



March 17, 2010

## **Board of Directors**

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Via Facsimile 202-456-3340

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## **Advisory Council**

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Re: Violation of Executive Order 13497 by the Office of Information and Regulatory Affairs

Dear Mr. Bauer:

We are a group of law professors at universities across the country specializing in the theory and practice of administrative law and members of the board of directors of the Center for Progressive Reform. We are writing to you today to request that you review three ongoing violations of presidential executive orders by the Office of Information and Regulatory Affairs (OIRA):

1. Contrary to President Obama's decision to revoke the authority of OIRA to scrutinize agency and department "guidance documents" in Executive Order (EO) 13,497,1 OIRA routinely asserts jurisdiction over some of those documents under criteria that are as opaque as they appear arbitrary.
2. OIRA exceeds the deadlines for completing reviews established by EO 12,866.2.
3. OIRA fails to disclose "before and after" documents allowing the public to determine what changes were made to regulatory actions, again as required by EO 12,866.

### **Improper Review of Guidance Documents**

OIRA's authority to review guidance documents was first established in the waning days of the George W. Bush Administration by EO 13,422.<sup>3</sup> The Bush EO's extension of this authority was criticized by legal commentators as an example of harmful overreaching that could paralyze the federal government's efforts to regulate everything from the financial services to environmental

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<sup>1</sup> 74 Fed. Reg. 6113 (2009).

<sup>2</sup> 58 Fed. Reg. 51735 (1993).

<sup>3</sup> 72 Fed. Reg. 2763 (2007).

pollution in a timely and effective manner.<sup>4</sup> On January 30, 2009, President Obama revoked EO 13,422 by issuing EO 13,497. His decision to reverse the Bush policy was praised as a return to more judicious and proactive regulatory policies.<sup>5</sup> But on March 4, 2009, Peter R. Orszag, Director of the Office of Management and Budget (OMB) issued a brief memorandum “clarifying” that President Obama did not intend to revoke OIRA’s authority to review guidance documents.<sup>6</sup> We believe that Mr. Orszag’s memorandum directly violates EO 13,497 and should be withdrawn immediately.

Mr. Orszag apparently believes that OIRA is entitled to review guidance documents despite the revocation of EO 13,422 because it did so before, pursuant to the authority of EO 12,866. He interprets EO 13,497 as simply “restoring the regulatory review process to what it had been under Executive Order 12,866 between 1993 and 2007.”<sup>7</sup> We do not dispute that OIRA reviewed guidance documents from time to time during the Clinton and Bush II administrations. And we accept Mr. Orszag’s contention that, if OIRA was ever asked to provide authority for such review, it may have cited EO 12,866 despite that order’s definition of “regulatory actions” as “substantive action...that promulgates or is expected to lead to the promulgation of a final rule or regulation.”<sup>8</sup> The fact remains, however, that when President George W. Bush issued EO 13,422, it was interpreted by all knowledgeable observers as creating *new* authority—that is, authority that had not previously existed—for OIRA to review guidance documents. Among others, both John Graham, OIRA administrator under President George W. Bush, and Sally Katzen, OIRA administrator who served under President Clinton, harbored no doubt about this implication.

Accordingly, Mr. Graham wrote:

The most important provisions of President Bush’s E.O. 13,422 clearly extend interagency review to guidance documents. E.O. 13,422 was reinforced by a Bulletin for Good Guidance Practices issued by the Office of Management and Budget (OMB).

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<sup>4</sup> See, e.g., House Committee on Science and Technology, Subcommittee on Investigation & Oversight, “Amending Executive Order 12866: Good Governance or Regulatory Usurpation?,” Feb. 13, 2007 (testimony of David Vladeck, director, Institute for Public Representation and Associate Professor, Georgetown Law Center) (“Whatever the wisdom of centralized OIRA review of *binding* agency rules, the same arguments do not extend to centralized review of *non-binding* agency guidance. Hundreds of guidance documents are issued each year, often in response to emergencies or other time-sensitive developments. Requiring agencies to stop dead in their tracks to justify the provision of guidance on “market failure” grounds cannot be defended on policy grounds; nor can giving OIRA the authority to meddle in the substance of significant agency guidance.”)

<sup>5</sup> Statement by Brad Miller (D-NC), Chairman, House House Committee on Science and Technology, Subcommittee on Investigation & Oversight, Feb. 4, 2009: “While the President’s order on Guantanamo Bay may get more of the national spotlight, his decision to rollback this Bush Executive Order is just as important to restoring open government and Constitutional separation of powers,” *available at* <http://science.house.gov/Press/PRArticle.aspx?NewsID=2350> (visited March 12, 2010).

<sup>6</sup> See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, Peter R. Orszag, Director, Office of Management and Budget, “Guidance for Regulatory Review,” (March 4, 2009) *available at* [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf) (visited on March 4, 2010) [hereinafter “Orszag Memorandum”].

<sup>7</sup> *Id.*

<sup>8</sup> 58 Fed. Reg. at 51,738.

