

180-
BUDGET
WASHINGTON

OMB Plans FY 83 Regulatory Strategy

By Kim Masters
Legal Times Staff

An internal planning document completed last week by the Office of Management and Budget's regulatory affairs office discusses administration strategies on issues ranging from retrenching on federal water-pollution controls to enhancing presidential authority over independent regulatory commissions.

The document, the "1983 Spring Planning Review," parallels a long-range budget planning exercise OMB undertakes every spring. But the review is the first such OMB effort addressing regulation. The resulting product, providing a look at issues OMB wants to tackle in fiscal 1983, is submitted to OMB Director David Stockman and to the White House.

Sources say the document was developed by OMB's office of information and regulatory affairs (OIRA) and covers those areas in which OIRA seeks top-level guidance. Each issue is discussed in terms of various alternatives available to the administration. Advantages and disadvantages of each option are listed, and in many instances, an OIRA recommendation is offered.

No recommendation is made about presidential oversight of independent regulatory commissions, but the document explores pros and cons of options that include attempting to minimize dis-



Sections of the Office of Management and Budget memo are reprinted in the Record at page 20. For an article on dissatisfaction with OMB's failure to issue paperwork reduction guidelines, see page 4.

tinctions between independent and executive agencies under current OMB oversight mechanisms; redirecting OMB review of independent agency information collection to provide increased oversight over policy; actively supporting legislative veto over independent agency regulations; or seeking amendments in current bills to give the president veto power over independent agency regulations.

In discussing the disadvantages of these approaches, the review says use of existing oversight mechanisms would not meet "the perceived need of demonstrating the President's direct, immediate control over [independent agency] regulatory policy" Another topic explored in the review is administration options for dealing with conventional water pollutants. The discussion on the fate of the standards for non-toxic pollution controls states that minimal standards

relying on "best practicable" technology have "resulted in substantial environmental improvements in some areas."

Divert Resources

Although the document does not offer a specific recommendation in this area, it further states that stringent standards could divert resources from clean-up efforts that can provide the greatest environmental payoff. It adds that stronger controls "may best be imposed by states and localities."

The alternatives explored include a strategy that would encourage additional clean-up of pollutants where technology-based regulations are "reasonably cost-effective," and another strategy, including legislative changes, that would minimize additional technology-based regulation. The review further discusses whether OMB should establish a regulatory cost-accounting system (requiring agencies to assemble dollar estimates of the annual costs imposed by regulations) and whether OMB should establish a regulatory budget (requiring agencies to set a budget for costs of regulations). If such a budget were established, the review says, the president and Congress would set the ceiling on incremental regulatory costs an agency could impose during a fiscal year.

The document states that creat-

Continued on page 7

OMB Review Addresses Pros and Cons of Reg Choices

Continued from page 1

ing a regulatory cost-accounting system would be "an ambitious undertaking" that would lead to considerable debate over the accuracy of cost estimates. Further, the review says such a program might be of limited usefulness because cost estimates may be inaccurate and because the approach would focus solely on costs, not benefits.

The review recommends, however, that the administration implement a regulatory cost-accounting system covering the major rules of all agencies. OIRA further recommends that a regulatory budget be initiated for selected programs, although none are named.

Radical Concept

OIRA concedes that setting ceilings or making meaningful tradeoffs may be difficult, since-cost estimates may be inaccurate. "As an untried and radical concept, its feasibility, let alone successful implementation, could encounter extreme skepticism," the review warns.

Another issue explored in the document is the administration's approach to dividing regulatory responsibility with the states and localities. The review states that regulation "should generally be administered at the lowest geographical level consistent with meeting public needs." This

executive branch leadership, the document states. Disadvantages cited are increased risk of eliminating important information collections and a higher level of complaints from the agencies.

Mandated Analyses

The document does not recommend increasing agency budgets to help them effectively perform regulatory impact analyses of proposed regulations. Such analyses are mandated under the administration's Executive

Order 12291, to assess costs and benefits of agency options.

The review recommends that the administration encourage shifts within agencies "to permit modest increases in efforts devoted to regulatory analysis relative to other activities." The review warns the administration to expect "considerable variation among agencies in the quality of [analyses]."

Other topics discussed in the document include federal computer obsolescence, federal information centers, and consolidation of reporting for block grants.

