OMB Plans FY 83 Regulatory Strategy

By Kim Masters
Legal Times Staff

An internal planning document completed last week by the Office of Management and Budget's regulatory affairs office discusses administration strategies on issues ranging from retrenching on federal water-pollution controls to enhancing presidential authority over independent regulatory commissions.

The document, the "1983 Spring Planning Review," parallels a long-range budget planning exercise OMB undertakes every spring. But the review is the first such OMB effort addressing regulation. The resulting product, providing a look at issues OMB wants to tackle in fiscal 1983, is submitted to OMB Director David Stockman and to the White House.

Sources say the document was developed by OMB's office of information and regulatory affairs (OIRA) and covers those areas in which OIRA seeks top-level guidance. Each issue is discussed in terms of various alternatives available to the administration. Advantages and disadvantages of each option are listed, and in many instances, an OIRA recommendation is offered.

No recommendation is made about presidential oversight of independent regulatory commissions, but the document explores pros and cons of options that include attempting to minimize distinctions between independent and executive agencies under current OMB oversight mechanisms; redirecting OMB review of independent agency information collection to provide increased oversight over policy; actively supporting legislative veto over independent agency regulations; or seeking amendments in current bills to give the president veto power over independent agency regulations.

In discussing the disadvantages of these approaches, the review says use of existing oversight mechanisms would not meet "the perceived need of demonstrating the President's direct, immediate control over [independent agency] regulatory policy." Another topic explored in the review is administration options for dealing with conventional water pollutants. The discussion on the fate of the standards for non-toxic pollution controls states that minimal standards relying on "best practicable" technology have "resulted in substantial environmental improvements in some areas."

Divert Resources

Although the document does not offer a specific recommendation in this area, it further states that stringent standards could divert resources from clean-up efforts that can provide the greatest environmental payoff. It adds that stronger controls "may best be imposed by states and localities."

The alternatives explored include a strategy that would encourage additional clean-up of pollutants where technology-based regulations are "reasonably cost-effective," and another strategy, including legislative changes, that would minimize additional technology-based regulation. The review further discusses whether OMB should establish a regulatory cost-accounting system (requiring agencies to assemble dollar estimates of the annual costs imposed by regulations) and whether OMB should establish a regulatory budget (requiring agencies to set a budget for costs of regulations). If such a budget were established, the review says, the president and Congress would set the ceiling on incremental regulatory costs an agency could impose during a fiscal year.

The document states that creat-

Continued on page 7
OMB Review Addresses Pros and Cons of Reg Choices

Continued from page 1

ing a regulatory cost-accounting system would be "an ambitious undertaking" that would lead to considerable debate over the accuracy of cost estimates. Further, the review says such a program might be of limited usefulness because cost estimates may be inaccurate and because the approach would focus solely on costs, not benefits.

The review recommends, however, that the administration implement a regulatory cost-accounting system covering the major rules of all agencies. OIRA further recommends that a regulatory budget be initiated for selected programs, although none are named.

Radical Concept

OIRA concedes that setting ceilings or making meaningful tradeoffs may be difficult, since cost estimates may be inaccurate. "As an untried and radical concept, its feasibility, let alone successful implementation, could encounter extreme skepticism," the review warns.

Another issue explored in the document is the administration's approach to dividing regulatory responsibility with the states and localities. The review states that regulation "should generally be administered at the lowest geographical level consistent with meeting public needs." This section pinpoints particular opportunities for shifting responsibilities to the states, including the Department of Housing and Urban Development's minimum housing standards.

The document makes no specific recommendation regarding these standards but explores possibilities of encouraging HUD to rescind or revise them. Several drawbacks to rescission are listed, including the disadvantage of "slightly" compromising federal financial protection against mortgage default, potentially driving up costs of building materials and housing, and obstructing new technology.

