

**A BLUEPRINT FOR OMB REVIEW OF
INDEPENDENT AGENCY REGULATIONS**

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Background

In recent years, many significant “Good Government” laws have been promulgated which are designed to “regulate the regulators,” thereby improving the substantive and procedural operations of federal agencies. In undertaking such regulatory reform efforts, due consideration should be accorded to the regulatory activities of independent agencies, and indeed many of these recent measures have applied in whole or part to this category of agencies.

The importance of independent agencies’ rules should not be underestimated, especially since many of these agencies issue economic regulations that have significant impacts on the economy. In fact, in a recent report to Congress on the costs and benefits of regulations, the Office of Management and Budget (OMB) found that social regulations (*e.g.*, environmental, health, and safety rules) and economic regulations (*e.g.*, transportation, energy, telecommunications, and international trade rules) are roughly equal in terms of the costs they impose, approximately \$230 billion/year each.¹ However, the report also found that “[i]n comparison to the agencies subject to E.O. [Executive Order] 12866, the independent agencies provided relatively little quantitative information on the costs and benefits of major rules.”² In an era of constrained resources, such a finding is troubling.

Reasons such as these help explain the bipartisan trend over the past thirty years toward increasing congressional and Executive Branch oversight of federal agencies, with a steadily expanding role for OMB in such tasks. Over time, Congress and the President have found less and less reason to exempt independent agencies from reporting requirements and other procedural measures to which Executive Branch agencies have been subject.

This progression is documented in the “OMB Papers” section of the Center for Regulatory Effectiveness (CRE) website (www.TheCRE.com), and the Appendix to this report also includes a listing of key documents related to OMB centralized regulatory review and a roster of key OMB regulatory officials under several recent Administrations. In light of these individuals’ expertise on the matter of regulatory review as related to independent agencies, CRE encourages these and other

¹ OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2001).

² *Id.* at 32.

interested parties to participate in this issue. Highlights of this progression of increasing responsibilities for both OMB and the independent agencies include:

- Under the Nixon Administration, the “Quality of Life Review” process was launched, which permitted OMB to review agencies’ regulations, standards, and guidelines related to environmental quality, consumer protection, and occupational and public health and safety.³ Independent agencies were not subject to the Quality of Life Review.
- Under the Carter Administration, the Paperwork Reduction Act of 1980 (PRA)⁴ was enacted. A key aspect of the PRA was its establishment of OMB’s Office of Information and Regulatory Affairs (OIRA) as the central regulatory office for the federal government. The PRA gave that office the role of approving all agency information collection requests, including those of independent agencies.
- Under the Reagan Administration, Executive Order 12291 (Federal Regulation)⁵ expanded OMB’s regulatory review authority, permitting OIRA to examine the substance of all regulations issued by Executive Branch agencies.
- During the Clinton Administration, Executive Order 12866 (Regulatory Planning and Review)⁶ was promulgated, replacing E.O. 12291 but arguably strengthening OMB’s regulatory review authority. During this period, Congress also passed additional legislation which applied to independent agencies, such as the Paperwork Reduction Act of 1995⁷ and the Data Quality

³ Key documents related to the Quality of Life Review process are posted on the CRE website in the “OMB Papers” issue section under “OMB Regulatory Review Program: By Administration.” See materials listed under the Nixon and Ford Administrations, *available at* <http://www.thecre.com/ombpapers/centralrev.html>.

⁴ Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 44 U.S.C. §§ 3501 *et seq.* (amended 1995).

⁵ Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

⁶ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁷ Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501 *et seq.* (amending 44 U.S.C. §§ 3501 *et seq.* (1980)).

Act.⁸

A logical next step for reform, which has been cited by numerous legal scholars,⁹ regulatory experts,¹⁰ and political leaders,¹¹ would be to extend Executive Branch oversight to independent agency rulemakings. OMB's Office of Information and Regulatory Affairs, based upon its current duties and expertise, would assume the lead on such an initiative. OMB's review of independent agency regulations could be accomplished under its existing authority without the need for any new legislation or Executive Order.

OMB review of independent agency regulations would extend the overarching quality control afforded by centralized regulatory review to the last major regulatory venue outside this process and would finally bring a measure of parity to economic and social regulations. All agencies can benefit from the assessment of their regulatory work by an objective third party such as OMB, and there is no reason why such benefits should not flow to the regulated community and those members of the public

⁸ 44 U.S.C. § 3516, note (contained in FY 2001 Consolidated Appropriations Act, Pub. L. No. 106-554, § 1(a)(3) [Title V, § 515], Dec. 21, 2000).

