Testimony of
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Before the
Subcommittee on Investigations and Oversight
Committee on Science and Technology
US House of Representatives

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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today. I am Gary Bass, Executive Director of OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in1983 to remove the veil of secrecy from the White House Office of Management and Budget (OMB), OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public. OMB Watch does not receive any government funding.

My testimony today focuses on 1) the responsibilities given Regulatory Policy Officers (RPOs) under Executive Order 13422, 2) the likely impacts of this regulatory change, 3) the current rulemaking structure and disclosure requirements, and 4) OMB Watch's recommendations for improving transparency in the rulemaking process in light of E.O. 13422.

Before addressing these points, I want to make clear to the Subcommittee that we strongly oppose E.O. 13422 and urge Congress to find a way to overturn the E.O. If that is not possible, we urge Congress to use its power of the purse to limit appropriations to implement some or all of the changes required by the E.O. The E.O. threatens public protections by further centralizing executive control over the regulatory process, removing agency discretion over legislative implementation, codifies regulatory delay, and substitutes free market criteria for public values of health, safety, and environmental protections.

I. President Clinton's Regulatory Policy Officer and Executive Order 13422

Executive Order 12866, Regulatory Planning and Review, created the Regulatory Policy Officer within each federal agency who reports generally to the agency head. The E.O. states:

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> "The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order."

The role of the RPO envisioned in the 1993 E.O. is to coordinate and carry out agency responsibilities in regard to regulatory planning and review of regulations by the Office of Information and Regulatory Affairs (OIRA). These responsibilities include: allowing "meaningful" public participation in the regulatory process; informing stakeholders of pertinent regulations; providing OIRA with a list of planned regulatory actions; providing OIRA with cost-benefit analyses for significant regulatory actions; and making available to the public information on proposed and final regulations.

In practice, the role of the RPO evolved differently. Not every agency maintains one designated RPO. In the case of the Department of Agriculture (USDA), various officials serve as de facto RPOs. Familiarity with the issue is likely to determine where responsibilities lie on a specific regulation. In the Department of Energy, the RPO also functions as an agency counselor. The RPO is not necessarily a political appointee, but the final regulatory decisions within an agency are in the hands of a political appointee, usually the agency head or his or her designee.

Two of President Bush's amendments to E.O. 12866 impact the RPO. First, agencies are now required to designate a political appointee as their RPO, and are to do so within 60 days of the issuance of the amendments, which should have already occurred. New text also requires OMB to verify this designation.

Second, in addition to changing the requirements of the designated RPO, the Officer's responsibilities are increased. The RPO will now be charged with approving an agency's Regulatory Plan, a responsibility previously given to the agency head. The amendments state that "no rulemaking shall commence nor be included" for consideration in the agency's regulatory plan without the political appointee's approval. The Regulatory Plan includes the most important regulations which an agency plans in a given year.

II. The Impact of Executive Order 13422 on RPOs

E.O. 13422, the order that amended E.O. 12866 and was issued January 18, 2007, will solidify the position of RPO as the preeminent regulatory manager within each agency. By requiring the Officer to be a political appointee, the amendments suggest a further politicization of the regulatory process. OMB Watch is concerned that by installing a political appointee as the RPO and increasing the responsibilities, that appointee will significantly affect an agency's ability to regulate in a fair and nonpartisan fashion.

In some agencies, the amendments related to the RPO may have little effect on regulatory development. In the case of the Department of Energy, the RPO is already a political appointee albeit without the sole responsibility to initiate regulations and without final decision making authority over regulations (unless one or both powers have been delegated to the RPO by the agency head). The White House is unlikely to have a greater or lesser impact on the way in which regulations are formulated within that agency. Similarly, the process in the Department of Labor is likely to go unchanged.

