Length of Rule Reviews by the Office of Information and Regulatory Affairs

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I. Executive Summary

Pursuant to requirements in Executive Order 12866, issued by President Clinton in September 1993 and still in effect, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) reviews hundreds of significant proposed and final rules before they are published in the *Federal Register*. The executive order states that OIRA's reviews should be completed within 90 days, but says reviews may be extended by the Director of OMB for 30 days and at the request of the agency head. From 1994 through 2011, the average amount of time it took to complete a review was 50 days, and the highest average review time in any year was 62 days.

However, in 2012, the average time for OIRA to complete reviews increased to 79 days, and in the first half of 2013, the average review time was 140 days – nearly three times the average for the period from 1994 through 2011. (*Note*: An increase in average review time for completed reviews in one year may reflect the closure of lengthy reviews that primarily occurred in previous years.) Some agencies were more affected by these increases in OIRA average review times than others, but by the first half of 2013, at least 17 departments and agencies had average review times of more than 90 days (up from only two departments in 2011). From 1994 through 2011, an average of fewer than 10 completed reviews per year (less than 2%) took more than six months; however, in the first half of 2013, 63 reviews (nearly 30%) took more than six months, and 27 (nearly 13%) took more than one year. Further, these statistics may understate the extent of the delays. According to senior employees in 11 departments and agencies (who were interviewed for this report anonymously and without indication of agency affiliation), OIRA has increasingly used "informal reviews" of rules prior to their formal submission, has required agencies to get OIRA approval before submitting rules, and has in some cases delayed recording the receipt of rules until some time after they were submitted by the agencies. (*Note*: The author discussed this report with OIRA officials, and the report reflects those discussions.)

These senior agency employees provided a variety of perspectives as to why they believe OIRA review times had increased: (1) concerns by some in the Executive Office of the President (EOP) about the issuance of potentially costly or otherwise controversial rules during an election year, (2) lengthy data or analytical requests from OIRA desk officers and a perceived lack of management of those desk officers, (3) a broadened definition of what constitutes a "significant" regulatory action, (4) lengthy coordinative reviews by other agencies and offices within the EOP, (5) the absence of any review time limit when OIRA directs the agencies to request review extensions, (6) a reluctance by OIRA to use return letters, and (7) OIRA staffing issues. Some of these observations appear to be long-standing criticisms (e.g., agency concerns about desk officers), and OIRA and the agencies are likely to have very different perspectives regarding when additional analysis is needed and which rules should be considered "significant."

Although it is tempting to recommend that a strict time limit on the length of OIRA reviews be established, such a cap may not always be advisable, and may not be necessary. Previous efforts have shown that OIRA can constrain the length of its reviews when OIRA leadership makes review timeliness a priority. The data indicate that OIRA has reduced its backlog of long-term reviews and has improved review times in recent months, although those review times have still not returned to historic norms. This report recommends that (1) the OIRA administrator continue these recent efforts and announce specific steps to return timeliness to at least historic norms, (2) OIRA return regulatory actions to the issuing agency as soon as practicable after 120 days, (3) the review "clock" start whenever OIRA begins to review agency approved drafts of rules, (4) submitting agencies respond to OIRA's comments as soon as possible, (5) non-submitting

agencies and offices provide their comments to OIRA as soon as possible, (6) agencies make the final decision as to when their significant rules should be sent to OIRA, and (7) OIRA staffing be increased.

II. Introduction

The Office of Information and Regulatory Affairs (OIRA) is one of several statutory offices within the Office of Management and Budget (OMB), which is located within the Executive Office of the President (EOP). OIRA is headed by an administrator who is appointed by the President, subject to Senate confirmation.[1] For more than 30 years, OIRA has reviewed the substance of hundreds of proposed and final rules each year on behalf of the President before they are published in the *Federal Register*.[2] These reviews are currently authorized by Executive Order (EO) 12866, which was issued by President Clinton on September 30, 1993.[3] Under the executive order, covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies)[4] must submit their "significant" proposed and final regulatory actions to OIRA for review.[5] OIRA can conclude review on the rules with or without change, return them to the agencies for reconsideration, or take other actions. As a result of these reviews, OIRA can play a significant—if not determinative—role in the rulemaking process for most federal agencies.

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[1] The other statutory offices, which are collectively referred to as the "management" side of OMB, include the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Electronic Government and Information Technology. OMB's resource management offices, which review agencies' budget submissions, are sometimes collectively referred to as OMB's "budget" side.

[2] The Administrative Procedure Act of 1946 (5 U.S.C. § 551 et seq.) generally requires that, before a rulemaking becomes law, agencies publish a notice of proposed rulemaking in the *Federal Register*, permit the public to comment on the proposed rule, and then publish a final rule addressing the comments provided.

[3] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. For a copy of this executive order, see http://www.whitehouse.gov/omb/inforeg/eo12866.pdf. As noted later in this report, EO 13563 reaffirmed the authorization for OIRA reviews.

[4] As used in this report, the term "independent regulatory agencies" refers to agencies established to be independent of the President, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term "independent agencies" refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management). For a more detailed discussion of types of agencies, see David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, First Edition, December 2012, prepared for the Administrative Conference of the United States, available at http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf.

[5] Section 3(e) of EO 12866 defines a "regulatory action" as any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." Because nearly 90% of all regulatory actions are draft proposed or final rules, this report sometimes uses "rules" as a shortened version of "regulatory actions." Section 3(f) of EO 12866 defines a "significant" regulatory action as one that satisfies any of four conditions: "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." Rules fitting the first of these conditions are often referred to as "economically significant" regulatory actions.

Section 6(b)(2) of EO 12866 requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames—(1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking), or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material, and there has been no material change in the facts and circumstances on which the rule is based). The executive order also states that the review process "may be extended (1) once by no more than 30 calendar days upon the written approval of the Director [of OMB] and (2) at the request of the agency head."[6] In October 1993 guidance on the implementation of the executive order, the OIRA administrator noted the "strict time limits" set forth in the executive order, and said "we must work closely together to ensure that requests for clarification or information are responded to promptly."[7]

Although concerns have sometimes been expressed about the length of its reviews of agency rules, OIRA has historically completed most of its reviews well within the time limits in the executive order. More recently, however, broader concerns about the timeliness of large numbers of OIRA reviews have arisen.[8] For example:

- During her April 9, 2013, confirmation hearing for the position of OMB director, Sylvia Burwell was asked by Senator Tammy Baldwin about the slow pace of rule reviews at OIRA. Specifically, Senator Baldwin said a number of rules had been "sitting at OMB" for long periods of time "with little information about where or why the process seems to have ground to a halt." Ms. Burwell said it was important to understand "why the rules are there, the ones that have been there for an extended period of time; is it related to complexity or is it related to other issues?" She also said it was important for the agencies and OMB to communicate about any factors that might slow down the rulemaking process.[9]
- Less than two months later, during his confirmation hearing for the position of OIRA administrator, Howard Shelanski was asked by Senator Carl Levin about the "chronic" delays of rules at OIRA, delays that Senator Levin said "fundamentally undermine the agencies' ability to effectively execute the responsibilities that those agencies have."[10] Mr. Shelanski said he shared Senator Levin's concerns about the timeliness of OIRA reviews, and said speeding up the review process would be "one of my highest priorities" should he be confirmed as administrator. However, he said not having been at OIRA, he

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[6] Section (6)(b)(2)(C). As discussed later in this report, OIRA views these two provisions as separate. The OMB Director may request a 30 day extension, or the agency head may request an extension that is not limited to 30 days.

[7] To view this guidance, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf.

[8] For earlier concerns, see Rena Steinzor, Michael Patoka, and James Goodwin, Center for Progressive Reform, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, White Paper #1111, November 2011, hereafter "CPR report," available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf; and Center for Effective Government, "Worker Safety Rule Under Review at OIRA for Over a Year: A Tale of Rulemaking Delay," February 22, 2012, available at http://www.foreffectivegov.org/node/11984. See also Amit Narang, Public Citizen, *The Perils of OIRA Regulatory Review: Reforms Needed to Address Rampant Delays and Secrecy*, June 12, 2013, available at http://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf.

[9] To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-sylvia-m-burwell-to-be-director-office-of-management-and-budget.

[10] Sean Reilly, "Nominee Promises Speedier Regulation Review," *Federal Times*, June 12, 2013, available at http://www.federaltimes.com/article/20130612/DEPARTMENTS06/306120013/Nominee-promises-speedier-regulation-review. To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski.

could not comment on what might have led to extended review of any particular rule, or what might have led to the large number of lengthy reviews.

- On May 7, 2013, Senator Richard Blumenthal sent a letter to the Director of OMB regarding several regulatory proposals that had been "seriously delayed" at OIRA.[11] Senator Blumenthal noted that 84 regulatory actions had been at OIRA for more than 90 days, and said he was particularly troubled by certain regulatory actions that had been under review "for an unacceptable amount of time"– one from the Occupational Safety and Health Administration (OSHA) within the Department of Labor (DOL) for 813 days and the other from the Department of Transportation (DOT) for 538 days. When OIRA reviews go beyond 90 days, he said "the public should be informed of the delay, the justification and the amount of time the Administration estimates it will take to complete review."

- On June 4, 2013, four Senators and two Representatives sent a letter to OMB Director Burwell noting that dozens of rules submitted to OIRA by the Environmental Protection Agency (EPA), DOL, and the Department of Energy (DOE) had been under review at OIRA for much longer than 90 days, and some for more than a year. The letter noted that the OMB Director had committed during her confirmation hearing to address regulatory review delays at OIRA, and urged her to take action.[12]

- On June 12, 2013, the *New York Times* published an article describing the extent of rule delays at OIRA, focusing on several DOE energy efficiency standards that had been under review for almost two years.[13] The article said that the slowdown was caused by a combination of factors, including "high-level vacancies and election-year politics."

- On June 30, 2013, the *New York Times* published an editorial noting the number of rules that had been under review at OIRA for some time, and suggested that the backlog "has more to do with politics than economics."[14] It went on to say that in 2012, "a presidential election year in which Republicans hammered the administration for its allegedly 'job killing' regulations, the number of rules receiving final approval hit a historic low (in data going back to 1993), while the time OIRA took to vet proposals hit new highs."

- On August 1, 2013, the Senate Judiciary Committee's Subcommittee on Oversight, Federal Rights, and Agency Action held a hearing on "Justice Delayed: The Human Cost of Regulatory Paralysis," at which several of the witnesses mentioned rules that had been under review at OIRA for extended periods of time.[15]

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[11] See http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-urges-end-to-regulation-delay-endangering-workers-and-children for a copy of this letter. See also Charles S. Clark, "Senator Pressures OMB on Delayed Safety Regulations," *Government Executive Magazine*, May 9, 2013.

