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## OMB PROMPT LETTERS: ARE THEY PROMOTING (SMARTER) REGULATION?

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*“Federal regulations can provide cost-effective solutions to many problems. If not properly developed, regulations can lead to an enormous burden on the economy.”<sup>1</sup>*

*John D. Graham, PhD, September 20, 2001*

### Introduction

When President George W. Bush took office in 2001, many observers anticipated a change in the regulatory atmosphere of Washington. Relief was desperately needed,<sup>2</sup> and the new administration seemed to clearly appreciate the detrimental impact that burdensome regulations were having on the economy.<sup>3</sup> In 2001, Americans faced a bill of more than \$800 billion each year to comply with regulations produced by Washington’s alphabet soup of federal agencies.<sup>4</sup> Moreover, estimates indicated that small businesses paid a disproportionately large share of the total regulatory burden. For firms employing fewer than 20 employees, the annual regulatory burden in 2000 was estimated to be \$6,975 per employee – nearly 60% higher than the \$4,463 estimated for firms with more than 500 employees.<sup>5</sup>

From the outset, the Bush administration publicly recognized the problem of excessive regulation and declared that it would subject regulatory actions to critical cost-benefit reviews.<sup>6</sup> To oversee its regulatory policies, President Bush appointed Dr. John D. Graham, who chaired the Harvard Center for Risk Analysis,<sup>7</sup> to head the Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB) that is charged with reviewing proposed and final agency rules to ensure that regulations are consistent with Executive Branch policies and priorities.<sup>8</sup>

With Graham at the helm, many foresaw an opportunity for OIRA to further expand its role in the regulatory review process.<sup>9</sup> Operating under the philosophy quoted above, Graham pledged to carry out OIRA’s regulatory reviews “thoroughly and cooperatively.”<sup>10</sup> And, arguably, Graham’s influence has been felt through the reinvigoration of existing OMB policies and through the institution of some new techniques.<sup>11</sup> The “prompt letter,” a procedure where OIRA proposes that an agency consider a new regulation, or modify or rescind an existing rule, represents one of the new regulatory tools introduced by Graham.<sup>12</sup>

This article will first examine the history of OIRA and its justification for issuing prompt letters. Next, the role of prompt letters in the overall regulatory reform effort will be evaluated. The article concludes that while prompt letters have done little to exacerbate the regulatory burden, the letters have likewise done little to promote agency priority setting and do not represent a good use of OIRA’s limited resources. Specific alternatives for addressing the regulatory problem are then presented.

### The Advent of OIRA’s Regulatory Authority

Over the last decade OIRA has assumed greater influence over agency rulemakings. Yet Presidential oversight of rulemaking had its initial inception over thirty years ago after federal regulatory programs exploded in the 1960s. This major regulatory expansion resulted from a burst of legislation relating to public health and safety, consumer affairs and the environment.<sup>13</sup> President Nixon appreciated the impact of this new federal regulatory legislation and recognized the importance of coordinating executive agency actions. To oversee the coordination efforts, Nixon issued Executive Order 11541,<sup>14</sup> which created the Office of Management and Budget.<sup>15</sup>

Under President Ronald Reagan, the first President to staff OIRA, the regulatory review process and OMB’s role in the process was strengthened in several important ways.<sup>16</sup> Recognizing the devastating impact that excessive and poorly designed regulations were having on the economy, Reagan created a Vice-Presidential Task Force on Regulatory Relief with a goal of reducing regulatory burdens on industry. As a result of the Task Force’s findings, Reagan issued Executive Order 12291, which directed agencies to submit all proposed and final regulations to OIRA for review.<sup>17</sup> Additionally, rules likely to have an economic impact of \$100 million annually were to be accompanied by cost-benefit analyses.<sup>18</sup> President George H.W. Bush essentially continued the Reagan Administration’s regulatory review program.