An appended memo by OMB analyst Brian Mannix lists further opportunities for turning regulatory power over to states, including areas now controlled by the Occupational Safety and Health Administration. "The states' role could be increased at the same time that OSHA shifted priorities more towards research and towards giving expert advice to states, businesses and labor organizations," the memo states. "Inspection and enforcement, in particular, should be left largely to the states."

On the question of federal paperwork reduction, the review recommends a 30 percent reduction by Oct. 1, 1983, instead of the 25 percent reduction by that date contemplated in the Paperwork Reduction Act of 1980. The change would show "greater Administration commitment to paperwork reduction" and demonstrate executive branch leadership, the document states. Disadvantages cited are increased risk of eliminating important information collections and a higher level of complaints from the agencies.

Mandated Analyses

The document does not recommend increasing agency budgets to help them effectively perform regulatory impact analyses of proposed regulations. Such analyses are mandated under the administration's Executive Order 12291, to assess costs and benefits of agency options.

The review recommends that the administration encourage shifts within agencies "to permit modest increases in efforts devoted to regulatory analysis relative to other activities." The review warns the administration to expect "considerable variation among agencies in the quality of [analyses]."

Other topics discussed in the document include federal computer obsolescence, federal information centers, and consolidation of reporting for block grants.

---

MIDNIGHT OIL
IS YOUR MOST EXPENSIVE ENERGY RESOURCE...

burning more than you should?

Call Law Services today! We'll show you how using our proven temporary paralegals and law clerks can save valuable professional time and cut the real cost of legal support.

Today, coping with "crunches" couldn't be simpler. Law Services provides support teams of specialists we've screened as carefully as you would yourself...performance guaranteed. They are available, often within the hour, wherever, whenever and for as long as needed.

Call or write...

Career & Blazer LAW SERVICES
NEW YORK
500 Fifth Ave., N Y 10110
TELEPHONE: 212-730-1575
WASHINGTON, D.C.
1001 Connecticut Ave., N W 20036
TELEPHONE: 202-295-8570

THE FIRST RESOURCE IN PERMANENT AND TEMPORARY LEGAL SUPPORT
THE RECORD

OMB Memo Lays Out Choices on Regulatory Issues

An internal Office of Management and Budget memorandum recently obtained by Legal Times outlines possible methods for increased executive branch oversight over the so-called independent regulatory commissions and agencies. The possible advantages of various alternatives—including legislative veto, oversight through the budget process, and redirection of OMB review under the Paperwork Reduction Act—are discussed.

Among other topics covered is the administration's strategy in enforcement of the Clean Water Act, including possible legislation that would shift EPA's emphasis from technology to water quality, and the need for reliance on economic incentives, and shift toward enforcement responsibility to states.

Full text of each of the above chapters follows:

OVERSIGHT OF INDEPENDENT REGULATORY COMMISSIONS

What is an appropriate strategy for Presidential oversight of the independent regulatory commissions (IRC)?

Background

The IRCs combine legislative, executive, and judicial roles in ways unique to the government.

The IRCs have considerable discretion as to implement broad regulatory authority.

Each IRC is controlled by a group of members appointed for fixed terms, no more than a bare majority of which may be from the same political party.

One result of the IRC structure and history is that commissioners draft their own "legislation" (regulations decreasing standards of conduct), authorize enforcement, and then adjudicate compliance (as if decisions reflecting often unarticulated, variable policies).

The structure of IRCs has led to a variety of problems.

Sluggish terms often deny a President the opportunity of controlling a majority until after his first term.

Because of the IRC judicial role, the Supreme Court ruled in 1935 that commissioners could not be removed at the pleasure of the President.

This strong, institutional independence endorses bureaucratic incentives to protect specific interests, even at the expense of broader, countervailing policies.

Yet, because IRC commissioners are presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control.

Because independent regulatory commissioners are presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control.

"Because independent regulatory commissioners are presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control."