⁹ See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 662-66 (1984).

¹⁰ See American Bar Association Commission on Law and the Economy, Report to the House of Delegates: Recommendation -- Support for Limited Presidential Authority Over Major Regulatory Decisions (date uncertain), *available at* CRE's website at http://www.thecre.com/pdf/Carter_ABA2.PDF. "While it may be that some agencies or issues should remain free of presidential review, it is urged that the exemptions be kept to a minimum. *No clear or principled decision underlies the current distinctions between 'independent' agencies, executive branch agencies, and 'independent agencies within the executive branch.'* Agencies of all kinds consider basic economic and social policy decisions that elected officials can and should be capable of addressing." *Id.* at 6 (emphasis added).

¹¹ Vice President George Bush articulated a need for regulatory review of independent agency rules in 1981 when he sought to persuade independent agencies to comply with Executive Order 12991, stating, "To the extent you can comply with the spirit of the order, this will help demonstrate to the American people the willingness of all components of the federal government to respond to their concerns about unnecessary intrusion of government into their daily lives." See Merrill Brown, *Agencies Reject Plea for OMB Review*, WASH. POST, July 9, 1981, at D9, *available at* the CRE website at <http://www.thecre.com/pdf/ReaganPA7981.PDF>.

impacted by independent agencies' missions.

Regulatory Challenge

The regulatory challenge will be to have OMB use its existing authority to develop new approaches in interacting with independent regulatory agencies, so as to facilitate OMB input into their economic regulations and other rulemakings prior to promulgation, while at the same time maintaining the independence of the agencies.

This challenge can be met by structuring review in such a way that OMB is simply supplying public comments to the agency like any other interested member of the public, albeit a commenter with significant expertise in risk assessment, cost-benefit analysis, and other areas of regulatory analysis. OMB's comments would be on the public record, but the independent agencies would not be required to accept OMB's views and recommendations. It should also be noted that OMB would only comment on agency rulemakings, and would not interject itself into independent agencies' conduct of administrative adjudicatory proceedings that affect the rights and responsibilities of individual third parties.

The likelihood is strong that the independent agencies would find OMB's counsel useful, as have other Executive Branch agencies. Although independent agencies have on balance done a good job in carrying out their functions, there is always room for improvement. Yet without formal requirements, agencies, like individuals, tend to focus on the myriad tasks at hand without taking on additional measures, despite their promise for improved operations or results. For example, independent agencies have never been *required* to conduct formal costs-benefit analyses of their rules, and OMB has never been *required* to review independent agency rules. However, quality of the agencies' regulations might be even better were such measures in place.

Thus, the proposed initiative for OMB review of independent agency regulations which follows is designed to institutionalize a cooperative process as both OMB and the agencies seek to implement the Administration's commitment to "developing a smarter regulatory system based on sound science and economics, [a] smarter system [which] is more transparent, accountable, and cost-effective."¹²

Purpose of the Paper

¹² OMB 2001 REPORT TO CONGRESS, *supra* note 1, at 3.

To assist OMB and the independent agencies in meeting the regulatory challenge articulated above, the Center for Regulatory Effectiveness has prepared the following report designed to:

- (1) Review and analyze existing legislative and Executive Branch authorities and precedents which would support OMB review of independent agency regulations without the need for any new legislation or Executive Order.
- (2) Propose a Program for OMB Review of Independent Agency Regulations, including a discussion of the substantive issues OMB would examine and the process and procedures for conducting such review.
- (3) Recommend a vehicle for consideration of the Program for OMB Review of Independent Agency Regulations, based upon Congress' statutory request for recommendations for reform.

Precedents Supporting OMB Review Authority Over Independent Agency Regulations

The first step on the road to increased OMB oversight of independent agency regulations is to overcome the misperception that these governmental institutions are immune to Executive Branch scrutiny. "Independent agencies, set up as arms of Congress, have an historic aversion to such White House oversight, and similar efforts by other administrations have met the same resistance."¹³

However, as discussed below, a number of statutory and Executive Branch provisions have imposed duties on independent agencies related to their regulatory activities. These provisions also offer opportunities for OMB to review and/or offer input on independent agencies' regulatory activities.

