

To: Jack Quinn

February 16, 1993

From: Jim Kohlenberger

Re: Regulatory Review

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I wanted to draw your attention to a couple issues that we will run into under the Policy Planning Committee structure you have outlined and suggest a few modifications that can avoid the problems.

Two legal points bear upon this structural decision. First, who can make regulatory decisions? Many regulatory statutes designate the agency head rather than the President as the ultimate decision maker; at the same time, the President is entitled under the constitution to be informed of all proposed agency actions and can operate through the Vice President. Thus, the agency is not required to listen to any decision an EOP body may make. The Quayle Council was often called an illegal entity for these reasons. The question has real impact on who has ultimate responsibility for regulations -- the EOP or the agency head. Instead, agency consent to binding arbitration or, as in past administrations, the fact that the President or Vice President voice their opinion as a recommendation rather than a decision may prove sufficient to resolve the issue. I believe the latter is more workable.

Second, to avoid lawsuits under FOIA, we should be careful in setting up a group that has a role as an "advisory" group to the President as opposed to having formal decision making power. Additionally, agency involvement should also be advisory and not carry decision making power. I am told that in *Meyers vs. Bush* (decided Jan 8, '93), decision making authority given to Bush under the Vice President's Task Force for Regulatory Relief came under review as an agency under FOIA definitions. The 2-1 majority said that it was not an agency but further suites could be expected. FOIA requests would mean that whatever sunshine provisions we include would then be made mute. Instead, we can avoid these concerns with careful language.

One structure consistent with these constraints might include the President designating the Vice President as head of a group of EOP advisors that perform the regulatory review function. The core group might consist of the VP as chair, the director of OMB, the Counsel to the President, the Assistant to the President for Domestic Policy, and the Assistant to the President for Economic Policy or their representatives. The core group could then put together ad hoc groups for a particular review that included expertise from both the EOP and the agencies. While there is great interest in agency involvement in review at the highest levels, maintaining agency personalities in the core group might encourage a back scratching or quid pro quo approach to regulatory review.

We may also want to give some thought to any pro-active affirmative role this group might play in providing legislative policy direction and, if we decide to go with such a model, a group of agency designates that work with agencies to develop and highlight innovative and efficient regulatory techniques

# Daily Report For Executives

July 30, 1993, Friday

## GORE SAYS REGULATORY REVIEW ORDER EXPECTED TO BE RELEASED IN LATE AUGUST

Vice President Al Gore said July 29 that the administration expects President Clinton to release a new regulatory review executive order in late August, noting that there is no reason why the administration would feel it necessary to wait until Congress returns to Washington after its month-long recess.

Speaking to a group of radio reporters, Gore said no date has been chosen for the release of the executive order, which the vice president's staff has been developing with the head of the Office of Management and Budget's regulatory affairs office, along with other federal officials.

"Since it is entirely a matter within the prerogative of the executive branch, there's no reason why we would have to do it, or why it would be especially appropriate to wait until Congress returns, so it may come after the reconciliation victory and before Labor Day, just because that's a natural time for it to take place," Gore said.

The vice president declined to discuss the specifics of the appellate role he is expected to play on behalf of the president in recommending resolutions to regulatory disputes that arise between the federal agencies and OMB's Office of Information and Regulatory Affairs. Gore's dispute-resolution role is outlined in the draft executive order the White House is in the final stages of refining with input from federal regulators and members of Congress.

### Gore Says OMB To Shoulder Regulatory Review

"Unlike in the last administration, we want these decisions to be made primarily in the regulatory office set up for this purpose at OMB," Gore said.

Referring to the OIRA administrator, the vice president said, "Sally Katzen is an enormously capable and competent individual who is perfectly suited to this task, and that's where the vast majority of these decisions will be made."

Gore said other details of the executive order will be disclosed when the president announces it, "probably in late August."

The proposed executive order would replace Reagan-era orders, including EO 12291 and EO 12498, and describes the Clinton administration's regulatory philosophy.

It establishes a system of federal review of existing and proposed regulations that will be

more open to public scrutiny, according to administration officials. It will continue previous administration's requirement for cost-benefit analysis by federal agencies of proposed regulations, but will place more emphasis on the non-quantifiable benefits of federal rules than was true during the Reagan and Bush administrations. The order also will set out a structure for coordinated regulatory planning among federal agencies.

