Institute *for*
Policy Integrity

new york university school of law

November 14, 2013

Committees on Administration & Management and Regulation
Administrative Conference of the United States

Subject: Comments on the Draft Statement for Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review (revised November 12, 2013)

The Institute for Policy Integrity at NYU School of Law respectfully submits the following comments on the draft statement on the OIRA regulatory review process prepared by the ACUS Committees on Administration & Management and Regulation. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

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 proposed statement both reinforces some best practices that OIRA has already begun to adopt and identifies additional improvements to the regulatory review process that have widespread support.

However, the proposed statement could be further improved in several key ways. Specifically with respect to delays, OIRA should develop updated, realistic schedules for review when announcing the reasons for any substantial delays. OIRA should specify and categorize its reasons for delay in ways that will be most informative and useful to the public, agencies, and Congress. ACUS should also clarify and expand its suggestions on increasing OIRA's staff resources. Finally, ACUS should 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*.

The initial draft statement included improving transparency; the most recent draft removed transparency from the title and minimized discussion of transparency in the statement. If ACUS is planning a separate statement on transparency of the regulatory review process, it should be officially announced. Otherwise, ACUS should discuss transparency in this statement, and it should expand its proposals to include common-sense improvements to the process. For example, in accordance with the current transparency requirements of Executive Order 12,866, ACUS should propose that regulatory agencies consistently prepare a summary of changes made during the OIRA review process and the motivations for those changes. This modest proposal would allow for greater transparency in the process without adversely affecting OIRA's ability to carry out the regulatory review process.

Importance of Reducing OIRA Delay

As noted in Policy Integrity's initial comments on this ACUS project,[1] OIRA delays can harm the public, regulated entities, and OIRA's reputation.

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.[2] If OIRA delays releasing regulations that are cost-benefit justified, then intended beneficiaries will not receive the benefits of the regulation.[3] For example, though OSHA estimates that the silica rule could save up to 60 statistical lives per year,[4] 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.[5] Such 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,[6] and require that some manufacturing facilities have on-site showers available for workers.[7] 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.[8] Though OIRA has greatly improved its track record for transparency, the public may perceive unexplained regulatory delay as undermining that track record.

Proposals for Reform

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. In its final proposals, the Committees on Administration & Management and Regulation should effectively incorporate the following concepts:

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

---

[1] Institute for Policy Integrity, Comments on ACUS's *Draft Statement for Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review* 1–2 (Oct. 28, 2013).

[2] *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).

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

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

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

[6] *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).

[7] *See id*. at 23.

[8] *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.

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.

<u>Specific Changes to the Draft Statement</u>

Proposal 4 in the November 12 draft statement contains critical improvements over the previous draft, but it could provide even 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. Policy Integrity suggests the following additions, in bold:

> 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.**

To provide the public and Congress with useful summary statistics on the timeliness of review, the Committees should add the following sentence to the end of Proposal 1:

> 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.

Increasing staffing at OIRA is a legitimate approach to addressing delay in the regulatory review process. Proposal 5, which discusses loaning agency staff to OIRA, has potential to help reduce delays. However, ACUS should elaborate on this proposal to discuss the 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 may want to borrow from language that OIRA developed when advising agencies on how to secure the independence of internal retrospective review committees.[9] ACUS may also want to consider proposing staff loans from White House offices outside of rulemaking agencies, such as CEA or CEQ.

Directly increasing OIRA's own staff resources will likely require not just increased staffing authorization, as noted in Proposal 5, but increased or dedicated appropriations. ACUS should consider advising Congress and OMB to coordinate on developing appropriations language that can deliver the necessary funding to OIRA.

Suggested changes to the draft Proposal 5 follow in bold:

> 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**.

Improving Transparency of OIRA Regulatory Review

Transparency is a key component of a democratically-responsive regulatory process. It is a cornerstone of the Administrative Procedure Act, which provides judicially-enforceable public notice and comment for most regulations.[10] In addition to any inherent value of information, transparency also benefits regulatory outcomes. Specifically, transparency in the regulatory process can increase public participation in the process and add to the legitimacy of the regulatory decisions.[11]

Transparency is especially important in the context of centralized regulatory review. Significant scholarship discusses the potential for improved transparency to add legitimacy to the process of

---

[9] OIRA, M-11-10, Executive Order 13563, "Improving Regulation and Regulatory Review" 5-6 (Feb. 2, 2011).