LEGISLATION

Paperwork Reduction Act of 1995

The goal of the Paperwork Reduction Act of 1995 (PRA) was to minimize the federal paperwork burden on individuals, businesses, state and local governments, and other parties. The Act, which gives OMB broad powers to maintain quality control over the collection and use of information

¹³ Brown, *supra* note 11, at D9 (discussing Vice President George Bush's request that independent agencies comply with the tenets of Executive Order 12291 (Federal Regulation)).

by federal agencies, specifically states that it also applies to independent agencies.¹⁴
Key duties of both the independent agencies and OMB are outlined below.

Independent Agency Duties

- Whenever an agency proposes to collect information from the public (*i.e.*, imposing reporting or recordkeeping requirements), the agency must seek OMB review and clearance for such information collection request (ICR). OMB clearance is required for both new ICRs and renewals of existing ICRs. As part of this process:
 - Agencies must solicit public comments for 60 days by publishing notice in the *Federal Register* regarding the agency’s need for and plan to collect such information from the

¹⁴ 44 U.S.C. § 3502 (Definitions) states:

As used in this chapter –

- (1) the term “agency” means any executive department, military department, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include –
 - (A) the General Accounting Office;
 - (B) Federal Election Commission;
 - (C) the governments of the District of Columbia and of the territories and possession of the United States, and their various subdivisions; or
 - (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities;

. . .
- (5) the 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.

public (agency public comment period).¹⁵

- Agencies must evaluate all comments received and, as part of the final rule published in the *Federal Register*, discuss how such comments were dealt with.¹⁶
- The head of the agency must make 10 certifications and provide record support to OMB regarding the need for and propriety of each proposed information collection.¹⁷

OMB Duties

- OMB must provide at least 30 days public comment on the ICR in question prior to making a decision whether to approve or disapprove the collection of information (OMB public comment period).¹⁸
- OMB must review the ICR clearance package sent by the agency.¹⁹
 - In the course of its review, OMB may provide comments to the agency on the information collection contained in a proposed rule.²⁰
- If and when OMB has approved the agency information collection request, the Director of OMB issues a control number for the information collection.²¹ Without such control number, respondents are not required to submit the requested information to the agency, and, in such

¹⁵ 44 U.S.C. § 3506(c)(2).

¹⁶ 44 U.S.C. §§ 3507(a)(1)(B), (d)(2).

¹⁷ 44 U.S.C. §§ 3506(c)(3), 3507(a)(1)(C).

¹⁸ 44 U.S.C. § 3507(b).

¹⁹ 44 U.S.C. §§ 3507(c), (d).

²⁰ 44 U.S.C. § 3507(d)(1)(B).

²¹ 44 U.S.C. § 3507(g).

cases, failure to do so will not result in any penalty.²²

- There is a provision in the PRA which permits independent agencies to override the OMB Director by majority vote. Presumably, though, an override would only occur in extraordinary circumstances.²³

Opportunities for Interaction

- The PRA gives OMB significant power over independent agency information collections, and since most of the rules proposed by these agencies contain information collection requirements, the majority of independent agencies' rules are already coming to OMB for PRA approval.
- In practical terms, OMB must undertake a substantive review of each proposed regulation in order to formulate any comments to the agency related to the ICR and to make its clearance decision.
 - OMB may not require changes to the substance of agencies' rules under the PRA. This limitation reflects the scope of review permitted under the PRA and the fact that such changes would be inconsistent with the legislative history of the Act.
- The PRA review process provides OMB with a mechanism to submit views and comments to independent agencies and offers a structure for dialogue.

Data Quality Act

Another recent statute which may have significant implications for independent agency rulemakings is the Data Quality Act, which was signed by President Clinton as part of the FY 2001 Consolidated Appropriations Act (Pub. L. No. 106-554). The Data Quality Act required the development of government-wide standards for the quality of governmental information disseminated to the public, including a mechanism for correction of information that does not meet these standards. The Act provides no exemptions for independent agencies from coverage. Key duties of the independent agencies and OMB under the Data Quality Act are outlined below.

OMB Duties

²² 44 U.S.C. § 3512.

²³ 44 U.S.C. § 3507(f).

