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CHAPTER 2:

THE FIRST 100 DAYS

This chapter identifies recommendations that President-Elect Obama should implement within the first 100 days of his administration. Those recommendations are followed by legislative action that should begin in the first 100 days of the 111th Congress.

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exception to this general rule is in the area of transparency. As we note above in the second principle, openness is critical to meaningful government accountability and much easier to accomplish with current information technology. The need to know what our government is doing and to participate fully as informed citizens requires the availability of information. As a result, government transparency and disclosure, and the public's right to know, are themes that run through this entire report.

The vision and the general thrust of the recommendations in this report are supported by each of us, although not all of us agree on every recommendation or characterization. With a new presidential administration and a new Congress taking office in 2009, we believe there is a great opportunity to reform a regulatory system urgently in need of repair. We hope these recommendations contribute to that important work.

ENDNOTES

1. See, for example, a nationwide Harris poll of adults taken October 16-23, 2007 found 53 percent believed there was too little government regulation around environmental protection; only 21 percent thought there was too much regulation. In another Harris poll of adults, from October 9-15, 2007, a majority of Americans believed oil, drug, and health insurance companies should be more regulated. At least 41 percent wanted more regulation of HMOs, gas and electric utilities, and tobacco.
2. Federal regulations, or rules, are "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency", according to the Administrative Procedure Act (APA) 5 USC §551(4), the principle federal law governing how agencies make rules to implement legislative mandates from Congress. In this report, the terms "regulations," "rules," and "protections" include regulations (the products of the rulemaking process), orders (the products of adjudicatory proceedings including permits and licenses), and deregulatory actions.
3. One outcome of these requirements is that the burden imposed on the regulated community has come to dominate considerations of regulations, except when explicitly stated otherwise in law.
4. Thomas McGarity has been making these arguments for more than 15 years. He argues that there is an "increasingly rigid and burdensome" federal regulatory process. See Thomas O. McGarity, "Some Thoughts on "Deossifying" the Rulemaking Process," Duke Law Journal, vol. 41 (1992), pp. 1385, 1385-86. Four years later, during debate over the Contract with America, McGarity makes the "paralysis by analysis" argument in Thomas O. McGarity, "The Expanded Debate Over the Future of the Regulatory State," University of Chicago Law Review, vol. 63 (1996), pp. 1463, 1523.
5. Mark Seidenfeld, "A Table of Requirements for Federal Administrative Rulemaking," Florida State University Law Review, vol. 27 (2000), pp. 533, 533-545.

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OUR PERSPECTIVE

The *Advancing the Public Interest Through Regulatory Reform* project was conceived during a time when regulatory problems were making national news. Mine and crane collapses killed workers; contaminants in toothpaste, pet food, and other products shipped from overseas made people and animals sick; contamination of spinach, jalapeños, meat, and other foods caused death and illness; dangerous chemicals were used in popular medicines; over-the-counter cough syrups were withdrawn because of hazards to toddlers; public lands and natural resources were exploited; endangered species and the climate went unprotected; and the housing and financial sectors began to collapse. In some instances, business interests are calling for better and stronger regulations to help reassure the public that their products are safe. Public interest advocates argue that these examples, and others, are a result of putting politics above the public interest.

It is our view that the new president and Congress must take decisive action to fix a regulatory system that, after a generation of attacks, has become dysfunctional. Quick action is needed to restore trust in government and better serve the public.

A key part of the "Reagan Revolution" was reducing regulation in the name of cutting government red tape. Operating on the principles of limited government and marketplace supremacy, the Reagan administration put forward a centralized regulatory review process controlled by the Office of Management and Budget (OMB) that imposed on agencies a central role for cost-benefit analysis in assessing the utility of a regulatory proposal. From the early 1980s to today, through legislation and various executive actions, there have been a number of requirements imposed on agencies to perform detailed analyses, focused on costs in particular, before moving forward with new regulation.[3] With the addition of each requirement, more and more time and resources are needed by agencies to complete rulemakings. Thus, a key part of the problem today is that it takes too long to get rules completed.

Seldom, if ever, has there been an effort to reduce the complexity of requirements imposed on agencies – the internal red tape. As a result, a number of students of the regulatory system criticized the process as "ossified."[4] Recognizing the growing list of requirements agencies must go through in order to finalize a rule, one study identified a comprehensive list of these requirements.[5] The list identified 110 requirements under 20 different laws, executive orders, and other policy pronouncements that agencies must follow. Since this study was published in 2000, there have been additional requirements imposed. For some agencies, it now takes more than a decade to implement a major rule.

Because the current regulatory system is so severely weighed down with procedural and analytical delays, we have tried to propose recommendations that do not impose additional burdens on regulatory agencies. The one

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for regulatory reform for the president and the Congress to take up in the first 100 days. Finally, we recommend a series of ongoing reforms aimed at creating a regulatory process that is open, inclusive, and efficient.

Ultimately, we envision governance that elevates the importance of sensible regulation and protects the public from harm. This vision relies on six principles that the next president should embrace:

1. **Regulatory decisions should be timely and responsive to public need.** It takes far too long to complete most rules. Timely action is a benefit to public and business interests. Government must actively assess public needs, identify where regulatory gaps exist, and act to address such gaps. Regulatory decisions should be based on the best available information, balanced with the need to act in a timely manner.
2. **The regulatory process must be transparent and improve public participation.** Too many important regulatory decisions are made behind closed doors. Openness, from pre-rulemaking to publication, is essential to meaningful accountability. The Internet age affords new ways of fostering meaningful public participation.
3. **Regulatory decisions should be based on well informed, flexible decision making.** The current regulatory process consists of unprecedented levels of suppressing, altering, and discrediting the information used to support regulatory decisions. There needs to be a premium on placing authority within regulatory agencies to decide what information is critical to effective regulations.
4. **Authority to make decisions about regulations should reflect the statutory delegation granted by Congress.** Federal agencies are given the responsibility to implement legislation and have the substantive expertise necessary to develop effective standards. That expertise should be recognized and provide the foundation for sound regulatory decisions.
5. **Agencies must have the resources to meet their statutory obligations and organizational missions.** For decades agency resources – human, financial, and organizational – have been cut or have not matched the growing responsibilities agencies have for implementing their statutory mandates. Resources are needed for addressing regulatory gaps, providing accountability mechanisms, and meeting regulatory compliance and enforcement functions.
6. **Government must do a better job of encouraging compliance with existing regulations and fairly enforcing them.** Agencies have too often been discouraged or prevented from using their compliance and enforcement tools to achieve effective compliance. In order to strengthen public protections and provide regulated communities with fair and predictable compliance approaches, agencies must be enabled to more effectively meet both current and new demands and work to improve regulatory compliance.

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ADVANCING THE PUBLIC INTEREST THROUGH REGULATORY REFORM

Federal regulations are critical elements to implementing public policies. Together these regulations provide the protections we need to ensure that our food is healthy, our children's toys are safe, our air and water are clean, dangers in our workplaces are reduced or eliminated, and our economy functions efficiently and effectively. Despite the importance of these essential governmental functions, neither the process for creating these protections nor the protections themselves receive much public attention until we discover they do not work or are not there at all.

With the growth of regulatory government, many politicians and social commentators have taken aim at these protections, flinging inflammatory rhetoric at governmental regulation: red tape, burdensome paperwork, bureaucrats run amok, and big government are just some of the invectives used. For 28 years, a philosophy of de-regulation and weak oversight has prevailed in Washington. The recent financial crisis affecting nearly every aspect of American life demonstrates the importance of having common sense protections and meaningful oversight. When it comes to Wall Street, few today would say "less regulation is better regulation."

Americans expect their government to protect them not only from financial harm but also from other dangers by providing common-sense protections and better enforcement. Virtually every day, there is news of food-borne illnesses, unnecessary workplace injuries, health problems emanating from environmental hazards, and other dangers. The majority of the public expects our government to ensure that the food we eat, the water we drink, the air we breathe, the items we buy, and the places we work are safe.[1]

This national election was largely about the need for change, including the way government approaches these public protections. Thus, the new administration has an opportunity to demonstrate that government will once again provide sensible protections to safeguard them and ultimately change the way we think about "government regulation."[2] But it must act now.

Government needs to change not only the substance of our rules but also the process by which they are made, reviewed, implemented, and enforced. Government needs to streamline the regulatory process, open it up and make it more transparent, link it more effectively to the expert community and the public that it serves, and give it the resources it needs to make and implement wise decisions that serve the public good.

This report is the work of the *Advancing the Public Interest Through Regulatory Reform* project – a group of 17 regulatory experts with varying perspectives on the regulatory process. We begin with a set of basic principles that should guide the thinking about regulatory reform. We then lay out a plan

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CHAPTER 1:

INTRODUCTION

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again effectively provide public protections, especially the work to design, implement, and enforce rules. Based on this information, the president should propose needed agency increases, and Congress should appropriate the requested funds.

Also during the transition process, the president should assess last-minute regulations from the previous administration. Outgoing administrations are noted for a rush of late regulatory activity, often called "midnight regulations." We recommend the president and the new Congress review regulations promulgated in the last months of the previous administration to identify ways to stop ill-advised rules from going forward. This review should include an assessment of whether the Congressional Review Act's procedures for resolutions of disapproval are needed.

The vision and the general thrust of the recommendations expressed in this report are supported by each of us, although not all of us agree on every recommendation or characterization. With a new presidential administration and a new Congress taking office in 2009, we believe there is a great opportunity to reform a regulatory system urgently in need of repair. We hope these recommendations contribute to that important work.

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Research and analysis are essential ingredients to effective rulemaking. Unfortunately, the integrity of the regulatory process has been seriously compromised by placing politics ahead of science and agency expertise. To fix this problem, the president should send a clear message early in the new administration that federal agencies will adhere to the highest principles of scientific integrity and independence. Regulatory development needs the best information that can be garnered from the scientific community, both within and outside of government. Agencies should be encouraged to restore needed collection and monitoring programs and address new information needs. It is equally important that this information is used in an objective and transparent fashion as the foundation for decisions affecting the public interest.

As indicated in the principles outlined above, transparency is a theme throughout this report. Transparency in the rulemaking process leads to a greater sense of government legitimacy, provides an important tool with which to hold government officials accountable, and can enhance public participation. To improve transparency in the regulatory process, the federal government should adopt a strategy that moves toward a presumption of openness through all stages of the process, including those stages where information and communications are not currently disclosed.

The Internet age allows agencies to make information publicly available more easily than in the past, and interactive technologies allow users to more easily access information. Agency rulemaking dockets should be expanded to include a wide range of information related to the rulemaking and available in an easily searchable online format. All research, public or private, used in the rulemaking should be included in the rulemaking docket, along with substantive communications regarding a rulemaking. Agency meetings, including those held to provide policy advice, should be as open as possible. Disclosure should begin upon creation of the rulemaking dockets and should occur as soon as possible after documents, communications, or other types of information are available.

Lack of resources is a critical problem in regulatory agencies. From research to enforcement, resources – both human and financial – have been cut. Agencies are experiencing an exodus of experts as budgets are cut or level-funded, often in the face of increasing regulatory responsibilities. We understand that the recommendations in this report to make the regulatory process work more effectively again will not happen without additional funding. There is public, private, and congressional support for beginning to restore the ability of federal agencies to respond to regulatory issues, even in a time of scarce federal resources. Without sufficient financial and human resources and clear enforcement goals, these issues cannot effectively be solved.

During the transition process, the president should ask agencies to review their regulatory budgetary needs for the current and next fiscal year to begin a process of restoring the personnel and research needed to once

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More directly, we believe that the White House has been too involved in the substantive review of agency rulemakings, at times disagreeing with agency experts and changing the science presented by the agencies. This needs to stop. It is essential that any White House requirements on agencies' actions give agencies flexibility to apply regulatory assessment tools in a manner that makes the most sense for agencies' missions and to ensure agency regulatory actions are consistent with statutory requirements.

We are in agreement that Executive Order 12866, *Regulatory Planning and Review*, is outdated and is no longer appropriate for today. This 1993 order outlines the process for agency and executive branch regulatory actions. We are not in agreement on whether E.O. 12866 should be replaced, but if it is, it should adhere to the principles above and benefit from the recommendations presented by the blue ribbon commission.

Cost-benefit analysis has been required by E.O. 12866, and OIRA has provided a prescriptive directive, Circular A-4, Regulatory Analysis, on how agencies are to conduct such analysis. We have differing views on the utility of cost-benefit analysis, but we do agree that prescriptive directives such as Circular A-4 should be curtailed. If there is White House guidance on cost-benefit analysis, it should provide agency flexibility on how to do such analyses, including the option to decide if such analyses are to be done at all.

We also have strong agreement on the principles that should steer any cost-benefit guidance:

a. Cost-benefit analysis should only be used in ways consistent with the values expressed in statutory or judicial provisions;

b. Cost-benefit analysis is an analytical tool and should not be determinative in regulatory decision making unless specifically required by statute (i.e., it should be a source of information, not a decisional standard);

c. Information and assumptions used in cost-benefit analysis should be transparent and allow for the analysis to be replicated. The analysis should include statements of uncertainty about the assumptions;

d. Cost-benefit analysis should disclose both quantitative and qualitative aspects – and utilize both when interpreting results;

e. Cost-benefit analysis should include an explicit statement about who benefits and who bears the costs; and

f. While it may be appropriate to have methodological questions about cost-benefit analyses conducted by federal agencies, the White House or other regulatory review agencies should never manipulate or alter results.

Overall, we recommend reducing the emphasis on quantification in regulatory decision making, reestablishing the importance of statutes in guiding agency actions, and changing the use of cost-benefit analysis as a determining factor in decision making except when it is specifically mandated in statute.

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ORGANIZATION OF THE REPORT

The Introduction to the report, Chapter I, further explains some of the problems with the current regulatory process and our perspective on why it is so important to reform that process. Chapter II contains our recommendations to both the president and Congress for actions to take in the first 100 days of the new administration. Chapter III is divided into five sections that contain recommendations for how to: 1) improve regulations; 2) restore integrity and accountability to the generation, collection, and use of information; 3) improve the implementation and enforcement of regulations; 4) increase the transparency of the process; and 5) improve mechanisms to allow greater public participation in the regulatory process.

The following section highlights the recommendations we consider to be of highest priority, the ones most critical to making the regulatory process better serve the public interest.

HIGH-PRIORITY RECOMMENDATIONS

We urge the next president to give significant attention to fixing the regulatory process and to make this agenda an early priority. We recommend that on the first day in office, the new president impose a moratorium on finalizing any new regulations and review those rules finalized but not yet in effect, except those required by court order, statute, or necessary to meet regulatory emergencies. The moratorium should be in effect for 60 days pending agency review and reconsideration of these rules. This moratorium has become the pattern for new presidents. To set a new tone, however, we think the president should also instruct agencies on his views of the importance of using regulatory tools to protect the public and that the regulatory process should serve the public, not special interests.

He should also announce his intent to establish a blue ribbon commission of regulatory experts to recommend ways to speed up the regulatory process by reducing unnecessary analytical and procedural requirements imposed by statute or executive authority. The goal of this commission is to make fundamental changes to the regulatory process so that rules are more effective, efficient, and timely.

Analytical and procedural requirements are only part of the problem. Of critical importance is the need to address the relationship between the Office of Information and Regulatory Affairs, the White House office with the current responsibility for reviewing agency regulations, and the federal agencies charged under law with the responsibility for issuing regulations. As a first step, Executive Order 13422, which deals with regulatory review, should be rescinded. It places significant regulatory authority with Regulatory Policy Officers, displacing agency heads and adding inappropriate power to White House rulemaking judgments.

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The new president and Congress must address this problem with urgency and precision in order to restore trust in government and protect the public good. Government needs to change the quality of our rules; simplify the process by which they are made, reviewed, implemented, and enforced; make the process more transparent; and provide the resources necessary to make and implement wise decisions that serve the public good.

The Steering Committee for the *Advancing the Public Interest Through Regulatory Reform* project is comprised of 17 experts on the regulatory process, representing contrasting views about solutions to the problems. We began meeting 15 months ago and quickly agreed that this is a time when contrasting views are mitigated by the desire to fix a broken system. We have put forth a set of 49 recommendations for the president and Congress premised on six principles that we believe should be embraced by government:

1. **Regulatory decisions should be timely and responsive to public need.** Timely action is a benefit to the public and all stakeholders. Government must actively assess public needs, identify where regulatory gaps exist, and act to address such gaps. Regulatory decisions should be based on the best available information, balanced with the need to act in a timely manner.

2. **The regulatory process must be transparent and improve public participation.** Openness, from pre-rulemaking to the publication of final rules, is essential to meaningful accountability in the process. The Internet age affords new ways of fostering meaningful public participation.

3. **Regulatory decisions should be based on well informed, flexible decision making.** There needs to be a premium placed on authority within regulatory agencies to decide what information is critical to effective regulations and to ensure those decisions reside with agency scientists and experts.