[12] To view a copy of this letter, see http://www.whitehouse.senate.gov/news/release/omb-delays-undermining-administrations-agenda-on-environment-energy-and-public-health.

[13] John M. Broder, "Regulatory Nominee Vows to Speed Up Energy Reviews," *New York Times*, June 12, 2013, available at http://www.nytimes.com/2013/06/13/us/politics/environmental-rules-delayed-as-white-house-slows-reviews.html?pagewanted=all.

[14] New York Times Editorial Board, "Stuck in Purgatory," *New York Times*, June 30, 2013, available at http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html?_r=0.

[15] See http://www.judiciary.senate.gov/hearings/hearing.cfm?id=46c0474f3ba43037db5917ce8f963f2b for further information about this hearing.

OIRA review is an important part of the federal rulemaking process. However, these developments suggest that delays of OIRA reviews have become an issue of concern, and may have become an impediment to timely rulemaking.

A. Objectives, Scope, and Methodology

The primary objective of this report is to determine the degree to which OIRA reviews in recent years have adhered to the time limits described in EO 12866, or have exceed historical norms. If OIRA review times in those years are not consistent with those time limits or exceed historical norms, the report will attempt to determine why this has happened, and will attempt to identify actions that can be taken to prevent a recurrence of such delays in the future.

To address these objectives, the report will (1) provide background information on OIRA and the requirements that its regulatory reviews be conducted within certain time limits, (2) provide data from OIRA's public database[16] on recent and historical review times, and (3) provide information derived from interviews with senior agency employees and other interested parties on what they believe to be the causes of any delay in OIRA review, and any actions that can be taken to prevent such lengthy reviews in the future. The report will not address other issues related to OIRA's regulatory review activities (e.g., other transparency issues, the proper role for OIRA, or whether OIRA reviews should be extended to independent regulatory agencies).

Agency staff members interviewed for this report were primarily senior employees responsible for interactions with OIRA regarding all or a large range of their agencies' rules. A total of 14 senior employees were interviewed, representing 11 cabinet departments and agencies that have experienced delays in the reviews of their rules by OIRA. To allow these employees to comment as candidly as possible, they were allowed to provide their views anonymously, and were assured that the names of their agencies would not be disclosed. This report does not seek to capture the extent to which their views are representative of the agencies for which they work, or of other agencies.

Current OIRA officials were contacted at the start of this project, but they declined to provide their perspectives as to the reasons for the lengthy reviews concluded in 2012 and 2013. The author discussed the reasons for the lengthy reviews with former OIRA officials in the Obama Administration, but they required that the discussions be off the record. To provide reactions to the senior agency employees' comments, the author obtained comments (both on and off the record) from two former OIRA administrators – Sally Katzen (administrator from 1993 until 1998) and Susan Dudley (administrator from 2007 until 2009) – and from Michael Fitzpatrick (former associate administrator during the Obama Administration and senior advisor to the administrator during the Clinton Administration). At the end of the project, the author and representatives from the Administrative Conference of the United States (ACUS) discussed the report with current and former OIRA officials, and this report reflects those discussions. Former OIRA administrator Cass Sunstein (September 2009 until August 2012) declined to participate in the study, but some of his relevant articles have been incorporated into this study.

[16] See www.reginfo.gov/public/jsp/EO/eoDashboard.jsp.

III. Background

Some type of presidential review of rulemaking has occurred since the 1960s,[17] and the appropriate role of the President and his representatives in the rulemaking process has long been the subject of academic debate.[18] Although some have argued that the current system should be limited or eliminated entirely,[19] others have suggested that presidential review be strengthened and expanded.[20] Currently, though, it is clear that presidential review has become an important component of the regulatory process and some form of review is virtually certain to remain in place for the foreseeable future.

Indeed, many have recognized the need for and benefits of presidential review of rulemaking. For example, more than 30 years ago, the U.S. Court of Appeals for the District of Columbia Circuit said the following:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.[21]

In 1987, the National Academy of Public Administration (NAPA) characterized regulatory management as an "essential element of presidential management."[22] ACUS said in 1988 that presidential review of rules "can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities,"[23] and later

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[17] See Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review*, volume 63 (2011, Special Edition), pp. 37-69, available at http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf.

[18] Some assert that the President should be able to make the final decision regarding the substance of agency rules, while others argue that the President cannot dictate the substance of rules that Congress has entrusted to the agencies. For a sample of this literature, see Robert Percival, "Presidential Management of the Administrative State: The Not-So Unitary Executive," *Duke Law Journal*, volume 51 (December 2001), pp. 963-1013; Peter L. Strauss, "Overseer, or 'The Decider'?: The President in Administrative Law," *George Washington University Law Review*, volume 75 (2007), pp. 696-760; Thomas O. Sargentich, "The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration," *Administrative Law Review*, volume 59 (2007), pp. 1-36; Michael A. Livermore and Richard L. Revesz, "Regulatory Review, Capture, and Agency Inaction," *Georgetown Law Journal*, volume 101 (2012-2013), pp. 1337-1398; and Alan B. Morrison, "Commentary: OMB Interference with Agency Rulemaking," *Harvard Law Review*, volume 99 (1986), pp. 1059-1074.

[19] In 2009, as part of the Obama Administration's reconsideration of EO 12866, several individuals and organizations suggested that OIRA's role be limited. See Ralph Lindeman, "Advocate Groups Want Reduced OIRA Role in OMB's Regulatory Review Revision Process," *BNA Daily Report for Executives*, April 2, 2009, p. A-13. In 2011, Rena Steinzor of the University of Maryland School of Law and the President of the Center for Progressive Reform recommended that the President terminate centralized review of individual rules. See Rena Steinzor, "The Case for Abolishing Centralized White House Regulatory Review," *Michigan Journal of Environmental & Administrative Law*, volume 11 (2011), pp. 209-285.

[20] See, for example, Richard Williams, "Recommendations for OIRA Reform,", March 10, 2009, available at http://mercatus.org/publication/recommendations-oira-reform; and John Morrall III, "Reinvigorating, Strengthening, and Extending OIRA's Powers," testimony before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, September 30, 2013, available at http://mercatus.org/publication/reinvigorating-strengthening-and-extending-oiras-powers.

[21] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

[22] National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies*, January 1987, p. vii. Hereafter, "NAPA, 1987."

[23] Administrative Conference of the United States, *Presidential Review of Agency Rulemaking*, Conference Recommendation 88-9 (1988), available at http://www.acus.gov/recommendation/presidential-review-agency-

characterized such reviews as "beneficial and necessary."[24] Also, some view OIRA as having a cross-agency perspective that can bring to bear a wider range of concerns than any specific regulatory agency.[25] In a June 2001 article in *Harvard Law Review*, Elena Kagan characterized the emergence of enhanced methods of presidential control over the regulatory state—what she termed the "presidentialization of administration"—as "the most important development in the last two decades in administrative process."[26] In 2003, the General Accounting Office (GAO, now the Government Accountability Office) said that OIRA reviews on behalf of the President "have become an established and important part of the federal rulemaking process."[27]

A. OIRA and Executive Order 12291

OIRA was created within OMB by Section 3503 of the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. Chapter 35). The PRA gave OIRA substantive responsibilities in many areas, but the bulk of the office's day-to-day activities under the act were initially focused on reviewing and approving agencies' proposed information collection requests.

OIRA's regulatory review responsibilities were first established in February 1981 by President Reagan through Executive Order 12291.[28] The executive order authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis from a covered agency (Cabinet departments and independent agencies, but not independent regulatory agencies). "Major" proposed rules (e.g., those expected to have a $100 million effect on the economy) were required to be submitted to OMB at least 60 days prior to publication, and major final rules were to be submitted at least 30 days before they were published.[29] Non-major rules were to be submitted 10 days before publication. The executive order indicated that OMB's review should

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rulemaking.

[24] Administrative Conference of the United States, *Improving the Environment for Agency Rulemaking*, Conference Recommendation 93-4 (1993), available at http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[25] See, for example, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, 1993), pp.10–11, who stated that "tunnel vision" by regulatory agencies can prevent them from seeing the larger cost-benefit picture.

[26] Elena Kagan, "Presidential Administration," *Harvard Law Review*, volume 114 (June 2001), pp. 2245-2385. In the academic debate about presidential power and rulemaking, Kagan took the position that the President can (and should) ultimately determine the substance of agency rules, but not if Congress has specifically prohibited or limited presidential intervention.

[27] U.S. General Accounting Office, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929, September 22, 2003, p. 110.

[28] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981. Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan Administration decided to integrate OMB's regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. For a description of the effects of this order, see Erik D. Olson, "The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," *Virginia Journal of Natural Resources Law*, volume 4 (Fall 1984), pp. 1-80. In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required the same agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned. See Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, January 8, 1985.

[28] Section 8(a)(2) of EO 12291.

[29] However, if an agency published a final rule without a prior proposed rule, the final rule was to be submitted at least 60 days prior to publication.

be completed within those time periods, but allowed the director to extend the review period whenever necessary.[30] The agencies were generally required to refrain from publishing any final rules until they had responded to OIRA's comments, and agencies published rules without OIRA approval at their peril.[31]

OIRA's regulatory review authorities were not unlimited, however. EO 12291 authorized OMB to take action only "to the extent permitted by law," and stated that the review procedures prescribed in the order did not apply to "any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order."[32] Although Subsection 3(f) of the executive order prohibited agencies from publishing proposed rules until OMB review was concluded, it also specified that nothing in the subsection "shall be construed as displacing the agencies' responsibilities delegated by law."[33] In its February 13, 1981, opinion supporting the legality of EO 12291, the Office of Legal Counsel within the Department of Justice said "the President's exercise of supervisory powers must conform to legislation enacted by Congress."[34] Therefore, "[i]n issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress."

OIRA's initial regulatory reviews under EO 12291 were highly controversial, with some of the concerns raised by Members of Congress and others focusing on the effect that the reviews had on the time required for agencies to issue rules.[35] In 1983, GAO concluded that the expansion of OIRA's responsibilities under EO 12291 had adversely affected the office's ability to carry out its statutory PRA responsibilities, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other activities such as regulatory review.[36]

As discussed in **Appendix A** of this report, delays in the issuance of a statutorily required EPA regulation eventually led to a 1986 decision by the D.C. District Court that was critical of OIRA review delays.[37] That same year, the House of Representatives voted to cut off all funds to OIRA, in part because the office was accused of "sitting on regulations" and operating in secret.[38] In an

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[30] After describing the 60, 30, and 10-day review periods, Section 3 of EO 12291 states that OMB "shall be deemed to have concluded review" within those periods unless it advises an agency that it intends to comment on the rule or the regulatory impact analysis, in which case the agency is to "refrain from publishing" the rule or the analysis.

