Executive Order on Regulation Boosts OMB's Power

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Executive Order 12291, issued by President Reagan on Feb. 17, 1981, could significantly affect regulations issued by executive branch agencies. The executive order states that a regulation's benefits exceed its costs and that an agency select the least costly regulatory approach justifiable under changes in current law and practice. Almost as significant as the new standards for regulations, however, is the order's explicit grant of power over regulatory matters to the Office of Management and Budget (OMB). Although the OMB has not yet been a regulatory czar, the office's new, more public role in managing the regulatory process deserves close scrutiny.

The executive order replaces President Carter's executive orders on government regulations and paperwork (E.O. 12044 and E.O. 12174, respectively) which in turn had superseded President Ford's executive orders requiring inflation and economic impact analyses (E.O. 11821 and E.O. 11949). The new order, which applies to the executive branch but not to independent agencies, goes much further than its predecessors.

Section 3 of E.O. 12291 outlines general requirements to which agencies, to the extent permitted by law, must adhere when promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation. Among these provisions are requirements:

- A regulation's potential benefits exceed its potential costs;
- An agency choose the least costly approach to any given regulatory objective;
- Agencies take into account the particular industries affected by regulations, the condition of the national economy and other regulatory actions contemplated when setting priorities.

Because a court would not be empowered to decide whether the analysis was done properly or the agency otherwise complied with the requirements, section 3 of E.O. 12291 requires that a court review the majority rule analysis only for the courts. The definition of major rule includes any final rule that until the annual effect on the economy of $100 million or more or a major increase in costs to individual industries, federal, state or local government agencies or geographic regions. The definition also includes rules that result in significant adverse effects on competition, employment, investment, productivity, innovation, or the viability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. While OMB estimates that 50 rules annually would fall within this definition.

Like E.O. 12044 the new executive order requires a preliminary regulatory impact analysis (RIA) to accompany a notice of proposed rulemaking and a final RIA to accompany publication of a final rule. The RIA must describe the potential costs and benefits of the rule as well as identify those likely to receive the benefits and bear the costs. The RIA must also describe the potential net benefits of the rule, including any that cannot be quantified in monetary terms.

The executive order requires an agency to forward to OMB for review all proposed and final rules, as well as all RIA's, before such documents are published. The length of time granted for OMB review varies according to the nature of the document reviewed. The director, again subject to the Task Force, can order an agency not to publish a notice of proposed rulemaking or preliminary RIA until OMB's review is concluded. The director may also order the agency not to publish or complete a rule until the agency has responded to the director's views and incorporated those views into the agency's response in the rulemaking file.

Oversight

Although, under the executive order, the regulatory impact analysis would be part of the whole rulemaking record for purposes of judicial review, a court would not be empowered to determine whether the analysis was done properly or the agency otherwise complied with the requirements. OMB provides the OMB director with strong oversight authority. That authority is, in turn, subject to the President's Task Force on Regulatory Relief, headed by Vice President Bush.

Theoretically, in an agency head or other interested person could appeal to the Task Force decisions made by the OMB director under the order. At present, however, OMB provides most of the staff for the Task Force. OMB Director David Stockman is a member of the Task Force, and OMB Administrator for Information and Regulatory Affairs, James Miller, serves as the Task Force's executive director. It remains to be seen whether the eight-man executive branch under the Task Force will emerge as a distinct entity capable of being allowed to accept appeals from OMB decisions.

The executive order requires an agency to forward to OMB for review all proposed and final rules, as well as all RIA's. OMB reviews would include an analysis of whether the agency has not to publish a notice of proposed rulemaking or preliminary RIA until OMB's review is concluded. The director may also order the agency not to publish or complete a rule until the agency has responded to the director's views and incorporated those views into the agency's response in the rulemaking file.

New Powers

In addition to the power to review rules and analyses, E.O. 12291 grants the OMB director significant new authority. Among the important powers granted the director is the authority to:

- Designate any proposed or existing rule as major;
- Issue uniform standards for the identification of major rules and the designation of RIAs;
- Require an agency to obtain and evaluate additional data relevant to a regulation from any appropriate source; and
- Waive the RIA and other requirements for proposed and final rules.

Not all of the authorities mentioned above are totally new to OMB. The White House and its consistent of offices has traditionally maintained that the President has inherent constitutional authority to manage the regulatory process. Because of the inherent authority, during the last Congress OMB opposed "statutory specification of when and how the President may exercise his authority to oversee the regulatory operations of the Executive Branch".