4. **Authority to make decisions about regulations should reflect the statutory delegation granted by Congress.** Federal agencies are given the responsibility to implement legislation and have the substantive expertise necessary to develop effective standards. That expertise should be recognized and provide the foundation for sound regulatory decisions.

5. **Agencies must have the resources to meet their statutory obligations and organizational missions.** Resources are needed for addressing regulatory gaps, providing accountability and transparency mechanisms, and meeting regulatory compliance and enforcement functions.

6. **Government must do a better job of encouraging compliance with existing regulations and fairly enforce them.** In order to strengthen public protections and provide regulated communities with fair and predictable compliance approaches, agencies must be enabled to meet more effectively both current and new demands and work to improve or create regulatory compliance programs.

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EXECUTIVE SUMMARY

ADVANCING THE PUBLIC INTEREST THROUGH REGULATORY REFORM

Federal regulations are critical elements to implementing public policy. They provide the protections we need to ensure that our food is healthy, our children's toys are safe, our air and water are clean, dangers in our workplaces are reduced or eliminated, and our economy functions efficiently and effectively. Despite the importance of these essential governmental functions, for at least a generation, many politicians and social commentators have taken aim at these protections, flinging inflammatory rhetoric at governmental regulation.

In light of the negative image of government regulations, Congress and the executive branch have imposed a number of requirements on federal agencies that direct them how and when to regulate. Some hurdles were proposed by those intent on stifling regulatory government, while others came from those hoping to create a process that results in "smarter" regulation. Regardless of the reason, with the addition of each requirement, agencies have had to spend more time and resources to justify and complete rulemakings. For some agencies, it now takes more than a decade to implement a major rule.

The current regulatory process no longer adequately protects the public. Examples of regulatory problems make national news almost daily: the crises in the housing and financial sectors; mine and crane collapses; contaminants in consumer products like toothpaste and pet food; contamination of spinach, jalapeños, meat, and other foods; dangerous chemicals used in popular medicines; and the exploitation of our public lands and natural resources. The process is not only fraught with procedural hurdles, but is one that has been dominated by special interests. Americans not only expect their government to protect them from financial harm, but also from other dangers by providing common-sense protections and better enforcement. Most observers concur that the regulatory process is in need of serious repair.

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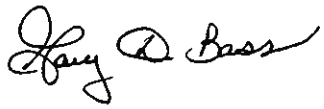
Concerned Scientists, and Ruth Ruttenberg of the National Labor College. Many of the ideas presented here had their seeds in the work of these task forces.

This work would not be possible without the philanthropic support of the William and Flora Hewlett Foundation, the HKH Foundation, and the Open Society Institute, along with general support to OMB Watch provided by the Bauman Foundation and several anonymous donors.

I would also like to thank other OMB Watch staff that helped with this project, including Brian Gumm, Paula Shoecraft, Barbara Western, and Sam Kim. Brian provided editorial and planning assistance, while Paula led the efforts to generate the foundation support for the project. Barb and Sam provided logistical support during this long project.

As one of the authors of these recommendations noted at the end of the process, "We've come a long way..." It is my hope that we have reduced the distance that the new president will need to travel to significantly improve the federal regulatory system.



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FOREWORD AND ACKNOWLEDGEMENTS

In my 25 years of running OMB Watch, I have never seen a project quite like *Advancing the Public Interest Through Regulatory Reform*, the project that has generated the recommendations herein. What began as an OMB Watch project guided by a Steering Committee transformed into an exciting, organic process with a product no longer owned solely by OMB Watch. Instead, these recommendations are a product of 17 diverse regulatory experts.

OMB Watch selected the members of the Steering Committee with three factors in mind. First, they needed to bring expertise either about specific aspects of the rulemaking system or about specific regulatory policy areas. Second, they had to agree that the current regulatory system needed major reform. Finally, they could not be anti-regulatory ideologues. These criteria left much room for various perspectives. In fact, what was striking about the Steering Committee was that the 17 people were not like-minded in their ideas for regulatory reform.

Such a process has its weaknesses and strengths. This product is clearly not the type of report that would be drafted by any one of the signatories; it reflects a consensus and acknowledges where we could not reach agreement. Of course, that may be its greatest strength: It represents a unified voice from diverse regulatory experts who are committed to finding solutions to fix a dysfunctional federal regulatory system.

This report is a testament to the commitment of each of the participants and a recognition of the seriousness of the problems we were addressing. There were many thorny issues; any one of them could have resulted in intransigence and stalemate. But the members were willing to look at problems in new ways and offer solutions to improve the regulatory process rather than solely advancing their past ideas. As chair of this process, I want to thank each member of the Steering Committee for their steady work on this project.

Yet none of this would have been possible without the outstanding staff work of Rick Melberth, who directs OMB Watch's regulatory program, and Matthew Madia, who is an OMB Watch regulatory policy analyst. The two of them managed this entire project. More importantly, they served as "honest brokers," listening to diverse opinions and finding compromise. It is particularly commendable because they worked to represent the will of the Steering Committee. Their ability to reflect the diverse views of the committee is a tribute to their pledge to make this process work.

I also want to thank the many people who provided input and support along the way. One part of this project involved creating four task forces to advise us on the development of recommendations. The participants of those task forces are listed in Appendix 4. However, I would like to personally thank the chairs for their work: Cary Coglianese of the University of Pennsylvania, Steven Croley of the University of Michigan, Francesca Grifo of the Union of

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RECOMMENDATIONS FOR PRESIDENT-ELECT OBAMA

1. **Place a moratorium on finalizing any new regulations, and review those rules finalized but not yet in effect,** except those required by statutory deadlines, court order, or necessary to meet regulatory emergencies, for 60 days pending agency review and reconsideration.

   Most recent presidential administrations have developed regulations in the closing days and months of their administrations that reflect that outgoing president's policy priorities. These "midnight regulations" may be hurriedly developed without full vetting or careful consideration.

   Some midnight regulations may still be winding their way toward completion as a new president takes office. The new president should issue a 60-day moratorium on all rules not yet finalized, giving his appointees time to adequately review them. The moratorium should be announced in a memorandum to agency heads on the first day in office in January 2009. Moratoria have become standard operating procedure for incoming administrations to stop any regulations that are in the pipeline that may be inconsistent with the new president's policies and priorities.

   For those midnight regulations the previous president finalized and published, the new administration should review any final rules not yet in effect. If new rules that have not been implemented need reconsideration, the administration should determine the approaches that can be employed to change or rescind a rule on a case-by-case basis.

2. **To set a new tone for the new administration, the president should pursue the timely appointment of qualified individuals to regulatory agencies critical to protecting the public.** In the past, presidents have too often appointed people to head agencies who were either unqualified or were too closely tied to interests they are asked to regulate as agency

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leaders. These appointments often have had severe consequences for the interests public protections are intended to serve. If a president appoints officials who formerly worked for the industries they will now oversee, the president and Congress need to ensure that the appointee will work in the public's interest.

The new president should draw attention to the importance and uniqueness of regulatory agencies by quickly appointing qualified people with the knowledge, technical expertise, and management skills to restore these agencies to the mission of protecting the public.

3. **Increase agency funding for regulatory implementation and enforcement.** Regulatory agencies urgently need more resources to meet their statutory obligations and organizational missions, as well as for regulatory compliance and enforcement. (See Recommendation C.1.) The new president will immediately need to begin preparing his budget proposal for FY 2010. The president-elect should ask agencies to review their budgets to identify data gaps, restore needed collection programs, and address new areas of information needs as they are confronted with new regulatory problems, and for developing and enforcing regulations. Once the new president takes office, any changes to agency budget requests should be submitted to OMB to help the president in preparing budget revisions for Fiscal Years 2009 and 2010.

4. **The president should form a blue ribbon commission to analyze the regulatory process with the goals of examining existing requirements and reducing unnecessary delay.** The president should establish a blue ribbon commission of experts on federal regulation, including those who may work in government, to: (a) identify existing regulatory requirements imposed by statute, by executive branch policies, and by organizational barriers; (b) make recommendations for changes in regulatory executive orders, directives, and memoranda in order to reduce delays in the rulemaking process; and (c) make recommendations for changes in statutory and procedural requirements in order to reduce delays. The commission should be created within the first 100 days of the administration and the results sent to the president within six months. The president should use this report as a basis for making changes to executive orders and other regulatory policy pronouncements as identified below.

   We arrived at the decision to recommend a blue ribbon panel from our discussions about the many requirements – assessments, directives, legislative requirements, etc. – that create burdens on agencies as they try to promulgate regulations in a timely and flexible manner. Some of us felt that the Small Business Regulatory Enforcement Fairness Act (SBREFA), along with risk assessment, peer review, and other requirements, have caused unnecessary delay. Others focused on different analytical requirements or institutional barriers. Although many people have different opinions

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about which of these requirements are burdens and which are necessities, we agreed that serious reform should start by considering the removal of all such requirements from the process and then the addition of requirements deemed essential to efficient, effective, and timely rulemaking. A balanced blue ribbon panel of regulatory experts may be the most thoughtful way of achieving this broad evaluation of the process.

The commission should assess the costs involved in rulemaking. There is not reliable information about how much it costs agencies to develop rules or the costs of the procedural burdens imposed on agencies by various directives and assessments.

The president should use the results from the commission to consolidate needed analytical requirements and procedures so that agencies, Congress, and the public are clear about steps the president is imposing beyond those required by statute. Additionally, the president should ask Congress to remove or modify statutory requirements that are unnecessary or reduce agency flexibility in addressing regulatory needs. The president should use the report as the basis for suggesting to Congress a thorough reexamination, consolidation, and simplification of all statutes concerning rulemaking.

Congress should use the commission's work to address changes in the structure of the regulatory process, including 1) legislative reforms to the role of agencies, and 2) legislative reforms that address the role of the executive branch in the regulatory process (such as changes to the Paperwork Reduction Act, the Regulatory Flexibility Act, etc.)

Examining Procedural Requirements

The extensive number of analytical requirements and procedural hurdles are key factors in causing agency delay in promulgating rules.[1] The commission should review statutes, executive orders, legislative provisions, and other procedural requirements currently imposed on agencies in developing and promulgating regulations. This broad review should include requirements that may not only affect a few agencies (such as panels created under the Small Business Regulatory Enforcement Fairness Act) but also government-wide requirements (such as assessments on private property rights and the impacts on children). The commission should then recommend executive and legislative branch actions to reduce delay from unnecessary burdens and lead to better protections and potential costs savings.

Executive Order 12866, Regulatory Planning and Review

The commission should also examine the appropriate relationship among agencies and between agencies and White House offices such as the Office of Information and Regulatory Affairs (OIRA). This review should occur with a focus on reducing procedural delays in the regulatory process. One important aspect of the review should be an examination of Executive Order 12866, *Regulatory Planning and Review*. The order establishes the president's

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policies regarding White House review of agency regulatory activities and establishes the relationship between the White House and the regulatory agencies.

Many strongly oppose centralized White House review, and there are equally strong proponents. The Steering Committee does not have a recommendation about whether there should be White House review of regulation, but the Committee does believe that if such review continues, it must be done in a manner far different than the past 28 years. The White House, including OMB, cannot continue to micromanage agency regulations.

This has significant implications for E.O. 12866, as this order (and its predecessor, E.O. 12291) has served as the vehicle for defining White House review of regulations and requirements imposed on agencies. Accordingly, we believe:

1. That E.O. 12866 is outdated and should no longer continue to be used;
2. That there needs to be a fundamental restructuring of the interaction between OIRA and the agencies, placing greater priority on agency expertise and statutory authority for decision-making; and
3. That the era of imposing simplistic one-size-fits-all approaches to rulemaking in agencies by White House offices must end.

We are divided about whether any executive order is needed to replace E.O. 12866. If the president chooses to replace the order, we do agree that the restructuring or replacement of the order should be a product of the blue ribbon commission's careful review. We strongly urge the president to ensure that any new order streamlines or eliminates requirements that unnecessarily cause delay, encourages agency flexibility in addressing regulatory issues, and respects both the statutory authority and the expertise that regulatory agencies have in the rulemaking process. The locus of decision making authority should reside in the federal agencies given the legal mandate to promulgate regulations.

5. **The president should appoint a qualified administrator for the Office of Information and Regulatory Affairs within the Office of Management and Budget who can lead the office in fulfillment of its statutory obligations and transform the role of OIRA.** There has been great controversy over the role of OIRA in regulatory affairs because of its control over regulatory information and decisions. In this role, it has strayed from its responsibilities under the Paperwork Reduction Act and created procedural hurdles in the regulatory process. Too often, OIRA has usurped agency authority by forcing agencies to use certain standards, to rely solely on specific research that bolsters OIRA's point of view, and to change results in agency analyses in order to achieve outcomes the office wants.

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The new administrator must change the role of OIRA, altering its substantive engagement in individual rules. We recognize that the president has a right to pursue consistency between agency decisions and his priorities. Also, the president exercises some control over regulatory decisions through the appointment and removal of agency heads. When conflicts arise over substance – whether between an agency developing a rule and the president or between two or more agency heads – the president (or more likely his designee, currently the OIRA administrator) should consult with agency heads, recognizing the legal responsibility of those appointed by the president to implement congressional delegations of authority, including regulatory responsibilities.

The new OIRA administrator should be well versed in issues pertaining to information resources management, including those dealing with dissemination of information, particularly since information management is the statutory responsibility of the office. The administrator should be charged with coordinating the recommendations from the blue ribbon commission (see Recommendation 4 above) that the president approves and assisting agency heads in implementing them. The president should appoint a person who is committed to and qualified to lead OIRA in this revised role.

6. **The president should rescind E.O. 13422 immediately.** The executive order, issued in January 2007, places significant rulemaking authority in Regulatory Policy Officers, displacing agency head authority and adding more power to White House rulemaking judgments. The E.O. requires that Regulatory Policy Officers approve the initiation of any rulemaking. Concerns have been raised about the constitutionality of delegating this authority and about placing the authority for initiating a rulemaking, especially in very large agencies, in one person's hands. In addition, the order is overly broad in its definition of what constitutes guidance from agencies, allowing OIRA to control the substance and timing of disclosure for information clearly not intended to impact rules. The elimination of E.O. 13422 should be announced at the same time as the 60-day moratorium on publishing new rules. (See Recommendation 1 above.)

7. **The president should improve executive branch transparency by replacing the Ashcroft memorandum with another memorandum directing agencies to make more information publicly available.** On October 12, 2001, then-Attorney General John Ashcroft issued a memorandum urging federal agencies to exercise greater caution in disclosing information requested under the Freedom of Information Act (FOIA). The Ashcroft memo prompted agencies to unnecessarily withhold government information from the public and, by pushing agencies to resist the public over FOIA requests, worsened the FOIA backlog. Ashcroft's memo superseded a 1993 memorandum from then-Attorney General Janet Reno that promoted disclosure of government information under FOIA unless it was "reasonably

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foreseeable that disclosure would be harmful." The Reno memo created an agency climate in which officials were more likely to share information with the public when responding to FOIA requests.[2] The president should instruct the new Attorney General to embrace the policy direction of the Reno memo and to reverse the Ashcroft memo. He should do so as soon as possible to send a message that the new administration favors a presumption of greater transparency. (See Recommendation D.3.a.)

ENDNOTES

1. We recognize that analytical and procedural requirements are not the sole reason for agency delay and inaction. In fact, when an administration wants to move quickly on a regulation, it has found a way to do so notwithstanding the many requirements that must be hurdled. Nonetheless, we agree that the existing requirements have been layered one on top of the other, creating hoops that are no longer meaningful and indeed add to the ossification.
2. Because this report addresses the rulemaking process, the focus here is on the benefits of disclosing information on domestic policy issues, not foreign policy or national security matters. However, to the best of our knowledge, the push for greater disclosure under the Reno memo never led to the release of government information that risked our national security or public well-being.

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RECOMMENDATIONS FOR THE 111TH CONGRESS

1. **Use the Congressional Review Act (CRA) to stop ill-advised "midnight regulations" from the previous administration.** The CRA allows Congress to enact a resolution of disapproval within 60 session days in the Senate and 60 legislative days in the House of a rule being promulgated. The resolution follows an expedited process that cannot be amended or filibustered, but, if passed by a majority in the Senate and House, it is sent to the president. For final regulations submitted to Congress with less than 60 session days in the Senate or 60 legislative days in the House before Congress adjourns *sine die*, the rule is carried over to the next session of Congress. The new Congress has 15 legislative days (House) or session days (Senate) before the 60-day clock is restarted. Depending on when the 110th Congress adjourns, final regulations published in early June 2008 could still be subject to the CRA in the 111th Congress.

   Within 15 legislative days (House) and session days (Senate), the 111th Congress should review regulations published in 2008 that fall within the CRA time limits and determine whether it should proceed with a resolution of disapproval.

