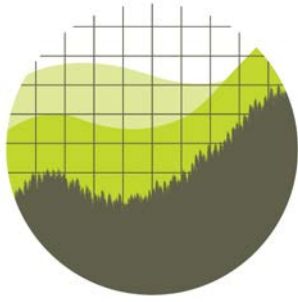

December 2, 2013

Administrative Conference of the United States
59th Plenary Session

Subject: Amendments to the Proposed Recommendations on Remand without Vacatur and the Proposed Statement on Improving the Timeliness of OIRA Regulatory Review

As a public member of the Conference, I propose the following amendments to the recommendations for consideration before ACUS's 59th Plenary Session:

a. Amend the Proposed Recommendations on Remand without Vacatur to:
    1. Strengthen the recommendation in favor of remand without vacatur when it furthers the interests of the prevailing parties; and
    2. Clarify the scope of the administrative record in the case of remand without vacatur.
b. Amend the Proposed Statement on Improving the Timeliness of OIRA Regulatory Review to:
    1. Advise OIRA to develop updated, realistic schedules for review when announcing the reasons for any substantial delays, and to specify and categorize its reasons for delay in ways that will be most informative and useful to the public, agencies, and Congress;
    2. Clarify and expand the suggestions on increasing OIRA's staff resources; and
    3. Propose that OMB include a summary of the timeliness, outcomes, and overall effectiveness of OIRA's yearly reviews, as distilled from data already generated on OIRA's website, in the annual *Report to Congress on the Benefits and Costs of Federal Regulations*.

I direct a non-partisan think tank at NYU School of Law, called the Institute for Policy Integrity. Policy Integrity is dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy. Policy Integrity has participated in the ACUS Committee proceedings on both of these two proposals being considered at the Plenary Session.

These comments offer specific revisions to the language of the proposals, as well as explanations of the rationales behind the suggested amendments.

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Amendments to the Proposed Recommendations on Remand without Vacatur

First, the ACUS Recommendations should emphasize the importance of weighing the interests of the prevailing parties when courts determine whether remand without vacatur is appropriate.

Amendment #1 (additions to existing proposed recommendation in **bold**)

> 5. In determining whether the remedy of remand without vacatur is appropriate, courts should consider equitable factors, including whether:
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> (a) correction is reasonably achievable in light of the nature of the deficiencies in the agency's rule or order;
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> (b) the consequences of vacatur would be disruptive; or
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> (c) the interests of the parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place. **Remand without vacatur is generally appropriate when this factor is satisfied.**

Justification for Amendment #1

Balanced judicial review is an essential part of a well-functioning regulatory process. But when courts find that agency action has been improper, the traditional legal remedy of vacating the agency action can create an antiregulatory bias. For proregulatory stakeholders—which may prefer the imperfect regulation over the status quo, even as they seek substantive and procedural improvements—the prospect of winning a court-ordered remand, only to lose out on net regulatory benefits until the agency completes a new rulemaking, presents a troubling disincentive to litigation. To protect the ability of proregulatory parties to challenge a rule as insufficiently stringent without sacrificing the net regulatory benefits while the agency develops a stronger alternative, remand without vacatur is a necessary remedy to preserve judicial review as a balanced part of the regulatory process.[1]

Remand without vacatur can sustain important benefits of flawed rules that still significantly advance the public welfare.[2] For example, in *North Carolina v. EPA*, the D.C. Circuit Court of Appeals granted remand without vacatur to EPA on the Clean Air Interstate Rule (CAIR), a regulation that aimed to reduce cross-state emissions of harmful air pollution like particulate matter. Such pollution was linked to major health problems, such as respiratory and cardiovascular symptoms resulting in hospital admissions, asthma exacerbation, acute and chronic bronchitis, and premature mortality.[3] These important public health gains could have been jeopardized by a traditional remedy that vacated the rule due to its legal flaws. Instead, the D.C. Circuit granted remand without vacatur in order to "temporarily preserve the environmental values covered by CAIR."[4] This remedy helped preserve approximately $181.2 billion in total net health and environmental benefits during the three years between when the court issued the remand without vacatur and when EPA's replacement rule, the new Transport Rule, was scheduled to take effect.[5]

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[1] RICHARD L. REVESZ AND MICHAEL L. LIVERMORE, RETAKING RATIONALITY 159-61 (2008). *See also, e.g.*, Mississippi v. EPA, 273 F.3d 246 (D.C. Cir. 2013) ("[V]acating a standard because it may be insufficiently protective would sacrifice such protection as it now provides, making the best an enemy of the good.").