- Drafting their own "legislation" (regulations decreasing standards of conduct), authorize enforcement, and then adjudicate compliance (as if decisions reflecting often unarticulated, variable policies).
- The structure of IRCs has led to a variety of problems.
- Sluggish terms often deny a President the opportunity of controlling a majority until after his first term.
- Because of the IRC judicial role, the Supreme Court ruled in 1935 that commissioners could not be removed at the pleasure of the President.
- This strong, institutional independence endorses bureaucratic incentives to protect specific interests, even at the expense of broader, countervailing policies.
- Yet, because IRC commissioners are presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control. Previous Presidents have attempted to increase their control over IRCs. Congress has resisted this, asserting that IRCs are "arms of Congress.

- In most cases, the designation of a chairperson from among the members of the President.
- Presidents have issued some Executive Orders applying to IRCs on a "voluntary" basis.
- IRCs comply with the OMB budget process, however, some submitted budgets request concurrently to Congress.
- IRC participation in the legislative clearance process is mixed; some are exempted by statute.
- Despite Justice Department efforts to establish oversight of all government activities, most IRCs have some authority to appear in court representing themselves, using their own staff.
- Over time, the major source of Presidential impact has been the quality of IRC commissioners appointed.

Legislation moving in Congress would provide increased oversight of IRCs by the courts (for example, in reviewing benefit-cost analyses, and through the broadened review permitted by the Bumpers amendment) and the National Environmental Policy Act review provided in H.R. 746); however, these legislative proposals would not materially increase Presidential authority in some cases would weaken it. (The Administration has test cases could in the legislative process accept a legislative veto applying to selected IRCs if such an action is constitutionally permissible).

Alternatives

1. In the use of existing OMB oversight mechanisms, however, although OMB has reduced its oversight role, it has retained considerable authority over IRCs.

- Alternative 1. Legislative veto of IRC regulations.
- Alternative 2. The Paperwork Reduction Act gives the OMB Director authority to approve or disapprove the "collection of information" from the public by the IRS, based on such criteria as need, definition, practical utility, and unwarranted burden. Congress explicitly provided IRC major.

- Alternative 3. Legislative veto of IRC regulations.

- Alternative 4. Seek amendments to current law to permit proposals to give Presidential authority to veto IRC regulations. The regulatory reform bills before Congress would provide additional oversight mechanisms for Congress.

"The existing [independent regulatory commission] oversight mechanisms, however, although OMB has reduced its oversight role, it has retained considerable authority over IRCs."

- "The existing [independent regulatory commission] oversight mechanisms, however, although OMB has reduced its oversight role, it has retained considerable authority over IRCs."

Advantages

- With the Paperwork Reduction Act, Congress has agreed to exempt any program not subject to review, and to hold over-the-counter, if not the substance, of many IRC regulations.

Advantages

- Congressional endorsement of direct Presidential authority over IRC regulations is needed, if not essential to integrate IRC policies into those of the Administration.

Disadvantages

- Giving the President simultan-

ous vetoes authority could be viewed as undermining potential Congressional vetoes.

- Would be strongly opposed by interest groups, many members of Congress, and obtaining enactment would be difficult.

- Could set the stage for the enactment of more expert rules governing OMB operations.

NON-TOXIC POLLUTION CONTROL STRATEGY

To what extent should the Administration encourage the progressive tightening of "technology-based standards for the control of toxic and polluting water pollutants? Or, should the Administration pursue a strategy, including possible legislative changes, that would tend to maximize benefits in relation to clean-up costs?"

Background

It is now ten years since the passage of the Clean Air and Clean Water Acts, and both Acts will be up for review during the current year. Both Acts set initial standards for non-toxic pollutant control and provide for progressive tightening of those standards over a period of several years. For example, the Clean Water Act requires "best practicable control technology" effluent standards for industrial sources by 1977, a more stringent "best available technology" standard (BACT) by 1984, and "best conventional control technology" (BCT) by 1984.

Typically, initial clean-up efforts yield the least cost per dollar of cost incurred, and progressively higher standards yield diminishing returns. A major issue in both air and water pollution regulation is the need...