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Dear Reeve:

Here are some further comments on Curtis Copeland's superb report, beyond those I was able to make during the October 29 meeting. I am sorry that an emergency matter arose that forced me to leave the conference.

The report understandably focuses on the Section 6 process, because that is the one in public view. But there is also Section 4, on creating the regulatory plan, and in my judgment some attention to it would permit better address to some of the issues in the statement.

A) This is the point at which needs for interagency coordination can usually be identified, and consideeration should be given to recommending that coordination be begun then (Statement recommendation 2) – potentially saving considerable time in the process. Also, consideration might be given to recommending that OIRA set time limits for coordinating agencies' responses if they are to be considered (i.e., so that the drafting agency may proceed if the coordinating agency is responsible for delay). I suppose this is an additional transparency issue, but the absence of discipline from the time commitments is troubling.

B) Section 4 also addresses the point at which OIRA can most readily tell agencies that their priorities should be elsewhere. If an agency has once been permitted to include a significant rule in its regulatory plan, so that it goes ahead with work, refusing to permit it to submit a draft regulatory analysis creates a considerable and generally unnecessary waste of agency resources – which, as we know, are not in abundant supply.

C) As Neil Eisner also suggested in a different way, there are considerable transparency issues raised by present practice. FDMS creates greater transparency in the rulemaking process *for OIRA* by putting the rulemaking docket on OIRA desks –

encouraging, inter alia, its intervention on the merits of technical issues. But, as Wendy Wagner's earlier study for the Conference reflected, OIRA interactions with agencies are imperfectly reflected, even as to those matters on which EO 12,866 promises transparency. OIRA-agency interactions during the period between approval of the regulatory plan and submission of the draft – for example, preceding the one day or one week "reviews" he found – are completely opaque. For me, this renders the accepting attitude of proposal 5 in the draft unacceptable. Section 4 *is* the E.O.'s provision for coordination prior to formal submission for review – it is the clearance to go to work; it is the right time for highlighting potential substantive concerns. That process could permit OIRA to instruct agencies what other agencies they need to work with, and what are the President's priorities for their work. But then OIRA's heavy participation, while development of the approved rulemaking draft goes on, invites OIRA's conversion from process supervisor to rulemaker, and deserves to be resisted. At the very least, transparency issues for this time need to be addressed, and the statement should *not* recommend discounting the time taken by OIRA participation in the process while the rule is being developed in the agency, before the agency believes itself ready for submission (Statement recommendation 5(a)).

D) I would support Neil Eisner's recommendation that OIRA be asked to make a greater use of return letters or other public statements to identify its interventions to delay agency rulemaking or cause withdrawal of drafted rules.

Best,