[31] For example, when EPA issued a regulation over the objections of OIRA during the Reagan Administration, an EPA official said that an OIRA official told him "there was a price to pay for doing what we had done and we hadn't begun to pay." Mary Thornton, "OMB Pressured EPA, Ex-Aide Says," *Washington Post*, September 28, 1983, p. A-1.

[32] Section 8(a)(2) of EO 12291.

[33] Section 3(f)(3) of EO 12291.

[34] Memorandum from U.S. Department of Justice, Office of Legal Counsel, "Proposed Executive Order on Federal Regulation" (February 13, 1981), reprinted in *Role of OMB in Regulation*, Hearings before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 97th Cong., 1st Sess. (1981). See http://thecre.com/pdf/DJMemoReaganEO12291PDF.pdf for a copy of this memorandum.

[35] Other concerns focused on the appropriate role of the President in carrying out statutory requirements that Congress placed on departments and agencies. See U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation*, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, volume 80 (Dec. 1981), pp. 193-247.

[36] U.S. General Accounting Office, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain*, GAO/GGD-83-35, April 20, 1983.

[37] *Environmental Defense Fund v. Thomas* (627 F. Supp. 566, D.D.C. 1986).

[38] Judith Havemann, "'Defunding' OMB's Rule Reviewers," *Washington Post*, July 18, 1986, p. A17; and Judith Havemann, "New Senate Difficulty Besets Regulatory Review Office," *Washington Post*, August 16, 1986, p. A8. See also Morton Rosenberg, "Regulatory Management at OMB," in *Office of Management and Budget: Evolving Roles and Future Issues*, Committee Print, 99th Cong., 2nd Sess., S. Prt. 99-134, February 1986, pp. 185-233.

effort to head off that legislation, the OIRA administrator issued a June 1986 memorandum to the heads of covered departments and agencies describing new procedures to improve the transparency of the review process.[39] For example, the memorandum said that OIRA would provide information to the public on meetings with outside parties, and on the dates it began and completed reviews of proposed and final rules.

In 1987, a NAPA report on presidential management of agency rulemaking summarized many of the criticisms of the OIRA review process, as well as the positions of its proponents. Although the report recommended that presidential management of the rulemaking process be accepted and continue, it also concluded that the "clearest impact of the regulatory management process has apparently been in slowing down rulemaking activities."[40] NAPA also said that OIRA "should avoid excessive delays in the review process," and "should not seek to defeat rules through a kind of pocket veto, by simply refusing to act on regulations it does not like."[41] On the other hand, the report also said that agencies should not try to shift the blame to OIRA to "disguise their own rulemaking problems."[42]

In 1988, ACUS generally supported presidential review of agency rulemaking, but also said that presidential review "does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law."[43] With regard to the timeliness of reviews, ACUS recommended that the process "should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines." Similarly, in 1993, ACUS said the reviewing or oversight entity in presidential reviews of rulemaking "should avoid, to the extent possible, extensive delays in the rulemaking process," and recommended that presidential review "not unduly delay or constrain rulemaking."[44]

In 1989, the Section of Administrative Law and Regulatory Affairs of the American Bar Association (ABA) approved a resolution endorsing the 1988 ACUS recommendations on OIRA timeliness. In 1990, the Section issued a report to the ABA House of Delegates that described delays in OIRA reviews as "the most important unresolved process problem involving the regulatory review program."[45] The report described (among other things) the "protracted review and negotiations" that some rules endured, and recommended the following:

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[39] Judith Havemann, "No 'Shade-Drawn' Dealings for OMB," *Washington Post*, June 17, 1986, p. A21. To view a copy of this memorandum, see Memorandum from Wendy L. Gramm, OIRA Administrator, to Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 on Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 [Revised] (June 13, 1986), reprinted in U.S. Office of Management and Budget, *Regulatory Program of the United States Government*, April 1, 1992 – March 31, 1993, at 585 (1993).

[40] National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies*, p. 7.

[41] Ibid., p. 40.

[42] Ibid.

[43] Administrative Conference of the United States, *Presidential Review of Agency Rulemaking*, Conference Recommendation 88-9 (1988), available at http://www.acus.gov/recommendation/presidential-review-agency-rulemaking.

[44] Administrative Conference of the United States, *Improving the Environment for Agency Rulemaking*, Conference Recommendation 93-4 (1993), available at http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[45] American Bar Association, Section of Administrative Law and Regulatory Practice, "Delay in Presidential Review of Agency Regulations," February 1990 (hereafter referred to as the "ABA Section report"), available at http://www.americanbar.org/content/dam/aba/directories/policy/1990_my_101c.authcheckdam.pdf. The report was submitted by Paul R. Verkuil, who was then Chair of the Section, and who is now the Chairman of ACUS. As noted later in this report, in 1990, the average review time for all rules was 28 days, and the average review time for major rules was 57 days.

> Within 60 days of receipt by OIRA of a proposed or final rule under Executive Order No, 12,291, unless the Director of OMB or the Administrator of OIRA by writing extends review for another 30 days, OIRA will either complete its review and so advise the agency, or it will return the rule to the agency for reconsideration. Whenever a rule is returned to any agency for reconsideration, OIRA shall inform the head of the agency in writing of its views as to why the rule is not consistent with the regulatory policies of the President.

The report stated that the OIRA administrator at the time (S. Jay Plager) viewed the recommendation as constructive and potentially helpful to the regulatory review process. The ABA House of Delegates subsequently adopted the report's recommendation without any revisions.

B. Executive Order 12866

In September 1993, President Clinton issued Executive Order 12866 on "Regulatory Planning and Review," which revoked EO 12291.[46] EO 12866 is still in effect, and continued the general framework of presidential review of rulemaking that was established by EO 12291. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit certain proposed and final rules to OMB before publishing them in the *Federal Register*. The order also requires agencies to prepare cost-benefit analyses for their "economically significant" rules (essentially the same as "major" rules under EO 12291).[47] Like the previous executive order, EO 12866 makes it clear that the requirements for review by OIRA are only permissible "to the extent permitted by law."[48]

EO 12866 does, however, differ from EO 12291 in several important respects. For example, it established a somewhat new regulatory philosophy and a new set of rulemaking principles,[49] and limited OIRA's reviews to "significant" rules, reducing the number of draft proposed and final rules examined by OIRA from between 2,000 and 3,000 per year to between 500 and about 700 rules per year. EO 12866 also established transparency requirements that included but went beyond those that had been put in place by the previously mentioned June 1986 memorandum. For example, Section 6(b)(2) of EO 12866 requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames—(1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking), or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material, and there has been no material change in the facts and circumstances on which the rule

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[46] EO 12866 also revoked EO 12498 on regulatory planning.

[47] The definitions of "major" and "economically significant" rules are similar, and most "economically significant" rules are also considered "major." Some rules may be considered "major" that are not "economically significant" (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). See p. 5 of OMB guidance on the Congressional Review Act, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

[48] The phrase "to the extent permitted by law" is used five times in EO 12866 in the context of required actions by both OIRA and regulatory agencies.

[49] For example, one of the stated objectives of EO 12866 is "to reaffirm the primacy of Federal agencies in the regulatory decision-making process," which was widely viewed as leaving greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation "justify" its costs was a noticeably lower threshold than the requirement in EO 12291 that the benefits "outweigh" the costs.

is based). The executive order also states that the "review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."[50]

EO 12866 states that coordinated review of agency rulemaking by OIRA is necessary to ensure that regulations are consistent with the law, other agencies' actions, and "the President's priorities."[51] It also states that OIRA is the "repository of expertise concerning regulatory issues, including . . . the President's regulatory priorities."[52] Therefore, OIRA can be viewed as the President's personal representative in the rulemaking process.[53] Some observers have suggested that advocating the President's priorities may sometimes take precedence over other responsibilities of the office.[54]

1. Subsequent Executive Orders

The Obama Administration has issued two executive orders on rulemaking that supplement, but do not change, the requirements in EO 12866. On January 18, 2011, President Obama issued Executive Order 13563 on "Improving Regulation and Regulatory Review."[55] The executive order is described as "supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in EO 12866 of September 30, 1993." It reiterates many of the principles in the 1993 executive order (e.g., that benefits should "justify" costs, and that agencies should select the regulatory alternative that maximizes net benefits). The primary new element was a requirement that agencies develop a plan for the retrospective review of their existing regulations to determine if any should be modified, streamlined, expanded, or repealed. On July 11, 2011, President Obama issued Executive Order 13579 requesting, but not requiring, independent regulatory agencies to follow the principles in EO 13563, and to develop plans for the review of their existing rules.[56]

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[50] Section 6(b)(2)(C) of EO 12866.

[51] Section 6(b) of EO 12866.

[52] Section 2(b) of EO 12866. In fact, the term "President's priorities" is mentioned 10 times in the executive order.

[53] For example, former OIRA administrator John Graham said, the office's actions "necessarily reflect Presidential priorities." John D. Graham, "Presidential Management of the Regulatory State," speech at the Weidenbaum Center Forum, National Press Club, Washington, DC, December 17, 2001. Similarly, former OIRA administrator Sally Katzen said that "OIRA is part of the Executive Office of the President, and the President is the office's chief client." GAO-03-929, op. cit., p. 40.

[54] For example, former OIRA administrator Susan Dudley wrote in 2011 that when OIRA's role as expert evaluator of agency regulatory proposals conflict with its role as defender of the President's priorities, "the President's preferences will generally prevail." See Susan E. Dudley, "Observations on OIRA's Thirtieth Anniversary," *Administrative Law Review*, volume 63, Special Edition (2011), pp. 113-129, at 116. She also noted that these dual roles are often not in conflict.

[55] Executive Order 13563, "Improving Regulation and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

[56] Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 *Federal Register* 41587, July 14, 2011.

