

STATEMENT OF JAMES C. MILLER III  
before the  
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES  
AND REGULATORY AFFAIRS  
of the  
COMMITTEE ON GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
on  
MARCH 11, 2003

Mr. Chairman and Members of the committee: thank you for inviting me to comment on the Office of Management and Budget's (OMB's) report on regulatory activity and how to improve compliance with the statutory requirement for an accounting by agencies and their programs on the impacts of Federal rules and paperwork requirements.<sup>1</sup> I am Chairman of The CapAnalysis Group, an affiliate of Howrey Simon Arnold & White, an international law firm which specializes in antitrust, intellectual property, and complex litigation.<sup>2</sup> I have a particular interest in the matters before you today, having been a Director of OMB (1985-1988) and having been the very first Administrator of OMB's Office of Information and Regulatory Affairs (OIRA; April-October, 1981).<sup>3</sup>

I'd like to make, then elaborate on, two points. First, the OMB's draft report: while it is draft, not final, and while in many ways it is incomplete, the major problem lies not in OMB's procrastination, but in the unwillingness of the agencies to comply fully with OMB's request for relevant information.

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<sup>1</sup> See U.S. Office of Management and Budget, Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations, Federal Register, February 3, 2003, pp. 5492-5527.

<sup>2</sup> Neither The CapAnalysis Group nor Howrey Simon Arnold & White receive any funding from the federal government.

<sup>3</sup> A brief resume is found at Attachment A to this statement. I'd like to thank Loren Zadecky, an Analyst at CapAnalysis, for assistance in the preparation of this statement.

Second, even if the OMB report were perfect in every respect, Congress would not have in place a process for making appropriate decisions about regulatory action. As we explored at a comparable hearing last year, and which, Mr. Chairman, led to our publishing an op-ed in the Washington Times (copy found at Attachment B to this statement), I believe Congress should institute a regulatory appropriations process patterned after the fiscal appropriations process.

### The OMB Report

OMB should be commended for the technical quality of its work and for its perseverance in getting agencies to improve their regulatory performance. Appendix C to its report (the “Draft Guidelines”) in particular shows great sophistication and adherence to the latest and best research on the benefits and costs of regulation. In the main body of the report, OMB works hard to make agency reports comparable and includes important admonitions and caveats about drawing unwarranted conclusions from the various agency analyses – a deficiency, in part, the guidelines are meant to address. For example, not all agencies have bothered to estimate benefits and costs of their proposed regulations, and those that do have not provided consistent estimates for their various activities. Across agencies, especially, there are differences in the time periods for discounting benefits and costs, the discount rates employed, the value placed on probabilities of reductions in premature deaths and injury, et cetera. OMB can solve some of these problems, but most of the deficiency arises from a lack of enthusiasm agencies have for meeting such requirements. As I did last year, I urge you to work with your colleagues who have more direct responsibility for the regulatory agencies, to encourage them to insist that the agencies comply with OMB’s requests for information needed to compile its annual report to Congress.

Let me make a few observations and make a few specific suggestions raised by the report. First, from the data, it appears that regulations have been better in more recent years, in the sense that estimates of benefits tend to be higher uniformly than estimates of costs. It would be hoped that all the reform efforts – enactment of the Paperwork Reduction Act, the establishment of OIRA (and work of its predecessors), efforts pursuant to the “Regulatory Right-to-Know Act,” and other reform activities would have improved regulatory performance. It may also imply that the more recent regulations, by nature, are closer calls (reflecting an appropriate ordering of regulatory initiatives – the more important earlier). But it may also imply a systematic bias in the benefit and cost estimates of prior regulatory initiatives.

Second, it’s important to understand that the vast majority of the information on which the analyses of costs and benefits are made come from the agencies, not OMB. As is well known, when pressed to provide estimates, the agencies have a bias to show high benefits and low costs of their work. It is also

well known that there are biases in the information available to the agencies – proponents have a tendency to overstate the benefits, and those directly bearing the costs, primarily business enterprises, tend to overstate the costs. On the whole, however, since the final determinations are made by the agencies, the agency bias tends to dominate – that is, to inflate estimates of benefits and deflate estimates of costs. OMB should be given a stronger role in policing this bias by replacing agency reports of benefits and costs with more objective estimates where warranted.

Third, as you know, independent agencies don't report estimates of benefits and costs through Executive Order 12866. Some of the independent agencies, such as the Securities and Exchange Commission, do provide estimates of benefits and costs in some of their rulemakings, but my impression, based on a selective review, is that such analyses fall far short of meeting the standards employed by OMB. Let me suggest that you include these so-called independent agencies under the purview of Executive Order 12866 (or its equivalent), the Regulatory Right-to-Know Act, and other regulatory reporting and review requirements.

Fourth, although I have not made a study of this, based on my experience at OIRA and elsewhere, there are a myriad of cases where a regulatory agency is forbidden explicitly from declining to promulgate a regulation that patently falls far short of meeting any reasonable benefit-cost test, or is forced to promulgate a regulation that is patently cost-ineffective. It may be a congressional mandate to promulgate a regulation "regardless of costs." It may be a mandate to promulgate a regulation based on any showing of adverse effect no matter how low the level of exposure. Or, it may be a mandate to promulgate a regulation based on specific engineering controls rather than a performance standard dealing with actual exposure. The potential for lowering overall regulatory costs, or for the same cost increasing regulatory benefits, could be quite large. I urge you to direct OMB to undertake, and the agencies to cooperate with, a study of such phenomena, and to report back to Congress in a timely fashion.

