

**Regulatory Innovation Summit 2000**

**Expanding Awareness of Federal  
Regulations Through  
Independent Oversight**

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# A Bountiful Platter of Procedures

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- ✓ Administrative Procedure Act
- ✓ OMB review under Executive Order 12866
- ✓ Regulatory Flexibility Act  
(as amended by the Small Business Regulatory Enforcement Fairness Act)
- ✓ Unfunded Mandates Reform Act
- ✓ Congressional Review Act
- ✓ Paperwork Reduction Act

# An Inedible Stew of Failure

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- ✓ The Administrative Procedure Act is broken
- ✓ OMB regulatory review is ineffective
- ✓ Small business protections are limited
- ✓ Unfunded Mandates Reform Act is toothless
- ✓ Congressional oversight is missing-in-action
- ✓ Paperwork Reduction Act is unenforced and increasingly unenforceable

# The Administrative Procedure Act Is Broken

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- ✓ Agency discretion arises from ambiguous statutory directives
- ✓ Courts defer to agency interpretations
- ✓ Challenges are expensive
- ✓ Standard of review is “arbitrary and capricious”
- ✓ Agency discretion is virtually unlimited

# OMB Review Is Ineffective Due to Conflicting Missions

- ✓ Implement president's stated regulatory principles
- ✓ Advance the president's regulatory agenda
- ✓ Defense of stated regulatory principles requires political "clients" within the White House
  - Carter: Regulatory Analysis Review Group, COWPS
  - Reagan & Bush: WHO, OVP, CEA
  - Clinton: ???

# OMB Review Is Ineffective By Design

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- ✓ “Non significant” rules aren’t reviewed by OMB
- ✓ Enforcement tools are purposefully limited
- ✓ Time limits on OMB review reward agency stonewalling
- ✓ Politically imposed cultural change within OMB inhibits effective performance

# Small Business Protections Are Limited

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## ✓ SBA has conflicting missions

- Defending the interests of small businesses
- Advancing the president's agenda
- Lending money to bad risks

## ✓ SBA's limited capacity to intervene

- Little timely access to rulemaking process
- Primary bureaucratic tool is harassment

# Unfunded Mandates Reform Act Is Toothless

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## ✓ Strong rhetoric

- Intergovernmental consultation and analysis required
- Requires “least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule”

## ✓ Weak enforcement

- Limiting clause encourages circular reasoning
- Judicial review is limited to matters not worth suing about



# Congressional Oversight Is Missing-in-action

- ▶ **Congressional Review Act**
  - expedited procedure to disapprove regulations
  - authorizing committees frequently support agency actions even when Members at large do not
  - Internal rivalries impede action
  - Regulators win public relations battles
- ▶ **Members prefer legislation to oversight**
- ▶ **Whither a Congressional Office of Regulatory Analysis?**

# Paperwork Reduction Act: Unenforced, Now Unenforceable?

- ▶ Regulations based on agency data collections covered by PRA “practical utility/burden” test
- ▶ OMB enforcement of PRA standards is lax, selective
- ▶ What should be done when:
  - Terms of clearance are violated?
  - Data are wrong?
  - Data are misused?
- ▶ New information technologies reduce burden but increase intrusiveness

# A Strategy for Expanding Awareness

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- ✓ Emphasize public's right-to-know
- ✓ Reinvigorate public participation in OMB's Paperwork Reduction Act reviews
  - Public participation is required under PRA
  - Public participation is prohibited under EO 12866
- ✓ Develop “shadow” regulatory dockets

# Public Right-to-know

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- ▶ The parable of the Toxic Release Inventory (TRI)
- ▶ The parable of medical errors
- ▶ The *Federal Register* -- public (non)disclosure
  - “A memorandum is written not to inform the reader but to protect the writer.” – Dean Acheson, 1893-1971
  - Obfuscation maintains agencies’ monopoly power
  - Government’s inherent conflict of interest
- ▶ The need for independent analysis and disclosure of information about government performance

# Public Participation in OMB's Paperwork Reduction Act Reviews

- ✓ Schizophrenia about public participation
  - Required by law under PRA
  - Severely constrained by policy under EO 12866
- ✓ Public knows virtually nothing about the PRA
- ✓ Public participation is necessary for effective OMB enforcement of statutory standards
- ✓ Effective participation reduces barriers to data access, can improve quality of science

# Develop “Shadow” Regulatory Dockets

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- ✓ CSAB’s Project on Regulatory Oversight  
(*CSABPro*)
- ✓ Overcome conflicts of interest within regulatory  
agencies through competition
- ✓ Encourage non-governmental regulatory analysis
- ✓ Baseball-style arbitration across competing  
regulatory analyses

# CSAB's Project on Regulatory Oversight

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- ✓ Initial two-year database of all major rules
  - Document in detail agency (non)compliance with existing procedures and requirements
  - Generalized noncompliance provides a sound empirical basis for process reforms
- ✓ Propose a uniform format for full disclosure
- ✓ Develop a non-governmental system for regulatory oversight

# Overcome Conflicts of Interest Within Regulatory Agencies

- ✓ Agency analyses have improved little over 20 years
- ✓ Agency analyses are performed to justify decisions, not to inform them
- ✓ Peer review processes are prone to inappropriate objectives, political interference and additional conflicts of interest
- ✓ Competition is the remedy for monopoly power



# Baseball-style Arbitration Across Competing Regulatory Analyses

- ✓ Regulated parties should fund independent regulatory analyses
- ✓ All analyses can be subjected to the same criteria
  - Statutory criteria set by Congress
  - Additional criteria set by President
- ✓ Full disclosure becomes necessary to survive competitive review, not just a worthy goal

# Conclusion

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- ✓ Existing models having failed, expanding public awareness requires new approaches
- ✓ Principles guiding new approaches:
  - Stop relying on government to oversee itself
  - Independent, non-governmental oversight
  - Use internet to facilitate public access to independent evaluations