

## **Restoring Regulatory Policy to Serve the Public Interest**

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### **Platform**

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- Direct all regulatory agencies to base their decisions on the standards established by the underlying regulatory statutes, rather than on the economic preferences of the regulated community or the new administration.
- Replace the regulatory review process established by Executive Orders 12291 and 12498 with a new system in which the reviewing agency's mission is not to veto or delay regulatory initiatives, but rather to ensure that the regulatory agencies are performing their required functions expeditiously and efficiently.
- Transform the annual regulatory planning process into a management tool for ensuring that regulatory agencies are provided with adequate resources to perform their regulatory duties in timely fashion.
- Restore the technical expertise of the federal regulatory agencies by providing them with the necessary resources for data gathering, analysis, and monitoring.
- Implement new disclosure policies that permit the public to monitor the progress of all regulatory initiatives and that require regulatory review to be conducted on the public record.
- Direct executive agencies to write regulations in a manner that will facilitate enforcement and to respect decisions by state and local governments affording citizens additional protection beyond federally-prescribed minimum standards.

Attitudes toward economic regulation vary dramatically, but there is wide agreement that social regulations—those designed to protect public health, safety, and the environment—are necessary and desirable. Even free-market advocates recognize the need for government intervention to correct market failures and to provide safety, a clean environment, and protection of public health. Although economic deregulation, which was initiated prior to the Reagan presidency, may sometimes benefit consumers, the Reagan administration's assault on social regulations has been harmful.

Private industry resists regulation because it inevitably increases the costs of doing business. Yet regulation can benefit society by requiring regulated industries to bear the true social costs of their activities, thus ensuring that resources are used most efficiently. Government regulation plays a vital role in protecting public health, safety, and the environment, as required by law.

The Reagan administration espoused regulatory "reform" as one of its top priorities upon assuming office, but it soon demonstrated that its overriding objective was regulatory "relief" for big business. The administration's Task Force on Regulatory Relief, chaired by Vice President Bush, canvassed business leaders to develop a "hit list" of regulations to repeal. On February 17, 1981, President Reagan promulgated Executive Order 12291, which suspended pending regulatory actions and created a regulatory review process centralized in the Office of Management and Budget.

Although the executive order described OMB's role as advisory and consultative, it gave OMB effective veto power over agency actions by prohibiting issuance of proposed or final regulations without OMB approval. Detailed cost-benefit analyses were required for all major regulatory actions, and agencies were directed to refrain from acting unless benefits outweighed costs. A subsequent Executive Order (12498) expanded OMB's role by requiring that regulatory initiatives be approved by OMB up to a year in advance and incorporated in an annual report, *The Regulatory Program of the United States*.

Not surprisingly, the Reagan administration used the new review process to block regulations opposed by its big business constituency. The administration's central concern was not to maximize net benefits to society, but rather to reduce costs borne by industry. Many significant initiatives to control threats to public health and the environment were vetoed by OMB or blocked until agencies agreed to weaken them.

The most pernicious part of the administration's anti-regulatory strategy was an assault on the technical expertise of the regulatory agencies. OMB slashed the budgets of the regulatory agencies even as it demanded costlier and more complicated analyses from them. Agencies were prohibited from proposing major new regulations until detailed cost-benefit analyses were performed, but major regulations could be repealed (as the administration tried to do with the extraor-

dinarily beneficial limits on lead in gasoline) without any analysis at all.

OMB cloaked its actions in extreme secrecy to avoid disclosure of instances when they were not consistent with statutory requirements or were products of *ex parte* contacts with affected industries.

Despite its anti-regulatory fervor, the Reagan administration has had remarkably little success in changing the basic structure of federal health, safety, and environmental laws. Perhaps the most lasting legacy of the administration's policies will be to undermine the prospects for genuine regulatory reform, which was discredited by the administration's biased program.

Despite the Reagan administration's abuse of the regulatory review process, the next administration should resist the temptation to abolish regulatory review entirely. A modified regulatory review and planning process could be a significant tool for revitalizing regulatory policy. The review process could be transformed into a positive tool for ensuring that regulatory policy operates more efficiently, expeditiously, and equitably. These changes can be accomplished by replacing Executive Orders 12291 and 12498 with a restructured regulatory review process and by implementing new regulatory and disclosure policies.

First, the new administration should direct all regulatory agencies to base their decisions on the standards established by the underlying regulatory statutes, rather than on the economic preferences of the regulated community or the new administration.

The Reagan administration made little effort to seek statutory change to accomplish its anti-regulatory goals. Instead, it often attempted to "repeal" regulatory statutes indirectly by forcing executive agencies to base their decisions on factors not permissible under the statutes. This raises serious legal concerns, because our constitutional system of government charges the executive with making sure that laws are faithfully executed.