Using this "inherent" authority, OMB has "challenged" agencies about classification of rules as major. Likewise, the Council on Wage Price Stability's Regulatory Analysis Review Group whose functions were recently transferred to OMB critiques agency regulatory analyses and presented comments to the agencies, both on and off the record.

Moreover, the recently enacted Paperwork Reduction Act[1] provided statutory base for OMB to coordinate agency regulatory that impose a paper burden on the public. With respect the act does not authorize the director to disapprove the accompanying rule itself as the two are separable.

The authorities granted by Executive
It should be noted that while the thrust of the executive order has been to expand OMB's authority, the order does limit the exercise of that authority in various ways. For example, OMB must observe various time limits if its comments on rules and regulatory impact analyses are to be considered by an agency. In addition, by providing that OMB comments along with the agency's response be included in the rulemaking file, there is a tacit acknowledgement that at least a portion of these interagency communications should be available to persons interested in the rule.

The executive order empowers OMB to designate currently effective rules to be reviewed in accordance with the provisions of the order. Thus, existing rules could be subject to a regulatory impact analysis. The OMB director may also establish schedules for reviews and analyses under the order.

These powers present many of the same questions raised above. Moreover, viewed in combination with OMB's other authority, it is clear that the office has cradle-to-grave powers concerning which regulations are analyzed and how agencies perform these analyses. Indeed, with its authority to order review of final existing rules, OMB can ensure that a regulation may never rest in peace.

Substantive Impact

The executive order gives OMB direct authority over the substance and timing of regulations, but they also provide new opportunities for interested persons to influence the regulatory process. For example, if an agency fails initially to designate a proposed rule as major (and therefore subject to an RIA), an affected firm or industry could ask OMB to make that designation. Forcing an agency to conduct an impact analysis means that the rulemaking will take longer and cost the agency more money, as well as require analysis of information the agency might otherwise have ignored. Conversely, the OMB director's waiver authority could be used when an agency wants to deregulate or soften a regulation. Waivers of the RIA requirement could greatly accelerate a rulemaking.

Since OMB has not yet announced what procedures it will use to make these decisions a number of questions naturally arise. How will determinations that a rule is major be made? Will such determinations be based solely on data supplied by the affected industry or OMB staff or will others have an opportunity to comment on that data before OMB makes a decision? What criteria and procedures will be used for granting waivers?

Similar questions arise about how OMB will exercise its authority during the rulemaking process once a decision to conduct a regulatory impact analysis has been made. The executive order specifically requires an agency to consult with the OMB director, at his request, about any preliminary regulatory impact analysis and notice of proposed rulemaking covered by the order. Moreover, upon receiving notice that the director intends to submit views concerning any final regulatory analysis or final rule, the agency must refrain from publishing these documents until the agency has responded to the director's views and incorporated those views and the agency's response in the rulemaking file. E x P a r t e C o n t a c t s

Recent court decisions have made clear that ex parte contacts can impair the goals of fairness to interested persons and reasoned agency decision-making because interested parties are not given an opportunity to know about and comment on these secret communications. OMB has historically taken the position that the agency is not bound by ex parte restrictions. Whether OMB's policy will remain the same in light of its new authority and expanded role remains to be seen. 3

The E.O. gives OMB influence over the substance and volume of agency regs.

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ve Order 12291 are significant not just because they expand OMB's powers, but because they make those powers explicit. Now that the powers are available for all to see, they are likely to remain unused.

Opportunities to Influence

These new authorities not only give OMB tremendous power over the substance and timing of regulations, but they also provide new opportunities for interested persons to influence the regulatory process. For example, if an agency fails initially to designate a proposed rule as major (and therefore subject to an RIA), an affected
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some personnel from the Council on Wage Price Stability's Regulatory Analysis Review Group and the Commerce Department to help it with its functions. OMB will still have a relatively small staff to devote to regulatory matters. It is unclear whether this staff will be able to perform all of the new functions assigned to it.

The Reagan administration has drastically cut OMB's staff and the White House has moved the regulatory review function from the regular policy-making process. This has put OMB in the position of having to do regulatory reviews and policy analysis. OMB will have to work with the agencies and use their expertise to perform its new functions.

The budget for the Office of Management and Budget (OMB) for fiscal year 1983 is $115 million, down from $135 million in fiscal year 1982. This reduction reflects the Reagan administration's emphasis on cutting the federal budget.

The OMB has been criticized for its role in regulating the economy. Some critics believe that OMB is too intrusive and that it usurps the role of the private sector. Others believe that OMB is essential to ensure that regulations are fair and reasonable.

It is unclear whether the new OMB order will make a significant difference in the role of OMB in the regulatory process. The order will likely be used to cut costs and reduce the federal budget.