[2] Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 287-88 (2005).

[3] OFFICE OF AIR & RADIATION, ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL CLEAN AIR INTERSTATE RULE 4-1 to -2 (2005).

[4] North Carolina v. EPA, 550 F.3d 1176, 1178 (2008) (granting remand without vacatur on rehearing).

[5] OFFICE OF AIR & RADIATION, ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL CLEAN AIR INTERSTATE RULE 1-1 (2005) ("EPA has estimated the benefits and costs of the Clean Air Interstate Rule and finds that the rule results in

Parties that desire a more stringent rule thus may find remand without vacatur to be a more preferable remedy.[6] Reassuring proregulatory stakeholders that this alternative will be available as courts fashion equitable remedies is necessary to correct the antiregulatory disincentive to litigate that proregulatory parties face under traditional legal remedies. Remand without vacatur is generally appropriate in situations when it serves the interests of the prevailing parties and should be given especially great weight in those cases.

Second, the ACUS Recommendations should clarify the scope of the administrative record in the case of remand without vacatur.

Amendment #2 (additions to existing proposed recommendation in **bold**)

> 7. Agencies should specifically identify or post judicial decisions vacating or remanding without vacatur agency rules or orders in any applicable public docket, and, if appropriate, on the agency website. When a court remands but does not vacate an agency's rule or order, the agency should include a statement explicitly advising that the rule or order has not been vacated and is still in effect despite the remand. **Further, in such cases of remand without vacatur, the agency should clearly state whether the public comments and other materials in any docket for the original action will or will not be incorporated into the docket for any response to the remand.**
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> 10. In responding to a judicial remand without vacatur of an agency action, agencies should identify the initial agency action as well as the remanding judicial opinion. **At the time of response (for example, in conjunction with a notice of proposed rulemaking), agencies should clearly state whether public comments and other materials in any docket for the original action will or will not be incorporated into the docket for the response.**

Justification for Amendment #2

In *EME Homer City Generation, LP v. EPA*, there was some controversy over whether issues raised during the proceedings on CAIR (which had been remanded without vacatur) were automatically incorporated into the proceedings on the Transport Rule, the reconsidered rule. The scope of the docket evidently had not been clear to all the parties, and there was considerable disagreement among the judges as to whether previous comments were incorporated.[7] Ultimately, the Supreme Court granted a petition for certiorari to resolve the scope of the administrative record in that particular case.[8] To help avoid such confusion in the future, agencies should make clear to stakeholders whether past materials are incorporated in the docket for any responsive action.

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estimated annual net benefits of . . . $60.4 in 2010 . . . reflect[ing] a discount rate of 7 percent."). CAIR was remanded without vacatur in December 2008, and the Transport Rule was scheduled to take effect in 2012, amounting to approximately three years of net benefits. The Transport Rule was vacated by the D.C. Circuit Court in *EME Homer City Generation, LP v. EPA*, 696 F.3d 7, 39-40 (2012); that case is currently on appeal to the Supreme Court.

[6] STEPHANIE J. TATHAM, THE EXTRAORDINARY REMEDY OF REMAND WITHOUT VACATUR: DRAFT REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 2 & n.2 (2013).

[7] EME Homer City Generation, LP v. EPA, 696 F.3d 7, 39-40 (2012) (Rogers, J., dissenting); Reply Brief for Petitioners at 9, EME Homer City Generation, LP v. EPA, No. 12-1182 (U.S. June 3, 2013) ("The CAA prohibits judicial invalidation of EPA rulemaking on any ground not 'raised with reasonable specificity during the period for public comment.' 42 U.S.C. 7607(d)(7)(B)."); *see also* Richard L. Revesz & Michael A. Livermore, *Sharp Legal Strategy in the Successful Challenge to Obama's Air Quality Rule*, HUFFINGTON POST (Aug. 24, 2012), http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/sharp-legal-strategy-in-t_b_1823784.html ("It is a foundational premise of administrative law that an agency's decision can be challenged only on the basis of arguments that were presented to the agency during its rulemaking process. This principle is meant to discourage exactly the kind of result that occurred in this case.").

[8] *See EPA v. EME Homer City Generation* Docket, No. 12-1182 (petition granted June 24, 2013).