The new administration must recognize the importance of statutory directives, even those the president may disagree with. If the administration wishes to change the law to implement new regulatory policies, it should ask Congress to do so. Otherwise, it must ensure that the regulatory decisions made by executive agencies conform to statutory requirements.

Second, the new administration should replace the regulatory review process established by Executive Order 12291 with a new system in which the reviewing agency's mission is not to veto or delay regulatory initiatives, but rather to ensure that the regulatory agencies are performing their required functions expeditiously and efficiently.

Regulatory review and planning must be used to expedite the regulatory process while opening regulatory decisionmaking to full public scrutiny. The reviewing agency should not be allowed to dis-

place agency decisionmaking or to put an indefinite hold on agency actions.

The new administration should transform the annual regulatory planning process into a management tool for ensuring that regulatory agencies are provided with adequate resources to perform their regulatory duties in a timely fashion.

Even before the Reagan administration, the glacial pace of the regulatory process was a chronic problem. The administration's actions aggravated this problem by building further institutional delays into the process. These delays are evident to anyone who has examined the progress of agencies in meeting their own deadlines for regulatory action, as reported in the agencies' semi-annual *Regulatory Agendas* and the annual *Regulatory Program of the United States*.

The new regulatory review process should be used to monitor the progress of agency initiatives. Budgetary authorities should ensure that adequate resources are allocated in advance for agencies to perform their anticipated regulatory functions. Regulatory review should be used to expedite the regulatory process by alerting program managers to important issues at an early stage, rather than to generate indefinite delay at the final stage of the process.

The new administration must make a concerted effort to restore the technical capacity of the federal regulatory agencies by increasing the resources available to them for data-gathering, analysis, and monitoring. Such investments will pay great dividends because the impact of regulatory decisions is so enormous.

The new administration should establish a disclosure policy that permits the public to monitor the progress of all regulatory initiatives and that requires regulatory review to be conducted on the public record.

Secrecy has been essential to the Reagan administration's anti-regulatory efforts. Unable to convince Congress to change the regulatory statutes, the administration resorted to extra-legal behavior to accomplish its ends. It abused the so-called "deliberative process" privilege in order to shield improper behavior from public scrutiny.

To ensure fairness in the regulatory process, regulatory review must be conducted on the public record. Significant comments by any reviewing agency should be submitted in writing and placed in public rulemaking dockets at the time the comments are made. Contacts by agency personnel with outside parties should be logged and placed in rulemaking dockets. The public record also should reflect any changes in regulatory proposals that occur in response to comments by reviewing agencies. This can be accomplished by requiring that drafts of all regulatory proposals submitted to other agencies for review be included in the docket. Concern that disclosure of deliberative information may have a chilling effect is misplaced; it will deter only comments that urge consideration of inappropriate factors.

The new administration should also disclose, upon request, the status of any pending regulatory proposal even if such disclosure is not required by the Freedom of Information Act). This will facilitate public monitoring of regulatory initiatives, enhancing public participation and pressure for expeditious action. Conducting regulatory review on the public record also will help ensure that agency decisions conform to statutory requirements.

The new administration should direct executive agencies to write enforceable regulations. A credible threat of enforcement is essential to achieving voluntary compliance with regulatory standards. Yet regulatory standards often are developed without adequate consideration of their enforcement implications. Too many regulations are written in a manner that makes enforcement difficult. The result is a kind of "Victorian compromise," in which very ambitious sounding standards are on the books, but often ignored in practice.

The Reagan administration aggravated this problem by reducing monitoring and enforcement resources. This policy shift was particularly dramatic in the early years of the Reagan administration at the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Department of Interior.

The new administration should expand the resources devoted to monitoring and enforcement while giving enforcement authorities greater input into the design of regulatory standards. Regulatory strategies based on economic incentives that afford regulated industries more flexibility will be successful only if they are enforceable. Expanded use of alternative dispute resolution techniques and other enforcement innovations will be effective if coupled with measures to expand the credibility of traditional enforcement techniques.

The new administration should direct executive agencies to respect decisions by state and local governments to afford their citizens additional protection beyond federally prescribed minimum standards. Despite its rhetoric, the Reagan administration applied its "federalism" selectively and inconsistently. While invoking federalism to justify weakening nationally applicable social regulations, it did not hesitate to preempt occasional state efforts to afford citizens greater protections. For example, after opposing OSHA's efforts to issue a national hazard communication standard, the Reagan administration abruptly shifted gears and acted to preempt state regulation after certain states enacted tough standards.

The new administration should recognize that minimum national standards are important to prevent economic competition among states from undermining health and environmental protection. But when states and localities choose to afford their citizens a higher level of protection (and to bear the costs of doing so), that choice should be respected by federal authorities.