- Congress mandated that by September 30, 2001, OMB must develop policy and procedural guidelines for federal agencies to ensure and maximize the “quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies....”²⁴
 - OMB issued proposed Data Quality guidelines on June 28, 2001, and invited public comment thereon (66 Fed. Reg. 34489).
 - OMB issued interim final Data Quality guidelines on September 28, 2001, but requested additional public comments on a portion of the standards dealing with reproducibility of “influential scientific or statistical information” (66 Fed. Reg. 49718).
 - OMB issued final Data Quality guidelines on January 3, 2002 (67 Fed. Reg. 369).
- OMB must review and approve agencies’ conforming Data Quality guidelines to ensure that they are consistent with OMB’s guidelines.²⁵
- OMB has a continuing oversight role under the Data Quality Act to monitor the number, nature, and resolution of complaints to agencies under the Data Quality guidelines.²⁶

Independent Agency Duties

- Within one year after promulgation of final Data Quality guidelines by OMB, agencies must develop and seek OMB approval of their own conforming Data Quality guidelines based upon OMB’s model; such guidelines must include the administrative correction mechanism discussed above.²⁷ Consistent with the timing of OMB’s actions, the agencies’ schedule for Data Quality guidelines is as follows:
 - Agencies must publish draft Data Quality guidelines in the *Federal Register* for public

²⁴ 44 U.S.C. § 3516, note.

²⁵ OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (OMB Data Quality Guidelines), 67 Fed. Reg. 369, 376 (Jan. 3, 2002).

²⁶ *Id.*

²⁷ 44 U.S.C. § 3516, note.

comment no later than April 1, 2002.²⁸

- After consideration of any public comments and appropriate revision, the agency must submit its draft guidelines to OMB by July 1, 2002, for review regarding consistency with OMB’s Data Quality guidelines.²⁹
- Upon completion of OMB’s review and clearance, agencies must publish their Data Quality guidelines in the *Federal Register* and on the agency’s website no later than October 1, 2002.³⁰
- Agencies must periodically report to the Director of OMB regarding the number and nature of complaints received by the agency under the Data Quality guidelines and how such complaints were handled by the agency.³¹

Opportunities for Interaction

- The Data Quality Act allows OMB to help shape the information quality standards of independent agencies, particularly since OMB must review the agencies’ guidelines for conformity with the standards set forth in OMB’s guidelines.
 - Indirectly, this Data Quality Act will also permit OMB to shape independent agencies rulemakings, because proposed rules constitute disseminations of information to the public under the statute.
- The Act also carves out an ongoing oversight role for OMB in terms of Data Quality Act complaints and how the agency handled such complaints.

²⁸ OMB Data Quality Guidelines, *supra* note 25, at 376.

²⁹ *Id.*

³⁰ *Id.*

³¹ 44 U.S.C. § 3516, note.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980³² (RFA) generally requires agencies to evaluate the potential effects of proposed regulations on small entities (*e.g.*, small businesses, small governments, and other small organizations) and to minimize any undue disproportionate burdens. Section 601(1) of the RFA adopts the definition of the term “agency” used in the Administrative Procedure Act (APA),³³ which does not exclude independent agencies from coverage. Key duties of independent agencies and OMB under the RFA are outlined below.

OMB Duties

- OMB’s Office of Information and Regulatory Affairs, as the office responsible for overseeing the federal government’s regulatory, paperwork, and information resources management practices, is required to compile semi-annually the *Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda)*.³⁴

³² 5 U.S.C. §§ 601 *et seq.*

³³ 5 U.S.C. § 551(1) of the APA provides:

- (1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –
 - (A) the Congress;
 - (B) the courts of the United States;
 - (C) the governments of the territories or possessions of the United States;
 - (D) the government of the District of Columbia

or except as to the requirements of section 552 of this title –

- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

³⁴ OMB has delegated authority to collect information for inclusion in the *Unified Agenda* to the Regulatory Information Service Center, within the General Services Administration (GSA). However,

- While publication of this document is required by Executive Order 12866³⁵ (Regulatory Planning and Review) (discussed in further detail subsequently), it also serves as a convenient vehicle for agencies to comply with their duties under the RFA and other laws.
- The *Unified Agenda* provides a variety of useful information, in a uniform format, about regulations that federal agencies are considering or reviewing. Entries range from preliminary activities through completed actions, and normally include a planned schedule for action. This document serves a highly useful public notice function.

Independent Agency Duties

- Pursuant to the RFA, independent agencies must publish a regulatory flexibility agenda in the *Federal Register* each April and October.³⁶ Agencies traditionally include this information as part of their submission for inclusion in the *Unified Agenda*. The regulatory flexibility agenda must include:
 - (1) a description of the subject of any agency rule expected to have a significant economic impact on a substantial number of small entities;
 - (2) the objectives and legal basis for issuance of such rules, and the approximate schedule for completion of agency action on any rule for which the agency has issued a notice of proposed rulemaking;
 - (3) the name and phone number of an agency official knowledgeable regarding each such rule.
- Agencies must publish an initial regulatory flexibility analysis in the *Federal Register* at the time of a notice of proposed rulemaking and seek public comments thereon.³⁷

OMB reviews the materials submitted by the agencies prior to publication.