OIRA’s role in the regulatory process received increased prominence when President Clinton issued Executive Order 12866.<sup>19</sup> E.O. 12866 directs OIRA’s oversight of agency rulemaking by requiring OIRA review of “significant” agency regulatory actions before they are offered for public comment, and again before they are issued in final form. Upon receipt of the rule from the agency, OIRA’s review determines, in part, whether the rule is consistent with the President’s policies and priorities. Additionally, OIRA reviews the agency’s assessed costs, benefits and considered regulatory alternatives, “including the alternative of not regulating.”<sup>20</sup> President George W. Bush then amended E.O. 12866 slightly with the issuance of Executive Order 13258, which eliminated the Vice President’s role in regulatory review.<sup>21</sup>

President Bush has made it a top priority for his administration to lower the regulatory burdens on businesses.<sup>22</sup> Early in his tenure, Dr. Graham showed an appreciation for the concerns of small business in particular.<sup>23</sup> In 2002, OIRA and the Small Business Administration’s Office of Advocacy entered into a Memorandum of Understanding to reduce the federal regulatory burden on small entities and to improve agency compliance with the Regulatory Flexibility Act (RFA). This partnership has enabled the two offices to share information to ensure that agencies adequately consider the impact of their proposed regulations on small businesses and consider less burdensome alternatives.

Moreover, with Graham in place as the Administration's regulatory czar, OMB also instituted several regulatory reform initiatives that were based largely on the results of cost-benefit accounting.<sup>24</sup> These proposals include targeting existing rules that "should be rescinded or changed to increase net benefits by either reducing costs or increasing benefits,"<sup>25</sup> and engaging in the same sort of activity with respect to "problematic" agency guidelines that have not complied with process requirements like cost-benefit accounting.<sup>26</sup> OIRA has also instituted the process of sending prompt letters to agencies when the Office believes that they are not prioritizing a particular, "beneficial" regulatory activity as highly as they should.<sup>27</sup>

Graham publicly stated that his pursuit of "smarter regulation" was neither pro-regulation nor anti-regulation.<sup>28</sup> Instead, he sought to "accelerate the adoption of good rules, modify existing rules to make them more effective and less costly, and rescind outmoded rules whose benefits do not justify their costs."<sup>29</sup> The cost-benefit approach advocated by OIRA under Graham could thus be used to either reform or eliminate regulations, or to identify areas where a regulation may be needed. Prompt letters, it seemed, would play critical roles in "encouraging" agencies to prioritize resources in order to promulgate "smarter regulations."<sup>30</sup>

### **Prompt Letters – An Effective Regulatory Tool for Encouraging "Smarter" Regulation?**

In September of 2001, Graham formally introduced the "prompt letter."<sup>31</sup> In a memorandum sent to the President's Management Council, which laid out the Bush Administration's approach to the implementation of E.O. 12866, Graham announced that:

OIRA plans to send, as occasion arises, what will be referred to as 'prompt' letters. The purpose of the prompt letter is to suggest an issue that OMB believes is worthy of agency priority. Rather than being sent in response to the agency's submission of a draft rule for OIRA review, a 'prompt' letter will be sent on OMB's initiative and will contain a suggestion for how the agency could improve its regulations. For example, the suggestion might be that an agency explore a regulatory matter, or consider rescinding or modifying an existing rule. We will request prompt agency response to 'prompt' letters, normally within 30 days.<sup>32</sup>

After three years of this proactive technique, it is now appropriate to ask — have prompt letters achieved the intended result of creating "smarter" regulations?

#### *1. The Role of Prompt Letters with Regulatory Reform*

As noted above, President George W. Bush indicated his intent to reduce the regulatory burdens on businesses.<sup>33</sup> Bush took immediate action by staunching the flow of President Clinton's midnight regulations.<sup>34</sup> On the day Bush took office, White House Chief of Staff Andrew Card, Jr. issued a memorandum to the heads of all executive agencies directing

them to withhold any proposed or final rules from the Federal Register until the rule received approval from a Bush appointee and to withdraw regulations that had been sent to the Federal Register but not yet published unless the rule dealt with an emergency situation.<sup>35</sup> Independent agencies were also encouraged to participate in this review.<sup>36</sup>

