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THE WHITE HOUSE

WASHINGTON

August 8, 1980

MEMORANDUM FOR: Wayne G. Crangvist  
FROM: Esther Peterson  
SUBJECT: Chapter 3 of Report on Compliance  
with E.O. 12044

We appreciate the opportunity to review and comment on Chapter 3 of OMB's report concerning agencies' progress under Executive Order 12044. Before addressing specific portions of the report, I would like to offer the following observations about the thrust of the policy contained in the report.

I fully recognize that regulatory reform has been and continues to be a major initiative of this Administration. I believe that we have made major strides in the area of procedural reform, particularly through the enactment of Executive Order 12044. At the same time, I think it is important that we maintain a perspective on what we are seeking to accomplish.

We Democrats in general, and President Carter in particular, have long recognized the importance of, and need for, effective social regulation, especially in the areas of environmental protection, consumer protection, worker health and safety, and fair dealing in the marketplace. It is therefore somewhat disconcerting that the major impression that is conveyed in Chapter 3 is that regulation, in general, is an evil that desperately needs to be contained.

This chapter, and the plan it outlines, seems to be based on the assumption that there is no social or economic cost of not regulating. There appears to be an implicit assumption throughout that the benefits of regulation are insignificant and the beneficiaries of regulation are unimportant as compared to regulatory costs - costs which the report concedes cannot and are not measured by objective standards of measurement.

I am also concerned that the totality of the recommendations and programs in this report may impose large scale inefficiencies on our government agencies and may begin to smother the regulatory process in bureaucratic molasses. Taken as a whole, these programs and recommendations, which go far beyond E.O. 12044, centralize enormous power in one agency of the government, power which in my judgment extends beyond government management to the very substance of Congressionally enacted programs.

In this regard, Chapter 3 seems to assume that OMB, with or without the concurrence of the regulator, is able or even authorized to second-guess social and economic policies of Congress and to arbitrarily curtail the regulatory programs created to effectuate those policies. Current Congressional frustration over ineffective, regulatory oversight by Congress does not automatically result in a grant of Constitutional power to the Executive Branch to order avoidance of Congressional regulatory goals. The OMB proposals are expressly based on the assumption that the current regulatory processes, even though specifically subject to the public participation and due process requirements of the Administrative Procedure Act, of the statutes passing the Congressional mandates, and of E.O. 12044 "are not subject to the regular, careful debate and analysis that occur in the agencies, OMB and Congress as part of the budget process." That is an unsupported assumption.

Even if we were to put aside unanswered doubts about the legality and equity of OMB-imposed restraints upon regulatory goals of Congress, pragmatic considerations attest to the weakness of the scheme under which OMB would become almost a "super regulator," absorbing and concentrating regulatory oversight and coordinating power. To simply match wits with the regulatory agencies on matters of regulatory priority, timing, methodology, etc., OMB would require significant staff increases. Without those additional resources and massive infusions of expertise, OMB will be erecting barriers to regulation comprised of new analytical requirements, forms, special clearances, and even temporary moratoriums on regulation - which in the end, may do little to improve the quality of regulation or add to public confidence in government. Implicit in Chapter 3 is the assumption that Federal agencies (presumably unlike other elements of society) have an infinite amount of time available to provide information and forms to OMB.

Finally, as a general matter, increased centralization of authority in OMB, as a matter of practice, removes from the public opportunities it now has to be a part of some of the most important decisions being made in government. We think it reasonable that the procedures used in implementing E.O. 12044 should themselves reflect a heightened awareness of legislative goals and an appreciation of new opportunities for public participation -- in order to improve the efficiency and effectiveness of consumer protection regulations.

With the above concerns in mind, we would like to register the following specific observations and questions:

- (1) Under the section on Applying Regulatory Flexibility, the discussion of variances granted to small business from strict regulatory compliance and the reference to the

projected OMB recommendations on expanded use of variances make no reference to E.O. 12044's directive of achieving legislative goals and complying with Congressional intent. The effects of these variances upon the beneficiaries of the law and regulations are not dicussed. Further, the reasonable inference drawn by the reader is that OMB's recommendations will not afford opportunity for public participation.

In addition, there is no mention of one of the most important regulatory flexibility reforms already imposed on federal agencies -- the use of performance rather than design standards. This method of regulation which is being used to a greater and greater extent, allows industry to select the most cost-effective methods of compliance with regulatory requirements. Performance standards also put a high premium on innovation and afford opportunities for new business economies.