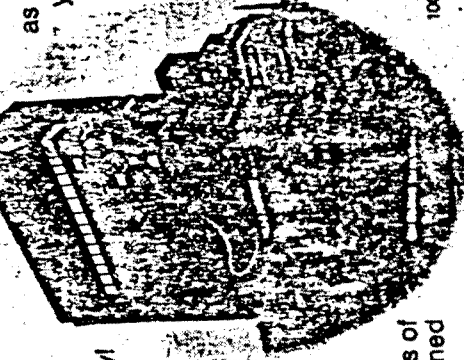
MIDNIGHT OIL

IS YOUR MOST EXPENSIVE ENERGY RESOURCE....

burning more than you should?

Call Law Services today! We'll show you how using our proven temporary paralegals and law clerks can save valuable professional time and cut the real cost of legal support.

Today, coping with "crunches" couldn't be simpler. Law Services provides support teams of specialists we've screened



as carefully as you would yourself... performance guaranteed. They are available, often within the hour, wherever, whenever and for as long as needed.

Call or write...

Career Blazers[®]
LAW SERVICES

NEW YORK
500 FIFTH AVE., N.Y. 10110
TELEPHONE: 212-730-1575
WASHINGTON, D.C.:
1001 CONNECTICUT AVE., N.W. 20036
TELEPHONE: 802-293-9370

THE FIRST RESOURCE IN PERMANENT AND TEMPORARY LEGAL SUPPORT

DOCUMENT PRODUCTION • HOLDING • COPIING • INDEXING • FILE ORGANIZATION • LEGAL RESEARCH • INFORMATION SYSTEMS • LEGAL TRAINING • BOOT • AGENCY RELATIONSHIP • AGENCY
COURT SERVICES • PHOTOCOPYING • LIBRARY SERVICES • ASSISTING AT TRIAL • PROOFREADING • PROJECT MANAGEMENT • AGENCY

THE RECORD

OMB Memo Lays Out Choices on Regulatory Issues

An Internal Office of Management and Budget memorandum recently obtained by Legal Times outlines possible methods for increased executive branch oversight over the so-called independent regulatory commissions and agencies. The possible advantages of various alternatives—including legislative veto, oversight through the budget process, and redirection of OMB review under the Paperwork Reduction Act, are discussed.

Among other topics covered is the administration's strategy in enforcement of the Clean Water Act, including possible legislation that would shift EPA's emphasis from technology to water quality standards, increase reliance on economic incentives, and shift water enforcement responsibility to states.

Full text of each of the above chapters follow:

OVERSIGHT OF INDEPENDENT REGULATORY COMMISSIONS

What is an appropriate strategy for Presidential oversight of the independent regulatory commissions (IRCs)?

Background

The IRCs combine legislative, executive, and judicial roles in ways unique to the government.

- The IRCs have considerable discretion to implement broad regulatory authority.

- Each IRC is controlled by a group of five to eleven individuals appointed for fixed terms, no more than a bare majority of which may be from the same political party.

- One result of the IRC structure and history is that commissioners

that IRCs are "arms of Congress." However, consider:

- In most cases, the designation of a chairperson from among the members is at the pleasure of the President.

- Presidents have issued some Executive Orders applying to IRCs on a "voluntary" basis.

- IRCs comply with the OMB budget process; however, some submit budget requests concurrently to Congress.

- IRC participation in the legislative clearance process is mixed; some are exempted by statute.

- Despite Justice Department efforts to establish oversight of all government litigation, most IRCs have some authority to appear in court representing themselves, using their own staff.

- Over time, the major source of Presidential impact has been the quality of IRC commissioners appointed.

Legislation moving in Congress would provide increased oversight of IRCs by the courts (for example, in reviewing benefit-cost analyses, and through the broadened review permitted by the Bumpers amendment) and by Congress (for example, legislative veto and the additional GAO review provided in H.R. 746); however, these legislative proposals would not materially increase Presidential authority and in some cases would weaken it. (The Administration has testified it could in the legislative process accept a legislative veto applying to selected IRCs if such an action is ruled to be constitutional).

Alternatives

1. In the use of existing OMB over-

diate control over IRC regulatory policy.

Alternative 2. The Paperwork Reduction Act gives the OMB Director authority to approve or disapprove the "collection of information" from the public by IRCs, based on such criteria as need, duplication, practical utility, and unwarranted burden. Congress explicitly provided IRC major-

countability to the public for IRC action.

- Could increase distance between the President and the IRCs.

Alternative 4. Seek amendments to current legislative proposals to give President authority to veto IRC regulations. The regulatory reform bills before Congress would provide additional oversight mechanisms for Con-

"The existing [independent regulatory commission] oversight mechanisms, however fuzzy, assure OMB communication with the IRCs."

gress and the courts. Until the issue of Presidential oversight is raised directly, however, there will be little basis for any broader discussion of what forms of agency oversight are most appropriate for which branch.