In other agencies, however, the RPO change will likely centralize the regulatory process and create OIRA-like structures within agencies even though OIRA has been criticized over the years for exerting political influence. In the case of USDA, this change, if

followed, will end the process of dividing regulatory authority based upon experience and expertise. Instead, the RPO will ultimately be responsible for all regulatory decision making and be involved in regulatory discussions from the beginning of agency considerations. Furthermore, installing a political appointee where one did not previously exist will facilitate White House input into agency regulatory matters.

A similar approach was attempted by President Reagan through his E.O. 12498, the Regulatory Planning Process, issued January 4, 1985. Under that order, agencies were to get approval from OMB prior to starting a rulemaking – a pre-rulemaking review. Many in the business community thought this would be an effective approach for choking off agency ideas in their earliest stage. That approach, however, proved too cumbersome and difficult to administer. E.O. 13422 revises this chokehold by placing that *de facto* prior approval in the agencies themselves, instead of at OMB.

To ensure that the process works, the E.O. grants authority to these new political appointees to be the eyes and ears for OMB. And it mounts a challenge to congressional authority. When writing legislation, Congress often directs agencies to initiate a rulemaking. The presence in the agencies of these appointees by whom rulemaking must now be initiated will create a process that works as if Congress had not directed the agencies to act, or as if that direction is irrelevant if the White House appointees disagree with it.

Moreover, a requirement that has political appointees overseeing all regulatory matters raises a public perception concern. When a political appointee instructs scientists and agency experts to change what they are doing, it will raise questions about whether politics is superseding science. If RPOs are to be operating in this way within agencies and are to be the points of communication with OIRA, then the need for transparency in the regulatory process has never been greater.

III. Current Rulemaking and Disclosure

OMB Watch for years has urged Congress and the Executive to require more transparency in the regulatory process. This process 1) has become more centralized in the last three decades and, 2) despite improvements created by OIRA administrators Sally Katzen and John Graham still is not transparent enough. Especially during the current Bush administration, greater access has been provided to those special interests who have the time, resources, and political influence to affect the outcome of the rulemaking process. And the influence on agencies of both these special interests and of OIRA is now more difficult to determine because so much is done outside of the public's view.

We are concerned about transparency in two major directions. First, within the agency as the RPO takes on the new responsibility of initiating regulations, to what extent will the RPO allow politics to supersede the need for health, safety, environmental and civil rights protections as determined by agency experts?

Second, to what extent will the RPO be a *de facto* OIRA official sitting in the agency coordinating and carrying out the responsibilities of the OIRA desk officers during the pre-rulemaking stage? Having been given the power to initiate regulations, we fear the RPO will further decrease agency rulemaking discretion and increase the trend toward OIRA dictating agency rulemaking. Transparency can prove our fear is groundless.

These transparency issues are concerns during both of the major time periods of the rulemaking process: the pre-rulemaking and rulemaking (OIRA review/notice-and-comment) periods.

A. Pre-Rulemaking Review

E.O. 12866 allowed OIRA to play an active role during the pre-rulemaking stage when agencies are formulating annual plans for regulatory activities. Even more than the official rules, OIRA unofficially encourages agencies to discuss regulatory ideas at the earliest stages. By having OIRA involved in agencies' planning processes, OIRA can quash or alter any contemplated regulation before it is proposed for the Regulatory Plan. The communications between OIRA and the agencies are not disclosed, thus it is difficult to measure the extent to which OIRA exerts influence over the drafting of the proposed regulation that is finally submitted to OIRA. A Government Accountability Office report concludes that OIRA, by its own admission and by its involvement in the pre-rulemaking stage, has significant influence over the proposed regulations agencies submit for review.[1]

Knowing that OIRA exerts this influence, it is critically important to document fully the pre-rulemaking communications between OIRA and the agencies, or at least, the outcome of these communications. Despite OIRA's involvement in shaping the content and direction of agency rulemaking, it is not covered by the basic statutory framework for the rulemaking process – the Administrative Procedure Act (APA). Because OIRA is not covered by the APA, its activities are not public and not accountable.