Amendments to the Proposed Statement on Improving the Timeliness of OIRA Regulatory Review

First, the ACUS Statement could provide more clarity on how OIRA should disclose the grounds for delay, as well as a common-sense proposal to schedule a new timeline for review.

Amendment #1 (additions to existing proposed principle in **bold**)

> 5. If OIRA concludes that it will be unable to complete the review of an agency's draft rule within a reasonable period of time after submission, recognizing the timeframes established in section 6(b)(2) of EO 12,866 and the nature of the matter—but in no event beyond 180 days after submission—OIRA should inform the public as to the reasons for the delay or return the rule to the submitting agency. **OIRA should disclose its reasons with as much specificity as feasible, using categories that will be informative to the public, agencies, and Congress. Such categories could include: prolonged inter-agency review; additional information or analyses required on costs, benefits, or alternatives; insufficient OIRA resources; or other reasons tied to pertinent provisions of EO 12,866. When disclosing the reasons for delay, OIRA should also announce a realistic timeline to complete the review.**

Justification for Amendment #1

Though OIRA review is an essential and valuable part of the regulatory process, key stakeholders broadly agree that the system of OIRA review faces significant challenges, including regulatory delay and the opacity of the process. These deficiencies can result in lost benefits from delayed implementation of efficient regulation and can damage OIRA's reputation. OIRA has already taken several steps to address these problems, but more could be done. ACUS's Statement should both reinforces some best practices that OIRA has already begun to adopt and identify additional improvements to the regulatory review process that have widespread support.

Undue delay in the regulatory review process imposes costs on the public. In cases where OIRA is slow to reject a regulation that will not be ultimately justified through the cost-benefit analysis, then it is preventing the promulgating agency from developing a better, more efficient rule.[9] If OIRA delays releasing regulations that are cost-benefit justified, then intended beneficiaries will not receive the benefits of the regulation.[10] For example, though OSHA estimates that the silica rule could save up to 60 statistical lives per year,[11] the rule was under OIRA review for over two years. Unless the additional time spent in OIRA review increased the net benefits of the rule by more than 120 lives saved, the delay was likely a significant loss to public health and welfare.

Delay in the regulatory review process also creates uncertainty, which further reduces the net social benefits of regulation.[12] Uncertainty may cause regulated entities to avoid investing in new, safer equipment or reduce their ability to secure funding more generally. Investors in industries likely to be affected by pending rules may delay their otherwise productive investments while waiting for additional information. For instance, if finalized, the silica rule will likely require facilities to purchase HEPA vacuums for clean-up,[13] and require that some manufacturing facilities

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[9] *See* Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1401-02 (2011).

[10] *See id.* at 1399-00.

[11] *See* SMALL BUSINESS ADVOCACY REVIEW PANEL, REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARDS FOR SILICA 5-6 (2003).

[12] *See* Sant'Ambrogio, *supra* note 2, at 1400-01.

[13] *See* OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, PRELIMINARY INITIAL REGULATORY FLEXIBILITY ANALYSIS OF THE DRAFT PROPOSED OSHA STANDARD FOR SILICA EXPOSURE FOR GENERAL INDUSTRY AND MARITIME 38 (2003).

have on-site showers available for workers.[14] The regulatory uncertainty surrounding the industries likely subject to the silica rule ultimately affects a wide range of investment decisions.

Moreover, delay can damage public perception of OIRA. The transparency and efficiency of the OIRA review process has made it an important and well-respected element of rulemaking. However, some groups continue to perceive OIRA as an anti-regulatory "black hole" for proposed regulations, given OIRA's past history.[15] Though OIRA has greatly improved its track record for transparency, the public may perceive unexplained regulatory delay as undermining that track record.

There are times when OIRA will need to spend more than 90 or 120 days reviewing a rule. Extended review may sometimes be unavoidable to ensure thorough and thoughtful centralized regulatory review. However, OIRA could take steps to ameliorate the negative impacts of regulatory delay.

If insufficient information is causing delay, OIRA should either announce a timeline for acquiring the necessary information or return the rule to the agency to collect more data: If insufficient information makes it impossible for OIRA to complete its review, OIRA should send the rule back to the promulgating agency or otherwise announce the steps it will take, in coordination with the agency, to acquire sufficient information. The agency could issue a public request for information, and send the rule back to OIRA when there is sufficient information to support cost-benefit analysis and regulatory review. By sending the rule back to the agency or announcing an information-collection process, the public can participate in the regulatory process and rulemaking can continue.