³⁵ Exec. Order No. 12866 § 4(b), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

³⁶ 5 U.S.C. § 602.

³⁷ 5 U.S.C. § 603.

- Agencies must address how they dealt with any RFA-related comments in the final regulatory flexibility analysis that it publishes in the final rule.³⁸
- Each agency must publish in the *Federal Register* every year a list of the regulations it expects to subject to review under section 610 of the RFA, which analyzes the continued need for and impacts of the rule. Agencies must invite public comment on those rules scheduled for section 610 review.³⁹

Opportunities for Interaction

- Like any other public commenter, OMB has an opportunity to review and offer input on independent agencies' analyses related to the RFA at each of the above points in the process. This will permit OMB to discuss costs, benefits, and other substantive issues under the rule, to the extent they impact small entities.
 - OMB has particular expertise with RFA-related issues, because under section 609(b) of the Act, OMB, along with the Small Business Administration (SBA) and the issuing agency, serves on review panels to examine impacts of proposed rules that may have a significant impact on small businesses. While this section is only applicable to the rulemaking activities of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), the skills that OMB has developed in this setting would certainly be transferable to its review of the RFA analyses of independent agencies.

FY 2000 Treasury and General Government Appropriations Act

Congress has long recognized that regulations impose a variety of direct and indirect costs on individuals and businesses, so Congress included language in the FY 2000 Treasury and General

³⁸ 5 U.S.C. § 604.

³⁹ 5 U.S.C. § 610(c).

Government Appropriations Act⁴⁰ designed to provide legislators with current information on such costs on a regular basis.⁴¹ This legislative provision incorporates key portions of the Regulatory Right-to-Know Act of 1999.⁴² In short, it requires the Director of OMB to issue a report to Congress on the costs and benefits of federal rules and paperwork.

Nothing in the legislation excludes independent agencies from OMB's purview. OMB's report for 2001 did analyze ten major rules issued by four independent agencies issued during the 12-month period running from April 1, 1999 to March 31, 2000. OMB's review of the independent agencies' rules was based upon the data provided by these agencies to the General Accounting Office (GAO) under the Congressional Review Act (*i.e.*, the congressional review provision of the Small Business Regulatory Enforcement Fairness Act⁴³).

Key duties of OMB under the Act are outlined below.

OMB Duties

- On an annual basis, the Director of OMB must publish and submit to Congress an accounting statement and accompanying report containing:
 - (1) an estimate of the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules and paperwork, to the extent feasible:
 - (A) in the aggregate;
 - (B) by agency and agency program; and
 - (C) by major rule;
 - (2) an analysis of impacts of Federal regulation on State, local, and tribal government, small business, wages, and economic growth; and
 - (3) recommendations for reform.⁴⁴

⁴⁰ FY 2000 Treasury and General Government Appropriations Act, Pub. L. No. 106-58, § 628.

⁴¹ Section 624 of Public Law No. 106-554 (2000) extends OMB's reporting requirement (as articulated in section 628 of Public Law No. 106-58) to 2002 and subsequent years.

⁴² S. 59, 106th Cong. (1999).

⁴³ 5 U.S.C. §§ 801 *et seq.*

⁴⁴ FY 2000 Appropriations Act, *supra* note 39, at § 628(a).

- OMB must provide public notice and an opportunity for comment on the statement and report before they are submitted to Congress.⁴⁵
- In implementing this section, the OMB Director is required to issue guidelines to agencies to standardize the measurement of the costs and benefits of regulations and the format of accounting statements.⁴⁶ Congress also mandated that these guidelines and the above report be subject to independent and external peer review.⁴⁷

Opportunities for Interaction

- OMB now has an annual statutory responsibility to review independent agency rules and to report to Congress on their associated costs and benefits. OMB made initial progress in that regard in its FY 2001 report by consulting the information submitted by the independent agencies to GAO.
 - However, in future years, OMB might supplement this analysis with further contacts with independent agency officials.
 - OMB could also make it part of its routine to review costs and benefits for all independent agency rules that come to OMB for Paperwork Reduction Act review and clearance.

EXECUTIVE BRANCH ORDERS AND INTERPRETATIONS

Executive Order 12866 (Regulatory Planning and Review)

Executive Order 12866⁴⁸ provides OMB’s primary regulatory review authority. Under the order, all Executive Branch agencies must submit those matters determined by the agency or OIRA to be “significant regulatory actions” to OMB for review and clearance under E.O. 12866 prior to their promulgation. The types of submissions which agencies must make to OMB include the text of the proposed regulatory action, an assessment of the costs and benefits, and in most cases, a discussion of

⁴⁵ *Id.* at § 628(b).