2. **As the new Congress organizes itself, it should clarify committee jurisdiction and reassert its responsibilities for review and oversight of cross-cutting regulatory issues.** Each congressional committee oversees agency actions, including regulatory actions. For government-wide regulatory process issues, oversight can be in various committees, including those dealing with government operations, administrative law, and science. In the past, Congress has been lax in overseeing regulatory issues, creating an imbalance between the executive and legislative branches in their respective responsibilities to see that agencies are meeting their organizational missions.

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Two things need to happen early in the 111th Congress. First, leaders in the House and Senate need to clarify committee jurisdiction for government-wide regulatory matters. Where overlapping jurisdiction exists, clarifying committee jurisdiction would help. Second, the appropriate committee chairs need to commit to meaningful oversight, which includes using the resources of the Government Accountability Office, the Congressional Research Service, and the Congressional Budget Office, and responding with legislative changes where needed.

3. **Increase agency funding for regulatory implementation and enforcement.** Agencies need more resources immediately to meet their statutory obligations and organizational missions, as well as for regulatory compliance and enforcement. (See Recommendation C.1.) For FY 2009, as Congress addresses the expiring continuing resolution to provide funding for government agencies in March, it should begin to provide the resources for agencies to identify data gaps, restore needed collection programs, and address new areas of information needs as they are confronted with new regulatory problems, and for developing and enforcing regulations.

4. **Strengthen federal protections for whistleblowers by passing pending legislation in both chambers.** Federal government and private sector whistleblowers serve as important checks on government misconduct in the regulatory process. Congress began addressing whistleblower protections in the 110th Congress in proposed and completed legislation that may form the basis for further strengthening accountability. (See Recommendation B.2.)

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CHAPTER 3:

DETAILED RECOMMENDATIONS

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PART A.

IMPROVING THE QUALITY OF REGULATIONS

THE PROBLEM

There are two related problems that affect the quality of regulations and the timeliness with which they are promulgated. First, the number of analytic requirements imposed on agencies has grown in number and complexity. These requirements are now so vast that their sum significantly delays most rulemakings without necessarily improving the quality of the regulations. These requirements need to be rationalized, simplified, and in many cases deleted.

Second, the application of some of these analytic requirements has tilted regulatory outcomes decidedly in favor of regulated interests. Regulatory outcomes are often determined by the application of analytical techniques that are mostly used to narrow the criteria by which regulatory standards are set or to justify not regulating at all. Agencies are increasingly forced into regulation-by-numbers. Some quantitative analyses can be helpful in the regulatory process, but they should not be determinative (i.e., not a decisional standard) or unnecessarily imposed on top of statutory mandates. Many of these tools hide assumptions that exist in conducting quantitative analyses; these assumptions can significantly affect the outcome of the analyses. These analyses may also ignore or diminish that which cannot or should not be quantified.

Presidents since Ronald Reagan have required agencies to send a cost-benefit analysis to the White House Office of Information and Regulatory Affairs (OIRA) for major or significant rules. OIRA has frequently used its power as a regulatory clearinghouse to delay or reject agency draft rules, not only on the merits of policy proposals, but because it finds fault with the accompanying analyses. The cost-benefit analysis has been elevated to a key factor in OIRA's decision making, at times conflicting with the agency's statutory mandate.

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The complexity of risk assessment and cost-benefit calculations can also delay regulation. Because agencies are required to complete certain analyses before proceeding with a rulemaking, difficulties in researching or composing analyses or disagreements over how to quantify factors can delay completion of an analysis, and therefore slow the movement of actual policy.

As currently employed, cost-benefit analysis results not just in the quantification of costs and benefits, but also in an even narrower quantification – the monetization of cost and benefits to arrive at a "net benefit" calculation, a single dollar number. Cost-benefit analysis hides the uncertainty involved in measuring the costs to society of regulating hazards in certain ways. For example, estimating the monetized benefits from preventing future incidence of cancer generally involves the application of controversial methods and assumptions. Furthermore, cost-benefit analysis ignores altogether both costs and benefits that can't be quantified. Even as presidential executive orders encourage the use of non-quantifiable elements in the cost-benefit analysis equation, the use of "net benefits" ultimately means that non-quantifiable factors are removed in favor of subtracting dollar costs from dollar benefits.

Moreover, calculations of costs and benefits rarely acknowledge market transformations that may occur when businesses adapt to new rules. For example, compliance costs may drop as new technologies are employed. These market changes are excluded from agency analyses.

The one-size-fits-all approach to cost-benefit analysis calculations in regulatory analysis is expensive and time-consuming and often provides an incomplete and inaccurate assessment of the costs and benefits of various policy alternatives. Cost-benefit analysis systematically overstates the costs of potential rules and systematically underestimates the benefits of potential rules because of its focus on quantification.

Congress has passed many public health, worker safety, and environmental quality statutes designed to improve the quality of life in America: for example, the Clean Air Act; the Clean Water Act; the Occupational Safety and Health Act; the Mine Safety and Health Act, the Transportation and Motor Vehicle Safety Act; the Consumer Product Safety Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Toxic Substances Control Act; and the Resource Conservation and Recovery Act. In passing these statutes, Congress made a conscious choice to make public health and safety the highest priority, not the costs of achieving it.

SUMMARY OF RECOMMENDATIONS

The recommendations below aim to counter the increasing trend toward quantification in regulatory decision making. Data and information can be critically important to quality regulation, identifying unmet needs, and executing smart policymaking. Nonetheless, the problems regulatory statutes address are complex, and solutions defy a simple numeric answer.

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Most importantly, these recommendations call for scaling back the use of cost-benefit analysis as a determining factor in regulatory decisions, for reestablishing the primacy of statutory provisions to guide the promulgation of rules, and eliminating White House directives that instruct agencies on how and when to use cost-benefit analysis.

DETAILED RECOMMENDATIONS

A.1. Regulatory solutions and the analysis of regulatory alternatives should be consistent with statutory provisions. If a statute directs agencies to promulgate regulations according to standards of best available technology or with an adequate margin of public health protections, for example, the regulatory options should follow that statutory mandate. This fundamental principle must be followed if the president decides he wishes OIRA to continue transactional reviews of individual significant regulations.

A.2. To the extent that cost-benefit analyses are done, they should be guided by a set of core principles. We have differing perspectives on the utility of cost-benefit analysis as a tool for regulatory decision-making, and therefore have no recommendations on methods for conducting such analyses. We unanimously agree, however, that OMB's prescriptions for a one-size-fits-all approach to all agency cost-benefit analysis, such as Circular A-4, "Regulatory Analysis," are not the right approach. If the White House or OMB chooses to issue guidance regarding cost-benefit analysis, there must be flexibility for agencies to use this tool in a way that allows agencies to pursue their organizational missions; this principle means that for some agencies, it may be inappropriate to use cost-benefit analysis. To the extent that agencies choose to use cost-benefit analysis, we have unanimity on principles that should guide the use of these analyses within the federal government:

a. Cost-benefit analysis should only be used in ways consistent with the values expressed in statutory or judicial provisions;

b. Cost-benefit analysis is an analytical tool and should not be determinative in regulatory decision making unless specifically required by statute (i.e., it should be a source of information, not a decisional standard);

c. Information and assumptions used in cost-benefit analysis should be transparent and allow for the analysis to be replicated. The analysis should include statements of uncertainty about the assumptions;

d. Cost-benefit analysis should disclose both quantitative and qualitative aspects – and utilize both when interpreting results;

e. Cost-benefit analysis should include an explicit statement about who benefits and who bears the costs; and

f. While it may be appropriate to have methodological questions about cost-benefit analyses conducted by federal agencies, the White House or other regulatory reviewing agencies should never manipulate or alter results.

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Underlying these principles is a belief expressed in other parts of this report that agencies should be afforded flexibility in pursuing regulations. In the context of cost-benefit analyses, the diversity of agency missions, mandates, expertise, and processes makes a one-size-fits-all prescription from the White House or OMB counterproductive.

A.3. Scientific uncertainty per se does not provide sufficient justification to avoid promulgating regulations. Federal officials should stop using claims of uncertainty to delay or avoid regulation for at least three reasons.

First, full scientific certainty can never be achieved. Pushing for certainty may result in completely stopping regulation in policy areas that rely on scientific information. Scientific research is based on the premise that some uncertainty and variability will always exist. Thus, the decision to regulate should consider the level of scientific uncertainty and risk, but the level should not be a controlling factor.

Second, federal laws often recognize that the government has a responsibility to protect citizens from harms they cannot control. Some statutes explicitly call for some margin of protection. The notion that officials must pinpoint risk (e.g., using dose-response data to find a precise exposure threshold at which harm occurs) before taking action runs counter to many of these statutory requirements. When pursuing statutory goals that emphasize prevention of harm, agencies should not delay action simply because scientific or technical uncertainties exist.

Despite the pleas of public health advocates, the Environmental Protection Agency and the Food and Drug Administration have refused to regulate diacetyl, a chemical used to add butter flavor to processed foods. Exposure to diacetyl is known to cause *bronchiolitis obliterans*, a rare degenerative lung disease, in workers exposed to it. However, less certainty exists on the effects of diacetyl in consumers. In June 2007, FDA said, "The agency does not have evidence that would cause it to take immediate action with respect to diacetyl," but pledged to continue to "monitor the scientific literature." In September 2007, the public became aware of the first known consumer to be diagnosed with bronchiolitis obliterans as a result of diacetyl exposure. The federal government has yet to take up a rulemaking to protect consumers from diacetyl.[3]

Finally, regulation is not an irreversible course of policy. In the event of significant uncertainty, federal officials should still choose to extend at least some protection as soon as possible while new information develops. As evidence grows, standards can be made more or less stringent if necessary. In fact, subsequent rulemakings may enhance the trust among federal officials and between government and outside stakeholders.

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A.4. Agencies should clearly state problems, identify data gaps, restore needed collection and monitoring programs, and address new information needs as they are confronted with new regulatory problems. As agencies' budgets were reduced and regulatory priorities changed, many data collection programs across policy areas were reduced or eliminated. These cuts have affected the ability of agencies to perform their statutory functions. Public safety and adequate evaluation of regulations requires agencies to collect and analyze data.

In 1997, the U.S. Geological Survey's Water Resources Investigations Division faced budget cuts that affected data collection activities nationwide that were important to evaluate hazards such as floods, landslides, and droughts. In the winters of 1996 and 1997, the data saved an estimated $2.7 billion in flood damage and saved lives during flooding in the Willamette Valley in Oregon.[1]

In December 2006, EPA finalized a rule that raised the threshold for reporting data on toxic chemical releases for most substances from 500 pounds to 5,000 pounds per year, resulting in the loss of data for dozens of chemicals and reduced data on hundreds of others.26 The reports are used to determine where, how, and in what amounts toxic chemicals are released or managed in communities and who is responsible for emitting them.[2]

In addition, many agencies lack sufficient information technology tools to collect and analyze data to help improve the quality of regulations. Applying new information technology systems can potentially reduce the burden of collecting, reporting, and analyzing data. As part of identifying data gaps and the need for new information, agencies should be given the necessary resources to build this capability.

Not only should the president request adequate resources from Congress each year to do this important work, but Congress should also approve adequate appropriations. Congress also has a responsibility to provide oversight to ensure resources are available and used effectively.

A.5. The Paperwork Reduction Act needs to be amended and reauthorized. The law requires agencies to seek approval of information collection requests from OIRA when attempting to collect information from ten or more people. The OIRA approval process can delay an agency's ability to collect information it needs to fulfill an agency function. OIRA reviews the "burden" the collection will impose and can reject the request if it believes the number of burden hours to be unreasonable or believes the request lacks practical utility. The Paperwork Reduction Act also requires agencies to reduce paperwork burden by five percent each year and set general goals for burden reduction. Even though the law is mostly noted for the OIRA paperwork clearance process, it primarily addresses the management of information resources, including records management, statistical policy, information dissemination, privacy and security, and information technology. Authorization for appropriations under the law expired in 2001, and Congress has not reauthorized the law.

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As Congress moves to reauthorize the law, it should first rebalance the statute to address more clearly the management of information resources in the 21st century (including possibly changing the name of the law).

Second, Congress must eliminate mandatory or automatic percentage reductions in paperwork "burdens" and encourage the use of electronic collection and reporting methods. The five percent reduction has sometimes served as a powerful disincentive within agencies for collecting information to evaluate programs and to identify regulatory gaps. This disincentive must be eliminated.

Third, the president and Congress should consider alternative approaches to the paperwork clearance process that would provide agency flexibility for collection of information on emerging or pressing issues in a timely way. For example, OIRA and agencies could work together to set an annual burden-hour budget that would allow the agency flexibility to collect information on issues as it sees fit without OIRA's approval as long as it is within the budget. This burden-hour budget could be limited to new information collections on new or pressing issues, not for routine collections or standard renewals, which might still go through the traditional OIRA review process.

A.6. Agencies should develop their own standards for the use of risk assessment according to best practices applicable to the issues with which they are confronted. National Academy of Sciences reports on risk assessment have concluded that agencies should tailor risk assessments to the specific needs for which they are undertaken.[4] Consistent with our principle of deference to agency expertise, we strongly concur with this recommendation.

A.7. Implied preemption in rulemakings must be curtailed. The president should instruct agency heads to avoid preemption of state laws when there is no express authority to do so. Too often, agencies have used federal regulation to inappropriately preempt state positive law (proscriptive requirements enacted by legislatures or set by regulatory bodies) and, in some cases, state tort law.

When agencies unilaterally and inappropriately decide to preempt state law through regulation, they remove a proven, valuable method of experimenting with policy solutions, and it removes citizens' recourse if they are harmed by defective products, for example. States have often provided the models for subsequent federal programs and regulatory approaches that advance the public good. The practice of preempting without statutory authority is leading to regulatory standards turned on their heads. Instead of federal regulations traditionally being the floor below which states cannot relax their standards, this approach creates federal standards, without congressional action, as ceilings above which states cannot issue stronger health, safety, and environmental protections.

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Unless statutes or the courts expressly give agencies the discretion to preempt state positive law or tort law through regulation, agencies should not include preemption language in rules. If Congress gives agencies authority to preempt state positive law through regulation, agencies should not try to extend their authority to preempt tort law as well.

The next president should ensure his administration leaves decisions about preemption to Congress and abides by those decisions.

ENDNOTES

1. U.S. Water News Online, "ASCE tells Congress that proposed cuts to Geological Survey budget risk public safety and property," April 1997, available at http://uswaternews.com/archives/arcpolicy/7asctel4.html, last accessed September 23, 2008.
2. U.S. Environmental Protection Agency, "Toxics Release Inventory Burden Reduction Final Rule." 71 Federal Register 76932, December 22, 2006.
3. Background information and source documents compiled by the Project on Scientific Knowledge and Public Policy, available at http://defendingscience.org/case_studies/A-Case-of-Regulatory-Failure-Popcorn-Workers-Lung.cfm
4. See, for example, National Research Council, Risk Assessment in the Federal Government: Managing the Process, Washington, DC: National Academies Press, 1983. This publication establishes the parameters for using risk assessment.

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PART B.

INTEGRITY AND ACCOUNTABILITY

THE PROBLEM

A democratic, accountable, and effective government, and an engaged and participatory citizenry, rely on an open and informed exchange of ideas. Information of all types – economic, scientific, technical, and social – is critical to a well functioning democracy. Government policymakers at all levels of the U.S. federal system, and those affected by the decisions made, rely on information collected, analyzed, and disseminated by federal agencies. Whether providing information for private financial markets or determining the safety of foods at the local market, all segments of society need reliable, accurate information.

In the regulatory arena, accurate and timely information is critical to setting standards protective of health and safety. It is critical to helping the regulated community understand how to formulate voluntary standards for regulatory compliance. Equally important are the processes for determining what information should be included in regulatory decision making. The processes for determining whether a new bridge design will meet adequate weight support limits, or whether an adequate margin of safety exists to protect the public from exposure to chemical toxins in drinking water, should be sufficiently open and transparent to provide the public and those tasked with implementing government policies with confidence that the public will be protected.

Beginning 28 years ago with the advent of centralized review of agencies' proposed regulations, presidents have exerted some control over the substance of regulations. Sometimes that meant trying to control the information – usually scientific information – that went into promulgating the regulations. The current regulatory process, however, consists of unprecedented levels of restrictions, manipulation, and suppression of scientific information

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essential to regulatory decision making. Some major industries and their representatives have made a concentrated effort at the federal level to create a perception that there is too much scientific uncertainty, thus weakening the case for regulations.

