulations are as accurate as possible in order to ensure that the law is faithfully executed. GPRA is also an part of the overall federal budget process, and the President and OMB have the statutory responsibility to prepare the federal budget and submit it to Congress. 31 U.S.C. § 1104, 1105. In preparing the budget the President, through OIRA, has the authority to oversee agency compilation of such information necessary to prepare the budget. Section 1104 provides:

¹³ 5 U.S.C. § 807.

d) The President shall develop programs and prescribe regulations to improve the compilation, analysis, publication, and dissemination of statistical information by executive agencies. The President shall carry out this subsection through the Administrator for the Office of Information and Regulatory Affairs in the Office of Management and Budget.

(e) Under regulations prescribed by the President, each agency shall provide information required by the President in carrying out this chapter. The President has access to, and may inspect, records of an agency to obtain information.

3. The Unfunded Mandates Reform Act ("UMRA", 2 U.S.C. § 1531 *et seq.*)

Under Title II of this 1995 Act, entitled "Regulatory Accountability and Reform," all agencies except "independent" agencies (2 U.S.C. §§ 1502, 658) must, in proposing the promulgating regulations, provide a qualitative and quantitative assessment of the costs and benefits of "significant" regulations -- ones that may result in the expenditure by state, local, or tribal governments or the private sector of more than \$100 million in any one year -- and adopt the least burdensome regulatory option unless it provides an explanation of why it has not done so. OMB is charged with providing annual reports to Congress detailing agency compliance with the Act's requirements. Here again, the President, through OIRA, has the Constitutional authority and duty to take care that the law shall be faithfully executed.

4. The Regulatory Flexibility Act ("RFA", 5 U.S.C. §§601 *et seq.*)

The RFA, which applies to all agencies, with no exemption for independent agencies, requires semi-annual publication of a Regulatory Agenda providing information on upcoming regulatory actions that it expects might have a significant impact on a substantial number of small entities. The Act also requires that for such rules each agency will prepare an initial and final "regulatory flexibility analysis." Those analyses require consideration of impacts, significant alternatives, and factual, legal, and policy reasons supporting rejection of significant alternatives. Here again, the President, through OIRA, has the Constitutional authority and duty to ensure that the law is faithfully executed.

5. The Paperwork Reduction Act of 1995 ("PRA", 44 U.S.C. §§ 3501 *et seq.*)

The PRA gives OIRA authority to approve or disapprove agency information collections proposed in a rule. Unless OIRA approves an information collection request, the public is not required to provide the information. Independent agencies are specifically covered (with minor exceptions, § 3502), but if they are headed by a body with two or more members, an OMB disapproval can be overridden by majority vote. (This provision does not allow an independent agency to refuse to submit a rule containing an ICR to OIRA; it only allows agency override of an OIRA disapproval or change.) Thus, any proposed rule containing a proposal for an information collection (or disclosure, such as a label or material safety data sheet, or that would require a third party to obtain or disclose information) must be submitted to OMB for review of the information collection requirements. OMB sends annual reports to Congress on the overall federal information collection burden (or "information collection budget") and agency

compliance with the law. Those reports do not tally the number of rules containing ICRs that were reviewed by OIRA, but the most recent report states that OIRA reviews approximately 3,500 ICRs a year.¹⁴

6. The National Technology Transfer Act of 1995 ("NTTA", 15 U.S.C. § 272, note)

Many regulations establish or incorporate technical standards. The NTTA requires all federal agencies and departments to use technical standards developed or adopted by voluntary consensus standards bodies unless the agency determines that use of such standards is contrary to law or impractical and provides an explanation to OMB of that determination. OMB must report to Congress annually on instances in which agencies submitted such explanations for not using voluntary consensus standards. Here again, OMB appropriately has a Constitutional role to see that the law is faithfully executed.

7. The Regulatory Right to Know Act ("RRTKA", 31 U.S.C. § 1105, note)

The RRTKA requires OMB to issue guidance to all agencies on standardized measures for determining costs and benefits, and also requires OMB to submit to Congress, along with the annual budget, a report on the costs and benefits of agency regulations and paperwork. OMB must also provide for independent external peer review of its guidance and annual reports to Congress. This is another example of a law in which the President and OMB have a Constitutional duty to see that a law requiring regulatory analysis -- in this case cost-benefit analysis -- is "faithfully executed" through review of the regulations of all agencies.

III. Maintaining OMB Oversight of Overlapping Agency Regulatory Authority and Mediation of Inter-Agency Disputes and Impacts.

The complexity of our Nation's regulatory structure has resulted in numerous inter-agency overlaps and the potential disputes. For example, in the realm of economic regulation, Treasury, the Federal Reserve, FDIC, SEC, and CFTC all play a role. In now-intertwined areas of energy and climate, Interior (MMS and BLM), FERC, NRC, NOAA, USDA, and NASA all contribute in different ways. Agencies such as EPA, CPSC, HHS, and NIOSH work on environmental/public health regulations, with ecological regulations being promulgated by EPA, NOAA, and DOD/COE (wetlands and rivers). And both the environmental and ecological regulations often impact other regulatory efforts regarding energy and climate. OMB is the only agency in a central position to reconcile and mediate such overlaps and disputes. As the D.C. Circuit observed in *Sierra Club v. Costle*, *supra* note 8 --

Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

¹⁴ http://www.whitehouse.gov/omb/assets/omb/inforeg/icb/2008_icb_final.pdf.

