BE IT RESOLVED, that the American Bar Association urges the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) to add the following provision to its 1986 procedures for regulatory review:

"Within 60 days of receipt by OIRA of a proposed or final rule under Executive Order No. 12,291, unless the Director of OMB or the Administrator of OIRA by writing extends review for another 30 days, OIRA will either complete its review and so advise the agency, or it will return the rule to the agency for reconsideration. Whenever a rule is returned to any agency for reconsideration, OIRA shall inform the head of the agency in writing of its views as to why the rule is not consistent with the regulatory policies of the President."
REPORT

DELAY IN PRESIDENTIAL REVIEW OF AGENCY REGULATIONS

In August, 1989, the Council of the Section of Administrative Law and Regulatory Affairs approved a resolution endorsing guidelines adopted by the Administrative Conference of the United States concerning the implementation of presidential executive orders on regulatory review. Among these guidelines is a general exhortation to complete presidential review of rulemaking in "timely fashion." The following report and recommendation supplement that important guideline by proposing a specific amendment to the regulatory review procedures adopted by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. S. Jay Plager, currently OIRA director, has indicated that he views the recommendation as constructive and potentially helpful to the regulatory review process.

Under Executive Orders No. 12291 and 12498, the President has directed OIRA to conduct a pre-promulgation policy review of proposed and final rules to be issued by Executive agencies. In the course of hearings on the reauthorization of the Paperwork Reduction Act recently conducted by the Legislation and National Security Subcommittee of the House Government Operations Committee, several witnesses referred to the problem of delay in OIRA review of agency rules.

The problem of delay has been considered at some length in the Section's recent panel discussions about the regulatory review process. The former Chair of the Section also raised the question of delay in her recent testimony before the Government Operations Subcommittee. It appears to be the most important unresolved process problem involving the regulatory review program.

THE PROBLEM OF DELAY

There are three different types of "delay" at work within the process:

1.) Backlog. One possible meaning of delay is that OIRA staff are bogged down by the sheer number of rules they are called upon to review. Delay of this sort is principally a management problem, but it is a problem common to all White House review processes and not unique to OIRA. Presidential staffs always have a tendency to take on too many projects, given their limited resources. An effective White House manager has to screen problems carefully and take on only the truly important policy issues. The existence of a processing backlog would be a good indicator that the program is not prioritizing policy issues and is not relying enough on the agencies to handle less pressing issues.

2.) Limited Appellate Capacity. Another frequent source of delay has been the inability of OIRA and the agencies to find White House officials or forums to resolve policy disputes. While the Vice President's Task Force
originally was charged with this responsibility, it quickly was abandoned when it became clear that no Vice President can safely assume the role of deciding between the President's principal appointees. Thereafter, throughout the Reagan years, the appellate capacity of the White House declined slowly but inexorably, and OIRA and the agencies often had no place to go to resolve their policy disputes.

Experience in the early months of the Bush Administration suggests that the difficulty in obtaining senior White House attention to rules is inherent in the structure of the Presidency. Regulatory issues must compete with other policy problems calling for Presidential action; they are not so critical as to command a specific allocation of staff and resources dedicated exclusively to their resolution. Particularly critical regulatory issues (like airbags in automobiles) will continue to obtain attention of top-level decisionmakers. But repeated efforts show that the White House staff will not have the time to devote to anything less than the most significant regulatory items. Therefore, another way has to be found to resolve policy disagreements identified by OIRA to avoid any tendency toward stalemate.

3.) Protracted Review and Negotiations. Many commentators have remarked that, especially on the most significant workplace safety and health rules, OIRA review often is extended beyond the relatively modest periods set forth in the Executive Order. This delay often occurs because OIRA has identified significant policy problems with the proposed rule, and OIRA and the agency are negotiating to resolve their differences. Critics have suggested that this process can be an infinite loop ("strategic delay").