Additionally, agency expertise is too often ignored by political appointees. While ultimately, regulatory decisions are made by political appointees, an accountable system ensures that agency decisions are formulated based on the best available information from experts within the agency, as well as others. Such a model would preclude manipulation of science, suppression of data, or silencing the voice of agency scientists. Two examples illustrate the problem:

- Former Consumer Product Safety Commission statistician Robin Ingle collected statistics on injuries and fatalities from all-terrain vehicle (ATV) accidents. The results indicated that in 2004, deaths and injuries were at a 20-year high. The general counsel at the agency tried to insert language into the executive summary of Ingle's report indicating the risk of riding these vehicles was decreasing. The general counsel at the time had been a lawyer for the ATV industry.[1]
- The Department of Interior's Inspector General (IG) investigated former deputy assistant secretary for fish, wildlife and parks Julie A. MacDonald and found she had intimidated staff and changed the scientific information agency scientists developed for decisions about listing or delisting threatened or endangered species. The IG's report was released to Congress the week of March 26, 2007, and showed MacDonald's involvement in "editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field."[2]

SUMMARY OF RECOMMENDATIONS

An accountable and responsive regulatory process must generate independent and credible information to be used in regulatory policy decisions. Agencies should have the most reliable scientific and technical information available from the scientific community and adhere to the highest principles of scientific integrity. Both the process and the information derived therefrom must be free from political interference. Government-sponsored research must be insulated from political interference. Agency experts, federal advisory committees, peer reviewers, and other experts involved in the design, conduct, and analysis of government research and regulations should be free from interference from political appointees within the agency and within White House offices. They should be free from political harassment and censorship and free to disclose information considered relevant to the recommendations they forward to policymakers. Agency experts must have access to and be able to generate independent scientific, technical, economic, and social information.

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The recommendations below mostly address the need to restore scientific integrity to the process. They focus on: 1) ways the public can hold government officials accountable for the actions they take on behalf of the citizens that rely on them; and 2) the need to ensure that information critical to policy decisions is independently developed and constitutes the best thinking that can be brought to solving policy problems. In conjunction with transparency recommendations that stress the importance of disclosing the range of meetings and materials relevant to agencies' regulatory decisions in agency dockets, these recommendations can begin to restore integrity and accountability in the regulatory process. As with other sections in this report, the definition of "regulation" includes permitting, licensing, and other activities that provide controlling actions.

DETAILED RECOMMENDATIONS

B.1. The president should instruct his agency heads that scientific integrity must be a core component of regulatory actions. The president should send a clear message early in the new administration that federal agencies will adhere to the highest principles of scientific integrity and independence. Although this message can be sent in several ways, such as appointing a high-level science advisor and expanding the network of executive branch advisory panels, the message must be that the government will apply the highest standards of scientific integrity and that this is a critical aspect of an improved regulatory system. The government must be committed to having the most reliable scientific and technical information available, both from expertise within agencies and from the larger scientific community, and using that information in an objective and transparent fashion as the foundation for decisions affecting the public interest.

B.2. Federal protections for public and private sector whistleblowers need to be strengthened to serve as a check on misconduct. Whistleblower protections are the backstop for accountability in government. Time and again, dedicated civil servants have stepped up to talk about misconduct in government science, regulation, and general decision making that can cost lives and money. Necessary improvements include:

- Strengthening the Office of Special Counsel's processes for reporting misconduct and corruption, reviewing whistleblowers' claims, and protecting from retaliation those who report abuses in good faith;
- Allowing whistleblowers to disclose to any member of Congress information regarding government misconduct or corruption;
- Strengthening the independence of agencies' inspectors general, along with creating and streamlining the mechanisms to permit agency employees to report misconduct anonymously; and
- Evaluating the effectiveness of the implementation of whistleblower reforms within agencies.

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Both houses of the 110th Congress passed legislation to address loopholes in the Whistleblower Protection Act of 1989, which has been weakened by subsequent court rulings.[3] The stronger protections in the House bill include due process protections for federal whistleblowers experiencing retaliation from co-workers and employers. The president should encourage the new Congress to pass legislation quickly in each house, reconcile their differences, and send him legislation early in 2009.

On August 14, President Bush signed the Consumer Product Safety Improvement Act of 2008, which provides whistleblower protections to nearly 20 million private sector workers in the manufacturing, distribution, and sale of consumer products such as children's products and household goods. The new law provides protections, enforceable by jury trials, for workers who disclose product safety violations or refuse to engage in illegal behavior.

Congress should extend the model established under the Consumer Product Safety Improvement Act of 2008 to other industries regulated by the federal government.

The president should make clear early in the administration that he stands for strong government accountability and the independence of public information. The president should highlight the importance of whistleblower protections for federal employees.

B.3. Strengthen the Federal Advisory Committee Act (FACA). Science advisory committees are a vital means through which agencies obtain valuable advice and information. Agencies use scientific committees and stakeholder or policy committees for different purposes. Scientific committees are used to provide agencies with expert advice and analysis of the complex scientific information critical to informing final decisions about public health or environmental quality standards, for example. Stakeholder or policy committees may be used to actively solicit the opinions of stakeholders who have expertise and are likely to be the parties impacted by regulatory actions. For example, the Department of Interior may wish to solicit the advice of western ranchers who may be affected by changes to policies about grazing practices on federal lands. Candidates for service on a federal advisory committee may be named either as "representatives," those who voice the views of specific interested parties, or "special government employees" (SGEs), those chosen to provide objective analysis and advice. It is important to note these differences when considering new ways of strengthening the use of these committees.

In some cases, agencies have stacked science advisory committees with representatives of special interests, thereby endangering the independence of the advice the FACA committees dispense.[4] The president should emphasize to agencies the importance of implementing the intent and spirit of FACA.

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Congress should consider strengthening FACA in several ways:

- Require agencies to appoint to scientific advisory committees individuals from the disciplines relevant to solving the charge of the advisory committee. Such appointments should be made without consideration of political affiliation or activity.
- End the practice of hiring private contractors to develop advisory committees to avoid FACA requirements. This practice has been used by some agencies to claim under a legal loophole that they do not have strict management over the committees. Congress should close this loophole.
- Extend FACA requirements to all subgroups of covered advisory committees.
- Make the processes by which committees operate and their members are selected fully transparent. For example:
  - Agencies should announce publicly any plans to form a new FACA committee, disclose the expected charge to the committee, and solicit nominations from the public for committee membership.
  - Agencies should disclose committee nominations and appointments on their websites so that the information is easily accessible; the names of appointees (and perhaps, the names of nominees similar, to the approaches used by the National Academy of Sciences (NAS) and the Environmental Protection Agency (EPA) for specific science advisory boards[5]) and any conflicts of interest or potential biases, as well as any waivers of conflicts should be included. Agencies should also provide a limited time for public comment on the appointments of committee members.
  - Agencies should disclose on their websites the records of all committee and subgroup meetings, the members of all committees and subgroups, and the transcripts or electronic records of any meeting.

B.4. Improve conflicts of interest laws. Special Government Employees (SGEs) are currently subject to the conflict of interest provisions of FACA, provisions that are enforced by the Office of Government Ethics. We believe there is a need for specific FACA conflict of interest guidelines.

As noted above in B.3, FACA committees may be used for different purposes. For scientific committees, the goal should be to establish a government-wide policy that strives for an absence of real and apparent conflicts of interest for committee membership. One model for accomplishing this policy is the approach taken by the World Health Organization's International Agency for Research on Cancer (IARC). Membership in IARC Working Groups is based on "(a) knowledge and experience and (b) absence of real or apparent

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conflicts of interests. Consideration is also given to demographic diversity and balance of scientific findings and views."[6] The model recognizes that there may be instances in which special expertise is needed and may have to come from those who have real or apparent conflicts. In these instances, the "invited specialists" are limited in the ways in which they can participate in a working group.

B.5. Disclose the scientific, technical, economic, and social analyses used in the formation and promulgation of regulatory documents. The information that forms the foundation of regulatory decisions is too often unavailable or hidden from public view. The labeling of information as classified business information (CBI) is overused, agency rulemaking dockets are not easily available, and studies are often used selectively to justify a predetermined policy outcome.

As recommended in D.1.a, all research results considered in the promulgation of regulations should be made part of the agency's rulemaking docket, which should be made available in an online searchable format. The docket should include all supporting materials – regardless of their source – unless classified or otherwise exempted by FOIA.

More specifically:

- The burden of justifying confidential business information (CBI) should be shifted to those making such claims on information critical to a substantive regulatory decision. The justification warranting the protection should be provided prior to receiving the protection and certified by a senior executive of the business requesting the protection. This approach has worked successfully in several programs, including the Toxics Release Inventory operated by the EPA. The president has substantial authority to make this shift in certain areas.
- Increasingly, information that may be important to a rulemaking is being categorized as critical infrastructure information or sensitive but unclassified. These control markings have been interpreted in an uneven manner throughout the government, oftentimes resulting in less disclosure of the information. On May 9, 2008, President George W. Bush issued a memo to agency heads that created a tiered system of designations to standardize the proliferation of these control markings under the name "Controlled Unclassified Information."[7] The president should refine this CUI policy by reining in the use of CUI designations and making very clear that a CUI control marking has no bearing on whether the information should be disclosed under FOIA; and
- Congress should consider legislation to require the disclosure of privately sponsored research used in the regulatory process in the same way that public research should be disclosed. Agencies must often rely on private research to develop regulations. Disclosure of privately sponsored research that identifies the extent to which the sponsor controlled the

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research design, analysis, and reporting of the results is necessary so the public and the agencies can judge the soundness of the research. This change would bring privately funded research under similar disclosure requirements that now exist for publicly funded research under the Shelby Amendment.[8] (See Recommendation D.1.a.)

- The president should establish a new standard of disclosure regarding non-governmental challenges to research and data used by agencies. Currently, agencies can face challenges of government-sponsored science used in rulemakings without the challenger submitting evidence of factual errors or flawed science. These challenges may call for other science to be considered instead of, or in addition to, the studies used by agencies. The president should establish a new standard that requires the challenger to submit evidence of errors in the agencies' use of science and ensure that the underlying data used for the challenge is available for public inspection for challenges to be considered valid.

B.6. Resurrect the Office of Technology Assessment (OTA). As previously constituted, OTA provided Congress and the scientific and technical communities with objective analyses of a wide range of scientific, technical, and comparative policy knowledge. Reconstituting OTA would provide Congress with its own scientific and technical research arm that could complement and/or check executive agencies. Congress should resurrect the OTA with sufficient funds to operate effectively and appoint a well respected scientist to head the office.

Unlike the National Academy of Sciences, which focuses on long-term analysis of scientific information, OTA was able to respond to short-term congressional needs for specialized knowledge that Congress's other two research arms, the Government Accountability Office and Congressional Research Service, cannot provide.

B.7. For key areas of international health and safety regulation affecting Americans and U.S. businesses, Congress and the president should call for greater transparency in order to make the process more democratic. Consumers are living in a global economy, and it is vital that consumer, labor, and environmental standards be upheld as the U.S. meets its obligations under various trade agreements. Some standard-setting bodies, like the Codex Alimentarius, which establishes food standards for international trade, are operating in the absence of full transparency. Consumer organizations can only participate if they are part of an international coalition approved by the World Health Organization. All interests should have the same opportunity to influence and preview the positions taken in international fora.

The president should allow full access to documents and ensure that the rights of U.S. organizations and citizens to comment are fully preserved. The president, along with Congress, should advocate for full disclosure and

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open meetings for international bodies that set standards with international implications. If international standards are affecting American consumers or businesses, we believe Americans should have a place to go to find out what is required of them, and there should be an opportunity for them to make their voices heard.

B.8. The president should encourage agency heads to adopt (or modify) guidelines to allow scientists to communicate freely. Federal scientists in some agencies are prevented from speaking with the media, the public, and even their professional colleagues. Instead, questions about the scientific studies are directed to public affairs officers, not scientists who conducted or know about the research in question. The president should encourage agencies to adopt media polices that respect two basic rights of scientific communications: 1) like any other federal employee, scientists have a right to express their personal views, with the express disclaimer that they are speaking as private citizens and not representing official agency policy; and 2) scientists have the right to review, approve, and comment publicly on publications or documents that rely significantly on their research or identify them as an author or contributor to ensure the accuracy of the information has been maintained during internal agency review processes.

B.9. Agencies should abstain from inappropriate interference in the work of other agencies and end secretive interagency reviews of scientific and technical information. Congress delegates responsibilities to federal agencies based on its determination of which agency is most suited to fulfill certain duties. Congress may consider which agency possesses the requisite expertise to competently address a task and will consider whether that agency's mission is consistent with statutory goals.

However, agencies may also have an interest in the work of other agencies with delegated authority from Congress, and, in some cases, one agency's decision may directly impact the operation of another. For example, under the Resource Conservation and Recovery Act, EPA can order the clean up of dangerously polluted land on both private and government property. But the Department of Defense (DOD) has refused to abide by official EPA clean-up orders for three military bases. The Department of Defense has even asked the White House to intervene on its behalf.[9]

The president should ensure that when these kinds of disputes arise, agencies defer to the agency given responsibility under federal law. Agencies subject to another agency's regulations must not be allowed to delay decisions or usurp power. The primary function of regulatory agencies is to carry out federal law. Other agencies have the right to comment and make known their interest in the issues and regulations that affect them, but they should not undermine the work of the agencies given the statutory responsibility for rulemakings.

The president should also terminate inappropriate interagency review and control of scientific and technical information that serves as the basis of

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rulemaking. For example, the interagency review process of toxicology profiles performed under EPA's Integrated Risk Information System allows other agencies potentially impacted by the assessments to direct EPA's scientific investigations and limits the dissemination of scientific information to the public. The review affords agencies that use toxic substances, such as DOD or NASA, multiple opportunities to delay, dispute, or alter EPA's scientific research and conclusions. Such reviews can interfere with and ultimately affect the outcome of a rulemaking.

In 2004, the Environmental Protection Agency (EPA) submitted to the White House Office of Management and Budget (OMB) a draft toxicity assessment for naphthalene, a chemical found in jet fuel, moth balls, and a variety of other products. OMB, consulting with the Department of Defense, objected to EPA's findings and suspended the assessment, citing the need for additional research. OMB then persuaded EPA to form an ad hoc scientific panel to research the issues related to OMB and DOD's objections. After continued delays, the initial studies upon which EPA had formed its opinion had become outdated, and the agency restarted the assessment process.[10]

There is a clear distinction between assessing the impacts of risks to the public and the policies for managing those risks. Scientific integrity is at greatest risk in situations where considerations other than science determine the assessments. Other considerations, including political considerations, are properly included in decisions about risk management and communication. Those considerations should not be a part of the assessment process. (See Recommendation A.6.)

The president should clarify which agencies have primary authority in various areas of expertise and limit the review of scientific or technical information by other agencies to advice and comment. When review does take place, the process should be completely transparent, and the comments of other agencies should be disclosed online.

ENDNOTES

1. Robin Ingle, "Which Toys Are Okay? Don't Ask the Safety Police," The Washington Post, December 23, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/21/AR2007122101555.html, last accessed October 6, 2008.
2. U.S. Department of the Interior, Office of Inspector General, Investigative Report On Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks, available at http://www.doioig.gov/upload/Macdonald.pdf, last accessed October 6, 2008.
3. See H.R. 985, the Whistleblower Protection Enhancement Act of 2007, and S. 274, Federal Employee Protection of Disclosures Act.

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4. U.S. Government Accountability Office, Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance, April 2004, available at http://www.gao.gov/new.items/d04328.pdf, last accessed September 24, 2008.

5. See, for example, EPA's Clean Air Scientific Advisory Committee (SAB) approach to forming an SAB Asbestos Panel in 2006-2007. EPA published in the Federal Register a notice request for nominations to the panel, sought comments on the short list of nominees, and then published another request for additional expertise for the panel. Documents are available at http://www.epa.gov/sab/panels/asbestos_expert_panel.htm, last accessed September 26, 2008.

6. World Health Organization, International Agency for Research on Cancer, "Preamble to the IARC Monographs, A. General Principles and Procedures," January 23, 2006, available at http://monographs.iarc.fr/ENG/Preamble/currenta5participants0706.php, last accessed September 26, 2008.

7. President George Bush, "Designation and Sharing of Controlled Unclassified Information (CUI)," Memorandum For The Heads Of Executive Departments and Agencies, May 9, 2008, available at http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html, last accessed October 3, 2008.

8. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. Public Law No. 105-277, also called the Data Access Act, available at http://thomas.loc.gov/cgi-bin/toGPObss/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ277.105.pdf, last accessed October 23, 2008.

9. Lyndsey Layton, "Pentagon Fights EPA On Pollution Cleanup," The Washington Post, June 30, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901977_pf.html, last accessed October 6, 2008.

10. John B. Stephenson, "Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System," United States Government Accountability Office, GAO-08-440, March 2008, 35-37. Available electronically at www.gao.gov/new.items/d08440.pdf

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PART C.

IMPLEMENTATION AND ENFORCEMENT

THE PROBLEM

By far the biggest problem facing agencies that implement federal regulations – monitoring, inspecting, and enforcing rules – is the extreme shortfall of both human and financial resources. Many agencies are experiencing an exodus of expertise as scientists, engineers, trained inspectors and safety officials, and lawyers leave as budgets are cut or level-funded, often in the face of increasing regulatory responsibilities. This decades-long trend has left some agencies unable to respond as ably to crises and problems as necessary. Moreover, the problem is likely to compound itself as the federal workforce gets older and people perceive that working in the federal government does not inspire innovation.