Shortly after this initial directive, President Bush, like his predecessor, entrusted OIRA with rulemaking oversight. Since its inception, OIRA has been viewed as the regulatory gatekeeper: the executive office charged with stopping - or at least curtailing - unnecessary regulations. Historically, OIRA exercised this authority through the use of a "return letter," which requires an agency to reconsider a rule that fails to meet OMB requirements.<sup>37</sup> In his initial directive to agency heads in September 2001, Graham warned that "a return may occur if the quality of the agency's analyses is inadequate, if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with the regulatory principles stated in the Order or with the President's policies and priorities, or if the rule is not compatible with other Executive Orders or statutes."<sup>38</sup> Graham also advised that OIRA would be taking a newly proactive role by suggesting regulatory priorities for agency consideration through the use of prompt letters.<sup>39</sup>

Graham's proactive stance might appear perplexing. After all, one might argue that prompt letters, by promoting regulation, complicate, rather than further, the Bush Administration's pledge of regulatory reform. In theory, however, prompt letters utilize the cost-benefit approach as a means or tool for prioritizing, and thereby, improving regulation. Under this premise, the letters support the Administration's pledge to encourage "smarter" regulation<sup>40</sup> by incorporating the cost-benefit approach that has been the mainstay of rulemaking oversight for the last 25 years.<sup>41</sup> While there is no doubt that blocking and eliminating many regulations, *i.e.*, deregulation, are critical components of regulatory reform, studies have also shown that adding some regulations and modifying others could also save millions of dollars annually.<sup>42</sup> Even commentators supportive of cost-benefit analyses concede that there are situations in which quantitative measurements support regulations.<sup>43</sup> Additionally, federal rulemaking "suffer[s] from significant problems" due in part to poor priority setting.<sup>44</sup> Commentators, including the National Federation of Independent Business, therefore predicted that prompt letters would improve rulemaking by encouraging agencies to focus on a more efficient rule at a lower cost and with a higher benefit to society.<sup>45</sup>

#### *2. No Appreciable Regulatory Burden Added By Prompt Letters*

Because the role of prompt letters in regulatory reform is not transparent on its face, it is important to first assess whether they have added regulatory burden. Based upon progress to date, it is safe to conclude that they have not. OIRA issued letters in limited circumstances, as a mechanism for encouraging regulation in areas where empirical analyses had showed good rather than harm would result from a rule or formal policy. OIRA's initial prompt letters addressed a

range of issues including the use of lifesaving defibrillators in the workplace, food labeling requirements for trans fatty acids, and better information regarding the environmental performance of industrial facilities.<sup>46</sup>

To date, OIRA has issued just twelve true prompt letters.<sup>47</sup> In addition to these twelve, OIRA also counts as prompt letters the following: an agreement with Environmental Protection Agency curbing pollution from diesel-powered, non-road engines and also a letter suggesting 49 regulatory reforms that was sent to independent agency heads - agencies over which OMB lacks authority. Additionally, one can presume that agency resources and personnel committed to responding to a prompt letter are likely resources and personnel diverted from other rulemaking presumed to be lower priority. When viewed in light of the thousands of new rules issued each year, OIRA's twelve promotional efforts are nearly indiscernible.

### *3. Prompt Letters Encouraging "Smarter" Regulation?*

While prompt letters may not have added appreciably to the regulatory burden, the question nevertheless remains – do they justify the use of OIRA's limited resources? C. Boyden Gray raised this question during a hearing before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law held in the summer of 2004.<sup>48</sup> OIRA's own actions may provide the answer.

While OMB has issued fourteen prompt letters altogether, it sent just two in 2004. This decrease may indicate OIRA's recognition that other procedures present greater opportunity for rulemaking reform.