When agencies and OMB cannot agree on a regulatory issue, OIRA will be able to take the dispute to Gore and his staff for a recommendation to the president. In helping to resolve the dispute, Gore will be able to draw on the input of others within the executive branch, including the National Economic Council, the Domestic Policy Council, the Office of Environmental Policy, the Office of Science and Technology Policy, and the National Security Council, among others, according to several administration officials.

### **Promoting The National Performance Review**

The vice president took the opportunity to champion the National Performance Review project he has coordinated for the administration, which will recommend ways to "reinvent government" in a report due Sept. 7. Gore promised the report will propose "revolutionary changes in the way government manages its business."

Among those changes, Gore pledged, will be cuts in overhead; an effort to "right-size government;" decentralization of decision-making authority; a re-examination of responsibilities among the federal, state and local governments; and changes in budgeting, procurement, personnel, and information systems.

"We're going to have a package of specific changes in every single Cabinet department and every agency," Gore said.

To: Regulatory Review Working Group

February 17, 1993

From: Jim Kohlenberger/Jessica Goldfarb

RE: What and how does OMB review?

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This is to respond to question raised during our recent meeting on what, how and why does OMB review regulations.

### THE PROCESS

Under the two primary Executive Orders, the President ordered executive agencies to submit all proposed and final rules to OMB for review before publication. OIRA reviews "major" regulations with special attention. Regulations so designated have economic costs of over \$100 million annually, or are projected to have significant effects on employment, inflation or industry viability. A regulatory impact analysis (RIA), done by the agency, must accompany major regulations at both proposed and final rulemaking stages. An RIA assesses the costs and benefits of the action and its alternatives. Agencies must submit major proposed rules to OMB at least 60 days before publication, and major final rules at least 30 days before publication.

### REGULATORY AGENDAS

Currently, OMB collects agencies Regulatory Planning Agendas in the annual "Regulatory Program of the US Government" and the "Semi-Annual Regulatory Agenda." The agendas set forth the agency's regulatory plans for the coming year. OMB conducts its first detailed review of agency rulemaking plans through the agenda process.

### ABOUT THE RULES THAT OMB REVIEWS

Of the rules that OMB reviewed in 1991, 3% were major proposed rules and 2.7% were major final rules. Non-major rules constituted 94.4% of all rules. OMB's time for review of all major rules in 1991 was on average 39 days, for non major rules it was 29 days.

2,523 rules were reviewed in 1991	
Type of OMB Action Taken on Rules	Percentage
Found consistent as submitted	63.2%
Found consistent after agency adopted change during review period	27.2%
Returned to the agency for reconsideration	2.8%
Withdrawn by agency	2.8%
Suspended	2.7%
Emergency rules subject to statutory or judicial deadlines	3.0%
Sent improperly or exempt	0.1%

There is general consensus that a majority of the 27% of regulatory changes are fairly non-controversial with the agencies and result primarily from OMB playing a coordinating role between agencies. There is little agreement on how often OMB insists on "substantive changes" with which the affected agency disagrees. OMB officials have suggested in the past that about 25% of changed rules fall into this category of disagreement. OMB almost certainly wins in a disagreement with an agency. As you know, OMB does not usually make public its comments to agencies about rules -- a good deal of the communication is not in writing but over the telephone.

