



November 12, 2013

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

RE: ACUS Project: Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review

The Center for Effective Government (CEG) is pleased to submit the following comments regarding the November 12, 2013 OIRA Review Draft Statement. CEG was founded as OMB Watch in 1983 as a 501(c)(3) non-profit organization, with the main focus of making the work of executive branch agencies more transparent and open to citizen input. The organization changed its name in January 2013 to reflect the fact that its work has expanded over the years and that it has a new focus: an effective government that reflects the needs and priorities of the American people, as defined by an informed, engaged citizenry. The Center for Effective Government's mission is to build an open, accountable government that invests in the common good, protects people and the environment, and advances the national priorities defined by an active, informed citizenry.

We applaud the Administrative Conferences of the United States (ACUS) for investigating the problems that OIRA's role in the rulemaking process presents through its "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review" project. The project report "Length of Rule Reviews by the Office of Information and Regulatory Affairs" provides a well-researched foundation for ACUS proposals that address the report's findings of dramatic increases in both the average time for completion of OIRA regulatory reviews as well as in the number of rules for which reviews exceeded the required 90 day limit for the period of 2011 to first half of 2013.

While the primary focus of this ACUS project has been on the timeliness of recent OIRA rule reviews, we believe that there remain substantial procedural and process issues with respect to the transparency and effectiveness of OIRA's involvement in the regulatory review process that would benefit from further attention by ACUS.

Specific comments on the November 12 Draft Statement are as follows:

CEG objects to the suggestion regarding use of "informal discussions" that predate the submission of a rule, which is included in the last sentence of the statement text material on page 6 prior to the list of proposals. The suggestion for utilizing pre-proposal informal discussions involving the submitting



agency, OIRA, and reviewing agencies that continue beyond the Executive Order 12,866 Section 4 coordination process encourages the problematic practice of inappropriate OIRA involvement in the detailed substance of rule development. This suggestion also raises significant concerns related to the lack of transparency with respect to the impact of such informal discussions on the substance of the proposed rule, which were raised by committee members and the public at the Nov. 6, 2013 joint meeting of the Committees on Administration & Management and Regulation. Based on information included in the ACUS report, such informal discussions would likely go well beyond the scope of the draft Statement's suggestion for use of the EO 12,866 Section 4 process to coordinate and establish lines of communication among the relevant entities; "create workplans with timelines and responsibilities for action;" and "identify the principal factual and policy issues likely to be raised by a proposed rulemaking and to convey any presidential priorities respecting them."

In addition, the inclusion of language concerning exclusion of such informal discussions from the review timeline "clock" would distort the accuracy and transparency of the actual rule review process, and through the potential use of extensive and extended "informal discussions" between OIRA, the submitting agency, and other reviewing agencies would actually serve to exacerbate the rule review timeliness concerns. Therefore, we recommend that the last sentence from the paragraph on page 6 of the Draft Statement prior to the proposals be deleted.

Proposal #1:

We support the suggestion that OIRA develop a publically available document that provides policies for OIRA, regulatory agencies, and agencies participating in interagency review. However, the objective for the review process timeframe should be those specifically required in EO 12,866, and that the measures of timeliness return to at least historical averages from 1994 - 2011, which was 51 days.¹

Proposal #2:

With respect to interagency reviews, it is essential for participating entities to complete their review process within the timeline schedule for submission of comments called for in this proposal. As such, we suggest eliminating the phrase "to the extent feasible" in the second line of this proposal. Establishing fixed deadlines for submission of other agency comments will be essential to ensuring that prolonged delays in the review process due to extended interagency reviews are avoided. Failure of agencies to meet the required deadlines for submitting comments should not provide a basis for delaying the review process.

¹ CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 24 (2013).

Proposal #3:

Proposal #3 provides, “Once OIRA has received a draft rule with approval from the appropriate senior agency official(s), the clock for the review period should commence.” As Peter Strauss noted in comments submitted Nov. 1, OIRA could postpone the receipt of a draft rule and continue to conduct informal discussions without commencing the official review period.² Concern regarding these “informal review” activities was raised by committee members and the public at prior committee meetings and in our comments above. Although proposal #3 does not expressly discuss informal reviews, this proposal could encourage their use and allow OIRA involvement in a rule’s development to evade the transparency requirements that are triggered by the formal submission of a rule for review. If text for a rule has been prepared by the agency, whether in piecemeal sections or as a single draft document, and sent to the OIRA desk officer, then the OIRA-agency interactions have gone beyond the general coordination envisioned under EO 12,866 Section 4. This is true regardless of whether OIRA received draft language “with approval from the appropriate senior agency officials(s).” Moreover, the proposal neither identifies the “appropriate senior agency officials” who must approve drafts nor specifies what constitutes such approval, which could lead to inconsistencies in documenting when review clocks are “commenced.” However, establishing these specific requirements would not prevent protracted informal review discussions. The “review clock” provision in proposal #3 therefore fails to address problems of timeliness and raises additional transparency concerns. We recommend striking the provision from the statement.