⁴⁶ *Id.* at § 628(c).

⁴⁷ *Id.* at § 628(d).

⁴⁸ Exec. Order No. 12866, *supra* note 6.

reasonably feasible alternatives.⁴⁹

Under E.O. 12866, federal agencies must also provide information reporting on the scope, nature, and schedule of their regulatory activities. A complete inventory of an agency's regulatory actions must be included in the *Unified Agenda of Regulatory and Deregulatory Actions* twice a year, and the agency's Regulatory Plan for its most significant regulatory actions must be included annually in the October edition of the *Unified Agenda*.

Independent agencies are exempt from the requirements of Executive Order 12866, except for the submissions to the *Unified Agenda* and the Regulatory Plan. Nevertheless, the important principles embodied in the order are arguably just as important to independent agencies as to their Executive Branch counterparts.

OMB Duties

- As discussed earlier, OMB is required to compile semi-annually the *Unified Agenda*, which is to include agencies' Regulatory Plans in the October edition.
 - Under section 4(c)(5) of E.O. 12866, "If the Administrator of OIRA believes that a planned regulatory action of an agency [contained in the agency's Regulatory Plan] may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President."
- OMB is required to conduct a review of all "significant regulatory actions" and may return to the agencies those proposed regulations which do not meet the requirements of the Executive Order, are contrary to or conflict with existing laws, or are otherwise not in accordance with the President's priorities.
 - *This OMB duty does not apply to independent agencies at the current time.*

Independent Agency Duties

- Each agency must provide a listing of all regulations under development or planned, and

⁴⁹ *Id.* at § 6(a)(3).

information about those regulatory actions in the semi-annual *Unified Agenda*.⁵⁰

- Each agency must prepare and publish in the October edition of the *Unified Agenda* a Regulatory Plan of the most significant regulatory actions that the agency expects to issue in proposed for final form in that fiscal year or thereafter.⁵¹

Opportunities for Interaction

- OMB is already reviewing independent agency submissions for inclusion in the *Unified Agenda* and Regulatory Plan. OMB can and should notify the agencies through written comments when inconsistencies or conflicts are identified pursuant to section 4(c)(5) of the Executive Order.
- At least for those regulations already being submitted by the independent agencies for PRA review, OMB might consider undertaking a 12866-type review. At a minimum, this would help OMB in its analysis related to the annual report on costs and benefits of regulations it must perform and submit to Congress pursuant to the FY 2001 Treasury and General Government Appropriations Act (discussed above).

RELEVANT PAST REGULATORY EFFORTS

While the following points do not provide current controlling legal precedent for OMB review of independent agency regulations, they do provide useful *historical* precedent of past regulatory actions and analyses which either applied to independent agencies or whose principles might be applicable to future analysis of their rules.

Regulatory Analysis Review Group

The Regulatory Analysis Review Group (RARG) was set up under the Carter Administration. It was an interagency body that maintained quality control of agency analyses by making filings on the public record at the end of an agency's public comment period on proposed rules.

RARG typically became involved with about 10 key regulations per year. The group's goal

⁵⁰ *Id.* at § 4(b).

⁵¹ *Id.* at § 4(c).

was to improve agency analytical skills and, thereby, the entire federal rulemaking process. According to one official familiar with RARG operations, “These filings served a useful public education purpose as well as helping to assure that White House concerns were made a part of the rulemaking record.”⁵²

The RARG process was eliminated by the Reagan Administration in favor of the regulatory review provisions contained in Executive Order 12291.

Department of Justice Memorandum on Regulatory Review Under Executive Order 12291

In a memorandum dated February 13, 1981, the Department of Justice (DOJ) rendered its opinion that Executive Order 12291 (the precursor to E.O. 12866) is acceptable in both form and legality.⁵³ It highlights the intended benefits of the order, including reducing regulatory burdens, providing presidential oversight of the administrative process, and ensuring well reasoned regulations. It also supports uniformity of interpretation and execution of diverse statutes.