In addition, as societal issues arise that require action on the part of the federal government, such as the current financial crisis, disasters like Hurricane Katrina, or the introduction of nanotechnology, agencies may fall even further behind in providing essential public protections.

The inability of federal agencies to respond adequately to some problems may have reached a peak in recent years. The U.S. is facing severe problems in mortgage and other lending practices and a rising tide of imported products (such as toys, tires, toothpaste, and a variety of food products) that made newspaper headlines for the risks they posed to consumers. For example, in 2007, approximately 104 recalls of lead-contaminated children's products were announced. The recalls covered more than 17 million individual products, 95 percent of which were manufactured in China. The number of products recalled in 2007 increased nearly six-fold compared to 2006.

Federal agencies responsible for regulating these financial and consumer products, and for regulating public health risks from environmental hazards,

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are plagued by declining resources and authority, making it more difficult to ensure the safety and soundness of consumer products. For example:

- The federal regulator of meat, poultry, and egg products, the Food Safety and Inspection Service (FSIS), faces resource limitations that make it more difficult for the agency to ensure the safety of the food supply. Although the agency's budget has risen since it was created, staffing levels have dropped steadily. From FY 1981 to FY 2007, the number of full-time employees at FSIS fell from 9,932 to 9,184 – a 7.5 percent drop. FSIS's inspection force has an average national vacancy rate of at least ten percent.[1]
- Over the past three decades, the Occupational Safety and Health Administration's (OSHA) budget, staffing levels, and inspection activity have dropped while the American workforce has grown and new hazards have emerged. Since FY 2001, OSHA's budget has been cut every year when adjusted for inflation. In FY 1980, OSHA's staffing level hit its peak of 2,950. For FY 2006, OSHA had a staff of only 2,092, the second-lowest level in 30 years. OSHA's budget for enforcement activity is currently 12 percent lower than it was in FY 1980. OSHA was appropriated $264 million for enforcement activity for FY 2006, compared to $301 million in FY 1980, when adjusted for inflation.[2]

There is public, private, and congressional support for restoring the ability of federal agencies to respond to some of these unmet needs. Many businesses hurt by consumers' refusal to buy unsafe products or by the inability to get short-term credit are supportive of expanded regulatory authority and quality standards while improving their own practices. Americans have become painfully aware of the positive role government can play and the consequences that can occur when regulatory protections break down. Public support is crucial to reestablishing agency funding as a priority amidst the competition for scarce federal dollars.

The public expects that if a regulation is on the books, it should be enforced. By the same measure, businesses, particularly small businesses, which intend to comply with federal regulations, may at times not know about the requirements. Strengthening compliance assistance would be extremely useful.

Evaluating the effectiveness of agency regulations is especially problematic. Agencies are starved for resources, under legislative and/or court-ordered mandates to issue regulations, and burdened with a wide array of procedural requirements. These factors make it increasingly difficult for agencies to plan rulemaking agendas, track regulatory effectiveness, or estimate the costs of rulemaking activities. In addition, the rulemaking process may require years to reach a final outcome, while the appropriations process is annual, thus leaving agencies to struggle with allocating resources each year for multi-year rulemaking efforts.[3] Part of an evaluation initiative should include some method of evaluating individual rules for their effectiveness.[4]

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SUMMARY OF RECOMMENDATIONS

Effective implementation of many financial, public health, worker and consumer safety, and environmental quality regulations require a complex mix of federal, state, and local government actions, as well as third party involvement. This mix relies substantially on the leadership of federal agencies: setting priorities, providing technical and financial assistance, and ultimately enforcing compliance with regulations. Without sufficient financial and human resources, clear enforcement goals, and sound evaluation tools, the problems identified and addressed in law cannot effectively be solved.

DETAILED RECOMMENDATIONS

C.1. Funding for enforcement of regulations must be increased. Agencies need more resources immediately to meet their statutory obligations and organizational missions. Agencies must be enabled to more effectively meet both current and new demands. The president should ensure adequate resources in his budget requests to Congress. And Congress, even in the context of tight budgets, must provide resources to support enforcement of regulations.

C.2. Develop a comprehensive regulatory compliance initiative. Working with small businesses, state and local governments, and other stakeholders, agencies should work to create or improve programs for strengthening compliance with regulations. Programs adopted by agencies should include compliance assistance, enforcement, and sanctions components, and these should be reflected in annual budget requests, to which Congress should give close scrutiny. Improving and strengthening enforcement programs can lead to a more efficient use of scarce federal dollars in an intergovernmental enforcement framework. In the competition for resources, however, the first priority should be for enforcement of regulations.

C.3. Modernize enforcement tools across government to assure credible deterrence. Increasing the resources available to agencies to enforce regulations is not the only way to improve enforcement. Alternative tools such as citizen suits with fee-shifting can be a useful enforcement tool that deputizes the public to act as private attorneys general instead of depending entirely on a federal enforcement staff. Additionally, there can be technological tools, such as pollution monitoring systems and electronic on-board recorders for trucking hours, that could improve compliance monitoring without requiring a vast expansion of the federal inspectorate. While these new tools can be helpful, so is ensuring that there are strong deterrents, such as meaningful civil and criminal penalties, for failure to comply with regulations. In that context, the president and congressional committees should review traditional enforcement tools to address weaknesses.

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C.4. Fund an historical assessment of regulatory agency budgets and resource needs. Congress should direct the GAO or the Congressional Research Service to assess the historical trends in regulatory agency budgets in order to begin restoring agencies to their traditional role of meeting statutory obligations and organizational missions. For example, agency budgets should be evaluated for changes over time in personnel, overall and programmatic funding, numbers of inspectors and inspections, numbers of inspectors and inspections compared to the growth of the regulated sector (or other baselines), enforcement personnel and actions, data collection, monitoring and management, and research requirements and priorities. These changes then need to be placed in the historical context of the statutory mandates placed on agencies.

Once data is collected, analyzed, and made available to Congress, there should be continued updating and analysis of resource capabilities and needs. The data collection effort should become an important part of essential congressional oversight. As the public and congressional oversight committees learn more about current resources for regulatory activity in the context of past expenditures, they may achieve greater understanding of the need for resources. This assessment may help Congress more efficiently allocate resources, especially in the short term as it faces difficult budgetary decisions. In addition, such data may better insulate agency regulatory needs from political interference and control by administrative fiat.

ENDNOTES

1. OMB Watch, "Federal Meat Inspectors Spread Thin as Recalls Rise," March 4, 2008, available at http://www.ombwatch.org/article/articleview/4183/1/527, last accessed September 23, 2008.
2. OMB Watch, "Workers Threatened by Decline in OSHA Budget, Enforcement Activity," January 23, 2008, available at http://www.ombwatch.org/article/articleview/4143/1/219, last accessed September 23, 2008.
3. There is some evidence that the number of proposed and final rules issued is decreasing. One recent report urges Congress to adopt an initiative to study systematically the development of regulations in federal agencies including best practices and methodologies. See Jeffrey S. Lubbers, "The Transformation of the U.S. Rulemaking Process—For Better or Worse," Ohio Northern University Law Review, vol. 34 (2008), pp. 469, 472-73.

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4. U.S. Government Accountability Office, Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, GAO-07-791, July 16, 2007, available at http://www.gao.gov/new.items/d07791.pdf, last accessed Sept. 24, 2008. This GAO report on retrospective reviews of agencies' regulations, noted that although there are some mandatory requirements for reviews, agencies generally used their discretion in determining whether and what to review. The report concludes: "Multiple factors helped or impeded the conduct and usefulness of retrospective reviews. Agencies identified time and resources as the most critical barriers, but also cited factors such as data limitations and overlapping or duplicative review requirements. Nonfederal parties said that the lack of transparency was a barrier; they were rarely aware of the agencies' reviews. Both agencies and nonfederal parties identified limited public participation as a barrier." See also Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking, Fourth Edition, p. 395 et seq. Chicago: American Bar Association, 2006.

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PART D.

TRANSPARENCY

THE PROBLEM

The process by which a rule is developed can be hidden from public view by institutional mechanisms, a lack of disclosure requirements, and government officials who would prefer not to disclose certain documents or communications. The opacities in the process are most acute during the pre-rule stage – the developmental phase of a rulemaking (before the publication of the Notice of Proposed Rulemaking (NPRM)) where federal officials make critical decisions on the direction of national policy.

White House review adds another hidden dimension to the regulatory process. During the Clinton administration, the Office of Management and Budget (OMB) began posting to its website a list of all rules under review and updates on OMB's decisions. During the George W. Bush administration, OMB began posting to the White House website a list of people from outside of government participating in meetings with OMB's Office of Information and Regulatory Affairs (OIRA) regarding rules under review. Although openness has improved, the website does not meet modern standards for transparency (e.g., it is not searchable). Additionally, the content of what is provided could be improved. For example, substantive reviews of regulations conducted by OMB, mostly done through oral, not written, communications with agencies, are not part of the public record. Increasingly, OMB input on a rule occurs prior to the formal regulatory review process described in Executive Order 12866 and is excluded from any form of transparency. This pre-rulemaking input can shape the regulatory outcome in undocumented ways.

Transparency in the rulemaking process is important for three main reasons. First, transparency leads to a greater sense of legitimacy from those outside government, improving both public support and compliance. Citizens are

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more likely to trust that a rule is in their best interest if they can follow and participate in the process. The regulated community is more likely to understand how to comply with a rule it has been able to follow in development. Second, where government is perceived to have erred, a transparent decision making process will provide citizens, stakeholders, Congress, and the courts an important tool with which to hold the proper official(s) accountable. Third, transparency is critical to public participation (discussed in the next section) because an open and well documented process will lead to better informed commenters and, presumably, more helpful comments.

SUMMARY OF RECOMMENDATIONS

To improve transparency in the rulemaking process, the federal government should broadly adopt a strategy that moves toward a presumption of openness. This strategy is particularly important in the pre-rule, or rule development, stage where the bulk of policy formation occurs and can be shaped through undocumented interactions with OMB. Once an agency decides that an issue is a priority, that the agency has sufficient resources, has legal authority, and decides (or is directed) to regulate, the agency should create the rulemaking docket. The creation of this docket should signal the beginning of the period when all subsequent and significant actions, communications, and information should be disclosed, including those that may occur with OMB or the White House prior to any formal review process.

The Internet age has also redefined the concept of government transparency: Information should be available online in a timely fashion and in searchable formats to be considered truly transparent in modern society. New interactive technologies can make it easier to find and use information. For example, the government should use open programming interfaces (e.g., application programming interfaces, or APIs) to make sharing of information more possible.

Transparency also means the content of what is being disclosed must be complete. Rulemaking dockets must include all information relevant to the development of a rule, as well as information relevant to permitting and licensing. A tracking system should be established so the public can examine the progress of a rule from its beginning (e.g., at the creation of the rulemaking record or announcement in the *Unified Agenda*) to its implementation, as well as any paperwork requirements that may be associated with the rule.

In general, the recommendations in this report avoid imposing additional procedural requirements on agencies – there are far too many as it is. Achieving government accountability through a transparent and open regulatory process is the exception to this general rule. Information technology today makes it far easier to have transparent processes consistent with democratic principles.[1]

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DETAILED RECOMMENDATIONS

D.1. Agency rulemaking dockets should be expanded, complete, and available online. Finding information related to a specific rulemaking can be difficult. Often, the only information an agency provides to the public at the time a rule is proposed or finalized is the text of the rule itself. Regulatory impact assessments, which identify, in monetary terms, the potential costs and benefits a rule may have to society, sometimes accompany a rule's release.

The public should have access to a broader range of information used in a rulemaking. The public also should have access to draft proposed rules and draft final rules sent to OMB for review. Agencies should include these drafts in the rulemaking docket in a timely manner so that the materials are available to the public as part of the notice-and-comment period. Disclosing a broader range of rulemaking materials would likely avoid the need for some information requests under FOIA and may help reduce the resources needed for FOIA actions. (See Recommendation D.3.)

> In July 2008, without prior notice, the Department of Labor sent to OMB a draft rule restructuring the Department's internal policies for the conduct of risk assessments. An entry on the OMB website revealed only the title of the rule; unlike other rules, the entry did not provide an abstract or proposed timeline. (Eventually, a draft of the rule was leaked to *The Washington Post*.) The Department did not consult experts inside the Occupational Safety and Health Administration or Mine Safety and Health Administration – the agencies the rule will affect. Instead, according to news reports, the Department based the rule on the report of a consultant who received a $350,000 contract to analyze the Department's current risk assessment regime. The Department refuses to release the consultant's report.

Online rulemaking dockets should be among the primary vehicles for disclosure. Regulations.gov – the federal government's central location for online access to rulemaking dockets and public commenting – is in need of improvement, as will be discussed in the next section. If dockets are complete and material is posted in a timely fashion, Regulations.gov, and the federal government's online rulemaking docket system as a whole, will improve rulemaking transparency.

We believe it is essential for at least the following classes of information (identified in the subsections of this recommendation) to be included in rulemaking dockets. Disclosure should begin upon creation of the rulemaking dockets. Disclosure should occur as soon as possible after documents, communications, or other types of information described below surface.

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D.1.a. Agencies should disclose online all studies in their possession related to a rulemaking, regardless of whether the study was used to inform the policy option the agency chose. Currently, agencies sometimes include in the rulemaking docket only the information that is directly cited in a rule. Other information to which the agency had access, but which it chose not to draw on or chose to ignore, is not included. The public may never find out about such information.

Studies, research results, and other inputs that *could* inform agency decision makers should be disclosed online, even if the information did not persuade or affect the chosen outcome. The public needs to have available in the administrative record all the information the agency had at its disposal during the decision making process so that interested parties can draw their own conclusions about the issue. Furthermore, existing law sets the foundation for disclosure of information during development of a rule.

D.1.b. Agencies should disclose online all written communications among federal officials from different agencies, including the White House, regarding rules under development or under review. Currently, the rulemaking process contains no requirements for disclosing communications made among federal offices. Agencies often have an interest in the rules other agencies are considering and the requirements those rules may impose.

OIRA purports to use the review period to mediate between an agency developing a rule and other agencies. Two problems exist. First, instead of serving as a mediator, OIRA often uses the period to challenge or alter the substance of a rule. Unlike agencies, however, OIRA often does not possess the requisite expertise to make substantive contributions. Second, other agencies with an interest in the rule may intervene in the rulemaking outside of the E.O. 12866 review period where communication and negotiation is even murkier. Transparency can serve as a check on these problems.

Officials outside of the agency developing the rule, including those in the White House, can have an enormous impact on the rule's substance. To avoid improper influence, whether real or perceived, the public should have greater access to the communications between and among officials. Therefore, written communications between and among federal agencies and White House offices should be disclosed to the public once the rulemaking docket is created.

The issuing agency should make available promptly in its online rulemaking docket any written communications between or among federal agencies and OIRA or other White House offices. This disclosure requirement should apply to communications made at any point during the rulemaking process, including the pre-rule stage (once the docket is created).

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To improve transparency during the review period, agencies should look to Section 307 of the Clean Air Act as a model. The act states:

> The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

As mentioned above, we recommend this type of disclosure be extended throughout the rulemaking process, even before the agency submits a draft rule for review.

When OIRA chooses to reject an agency proposal, improved transparency among federal officials may also provide the public with a better understanding as to why the rule was insufficient in OIRA's view. OIRA provides in writing its reasons for returning a regulation under review for agency reconsideration. However, the written document most often does not convey the multiple interactions between OIRA and the agency. The final letter sometimes appears sanitized so as not to reveal the true reasons for the rejection.

D.1.c. Agencies should disclose online all substantive communications, written or oral, between any White House office and any nongovernmental entity regarding rules under development or under review. Currently, OIRA shares with regulatory agencies written communications it receives from nongovernmental entities regarding a regulation under review. It also invites agencies to any meetings that OIRA has with nongovernmental entities regarding a regulation under review. Finally, any meetings with nongovernmental entities are logged on OMB's website, which provides the general topic, the date of the meeting, and a list of participants.

There are two problems with this system. First, it only applies to a regulation under review. Any substantive communication with nongovernmental entities regarding the development of a rule, such as those made during the pre-rulemaking stage, is not required to be provided to the agencies. Second, the content of oral communications, such as meetings, are not recorded or summarized.

Since OIRA can have significant influence in the outcome of a rulemaking, its actions should be documented in the rulemaking record, just as the regulatory agencies' actions are documented. The public should have a right to know about OIRA's communications with these entities.

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To improve transparency between White House offices and nongovernmental entities, the president should require any White House office to document any substantive communications, written or oral, with nongovernmental entities regarding a regulation being considered. For oral communications, the date of the communication, who participated, and a summary of the communication should be written and made part of agencies' online rulemaking dockets.

Promptly after the meeting, if the agency was not already involved, the White House office should notify the agency of the meeting and provide the agency with any documents or meeting summaries. The agency should then post this information in its online rulemaking docket.