[citation omitted] Together, E.O. 13,422 and the OMB Bulletin establish the first government-wide “rules of the road” to manage the development and use of guidance documents.<sup>9</sup>

And Ms. Katzen testified:

Then, on January 18, 2007, OMB issued its final Bulletin on “Agency Good Guidance Practices.” Agencies are increasingly using guidance documents to inform the public and to provide direction to their staff regarding agency policy on the interpretation or enforcement of their regulations. While guidance documents -- by definition -- do *not* have the force and effect of law, this trend has sparked concern by commentators, including scholars and the courts. In response, the Bulletin sets forth the policies and procedures agencies must follow for the “development, issuance, and use” of such documents. It calls for internal agency review and increased public participation – all to the good. In addition, however, the Bulletin also imposes specified “standard elements” for significant guidance documents; provides instructions as to the organization of agency websites containing significant guidance documents; requires agencies to develop procedures (and designate an agency official/office) so that the public can complain about significant guidance documents and seek their modification or rescission; and extends OIRA review to include significant guidance documents. I do not believe it is an overstatement to say that the effect of the Bulletin is to convert significant guidance documents into legislative rules, subject to all the requirements of Section 553 of the Administrative Procedure Act, even though the terms of that Section explicitly exempt guidance documents from its scope. To the extent that the Bulletin makes the issuance of guidance documents much more burdensome and time consuming for the agencies, it will undoubtedly result in a decrease of their use. That may well have unintended unfortunate consequences, because regulated entities often ask for and appreciate receiving clarification of their responsibilities under the law, as well as protection from haphazard enforcement of the law, by agency staff.<sup>10</sup>

This consensus interpretation of EO 13,422 by two prior OIRA administrators suggests that when President Obama revoked that order, he intended to deprive OIRA of the authority to review guidance documents. As we are sure you can appreciate, allowing a White House staff member, even one who is a Cabinet-level official, to countermand an executive order in this manner undermines the President’s authority and contributes to a troubling erosion of the rule of law.

It is apparent from a cursory review of OIRA’s website that it has asserted authority to review several documents that meet the definition of “guidance document” under the now-defunct EO 13,422.<sup>11</sup> For example, OIRA is now reviewing EPA guidance to other agencies

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<sup>9</sup> Paul R. Noe and John D. Graham, “Due Process and Management for Guidance Documents: Good Governance Long Overdue,” 25 Yale J. on Reg. 103 (2008).

<sup>10</sup> House Committee on Science and Technology, Subcommittee on Investigation & Oversight, “Amending Executive Order 12866: Good Governance or Regulatory Usurpation?,” Feb. 13, 2007 (testimony of Sally Katzen, Adjunct Professor and Public Service Fellow, University of Michigan Law School).

<sup>11</sup> 72 Fed. Reg. at 2763 (“an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue”).

regarding the implementation of President Obama's Chesapeake Bay EO 13,508,<sup>12</sup> as well as EPA guidance on implementation of a water quality criterion for methylmercury.<sup>13</sup> It also appears to us that OIRA is operating under as-yet undisclosed arrangements with agencies and departments that allow it to cherry pick which guidance documents come before it for review. While we have never seen any reliable estimates of the number of guidance documents issued government-wide, a memorandum by the Congressional Research Service said that at the relatively small Occupational Safety and Health Administration alone, some 3,374 guidance documents were issued between 1996-2000.<sup>14</sup> As these figures indicate, federal agencies and departments undoubtedly issue tens of thousands of guidance documents annually, in the form of letters, speeches, electronic mail messages, and other documents. If Mr. Orszag is correct that OIRA is now authorized to subject all of these materials to review under EO 12,866, OIRA would literally be drowning in paperwork. To say the least, OIRA's opaque selection process does not fulfill President Obama's repeated pledges to run a transparent government.

### **Missed Deadlines**

EO 12,866, issued by President Clinton, replaced EO 12,291,<sup>15</sup> which was the first executive order to establish a process for centralized White House review of regulatory actions by federal agencies and departments. A central purpose of EO 12,866 was to adopt significantly more detailed requirements for and limitations on OIRA's procedures, including a series of mandatory deadlines for the conclusion of review. Accordingly, section 6(b)(2)(C) of EO 12,866 limits the review period to 90 days following submission by an agency or department, with one extension of 30 days possible, with the written approval of the OIRA administrator "and" provided that the agency head also requests that extension.<sup>16</sup> While OIRA generally meets these deadlines, it has violated these requirements on several occasions, most notably from our perspective with respect to EPA's proposed rule regarding the disposal of coal ash generated by power plants. The proposal was submitted on October 16, 2009, a date well over 90 days ago, and we are unaware that EPA Administrator Lisa Jackson has ever agreed to an extension of the review period.<sup>17</sup>

### **Failure to Disclose Before and After Documents**

EO 12,866 section 6(b)(4)(D) requires that after a regulatory action is published in the *Federal Register*, or after an agency or department has announced its decision not to publish or issue this regulatory action, OIRA "shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section."<sup>18</sup> OIRA does not

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<sup>12</sup> 74 Fed. Reg. 23,099 (2009)

<sup>13</sup> See [http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp?main\\_index=0&sub\\_index=0](http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp?main_index=0&sub_index=0) (visited on March 12, 1010).

<sup>14</sup> Curtis Copeland, Specialist in American National Government, Government and Finance Division, "Changes to the OMB Regulatory Review Process by Executive Order 13,422 (Feb. 5, 2007) at 10, note 22.

<sup>15</sup> 46 Fed. Reg. 13,193 (1981).

<sup>16</sup> 58 Fed. Reg. at 51,742.

<sup>17</sup> See RIN 2050-AE81, Proposed Rule, Standard for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers, *available at* [http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp?main\\_index=0&sub\\_index=0](http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp?main_index=0&sub_index=0) (visited on March 14, 2010).

<sup>18</sup> *Id.* at 51,743.

fulfill this mandate. Unless there have been no changes in the rules during OIRA review, its failure to post deprives the public of the transparency that the Obama Administration has promised.

Thank you for your attention. If you need any further information, please contact Shana Jones at (757) 965-7655.

Sincerely,

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