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OMB Now a Regulator In Historic Power Shift

By Peter Behr
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It was Feb. 17, less than a month after the Reagan administration took office, when the Office of Management and Budget called in the top attorneys of the executive branch regulatory agencies to have a look at the president's new executive order on regulatory policy, an order that had been in preparation for weeks.

Seated around a table in a second-floor office in the Executive Office Building next door to the White House, the attorneys began to read, several taking out pens to note changes they wanted to make or parts they found objectionable. Not until the last page — when they saw President Reagan's signature — did they realize this was not the draft of a proposed order. It was the last word.

The story has become a favorite in the offices of OMB, demonstrating an abrupt and historic shift of power from the regulatory agencies and into the hands of one bureau — the Office of Management and Budget.

The executive order makes OMB the clearinghouse for

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OMB Becomes a Regulator in Power Shift

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all regulations. Although the agencies still are responsible for issuing regulations, no major rules can be proposed or issued until OMB is satisfied the measure is necessary and is taking the lowest-cost approach.

In the Reagan administration, OMB has become what James C. Miller III, one of its top officials, calls "the toughest kid on the block." It's a Charles Atlas transformation for an agency whose clout traditionally has been confined to managing preparation of the president's budget.

The change in OMB's influence is perhaps most dramatically highlighted by the diesel rule. On April 6, the Reagan administration announced plans to change the tough environmental regulations scheduled to be imposed on diesel vehicles in the fall of 1984.

The announcement was a momentous one for the auto industry, which wants to be building at least 4 million diesel-powered cars and light trucks by 1984, 10 times today's number. The environmental rules could have kept all but the smallest diesel cars off the road, the industry maintained.

The new diesel policy was essentially put in place by OMB, not the Environmental Protection Agency, which has statutory responsibility for controlling the pollution in diesel exhaust, according to interviews with officials of both agencies.

"I think the substantive guidance came from OMB," said Miller, who in addition to being a top OMB administrator is also executive director of the new Cabinet task force on regulatory relief headed by Vice President Bush.

The career officials at EPA, who have been running the agency awaiting Senate confirmation of Anne Gorsuch, Reagan's nominee for EPA administrator, persuaded OMB to modify its original idea of a two-year delay in the diesel regulation, and accepted the final result, said Michael Walsh, EPA assistant administrator in charge of auto emission regulation.

No one has quit in protest at EPA, and the change will not become final until EPA has held formal hearings and considered all scientific and economic evidence in the record later this year.

But the new diesel policy is striking testimony to the new role being played by a handful of regulatory overseers who work for Miller in the executive office buildings that face the White House on Pennsylvania Avenue. The director of OMB is David A. Stockman, Reagan's top budget-cutter. But the regulatory matters in the agency fall primarily to Miller; Jim Tozzi, a senior career OMB official, and Boyden Gray, who is Bush's counsel.

When he worked in the Ford administration, Miller was one of a succession of OMB and White House officials who tried — and failed — over the past decade to impose greater central control over government regulation. "Quite frankly, when we were in the Ford administration, the only weapon we had was ridicule," Miller said.

OMB and the president's economic advisers had to be content with making a stronger case than the regulatory agencies and, when persuasion failed, with trying to embarrass the opposition.

James T. McIntyre, President Carter's director of OMB and now a Washington attorney, says almost wistfully, "Most of the regulators contended the president had no authority to review their regulations. EPA never did agree that OMB had a role to play in regulatory review."

For President Reagan's top aides, who share his belief that the government has loaded a huge burden of unnecessary regulation on business, the new role for OMB is essential.

But some of the Carter administration's top regulators and their allies in the environmental and labor movements see the new role as a one-sided extension of Republican sympathy for business. David Hawkins, a powerful EPA regulator in the Carter administration who has returned to the environmental movement, claims the bottom line of the new system is "giving the regulated industries what they want."

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There is no job description that can accurately portray the role of a federal regulator. In theory, the regulator is a neutral judge, weighing evidence from all sides impartially and applying the laws enacted by Congress, as well as the administration's policies as long as they don't conflict with the law.

But because many important regulatory statutes are written with deliberate imprecision to make them attractive to a majority of legislators, there has always been room for regulators to tailor rulemakings to suit policies of the administration in power.

In this gray world of hazy legal and political boundaries, the process of regulation becomes critical. That is the bureaucracy's jugular and is where the Reagan administration's deregulators aimed.

"Bureaucracies work off of a process. When you say that all rules must go over to OMB, it creates a state of mind in the government, a culture," said one top-level career bureaucrat who asked not to be identified. "It's amazing how fast a town can change."