This has become all the more necessary because of the changed role of OIRA during the Bush administration. As former OIRA administrator Sally Katzen testified earlier this year before this Subcommittee, the intent of E.O. 12866 was to have OIRA be a "counselor" to the agencies:

> Executive Order 12866 retained centralized review of rulemakings, but also reaffirmed the primacy of the agencies to which Congress had delegated the authority to regulate. (Preamble) Among other things, Executive Order 12866 limited OIRA review to “significant regulations” – those with a likely substantial effect on the economy, on the environment, on public health or safety, etc. or those raising novel policy issues (Section 6(b)(1))– leaving to the agencies the responsibility for carrying out the principles of the Executive Order on the vast majority (roughly 85%) of their regulations.[2]

Instead of being a "counselor", OIRA has become a "gatekeeper" over agencies' proposed regulations. Before agencies submit proposed regulations to OIRA, the regulatory outcome has already been determined. This power is exerted in several ways:

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1 General Accounting Office, *OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews.* September 2003. Available at www.gao.gov/cgi-bin/getrpt?GAO-03-929. GAO changed its name to Government Accountability Office in 2004.

2 Testimony of Sally Katzen, Adjunct Professor and Public Interest/Public Service Fellow University of Michigan Law School before the House Committee on Science and Technology, Subcommittee on Investigation & Oversight, February 13, 2007, on “Amending Executive Order 12866: Good Governance or Regulatory Usurpation?” p.4.

- In 2002, OMB issued its Data Quality Act Guidelines[3] which created new categories of information hierarchy. "Influential information" would now require a higher level of scrutiny than "information". OMB required agencies to issue guidelines, subject to OMB approval, establishing mechanisms to allow entities to challenge the accuracy of agency information and to report to OMB on the number and nature of these challenges.

- In 2003, OMB issued its Proposed Draft Peer Review Standards for Regulatory Science[4] which were widely criticized as too restrictive and too favorable to regulated industries. Furthermore, the draft standards provided another layer of OMB review of scientific and technical studies used in the pre-rulemaking process. The Final Bulletin, issued December 2003, was an improvement over the draft but still left OMB in the position of overseeing peer reviews, selecting industry representatives for the panels, and requiring public comment on peer review conclusions which delays the rulemaking process even further.

- In 2004, OMB issued Circular A-4[5] which describes in detail how agencies must conduct their Regulatory Impact Analysis (RIA), the basic cost-benefit analysis that must be provided for all economically significant proposed regulations. The RIA is the primary mechanism for justifying regulations and is the first point of review by OIRA desk officers.

- In 2006, OMB issued its Proposed Risk Assessment Bulletin[6] which, as do all of the above guidelines, tried to impose a one-size-fits-all standard on the way agencies were to conduct risk analyses. It, too, was widely criticized and finally withdrawn by OMB in January 2007 after a peer review by the National Research Council's concluded the document was "fundamentally flawed."[7]

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3 Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.* February 22, 2002. Available at http://www.defendingscience.org/public_health_regulations/upload/Office-of-Management-and-Budget-Information-Quality-Act-Guidelines-2002.pdf.

4 Office of Management and Budget. *Final Information Quality Bulletin for Peer Review.* December 16, 2004. Available at http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.

5 Office of Management and Budget, *Circular A-4, Regulatory Analysis*. September 17, 2003. Available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

6 Office of Management and Budget, *Proposed Risk Assessment Bulletin*. January 9, 2006. Available at http://www.ombwatch.org/regs/2006/riskassessmentbulletin-draft.pdf.

7 National Research Council, *Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget.* January 11, 2007. Available at http://www.nap.edu/catalog.php?record_id=11811.

As OMB Watch described in testimony before this Subcommittee in February, these tools have been compromised by the issuance of these guidelines to further bias the regulatory process and threaten public health, safety, and the environment.[8]

1. Guidance review

In January 2007, OMB issued *The Final Bulletin for Agency Good Guidance Practices*[9], on the same day as President Bush issued E.O. 13422. The Bulletin requires internal review of significant guidance documents by senior agency officials as well as public notice-and-comment on guidance documents deemed "significant" or "economically significant."