The memorandum discusses the Executive Office’s role under E.O. 12291 as a “power of consultation.”⁵⁴ “It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President’s Order.”⁵⁵

The DOJ memorandum does not address the issue of whether it would have been legally permissible to apply the principles of Executive Order 12291 to independent agencies, had the order been so written. The DOJ opinion does note that “Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies

⁵² Statement of George C. Eads, Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97 Cong. 5 (June 18, 1981). For further detail on the Regulatory Analysis Review Group process, please consult the CRE website with information *available at* <http://www.thecre.com/ombpapers/RARG.htm>.

⁵³ Proposed Executive Order Entitled “Federal Regulation”, Op. Off. of Legal Counsel, Dept. of Justice 1 (Feb. 13, 1981), *available at* <http://www.thecre.com/pdf/DJMemoReaganEO12291PDF.pdf>

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

when it has sought to minimize presidential interference.”⁵⁶

It is unclear whether it would be constitutionally permissible to apply the requirements of an Executive Order 12291 or 12866 to independent agencies. However, what is clear is that the counsel, as envisioned above, would certainly provide useful information to the agencies as they regulate.

Proposed CRE Program for OMB Review of Independent Agency Regulations

CRE proposes the following plan for OMB Review of Independent Agency Regulations. The Center’s plan is designed to close the last significant gap in the centralized regulatory review process developed over the past three decades, while at the same time maintaining the independence of the independent agencies.

By way of overview, the steps outlined below draw almost exclusively upon the currently existing legislative and Executive authorities and duties discussed in the body of this paper. In most cases, OMB is already reviewing the independent agencies’ regulations for other purposes. Also, because the product of OMB’s review would simply involve submission of non-binding public comments, the agencies’ independence would by no means be compromised.

Consequently, implementation of the following steps should provide highly useful information to independent agencies without the need for additional mandates from either Congress or the President.

Step 1: Targeting Independent Agency Regulations for Review Through the *Unified Regulatory Agenda*

- OMB is already required to compile and independent agencies are required to report information on their ongoing and planned regulatory activities for submission in the *Unified Regulatory Agenda*.

⁵⁶ *Id.* at 3-4.

- *OMB should screen these independent agency submissions in order to identify important regulations that OMB believes might merit review. Using the Unified Agenda in such a screening process would permit OMB to target those rules that should receive priority attention.*
 - During this phase, OMB could start placing initial questions with agency officials, establish a dialogue on the proposed rule, and otherwise begin monitoring the agency’s progress on the proposed regulation.

Step 2: Reviewing Targeted Independent Agency Regulations During the Course of Paperwork Reduction Act Review

- The Paperwork Reduction Act already requires independent agencies to submit and OMB to review information collection requests associated with proposed rulemakings. Thus, as mandated by law, OMB routinely receives and conducts a substantive review of these regulations, in order that OMB may make a determination regarding the paperwork request. (For reasons stated earlier, OMB may not require changes to the substance of agencies’ rules under the PRA.)
- *In conducting its required review of the independent agencies’ regulations under the PRA, OMB should also review those regulations identified in Step 1 for compliance with the principles embodied in Executive Order 12866, procedural requirements of the APA and other Good Government laws, and for any apparent Data Quality Act violations.*
 - In many instances, OMB’s analysis under the PRA and this plan may be identical, thereby necessitating minimal allocation of additional resources.
 - OMB’s analysis would be two-fold: one would be PRA comments, and the other would be Step 3 below.

Step 3: Submission of RARG-type Review Under the Administrative Procedure Act

- Because independent agencies are subject to the requirements of the Administrative Procedure Act, they must conduct their rulemaking activities in accordance with the notice and comment procedures of 5 U.S.C. § 553, including providing all interested persons the opportunity to submit written comments on the proposed regulation.
- *Based upon its review and analysis conducted in Step 2, OMB should prepare a RARG-*

type⁵⁷ report of written comments for submission to the independent agency on its proposed rule before the end of the APA public comment period. Such comments would particularly emphasize any instances of agency non-compliance with the procedural requirements of the APA or other Good Government laws or any quality issues under the Data Quality Act. This would provide the independent agency with an opportunity to take corrective action regarding the points raised in such comments.

- Nothing precludes OMB from commenting like any other member of the public, and the agency is statutorily required to consider all such comments.
 - The OMB comments would be on the public record.
 - The OMB comments would offer the agency an opportunity to take corrective action prior to promulgation of a final rule.
 - As in the RARG process, agencies would have complete discretion whether or not to adopt the recommendations contained in the OMB comments.