Advantages

- With the Paperwork Reduction Act, Congress has already agreed to give OMB substantial authority over the enforcement, if not the substance, of many IRC regulations.

- Congressional endorsement of direct President oversight authority of IRC regulations is needed, if not essential, to integrate IRC policies into those of the Administration.

Disadvantages

- Giving the President simultaneous veto authority could be viewed as undermining potential Congressional vetoes.

- Would be strongly opposed by interest groups, many members of Congress, and obtaining enactment would be difficult.

- Could set the stage for the enactment of ex parte rules governing OMB operations.

NON-TOXIC POLLUTION CONTROL STRATEGY

To what extent should the Administration encourage the progressive tightening of technology-based standards for the control of conventional water pollutants? Or, should the Administration pursue a strategy, including possible legislative changes, that would tend to maximize benefits in relation to clean-up costs?

Background

It is now ten years since the passage of the Clean Air and Clean Water Acts, and both Acts will be up for review during the coming year. Both Acts set initial standards for non-toxic pollutant control and provide for progressive tightening of these standards over a period of several years. For example, the Clean Water Act requires "best practicable control technology" effluent standards for industrial sources by 1977, a more stringent "best available technology" standard (BAT) by 1984, and "best conventional pollutant control technology" (BCT) by 1984.

Typically, initial clean-up efforts yield the greatest benefit per dollar of cost incurred, and progressively tighter standards yield diminishing returns. A major issue in both air and water pollution regulation is the need

"Because [independent regulatory] commissioners are Presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control."

draft their own "legislation" (regulations decreeing standards of conduct), authorize enforcement, and then adjudicate compliance (*ad hoc* decisions reflecting often unarticulated, variable policies).

The structure of IRCs has led to a variety of problems.

- Staggered terms often deny a President the opportunity to appoint a controlling majority until after his first term.

- Because of the IRC judicial role, the Supreme Court ruled in 1935 that commissioners could not be removed at the pleasure of the President.

- This strong, institutional independence reinforces bureaucratic incentives to protect specific interests, even at the expense of broader, countervailing policies.

- Yet, because IRC commissioners are Presidential appointees, the President is held publicly accountable for controversial IRC policy decisions over which he has little actual control.

Previous Presidents have attempted to increase their control over IRCs. Congress has resisted this, asserting

sight mechanisms, seek to minimize any distinction between IRCs and other government agencies.

2. Redirect OMB review of the "collection of information" activities by IRCs to provide for increased oversight of the substance of IRC regulatory policy.

3. Actively support legislative veto of IRC regulations.

4. Seek amendments in current bills to give the President authority to veto IRC regulations.

Analysis

Alternative 1. The existing IRC oversight mechanisms, however fuzzy, assure OMB communication with the IRCs. The budget process can have a strong influence in shaping IRC policies, at least in general terms. To the extent OMB can minimize the distinction between IRCs and other agencies in carrying out OMB oversight, OMB can gradually weaken IRC independence. The disadvantage of this approach is that it does not meet the perceived need of demonstrating the President's direct, imme-

diately-vote override and, in emergency situations, mandated prompt OMB action.

Redirection of OMB Paperwork Reduction Act review of the "collection of information" by IRCs to control the substance of IRC regulatory policy related to information collection could involve, for example, disapproving a SEC ruling concerning company disclosure or reducing compliance monitoring to prevent the expansion of a CPSC safety program. OMB reports review has not been staffed to address such issues.

Advantages

- The reports review process is already in place.

- It appears easy to implement.

Disadvantages

- Using reports review to oversee substantive IRC policy could increase personal involvement by OMB management and other OMB staff not in OIRA.

- Would require a heavy shift of OIRA priorities, reducing OIRA oversight of cabinet departments and other single-headed, executive branch regulators.

- Escalating OMB forms review beyond that intended by Congress and envisaged by the IRCs would build resistance and increase the likelihood of IRC override.

- Using reports review to oversee substantive regulatory policy related to information collection could build resistance to reports review in cabinet departments; if not part a coordinated OMB effort, such use of reports review could also disrupt other OMB oversight mechanisms.

Alternative 3. Legislative veto of IRC regulations can take many forms. Regardless of constitutionality, existing legislative veto proposals would delay issuance of regulations, increase Congressional staff involvement in IRC management, and reinforce the IRC special interest in the "iron triangle."

Advantages

- Would increase oversight by Congressional committees.

- Would be consistent with President's campaign promises.

- Would provide a means of controlling actions of IRCs.

- Has a good chance of getting enacted.

Disadvantages

- Would not reduce Presidential ac-