The Bulletin first appeared in its proposed form late in 2005. It was announced in the *Federal Register* on Nov. 30, 2005, and was open for public comment. In those comments, public interest groups (including OMB Watch) criticized the Bulletin for its potential to allow OMB to interfere unnecessarily in agency practices. Industry organizations expressed their support for the Bulletin, citing their desire for OIRA to review guidance documents in the same way it reviews regulations.

As OMB Watch reported in our final analysis of the new E.O. and the Good Guidance Practices Bulletin[10], the Bulletin defines guidance documents to include "interpretive memoranda, policy statements, guidances (sic), manuals, circulars, memoranda, bulletins, advisories, and the like." Federal agencies issue thousands of guidance documents each year relating to hundreds of different types of activities.[11]

As Section 9 of the amended E.O. also clearly states, the OIRA administrator has the power to determine which guidance documents are significant, thus submitting them to the review process, as well as when "additional consultation" is needed before a document can be issued. Section I(4) of the Good Guidance Practices Bulletin provides that the head of an agency, "in consultation and concurrence" with the OIRA administrator, may exempt categories of significant documents from the Bulletin's requirements.

Section I(5) of the Bulletin adds a further category of guidance document, the economically significant guidance document which is:

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8 Testimony of Rick Melberth, Director of Regulatory Policy OMB Watch before the House Committee on Science and Technology, Subcommittee on Investigation & Oversight, February 13, 2007, on "Amending Executive Order 12866: Good Governance or Regulatory Usurpation?" Available at http://www.ombwatch.org/regs/PDFs/Melberth_testimony.pdf.

9 Office of Management and Budget, *The Final Bulletin for Agency Good Guidance Practices.* January 18, 2007. Available at http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.

10 OMB Watch, *A Failure to Govern: Bush's Attack on the Regulatory Process*. March 2007, p. 16. Available at http://www.ombwatch.org/article/articleview/3774.

11 Congressional Research Service, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, February 5, 2007. p. 10. Available at http://www.ombwatch.org/regs/PDFs/CRS-EO13422.pdf.

> "a significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts."

The definitions of both significant and economically significant guidance documents include documents that "may reasonably be anticipated to lead to" certain conditions. This language applies to all four conditions in the definition of significant guidance document,[12] and the Bulletin "makes clear that the impacts of guidance often will be more indirect and attenuated than binding legislative rules."

While the proliferation of agency guidance documents may well deserve attention, the solution is not additional OIRA review. If anything, the growth of agency guidance indicates that the existing regulatory process is broken.

2. Guidance and the RPO

This is an area in which the RPO may effect significant change even in those agencies, like Labor and Energy, where the RPO has already been a political appointee. Under E.O. 13422, OMB can now engage the agency, along with other government personnel (as provided for in one amendment), in reaching a "common understanding" on regulatory efforts through the presence of the RPO.

After internal agency approval by the RPO, the agency will send drafts of significant guidance documents to OIRA for review. The RPO is responsible for ensuring that the agency sends a draft of the significant guidance to OIRA, along with an explanation of the need for the guidance and how the guidance document will meet that need. The fourth part of the guidance definition, raising "novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in this Executive order," is nearly broad enough to permit OIRA to sweep into its review any guidance it wishes to review. It is likely that the RPOs, in reaching that "common understanding", will be the ones providing that internal approval.

Beyond this grant of authority to review significant guidance, there is little explanation in the Bulletin of OIRA's role in the review process. Unlike the detailed procedures for OIRA's review of regulations, the procedures for OIRA's review of guidance is relatively vague. OIRA will "notify the agency when additional consultation is required before the issuance of a significant guidance document." There are no timelines for completing the review, and there is vague language about the administrator's ability to exempt guidance for an emergency or "other appropriate consideration."