If rule complexity or prolonged inter-agency review is causing delay, OIRA should set a new timeline for review: Complex rules with many elements or difficult methodological problems may have particularly complicated cost-benefit analyses. Significant rules may attract attention from multiple agencies, and coordinating a comprehensive inter-agency review may create logistical complications. In such instances, OIRA may not be able to complete the review in the usual 90-day period. When this is the case, OIRA should publically acknowledge the delay and explain the need for additional time. Reasons for delay should be as specific as feasible. If possible, OIRA should provide a real and achievable updated timeline for completing review. Such a policy would increase transparency and make it clear to the public that OIRA has not lost track of the rule and is not merely delaying the rule without reason.

If insufficient resources are causing delay, OIRA should disclose the shortfall to the public and, as much as possible, take steps to addressing staffing shortfalls: If OIRA cannot complete a review in a timely manner due to lack of resources, OIRA should inform the public and Congress of its shortage. A lack of resources may be temporary, due to staff turnover, or longer lasting, as in the case of a constrained OIRA budget. Publicizing these situations would increase transparency and could garner support for the additional monetary and staff support OIRA needs to carry out its review duties.

OIRA should not hold rules indefinitely for political reasons or due to pressure from special interests: Politically-motivated delays undermine the credibility both of OIRA as a neutral reviewing body and of cost-benefit analysis as a neutral tool for evaluating regulatory policies. Such delays are especially damaging to OIRA's credibility given its particular institutional history.

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[14] *See id*. at 23.

[15] *See e.g.*, Molly Redden, *New Republic: OIRA Antagonizing Environmentalists*, NAT'L PUB. RADIO, Jan. 12, 2012, http://www.npr.org/2012/01/12/145095539/new-republic-oira-antagonizing-environmentalists.

Second, the ACUS Statement should expand on its advice regarding OIRA staffing shortages.

Amendment #2 (additions to existing proposed principle in **bold**):

> 6. OIRA's staffing authorization should be increased to a level adequate to ensure that OIRA can conduct its regulatory reviews under EO 12,866 in a timely and effective manner. **Congress and OMB should take steps to establish secured funding for OIRA, either through a separate budget line or through appropriations language that dedicates additional funding to OMB for use by OIRA.** In addition, or as an alternative, staff from rulemaking agencies **and from other White House offices** could be detailed to OIRA under appropriate guidance **and through a process that maintains sufficient independence from agency staff responsible for writing and implementing the regulation under review**.

Justification for Amendment #2

In the long run, increasing staffing at OIRA is a legitimate approach to addressing delay in the regulatory review process. OIRA should advocate for greater funding from Congress. Additionally, ACUS's suggestion on loaning agency staff to OIRA has potential to help temporarily reduce delays. However, there are potential pitfalls of assigning agency staff who may either know the substance of the rule and have a professional stake in the outcome, or else may be unfamiliar with the substance of the rule. ACUS should borrow from language that OIRA developed when advising agencies on how to secure the independence of internal retrospective review committees.[16] ACUS should also propose possible staff loans from White House offices outside of rulemaking agencies, such as CEA or CEQ.

Amendment #3 (new language to be added at the end of the first proposed principle):

> Additionally, OIRA should include in the annual *Report to Congress on the Benefits and Costs of Federal Regulations* information on the timeliness and effectiveness of the regulatory review process over the previous year. Distilling the data generated by OIRA's online database, the Report should include: the number of reviews initiated and completed in the previous year, the average length of completed reviews, and the number of rules changed during the OIRA regulatory review process.

Justification for Amendment #3

OIRA's website already contains a wealth of raw data on the timeliness of review. But beyond academia and the advocacy community that pays close attention to OIRA, such information may not be as easily accessible for members of Congress and the public. This information could be easily summarized and added to OMB's existing annual *Report to Congress on the Benefits and Costs of Federal Regulations*, to help Congress and the public better understand the number of reviews conducted by OIRA annually, the average length of reviews, and the number of rules changed during the OIRA review process.

Sincerely,

Richard L. Revesz, Public Member
Dean Emeritus and Lawrence King Professor of Law, NYU School of Law

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[16] OIRA, M-11-10, Executive Order 13,563, "Improving Regulation and Regulatory Review" 5-6 (Feb. 2, 2011).