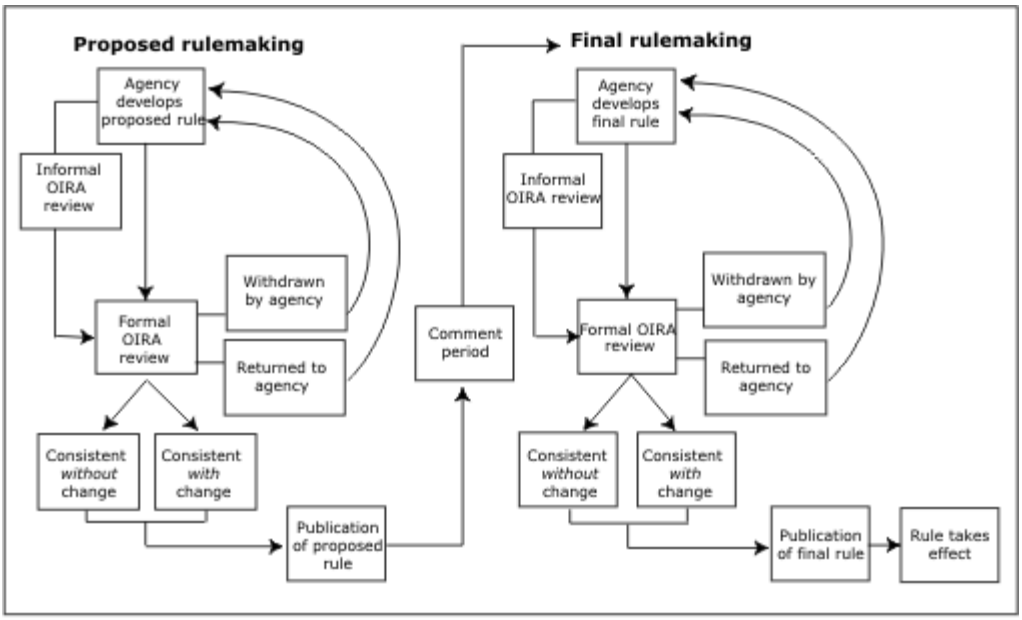
2. OIRA Review Process

The OIRA review process was described in detail in a 2003 GAO report that the author of this report helped prepare,[57] and that then-OIRA administrator John Graham subsequently described as accurate.[58] The review process varies somewhat depending on the nature of the rule (e.g., whether the rule is "economically significant" or contains a collection of information, and the number of other agencies that the rule could affect). Although all significant rules go through the formal review process, some of those rules are also reviewed informally before being formally submitted to OIRA.

a) Formal Reviews

As **Figure 1** below shows, OIRA reviews agencies' draft rules at both the proposed and final stages of rulemaking. In each phase, the review process starts when the rulemaking agency develops the rule and then formally submits a regulatory review package to OIRA through an online submission system. After submission, the review package is forwarded to the appropriate desk officer.

Figure 1: OIRA Reviews Draft Proposed and Final Rules



Source: GAO-03-929, p. 30.

If the draft rule contains a collection of information covered by the PRA, the desk officer would also review it for compliance with that act. If the draft rule is "economically significant" (e.g.,

[57] GAO-03-929.

[58] Ibid., p. 216. In comments on the report, Graham said it provided "an excellent overview of the regulatory review process." He later asked for 40 copies of the report and provided them to OIRA staff.

expected to have an annual impact on the economy of at least $100 million), the executive order requires agencies to prepare an economic analysis describing, among other things, the alternatives that the agency considered and the costs and benefits of those alternatives.[59] For those economically significant rules, OIRA desk officers review the economic analyses applying the principles of OMB Circular A-4, which provides the office's guidance on how to prepare regulatory analyses under the executive order.[60] OIRA may also circulate a draft rule to other parts of the EOP (e.g., the Office of Science and Technology Policy or the Council on Environmental Quality) or other agencies (e.g., DOE or DOT for certain EPA rules). An attachment to a September 2001 memorandum to the President's Management Council described the general principles and procedures that OIRA reportedly uses in the implementation of EO 12866.[61]

There is usually some type of communication during the review process (often via e-mail or telephone) between the OIRA desk officer and the rulemaking agency regarding specific issues in the draft rule. Briefings and meetings are sometimes held between OIRA and the agency during the review process, with OIRA branch chiefs, the deputy administrator, the associate administrator, or the administrator involved in some of these meetings. The OIRA desk officers may also consult with the resource management officers on the budget side of OMB as part of their reviews. If the draft rule is considered economically significant, the desk officer would also consult with an OIRA economist to help review the required economic analysis. For other rules the desk officer might consult with other OIRA staff on issues involving statistics and surveys, information technology and systems, or privacy issues, for example.

At the end of the review period, OIRA either returns the draft rule to the agency for "further consideration" or OIRA concludes that the rule is consistent with the executive order. OIRA codes the rule in its database as "consistent with change" if there had been any changes to the rule, regardless of the source or extent of the change. OIRA codes rules in its database as "consistent without change" only if they are exactly the same at the end of the review period as the original submission. As shown in **Appendix B** of this report, in every calendar year since 2008 (including the first half of 2013), between 70% and 80% of OIRA reviews have been coded "consistent with change," and between 11% and 18% of reviews are coded "consistent without change." In some cases (usually about 5% to 7% of reviews each year), agencies withdraw their rules from OIRA and the rules may or may not be subsequently submitted.

After OIRA concludes its review of a draft proposed rule as "consistent" with the executive order (with or without change), the agency may then publish a notice of proposed rulemaking in the *Federal Register*, obtain comments during the specified comment period, review the comments received, and make any changes to the rule that it believes are necessary to respond to those comments.[62] If the draft is a final rule, the agency may publish the rule and the rule will generally take effect either at that point or at some later date specified by the agency.

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[59] Section 3(f) of the executive order also defines an economically significant rule as adversely affecting "in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

[60] For a copy of this guidance, see http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

[61] For a copy of this September 2001 memorandum, see http://www.whitehouse.gov/omb/inforeg_oira_review_process/.

[62] Although the Administrative Procedure Act does not establish a minimum time frame for public comments, Section 6(a) of EO 12866 states that this comment period should, in most cases, be at least 60 days for significant rules reviewed by OIRA. ACUS has also recommended a 60-day comment period for significant rules, and at least 30 days for other rules. See ACUS recommendation 2011-2, August 9, 2011, available at http://acus.gov/sites/default/files/documents/Recommendation%202011-2%20%28Rulemaking%20Comments%29.pdf.

The executive order does not permit OIRA to "approve" or "disapprove" a draft rule; rather, OIRA either concludes review with a finding that the rule is "consistent" with the executive order (with or without change), or returns it to the agency for further consideration. Section 7 of EO 12866 states that, to the extent permitted by law, unresolved disagreements between or among agency heads or between OMB and any agency "shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials."

b) Informal Reviews

Figure 1 also shows that, for some rules, there is an additional phase of "informal review" before the rule is officially submitted to OIRA. In its December 2001 report on the costs and benefits of federal regulations, OIRA stated that the office's original review process "was designed as an end-of-the-pipeline check against poorly conceived regulations."[63] OIRA also said, however, that by the time an agency formally submits a rule to OIRA for review there may be "strong institutional momentum" behind the proposal and, as a result, the agency may be reluctant to address certain issues that OIRA analysts might raise. Therefore, OIRA indicated "there is value in promoting a role for OIRA's analytic perspective earlier in the process, before the agency becomes too entrenched." OIRA went on to state the following:

> A common yet informal practice is for agencies to share preliminary drafts of rules and/or analyses with OIRA desk officers prior to formal decision making at the agency. This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OMB begins to tick. The practice is also useful for OIRA analysts because they have the opportunity to flag serious problems early enough to facilitate correction before the agency's position is irreversible.

GAO reported that OIRA could not informally review each of the hundreds of significant proposed and final rules that are submitted to the office each year. Informal reviews were said to be most likely when there is a statutory or legal deadline for a rule or when the rule is extremely large and requires discussion with not only OMB but also other federal agencies. OIRA representatives interviewed by GAO indicated that EPA, DOT, and the Departments of Agriculture (USDA) and Health and Human Services (HHS) often issued those types of rules, and therefore were more likely to have certain rules reviewed informally before formal submission.[64]

OIRA has informally reviewed some draft rules since its regulatory review function was established in 1981. Early in the George W. Bush Administration, GAO reported that OIRA had increased its use of informal reviews. For example, in its March 2002 draft report to Congress on the costs and benefits of federal regulation, OIRA said "agencies are beginning to invite OIRA staff into earlier phases of regulatory development in order to prevent returns late in the rulemaking process. It is at these early stages where OIRA's analytic approach can most improve on the quality of regulatory analyses and the substance of rules."[65] Separately, in 2002, the OIRA

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[63] Office of Management and Budget, *Making Sense of Regulation: 2001 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities*, Dec. 2001, available at http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf.

[64] GAO-03-929, op. cit., p. 36.

[65] Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," 67 *Federal Register* 15018, March 28, 2002, available at

administrator said "an increasing number of agencies are becoming more receptive to early discussions with OMB, at least on highly significant rulemakings."[66]

The OIRA administrator also indicated that agencies' "receptivity" to informal reviews could be enhanced by the possibility of a returned rule. For example, in 2002 he said that OIRA was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us—well, in a sense, they're rolling the dice."[67]

3. Return Letters

For each regulatory action returned to the agency for reconsideration, Section 6(b)(3) of EO 12866 requires the OIRA administrator to "provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing." The September 2001 memorandum to the President's Management Council states that "a return does not necessarily imply that either OIRA or OMB is opposed to the draft rule. Rather, the return letter will explain why OIRA believes that the rulemaking would benefit from further consideration by the agency."[68]

According to OIRA's public database,[69] of the more than 4,000 significant rules that OIRA reviewed from 1994 through 2000, OIRA returned only seven rules to the agencies—three in 1995 and four in 1997. OIRA administrators during that period told GAO in 2003 that they viewed the use of return letters as evidence of the failure of the collaborative review process, since OIRA and the agencies were part of the same presidential administration.[70]

In contrast, during 2001 and 2002, OIRA returned a total of 23 rules to the agencies, with the letters commonly indicating that OIRA did so because of concerns about the agencies' analyses (e.g., whether the agencies had considered all reasonable alternatives or had selected the alternative that would yield the greatest net benefits).[71] Some of these return letters appear to have also been precipitated by concerns about adherence to the 90-day limit on OIRA reviews. For example, in a September 14, 2001, return letter to DOT, the OIRA administrator said "(s)ince the resolution of the concerns will take some additional time, I am returning the two rules to the Department for your reconsideration."[72] The return letters for these and other rules were sent to the agencies shortly after the applicable 90-day OIRA review periods had ended.

After 2002, however, the number of returned rules dropped considerably. Two rules were returned in 2003, and a total of two rules were returned between 2004 and 2006. OIRA officials attributed the decline in return letters to the improved quality of agencies' regulatory submissions after the

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http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cbreport.pdf.

