

Comments from Professor Peter Strauss (Senior Fellow, Committee on Regulation)

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I expect to be on line Wednesday morning, but thought it might be helpful to send these suggestions for their revision in advance -- revisions intended to take advantage of the early opportunity regulatory plan procedures under Section 4 of the Executive Order offers for dealing with some of the issues that have arisen. As I wrote you, Section 4 review seems ideally suited both to prompting interagency review and to communicating to agencies the President's priorities. If it were used to these ends, I believe several significant advantages would accrue.

(1) Interagency review and coordination could begin at an early point, both reducing the possibility that it would cause delay and providing an opportunity for constructive approaches to coordination -- OIRA suggestions of joint work; possible time constraints on interagency contributions, etc.

(2) Presidential priorities could be communicated before agencies had wasted resources in developing rules that would inevitably prove unsatisfactory. The retrospective character of Section 6 review (like Monday morning quarterbacking by the courts) creates risks worthy of avoidance in this way.

(3) One of the most disturbing findings of Curtis's report is that OIRA has been actively participating in rule formulation before submission of agency drafts. E.O. 12866 and its predecessors were never intended, and have not been accepted by Congress and the legal community, to convert OIRA from a supervisor of agency processes into itself a rulemaker; but when EO 12866 reviews are accomplished in a day or a week, it is reasonably evident that this is what has happened. Pitching the occasion for policy guidance to Section 4 rather than Section 6 might help reestablish that it is the agency to which Congress has delegated that responsibility that is to be the rulemaker, not OIRA, and curb the failures of adherence to (or perhaps one should say the evasions of) the EO's promises of transparency that Wendy Wagner's report to the Conference also revealed. Recommendation 5, as stated, will not address this problem. An OIRA that can keep the clock from starting before formal submission of a draft will face little difficulty in postponing receipt of a draft rule "with approval from the appropriate senior agency officials," and 12,866's promises of transparency should also be keyed to this event.

At the very least, ACUS should not be making a recommendation that in effect endorses this practice, as I read proposed 5(a) to do.

Consequently, I ask that the Committee consider the following changes in the proposed recommendations:

For Recommendation 2, substitute the following:

2. To facilitate interagency coordination and efficient rulemaking, OIRA should use the Section 4 Regulatory Plan process, which itself includes interagency coordination, to identify all of the relevant entities, establish lines of communication among them, and create workplans with timelines and responsibilities for action. The Section 4 process should be used to identify the

principal factual and policy issues likely to be raised by a proposed rulemaking, and to convey any presidential priorities respecting them. OIRA should hold itself available to mediate such disputes among the identified agencies as may arise, and to assure that all participating agencies place a high priority on the resulting processes, so as not to cause undue delays. Absent extraordinary circumstances, agencies that have not participated in this process should not be permitted to cause delay in the rulemaking or review process.

Renumber Recommendation 5 as Recommendation 3 and delete all of its text preceding present 5(b), which alone should constitute Recommendation 3

Renumber present Recommendation 3 as Recommendation 4, omit present Recommendation 4 (which I intend to have incorporated into proposed 2, above), and renumber proposed Recommendation 6 as 5.