



**VIA EMAIL AND FAX**

September 5, 2008

Hon. Jim Nussle

Director

Office of Management and Budget

725 17<sup>th</sup> Street, NW

Washington, D.C. 20503

Fax: (202) 395-3888

Dear Director Nussle:

As an organization dedicated to improving the quality of governmental decisionmaking, we are troubled by three recently proposed regulations that violate sound policymaking procedure and request prompt action by the Office of Management and Budget (OMB) to reassert appropriate controls over the regulatory process.

**“Midnight” Policymaking**

On May 9, 2008 White House Chief of Staff Joshua Bolten directed the heads of executive departments and agencies to submit all proposed regulations they wish to finalize before the end of the Bush Administration by June 1, 2008, except in “extraordinary circumstances.” This directive explicitly sought to “resist the historical tendency of administrations to increase regulatory activity in their final months.” Presumably, the purpose of the deadline was to ensure that agencies did not engage in ill-conceived rulemakings prior to a change of administration. We believe this deadline represented sound policymaking procedure by creating a sufficient window for the vetting and review of new rules and discouraging “last-minute” policymaking.

Unfortunately, in recent months, federal agencies have proposed at least three new rules in violation of Mr. Bolten’s directive:

- On August 15, 2008, the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) proposed a regulation entitled “Interagency Cooperation Under the Endangered Species Act” (RIN 1018-AT50, RIN 0618-AX15), 73 Fed. Reg. 47868 (Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402).

- On August 26, 2008, the Department of Health and Human Services (HHS) proposed a regulation entitled “Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” (RIN 0991-AB48), 73 Fed. Reg. 50274 (Aug. 26, 2008) (to be codified at 45 C.F.R. pt. 88).
- On August 29, 2008, the Department of Labor (DOL) proposed a regulation entitled “Requirements for DOL Agencies’ Assessment of Occupational Health Risks” (RIN 1290-AA23), 73 Fed. Reg. 50909 (Aug. 29, 2008) (to be codified at 29 C.F.R. pt. 2).

These proposed regulations are in clear violation of the White House directive and the Administration’s expressed commitment to principled regulation. The Institute strongly urges OMB to comply with and enforce that policy – either by requiring these federal agencies to explain why these regulations are proposed under “extraordinary circumstances,” or, if agencies cannot make this showing, by preventing these agencies from promulgating these rules.

### **Cost-Benefit Analysis**

Under Executive Order 12,866 (1993), as amended by Executive Order 13,422 (2007), before issuing any “significant regulatory action,” an agency must provide “an assessment of the potential costs and benefits of the regulatory action.” The Order defines a “significant regulatory action” as “any regulation action that is likely to result in a regulation that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” This language is clearly expansive and designed to subject a broad array of regulatory actions to cost-benefit analysis and review by OMB. Given the broad intent of the Executive Order, deregulatory measures that have adverse net impacts of \$100 million on social welfare (even though they might reduce compliance costs) should be subjected to review.

In order to ensure compliance with the letter and spirit of EO 12,866, we request the following steps:

- Because FWS/NOAA determined that the proposed rule was “significant” under EO 12,866 the rule was reviewed by OMB and, presumably, subjected to cost-benefit analysis. In the interest of public participation and transparency, we request a copy of the document(s) detailing this analysis.
- HHS preformed a cost-benefit analysis in support of the new rule, but this analysis included only cursory evaluation of the costs and benefits of this rule. While we understand the difficulty of measuring and monetizing cost and benefits in this area, given that HHS decided to complete a cost-benefit analysis, we

request that OMB require a more formal accounting of the impacts of the proposed regulation in economic terms.

- The DOL regulation should be subject to cost-benefit analysis and regulatory review by OMB. The proposed DOL regulation would substantially alter the risk assessment paradigm for developing health standards for workplace exposure to toxic substances and hazardous chemicals. By changing how *all* workplace toxics regulation is evaluated, this rule is likely to lead to decreased compliance costs to employers, as well as increase health risks to workers (including mortality and morbidity risks) with associated secondary economic effects – including increased health care costs and lost productivity. Rules that reduce regulatory compliance costs – and that potentially lead to increases in exposure to health risks – can be as costly in economic terms as new regulatory measures, and should be fully evaluated. At the very least, if DOL does not perform a cost-benefit analysis, it should justify how its rule does not lead to any significant economic impacts.

Finally, the federal agencies mentioned above are also engaging in extremely irregular deviations from the traditional rulemaking process in proposing these late rules, including a failure to hold public hearings, failure to accept electronic public comments, and shortened public comment periods. OMB should require these agencies to solicit public comments – including electronic comments – for the full traditional notice-and-comment period and hold public hearings.

We hope you will give this matter your prompt attention.

Sincerely,



Richard L. Revesz  
Faculty Director  
Dean, New York University School of Law



Michael A. Livermore  
Executive Director

cc: Hon. Susan E. Dudley  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503  
Fax: (202) 395-3047