[66] Dr. John D. Graham, remarks prepared for the American Hospital Association, July 17, 2002. For a copy of this speech, see http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html.

[67] Rebecca Adams, "Regulating the Rulemakers: John Graham at OIRA," *CQ Weekly*, Feb. 23, 2002, pp. 520-526.

[68] See http://www.whitehouse.gov/omb/inforeg_oira_review_process/.

[69] See http://www.reginfo.gov/public/do/eoCountsSearch.

[70] GAO-03-929, pp. 42-43.

[71] To view copies of OIRA's return letters since 2001, see http://www.reginfo.gov/public/do/eoReturnLetters.

[72] See http://www.reginfo.gov/public/return/boeing737_return_letter.html.

initial flurry of returns. As **Appendix C** of this report indicates, OIRA issued a total of nine return letters involving 13 rules from January 2003 through June 2013, the most recent being in 2011. Two of the return letters during this period (one in June 2003 and the other in February 2004) involved the same DOT rule. In four of the nine return letters for this period (involving six of the rules), OIRA indicated that the rules were being returned to permit the agency additional time for analysis. For example, in the January 6, 2009, return letter for three Small Business Administration (SBA) rules, OIRA said the agency had proposed to undertake further analysis, and the rules were being returned "to provide the time needed to conduct that analysis."[73] All three rules had been under review at OIRA for slightly more than 90 days.

OIRA has also issued "review" letters to agencies at various stages of the rulemaking process, and may be issued at the administrator's discretion. According to OIRA, a review letter following the issuance of a proposed rule "may urge the agency to perform additional regulatory analysis or consider other alternatives prior to finalizing the rule," and a letter following the issuance of a final rule "may offer implementation advice or explain OMB's dispute resolution process."[74]

4. Extensions of Reviews

As noted earlier in this report, Section 6(b)(2)(C) of EO 12866 states that the formal review process "may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head." Given the wording of this provision, it is ambiguous as to how it should be interpreted – i.e., whether both the OMB Director and the agency head would have to agree on an extension, and (if agency requests for extension may be made without the involvement of OMB) whether agency-requested extensions are limited to 30 days.

OIRA considers the two extension provisions in the executive order to be unrelated, with *either* the OMB Director or the agency head able to request extensions, and *only* extensions initiated by the OMB Director subject to the 30-day limit. According to a "Frequently Asked Questions" page on the OIRA website:

> The period for OIRA review is limited by Executive Order 12866 to 90 days. There is no minimum period for review. Under the Executive Order, the review period may be extended indefinitely by the head of the rulemaking agency; alternatively, the OMB Director may extend the review period on a one-time basis for no more than 30 days.[75]

OMB has indicated since shortly after EO 12866 was issued that the two extension options are separate. For example, in its May 1994 report on the implementation of the executive order during its first six months, OMB said "The Order allows the review period to be extended upon written approval of the Director of OMB *or* at the request of the agency head."[76] (Emphasis added.) Former OIRA officials have also evidenced this interpretation of the extension provisions in public statements. For example, in a 2013 article on OIRA "myths and realities," former OIRA administrator Cass Sunstein said that when agencies and OIRA do not agree on how to proceed

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[73] See http://www.reginfo.gov/public/return/20090106131254697.pdf.

[74] This description may be found at http://www.reginfo.gov/public/jsp/EO/letters.jsp. See http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp for copies of these review letters.

[75] See http://www.reginfo.gov/public/jsp/Utilities/faq.jsp.

[76] Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

during the 90-day review period, "agencies generally request extensions, which can be quite lengthy."[77] He also said the extension provision in the executive order

> might be taken to be ambiguous because of the use of the word "and" rather than "or," suggesting the possibility that both conditions must be met; but it has long been understood that the agency head may request an extension of any length, including an indefinite one.[78]

Other observers have viewed the two provisions in EO 12866 as related, with both OMB and the agency head having to agree to an extension, and with the total review time limited to 120 days. For example, during the June 2013 confirmation hearing for then-OIRA nominee Howard Shelanski, Senator Levin said "OIRA has 90 days to review a draft proposed or final rule. There is one 30-day extension that is available."[79] Also, in a forthcoming article for the *Pace Environmental Law Review*, Lisa Heinzerling of Georgetown University Law School, who worked at EPA for two years from 2009 through 2010, noted that the extension provision in EO 12866 "seems, with its use of the word 'and' rather than 'or,' to contemplate a process whereby both the OMB Director and the agency head would need to agree on an extension."[80] She also said the provision "seems to contemplate one 30-day extension if the OMB Director and the agency head agree to it."[81]

Sally Katzen, OIRA administrator during most of the Clinton Administration and one of the authors of EO 12866, told the author of this report that the extension provision in the executive order was not particularly well drafted, but was intended to be read to allow for unlimited agency-requested extensions. However, she said that when she was OIRA administrator, she required desk officers to put rules with agency-requested extensions on "the top of their pile," and told them that such rules should get the "highest priority" once the agency responds to OIRA comments. She said her office was diligent in expediting review in such cases, and OIRA did not take advantage of the unlimited nature of the review extensions.

OIRA's interpretation of the extension provision has an effect on other responsibilities described in the executive order. As noted previously, Section 8 of EO 12866 prohibits an agency from publishing a reviewed rule, except to the extent required by law, until OIRA has waived review or has completed its review without any requests for further considerations, or until "the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration." If the "applicable time period" for an agency-requested extension is "unlimited," then the prohibition on an agency publishing its rule is also unlimited.

Also, if OMB-requested extensions are limited to 30 days, but agency-requested extensions are of unlimited duration, it is to OIRA's advantage if the agency makes the request. Previous reports

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[77] See Cass R. Sunstein, "Commentary: The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review*, volume 126 (2013), pp. 1838- 1878, at p, 1848. Hereafter referred to as "Sunstein."

[78] Ibid., p. 10, note 37.

[79] See http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski to view this hearing. Senator Levin's comments are at 51:45 of this hearing. Also, in a November 2011 report, the Center for Progressive Reform stated that EO 12866 limited OIRA reviews to 90 days, but allowed for a "one-time extension of 30 days (with the approval of OIRA's director *and* at the request of the agency head)." (Emphasis in the original.) See Rena Steinzor, Michael Patoka, and James Goodwin, Center for Progressive Reform, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, White Paper #1111, November 2011, hereafter "CPR report," available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

[80] Lisa Heinzerling, "Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House" *Pace Environmental Law Review*, forthcoming, draft as of June 12, 2013, p. 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262337.

[81] Ibid., p. 27. Heinzerling notes, however, "This is not the way the OIRA process works now."

suggest that at least some agency requests for extensions may actually originate with OIRA, not with the agency submitting the request. For example, GAO said in its 2003 report that OIRA sometimes asked agencies to request extensions (citing agency officials and a former OIRA administrator).[82] More recently, Lisa Heinzerling stated that, based on her experience at EPA in 2009 and 2010:

> [T]he way that agency heads come to request extended review…is that OIRA calls an official at the agency and *asks the agency to ask for an extension*. [Emphasis in original.] It is clear, in such a phone call, that the agency is not to decline to ask for such an extension. Thus, not only is there no deadline for OIRA review, but OIRA itself controls the agency's "requests" for extensions. In this way, it comes to pass that rules can remain at OIRA for years.[83]

Regardless of how this part of EO 12866 is interpreted, and even if no review extensions are requested, there are no clear consequences in the executive order if OIRA fails to meet the deadlines for review. Section 6(b)(2) of the executive order states "OIRA shall waive review or notify the agency in writing of the results" within the specified review periods, but does not indicate what would happen if OIRA did not take those actions. Also, EO 12866 states that it "is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."[84]

IV. Timeliness of OIRA Regulatory Reviews

The timeliness of at least some of OIRA's regulatory reviews has been a concern virtually since the office began those reviews under EO 12291 in early 1981. This section of the report describes some of those concerns, and provides data regarding the length of reviews under both EO 12291 and EO 12866.

A. EO 12291 Reviews

As noted earlier in this report, under EO12291, covered agencies submitted virtually all of their regulatory actions for review. OIRA was generally expected to complete its reviews of major proposed rules within 60 days, and major final rules within 30 days (unless the final rule was being issued without a notice of proposed rulemaking). Non-major proposed and final rules were to be reviewed within 10 days. However, any review could be extended indefinitely if OIRA indicated to the agencies that it had concerns about a rule. In a June 1981 hearing on "The Role of OMB in Regulation," then-OIRA administrator James Miller, III, testified that of the initial 881 rules submitted to OIRA under EO 12291, the average review period was nine days, and reviews were extended in only 4% of the rules, which he said "reflects the admonitions of the Vice

[82] GAO-03-929, p. 45.

[83] Lisa Heinzerling, "Inside EPA," op cit.

[84] Section 10 of EO 12866.

President and the Director that we respond expeditiously to agency submissions and not create 'another layer of bureaucracy and red tape.'"[85]

Table 1 below shows the length of OIRA reviews starting in 1981 and ending in 1992 (the last full year of EO 12291). The data indicate that, on average, OIRA reviewed major rules within 60 days in most years, but generally did not complete review of non-major rules within an average of 10 days. Average review times for non-major rules were often much less than for major rules. Nevertheless, for certain rules, the OIRA reviews extended far beyond the limits in the executive order, and these lengthy review times were of such concern that in May 1986, Senator Carl Levin and Senator David Durenberger proposed limiting the length of OIRA's reviews to 30 days. OIRA administrator Miller objected to this proposal, saying "In many situations, issues raised by a regulatory proposal are sufficiently complex that no serious review could be conducted in a 30-day or even a 60-day period."[86]

Table 1: Average Length of OIRA Reviews Under EO 12291

Calendar Year	Major Rules		Non-Major Rules		All Rules	
	Number of Rules	*Average Days in Review*	*Number of Rules*	*Average Days in Review*	*Number of Rules*	*Average Days in Review*
1981	60	12	2,732	9	2,792	9
1982	79	28	2,558	12	2,637	12
1983	63	28	2,420	15	2,483	16
1984	60	31	2,052	22	2,112	22
1985	59	65	2,154	27	2,213	28
1986	74	30	1,936	24	2,010	24
1987	70	44	2,245	25	2,315	25
1988	82	51	2,277	32	2,359	32
1989	79	64	2,141	28	2,220	29
1990	82	57	2,055	27	2,137	28
1991	142	39	2,381	29	2,523	29
1992	121	44	2,164	39	2,285	39

Source: OIRA database, available at www.reginfo.gov.