Proposal #4:

We support the recommendation that OIRA should inform the public of the reasons for review delays or return rules to the submitting agencies, and suggest that such notification be triggered by the review times specified by EO12,866. The OIRA statement should provide sufficient information regarding the cause of the delay so that the public and other agencies can reasonably understand the nature of the issues causing the delay, without requiring such detail that would impinge on the government’s deliberative process. As such, we would regard a statement limited to, for example, “This rule has been delayed to the complexity of the issues under review” to be insufficient in providing transparency as to the reasons for the review delay. Instead, at a minimum, the statement should indicate whether OIRA has been unable to allocate sufficient staff and resources to complete its review, is waiting on

² See Peter Strauss, Senior Fellow, Committee on Regulation, Comments on Draft Statement (Nov. 1, 2013) (“An OIRA that can keep the clock from starting before formal submission of a draft will face little difficulty in postponing receipt of a draft rule ‘with approval from the appropriate senior agency officials,’ and 12,866’s promises of transparency should also be keyed to this event.”).

interagency comments, is requesting additional analyses (with information as to which agency is being asked to conduct or provide those additional analyses), or is requiring supplemental information from the rulemaking agency or another agency. The statement should indicate when OIRA expects to receive any additional analyses or information and provide a new estimated date for completing review.

Proposal #5:

We recommend retaining the caveat “If necessary” before any suggestion to increase OIRA staffing. An unqualified increase in staff incorrectly assumes that review delays are largely caused by staffing problems and could therefore be (at least partly) cured by staffing increases. However, there is insufficient evidence that OIRA staffing levels are related to increased review times. It would be unwise to increase OIRA’s resources without first addressing the troubling practices that are described in the report, particularly the extended “informal” reviews and undocumented OIRA-agency interactions.³ As Table 7 of the report indicates, staffing levels remained generally consistent between FY2007 and FY2012, with 46 FTE positions in every year except 2010,⁴ while rule review times significantly increased only beginning in 2011.

The report itself recognizes six other potential causes of delay, including political sensitivity, “a broadened definition of what constitutes a ‘significant’ regulatory action,” and the absence of time limits when OIRA directs the agencies to request review extensions. The accounts from several senior agency officials in the ACUS report of deferred/delayed agency rulemaking of potentially controversial rules in the 2011-2012 period prior to the 2012 election appear to have been a contributing factor to the surge in rule reviews delayed beyond 90 days and one year for the 2011 – first half of 2013 period, as documented in Table 4.⁵ We note a similar trend for the 1999 – 2001 period surrounding the 2000 election as well.

In addition, a majority of OIRA reviews involve non-economically significant rules as well as guidance and policy documents deemed significant for its review, despite EO 12,866’s emphasis on reviews of economically significant rules.⁶ OIRA should focus its workload on the economically significant rulemakings that are the focus of EO 12,866 and use substantially greater discretion in claiming jurisdiction to review rules defined as significant in Section 3(f)(2-4). Since the authorization for

³ See COPELAND, *supra* note 1, at 35-41.

⁴ *Id.* at 51, tbl.7.

⁵ *Id.* at 29-30, tbl.4.

⁶ See *id.* at 25, tbl.2 (comparing historical counts of “economically significant” reviews with “other significant” reviews).

inclusion of policy and guidance documents is not from EO 12,866 but rather the 2009 Orszag memo,⁷ the need for OIRA review of such documents should be eliminated. Refining the scope of OIRA's review jurisdiction should thus reduce OIRA's workload to a more manageable level. The need for any additional OIRA staff should be evaluated and considered only after such refinement of OIRA's workload and the review process concerns noted in the ACUS report are fully addressed.

We appreciate the opportunity to provide these comments.

Sincerely,

Ronald White
Director of Regulatory Policy

⁷ Memorandum from Peter Orszag, Director, White House Office of Management and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf