

CENTER FOR PROGRESSIVE REFORM EDITORIAL MEMORANDUM

To: Editorial Writers and Columnists

From: Center for Progressive Reform Member Scholars Rena Steinzor and Robert Glicksman

Date: November 20, 2009

Re: Forthcoming Executive Order on Regulatory Process

Sometime in the new few weeks, President Obama is expected to issue revisions to Executive Order 12,866, which establishes the rules of the road for how the White House Office of Management and Budget (OMB) supervises federal regulatory agencies as they develop regulations to protect health, safety, the environment, and more. The new Executive Order will undoubtedly give great power to the OMB's Office of Information and Regulatory Affairs (OIRA) to ride herd over regulatory agencies, as it has in the past. At issue is exactly how much power.

OIRA is home to the so-called "Regulatory Czar" – an informal title that predates the Obama Administration – as well as a staff of some 30 economists, and a handful of other professionals. This relatively small group wields enormous power over the regulatory system. Indeed, during presidential administrations from Ronald Reagan to George W. Bush, OIRA earned a reputation as the place that protective regulations went to be watered down or killed. Among regulated industries and opponents of regulation, it also came to be known as the court of last resort. In theory, the policy choices that guide the regulatory process are made when Congress passes the applicable laws, and those choices are implemented by the regulatory agencies to which Congress delegates authority. But in practice, policy battles lost in Congress are refought as regulated entities make their case anew to regulatory agencies, and then again when draft regulations go to OIRA for review. Particularly in recent years, OIRA has given those industries a friendly hearing, often imposing revisions to agencies' regulations that are plainly at the behest of industry.

In addition, OIRA's aggressive use of cost-benefit analysis has consistently undercut the expert judgment of scientists and analysts at the various regulatory agencies. Weighing the impact of a regulation against the costs it imposes makes sense, but cost-benefit analysis has proved to be an error-laden method – commonly overstating the costs of regulations by relying on inflated industry estimates while understating benefits. Moreover, in the majority of statutory provisions under which agencies regulate, the law actually calls for some method of regulatory impact analysis *other than cost-benefit*, so OMB's imposition of its favored method violates congressional intent. Finally, cost-benefit lends a patina of mathematical precision to OIRA's work, creating numbers for costs and benefits that can be added up and compared, but that are built on a foundation of omitted data and fundamental misassumptions. In sum, OIRA's principal contributions to the regulatory process have been to give regulated entities a friendly hearing and to impose a method of regulatory impact analysis that distorts congressional intent and invariably weakens regulations.

Early in his administration, President Obama announced his intention to revamp EO 12,866. Consumer and environmental groups have called for fundamental changes in the regulatory process for years, and their cause appears to have the most to gain from such a reevaluation. But their aspirations were tempered by the President's choice of Harvard Professor Cass Sunstein to be his OIRA administrator.

Sunstein is best known for his progressive views on a variety of issues, but his thinking on regulatory affairs stands in striking contrast. In his wholehearted embrace of cost-benefit analysis, he is closely aligned with John Graham, his Bush-era predecessor at OIRA – who enthusiastically endorsed Sunstein’s appointment. Not only does Sunstein support the continued use of cost-benefit, he has endorsed highly controversial elements of the John Graham version of this rule-killing methodology. These include the so-called “senior discount,” a statistical process that discounts the monetary value of *not killing* senior citizens (with toxic substances or by product-related injuries, for example) on the grounds that seniors have fewer years to live anyway. Sunstein also embraces the use of discounting the value of benefits that will not be achieved right away on the grounds that children who lose IQ points from brain damage caused by exposure to toxic substances today, for example, won’t miss the resulting lost income until they join the workforce years in the future.