[10] Administrative Procedure Act (APA), 5 U.S.C. § 553(c) (2012).

[11] CARY COGLIANESE ET AL, UNIV. OF PA. SCHOOL OF LAW TRANSPARENCY AND PUBLIC PARTICIPATION TASK FORCE, TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS 3 (2008), *available at* http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf.

regulatory review.[12] Prior to the development of Executive Order 12,866, stakeholders had expressed concern about the opaqueness of the regulatory review process.[13] To that end, the Order required significant disclosure requirements, including disclosure of changes made during regulatory review, specifying those changes made at the direction of OIRA.[14]

However, challenges remain in implementing these transparency requirements. For example, changes made during OIRA regulatory review are inconsistently summarized, when they are disclosed at all. Agencies have also repeatedly expressed concerns with lack of transparency and control during OIRA's informal reviews.[15] Conversely, transparency is not without potential pitfalls, and it must be balanced against competing goals. For instance, transparency may undermine candor in the valuable communications between OIRA and regulatory agencies, harming the effectiveness of the review process.[16] Additionally, any transparency requirement placed on OIRA creates work for an organization with already limited resources. Clearly, there is a delicate balance to be drawn in transparency requirements.

Some level of increased transparency in regulatory reviews would likely benefit OIRA's reputation and increase public participation, and as such many stakeholders have endorsed greater transparency in the regulatory review process. For one, as noted in the draft statement, previous ACUS recommendations have encouraged increased disclosure and transparency in intergovernmental communications and regulatory review.[17] Additionally, the Government Accountability Office (GAO) has published multiple reports on the OIRA review process supporting increased transparency. In 2003, GAO provided eight recommendations for improving the OIRA review process.[18] In its 2009 follow-up report, GAO noted that OMB had "improve[d] the clarity of

---

[12] See Nina Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2 (2009); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

[13] RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY 29 (2008).

[14] Exec. Order No. 12,866, 58 Fed. Reg. 190 (October 4, 1993) § 6(a)(3)(E).

[15] Policy Integrity, *Fixing Regulatory Review: Recommendations for the Next Administration* 4, 8 (Report No. 2, Dec. 2008).

[16] COGLIANESE, *supra* note 11, at 3. (*citing* Special Committee, Administrative Conference of the United States, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421 (1997)).

[17] Memorandum on the Draft Statement on "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review" from the Admin. Conference of the United States Comms. on Admin. & Mgm't and Regulation (October 21, 2013) (*citing* Admin. Conference of the United States, Recommendation 88-9, Presidential Review of Rulemaking, 54 Fed. Reg. 5,207 (Feb. 2, 1989) & Admin. Conference of the United States. Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980)).

[18] The specific recommendations called on OMB to:

- Define the transparency requirements applicable to the agencies and OIRA in section 6 of Executive Order 12866 in such a way that they include not only the formal review period, but also the informal review period when OIRA says it can have its most important impact on agencies' rules. Doing so would make the trigger for the transparency requirements applicable to OIRA's and the agencies' interaction consistent with the trigger for the transparency requirements applicable to OIRA regarding its communications with outside parties.
- Change OIRA's database to clearly differentiate within the "consistent with change" outcome category which rules were substantively changed at OIRA's suggestion or recommendation and which were changed in other ways and for other reasons.
- Improve the implementation of the transparency requirements in the executive order that are applicable to OIRA. Specifically, the Administrator should take the following actions:
    - More clearly indicate in the meeting log which regulatory action was being discussed and the affiliations of the participants in those meetings.
    - Because most of the documents that are exchanged while rules are under review at OIRA are exchanged between agency staff and OIRA desk officers, OIRA should reexamine its current policy that only documents exchanged by OIRA branch chiefs and above need to be disclosed.

