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 that
still are responsible for issuing regula-
tions, no major rules can be pro-
posed or issued until OMB is satisfied
with the measure is needed to adopt
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 prepara-
tion 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 environ-
mental regulations scheduled to be
imposed on diesel vehicles in the fall
of 1984.

The announcement was a momen-
tum one for the auto industry, which
was preparing to quit investing in
diesel-powered cars and light trucks
by 1984, 10 times today's number.
The environmental rules could have
been lifted after the first few years,
and the public would have been
better off, the industry maintained.

The new diesel policy was essenti-
ally the one in place by OMB, not the
Environmental Protection Agency, which
has statutory responsibility for con-
trolling the pollution in diesel exhausts
according to interviews with officials
of both agencies.

"I think the substantive guidance
came from OMB," said Miller, in
addition to being a top OMB adminis-
trator, Miller is also executive director
or the new Cabinet task force on
economic policy, a position
that led to the creation of the
ombudsman's job.

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

No one has quit in protest at EPA,
and the changes 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 building that face the
White House on Pennsylvania Ave-
b. The director of OMB's budget
Stockman, Reagan's top budget-cutter.
But the regulatory messes in the
agency fall primarily to Miller, Jim
Toomey, a senior career OMB aide,
and Boyd Gray, who is Bush's
counsel.

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James T. McIntyre, President Car-
ter's director of OMB and now a
Washington attorney, says almost
wistfully, "Most of the regulators con-
tended 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 govern-
ment has placed a huge burden of
unnecessary regulation on business, the
new role for OMB is essential.

But some of the Carter administra-
tion's top regulators and their allies in
the environmental and labor move-
ments see the new role as a one-sided
extension of Republican sympathy for
business. David Hawkins, a powerful
OMB regulator in the Carter admin-
istration who has returned to the en-
vironmental movement, claims the
bottom line of the new system is "giv-
ing the regulated industries what they
want.

"There is no job description that can
prevent or the role of a federal, reg-
ulator. 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 regula-
tory statutes are written with delib-
erate imprecision to make them
flexible, such a system is impractical.

In this gray world of fuzzy legal
and political boundaries, the process
of regulation becomes critical. That's
the bureaucracy's job and is where
the Reagan administration's deregula-
tion efforts moved.

"Bureaucracies work off of a pro-
cess. When you say that all rules must
be OMB reviewed, it creates a state of
mind in the government," 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 regula-
tions 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
without a final regulatory 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
60 days, and if no major objections are
raised, the agency then has an
opportunity to defend or attack the
proposal. After this public comment
period, the agency must prepare an
other impact statement for OMB and
wait for approval before issuing a final
rule.

If it is in a hurry to change an ob-
jectionable rule, 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 en-
actment 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.

See OMB, A6, Col. 3
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 rule 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 regulatory task force, he notes.

The diesel rule is a case in point. During the last presidential campaign, the Carter administration had been 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 Morrell, 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 1980 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 $500 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 administration 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 Morrell.

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.'"