- (2) The section on Reducing Government Red Tape talks of a "new process" for coordinating government assistance procedures and requirements to be administered through an agency network created by OMB. The aims and operations of this "new process" and their relation to differing statutory requirements are not explained, making public assessment difficult at best. Similarly, the legislative authority to suspend a government-wide assistance policy being requested by OMB is based on an undefined "harm or disruption" inherent in the legislative requirement. Further, we believe some examples of the existing "unintentioned burdens" (sic) would facilitate public understanding of the justification for what is being proposed. Without greater explanation of need and details of the proposal, I do not think we should even mention it in this report. The idea should be more fully discussed and debated within the Administration before we submit the idea to Congress.
- (3) The section Federal Advisory Committee Act Study espouses the view that the FACA may be in conflict with E.O. 12044's policy of promoting greater State articulation with Federal regulators. Since E.O. 12160 similarly calls for greater consumer articulation with Federal regulators, we wonder whether OMB's upcoming recommendations on FACA include consideration of E.O. 12160. We recommend that E.O. 12160 be considered in OMB's deliberations pertaining to the FACA. Those deliberations should also include the matter of "balance" on advisory committees. Even more fundamentally, we wonder how broadening of FACA's exemptions can be dealt with in OMB's "specific recommendations concerning the proposed GSA regulations," presumably to be issued under FACA. Will the public be allowed to comment on OMB's recommendations?

- (4) In the discussion on Improving OMB's Management Capability, there is no indication as to whether OMB's new Office of Regulatory and Information Policy will publicly develop criteria to be used in coordinating Federal regulatory reporting requirements. What is described takes on the appearance of a "super regulator".
- (5) In determining "appropriate levels of credit activity" (for credit programs presently excluded from appropriation controls), what criteria will be used by OMB in the determination and will the criteria be developed in public? OMB's desire to "determine appropriate levels of credit activity" suggests an unprecedented concentration of authority. I also wonder what relevance this has to regulation and E.O. 12044.
- (6) In the section Controlling Federal Paperwork, it is stated that collection of information by the Federal government places ~~an~~ "unacceptable burden" on the public. We wonder whether the standards used in arriving at this judgment and to be used in determining the "paperwork budget" eventually allotted to each agency (for business and non-business subpublics) are available to the public. In other words, are special standards being developed other than the general requirements of E.O. 12174 (Federal Paperwork Reduction) that forms be reduced and burdens on small business minimized? It all sounds very arbitrary and may be imposing an "unacceptable burden" of paperwork on the agencies.
- (7) The section on Building a Regulatory Management Information System speaks of "existing overlaps, duplications, and inconsistencies" among Federal regulations and then goes on to say that we need a computerized regulatory retrieval system to identify overlap and inconsistencies. Before the Regulatory Management Information System and the Federal Information Locator System are created, it might be wise to avoid conclusions about the overlap, inconsistencies, burdens, duplication, etc.
- (8) The sections on Measuring and Managing Regulatory Effects and Regulatory Cost Accounting are both confusing and disturbing to us. They describe at some length guidelines prepared and distributed by OMB to Federal agencies outlining how to create a regulatory cost accounting system, compile data on costs of important rules and eventually develop Presidential recommendations on changes in regulatory statutes,

as well as providing a basis for relating the impact of proposed regulations to the cash flows of a particular industry or sector. (Presumably this would also be the basis for assigning regulatory budgets.) We have discussed above our reservations about the assumptions and questionable basis inherent in the regulatory oversight role being proposed by and for OMB. The role presumably would utilize these regulatory guidelines. We contrast this optimistic picture of the state of the art of regulatory analyses with the following language found in the same section:

"At present there is no system that allows us to account for the costs - not to mention the benefits of regulation." (p.33)

"However, we are a long way from being able to budget regulatory costs." (p.38)

"Much more information is needed before we could even agree that a regulatory budget ... is practical." (p.39)

"It will take time before methodologies can be agreed upon and estimates of costs and benefits can be more than educated guesses." (p.39)

If the real picture of current methodologies for regulatory analyses corresponds with the direct quotes - and we agree that it does - we suggest that premature rhetoric about regulatory cost accounting only serves to confuse the public or worse -- i.e., promote the creation of public policy based on myths. It is after all a myth that any set of in-house guidelines can effectively mandate the social judgments inherent in a national consensus on measurements of regulatory costs, and it is also a myth that a system of regulatory cost accounting could be accepted and survive without such a consensus being developed. We are concerned that the language of Chapter 3 may give currency to myths. Unfortunately, as has been demonstrated over the years in Washington, public policy can be, and often is, based on myths. I am very concerned that the proposals put forward by OMB present the Administration as captivated by popular myths and insensitive to the benefits and beneficiaries of laws and regulations required under those laws.

I hope you find these observations and suggestions to be a constructive critique of Chapter 3. Before the report is finalized, I hope that we will have the opportunity to discuss these issues further.

I would be interested in your reactions.