Miller's small staff of 65, which soon will grow to 90, must oversee the most important of the 7,000 regulations that typically take effect each year. Since Inauguration Day they have reviewed more than 500. But with a staff that small, they have to be selective, and the executive order lets them be.

Under the new system, an agency cannot propose a major new rule — one that would have an economic impact of $100 million or more — unless it first prepares a "regulatory impact statement" describing the costs and benefits of the proposed rule.

The statement must be submitted for approval to OMB. When OMB is satisfied, the proposed rule may be published in the Federal Register for all to see, and the public then has an opportunity to defend or attack the proposal. After this public comment period, the agency must prepare another impact statement for OMB and wait for approval before issuing a final rule.

If it is in a hurry to change an objectionable ruling, OMB can waive its requirement for regulatory analysis. It can also decide which regulations are "major."

And as a final source of clout, OMB now has the authority, following enactment of the Paperwork Reduction Act, to approve all forms and record-keeping requirements imposed on the public by the government, both the executive branch agencies like EPA and the independent agencies like the Federal Trade Commission.

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Most important regulations require some kind of federal form.

OMB's role in the new regulatory process is primarily beneath the surface and out of public view, and that is what most worries Carter administration regulators like Hawkins.

Hawkins said the cost-benefit analysis was done in the open in the Carter administration. The new system is a "secret process that gives no such opportunity to know what an agency's original intention was and what OMB's influence was. My question is, why are they settling these things in the back room?"

Miller responds that the agency's formal rules will be made in the open, even if OMB's advice is not always spelled out.

OMB cannot dictate terms of a rule, but it will be a rare event when an agency publishes a rule over OMB's opposition, Miller predicts. Before that would happen, the agency administrator would have to justify the action in front of Bush's regulation task force, he notes.

The diesel rule is a case in point. During the last presidential campaign, the Carter administration had begun searching for ways to help the devastated auto industry, and the president's economic advisers wanted to change a number of environmental and safety regulations they felt were excessive.

OMB had the task of preparing a list of possible rule changes. But according to OMB officials, it got nowhere with the National Highway Traffic Safety Administration on safety rules, and received only a few proposed changes from EPA that were far down on the auto industry's list of objectional federal rules.

When the Reagan administration began its review of auto regulations soon after Inauguration Day, EPA suggested a few more regulatory changes, but still did not come forward with the modifications OMB — and the auto industry — thought were most significant and most justified by the weighing of costs and benefits.

John Morrall, an OMB regulatory official, and several OMB associates then met with Walter Barber, acting administrator of EPA, and with Michael Walsh of EPA, to tell them what OMB was looking for in regulatory relief.

At the top of the list was the change in the diesel regulation. The Carter administration had insisted that new, stricter emissions standards for diesels take effect beginning with the 1985 model year, going on sale in the fall of 1984.

The rules would require that all but the smallest diesel passenger cars be outfitted with special control systems to trap the fine carbon exhaust particles from the engine.

The industry said it did not know how to perfect such a device and doubted it would master the technology by 1984. Even if it could be done, Detroit contended, the cost would be heavy — at least $600 per car.

The policy change agreed to by EPA and OMB would permit an averaging of diesel emissions — low levels of pollution from small cars would balance out higher levels from larger cars. The Reagan administraion says there should be no public health problem if the average remains below the existing EPA emissions standard.

The Carter administration would have required all cars and light trucks to meet the standard and that would have forced installation of the particulate traps on most vehicles. Now, perhaps only one-third of the new diesels will require traps, beginning in 1984, according to Walsh and Morrall.

Murray L. Weidenbaum, chairman of the Council of Economic Advisers, says the administration's determination to eliminate excessive regulation is not a move to "gut" environmental legislation.

The diesel proposal, he told a Senate subcommittee recently, "will allow auto manufacturers to meet diesel exhaust emissions standards by using sales-weighted averages of the results from different model lines.... The environmental consequences of this reform are negligible." Total emissions will be the same, but the new flexibility will save companies and consumers millions of dollars, he said.

Perhaps not, Hawkins claims. He worries about health hazards in urban areas, where the large diesel-powered vehicles — delivery trucks and taxicabs, for instance — will be clustered. These may exceed the average, concentrating diesel fumes in heavy traffic areas, he says.

And scientists do not know how serious the threat of cancer is from diesel exhaust particles.

EPA had rejected averaging a year ago, Walsh said. It accepted the approach now because it has more confidence it can work. "We still feel that there's enough health concern to regulate diesels to the level that's technologically feasible. What we know is that the evidence strongly suggests a potential cancer risk.... It's prudent policy to control, but it isn't the kind of concern that makes us say, 'Ban diesels tomorrow.'"

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