#### WHAT DOES OIRA LOOK FOR?

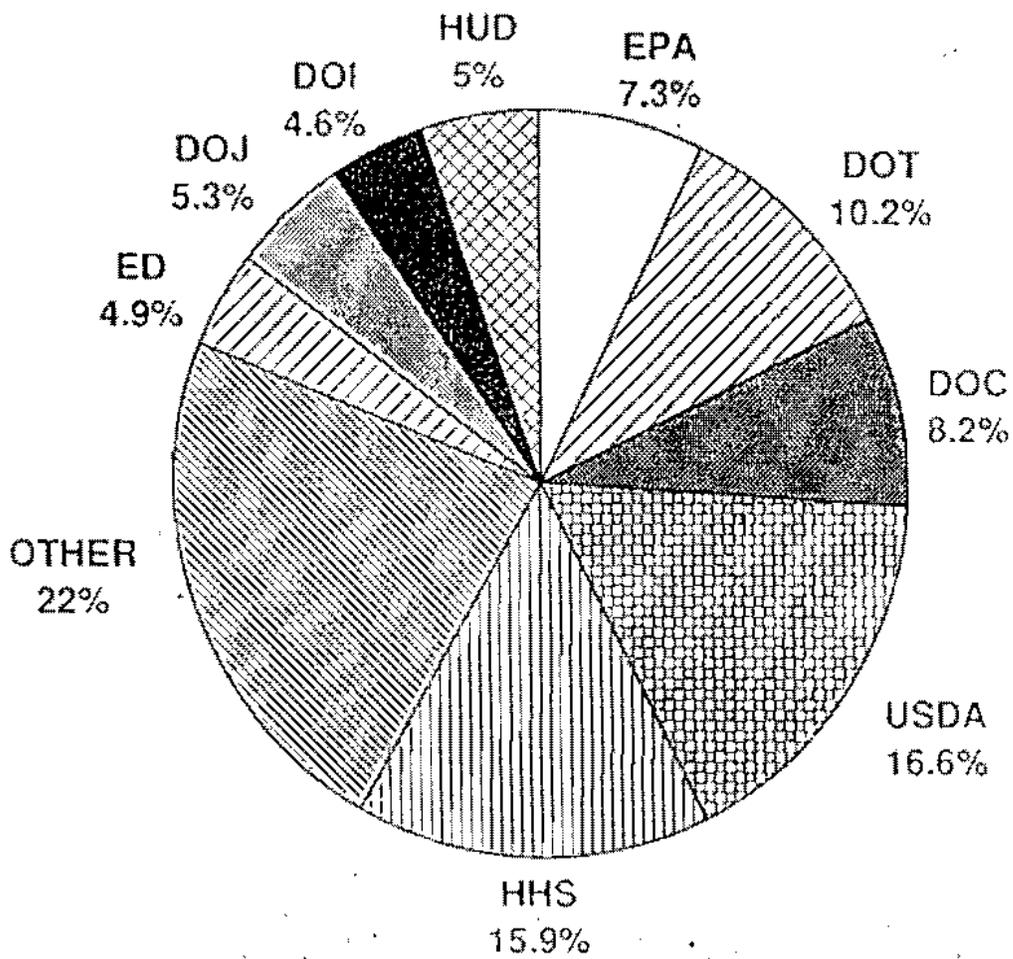
OIRA review regulations to see if they are consistent with Executive Order 12291. Under these principles, agencies are to issue regulations that are:

- Consistent with law
- Are based on adequate information
- Do not conflict with other agencies regulations and mandates
- Provide maximum net benefits to society
- Conform to Administration policies and regulatory principles to the extent the law permits

Also, regulations must conform to other guidelines as well. Some of the Principles they have outlined call for:

- Issuing regulations only on evidence that the benefits would outweigh the costs;
- Avoiding regulation of prices and entry in competitive markets;
- Prescribing uniform standards for private goods and services only where products are needlessly unsafe, product variations are wasteful, or private standards have failed to correct the problem;
- Basing health and safety regulations on scientific risk assessments and addressing risks that are real and significant rather than hypothetical or remote;
- Addressing ends not means in health, safety, and environmental regulations;
- Licensing and permitting new products swiftly, based on standards clearly defined in advance; and
- Encouraging unrestricted exchange of private rights or obligations that regulations create.

**EXECUTIVE ORDER 12291**  
**TOTAL REVIEWS BY AGENCY**  
**1991**



REMARKS BY PRESIDENT BILL CLINTON  
AND VICE PRESIDENT AL GORE  
AT SIGNING OF EXECUTIVE ORDER ON REGULATORY REFORM  
THE WHITE HOUSE, WASHINGTON DC  
THURSDAY, SEPTEMBER 30, 1993

PRESIDENT CLINTON: Okay, y'all sit down and relax.

Good morning, ladies and gentlemen, and welcome to another action-packed meeting of our action-packed administration. Today I am signing an executive order to create a fair, open, streamlined system of regulatory review for our government to eliminate improper influence, delay, secrecy, and to set tough standards and time limits for regulation. It's a move in keeping with everything else we've tried to do since inauguration day.

The philosophy of this administration has always been consistent when it comes to regulation. We reject the "if it moves, regulate it" approach, and we reject the idea that we can walk away from regulation entirely. We have sought a third way consistent of the philosophy behind the vice president's reinventing government project, with our approach to health care, to export controls, to a whole range of other issues.

We can't reject all regulations. Many of them do a lot of good things. They protect workers in the workplace, shoppers in the grocery stores, children opening new toys. But there are others that serve no purpose at all. This executive order will provide a way to get rid of useless, outdated, and unnecessary regulations that are outdated, obsolete, expensive, and bad for business.

We're working on the impact of regulation on government, too. That's what the vice president's report on reinventing government does. To improve budget, personnel, and procurement systems we can strip away an awful lot of red tape for all of you. All of you are working yourselves on the focussed review of regulations, and that's why on September the 11th, as you'll recall, I signed an executive order directing our agencies to eliminate 50 percent of our internal regulations. The next step is reforming the regulatory review process itself. That's what the executive order today does.

We've already shut down the so-called Competitiveness Council, which closed the back door to special interests to get out from under regulations they didn't like. In its place we have a dramatically different approach, fair, streamlined, responsive, much more straight-forward.

Under the executive order that I'm signing today, involvement by the president and the vice president in the regulatory process is strictly limited. The order permits the vice president's review only at the request of a cabinet or the OMB's OIRA office. Communications between White House staff members and the public are limited, too, on matters of regulation. In order to be utilized in the rule-making process or the review process, they must be made in writing.

and put in the public record.

Just these changes alone mean that the days of back door access to undermining the regulatory process is over. But we also want to limit the number of regulations that may be reviewed by the Office of Information and Regulatory Affairs. It's very important that we let ordinary regulations be done in a more timely fashion where the people who are going to be affected by them have more front-end involvement.

This order requires written justification for rejections of regulations, mandates sunshine provisions, requires a publicly available log -- which the press will love. (Laughter.) It has guidelines not just for review of new regulations, but -- this is very important -- for review of existing regulations, too. We should be eliminating regulations even as we have new ones.

This office will -- this order will lighten the load for regulated industries and make government regulations that are needed more efficient. Most of all, it will put behind us the politics of adversarialism that has divided government and industry for too long. We saw a beginning of what that can mean for America yesterday with the announcement between the government and the auto industry of the project to try to triple the fuel efficiency of our cars by the end of the decade. That's the sort of thing we ought to be focusing on in our relationships with government and industry.

In the last few weeks, we've seen a remarkable amount of progress in our nation, a lot of things turning around. This is an important step in that process. The way the government relates to people whom it must regulate or decide whether to regulate or not has an enormous amount to do with the credibility that our government has with all the citizens of our country and with how we're spending their tax money. I am very excited about this. I think the wind is now behind us, and I hope we can see through this project and continue on the road that we are clearly taking now.

I'd like to ask the vice president to say a word or two about the order.

**VICE PRESIDENT GORE:** Thank you, Mr. President.

Regulatory reform is an extremely difficult and important challenge, and your team has approached it with tremendous dedication. It's been a long process: We have worked very closely with representatives of the business community, with public interest groups and hundreds of agency regulators, economists and lawyers.

Because we have included so many people and taken their concerns into account, I'm happy to report to you this morning, Mr. President, that the wars over regulatory review are now coming to an end. The executive order that you are about to sign is being publicly endorsed this morning by the Business Roundtable and the Sierra Club, the Chamber of Commerce and Public Citizen, NFIB and OMB Watch, and Small Business United and many other groups both on the right and on the left.

Because the argument is no longer pro-regulation or anti-regulation, the argument is about

how we regulate, how we involve the people affected by the process in the decisions that are made, how we eliminate the unnecessary and obsolete regulations that are a burden on our economy, and how at the same time we discharge the obligations to regulate when it is necessary but only when it is necessary, and whenever it is done in as wise a way as possible with the least intrusion possible.

I'd like to thank, Mr. President, Jack Quinn and Kumiki Gibson on my staff for the work they've done on this; Sally Katzen, who is heading the Office of Information and Regulatory Affairs at OMB, and whose appointment received universal approval also from the right and the left, and she's helped tremendously in this; and Jim Kohlenberger and Linda Lance on my staff also, and all of the Cabinet members and those who worked with the Cabinet members on regulatory affairs.

The principles embodied in this executive order were outlined in detail in the National Performance Review in the section on regulatory reform, and it is a tremendous challenge that also requires constant attention. You will be issuing along with this executive order a set of instructions to various people in the executive branch that will also emphasize things like negotiated regulations, so that we avoid all of the fine print, detailed command and control approach, and as you suggested in your remarks, instead focus on the broad objectives, build trust and confidence and partnership and reach the results that our nation wants us to reach without all of the constant battling and fighting and unnecessary red tape.

So it is a real step forward, Mr. President, thanks to all of the people on your team who have made this possible.

PRESIDENT CLINTON: Thank you.