Undoubtedly some of OIRA's letters encouraged agency action. For example, its second prompt letter involved automatic external defibrillators (AEDs).<sup>49</sup> The letter requested the Occupational Safety and Health Administration consider whether the promotion of AEDs should be elevated to a priority. The prompt letter noted "some preliminary cost-effectiveness calculations" indicate "AEDs in the workplace might prove to be very cost-effective."<sup>50</sup> In 2003 OSHA issued a technical bulletin that encourages AED placement in the workplace.<sup>51</sup>

Justification for other letters is less impressive. For instance, the first prompt letter that was issued to the Food and Drug Administration (FDA), in 2001, involved mandatory disclosure of trans fatty acids in the Nutrition Facts panel of food products.<sup>52</sup> OIRA encouraged FDA to issue a disclosure rule, which FDA's own preliminary analysis showed benefits in the range of \$25 billion to \$59 billion, while costs would be \$400 million to \$850 million. OIRA reported in its 2003 Report to Congress that a final rule had been published in July 2003. What OIRA did not publicize was that the FDA proposed the rule in 1999, so rather than prompting agency action, OIRA's letter simply encouraged an ongoing agency rulemaking.

In a United States Department of Agriculture (USDA)

the Department of Health and Human Services (HHS) and USDA revise the Dietary Guidelines to reflect the risks associated from trans fatty acids and benefits associated with foods rich in Omega-3 fatty acids.<sup>53</sup> It does not appear that either HHS or USDA responded to OIRA prior to issuing a final rule in 2005. Moreover, one questions whether this issue even merited OIRA's attention since the guidelines are revised every five years and there is no indication that either agency had overlooked OMB's expressed concerns.

While OMB included a separate appendix on the status of its return letters in its 2003 report to Congress, in 2004 OMB did not provide a comparable status report on prompt letters.<sup>54</sup> However, as previously mentioned, in 2004 OIRA sent just two prompt letters. The first letter requested that the Environmental Protection Agency (EPA) promulgate rules to ensure compliance with the Beaches, Environmental Assessment and Coastal Health Act of 2000, which requires coastal States to adopt up-to-date pathogen criteria.<sup>55</sup> EPA had indicated that a proposed rule would be forthcoming. The second letter, sent to the National Institutes of Health (NIH), recommended that NIH prepare a response-to-comments document for public review before listing or delisting a substance on the Report on Carcinogens. OIRA has not indicated whether NIH responded.

While OMB may contend that prompt letters have resulted in proven benefits, without knowing what resources were expended to produce the letters, it is impossible to know if the claimed benefits outweighed costs. This lack of quantifiable information led to C. Boyden Gray's request for "empirical research" on prompt letters. Even if the prompt letters have provided some benefits to the regulatory climate, it is hard to justify them when one considers the amount of existing regulations in need of reform. Reform of existing burdensome regulations represents a better use of OMB's resources.

Furthermore, the prompt letters have not addressed workplace regulations, the category of regulation that imposes some of the highest costs on small businesses.<sup>56</sup>

When Graham introduced the prompt letter in 2001, he indicated that the letters might encourage agency reform of an existing rule. A few of the OIRA letters did suggest regulatory reforms, including one that recommended the Department of Transportation modify its crash test and, notably, a 2002 letter that recommended that the Office of Federal Housing Enterprise Oversight strengthen corporate governance of Fannie Mae and Freddie Mac. However, none of OIRA's prompt letters addressed the burdensome workplace rules that urgently need reform.

### **Opportunities for Reining in Burdensome Regulations**

The Bush Administration's attempt to protect small entities from excessive regulatory burden has received mixed reviews.<sup>57</sup> The Administration has limited the regulatory burden in some notable respects, such as the 2001 freeze on new regulations and its increased reliance on the Office of Advocacy's efforts to identify regulations that unfairly burden small business. The administration has been less suc-

successful at reforming existing rules. Because OIRA, like the federal agencies themselves, has limited resources, we recommend that OIRA focus on initiatives that offer the greatest opportunities for improving regulatory policy and reducing the regulatory burden on small businesses. We do not believe prompt letters provide such opportunities. Instead, OMB should concentrate on stricter enforcement of agency compliance with existing regulatory requirements, including OMB's guidelines for regulatory analysis and the RFA. Additionally, OMB should devote greater attention to the sea of existing regulations that need renovation.