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12 Section 3(h) of E.O. 13422 defines a significant guidance document as "a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to: (A) Lead to an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

B. Rulemaking Review and Public Comment

Currently, the public can first learn about an agency's intentions to regulate through the semi-annual Unified Agenda which is published in the *Federal Register.* It is notoriously inaccurate in its reporting of agency regulatory work and timing of an agency's activities. Nonetheless, it is an important document that should be improved.

In reality, the public first learns of a specific agency regulatory activity from a website operated by OIRA when OIRA logs agency regulatory submissions for review. The website is meager, however. The public cannot search for a rule; instead, there is a long list of rules sorted by departments.

E.O. 13422 does not amend the rulemaking review procedure significantly; its impact is in the pre-rulemaking stage. In conjunction with the Good Guidance Practices Bulletin, however, it establishes OIRA review and notice-and-comment procedures over agency guidance documents.

By subsuming guidance documents to a review process almost identical to the review process OIRA uses to review and approve regulations, the extent of OIRA's reach into agencies' responsibilities will be at an all-time high, as will the influence and access of regulated sectors. As a result, the administration has unilaterally redefined the Administrative Procedure Act, which specifically exempts interpretive rules and policy statements from the notice-and comment process. All of the documents deemed significant will now come under review by OIRA's staff of about 55 people and go through the regulatory notice-and-comment period -- but only after being vetted by the RPO.

1. OIRA Review

OIRA has 90 calendar days to review a proposed regulation after submission, but this can be extended. Desk officers review the RIA developed according to OMB's Circular A-4. Review is required only of significant regulations, but OIRA has the authority to review those deemed non-significant as well. Although there often is extensive communication between OIRA and the agency during pre-rulemaking, OIRA has used "return letters" and "prompt letters" to indicate to an agency areas in which the proposed regulation has deficiencies, or to urge an agency to take regulatory – or deregulatory – action.

According to section 8 of the E.O., during the review period, an agency is not permitted to publish the proposed rule in the *Federal Register* until the OIRA administrator notifies the agency that OIRA has completed or waived its review or the applicable time limits for review have expired. Even without a response from OIRA, the agency must seek presidential consideration through the Vice President before publishing the regulatory action.

Section 6 of E.O. 12866, *Centralized Review of Regulations,* describes the disclosure requirements OIRA must follow during and after the review period:

> (4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:
>
> (A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the

Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines:

(i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

While OIRA publishes some of this information on its website or Reginfo.gov, much of the information is not available to the public, but is only available, if requested, in its docket room. In October 2001, OIRA Administrator John Graham issued a memorandum clarifying OIRA procedures for disclosure and acknowledges OIRA's intent to add more information in compliance with the E-government plans of the administration.[13]

There are many areas, however, that are not covered by the disclosure policies. For example:

- **Rules not under review are not covered** by its disclosure policy: "Rules are not under review prior to the start of informal OIRA review or after OIRA has

13 John D. Graham, OIRA Administrator, *Memorandum for OIRA Staff: OIRA Disclosure*. October 18, 2001. Available at http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html.

notified the agency that review is concluded; legislative discussions are not covered." Thus, informal OIRA pre-rulemaking activities are not public.

- **Meetings with parties outside of government about rules not under review are not covered.** Regarding meetings with outside parties, "any meeting" to discuss the substance of an individual rule is covered, but "Meetings to discuss rules not under review, or meetings to discuss broad regulatory topics (e.g., analytic methodology or legislation)" are not covered. Moreover, even for those meetings that are disclosed, the disclosed information is inconsistent. The disclosure sometimes omits participants' affiliations, or rules or topics discussed.
- **Correspondence about rules not under review are not covered.** "Correspondence received while a rule is not under review" is not covered by the disclosure policy.
- **Internal communications are not disclosed.** "Outside parties", for purposes of disclosure, are "persons not employed by the executive branch". So communications with Congress and the public are disclosed, but not inter- and intra-departmental communications.
- **Substantive communications are not defined.** "Substantive communications" are not defined while "non-substantive discussions" are defined only by providing examples like "status of review, review procedures". What kind of communications are classified as substantive, and how does the public know these policies are being followed?