In June 2007, the Environmental Protection Agency proposed changes to the national public health standard for exposure to ozone. EPA proposed a range from which it would choose its final standard. The proposed range was weaker than the recommendation of EPA's scientific advisors and staff. The public never learned why EPA ignored the advice of its experts or who made the decision to do so. However, many fear the White House, acting on behalf of industry, played a role. OIRA held three closed-door meetings prior to publication of the proposal – two with industry and one with public health experts. Neither OIRA nor EPA disclosed what was discussed during the meetings. Before publication of the final rule, which adopted the weakest end of the proposed range, OIRA held two more closed-door meetings with industry lobbyists. The nature of these meetings was not disclosed.

D.1.d. Agencies should disclose online all substantive communications between the agency and nongovernmental entities regarding regulations. The primary mechanism for nongovernmental entities to communicate with federal agencies about a rule is through the comment period following publication of an NPRM. These communications are currently disclosed in the rulemaking docket. However, nongovernmental entities also communicate with agencies outside of the public comment period. Currently, rules do not exist to govern disclosure of these communications.

Interest groups, especially those in Washington, with the resources and contacts to access agency decision makers are much more likely to engage in communications outside of the public comment period and off the public record, thus creating an imbalance. Small interest groups, groups outside of Washington, and individual citizens generally use the public comment period to comment on a rule, and the agency includes their comments in the public record.

Agencies should begin disclosing both written and oral communications made with any nongovernmental entity related to a rulemaking once the docket has been created. For oral communications, the date of the communication, who participated, and a summary of the communication should be written and made part of agencies' online rulemaking dockets. Written communications

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and the logs of meetings between nongovernmental entities and the agency should also be made part of the online rulemaking docket.

D.2. Create a system that allows the public to track the status of a rule and its associated paperwork requirements. The rulemaking process as currently devised provides few mechanisms for the public to learn about a rule's status. Twice a year, federal agencies are required to announce the rules they have in the pipeline, their stage of development (i.e., early stages of development, proposed rule, or final rule), and an approximate timeline. The information is published in the *Unified Agenda* and is notoriously inaccurate.

Rules are given a Regulatory Identification Number early in the regulatory formulation process, but that identification does not necessarily always follow the regulation through its lifecycle. If the regulation is substantially revised, it may be given a new number, but there is no systematic way to trace its origins and connections to previous proposals. Moreover, there is no way to track paperwork that is associated with a particular rule.

OMB, in concert with the agency overseeing the e-rulemaking initiative (see Recommendation E.1), should develop a regulatory tracking system. Creating a tracking system may require federal agencies to establish online, searchable holdings of regulatory actions under development. The system should be updated regularly, giving the public a better indication as to the rule's progress and when significant rulemaking decisions have been made. It may take years to perfect the system, but the work should begin as part of the broader e-rulemaking project.

The creation of such a system would benefit both the public and the agency. The public would be better informed, earlier in the process (that is, before publication of the NPRM). If the public is better informed, an agency can better gauge public reaction and incorporate the public's views into a proposal during its formation, rather than after it has been fully developed and internally vetted. (The democratic benefits of public participation earlier in the process will be discussed in the next section.)

A tracking system would be a helpful tool for small business. For example, businesses could look up a final rule and find out what paperwork is associated with the rule. That way, a company could know more easily what is expected of it.

D.3. To the extent permitted by law, agencies should make government information publicly available. Improvements to the FOIA process could aid in rulemaking transparency. Although FOIA's reach extends beyond rulemaking and into other areas of government information, improved access to a broad class of records can contribute to a better public understanding of how government works, including rulemaking.

Section (a)(2) of FOIA embodies the disclosure principles federal agencies should embrace. Under Section (a)(2), agencies are required to make publicly

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available certain categories of government documents, the contents of FOIA requests the agency has fulfilled if they "have become or are likely to become the subject of subsequent requests," and an index of those documents.

Currently, federal agencies are not fully embracing the spirit of Section (a)(2), in particular the clause in Section (a)(2) that requires them to make publicly available information they believe the public will request repeatedly, nor do most agencies keep an index of those documents. As with rulemaking information, it is important for government openness and accountability that agencies make such information available online.

Making greater use of Section (a)(2) of FOIA to make government information available online would greatly enhance transparency and public participation. Embracing Section (a)(2) would also benefit the agency because officials would not have to spend as much time processing duplicative, repeat FOIA requests. (See Recommendation D.1.)

By enacting the following recommendations, agencies can make strides in embracing FOIA's idea that government information be made available to the public in a timely way.

D.3.a. The president should instruct the attorney general to issue a memo calling on agencies to make government information publicly available under FOIA whenever possible. (See Recommendation 7 in "The First 100 Days: Recommendations for President-Elect Obama" section.) On October 12, 2001, then-Attorney General John Ashcroft issued a memorandum urging federal agencies to exercise greater caution in disclosing information requested under FOIA. The Ashcroft memo has prompted agencies to unnecessarily withhold government information from the public and, by encouraging agencies to battle the public over FOIA requests, worsened the FOIA backlog.

Ashcroft's memo superseded a 1993 memorandum from then-Attorney General Janet Reno that promoted disclosure of government information under FOIA unless it was "reasonably foreseeable that disclosure would be harmful." The Reno memo created an agency climate in which officials were more likely to share information with the public upon request.

Because this report relates to the rulemaking process, we have focused on the benefits of disclosing information related to rulemaking issues, not foreign policy or national security matters. However, to the best of our knowledge, the push for greater disclosure under the Reno memo never led to the release of government information that risked our national security or public well-being.

The president should direct the new attorney general to instruct agencies that the Justice Department will embrace the policy direction of the Reno memo to provide a defensible argument for aggressively disclosing information when possible. The president should act as soon as possible to send a message that the new administration stands for greater transparency.

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D.3.b. Agencies should work to reduce the FOIA backlog. The FOIA backlog – the number of FOIA requests in the federal government's queue waiting to be addressed – continues to be a problem. In 2007, the FOIA backlog improved, but it still stands at 33 percent of the total number of requests processed.[2] From 2006 to 2007, eleven agencies did not make progress in reducing their FOIA backlog or presided over a worsening FOIA backlog.[3] Severe FOIA backlogs are an impediment to transparency and public access.

Agencies should actively work to reduce FOIA backlogs. A new administration-wide directive on FOIA (see Recommendation D.3.a above) will help, as will making more information publicly available in rulemaking dockets, but agencies should take other steps as well. Agencies should devote more time and resources to fulfilling FOIA requests.

D.3.c. The president should request, Congress should appropriate, and agencies should use more funds to fulfill FOIA requests. As a general trend, the number of FOIA requests the government receives increases each year. The cost to the federal government of handling FOIA requests was more than $350 million for 2007.[4]

Because the FOIA backlog is so significant, and because FOIA requests are likely to increase each year, agencies will eventually require more funds if they are to make progress in reducing the FOIA backlog and to promptly handle new FOIA requests.

D.3.d. Agencies should develop plans for digitizing non-digital information. As mentioned above, the rise of the Internet has redefined the expectations for government transparency. For government information to be truly transparent, it should be available online.

Untold numbers of government documents predate the Internet age, and some new documents are in a non-digital format. Scanning these documents and uploading them to agency websites will be costly and time consuming.

Agencies should develop long-term plans for digitizing non-digital information. Agencies should plan to transition existing non-digital documents into digital, full-text searchable formats. Agencies should also plan to minimize the amount of new information that is created in non-digital and/or non-full-text searchable formats.

D.3.e. Agencies should not use the Confidential Business Information (CBI) claims under FOIA during public health emergencies. One of the nine FOIA exemptions allows agencies to deny FOIA requests if the information in question is "privileged or confidential" business information.[5] Agencies can and do claim the CBI exemption during public health emergencies. For example, during meat recalls, the federal meat inspection agency has refused to disclose the names of retail outlets where contaminated beef has been shipped if the list of retailers is considered confidential. The agency may be legally protected

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in doing so, but not releasing the information unnecessarily puts the public at risk. During public health crises such as these, agencies should be disclosing CBI to the extent necessary to address the emergency. Where agency statutes do not provide authority to disclose CBI during public health emergencies, the Congress should provide necessary authority to do so.

D.3.f. Agencies should disclose online the calendars of senior agency officials. The calendars of government officials often provide valuable evidence of how officials and/or their staffs spend their time. Officials' calendars are often the subject of FOIA requests. In the spirit of FOIA Section (a)(2), agencies should disclose online the calendars of political appointees and senior career officials.

D.3.g. The president should ensure the FOIA ombudsman is housed at the National Archives and Records Administration, not the Department of Justice. The OPEN Government Act of 2007 created a new Office of Government Information Services at the National Archives and Records Administration (NARA) to serve as a FOIA ombudsman. It is to oversee the federal FOIA process and settle disputes within agencies. Although the Department of Justice holds the primary responsibility for enforcing FOIA, Congress saw fit to house the ombudsman at NARA in order to insulate it from political influence. In his FY 2008 budget request, President Bush attempted to move the ombudsman's office to the Justice Department.

The president should ensure that NARA has adequate resources to implement the new Office of Government Information Services.

ENDNOTES

1. See, for example, the American Bar Association's 2008 study on the status and future of e-rulemaking, entitled Achieving the Potential: The Future of Federal E-rulemaking, for a thorough evaluation of electronic rulemaking and recommendations for the future.
2. OpenTheGovernment.org, "Secrecy Report Card 2008: Indicators of Secrecy in the Federal Government," p. 11, available at http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf, last accessed October 6, 2008.
3. Ibid.
4. Ibid., p. 10.
5. Use of Exemption 4, which covers CBI issues, has increased dramatically since 2003 in the aftermath of instructions from then-Attorney General John Ashcroft and White House Chief of Staff Andrew Card instructing agencies to make greater use of FOIA Exemptions 2 (internal agency rules), 4 (proprietary information and trade secrets), and 5 (inter-agency memoranda) in handling "sensitive" information. Use of Exemption 4 increased 46% in the five years since the instructions (2003 to 2007) compared to the five year prior to the instructions (1998 to 2002). In 2007, there were 10,136 uses of Exemption 4 by federal agencies. Source: OMB Watch analysis of data in Coalition of Journalists for Open Government, "An Opportunity Lost: An In-depth Analysis of FOIA Performance from 1998 to 2007," July 3, 2008,available at http://cjog.net/documents/Part_1_2007_FOIA_Report.pdf, last accessed November 3, 2008.

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PART E.

PUBLIC PARTICIPATION

THE PROBLEM

The primary vehicle for public participation is the comment period directly following publication of a notice of proposed rulemaking (NPRM). What the public does not fully appreciate, however, is that notice of a proposed rulemaking comes quite late in the rule development process. Agencies often decide the general framework for regulatory actions during the pre-rule stage (before the publication of the NPRM). Therefore, participation during the standard comment period provides post hoc reactions to largely predetermined policy choices, and those earlier policy choices have not been made in an open, inclusive, or transparent process.

The participation that occurs either in the pre-rule stage or during the comment period is one in which interested parties give feedback to government officials but where there is no clear process for regular interaction between agency officials and the public. As a result, the participation that actually impacts agency decision making is limited to those with the knowledge, resources, and access that enables them to contact decision makers informally at key points in the process.

Public participation in the rulemaking process is important for both the public and for federal agencies developing rules. The public has a right to participate in the rulemaking process, and doing so enhances both civic engagement and understanding. The rulemaking process does not, and should not, operate as plebiscite or referendum. However, the ability of citizens to have a voice in the policymaking process is a central tenet of our representative democracy, even if that voice is not determinative. Agencies benefit, too. Meaningful public participation can provide decision makers with valuable insight into how a policy proposal will actually be implemented, what its real world impacts may be, or simply how it will be received in the court of public opinion.

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The "public" can include experts and people who are not directly interested in the rule and might not otherwise participate, but who bring vast knowledge and experience, directly or indirectly, with the issues raised by the rulemaking. In the past, it was difficult or impossible to include these people because they were geographically dispersed. In addition, there are laws that allow certain stakeholders (for example, state and local governments, small business representatives) affected by rules to have access to the rulemaking process prior to the time when the experts and other knowledgeable segments of the public have access. Online commenting opens new possibilities for reaching out to these people, bringing them into the regulatory process, thus leveling the playing field and drawing on their knowledge and insight to craft a better rule. If federal officials incorporate such insights into their thinking as they craft the proposed and final rules, the result will be rules of greatly improved quality that better serve the public.

Another problem with the process as currently structured is that the comment period does not easily allow for a dialogue among commenters. Commenters often file on the last day of a period partly because they have used the entire comment period to prepare and polish their submissions, and partly so as not to reveal their arguments to those holding opposing views. Interested stakeholders can and do use their comments to refute what they *anticipate* will be the arguments of their opponents, but this approach is not as helpful as replies to actual comments through dialogue or debate. The absence of a debate underscores the need for a comment process that can generate an actual dialogue about a proposed rule.

Ultimately, the objective should be to bring to the process a broad range of relevant expertise, interests, and perspectives, and then improve the quality of the dialogue between the public and the agency so that regulatory outcomes are of the highest quality possible and are perceived as fair, open, and legitimate. Given the technical nature of rulemakings, numerous challenges present themselves. First, even experts may have limited understanding of the rulemaking process and may not be aware that a rule of potential interest is being developed. Second, the public may not understand complex rules, but may still be able to provide helpful input on the substantive issues in proposed regulations. Third, when the public has value to add, it may not possess the means or time to do so. Fourth, there is a tendency for the regulatory process to become captive to narrow audiences that may not adequately reflect the broader public perspective.

These problems have always been with us and will afflict any regulatory process. The rise of electronic communication offers new possibilities for reforming the rulemaking process to include a wider range of experts and stakeholders in a process that, for the first time, is truly open, interactive, and well informed. It is too soon to prescribe specific methods and procedures for how electronic rulemaking should work, but agencies have begun to experiment with new procedures. The president should strongly encourage agencies in such experiments – both by directive and by funding such pilots in agency budgets.

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SUMMARY OF RECOMMENDATIONS

Public participation in the rulemaking process should involve more constructive communication between federal officials, the public at large, and outside stakeholders. Federal agencies should experiment with new techniques that allow for an exchange of ideas between interested parties and the government and among interested parties with diverse views. New techniques should create opportunities for participation in the pre-rule stage while policies are still under development.

DETAILED RECOMMENDATIONS

E.1. The federal e-rulemaking initiative needs to be reformed and accelerated to strengthen public engagement in the rulemaking process. Regulations.gov is a government-run website, the primary purpose of which is to provide the public and other agencies with a central location to find, view, and comment on proposed rules. Regulations.gov displays the text of proposed policies and the text of comments. It can also allow users to search for and read supporting material that serves as the basis for rulemakings.

Regulations.gov has made pioneering strides in making the rulemaking process more accessible in the Internet age, but it has not lived up to expectations nor to its full potential. The site is difficult to use, and finding regulatory proposals or other information can be tedious. For example, the site does not allow users to easily search for dockets – the collection of documents related to a specific rulemaking.

Changes to Regulations.gov should allow the website to better serve the public's need for access to rulemaking dockets. (See Recommendation D.1.) A top priority should be to improve the website to make it easier for the public to find regulations of interest and to comment on them.

To engage the public earlier in the process, agencies should open dockets as soon as they make the decision to undertake a rulemaking and regularly post information on developments occurring before publication of the NRPM. For example, contact information for agency officials, updates on regulatory planning included in the semiannual *Unified Agenda*, and the posting of key studies could all be included in the online docket before the NPRM is finished and posted.

Regulations.gov should also be a mechanism for allowing both user and agency experimentation in order to improve the regulatory process. It could provide the platform for assessing and supporting greater information technology capabilities and resources within agencies and among stakeholders. It could allow, for example, the public and regulated communities to have the option of using either the central website or agency sites to get needed information. Having multiple pathways to regulatory information in today's world of distributive databases would mean that the same core data are available to the

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public no matter which approach is used to find information. Visiting agency websites, however, the user might find other value-added information; if visiting Regulations.gov, the user might find more comparative information across government.

The Office of Management and Budget (OMB) should make improvements to e-rulemaking a high priority, working closely with the appropriate agencies, to formulate and implement a plan of action. Here are two ways OMB can be helpful. First, it should request resources from Congress to adequately fund the e-rulemaking initiative. Currently, federal agencies are required to divert resources from other programs to fund the initiative. This requirement may be a disincentive to encourage participation. Second, OMB should seek resources to strengthen agency information technology capacity so that they further expand the objectives of the e-rulemaking initiative.[1]

E.2. Agencies should be encouraged to experiment with interactive technology to solicit stakeholder input. Agencies should be encouraged to try new ways of stimulating public participation, such as using pilot programs to experiment with interactive technology. For example, agencies could experiment with making field hearings open to broader audiences than ever before by using online and teleconference tools. Just the same, technological innovations cannot completely preclude real-world practical concerns: a recent Mine Safety and Health Administration hearing on drug and alcohol testing for miners was set up as a teleconference, but MSHA did not provide for large-enough spaces for the public to attend and participate in the teleconference. These experiments should be evaluated and the tension between expediting the rulemaking process and improving participation should be balanced before full-scale approaches are adopted.