One of the most striking conclusions in the 2001 Crain-Hopkins report was that "Firms employing fewer than 20 employees face an annual regulatory burden of \$6,975 per employee, a burden of nearly 60 percent above that facing a firm employing over 500 employees."<sup>58</sup> Because of the disproportionate impact of regulatory costs on small firms, OIRA must continue its work with the Office of Advocacy in the Small Business Administration to strengthen the enforcement of the RFA and reduce unnecessary burden on small entities.

As previously mentioned, Dr. Graham's work on behalf of small business, particularly through the MOU between OIRA and the Office of Advocacy, has been helpful in ensuring that new regulations do not unfairly burden small business. Therefore, coordination with the Office of Advocacy should remain a priority, and OIRA should be prepared to return any draft rules for agency reconsideration if they have not taken into account the impact of the draft rule on small businesses as required by the RFA. In Graham's first six months as Administrator of OIRA, more than twenty rules were returned to agencies.<sup>59</sup> This amounted to more than the total number of returns during the entire Clinton Administration.<sup>60</sup> OIRA should continue to issue return letters when agencies' economic analyses fail to comply with OMB guidelines and other required regulatory measures like the RFA.

OIRA also should continue its work on recommendations for regulatory reform. OMB has completed two rounds of request for reform nominations and has identified a number of unnecessary regulations adversely impacting small businesses. In 2002, 1,700 commentators made suggestions, resulting in 156 recommendations for changes. Last October, a year and one-half after the process started, OIRA announced agencies would look into 34 of the 156. Thus far, no actions have been taken on those 34 regulations.<sup>61</sup> We encourage OMB to work with the agencies to complete these reform efforts.

## Conclusion

The Bush Administration and OIRA have demonstrated an understanding of the impact that regulations have on all business generally, and on small businesses, in particular. More importantly, they have committed to tackling the larger problem of reining in the regulators. But, as often is the case, the tools used dictate the success in completing the job. It appears that the prompt letter may not be the best tool OIRA has for meeting its regulatory reform goals. OIRA should

continue to expand its efforts in holding agencies accountable for the regulations they issue and working with allies, like the Office of Advocacy, to ensure that any new regulations do not unfairly burden the most important, and fastest-growing segment of the nation's economy – small business.

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## Footnotes

<sup>1</sup> See Memorandum from John D. Graham, Administrator, Office of Information and Regulatory Affairs, to President's Management Council (Sept. 20, 2001) [hereinafter Graham Memorandum], available at [http://www.whitehouse.gov/omb/inforeg/oira\\_review-process.html](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html).

<sup>2</sup> Robert W. Hahn, et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000) (concluding that regulatory reform efforts under Presidents Reagan, Bush and Clinton had fallen short of expectations).

<sup>3</sup> See President Bush's Small Business Agenda (September 11, 2002) (expressing support for "tear[ing] down regulatory barriers") available at <http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html#>.

<sup>4</sup> See W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms* (2001) (estimating that in 2000 Americans spent \$843 billion, or over \$8,000 per household, to comply with federal regulations), available at <http://sba.gov/advo/research/rs207tot.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> See Graham Memorandum, *supra* note 1.

<sup>7</sup> See Biography of John D. Graham, available at <http://www.whitehouse.gov/omb/inforeg/bio.html>.

<sup>8</sup> See Questions & Answers about OIRA (Feb. 26, 2002), available at [http://www.whitehouse.gov/omb/inforeg/qa\\_2-25-02.pdf](http://www.whitehouse.gov/omb/inforeg/qa_2-25-02.pdf).

<sup>9</sup> See Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

<sup>10</sup> See Graham Memorandum, *supra* note 1.

<sup>11</sup> See Richard A. Greene, *Recent Developments in Federal Regulatory Policy*, 6 J. SMALL & EMERGING BUS. L. 607, 615-620 (2002) (expressing support for "innovative" approaches instituted by Graham) and Robin K. Craig, *The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA*, 28 ADMIN. & REG. L. NEWS 8 (2003) (criticizing the "expansion" of OIRA's regulatory review authority under Graham).