The Executive Order suggested that when OIRA found that a rule did not comport with the President's policy preferences, it would be returned to the agency, together with a written explanation of OIRA's criticism. In practice, OIRA proved hesitant (some would say timorous) in exercising this authority. A written OIRA explanation of the deficiencies in a rule was thought poisonous to further working relations, because the agency staff would be embarrassed if OIRA pointed out the deficiencies in their work to the agency head and to groups waiting to challenge the rule in court.1

1. This concern is exemplified by Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986). OSHA sent OIRA a major ethylene oxide rule for review two days before a judicial deadline. OIRA concluded that the rule contained major policy flaws and identified them in a letter to senior policy officials of the Department of Labor. The OIRA letter persuaded Labor officials that changes to the OSHA proposal were needed. Rather than take literally the one minute necessary to white out portions of the draft to reflect the changes ordered by Labor after considering OIRA comments, OSHA staff simply marked a line through those sections in the version of the rule submitted to the Federal Register for printing. Whether this action was intended to provide OIRA's opponents with ammunition to attack the regulatory review process or whether it was simply intended to bolster the legal case of the litigants who would be challenging Labor's decision, it was
As a result, the pattern for controversial rules has been that OIRA would neither formally return the submission nor clear it, and OIRA and the agency would negotiate in an attempt to resolve their policy differences. Absent a statutory or judicial deadline for issuance of the rule, there was no action forcing event, and the negotiations could (and did) drag on for lengthy periods. These periods of extended, but unexplained, delay created suspicions about OMB's motives in the minds of persons skeptical of the process or who had a particular policy interest in the outcome of a specific rule under review.

Former OMB officials responsible for administering the program have stated that delay was never used for a strategic purpose. They point to the fact that extended delay had the effect of creating substantial pressure from Congressional supporters of the agency initiative and the press to clear the rule, while harming OIRA's institutional credibility. In any event, OMB Director Richard Darman recently has publicly assured Congress that, even if delay were ever used in the past for strategic purposes, it will not be so used in the future.

A RECOMMENDED ADMINISTRATIVE SOLUTION TO ELIMINATE DELAYS

The occasional delay that occurs in OIRA review of agency rules is a problem that should be resolved. The appropriate solution is a two-prong approach, which would respond to all three aspects of delay while maintaining necessary flexibility in the policy review process. It would promote public and Congressional interests in understanding the issues presented by regulations and in procedural regularity:

- First, reasonable time deadlines should be established for different categories of rules, and OIRA should be required to complete its review within those deadlines. By the time the deadline expired, OIRA either would have to notify the agency head that review was complete or return the rule to the agency for reconsideration; otherwise, its review would be deemed complete and the agency could proceed with the rule. With proper management of the Regulatory Planning Process, which gives the White House and the public advance notice of the most important forthcoming rules, compliance with relatively short deadlines should be possible.

- Second, consistent with a practice of prompt clearance or return of rules, OIRA should be required to state its objections to rules in writing. OIRA has been too conservative in returning regulations, because of the uproar that has surrounded such exceptional actions, and because of the perceived corrosive effect on working relations between OIRA and the agency. If OIRA's release of analytical, on-the-record criticism of proposed rules becomes more clear that the OSHA staff had taken hostile action to defuse the effect of OIRA's criticism. This case became an internal object lesson within OIRA about the hazards of returning a rule with a written explanation.
common and no longer an extraordinary action, the issuance of a return letter will have less adverse effect on working relations.

Requiring OIRA to respond within manageable but prompt deadlines will have several salutary effects. First, OIRA will have incentives to focus its review on the most significant and most problematic rules, thus avoiding the problem of excessive White House micromanagement of agency rulemaking. Second, policy problems will be identified and raised for consideration within OMB promptly. Third, inter-agency regulatory disputes can be elevated to the political level more quickly than is now possible, for consideration by the agency heads, the White House staff, or the President as appropriate. If White House dispute resolution procedures are not available, the interested agencies will know promptly and can seek other solutions. Finally, early passback of OIEIA views will permit the agency head to make a timely decision whether to proceed with the rule, despite indications of conflict with Administration policy, or whether to conduct further discussions with other interested officials to seek to resolve those problems.

As an incidental matter, a prompt review and return policy should largely resolve the remaining concerns with the procedures surrounding the regulatory review process. The concern that OIRA operated as a "black box" for surreptitious communication of inappropriate private sector views stemmed from two aspects of the process -- long and unpredictable delays; and the failure of OIRA to put the grounds for its opposition on the record, for the world to see and to stimulate debate among other interested parties. With prompt passbacks and placement of OIRA objections in writing, attention should switch from the process by which regulatory review is performed to the substance of agency policy disagreements about the proper regulatory approach.