In the case of inter-agency overlaps and impacts, OMB is uniquely situated to ensure that the laws are faithfully executed while reconciling overlaps and minimizing adverse impacts through its regulatory review function. After all, regulations are one of the primary means through which the laws are executed.

IV. Ensuring Full Agency and OIRA Consideration of the Likely Impacts of a Proposed Regulation on Small Businesses

Small businesses are a bedrock of the U.S. economy. They employ the majority of workers and are major incubators of innovation. Yet they often bear a disproportionate share of the national regulatory burden. Their importance has been recognized by Congress in the Regulatory Flexibility Act ("RFA"), as amended by SBREFA. (5 U.S.C. §§ 601 et seq.) The Small Business Administration and its Office of Advocacy assists the agencies and Congress in ensuring compliance with the RFA.

As discussed above in section II, the RFA is a comprehensive regulatory review statute applicable to regulations that are determined to have a significant impact on a substantial number of small entities. Ensuring compliance with the RFA is largely undertaken by OIRA, in consultation with the SBA Office of Advocacy. However, an agency can escape compliance by certifying in its rulemaking proposal that its proposed rule would not have a significant impact on a substantial number of small entities along with a statement providing the factual basis for the certification. 5 U.S.C. § 605(b). In addition, proposed and final rulemaking notices often do not sufficiently address SBA Advocacy comments.

The RFA specifically recognizes the importance of ensuring compliance with its provisions. It provides specifically that SBA Advocacy shall report on agency compliance "at least" annually to the President and Congressional Committees. 5 U.S.C. § 612(a). The Advocacy role in ensuring compliance was further clarified by a Memorandum of Understanding between Advocacy and OIRA in 2002, providing for Advocacy comments to OIRA on whether an agency should have prepared a regulatory flexibility analysis, and by Executive Order 13272, which also provides for Advocacy comments to OIRA on draft rules.¹⁵ To ensure that proper consideration of small business impacts in agency rulemaking continues, aided by the advice and comments of SBA Advocacy, E.O. 12866 should be strengthened in this regard by providing:

1. An agency must address, in the Federal Register notice of a proposed rule, SBA Advocacy comments on either the proposed rule or a certification of no significant impact on a substantial number of small entities, and any further SBA Advocacy comments in the Federal Register notice when it promulgates a final rule.¹⁶

¹⁵ The MOU expired in 2005; E.O. 13272 remains in effect.

¹⁶ Under 5 U.S.C. § 605(b), an agency must provide a copy of the certification to Advocacy at the time of proposing a rule. However, the statute does not specify that the certification must be provided to Advocacy far enough in advance of submittal of the rule to OIRA to allow for Advocacy to comment on the certification to OIRA under E.O. 13272. Sec. 6905 and E.O. 13272 also do not require the agency to provide an advance copy of a draft final rule to Advocacy before it is sent to OIRA. These oversights should be corrected in revisions to E.O. 12866.

2. An agency must provide a copy of a proposed certification of no significant impacts on a substantial number of small entities, and a proposed and final rule, at least 30 days in advance of submission of the proposed rule to OIRA to allow Advocacy to comment to OIRA on the certification. If Advocacy does not agree with the certification or comments on the proposed or final rule, OIRA must attempt to resolve the disagreement and ensure that Advocacy's comments are addressed in the proposed and final rule.
3. If Advocacy submits comments to OIRA in writing on a proposed or final rule, the proposed or final rule must provide a link to a copy of the actual text of the Advocacy comments in the proposed or final rule.

Such revisions to E.O. 12866 will appropriately strengthen the role of Advocacy in commenting on rules affecting small businesses undergoing regulatory review by OIRA and ensure the full compliance with the RFA as intended by Congress. This, again, is in keeping with the President's Constitutional duty to ensure that the laws are faithfully executed.

V. Ensuring Transparency with regard to White House Officials outside OIRA

When E.O. 12866 replaced E.O. 12291, one of the significant changes was the addition of provisions "to ensure greater openness, accessibility, and accountability in the regulatory review process." Accordingly, sec. 6(b)(4) of E.O. 12866 provides for public disclosure of all OIRA written communications with the regulatory agency during regulatory review. The intent of these provisions was to allow the public to view the input that the President, represented by OIRA, had on the regulatory process. In the current Administration, however, these transparency provisions might not suffice. A number of new positions have been created that apparently give power to White House and other Executive Branch staff, viewed as "insiders", but not within OIRA, to influence the regulatory process. Consequently, if the transparency provisions of a regulatory review order are to be meaningful, they should require disclosure of all communications, written or oral, between any high-ranking Executive Branch officials, whether inside OIRA or outside OIRA but in the White House, to an agency proposing regulations. Otherwise, the goal of transparency currently reflected in E.O. 12866 could easily be bypassed by White House or other Executive Branch personnel outside OIRA communicating with the regulatory agency while a rulemaking proposal is undergoing regulatory review.