Note: The data include primarily draft proposed and final rules, but also include some notices and guidance documents. For ease of description, the term "rule" is used in this and other tables.

[85] Testimony of James C. Miller, III, OIRA Administrator, before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, "The Role of OMB in Regulation," June 18, 1981, Serial no. 97-70, p. 49.

[86] Judith Havemann, "Lawmakers Want to Dethrone OMB Rule Reviewers," *Washington Post*, May 22, 1986, p. A17.

B. EO 12866 Reviews

The initial 90-day review time limit established by EO 12866 in 1993 is longer than the average review times that the agencies experienced under EO 12291, but was intended to curb certain long reviews that agencies were experiencing for certain rules.[87] In a May 1994 report on the initial implementation of EO 12866, OMB said that the executive order "establishes strict time limits on OIRA review in most cases" and that the office had "made a concerted effort to meet not only the letter of this requirement, but its spirit as well."[88] Of the 578 rules that were received and reviewed by OIRA in the first six months under EO 12866, OMB reported that only three reviews were extended beyond the 90-day limit, each was extended at the request of the agency, and the reviews were all completed within three weeks after the extension was requested.

However, within a few years, the timeliness of OIRA reviews again became an issue. In September 1997, then-OIRA administrator Sally Katzen testified that "when two or more agencies are at loggerheads over a regulatory issue, it may well take more than 90, or even 120, days to obtain needed data and analyses, to conduct the appropriate evaluation, and to arrange for the policy officials in the interested agencies to come to agreement."[89] For that and other reasons she opposed draft legislation that would have imposed a statutory time limit on OIRA reviews. John Spotilla, OIRA administrator at the end of the Clinton Administration, also told GAO in 2003 that he considered it more important to "get the rule right" rather than rigidly adhere to a 90-day time limitation.

During each of the calendar years 1999, 2000, and 2001, more than 100 OIRA reviews exceeded the 90-day review limit (115, 159, and 149 reviews, respectively).[90] An OIRA representative told GAO in 2003 that virtually all of the extensions of the review periods in each of these years were done at the request of the agency issuing the rule. However, as noted earlier in this report, employees from one agency and a former OIRA administrator told GAO that OIRA sometimes asked agencies to request review extensions.

During calendar year 2002, however, only nine OIRA reviews lasted longer than 90 days – a dramatic decline in the number of extended reviews that is directly traceable to a change in policy by the then-new OIRA administrator John Graham. In July 2002, Graham said "agencies have sometimes been forced to wait 6 months, a year, or even longer to get an answer from OMB. We have changed that practice. I have instructed my staff that no rule will stay longer than 90 days at OMB without my personal authorization."[91] He went on to say, "We believe that since agency staff often toil for years in development of a regulatory proposal, they and the public deserve a rigorous yet prompt review from OMB." According to OIRA's December 2002 report on the costs and benefits of regulations, the office regarded the 90-day review limit as "a performance indicator for a strong regulatory gatekeeper."[92] OIRA representatives confirmed to GAO in 2003

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[87] OMB stated in its first report on the implementation of EO 12866 that the review deadlines were put in place "to eliminate unwarranted delays in the regulatory review process." See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

[88] Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at p. 24277.

[89] Cited in GAO-03-929, p. 46.

[90] Ibid, p. 45.

[91] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," Remarks prepared for the American Hospital Association, July 17, 2002, available at http://georgewbush-whitehouse.archives.gov/omb/inforeg/graham_ama071702.html.

[92] Office of Management and Budget, *Stimulating Smarter Regulation*, p. 19, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2002_report_to_congress.pdf.

that close adherence to the 90-day "clock" was a new practice and said that OIRA management tracked all rules that have been under formal review for more than 60 days. They also said that a benefit of stricter adherence to the 90- day review limit was that it forced officials to make decisions sooner, thereby moving the review along more quickly.[93]

Officials from several rulemaking agencies told GAO in 2003 that OIRA staff seemed much more focused on the 90-day review clock than during the previous administration. Officials in other agencies also told GAO that rules were sometimes returned or withdrawn at OIRA's request when time was running out on the 90-day clock and more time was needed to resolve issues "off the clock" or during a separate 90-day period. However, representatives of OIRA told GAO that they did not request that agencies withdraw rules, and emphasized that it was the agencies—not OIRA—that ultimately made withdrawal decisions. They also said agencies sometimes withdrew rules from OIRA as a negotiating strategy.[94]

C. The Length of OIRA Regulatory Reviews (1994 – 2013)

There are at least three ways to depict the timeliness of OIRA reviews – by showing (1) the average number of days it takes for OIRA to complete its reviews of agencies' rules (both overall and by agency within particular years), (2) the number and percentage of completed OIRA reviews each year that exceed certain time frames (e.g., 90 days or one year), and (3) how long ongoing reviews have lasted. Each approach has certain advantages and disadvantages. The following sections discuss each of those metrics.

1. Average Review Times

The average amount of time it takes OIRA to review significant rules overall or within a particular agency provides a convenient way to compare OIRA's performance over time and across agencies within a particular year. Both OIRA and others have used average review times for decades to gauge the office's performance.[95] However, such averages can also conceal large differences in the review periods for individual rules. For example, if an agency sends 10 rules to OIRA for review in a particular year, and OIRA completes review of eight of them in 10 days, but takes 200 days to review the other two, the average review time for all 10 rules is 48 days. Also, average review times only include completed reviews; they do not include reviews that are continuing at the end of the year or other time period. Finally, because average review times are recorded only when reviews are completed, lengthy reviews recorded in one year may have primarily occurred during a previous year.

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[93] GAO-03-929, p. 47.

[94] Ibid.

[95] For example, as noted earlier in this report, then-OIRA administrator James Miller, III, testified in June 1981 about the relatively short average length of reviews. See Testimony of James C. Miller, III, OIRA Administrator, before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, "The Role of OMB in Regulation," June 18, 1981, Serial no. 97-70, p. 49. Also, in its first report on the implementation of EO 12866, OIRA reported average review times overall and for particular agencies. See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24287.

Table 2 below shows, for each year from calendar year 1994 (the first full year under EO 12866) through the first half of calendar year 2013, the average number of days it took OIRA to complete review for (1) economically significant rules (e.g., those expected to have a $100 million annual effect on the economy), (2) other types of significant rules, and (3) all significant rules. The data indicate that the average review time for all significant rules varied somewhat from 1994 through 2011, but never exceeded 62 days. Then, in 2012, the average length of completed OIRA reviews increased to 79 days, and then jumped to 140 days during the first half of 2013 – nearly three times the average review time for the 18-year period from 1994 through 2011 (50 days). The data also show that overall, and in 2012 and 2013 in particular, economically significant rules generally took *less* time for OIRA to review on average than non-economically significant rules.[96] Nevertheless, during the first half of 2013, the average amount of time it took OIRA to complete review of both types of rules exceeded 90 days.

Table 2: Average EO 12866 Review Times Rose Sharply in 2012 and 2013

Calendar Year	Economically Significant Rules		Other Significant Rules		All Significant Rules	
	Number of Reviews	*Average Days in Review*	*Number of Reviews*	*Average Days in Review*	*Number of Reviews*	*Average Days in Review*
1994	134	33	697	30	831	31
1995	74	41	546	35	620	35
1996	74	39	433	42	507	42
1997	81	47	424	54	505	53
1998	73	33	414	50	487	48
1999	86	51	501	53	587	53
2000	92	60	490	62	582	62
2001	111	46	589	60	700	58
2002	100	44	569	46	669	46
2003	101	42	614	50	715	49
2004	85	35	541	55	626	53
2005	82	39	529	59	611	57
2006	71	34	529	59	600	56
2007	85	49	504	64	589	61
2008	135	53	538	63	673	61
2009	125	33	470	40	595	39
2010	138	48	552	51	690	51
2011	117	51	623	60	740	58

[96] There are a variety of possible reasons why this could be the case. For example, economically significant rules may be more likely to have statutory or judicial deadlines, and therefore may be more likely to be informally reviewed prior to formal submission. According to former OIRA Administrator Susan Dudley, desk officers may perform a type of "triage" in which non-economically significant rules may be set aside while they focus on the larger, more important rules first.

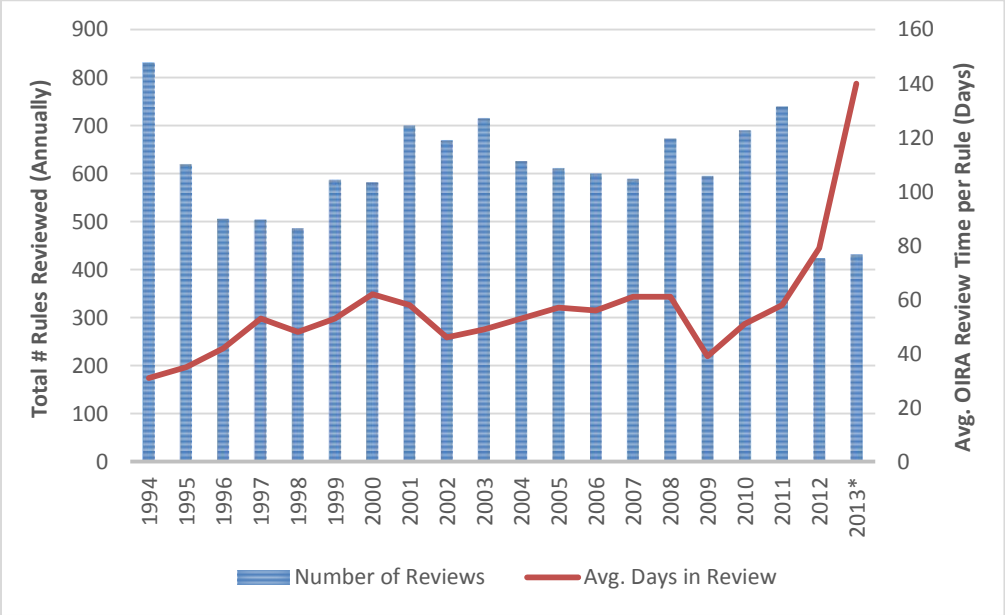
2012	***83***	***69***	***341***	***81***	***424***	***79***
2013*	***50***	***93***	***162***	***154***	***212***	***140***

Source: OIRA database, available at www.reginfo.gov.

Note: The data include primarily draft proposed and final rules, but also include some notices and guidance documents. For ease of description, the term "rule" is used in this and other tables. 2013 data are as of June 30, 2013.

