Identifying Major Rules by Independent Regulatory Agencies

Comment to the Office of Management and Budget

July 24, 2013

The Office of Management and Budget (OMB) has requested comment on the 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities. This comment has been developed by Joe Aldy, Art Fraas, and Randall Lutter. Aldy currently serves as an Assistant Professor of Public Policy and Faculty Chair of the Regulatory Policy Program at the John F. Kennedy School of Government at Harvard University, and served as the Special Assistant to the President for Energy and Environment at the White House in 2009-2010. Both Fraas and Lutter currently serve as Visiting Scholars at the think tank Resources for the Future. Fraas served as an economist and branch chief within the OMB Office of Information and Regulatory Affairs (OIRA), the office responsible for coordinating regulatory review. Lutter also served as an economist at OMB/OIRA, as senior economist at the Council of Economic Advisers and as Chief Economist and Deputy Commissioner for Policy at the Food and Drug Administration. The three of us have extensive experience in government -- totaling about 50 years -- in undertaking benefit-cost analysis, designing regulations, and reviewing regulatory proposals and we have each published papers in peer-reviewed journals relevant to benefit-cost analysis and diverse aspects of regulatory policy.

Transparency in the management of government programs has become increasingly important and is recognized as a hallmark of the current Administration.[1] The Office of Management and Budget, however, needs to do more to promote transparency in the execution of its responsibilities under the Congressional Review Act (CRA), especially with respect to designating major regulations by independent regulatory agencies as major.

In comments filed with OMB on the draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (hereafter "2012 Report"), we recommended that OIRA should adopt a new process for designating and identifying the independent regulatory agencies' rules that are major.[2]

[1] Office of the President, "Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies" 74 FR 4685, January 2009, *www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf*

[2] Joe Aldy, Art Fraas and Randall Lutter, "Public Interest Comment on The Office of Management and Budget's Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations, June 2012.

Specifically, we recommended that the new process be transparent, and that it "should provide an evidence-based and data-driven determination of major rules for important financial regulatory decisions." In response, the final OMB 2012 Report to Congress stated that (p. 156):

> We appreciate these suggestions. We note that following the enactment of the Congressional Review Act, on March 30, 1999, OMB issued Memorandum 99-13, "Guidance for Implementing the Congressional Review Act." The guidance, which is applicable to departments, executive and independent agencies, is still in effect today. We will consider additional steps to promote consistency and transparency.

OMB Memorandum 99-13 sets out the following instructions for identifying "major rules" under the CRA:

> If the rule is subject to E.O. 12866 review, you should indicate whether you consider the rule as "major" when you submit both the proposed rule and final rule for OMB review. If the rule is not subject to E.O. 12866 review, you should contact your Desk Officer in OMB's Office of Information and Regulatory Affairs (OIRA) in accordance with your established practice.

We are concerned with the absence of transparency in this process. The "established practice" for independent regulatory agencies is not well-known by or communicated to the public. In recent rulemakings, there is no public record of OMB's decisions regarding whether independent agency rules are major. Moreover, there is no public record of the rules OMB staff discussed and reviewed with the independent agencies. Last year we reviewed the final 15 independent financial regulatory agency rules listed as major in the draft 2012 Report (Table 1-7).[3] We found that none of these 15 final rules issued by the independent financial agencies contains an independent section providing a determination under the CRA that the rule is a major rule and only one contains a statement referring to a determination that the rule was major. Further, there is no evidence that OMB/OIRA played any role in the determination that these independent financial agency rules were major. As importantly, there is no evidence that OMB/OIRA played any role in determinations that other rules issued by independent agencies were not major. In contrast, the Nuclear Regulatory Commission final rule revising its fee schedule (listed in Table 1-7 of the draft 2012 report) contains a specific section indicating that its rule is a major rule under the CRA, and that it verified its determination with the OMB Office of Information and Regulatory Affairs.