OIRA's meeting log to better identify participants in . . . meetings with external parties on rules under review by disclosing the affiliations of participants,"[19] but, having found that none of the other recommendations had been implemented, maintained its request for increased transparency in the regulatory review process. Moreover, the Office of Management and Budget (OMB) has endorsed some increase in transparency in the regulatory review process. In its 2010 Report to Congress, OMB stated the support of the President for utilizing transparency to improve analysis and regulation.[20] Specifically, the report called for increased disclosure of data from agencies.[21]

Proposals for Reform

As the draft statement has evolved, it has largely moved toward focusing on addressing OIRA delays and away from transparency issues. Although the title of the original draft statement was "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review,"[22] the most recent draft statement dropped transparency and effectiveness leaving only "Improving the Timeliness of OIRA Regulatory Review."[23] Additionally, numerous references to enhancing OIRA transparency were deleted from the November 1 draft. If ACUS is making these changes because it intends to have a separate project on OIRA transparency, Policy Integrity looks forward to the announcement of that project and the opportunity to participate in that discussion.

Though the statement as presently drafted largely focuses on timeliness, Proposal 3 may in fact improve transparency in an important way, by clarifying the agency's role in determining when OIRA's informal—and relatively less transparent—reviews end and formal reviews begin. In preparing its final statement, ACUS should build on this transparency recommendation by proposing some simple, easy to implement, and generally supported processes that would improve OIRA review transparency without undermining OIRA's effectiveness, and which could be re-incorporated into the current draft statement. In particular, ACUS should examine the well-researched 2003 and 2009 GAO reports and their recommendations for additional suggestions about improving transparency.

- Establish procedures whereby either OIRA or the agencies disclose the reasons why rules are withdrawn from OIRA review.

- Improve the implementation of the transparency requirements in the executive order that are applicable to rulemaking agencies. Specifically, the Administrator should take the following actions:
  - Define the types of "substantive" changes during the OIRA review process that agencies should disclose as including not only changes made to the regulatory text but also other, noneditorial changes that could ultimately affect the rules' application (e.g., explanations supporting the choice of one alternative over another and solicitations of comments on the estimated benefits and costs of regulatory options).
  - Instruct agencies to put information about changes made in a rule after submission for OIRA's review and those made at OIRA's suggestion or recommendation in the agencies' public rulemaking dockets, and to do so within a reasonable period after the rules have been published.
  - Encourage agencies to use "best practice" methods of documentation that clearly describe those changes (e.g., like those used by FDA, EPA's Office of Water, or FMCSA).

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews 13-14 (2003).

[19] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 35 (2009).

[20] OFFICE OF MGMT'. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 49-52 (2010).

[21] Id. at 50.

[22] Memorandum on the Draft Statement on "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review" from the Admin. Conference of the United States Comms. on Admin. & Mgmt and Regulation (Oct. 21, 2013).

[23] Memorandum on the Draft Statement on "Improving the Timeliness of OIRA Regulatory Review" from the Admin. Conference of the United States Comms. on Admin. & Mgmt and Regulation (Nov. 12, 2013).

Additionally, in the final statement, the Committees on Administration & Management and Regulation should propose that regulatory agencies prepare a summary of changes made during the OIRA review process and the motivations for those changes. As noted above, Executive Order 12,866 calls on agencies to "[i]dentify . . . the substantive changes between the draft submitted to OIRA for review and the action subsequently announced . . . and . . . those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."[24] Although there are legitimate concerns that attributing changes to OIRA as opposed to the agencies could increase tensions between the two, the changes made during the review process could still be summarized, as required by the Executive Order, without attributing the change to either OIRA or the agency. Similarly, the motivations for the changes can be summarized without attributing to change to one party or another and without undermining the effectiveness of the OIRA review process. ACUS should advise agencies to follow the requirements of Executive Order 12,866, by adding a new Proposal 6:

> Following publication of a regulatory action reviewed by OIRA, rulemaking agencies should issue a statement summarizing the changes made while the regulation was under OIRA review, including an explanation for motivations behind those changes, and noting that all changes were made with both the agency's and OIRA's approval.

Sincerely,

Adam Axler
Jason A. Schwartz

INSTITUTE FOR POLICY INTEGRITY
NYU SCHOOL OF LAW

[24] Exec. Order No. 12,866, 58 Fed. Reg. 190 (October 4, 1993) § 6(a)(3)(E).