### Regulatory Appropriations Process

Let me now turn to a matter we discussed last year and one, Mr. Chairman, you have asked your colleagues to consider. I refer, of course, to the notion of a regulatory appropriations process.

As you and I wrote in the piece attached to this statement, there is a crying need for Congress not only to be informed about agencies' regulatory performance, but to play a more active role in setting limits and establishing priorities. Just consider: reasonable estimates place the annual cost of federal regulations at about half total fiscal outlays – or more than total discretionary outlays. In other words, the cost of federal regulation exceeds the (fiscal outlay) cost of the Departments of Defense, Justice, State, Interior, Transportation,

Labor, Commerce, and others put together. Yet, I doubt the attention given by Congress to the budgets of each of those agencies just mentioned exceeds the attention given to the whole of federal regulatory activity.

Congress should remedy this oversight by establishing a systematic way of reviewing regulatory activity and giving more direction to the regulators. In fact, the need for such a comprehensive process is suggested by OMB in its draft report:

OMB's examination of the benefits and costs of Federal regulation supports the need for a common-sense approach to modernizing Federal regulation that involves the expansion, modification, and rescission of regulatory programs as appropriate.<sup>4</sup>

With the establishment of the type of regulatory appropriations process we suggest, Congress could address the appropriate size and scope of the regulatory enterprise, encourage agencies to be cost-effective in the regulations they promulgate, and prioritize more efficiently by providing an incentive for agencies to annul or improve regulations which are no longer needed or which are imposing unwarranted costs in relation to benefits.

None of us would argue that the present (fiscal) appropriations process is perfect. But, warts and all, it far exceeds the efficiency and comprehensiveness of the current regulatory process.

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<sup>4</sup> OMB, Draft Report, *ibid.*, p. 5495.

JAMES C. MILLER III  
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Jim Miller is Chairman of The Capital Analysis Group (“CapAnalysis”) at Howrey Simon Arnold & White, where he heads a team of economists, accountants, and regulatory experts that provides litigation support and performs analyses for the firm and for clients outside the firm. In addition, he is a Distinguished Fellow of the Center for Study of Public Choice at George Mason University, a Distinguished Fellow of the Mercatus Center at George Mason University, and a Senior Fellow (by courtesy) of the Hoover Institution at Stanford University. He is also a Member of the Emeritus Boards of Citizens for a Sound Economy, the Tax Foundation, and the Progress and Freedom Foundation, and he was recently nominated by President Bush to be a Member of the Board of Governors of the U.S. Postal Service.

In addition, Miller is a Member of the Board of Atlantic Coast Airlines (“United Express” and “Delta Connection”), a Member of the Board of Recipco Corporation, a Member of the Board of Washington Mutual Investors Fund, a Member of the Board of the Tax-Exempt Fund of Maryland, a Member of the Board of the Tax-Exempt Fund of Virginia, a Member of the Board of the JPMorgan Value Opportunities Fund, and a consultant to Freddie Mac.

Jim is frequently called on to comment on public issues. He has appeared on the Today Show, CBS Morning News, Good Morning America, Meet the Press, Face the Nation, This Week, Inside Edition, MacNeil-Lehrer NewsHour, Crossfire, Inside Politics, Inside Edition, Late Edition, Kudlow-Cramer, and Wall Street Week. His opinion pieces have appeared in the Wall Street Journal, New York Times, Washington Post, Washington Times, USA Today, Investors Business Daily, and other major newspapers. He has also been an occasional commentator for Marketplace Radio.

In 1994, Miller was a candidate for the Republican nomination to the U.S. Senate from Virginia, losing a close race to Col. Ollie North at the state party’s convention in June. In 1996, once again Miller was a candidate for the Republican nomination to the U.S. Senate, losing to incumbent Sen. John Warner in the June primary. In 1998, he was treasurer of his wife’s campaign to represent Virginia’s 8<sup>th</sup> Congressional district (winning the primary but losing the general election) and assisted her with another (losing) run for the same office in 2000.

From October 1985 to October 1988, Miller was Director of the Office of Management and Budget, was a member of President Reagan’s Cabinet, and was a member of the National Security Council. From October 1981 to October 1985, he was Chairman of the Federal Trade Commission. And from January 1981 to October 1981, he was Administrator for Information and Regulatory Affairs at OMB, where, among other things, he set up President Reagan’s program of regulatory relief.

The holder of a B.B.A. in economics (University of Georgia, 1964) and a Ph.D. in economics (University of Virginia, 1969), Miller is the author of over 100 articles in professional journals and is the author, co-author, or editor of nine books, the most recent of which is Monopoly Politics, published in 1999 by the Hoover Press at Stanford University.

Miller was born in Atlanta on June 25, 1942, and was raised in Conyers, Georgia. He resides with his wife, Demaris (holder of a Ph.D. in psychology from George Mason University), in McLean, Virginia, and in Rappahannock County, Virginia. The Millers have three grown children, one daughter-in-law, one son-in-law, one granddaughter, and one grandson: Katrina Miller; Felix, Anna & Natalie Miller; and Sabrina, Fernando, & Tristan Pagkalinawan.

For further information, see [www.capanalysis.com](http://www.capanalysis.com).

