Civil Justice Playbook

IDEAS, INITIATIVES & INFLUENCE

OMB: Between a Rock (Science) and a Hard Place (Policy)

The following remarks are from "Science and Federal Regulation: Is the Office of Management and Budget an Effective Gatekeeper?" a program held on May 19 in Washington, D.C. as part of the Washington Legal Foundation's Media Briefing Series. The panel was moderated by Hon. ***Douglas H. Ginsburg,*** *former chief judge of the U.S. Court of Appeals for the D.C. Circuit and former administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). The panelists are:* ***Paul Noe,*** *vice president, Public Policy, with the American Forest & Paper Association and former counselor to the administrator of OIRA;* ***Nikesh Jindal,*** *counsel, King & Spalding and former associate general counsel at OMB; and* ***Lawrence A. Kogan,*** *managing principal of The Kogan Law Group and chief executive of the nonprofit Institute for Trade, Standards and Sustainable Development. This has been edited for length and style. A video of the full program can be found at the Washington Legal Foundation (at www.wlf.org/communicating/mediabriefing_detail.asp?id=268).*

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Judge Ginsburg: The federal courts routinely hear cases in which scientific/technical subject matter plays a large role. This is particularly true for the D.C. Circuit, which hears petitions challenging or seeking review of agency regulatory decisions, mostly of rulemaking. Because the agencies have scientific/technical expertise, federal courts typically defer to some degree – and some quite deeply – to their judgments.

According to the most recent report from the Office of Management and Budget (OMB) to Congress, in the decade from 2004-13, federal agencies published 37,000 final rules in the Federal Register. OMB reviewed 3,040 of those through the Office of Information and Regulatory Affairs (OIRA), and of the rules reviewed, 569 were considered major rules with an expected economic impact in excess of $100 million. The best estimate is that about 35,000 rules were issued by federal agencies in 2014 and that OMB reviewed 452. About half these are from six agencies: Treasury, Interior, Commerce, Transportation, Health and Human Services, and Environmental Protection.

Because OMB reviews only a fraction of the rules issued every year, and because the agencies frequently make policies outside of the rule-making process, OMB's long-standing Information Quality Act (IQA) guidelines are no less important a tool than OMB review in helping to promote sound scientific decision making by the agencies. There's a debate as to whether the guidelines have proven to be too much of a barrier to agency action or, on the other hand, should be enforced more strictly than they are now.

Scientific soundness of agency decision making is critical. I look forward, as we all do, to hearing the views of our panelists about the role of OMB in promoting science-based government.

Paul Noe: OIRA can't help but be involved in issues related to regulatory science policy because it is at the intersection of questions involving cost-benefit trade-offs in federal regulation. That's its assigned role by presidential executive order.

It's a fair question to ask why every president since Richard Nixon has wanted there to be some form of centralized review, and it's a fair question to ask why any clear-headed president would think that an office of maybe 50 professionals could manage the regulatory state. The simple answer is if OIRA didn't exist, it would have to be invented.

How can OIRA function given its size? There are a few ways to increase the power of the review function. OIRA is involved in inter-agency review, and other agencies have technical experts who are very relevant to particular issues. There's also the issue of in-house expertise. I'm a strong believer that OIRA should have scientific expertise and technical expertise. A third thing that helps OIRA handle this formidable task is prioritization. OIRA focuses its limited time and resources on the most significant rules – typically those with over a $100 million impact. It also prioritizes based on where it can make the most important contributions.

Heated debate often swirls around the use of science in developing regulations. A common argument is that political officials try to intervene and control science. To be fair, political officials should not be trying to change science. If the Earth is round, it's round, and we should take it at that.

But there's another compelling argument. There's a problem when scientists try to control policy. The Bipartisan Policy Center says the tendency to frame regulatory issues as debates solely about science regardless of the actual subject in dispute is at the root of the stalemate and acrimony in the regulatory system today. I very much agree with that statement.

Science in and of itself rarely is sufficient for making policy decisions. Scientists will never have complete information to predict outcomes with perfect certainty. So risk assessors use risk assessment policy. Both scientific judgements and policy choices may be involved. Matters such as risk and uncertainty need to be informed by scientific results, but science cannot tell policy makers how to act. Policy debate would be clarified and enhanced if a systematic effort were made to distinguish between questions that can be resolved through scientific judgements and those that involve judgements about values and other matters of policy. This transparency would help force values debates into the open and limit attacks on science.

Nikesh Jindal: In the absence of OMB's role in reviewing science and scientific coordination, the only resort would be a purely litigation-orientated regime, which is not suitable for a variety of reasons. Companies are often reluctant to sue their regulator. It's hard to go on a war footing and say all sorts of nasty things about your regulator in court and then try to intersect with them in a nice and friendly way on a day-to-day basis. There's also reluctance among the courts to wade into complex, technical kinds of issues. Courts may naturally defer to agency judgments and avoid getting into whether or not the science is technically accurate. That speaks to the importance of the OMB function in making sure that these scientific determinations are being made in a comprehensive and thorough manner.

My own personal experience having been both at the Department of Energy (DOE) and OMB is it's not simply that you have a small band of people at OIRA and OMB who are performing this function. At DOE we were often brought in early in the review process because we did have scientists with expertise who could help the whole review process – kind of a coordinated review where there were meetings and discussions among various agency officials. The range of experts within the government that was brought to bear wouldn't be possible if OMB didn't serve that kind of clearinghouse and intermediary function.

There are different reform proposals about how to improve the technical and scientific review process within the government. A couple may actually align with making it easier for the courts to grapple with these issues [such as] recognition that we have a default baseline status quo standard. What's the justification to make it from x to x+y? That may be a way to simplify the issues that makes the science or the technical analysis easier to grasp for the courts by recognizing that rather than just analyzing the science on a blank slate, we're analyzing it vis-à-vis an existing baseline.

Lawrence Kogan: The Information Quality Act (IQA) is a procedural statute that applies to every substantive law promulgated by federal agencies, including White House offices. It injects a degree of objectivity that agencies might not find within their own houses, and, as a result, there are those who are for it and those who are against it. You have to take into account when you look at the IQA how it imposes a rigorous peer review standard depending upon the economic impact. There are two basic levels: influential scientific information (ISI) and highly influential scientific assessments (HISA). The ISI economic impact trigger is less than that for HISA, which is over half a billion dollars. When you look at HISA as opposed to ISI, it imposes more rigorous requirements. If the agencies performed their necessary external peer review, which they're supposed to do under the standards, then supposedly they will get to produce, develop and review a higher level science document that can be justified as support for regulation.