<sup>12</sup> See Graham Memorandum, *supra* note 1.; *Hearings Before the United States House of Representatives Subcomm. On Regulatory*

*Reform and Oversight of the Comm. on Small Business* (June 6, 2002) (testimony of John D. Graham) [hereinafter Graham testimony], available at [www.whitehouse.gov/omb/legislative/testimony/graham/060602.html](http://www.whitehouse.gov/omb/legislative/testimony/graham/060602.html).

<sup>13</sup> See ROBERT V. PERCIVAL, *et al.*, ENVIRONMENTAL REGULATION; LAW, SCIENCE AND POLICY at 104-09 (3d ed. 2000) (describing the development and growth of federal regulation in the 1960s).

<sup>14</sup> 35 Fed. Reg. 10,737 (July 1, 1970).

<sup>15</sup> OMB acquired a more critical role in regulatory matters as a result of the Paperwork Reduction Act of 1980 (currently 44 U.S.C. § 3501 et seq. (2004)), which authorized OMB to prevent agencies from imposing unnecessary paperwork burdens on the public.

<sup>16</sup> OIRA owes its genesis to the Paperwork Reduction Act signed by President Jimmy Carter. Under this act, Congress ordered the Director of OMB to “delegate to the [OIRA] administrator the authority to administer all functions under this subchapter, except that any such delegation shall not relieve the Director of responsibility of the administration of such functions.” 44 U.S.C. § 3503(b). Under the Act the administrator “serve[s] as principal advisor to the Director [of OMB] on Federal information resources management policy.” *Id.*

OIRA also plays an important role in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. § 658 et seq. (2004), which requires federal agencies to assess the effects of proposed regulations on state, local and tribal governments and the private sector and to select the least burdensome regulatory option when possible.

<sup>17</sup> 46 Fed. Reg. 13,193 (Feb. 17, 1981).

<sup>18</sup> *Id.* at 1(b)(1), (3)(c).

<sup>19</sup> 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>20</sup> See Graham Memorandum, *supra* note 1.

<sup>21</sup> 67 Fed. Reg. 9385 (Feb. 26, 2002).

<sup>22</sup> See President Bush’s Small Business Agenda, *supra* note 3.

<sup>23</sup> See Graham testimony, *supra* note 12.

<sup>24</sup> See generally Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15,014, 15,020 (Mar. 28, 2002) (describing OIRA’s effort to shift from being a “reactive” to a “proactive” force “in suggesting regulatory priorities for agency consideration”).

<sup>25</sup> *Id.* at 15,022.

<sup>26</sup> *Id.* at 15,035.

<sup>27</sup> *Id.* at 15,020.

<sup>28</sup> John D. Graham, Smarter Regulation – Progress and Unfinished Business, address before Kennedy School of Government, Harvard University (Sept. 25, 2003), available at [www.whitehouse.gov/omb/inforeg/speeches/030925graham.pdf](http://www.whitehouse.gov/omb/inforeg/speeches/030925graham.pdf); John D. Graham, Reigning in the Regulatory State: The Smart-Regulation Agenda, Cato Institute Hill Briefing (October 3, 2003), available at [www.whitehouse.gov/omb/inforeg/speeches/031003graham.pdf](http://www.whitehouse.gov/omb/inforeg/speeches/031003graham.pdf) [hereinafter 2003 Remarks of Graham].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Graham Memorandum, *supra* note 1.

<sup>32</sup> *Id.*

<sup>33</sup> See President Bush’s Small Business Agenda, *supra* note 3.

<sup>34</sup> When Clinton left office in January 2001, his administration left behind a last-minute legacy of thousands of pages of proposed rules. See generally 65 Fed. Reg. 66,923 (Nov. 8, 2000) through 66 Fed. Reg. 6426 (Jan. 19, 2001).