Implementation Method. The problem of delay could be addressed in either of two ways:

-- By a statutory change, to establish a fixed timetable for completion of review; and

-- Administrative modifications to OIRA's existing procedures.

While the pendency of a bill to reauthorize the Paperwork Reduction Act has afforded a useful opportunity for interested parties to review problems in OIRA's implementing procedures, Congress should not attempt to establish statutory deadlines for completion of regulatory reviews under the Executive Orders. The problem of delay seems better suited to resolution by administrative action of OMB, reinforced by aggressive Congressional oversight to make certain that the procedural reforms are carried out.

-- The Executive Branch can always agree that it will impose on itself more stringent internal controls than Congress could impose upon it. If Congress attempted to establish fixed time limits within which Executive Branch policy deliberations on rules (or other matters) have to be completed, significant constitutional questions would be presented, and concerns about
institutional prerogatives inevitably would arise. Effective changes can be accomplished without starting an institutional battle. The 1986 revision to OIRA procedures was the product of a political agreement among the Executive and Legislative Branches, and not of legislation. But they have produced permanent and positive changes in the administration of the Executive Order process. Such an agreement about deadlines would be equally effective.

--Statutes, once passed, are inflexible and resist change. At this early stage in the process of formal regulatory review, it would be difficult, if not impossible, to craft appropriate statutory deadlines, because there has not been enough experience with different types of rules to understand what deadlines are appropriate for what types of rules.

--Finally, as a political matter, there is a reluctance by some Members of Congress to implicitly acknowledge the constitutionality or legitimacy of a regulatory review process conducted by the White House. Following the approach taken in 1986 -- revisions to OIRA's procedures, backed by a formal commitment from the Director of OMB to Congress to abide by those provisions -- adequately resolves the substantive problems without making the process the occasion for an unnecessary debate between the Branches about their respective prerogatives.

For these reasons, the issue of delay should be resolved administratively by OIRA. This approach would be implemented by adding the following new paragraph to the 1986 OIRA procedures:

"Within 60 days of receipt by OIRA of a proposed or final rule subject to review under Executive Order No. 12291, unless the Director or the Administrator by writing extends review for another 30 days, OIRA will either complete its review and so advise the agency, or it will return the rule to the agency for reconsideration. Whenever a rule is returned to any agency for reconsideration, OIRA shall inform the head of the agency in writing of its views as to why the rule is not consistent with the regulatory policies of the President."

Respectfully submitted,

Paul R. Verkuil
Chair, Section of Administrative Law and Regulatory Practice

February 1990
1. Summary of Recommendation

The resolution proposes an amendment to the regulatory review procedures of the Office of Information and Regulatory Affairs of the Office of Management and Budget. The amendment is intended to reduce delays in the regulatory review process and to help clarify the status of rules under review.

2. Approval By Submitting Entity.

The resolution was approved at a regularly scheduled meeting of the Section Council, held on October 21, 1989.

3. Previous Submission to the House or relevant Association position.

The Section of Administrative Law and Regulatory Practice now has before the House a related resolution endorsing more general recommendations by the Administrative Conference of the United States (ACUS) concerning procedural improvements in the process of presidential regulatory review. The attached resolution is consistent with the resolution regarding ACUS, but responds in greater detail to the problem of administrative delay, which the other resolution addresses only generally. Although the Association has previously endorsed the principles underlying the current program of presidential regulatory review, it has not previously taken a position on the administrative reform issues that the current resolutions address.

4. Need for Action at This Meeting.

Action is desirable at this meeting. Although the recommendation does not explicitly address pending legislation, OMB adoption of the position that the Section recommends could affect Congress's current consideration of the proposed reauthorization of the Paperwork Reduction Act of 1980.


Although the recommendation does not explicitly address pending legislation, Congress is currently reviewing a proposed reauthorization of the Paperwork Reduction Act of 1980, which could potentially address the same issue. OMB adoption of the position that the Section recommends might well shape the final bill recommended by the relevant House and Senate committees.
6. Cost to the Association. (Both direct and indirect costs.)

None.


Although some members of the Committee that proposed this resolution and of the Council that approved it have served in the Office of Management and Budget, we are not aware that any member has any interest in the resolution.

8. Referrals.

A copy of the Report with Recommendation was circulated to all Section and Division Chairs in December, 1989.

9. Contact Person. (Prior to Meeting.)

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10. Contact Person. (Who will present the report to the House.)

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