Note also that the number of completed reviews dropped significantly between 2011 and 2012 (from 740 reviews in 2011 to 424 reviews in 2012, a more than 40% decline).[97] As **Table 2** and **Figure 2** below indicate, the 424 reviews completed during 2012 were fewer than any year since EO 12866 was issued in 1993, and 33% lower than the average of the previous 18 years (629 reviews per year). The pace of completed reviews during the first half of 2013 (212 reviews in 6 months), if continued for the rest of the year, would produce about the same number of reviews in 2013 as in 2012 (424 reviews).

Figure 2: Average OIRA Review Time Has Increased Recently While Number of Completed Reviews Has Declined



Source: OIRA database, available at www.reginfo.gov. The data on average review time for 2013 are as of June 30, and the number of reviews for the full year were projected from the rate in the first half of the year.

[97] As detailed in **Appendix D** of this report, the number of final rules issued in 2012 was also a record low, and the pace of rulemaking in the first half of 2013 was even lower.

a) Average Review Times by Agency

Focusing only on calendar years 2011, 2012, and 2013, the data in **Table 3** below indicate that the average review times varied substantially by agency within each year, and by year within individual agencies. The average review times for certain agencies (USDA, DOE, DOL, DOT, the Department of Housing and Urban Development (HUD), and EPA) substantially exceeded the average review time for all agencies in at least two of the three years.[98] For other agencies (the Departments of Commerce (DOC), Defense (DOD), Education, and Homeland Security (DHS), and the Federal Acquisition Regulation (FAR)), their average review times were substantially less than the average for all agencies in at least two of the three years.[99] Overall, though, the number of agencies with average review times greater than 90 days rose from two agencies in 2011, to seven agencies in 2012, to 17 agencies in the first half of 2013. Every agency experienced an increase in OIRA review time between 2011 and 2013, and in some cases the increases were substantial. For example, average review times for draft rules from the Department of State went from 55 days in 2011 to 281 days during the first half of 2013. In some cases, the increases appeared to be driven by long reviews of a small number of rules. For example, the average review time for rules from the Department of Justice (DOJ) went from 45 days in 2011 to 239 days in the first half of 2013, but OIRA completed review of only two DOJ rules in the first half of 2013, and a single long review of more than 400 days affected the average.

Table 3: Average EO 12866 Review Times Varied by Department/Agency

Department/ Agency	Calendar Year 2011		Calendar Year 2012		Calendar Year 2013 (through 6/30)	
	Number of Reviews	Average Days in Review	Number of Reviews	Average Days in Review	Number of Reviews	Average Days in Review
USDA	52	75	30	112	14	146
DOC	32	33	33	53	16	147
DOD	53	42	19	55	7	99
Education	16	37	13	42	7	52
DOE	15	100	7	131	4	247
HHS	127	54	81	55	44	106
DHS	23	42	21	80	12	47
HUD	23	65	8	136	7	224
DOI	13	37	17	67	9	136
DOJ	25	45	12	77	2	239
DOL	32	106	10	110	13	117

[98] Review times were considered to be substantially higher if they were more than 25% higher than the average of all agencies that year. Therefore, review times were considered substantially higher if they were above 72.5 days in 2011, 99 days in 2012, and 175 days in 2013.

[99] Review times were considered to be substantially lower if they were more than 25% lower than the average of all agencies that year. Therefore, review times were considered substantially lower if they were below 43.5 days in 2011, 59 days in 2012, and 105 days in 2013.

State	27	55	17	85	11	281
DOT	39	73	21	131	10	144
Treasury	22	52	13	52	2	298
VA	13	56	7	79	2	215
EPA	97	73	53	104	24	181
FAR	39	36	11	32	5	123
NASA	5	60	5	38	0	-
OPM	24	55	14	65	7	86
SBA	19	48	16	105	4	104
SSA	17	60	8	63	8	110
Other agencies	27	50	8	126	4	171
Total	740	58	424	79	212	140

Source: OIRA database, available at www.reginfo.gov.

Note: Table includes all departments and agencies with at least five OIRA reviews in any year. "Other agencies" include the Agency for International Development, the Equal Employment Opportunity Commission, the General Services Administration, the Office of Government Ethics, and the Pension Benefit Guarantee Corporation. Acronyms not previously introduce are DOI (the Department of the Interior), VA (the Department of Veterans Affairs), NASA (the National Aeronautics and Space Administration), OPM (the Office of Personnel Management), and SSA (the Social Security Administration).

b) Longest Reviews Completed During First Half of 2013

Appendix E of this report lists the 27 longest reviews completed by OIRA during the first half of calendar year 2013 (all of which took at least one year), with information on the department and/or agency issuing the rule, its title and Regulation Identifier Number (RIN),[100] the date the rule was received by OIRA, the date review was completed, and the number of calendar days the rule had been under review. Most of these reviews were concluded because OIRA considered the rule "consistent with change" (meaning that some part of the rule changed while it was under review at OIRA), but eight rules were listed as "withdrawn" by the agencies (the Food and Drug Administration (FDA) rule on "Premarket Approval for Two Class III Preamendment Devices," the National Highway Traffic Safety Administration (NHTSA) rule on "Rearview Mirrors," and six rules submitted by the Departments of Commerce and State regarding the U.S. Munitions List).

The table also indicates that the 140-day average review time during the first half of 2013 included a number of reviews that took much more than 140 days, and some took nearly two years to complete. Even individual agency averages include rules well above those averages. For

[100] The RIN is a unique eight-digit code assigned by the Regulatory Information Service Center (RISC), and allows the public to track a regulatory action throughout its life cycle. In April 2010, OIRA administrator Cass Sunstein issued a memorandum to the President's Management Council stating that agencies should use the RIN on all relevant documents throughout the "lifecycle" of a rulemaking. For a copy of that memorandum, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness_04072010.pdf. RISC compiles the Unified Agenda for OIRA, and provides information about federal regulatory activity to the President, other parts of the EOP, Congress, agency managers, and the pubic.

example, the State Department had the highest average review time during the first half of 2013 (281 days, more than any agency with 10 or more completed reviews), but that average included four rules with review times of nearly 500 days.

2. Completed Reviews Exceeding 90 Days/Six Months/One Year

Table 4 below shows, for calendar years 1994 through the first half of 2013, the number of completed OIRA reviews in each year that lasted more than 90 days but less than six months, more than six months but less than one year, and more than one year. Providing the data on review times this way avoids the problem with "average" times (extremely high review times may be balanced out by extremely low ones), but still allows comparisons of OIRA's performance across time. However, because the data are recorded only when reviews end, lengthy reviews that are completed in one year may have actually begun during a previous year. In some cases, the significant majority of time under review was during a previous year.

The data in **Table 4** indicate that 27 reviews were completed during the first six months of 2013 that lasted more than a year – more than three times the highest previous full year (2008, in which there were eight reviews that lasted more than a year). If the same number of reviews lasting more than one year is completed during the second half of 2013, the projected number for the full year (54 reviews) would be more than twice the cumulative number for the 18-year period from 1994 through 2011 (25 reviews).

Table 4: Record Numbers of Completed OIRA Reviews Took More Than Six Months in 2012 and First Half of 2013

Year	Number of OIRA Reviews Completed in			Total Number of Reviews
	91Days to Six Months	Six Months to One Year	More Than One Year	
1994	20	2	0	831
1995	40	1	0	620
1996	55	6	0	507
1997	87	12	0	505
1998	78	7	0	487
1999	100	12	3	587
2000	133	21	5	582
2001	120	28	1	700
2002	9	0	0	669
2003	10	1	0	715
2004	34	2	0	626
2005	25	12	0	611
2006	43	8	2	600
2007	56	8	2	589

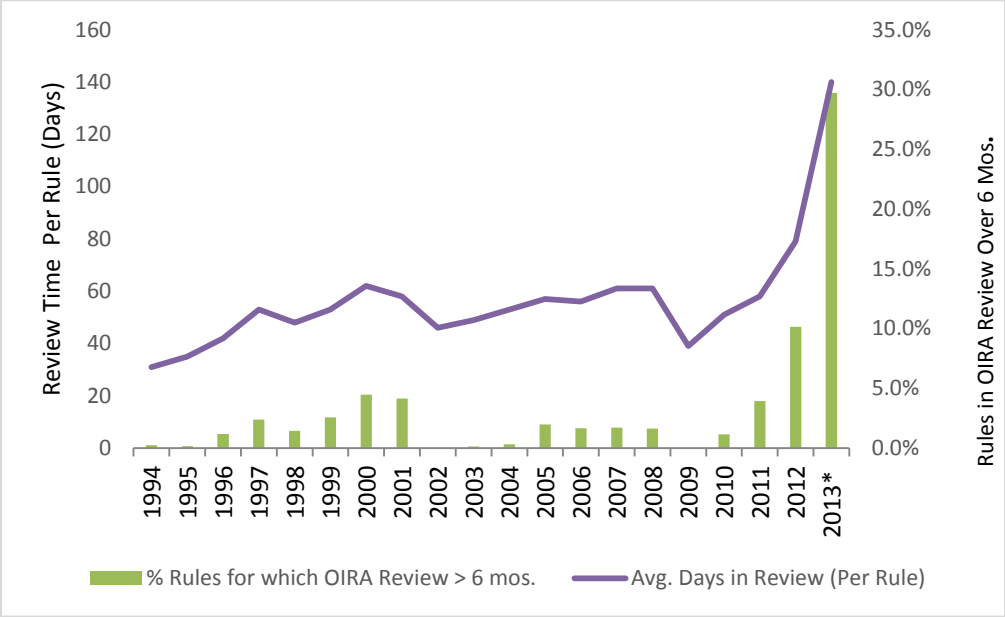
2008	50	3	8	673
2009	27	0	0	595
2010	60	8	0	690
2011	87	25	4	740
2012	**90**	**39**	**4**	***424***
2013*	**30**	**36**	**27**	***212***

Source: OIRA database, available at www.reginfo.gov.

Note: The data for 2013 are as of June 30, 2013.

Also, the 36 completed reviews during the first half of 2013 that lasted between six months and a year were exceeded only by the 39 such reviews completed in all of 2012. Taken together, the 63 reviews completed during the first half of 2013 that lasted more than six months (36 from six months to a year, plus 27 that took more than one year) represented 29.7% of the 212 reviews completed during that period. In comparison, during the 18-year period from 1994 through 2011, an average of 1.6% of reviews exceeded six months (181 of 11,327 reviews). Therefore, the rate of reviews lasting more than six months for the first half of 2013 was more than 18 times greater than the rate during the period from 1994 through 2011. **Figure 3** below illustrates this issue.