These kinds of loopholes abound throughout the memo. Limiting disclosure to information and communications generated during the 90 or so days the rule is under OIRA review ignores the years involved in developing rules under the current process. There is extensive communication within and among agencies, agencies and OIRA, agencies and the regulated communities, OIRA and the regulated communities, etc. None of these communications are shared publicly as part of OIRA's disclosure policies. The opportunities for influence to be exerted in multiple directions are extensive.

In addition, these disclosure requirements are far too limited in light of publication of agencies' regulatory plans in the Unified Agenda. Proposed regulations don't just appear one day as submissions to OIRA. Limiting disclosure to the 90 day period of OIRA's review is like shining a flashlight on an item when electricity is available.

2. Notice-and-Comment Period

The publication of a proposed rule in the *Federal Register* triggers the public participation phase of the rulemaking process. The notice-and-comment requirements under Section 553 of the APA outline this public process and have been subject of criticism and litigation for years.

> The traditional view of section 553 procedure as a process for educating the agency has, however, been gradually replaced, in practice if not in theory, by the belief that informal rulemaking procedure should provide interested persons an opportunity to 'challenge the factual assumptions on which [the agency] is proceeding and to show in what respect such assumptions are erroneous.' In other words, the public must be informed of the data and assumptions on which the agency's proposal is based.[14]

14 Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking.* (Chicago: ABA Publishing, 2006.) p.298-9.

Anyone who has tried to comment on or review the comments of others during this period knows that the information available to the public is far from the standard Professor Lubbers describes above. Information from agencies is incomplete or not available, opportunities to comment on some rules open for comment don't exist on electronic dockets, and the opportunity to see who has commented and what those comments address is too often non-existent.

Furthermore, as this Subcommittee well knows, the Bush administration has distorted science, chilled scientific speech, and manipulated regulatory tools in pursuit of ideological ends. OMB Watch encourages the Subcommittee and Congress to examine the entire regulatory process for opportunities to increase transparency in the public process and in the substance of the information available. To that end, OMB Watch has recommendations for specific ways in which regulatory transparency could be improved.

I want to again express our opposition to E.O. 13422 and urge Congress to overturn the E.O. Short of that option, we urge Congress to use its appropriations powers to limit the executive's ability to implement some or all of the E.O.

IV. Recommendations for Improved Transparency

One serious concern with the advent of a politically appointed RPO in each agency is that the interests of the RPO may become more closely aligned with those of OIRA and the White House than with those of the agency in which the RPO works, with public sentiment and need, or with scientific consensus on an issue. If the RPO now has the ability to initiate regulations, then the point at which agency personnel reach a decision to recommend regulatory action, and make that recommendation to the RPO needs to be clearly defined. We recommend the following:

A. Agency Responsibilities

1) That each agency clearly identify the RPO, provide a description of that person's role in regulatory matters, and how the public can contact that person. The information should be conspicuously available on agency websites.

2) That each agency be required to disclose with its regulatory plan, those proposed regulatory activities that the RPO has decided the agency will not pursue. The plan and the ideas and proposed regulatory activities discarded or delayed should be published in the Unified Agenda published semi-annually in the *Federal Register* along with justification for the delays or decisions not to undertake the activities.

3) That the public should have the right to obtain from the RPO clarification of items in the plan in addition to the items rejected or delayed.