<sup>35</sup> Memorandum for the Heads and Acting Heads of Executive Departments and Agencies from Andrew H. Card, Jr., White House Chief of Staff, 66 Fed. Reg. 7702 (Jan. 24, 2001).

<sup>36</sup> *Id.*

<sup>37</sup> See Executive Order 12866, *supra* note 19.

<sup>38</sup> See Graham Memorandum, *supra* note 1.

<sup>39</sup> *Id.* Prompt letters do not have the force of “return letters,” which are authorized by E.O. 12866. Instead, prompt letters simply represent an OMB request that “an agency elevate a matter in priority, recognizing that agencies have limited resources and many conflicting demands for priority attention.” OMB, Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 185, available at [www.whitehouse.gov/omb/inforeg/2003\\_cost-ben\\_final\\_rpt.pdf](http://www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf).

<sup>40</sup> See 2003 Remarks of Graham, *supra* note 28.

<sup>41</sup> See Hahn, *Assessing Regulatory Impact Analyses*, *supra* note 2, at 860.

<sup>42</sup> Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1053-54 (2004) (conceding that there are situations where quantitative cost-benefit analysis will support regulations).

<sup>43</sup> *Id.*

<sup>44</sup> See Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation?*, *supra* note 9.

<sup>45</sup> *Id.* at 1521-24; Greene, *supra* note 11, at 619-20; William S. Morrow, Jr., *The Year in Review: Excerpts from ‘Developments in Administrative Law & Regulatory Practice 2000-2001*, 27 ADMIN. & REG. L. NEWS 4 (2002); *The Impact of Regulation on Small Business: Hearings before the United States House of Representatives Subcomm. on Regulatory Reform and Oversight of the Committee on Small Business* (June 6, 2002) (testimony of Andrew M. Langer, National Federation of Independent Business).

<sup>46</sup> See OIRA prompt letters, available at [http://www.whitehouse.gov/omb/inforeg/prompt\\_letter.html](http://www.whitehouse.gov/omb/inforeg/prompt_letter.html).

<sup>47</sup> *Id.*

<sup>48</sup> Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAW 26 (2004).

<sup>49</sup> See Prompt Letters, *supra* note 46.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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<sup>54</sup> Compare OMB, 2003 Report to Congress, *supra* note 39, at 185, available at [www.whitehouse.gov/omb/inforeg/2003\\_cost-ben\\_final\\_rpt.pdf](http://www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf) with OMB, Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, available at [http://www.whitehouse.gov/omb/inforeg/2004\\_cb\\_final.pdf](http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf).

<sup>55</sup> See Prompt Letters, *supra* note 46.

<sup>56</sup> *Reforming Regulation to Keep America's Small Businesses Competitive: Hearings Before the United States House of Representatives Subcommittee on Regulatory Reform and Oversight of the Committee on Small Business* (May 20, 2004) (testimony of Susan E. Dudley), available at [www.mercatus.org/article.php/709.html](http://www.mercatus.org/article.php/709.html).

<sup>57</sup> James L. Gattuso, *State of the Union: Small Business, Large Regulation*, The Heritage Foundation (Jan. 21, 2004) (observing that the Bush administration sent almost 100 significant new regulations to OIRA “topping not only the Reagan average of less than 70, but the Clinton rate of 90”), available at <http://www.heritage.org/Research/Regulation/wm400.cfm>; and James L. Gattuso, *Reining In the Regulators: How Does President Bush Measure Up?*, The Heritage Foundation BACKGROUNDER, No. 1801 (Sept. 28, 2004), available at <http://www.heritage.org/Research/Regulation/bg1801.cfm>; see also Testimony of Susan E. Dudley, *supra* note 56.

<sup>58</sup> See Crain and Hopkins, *The Impact of Regulatory Costs on Small Firms*, *supra* note 4.

<sup>59</sup> See 2003 Remarks of Graham, *supra* note 28.

<sup>60</sup> *Id.*

<sup>61</sup> James L. Gattuso, *State of the Union: Small Business, Large Regulation*, *supra* note 57.