In addition, Sunstein is a leading advocate for reliance on the emerging field of “behavioral economics.” His recent book, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, co-authored with Richard Thaler articulates his views on the subject. In the context of regulation and cost-benefit, Sunstein has called for reliance on “willingness to pay” studies as a measure of the benefits of a regulation. Such studies rely on consumers’ responses, offered in the abstract, to questions about how much they would pay to protect themselves from certain harms – cancer or injury in a car accident, for example. Such studies are notoriously unreliable, and mandating their use in the regulatory process would add yet another layer of delay to an already glacial process. When such studies of a few, small groups of people are used to undermine the mandates passed by Congress, they become affirmatively anti-democratic.

Sunstein’s attachment to behavioral economics also leads him to address certain harms by merely warning consumers about possible hazards, rather than requiring that the sources of those hazards be addressed – an approach that shifts the burden of protection away from the industries that create them to individuals and families. Such approaches bias the regulatory system towards outcomes that are contrary to the President’s stated desire to reinvigorate the regulatory system to strengthen protections for health, safety and the environment. On a more hopeful note, Sunstein has pledged to defer to statutes that bar the use of cost-benefit approaches and it will be telling to see if the new EO fulfills this pledge.

So far, only a small circle of advisors knows whether the new Executive Order will lead to the revitalization of a badly weakened regulatory process or redoubled efforts to submerge aggressive protection of public health, workers, and the environment at the behest of business. The Member Scholars of the Center for Progressive Reform have a long track record on these issues, and filed [extensive comments](#) with OMB when the Administration announced its intent to revamp the Executive Order. We have called for an end to OIRA’s overreliance on cost-benefit analysis, and proposed a different method: [Pragmatic Regulatory Impact Analysis](#), a method that begins by applying the methods of analysis dictated by statute and goes on to gather broad input from experts in a range of disciplines.

We have no expectation that the new Executive Order will discontinue the use of cost-benefit, for the simple reason that Sunstein has been such an ardent devotee of the approach. But the Obama Executive Order could still be a vast improvement over the Bush process, if it includes several key elements. When that new order is issued, we intend to evaluate it by asking the following questions:

1. Does the new EO continue to require agencies to justify proposed rules by quantifying “benefits” in dollar terms only – thus inviting agencies to ignore benefits that defy such monetization?
2. Does the new EO continue to apply a “discount rate” to benefits of regulatory protections that won’t be realized for several years to come? And if it does apply a discount rate, is it set at the current rate of 7 percent, a number so high that future benefits from, for example, efforts to slow climate change essentially drop out of the equation after a couple of decades?
3. Does the new EO explicitly disavow the “senior death discount” or other versions of lowering the value of a year of life if people are sick or handicapped?
4. Does the new EO embrace – and to what extent – Sunstein’s attachment to “behavioral economics”? In particular, does it substitute warnings to citizens about potential harms for actual regulatory protection from harms? And does it rely on “willingness to pay” studies that peg the “benefits” of regulation to suspect data on how much people say, in the abstract, they are willing to pay to avoid certain harms.
5. Does the new EO preserve OIRA’s power to “return” proposed regulations it does not like to agencies for time-consuming additional evaluation rather than simply advise agency heads that it disagrees with their judgments?
6. Does the new EO impose transparency on OIRA’s activities, most significantly by ending OIRA’s practice of forcing regulatory agencies to meet with it behind closed doors and using those meetings to kill ideas for proposed regulations even before they are made public?

The Administration has not announced a timetable for completion and release of the Executive Order, although Sunstein’s confirmation in September would seem to suggest that an order might finally be on the way after several months of White House deliberation. When it comes out, CPR plans to publish an analysis on at www.progressivereform.org/blog. We hope you’ll have the opportunity to read that and that you’ll find space to editorialize on the Executive Order in your pages. We would be delighted to discuss the matter with you. If you’d like to follow up, please contact Matt Freeman or Ben Somberg in our media office at 202.747.0698, or at mfreeman@progressivereform.org and bsomberg@progressivereform.org. You can also find us on the web at www.progressivereform.org. Thanks very much.