E.3. Agencies should experiment with new ways to encourage participation by the public and stakeholders even prior to proposed rulemaking in order to level the playing field. Either by statutory requirement or executive prerogative, agencies seek input even before the rule enters the formal notice-and-comment stage. Unfortunately, this involvement in the pre-rulemaking stage is selective to certain stakeholders, building unfairness into the rulemaking process.

The Small Business Regulatory Enforcement Flexibility Act requires the Environmental Protection Agency and the Occupational Safety and Health Administration to consult with a panel of small business men and women before proposing or finalizing rules that might impact the small business community. However, this consultation occurs before the public is privy to information about the rule and can affect rules in ways that tilt the outcome toward regulated interests. In 2006, OSHA finalized a health standard for workers exposed to hexavalent chromium, a dangerous carcinogen. The standard announced in the final rule was significantly weaker than what OSHA had proposed two years earlier. In the final rule, OSHA indicated it changed the standard partly as a result of the SBREFA panel's input.

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We need to find new ways to engage the public. To facilitate improved participation in the pre-rule stage, agencies should notify the public of its plans to undertake a rulemaking and then provide regular updates. For example, improved tracking capabilities would allow the public to follow the rule as it develops and comment at any critical juncture that may set the course of the new policy. Allowing the public to voice concerns in a timely way permits the agency to respond to concerns in conjunction with making a decision instead of long after. See Recommendation D.2. for how to improve rule tracking.

Examples of other mechanisms with which agencies might experiment to solicit diverse views about a rulemaking could include:

- Creating an interactive website similar to the European Union's Your Voice in Europe site (see http://ec.europa.eu/yourvoice/index_en.htm);
- Employing public health/environmental analysts to help explain technical issues to the public;
- Creating an ombudsman/public interest advocate similar to one that exists for small business;
- Funding outside groups on a rule-by-rule basis similar to the community advocate funding provided under Superfund legislation; and/or
- Hosting online meetings/communications using interactive technologies.

E.4. Agencies should make better use of advisory committees to serve as vehicles for hearing the views of stakeholder groups and the public at large, especially in the pre-rule stage. Federal agencies should use federal advisory committees (FACs) more frequently to elicit public, scientific, and stakeholder views, including during the pre-rule stage. Agencies may form standing FACs to address scientific issues that are likely to remain of national concern, such as climate change or import safety. Agencies may also wish to form ad hoc FACs when they decide to undertake a specific rulemaking. These FACs can run a parallel course to the agency's efforts to develop rules; panel members could weigh in on questions, determinations, or evidence in the pre-rule stage as they arise. In any case, the committees should be used to solicit information important to forming effective options and alternatives before policy decisions are made.

The Federal Advisory Committee Act (FACA) requires, with limited exception, that advisory meetings be open to the public. The act also requires FACs to be "fairly balanced in terms of the points of view represented." Taking those two points into consideration, FACs can be a vehicle to hear the views of stakeholder groups and the public at large on pressing issues – especially in the pre-rule stage before an agency narrows policy into one or more regulatory options.

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To realize the promise of advisory committees as participation vehicles, provisions requiring both openness and balance must be met. Currently, FACA meetings are not as open as Congress likely envisioned. In 2007, only 30 percent of FACA meetings were fully open to the public.[2] Agencies must open more meetings to the public and provide time for comments or questions, especially for meetings related to a rulemaking. Agencies must also make concerted efforts to inform the public of upcoming meetings. Specific recommendations about strengthening the workings of federal advisory committees are in Recommendation B.3 and B.4.

ENDNOTES

1. American Bar Association, Achieving the Potential: The Future of Federal E-rulemaking.
2. According to the General Service Administration's FACA database, 6,940 meetings were held in FY2007. Of those, 2,109 were open, 4,541 were closed, and 290 were partially closed. Available at http://www.fido.gov/facadatabase/public.asp, last accessed October 6, 2008.

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APPENDICES

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APPENDIX 1.

LISTS OF RECOMMENDATIONS

ORGANIZED BY TOPIC

Below is the list of recommendations as they appear in the report, without explanatory text.

The First 100 Days: Recommendations for President-Elect Obama

1. Place a moratorium on finalizing any new regulations, and review those rules finalized but not yet in effect.

2. To set a new tone for the new administration, the president should pursue the timely appointment of qualified individuals to regulatory agencies critical to protecting the public.

3. Increase agency funding for regulatory implementation and enforcement.

4. The president should form a blue ribbon commission to analyze the regulatory process with the goals of examining existing requirements and reducing unnecessary delay.

5. The president should appoint a qualified administrator for the Office of Information and Regulatory Affairs within the Office of Management and Budget who can lead the office in fulfillment of its statutory obligations and transform the role of OIRA.

6. The president should rescind E.O. 13422 immediately.

7. The president should improve executive branch transparency by replacing the Ashcroft memorandum with another memorandum directing agencies to make more information publicly available.

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The First 100 Days: Recommendations for the 111th Congress

1. Use the Congressional Review Act (CRA) to stop ill-advised "midnight regulations" from the previous administration.

2. As the new Congress organizes itself, it should clarify committee jurisdiction and reassert its responsibilities for review and oversight of cross-cutting regulatory issues.

3. Increase agency funding for regulatory implementation and enforcement.

4. Strengthen federal protections for whistleblowers by passing pending legislation in both chambers.

A. Improving the Quality of Regulations

A.1. Regulatory solutions and the analysis of regulatory alternatives should be consistent with statutory provisions.

A.2. To the extent that cost-benefit analyses are done, they should be guided by a set of core principles.

A.3. Scientific uncertainty per se does not provide sufficient justification to avoid promulgating regulations.

A.4. Agencies should be encouraged to clearly state problems, identify data gaps, restore needed collection and monitoring programs, and address new information needs as they are confronted with new regulatory problems.

A.5. The Paperwork Reduction Act needs to be amended and reauthorized.

A.6. Agencies should develop their own standards for the use of risk assessment according to best practices applicable to the issues with which they are confronted.

A.7. Implied preemption in rulemakings must be curtailed.

B. Integrity and Accountability

B.1. The president should instruct his agency heads that scientific integrity must be a core component of regulatory actions.

B.2. Federal protections for public and private sector whistleblowers need to be strengthened to serve as a check on misconduct.

B.3. Strengthen the Federal Advisory Committee Act (FACA).

B.4. Improve conflicts of interest laws.

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B.5. Disclose the scientific, technical, economic and social analyses used in the formation and promulgation of regulatory documents.

B.6. Resurrect the Office of Technology Assessment (OTA).

B.7. For key areas of international health and safety regulation affecting Americans and U.S. businesses, Congress and the president should call for greater transparency in order to make the process more democratic.

B.8. The president should encourage agency heads to adopt (or modify) guidelines to allow scientists to communicate directly with interested parties.

B.9. Agencies should abstain from inappropriate interference in the work of other agencies and end secretive interagency reviews of scientific and technical information.

C. Implementation and Enforcement of Regulations

C.1. Funding for enforcement of regulations must be increased.

C.2. Develop a comprehensive regulatory compliance initiative.

C.3. Modernize enforcement requirements across government to assure credible deterrence.

C.4. Fund an historical assessment of regulatory agency budgets and resource needs.

D. Transparency in the Rulemaking Process

D.1. Agency rulemaking dockets should be expanded, complete, and available online.

D.1.a. Agencies should disclose online all studies in their possession related to a rulemaking, regardless of whether the study was used to inform the policy option the agency chose.

D.1.b. Agencies should disclose online all written communications among federal officials from different agencies, including the White House, regarding rules under development or under review.

D.1.c. Agencies should disclose online all communications, written or oral, between any White House office and any nongovernmental entity regarding rules under development or under review.

D.1.d. Agencies should disclose online all substantive communications between the agency and nongovernmental entities regarding regulations.

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D.2. Create a system that allows the public to track the status of a rule and its associated paperwork requirements.

D.3. To the extent permitted by law, agencies should make government information publicly available.

D.3.a. The president should instruct the attorney general to issue a memo calling on agencies to make government information publicly available under FOIA whenever possible.

D.3.b. Agencies should work to reduce the FOIA backlog.

D.3.c. The president should request, Congress should appropriate, and agencies should use more funds to fulfill FOIA requests.

D.3.d. Agencies should develop plans for digitizing non-digital information.

D.3.e. Agencies should not use the Confidential Business Information (CBI) claim under FOIA during public health emergencies.

D.3.f. Agencies should disclose online the calendars of senior agency officials.

D.3.g. The president should ensure the FOIA ombudsman is housed at the National Archives and Records Administration, not the Department of Justice.

E. Public Participation in the Rulemaking Process

E.1. The federal e-rulemaking initiative needs to be reformed and accelerated to strengthen public engagement in the rulemaking process.

E.2. Agencies should be encouraged to experiment with interactive technology during comment periods.

E.3. Agencies should experiment with new ways to encourage participation by the public and stakeholders even prior to proposed rulemaking in order to level the playing field.

E.4. Agencies should make better use of advisory committees to serve as vehicles for hearing the views of stakeholder groups and the public at-large, especially in the pre-rule stage.

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ORGANIZED BY DECISION MAKER

In each recommendation in the report, the Steering Committee has identified one or more decision making bodies responsible for carrying out the recommendation. This list categorizes recommendations by decision making body – either Executive Branch (the President, the Executive Office of the President, or federal agencies) or Congress. Where a recommendation is the responsibility of both branches, it is included in both categories and marked with an asterisk (*).

Executive Branch

Next Administration 1. Place a moratorium on finalizing any new regulations, and review those rules finalized but not yet in effect.

Next Administration 2. To set a new tone for the new administration, the president should pursue the timely appointment of qualified individuals to regulatory agencies critical to protecting the public.

Next Administration 3. Increase agency funding for regulatory implementation and enforcement.

Next Administration 4. The president should form a blue ribbon commission to analyze the regulatory process with the goals of examining existing requirements and reducing unnecessary delay.

Next Administration 5. The president should appoint a qualified administrator for the Office of Information and Regulatory Affairs within the Office of Management and Budget who can lead the office in fulfillment of its statutory obligations and transform the role of OIRA.

Next Administration 6. The president should rescind E.O. 13422 immediately.

Next Administration 7. The president should improve executive branch transparency by replacing the Ashcroft memorandum with another memorandum directing agencies to make more information publicly available.

A.1. Regulatory solutions and the analysis of regulatory alternatives should be consistent with statutory provisions.

A.2. To the extent that cost-benefit analyses are done, they should be guided by a set of core principles.

A.3. Scientific uncertainty per se does not provide sufficient justification to avoid promulgating regulations.

A.4. Agencies should be encouraged to clearly state problems, identify data gaps, restore needed collection and monitoring programs, and address new information needs as they are confronted with new regulatory problems.

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A.6. Agencies should develop their own standards for the use of risk assessment according to best practices applicable to the issues with which they are confronted.

A.7. Implied preemption in rulemakings must be curtailed.

B.1. The president should instruct his agency heads that scientific integrity must be a core component of regulatory actions.

B.2. Federal protections for public and private sector whistleblowers need to be strengthened to serve as a check on misconduct.*

B.3. Strengthen the Federal Advisory Committee Act (FACA).*

B.4. Improve conflicts of interest laws.*

B.5. Disclose the scientific, technical, economic and social analyses used in the formation and promulgation of regulatory documents.*

B.7. For key areas of international health and safety regulation affecting Americans and U.S. businesses, Congress and the president should call for greater transparency in order to make the process more democratic.*

B.8. The president should encourage agency heads to adopt (or modify) guidelines to allow scientists to communicate directly with interested parties.

B.9. Agencies should abstain from inappropriate interference in the work of other agencies and end secretive interagency reviews of scientific and technical information.

C.1. Funding for enforcement of regulations must be increased.*

C.2. Develop a comprehensive regulatory compliance initiative.

C.3. Modernize enforcement requirements across government to assure credible deterrence.

D.1. Agency rulemaking dockets should be expanded, complete, and available online.

D.1.a. Agencies should disclose online all studies in their possession related to a rulemaking, regardless of whether the study was used to inform the policy option the agency chose.

D.1.b. Agencies should disclose online all written communications among federal officials from different agencies, including the White House, regarding rules under development or under review.

D.1.c. Agencies should disclose online all communications, written or oral, between any White House office and any nongovernmental entity regarding rules under development or under review.

D.1.d. Agencies should disclose online all substantive communications between the agency and nongovernmental entities regarding regulations.

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D.2. Create a system that allows the public to track the status of a rule and its associated paperwork requirements.

D.3. To the extent permitted by law, agencies should make government information publicly available.

D.3.a. The president should instruct the attorney general to issue a memo calling on agencies to make government information publicly available under FOIA whenever possible.

D.3.b. Agencies should work to reduce the FOIA backlog.

D.3.c. The president should request, Congress should appropriate, and agencies should use more funds to fulfill FOIA requests.*

D.3.d. Agencies should develop plans for digitizing non-digital information.

D.3.e. Agencies should not use the Confidential Business Information (CBI) claim under FOIA during public health emergencies.

D.3.f. Agencies should disclose online the calendars of senior agency officials.

D.3.g. The president should ensure the FOIA ombudsman is housed at the National Archives and Records Administration, not the Department of Justice.

E.1. The federal e-rulemaking initiative needs to be reformed and accelerated to strengthen public engagement in the rulemaking process.

E.2. Agencies should be encouraged to experiment with interactive technology during comment periods.

E.3. Agencies should experiment with new ways to encourage participation by the public and stakeholders even prior to proposed rulemaking in order to level the playing field.

E.4. Agencies should make better use of advisory committees to serve as vehicles for hearing the views of stakeholder groups and the public at-large, especially in the pre-rule stage.

Congress

Next Congress 1. Use the Congressional Review Act (CRA) to stop ill-advised "midnight regulations" from the previous administration.

Next Congress 2. As the new Congress organizes itself, it should clarify committee jurisdiction and reassert its responsibilities for review and oversight of cross-cutting regulatory issues.

Next Congress 3. Increase agency funding for regulatory implementation and enforcement.

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Next Congress 4. Strengthen federal protections for whistleblowers by passing pending legislation in both chambers.

A.5. The Paperwork Reduction Act needs to be amended and reauthorized.

B.2. Federal protections for public and private sector whistleblowers need to be strengthened to serve as a check on misconduct.*

B.3. Strengthen the Federal Advisory Committee Act (FACA).*

B.4. Improve conflicts of interest laws.*

B.5. Disclose the scientific, technical, economic and social analyses used in the formation and promulgation of regulatory documents.*

B.6. Resurrect the Office of Technology Assessment (OTA).

B.7. For key areas of international health and safety regulation affecting Americans and U.S. businesses, Congress and the president should call for greater transparency in order to make the process more democratic.*

C.1. Funding for enforcement of regulations must be increased.*

C.4. Fund an historical assessment of regulatory agency budgets and resource needs.

D.3.c. The president should request, Congress should appropriate, and agencies should use more funds to fulfill FOIA requests.*

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APPENDIX 2.

PROJECT DESCRIPTION

OMB Watch initiated this regulatory reform project, *Advancing the Public Interest Through Regulatory Reform*, in Spring 2007 to develop recommendations to improve the US regulatory system. Comprehensive reform of the entire regulatory system in all its complex details is well beyond the scope of this project; to achieve a fully restructured regulatory system will require the public, private enterprise, the president, Congress, and federal agencies to be thoughtfully engaged. We hope our efforts to address the most pressing issues and identify principles of reform can be a catalyst for that broader reform effort.

Nineteen people agreed to serve on the Steering Committee to oversee the project.[1] The criteria for service on the Steering Committee were 1) a knowledge of the regulatory system, 2) belief that the system is in need of substantial reform, and 3) a belief that the federal government has an important regulatory role to play in providing essential public protections. Membership in the Steering Committee changed only slightly over the course of the project.

The initial goals of the project were to produce:

- A report with specific recommendations the next president can implement to improve the regulatory process, as well as longer-range ideas for changing the regulatory process;
- Public opinion research to frame regulatory discussions; and
- A web-based regulatory resource center.

Recommendations to the next president and other recommendations for changing the regulatory process are included in this report. The public opinion research was used to inform much of the report. For example, it lends credence to the call for reforming the regulatory process generally and

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for the transparency reforms in particular. The Regulatory Resource Center is part of OMB Watch's website (available at http://www.ombwatch.org/regresources). Each of these project segments are described below.

In leading the project, the Steering Committee 1) identified topics that should be covered by this project, 2) provided the structure and topics for the work of four task forces to help develop recommendations, 3) assisted with approaches to frame regulatory matters, including advice and background materials for the public opinion research, 4) provided advice during the development of the regulatory resource center, 5) developed recommendations that the next president can immediately implement to strengthen the regulatory process, 6) developed a longer-range framework for a more efficient and responsive regulatory structure in government, and 7) developed the strategy and products to disseminate the results of the project.

