

White House Seeks Public Comment on Potential New Executive Order that Could Significantly Change Office of Management and Budget Regulatory Review Processes

On February 26, 2009, the White House Office of Management & Budget (OMB) announced it will take public comment on a potential new executive order that could have significant impacts on executive review of proposed agency regulations affecting the vast range of businesses, organizations, and individuals regulated by the federal government (74 Fed. Reg. 8819, Feb. 26, 2009). Public comments are due March 16, 2009.

More specifically, the February 26 notice explained the Director of OMB is developing a set of recommendations to the President for a new executive order on federal regulatory review. OMB has taken the unusual step of inviting public comment concerning how the OMB process can be improved and, specifically, the principles that should govern the OMB review process. In a recent Memorandum for the Heads of Executive Departments (74 Fed. Reg. 5977, January 30, 2009), President Obama instructed the Director of OMB to produce these regulatory review recommendations, which “should offer suggestions for the following:

- The relationship between OMB’s Office of Information and Regulatory Affairs (OIRA) and the agencies;
- Disclosure and transparency;
- Encouraging public participation in agency regulatory processes;
- The role of cost-benefit analysis;

- The role of distributional considerations, fairness, and concern for the interests of future generations;
- Methods of ensuring that regulatory review does not produce undue delay;
- The role of the behavioral sciences in formulating regulatory policy; and
- The best tools for achieving public goals through the regulatory process.

Notably, public comment is not required, and seldom sought for executive orders. The fact that OMB is seeking public comment here may indicate the White House is contemplating a substantial departure from Bush-era (and Clinton-era) directives which increased executive oversight over, and cost-benefit analysis of, a broad array of agency actions. It may also signal a diminished role for OIRA, which has been singled out by interest groups which argue the Bush Administration misused OIRA to stall important environmental and safety regulations by requiring searching analysis of the impacts of these regulations on the financial well-being of the companies that are required to comply. At the same time, OMB review has provided an important safeguard, helping to ensure that legislative and regulatory requirements are implemented in a manner that is evidence based and avoids imposing undue legal and economic burdens on regulated companies and the public.

Accordingly, the OMB request for public comment provides an important opportunity, as the new Administration organizes, for companies and other entities regulated by the vast majority of federal agencies to explain and suggest improvements to these valuable

OMB processes. Clearly, the various regulated communities can reasonably expect the outcomes of substantive regulatory policy decisions to be different under the Obama Administration than they were under the G.W. Bush Administration. Certain OMB review protocols will likewise be revised to reflect the analytical approaches of the new President's OIRA administrator. That being said, successive administrations since at least the 1970's, up to and including the G.W. Bush Administration, have worked to improve the analytic rigor and transparency of these executive regulatory review processes, and the status and outcomes of OMB review are publicly available through the OMB website.

The Obama Administration is articulating a very ambitious regulatory agenda that includes, among other things, addressing climate change concerns; reform of the securities and banking industries; food, drug and product safety; and re-orientation of the nation's health care delivery and reimbursement system. Setting aside differing policy perspectives as presidential administrations change, there has always been, and always will be, a role for the application of impartial standards to ensure that regulations are based on sound science and an informed understanding of their direct and indirect costs and benefits.

ROLE OF OMB

OMB's mission is to assist the President in the preparation and implementation of the annual budget and to supervise White House administration of Executive Branch agencies. In that role, OMB helps set agency priorities and evaluates the efficacy of agency programs, policies, and rules. Throughout its history, various executive orders have provided the basis for the level of oversight that OMB brings to bear over agency rule-making and guidance – typically through OIRA.

OMB/OIRA's current role is largely governed by former President Clinton's Executive Order 12866, which established the guiding principles agencies must follow, and OMB/OIRA must enforce. Those principles include encouraging the use of cost-benefit analysis, risk assessment, and performance-based regulatory stan-

dards. OIRA is typically engaged in a rulemaking both early in the process and at the clearance stage just prior to promulgation.

President G.W. Bush amended Executive Order 12866 to require executive agencies and OMB/OIRA to apply the E.O. 12866 requirements to "guidance documents" which may have regulation-like impacts on the regulated community. The G.W. Bush Administration also developed additional procedures and guidelines for, among other things, scientific risk assessments and small business impact analyses, as well as a thorough on-going revision of regulatory review standards and methodologies. Accordingly, under President Bush, OMB/OIRA was particularly influential.

For instance, under then-Administrator, Dr. John D. Graham, OIRA developed and implemented OMB Circular No. A-4 on September 13, 2003 (which became effective for economically significant final rules on January 1, 2005). Dr. Graham, in a March 2, 2004, memorandum, explained that the regulatory review guidelines contained in the new Circular:

... include several significant changes from previous OMB guidance. For example, they include (1) more emphasis on cost-effectiveness analysis, (2) formal probability analysis for rules with more than a billion-dollar impact on the economy, and (3) more systemic evaluation of qualitative as well as quantified benefits and costs. OMB analysts are now reviewing for compliance with Circular No. A-4 the regulatory analyses prepared under Executive Order 12866. OMB may return a rule to an agency if its regulatory analysis does not conform to Circular No. A-4.