4) That each agency provide formal documentation of ideas generated by agency personnel regarding activities that may lead to regulatory actions. This documentation requires:

    a) A clear definition of when a regulatory action commences. For example, a regulatory action commences at the point at which an agency employee or

contractor transmits a recommending document to the RPO or starts a formal communication on the matter.

b) Within a very short period, for example, 30 days, the RPO publishes a written response to recommending actions with justification for declining, agreeing, or other actions regarding the recommendation. The public must be assured that the RPO's decision to stop a rule from being developed is not a triumph of politics over responsible government.

c) Placing all documents in the agency rulemaking record for activities that move to the proposed rulemaking stage and creating a new public docket, available through the Internet, of all other actions (i.e., those not pursued).

5) That agencies submit an annual report to Congress on activities that have been delayed, withdrawn, or rejected by the RPO and the justifications for such actions.

6) That all intra-agency communications, written and oral, between the RPO and the agency personnel responsible for developing the proposed regulation be documented and included in the agency's rulemaking record.

7) That all inter-agency communications, written and oral, be documented and included in the agency's rulemaking record.

B. Reviewing Entities Responsibilities

This section covers the role of OIRA and other reviewing entities such as the Small Business Administration (SBA).

1) That "substantive" communications be defined and not left to individual discretion.

2) That all substantive communications, written and oral, between the agency and the reviewing entities be documented and included in the agency's rulemaking record.

3) That all substantive communications between parties outside of government, and excluding communications with the President, and any party involved in the rulemaking process (agency or reviewing entity) be documented and included in the agency's rulemaking record. This disclosure covers materials submitted by the outside parties, and documentation of oral and written communications.

4) That OMB establish a government-wide regulatory tracking system. As part of the implementation of the E-Government Act of 2002, agencies should develop a regulatory tracking system by which the public can follow a regulation through each step of the rulemaking. Currently, there is an e-rulemaking approach being refined on Regulations.gov. Each agency should provide a clear process by which regulations can be tracked through this system with appropriate links to the information contained in the rulemaking record.

5) That OIRA's website be searchable, with information consistent for each record, and with identification numbers that link records clearly to the regulatory actions with which they are associated.

6) That meeting logs, made available through OIRA's website, be complete and include the purpose of the meeting, generally what was discussed, the participants and their affiliations, a brief description of materials circulated, and any conclusions or outcomes that resulted from the meeting.

If OIRA and other reviewing entities like the SBA continue to have significant impact on the substance of agency rulemaking, then the APA informal rulemaking process should apply to these reviewing entities. It is unfair to the agencies who are sued as a result of rulemaking actions to bear the full burden of litigation when they do not have full responsibility for the substantive rulemaking outcome. If the APA needs to be amended to cover these reviewing entities, then we urge Congress to take appropriate action.

We realize the burden of this transparency proposal falls primarily on the agencies. But until and unless the reviewing entities which influence the substantive outcome of regulatory activities are subjected to the same APA rules, the agencies must be the repository for the full rulemaking record.

Subjecting agency guidance documents to the same APA-like review process requires the same level of transparency, record development, and information access we are recommending for rulemaking. After all, OMB's justification for subsuming agency guidance into the review process is that agencies are using guidance to avoid the rulemaking process. Therefore, the transparency principles should apply to review of guidance documents as well.

Post notice-and-comment communications may be helpful to agency and the reviewing entities. The decision to limit or accept these communications should be left to the agencies. But the same principles apply if agencies decide to allow communications at this point: the communications and identification of the parties should become part of the record. Similarly, OIRA's and other entities communications with parties after the notice-and-comment period should become part of the agency's rulemaking record. These principles of open and transparent decision making should apply to a second notice-and-comment period if deemed necessary.

In addition to helping to restore trust in government by providing transparency, the ability to evaluate regulatory outcomes is greatly enhanced by having the substantive basis of decisions available to the public. Congress, the President, other government agencies responsible for providing information to these branches, state decision makers and policy staffs, researchers, and other segments of the public can access, analyze, and share information. The technological advances that have occurred make this transparency far easier than was possible in past decades. As the federal government moves to increased transparency in its interaction with the public, our political dialog is enhanced by providing more information, and using that information to achieve increased government effectiveness and efficiency.

Thank you for the opportunity to testify.