The Steering Committee met four times between July 2007 and September 2008 either in person or by teleconference. In addition, there were two ad hoc subcommittees formed, one to assist with framing the public opinion research issues and one to assist in the development of the outline of the final report and the products to help disseminate the recommendations. OMB Watch provided staff support to the project. The following sections describe the processes the Steering Committee used to achieve each of the project goals.

DEVELOPING REGULATORY RECOMMENDATIONS

The project was initiated and potential Steering Committee members contacted in early 2007. OMB Watch initiated the project well in advance of the change in presidential administration in order to more comprehensively address the problems in the regulatory process. Steering Committee members brought unique knowledge of and experience with the regulatory system. The members brought the perspectives of business, scientific, public health, and government accountability public interest organizations, unions, academia, and law practitioners. (See Appendix 3 for a list of members and their affiliations.)

At the first committee meeting in July 2007, members established the guidelines for the project, such as the project's objectives and Steering Committee and staff responsibilities. More importantly, the Committee: 1) set out the principles government should try to advance through its regulatory process; and 2) reached agreement on the subjects of four task forces that would be vehicles for helping the Committee develop its list of recommendations.

The Steering Committee created the task forces organized around four topics deemed critical to addressing the range of regulatory issues the Committee identified. The task force topics were: 1) transparency and public participation; 2) scientific integrity; 3) regulatory tools; and 4) government

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management. In subsequent communications, the Steering Committee established the basic mandates for each task force, insisting each operate independently from the Committee and from each other.

Each task force consisted of a chair and a variety of members selected by the chair in coordination with the project staff. The task forces were formed and began their work early in 2008. Each addressed its individual mandate from the Committee in different ways as described below. (See Appendix 4 for lists of task force members.)

The task force members did not participate in any way in developing this overall project report. Involvement by task force members implies no endorsement of the Steering Committee's analysis or recommendations.

Transparency and Public Participation Task Force

This task force addressed several questions focused on improving both transparency and public participation in the rulemaking process specifically. The task force also addressed ways to strengthen both technical aspects as well as government-wide issues of transparency and participation. For example, it addressed steps that can be taken to improve the way the public can track individual agency regulations and their associated records, and better participate in the notice-and-comment period when regulations are being developed; it also addressed steps to strengthen transparency of the rulemaking process across government agencies.

Professor Cary Coglianese of the University of Pennsylvania chaired the task force. The task force consisted of fifteen members from academia, public interest groups, consultants, lawyers, and academic librarians. The members were brought together to discuss problems and issues and reviewed materials prepared by the chair and two University of Pennsylvania law students acting as reporters. Individual members were asked to contribute language regarding specific issues the task force addressed, and the preparation of the task force report was completed by Professor Coglianese and the reporters and reviewed by task force members. The task force did not set a goal of consensus on recommendations; thus, the recommendations presented in the final task force report represent a synthesis of the discussions. The report of the Transparency and Public Participation Task Force is available online at www.ombwatch.org/regs/PDFs/TPPreport.pdf.

Scientific Integrity Task force

The Steering Committee asked this task force to address issues around ways to safeguard scientific information in the rulemaking process: the independence of the information and the mechanisms used to generate it, and the independence of scientists and the climate within the agencies in which they work. For example, the task force addressed the appropriate role for federal advisory committees within agencies and how agencies might better deal with the selection of committee membership and with conflict of interest issues.

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Dr. Francesca Grifo of the Union of Concerned Scientists chaired the task force. In an approach similar to the transparency task force, Dr. Grifo and her staff drafted materials and circulated them to the members of the task force and to colleagues in the scientific community familiar with the way agencies conduct their regulatory work. The reviewers made suggestions and comments about realistic improvements to the draft materials. The report was again circulated to members of the task force for subsequent review. The report of the Scientific Integrity Task Force is available online at www.ombwatch.org/regs/PDFs/SIreport.pdf.

Government Management Task Force

This task force had the broadest mandate from the Steering Committee. The task force addressed the philosophical and legal frameworks for a new vision of the regulatory process. In addition to these important elements, the Steering Committee asked the task force to address ways to make agencies more responsive and effective in everything from their planning, review, and enforcement responsibilities to their responsiveness in emergency situations. Finally, the task force recommended steps the next president should take immediately upon entering office to change the regulatory system.

Professor Steven Croley of the University of Michigan was the task force chair. The task force consisted of nine total members representing government officials, academia, and the public interest community. Due to the breadth of the mandate to this task force, Professor Croley asked the members to volunteer to write papers on each of the questions asked of the task force. Singularly and in pairs, members drafted papers for review by the chair and subsequently by the entire task force. The chair then combined the papers into a final Government Management Task Force report, which is available online at www.ombwatch.org/regs/PDFs/GOVMGMTreport.pdf.

Regulatory Tools Task Force

The Steering Committee asked this task force to address issues surrounding the range of tools agencies use in their analyses of regulatory options and to explore and recommend alternative methods if available. Among the many tools used are risk assessments, cost-benefit analysis, various data collection techniques, environmental impact statements, and peer review procedures. The application of these many tools is critical to setting the levels of protective standards such as air pollution limits or toxic chemical exposure levels.

Dr. Ruth Ruttenberg of the National Labor College chaired the task force which consisted of nine total members representing public health professionals, unions, academia, law, and the public interest community. The task force members had a wide range of opinions, based on their diverse experiences, about the range of tools that the task force should address. As a result, the members provided information about the regulatory process in a series of conference calls and by drafting statements describing the way various tools are and should be used in their areas of expertise. This approach provided the project staff with information about the range of tools and their applications. The task force issued draft reports but did not issue a final report.

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The task forces were used as important, but not the only, sources of information to inform project staff as staff developed recommendations for the Committee's consideration. The task forces completed their work in July and August. The staff drafted an initial version of recommendations drawing on the task force work, outside materials from a wide range of sources (academic studies, regulatory reports and analyses, legal sources, etc.), conversations with regulatory experts from different fields, their own regulatory expertise, and interviews with Steering Committee members.

The Steering Committee met for two days in September 2008 to review the recommendations and to decide which recommendations for reforming the regulatory process they would advance. Staff revised the draft report, circulated it again to the Steering Committee for revisions, and then drafted the final report issued by the Steering Committee after a final review by the Committee. At the September meeting, Steering Committee members agreed that the report should not be issued as an OMB Watch report, but as a product produced by the 17 participants since it reflected a combined effort. Project staff prepared a separate summary of the recommendations to use with the transition team and congressional visits.

PUBLIC OPINION RESEARCH

As part of OMB Watch's project, *Advancing the Public Interest Through Regulatory Reform*, Lake Research Partners (LRP) conducted a series of focus groups. In early 2008, LRP held four focus groups with likely voters of no strong partisan affiliation. Two were held in Philadelphia on Feb. 6, 2008. One group was mixed race, white collar (those with college or graduate-level education), and female. The other was mixed race, blue collar (those who were high school graduates who may have attended trade schools but did not graduate from college), and male. The other two focus groups were held in Atlanta on Feb. 12, 2008. One group was mixed race, blue collar, and female. The other was all white, white collar, and male. All four groups had 10 participants.

LRP also conducted two focus groups of small business owners (businesses with no more than fifty employees) of no party affiliation or no strong party affiliation. Both were held in Chicago on April 17, 2008. One group was male, the other was female, and both groups were mixed race. Both groups had six participants.

A subcommittee of the Steering Committee provided valuable assistance in framing the issues addressed in the focus group research. In two meetings with LRP staff, one about the likely voter group and one about the small business group, the subcommittee helped develop the guides used by the moderators of the focus groups. The subcommittee raised issues and provided examples to test in the groups.

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The research was done to gauge public sentiment about the role of government today and the public's views on the pros and cons of regulation. The research was also designed to begin framing regulatory issues for policymakers, advocates, and other interested parties. LRP completed its final report in June 2008 and their findings are reflected throughout the Steering Committee's report.

REGULATORY RESOURCE CENTER

An additional component of the regulatory project was the creation of a web-based resource center for advocates and the public to learn about the regulatory process and how to participate in it. The Regulatory Resource Center is housed on OMB Watch's website (http://www.ombwatch.org/regresources). The center consists of an advocacy center and a policy library. It is designed to educate citizens on how they can become involved in the regulatory process (Advocacy Center) and to inform the public about the workings of the regulatory process (Policy Library).

The Steering Committee reviewed the center as it was being developed by OMB Watch staff and tested early components. Staff conducted beta testing with the Steering Committee and OMB Watch employees. OMB Watch then publicized the website in a developmental stage and users were encouraged to submit suggestions on the design, content, and usability. After making modifications to the website, the center was officially launched in March 2008. It is one of the few web-based sites for information about the regulatory process and is being continually updated.

ENDNOTES

1. Three people had to resign from the Steering Committee during the project, and one person joined mid-way, resulting in 17 people on the Steering Committee at the end of the project.

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APPENDIX 3.

STEERING COMMITTEE MEMBERSHIP

Below are the Steering Committee members for the *Advancing the Public Interest Through Regulatory Reform* project as of November 2008.* Affiliations are for identification purposes only and do not indicate involvement or an endorsement of the project recommendations by the organizations.

Gary D. Bass
Executive Director
OMB Watch

Michael Bird
Senior Federal Affairs Counsel
National Conference of State Legislatures

Caroline Smith DeWaal
Director, Food Safety Program
Center for Science in the Public Interest

N. Bruce Duthu
Professor of Native American Studies
Dartmouth College

David J. Goldston
former Chief of Staff
U.S. House Committee on Science

Mark Greenwood
Partner
Ropes & Gray

Francesca Grifo
Senior Scientist and Director of Scientific Integrity Program
Union of Concerned Scientists

John Irons
Research and Policy Director
Economic Policy Institute

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Edwin S. Jayne
Associate Director of Legislation
American Federation of State, County, and Municipal Employees

Sylvia Johnson
Legislative Representative
United Automobile Aerospace and Agricultural Implement Workers of America (UAW)

David Michaels
Research Professor and Interim Chair
Department of Environmental and Occupational Health
The George Washington University School of Public Health and Health Services

Richard W. Parker
Professor of Law
University of Connecticut School of Law

Beryl Radin
Scholar in Residence
School of Public Affairs
American University

Reece Rushing
Director, Regulatory and Information Policy
Center for American Progress

J. Robert Shull
Program Officer
Public Welfare Foundation*

Peter L. Strauss
Betts Professor of Law
Columbia Law School

Wesley Warren
Director of Programs
Natural Resources Defense Council

* We also benefited greatly from the contributions of John Arensmeyer of the Small Business Majority, Rena Steinzor of the University of Maryland School of Law, and Mike Wright of the United Steelworkers, who left the Steering Committee before the report was finalized. Ed Jayne joined the project in mid-2008.

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APPENDIX 4.

TASK FORCE MEMBERSHIP

Below are the members of the four task forces that helped develop background information for the *Advancing the Public Interest Through Regulatory Reform* project. The task forces operated independently of the Steering Committee and have neither considered nor endorsed the specific recommendations presented in this report. As such, the listing of task force members here does not indicate any involvement in or an endorsement of the project recommendations. Affiliations are for identification purposes only.

GOVERNMENT MANAGEMENT TASK FORCE

Matthew Adler
Leon Meltzer Professor of Law
University of Pennsylvania Law School

Lisa Bressman
Professor of Law/ Co-Director
Regulatory Program
Vanderbilt University Law School

Steven Croley, *Task Force Chair*
Professor of Law
University of Michigan Law School

Mariano-Florentino Cuellar
Professor of Law
Stanford Law School

Jeffrey Lubbers
Fellow in Law and Government
American University Washington College of Law

Frank O'Donnell
President
Clean Air Watch

Connor Raso
Submissions Director
Yale Journal on Regulation
Yale University

Jacqueline Simon
Public Policy Director
American Federation of Government Employees (AFGE)

Matthew Stephenson
Assistant Professor of Law
Harvard Law School

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REGULATORY TOOLS TASK FORCE

E. Marla Felcher
Adjunct Lecturer
Kennedy School
Harvard University

Rick Inclima
Director of Safety
Brotherhood of Maintenance of Way Employees Division

Michael Lipsky
Senior Program Director
Demos, and
Visiting Professor
Public Policy Institute
Georgetown University

Shelley Metzenbaum
McCormack Graduate School of Policy Studies
University of Massachusetts - Boston

Frank Mirer
Professor
EOH Program
School of Health Sciences
Hunter College

Randy Rabinowitz
Attorney

Kathy Rest
Executive Director
Union of Concerned Scientists

Ruth Ruttenberg, *Task Force Chair*
Professor
National Labor College

Susan Wood
Research Professor
School of Public Health and Health Services
George Washington University

SCIENTIFIC INTEGRITY TASK FORCE

Francesca Grifo, *Task Force Chair*
Senior Scientist and Director of Scientific Integrity Program
Union of Concerned Scientists

David Michaels
Research Professor and Interim Chair
Department of Environmental and Occupational Health
School of Public Health and Health Services
George Washington University

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TRANSPARENCY AND PUBLIC PARTICIPATION TASK FORCE

Steven Balla
Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs
George Washington University Elliot School of International Affairs

Barbara Brandon
Reference/Faculty Services Librarian
University of Miami Law Library

Ashley Brown
Executive Director
Harvard Electricity Policy Group
John F. Kennedy School of Government

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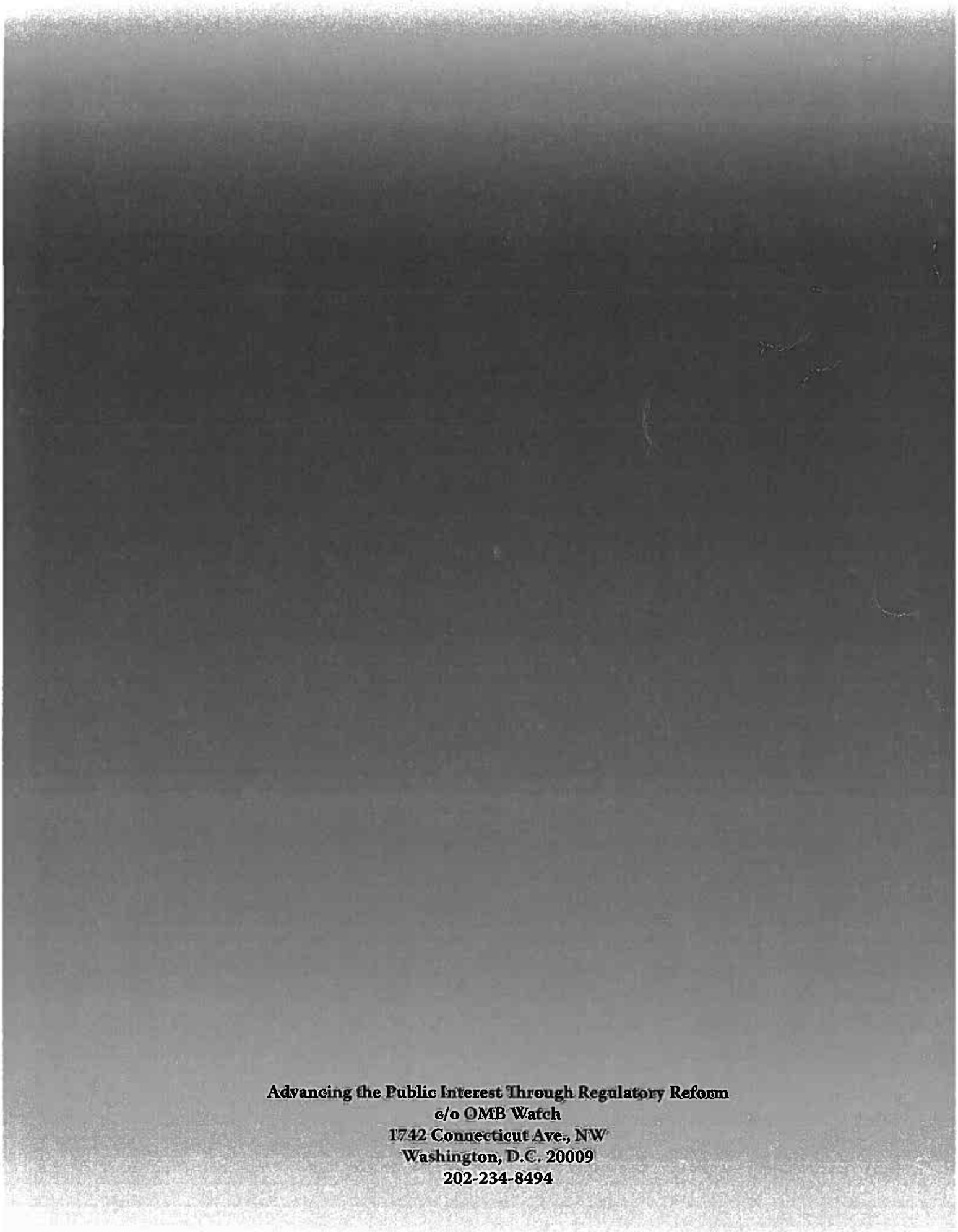

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