The new administration will face a formidable task in restoring regulatory policy to serve the public interest. This can be accomplished

by transforming the regulatory review and planning process into a positive tool for improving the speed, efficiency, and fairness of the process.

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## Resources

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### Recommended Appointees for a New Administration

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- William J. Baer, Partner, Arnold & Porter, Federal Trade Commission official in the Carter administration, expert on regulatory policy issues
- William Drayton, Director of Environmental Safety, MacArthur Fellow, former Assistant Administrator for Planning and Management, Environmental Protection Agency
- George C. Eads, former Dean of the University of Maryland School of Public Affairs, member of President Carter's Council of Economic Advisors and chairman of Regulatory Analysis Review Group, currently Vice President and Chief Economist for General Motors
- Michael Fix, Senior Research Associate and attorney at the Urban Institute, who has written extensively on regulatory review and regulatory policy issues
- Alfred Kahn, former CAB Chairman and anti-inflation czar in the Carter administration, currently Professor of Economics at Cornell University, has written extensively on regulatory policy
- Richard Morgenstern, Director, Office of Policy Analysis, Environmental Protection Agency, who coordinated EPA regulatory policy in the face of OMB opposition
- Alan Morrison, Director, Public Citizen Litigation Group, who has brought much of the most important litigation on regulatory policy issues
- Robert Pitofsky, Dean of the Georgetown University Law Center, former member of the Federal Trade Commission, expert on anti-trust and regulatory policy
- Robert Reich, former Federal Trade Commission official, has written extensively on regulation and the interface between business and government, now at Harvard's John F. Kennedy School of Government
- Cass R. Sunstein, Professor at the University of Chicago Law School, has written brilliantly and extensively on administrative law and the regulatory policy process
- Susan J. Tolchin, Professor of Public Administration at George Washington University, an expert on the regulatory policy process, co-authored *Dismantling America: The Rush to Deregulate* (1983)

### **Organizations**

- Advocacy Institute, 1730 M St. NW, Washington, DC 20036; (202) 659-8475
- Alliance for Justice, 600 New Jersey Ave. NW, Washington, DC 20001; (202) 624-8390
- Oversight and Investigations Subcommittee, House Energy and Commerce Committee, 2323 Rayburn HOB, Washington, DC 20515; (202) 225-4441
- OMB Watch, 2001 O St. NW, Washington, DC 20036; (202) 659-1711
- Public Citizen Litigation Group, 2000 P St. NW, Washington, DC 20036; (202) 785-3704

### **Further Reading**

- Christopher Demuth and Douglas Ginsburg, "White House Review of Agency Rulemaking," 99 *Harvard Law Review*, 1975, 1986.
- George C. Eads and Michael Fix, *Relief or Reform? Reagan's Regulatory Dilemma*, Urban Institute Press, 1984.
- Michael Fix and George C. Eads, "The Prospects for Regulatory Reform: The Legacy of Reagan's First Term," 2 *Yale Journal on Regulation*, 293, 1985.
- John M. Mendelhoff, *The Dilemma of Toxic Substance Regulation*, 1988.
- Lester B. Lave, *The Strategy of Social Regulation: Decision Frameworks for Policy*, Brookings Institution, 1981.
- Alan Morrison, "OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation," 99 *Harvard Law Review*, 1059, 1986.
- Erik D. Olson, "The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12291," 4 *Virginia Journal of Natural Resources Law*, 1, 1984.
- OMB Watch, *OMB Control of Rulemaking: The End of Public Access*, August 1985.
- Robert V. Percival, "Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget," 17 *Environmental Law Reporter*, 10017, 1987.
- Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12291," 80 *Michigan Law Review*, 193, 1981.
- Peter L. Strauss and Cass R. Sunstein, "The Role of the President and OMB in Informal Rulemaking," 38 *Administrative Law Review*, 181, 1986.

- Subcommittee on Intergovernmental Relations, Senate Committee on Governmental Affairs, 99th Cong., 2nd Sess., *Oversight of the Office of Management and Budget Regulatory Review and Planning Process*, 1986.
- Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 99th Cong., 1st Sess., *EPA's Asbestos Regulations: Report on a Case Study of OMB Interference in Agency Rulemaking*, 1985.
- Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 99th Cong., 2nd Sess., *OMB Review of EPA Regulations*, 1986.
- Susan J. Tolchin and Martin Tolchin, *Dismantling America: The Rush to Deregulate*, Houghton Mifflin, 1983.

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Robert V. Percival is an Assistant Professor at the University of Maryland Law School. Prior to joining the Maryland faculty, Percival was a senior attorney with the Environmental Defense Fund, where he served as lead counsel in *EDF v. Thomas*, the first successful legal challenge to OMB's use of regulatory review to delay promulgation of regulations subject to statutory deadlines. He has written and testified frequently on regulatory review and policy issues.

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