Step 4: Third Party Enforcement Under the Administrative Procedure Act and the Data Quality Act

- Since comments submitted under the APA's rulemaking provisions are on the public record, interested stakeholders could obtain and review public comments filed by OMB.
 - Based upon OMB's expertise in risk assessment, cost-benefit analysis, and other forms of regulatory analysis, the OMB comments submitted under Step 3 have the potential to identify procedural violations under the APA and other Good Government laws, as well as analytical and statistical errors or inaccuracies amenable to challenge under the Data Quality Act.
- *To the extent procedural violations are found and a stakeholder agrees with OMB's analysis, such third party could launch a judicial challenge against the agency under the APA for any procedural violations.* The APA is routinely used as a vehicle for judicial challenge of agency procedural violations in the course of rulemakings.

⁵⁷ See discussion of the Regulatory Analysis Review Group (RARG) at page 16 of this report.

- *To the extent information quality problems are identified and a stakeholder agrees with OMB's analysis, such third party could petition the independent agency for correction of the information in question under the Data Quality Act. OMB's comments could be used to support the petitioner's arguments.*
 - If the agency denies the petition, the stakeholder could then seek judicial review and relief under the Data Quality Act.

Proposed Plan for Adoption of CRE Program for OMB Review of Independent Agency Regulations

CRE offers this proposal for a Program for OMB Review of Independent Agency Regulations pursuant to Congress' request for recommendations for reform under the FY 2000 Treasury and General Government Appropriations Act. Therefore, CRE is submitting this proposal as a comment to OMB, which is statutorily mandated to seek public input on its draft FY 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities, the OMB report required under the Act.

In light of the less than exemplary regulatory analyses of independent agencies discovered by OMB in the context of its FY 2001 Report,⁵⁸ CRE urges consideration of the proposed Program for OMB Review of Independent Agency Regulations as a significant reform measure, which is minimally burdensome and consistent with existing authorities, is non-intrusive in terms of the agencies' independence, equalizes treatment of social and economic regulations, and has the potential to measurably improve the central regulatory review process.

⁵⁸ According to the OMB report, "[i]n comparison to the agencies subject to E.O. 12866, the independent agencies provided relatively little quantitative information on the costs and benefits of major rules. As Table 5 indicates, seven of the ten rules included some discussion of benefits and costs. None of the ten regulations had any monetized cost information; one regulation monetized benefits." OMB 2001 REPORT TO CONGRESS, *supra* note 1, at 32.

APPENDIX



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OMB Papers on Centralized Regulatory Review

OMB, through its review of all agency regulations, has a major influence on the federal regulatory process. The papers posted on this portion of the site include internal OMB working papers which led to the centralized review of agency regulations by OMB. These materials are from the private collection of Dr. Jim Tozzi, a member of the CRE Board of Advisors, who was also the first Deputy Administrator of OMB's Office of Information and Regulatory Affairs (the non-political appointee) and the career official in charge of Quality of Life Review (Nixon), the OMB regulatory review program instituted for EPA in the 1970's and the predecessor to regulatory review Executive Orders 12044 (Carter), 12291 (Reagan), and 12866 (Clinton).

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- [A Quiet Shift of Power](#)
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- [Congressional Reaction to the Regulatory Budget \(383 kb\)](#)
- [Executive Order 12291 \(Federal Regulations\) \(pdf 961 kb\)](#)
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- [Federal Register Analyses \(pdf 335 kb\)](#)
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- [President Signs Data Quality Legislation \(Public Law 106-554 Section 515\)](#)
- [Executive Order 12866 \(Regulatory Planning and Review\)](#)
- [President Signs Data Access Law \(P.L. 105-277\)](#)
- [OMB Issues Final Rule on Circular A-110 \(Data Access\)](#)
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- [Bush Administration Opens Up the OMB Regulatory Review Process: A Major Change From Its Predecessors](#)
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Nixon	Jim Tozzi	Chief, Environment Branch
Ford	Jim Tozzi	Chief, Environment Branch
Carter	Wayne Granquist Jim Tozzi Stan Morris	Associate Director Assistant Director Division Chief
Reagan	Jim Miller Jim Tozzi Tom Hopkins Chris DeMuth Bob Bedell Doug Ginsburg Wendy Gramm Jim MacRae Jay Plager	Administrator Deputy Administrator Deputy Administrator Administrator Deputy Administrator Administrator Administrator Deputy Administrator Administrator
Bush (1)	Jim MacRae	Acting Administrator
Clinton	Sally Katzen Jim MacRae John Spotila Don Arbuckle	Administrator Deputy Administrator Administrator Deputy Administrator
Bush (2)	John Graham Don Arbuckle	Administrator Deputy Administrator