Our review of the final major rules from independent financial regulatory agencies listed for the most recent year in the draft 2013 Report finds that this lack of transparency continues. With the exception of an annual Nuclear Regulatory Commission (NRC) rule on fees, only one of the

[3] Joe Aldy, Art Fraas and Randall Lutter, "Public Interest Comment on The Office of Management and Budget's Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations, June 2012.

rules—the CFTC Swap dealer and major swap participant recordkeeping, reporting, and duties rule (77 FR 20128, April 3, 2012), provides any discussion of a major rule determination, and it is an incidental revelation as part of a discussion of the effective date of the rule. The general absence of any publicly available indication of whether a rule is major violates the spirit—if not the letter—of the CRA. Section 804 of the CRA defines "major rule" in a way that provides a role for the Administrator of OIRA in making a determination as to whether an independent financial agency rule is major. Thus the lack of transparency by the independent regulatory agencies can be remedied by better use of administrative authorities that Congress has granted to the Office of Information and Regulatory Affairs. We should add that this approach is inconsistent with the fundamental principle that regulatory agencies need to distinguish publicly between big and small regulatory decisions. Doing so highlights the priorities for more intensive review and engagement by the public, various stakeholders, and Congress.

The lone independent regulatory agency rule (other than one issued by the NRC) issued in 2012 with any discussion of whether it is major offers a useful insight on flaws in the current process of designating major rules. In this CFTC rule, the major rule discussion is in a statement by Commissioner Scott O'Malia appended to the preamble of the final rule. The O'Malia statement sets out the case for the importance of developing a quantitative benefit-cost analysis. In doing so, his statement specifically points to the principles of EO 12866 and 13563--and it lifts the curtain a bit on OMB's role in the determination that the rule was a major rule by noting that:

> The fact that OMB's Office of Information and Regulatory Affairs has concurred with our determination that this set of rules qualifies as a ''Major Rule'' under the Congressional Review Act with an annual effect on the economy of more than $100 million without a fulsome discussion of anticipated costs, let alone an analysis based on reasoned assumptions or evaluation of the impacts of this rulemaking against the prestatutory baseline, is regulatory malpractice in my book.[4]

Unmentioned in the draft 2013 OMB Report is a Memorandum of Understanding (MOU) between the CFTC and OIRA on OIRA technical assistance with respect to benefits and costs of CFTC rules implementing the Dodd-Frank Act.[5] The MOU carries the following conditions:

> The provision and acceptance of this technical assistance shall not be interpreted to alter in any way the current relationship between OIRA and the CFTC during the rulemaking process. The sharing of draft and final CFTC documents and other information with

[4] Commissioner O'Malia notes in a footnote that "… the only verification we received at the Commission was a perfunctory email from an OMB employee stating, 'OMB concurs that the rule is major.' It is unclear as to what data OMB could have relied upon in reaching its conclusion." (77 FR 20212)

[5] On May 9, 2012, CFTC Chairman Gary Gensler and OIRA Administrator Cass Sunstein signed an MOU for the purpose "…of permitting staff of the Office of Information and Regulatory Affairs (OIRA) to provide technical assistance to the Commodity Futures Trading Commission (CFTC) staff during the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, particularly with respect to the consideration of the costs and benefits of proposed and final rules."
http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf

> OIRA staff pursuant to this technical assistance shall not constitute submission of such materials to OIRA for review. Further, any documents and information exchanges between the staffs of the CFTC and OIRA shall: retain any applicable legal or governmental privilege; and treat as confidential, to the extent permitted by applicable laws, all nonpublic information provided pursuant to this MOU.

While we applaud such consultation, we believe that it needs to be extended to all regulations issued by the independent regulatory agencies. Further, we call again for a process that is based on a quantitative, data-driven determination of whether important financial regulations are major rules—and that is transparent so that the public can know which rules have been designated as major rules. For example, these designations should be made public in the Federal Register notices about new agency rules and in press releases issued by regulatory agencies regarding the rules in question. Burying the designations in an annual report to Congress or relying on the Government Accountability Office to post the designation on a webpage weeks after promulgation of the final rule does not constitute sufficient transparency by the Executive Branch in the operation of the regulatory program. Further, this process needs to extend to proposed rules as well as final rules. Currently, only insiders who closely follow the nuance of rulemakings by independent regulatory agencies are able to distinguish big from small rules at the proposed rule stage. The absence of information about the relative importance of proposed rules serves to discourage public comments from parties not closely and significantly affected by the regulatory decision or those lacking the resources and expertise to track and discern rules.

We believe that Section 804 of the Congressional Review Act can and should serve as the basis for a consultation between the independent financial agencies and OIRA on the determination of whether a rule is major. Regular reporting of the results of such consultations and the routine identification of all major rules—both proposed and final—are necessary for OMB to meet the standards of transparency in governance laid out by President Obama in 2009.