Various public interest groups, which have been long-time OIRA critics are now advocating for substantial revision and limitation of OMB's and OIRA's role in regulatory processes. Significantly, however, OIRA's processes provide all interested parties—and not just the regulated community—an equal opportunity to present their concerns regarding the need, scope and/or impact of a rulemaking. The ground-rules for these commu-

nications are set forth in Executive Order 12866 and in OMB guidance documents. Communications by members of the public with OMB regarding a proposed rule, whether oral or written, are made public on OMB's website. So, too, are any documents provided to OMB. Face-to-face meetings are required to be held at OMB, and representatives of the regulating agencies have notice and an opportunity to be present (*Executive Order 12866*). Moreover, OMB representatives listen to presentations by members of the public requesting the meeting, but do not facilitate, or even permit, debate or negotiation with the agency.

For instance, the public OMB record shows that Kelley Drye and its client representatives had Executive Order 12866 meetings at OMB, just as did interest groups that specifically sought a different regulatory outcome. In certain instances, our participation in OMB processes, as well as the participation of those with a different substantive point of view on proposed agency action, may have led the regulating agency to modify, or even to defer action, on a final rule.

POTENTIAL NEW DIRECTION?

Soon after taking office, President Obama asked OMB to produce a set of recommendations for a new executive order which would address the relationship between OIRA and the agencies, facilitate transparency and disclosure, encourage public participation in the rulemaking process, avoid undue delay in the regulatory review process, and reconsider the role of the cost-benefit analysis. More recently, the Federal Register notice further states that the intent of the potential new executive order is to “ensure consistency with presidential priorities, to coordinate regulatory policy, and offer a dispassionate and analytical ‘second opinion’ on agency actions.” Certain groups, including the Center for Progressive Reform, have been advocating aggressively for a diminished role for OMB/OIRA. In fact, media reports have speculated that efforts by such advocacy groups are serving as a catalyst for such a high-profile process to review OMB/OIRA standards and processes.

Taken together, there is significant cause for concern that OIRA's role and processes may be changed to permit agency regulatory efforts to proceed with a less rigorous level of cost-benefit and risk analysis, as well as with a diminished role for OIRA and OMB more generally.

Impartial and rigorous OMB/OIRA review processes represent, however, a critical component of an informed rulemaking, no matter what substantive policy outcome is ultimately implemented. While the Bush-era OMB Circular No. A-4 may be the subject of controversy, it does identify normative analytical objectives that, as a matter of sound regulatory procedure, successive presidential administrations should share. For instance, it explains:

A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs. A non-quantified outcome is a benefit or cost that has not been quantified or monetized in the analysis. When there are important non-monetary values at stake, you [the regulating agency] should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so readers can evaluate them.

As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues. Consultation can be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts (*OMB Circular No. A-4, at 3*).

Regulatory agencies are designed to regulate. They are adept at recognizing the incremental benefits of increasingly strict regulations, but often they do not adequately consider these regulations' costs or unanticipated consequences. Also, both at an institutional and individual human level, they can become vested in certain outcomes. Thus, OMB and OIRA have a significant role to play, regardless of the presidential administration, in providing for a dispassionate and impartial review of proposed agency action. That role is more critical than ever as domestic industries face an unprecedented financial crisis, plummeting consumer spending, and massive global competition. Efforts to diminish, for instance, the role of OIRA, to that of a merely consultative function, eliminate the cost-benefit analysis, and unnecessarily shorten OMB's review time would likely have a significant detrimental impact on the regulatory process itself, not just on particular stakeholders.

RECOMMENDATION

The circumstances and public statements which surround OMB's February 26 request for comments may indicate that the White House is actively considering a significantly diminished role for OMB and OIRA in the agency rulemaking process. As explained above, Kelley Drye & Warren has presented information and analyses to these offices, on the public record, in efforts to ensure balance in the rulemaking process. So, too, have our regulatory adversaries.

Rigorous OMB and OIRA processes can help to promote the development and consideration—both at the agency level and during OIRA review if necessary—of regulatory alternatives which provide equivalent levels of regulatory benefit with significantly less cost to the regulated community. Dispassionate review and oversight should not be set aside in the interests of streamlining implementation of an aggressive regulatory agenda.

To its credit, the White House has sought public input on these processes. President Obama's choice to lead OIRA, distinguished professor Cass Sunstein, may not

share all his recent predecessors' views on how regulatory analysis and review should be conducted, but his writings demonstrate he certainly shares their interest in ensuring an informed and impartial review.

Kelley Drye is encouraging its clients and friends in the various regulated communities to provide comments highlighting the important procedural roles played by OMB and OIRA. Kelley Drye will also be filing its own comments in this matter, highlighting and expanding upon the considerations identified in this client advisory. We are glad to promote joint efforts to increase the profile and decrease the individual costs of this effort. *Comments are due March 16, 2009.*

About Kelley Drye's Government Relations & Public Policy Practice

Kelley Drye's Government Relations & Public Policy practice helps clients interpret and shape governing laws, enabling them to achieve and maintain market leadership. The Government Relations practice includes attorneys who are both litigators and legislative advocates, as well as non-lawyer legislative professionals who have experience with the legislative and executive branches and the federal agencies. We work closely with the full range of Kelley Drye's regulatory practice groups, including, but not limited to, antitrust, advertising, consumer product safety, environmental, food and drug, healthcare, international trade, tax and telecommunications and e-commerce.

**If you would like to participate
in these comments or have any
further questions, please contact:**

DAVID E. FRULLA

Partner

(202) 342-8648

dfrulla@kelleydrye.com