Figure 3: Both Average Review Time and Percentage of Completed Reviews Lasting More Than Six Months Have Increased

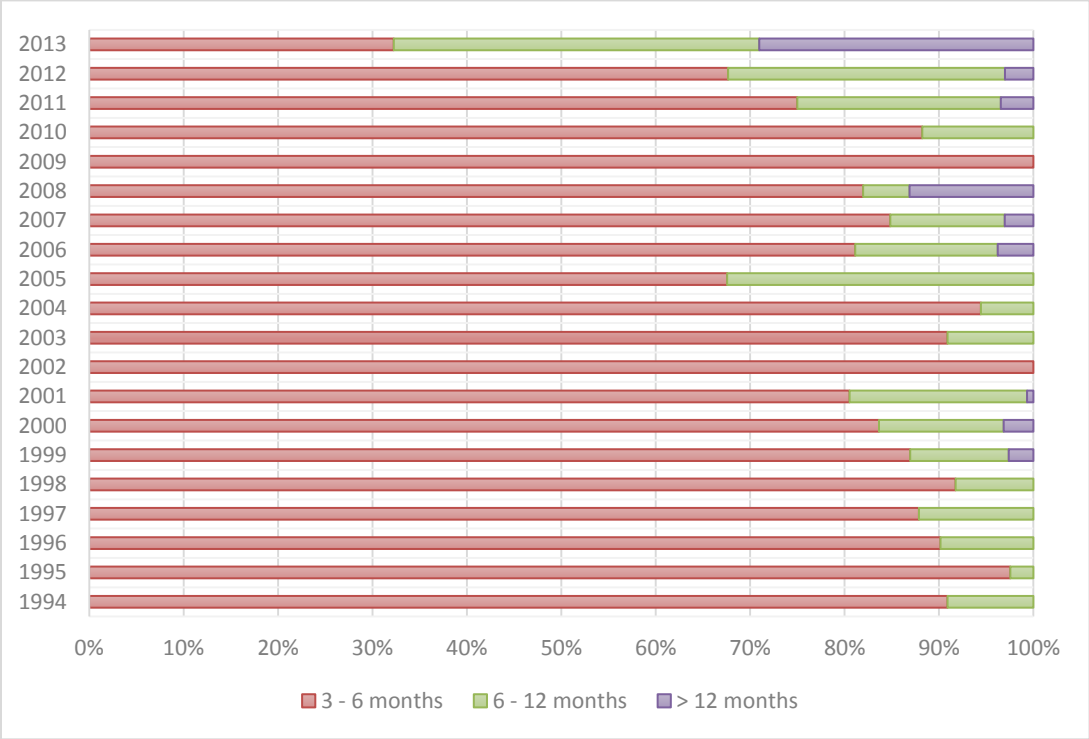


Source: OIRA database, available at www.reginfo.gov. Data for 2013 are as of June 30, 2013.

As **Table 4** illustrates, in every year there were OIRA reviews that took more than 90 days (although the number of such extended reviews varied substantially). **Figure 4** below shows the difference in the composition of those extended reviews. In some years (e.g., 1994 through 1996, 2002 through 2004, and 2009), 90% or more of the extended reviews took less than six months to

complete. Until 2012, there was only one year in which more than 30% of the extended reviews took more than six months (and then, all of the reviews were completed within one year). However, in 2012, more than 30% of the extended reviews took more than six months, and some of those reviews took more than a year. In the first half of 2013, nearly 70% of the extended reviews took more than six months, and nearly 30% took more than a year.

Figure 4: Extended Reviews in 2013 Included More Reviews Over Six Months



Source: OIRA database, available at www.reginfo.gov. Data for 2013 are as of June 30, 2013.

3. Ongoing OIRA Reviews Exceeding One Year

All of the data in the previous sections of this report were for regulatory actions that had *completed* the OIRA review process; the data did not include any actions for which review was *continuing* as of the end of the applicable time periods. The amount of time continuing reviews have been at OIRA may be a good indication of the future for other measures of OIRA timeliness. For example, although the average review time for reviews completed during the first half of 2013 was a record 140 days, if a large number of rules with even longer review times were still under review and if those reviews are completed by the end of the year, the average review times for all of 2013 could go even higher. (The completion of those reviews would, of course, be a positive development, even though they are likely to result in an increase in the average length of completed reviews.)

As of June 30, 2013, a total of 141 rules were under review at OIRA, of which 74 (52%) had been under review for more than 90 days. Thirty-eight of those 74 rules had been under review at

OIRA for more than a year, including 23 since at least 2011 and three since 2010. (See **Appendix F** of this report for a list of the 38 rules by agency, along with their RINS, date received by OIRA, and number of days under OIRA review as of June 30, 2013.) The 38 rules under review for more than a year included:

- 12 rules from EPA, including two since 2010 and six since 2011;
- eight rules from DOE, including five since 2011;
- six rules from DOL, including five since 2011;
- four rules from DOI;
- two rules from DOT, including one since 2010 and one since 2011; and
- two rules from HHS, both since 2011.

Four other departments and agencies (USDA, State, VA, and AID) each had one rule under review at OIRA for more than a year. Two rules (one from EPA and one from DOT) had been under review for 1,000 days or more. The rules under review for more than a year as of June 30, 2013, covered a variety of topics, and included (1) six DOE energy efficiency or conservation standards, (2) three DOL/OSHA rules on occupational exposure to silica, electrical protective equipment, and reporting occupational injuries and illnesses; (3) DOT rules on the transportation of lithium batteries and flight crewmember mentoring; and (4) EPA rules on metal mining reporting requirements, a "chemicals of concern" list, and clean water protection guidance.

Some observers assert that by delaying these and other rules, OIRA has also delayed the benefits that the rules were intended to provide.[101] In September 2013 testimony before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, OIRA administrator Howard Shelanski said that while ensuring the quality of analysis required in relevant executive orders is the first priority of OIRA review, "unnecessary delays in review are harmful to everyone: to those who are denied the benefits of regulation, to those wishing to comment on proposed rules and influence policy, and to those who must plan for any changes the regulations require of them."[102]

D. Recent Improvements in Timeliness of OIRA Reviews

There are clear indications that OIRA has reduced the backlog of lengthy reviews during calendar year 2013, and has improved the pace of its reviews. As **Table 5** and **Figure 5** below indicate, the number of ongoing OIRA reviews lasting more than 90 days dropped by nearly 40% between the first of the year and mid-September 2013, and the number of one-year reviews was cut nearly in half between March 2013 and mid-September. The number of reviews lasting more than six months dropped most precipitously, from 83 in January 2013 to 38 in mid-September (a nearly

[101] For example, at an FDA public meetings on September 19-20, 2013, Sandra Eskin, director of food safety at The Pew Charitable Trusts, noted several food safety rules that were required by the Food Safety Modernization Act in January 2011 had not been issued, and said the "longer it takes these rules to be put in place, the more people will needlessly be put at risk and the less confidence consumers will have in the safety of the food supply." One of the rules discussed at the public meetings was a proposed rule on the "Foreign Supplier Verification Program" (RIN: 0910-AG64), which had been under review at OIRA from November 28, 2011, until July 26, 2013. For more information on these FDA meetings, see http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm364950.htm. A copy of Ms. Eskin's testimony is available from the author.

[102] See http://judiciary.house.gov/hearings/113th/hear_09302013.html to view a copy of this testimony.

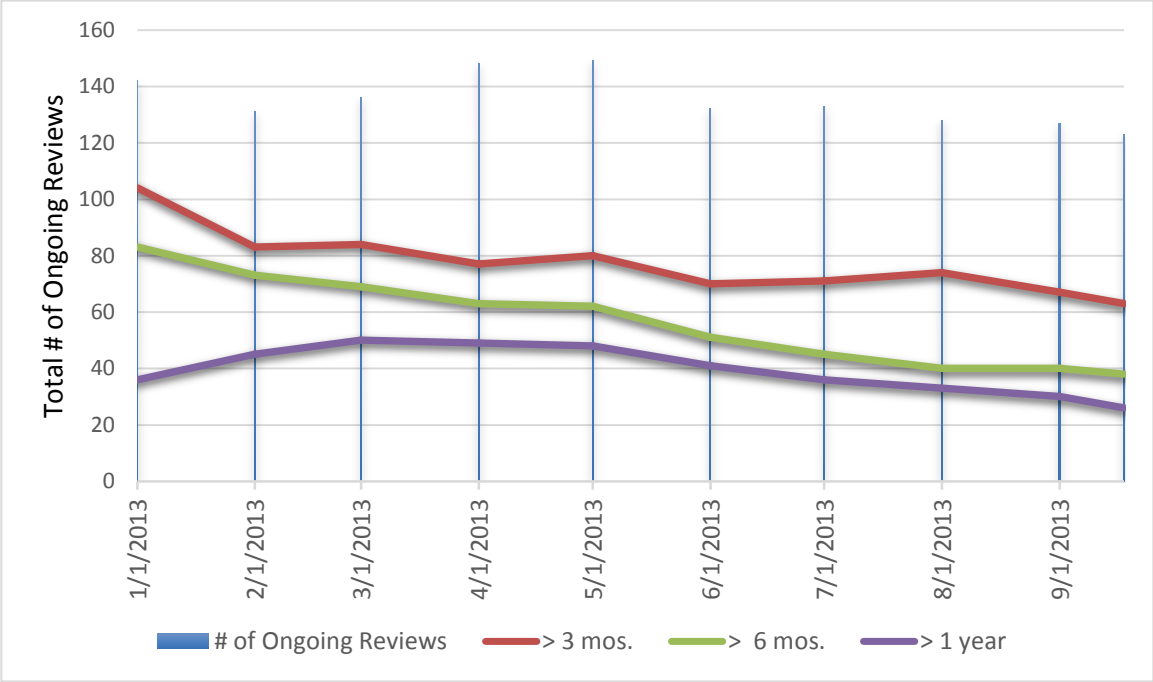
55% reduction). While these reductions in the number of lengthy ongoing reviews should be recognized and indicates a commitment at OIRA to reduce the backlog, the fact remains that as of September 18, 2013, 38 agency rules had been under review at OIRA for more than six months (more than 30% of the total number of ongoing reviews), and 26 of those rules had been under review for more than a year.

Table 5: Number of Lengthy Ongoing Reviews Has Declined in 2013

Date	Total Number of Ongoing Reviews	Number of Ongoing Reviews Lasting		
		More Than 90 Days	More than Six Months	More Than One Year
01/01/2013	142	104	83	36
02/01/2013	131	83	73	45
03/01/2013	136	84	69	50
04/01/2013	148	77	63	49
05/01/2013	149	80	62	48
06/01/2013	132	70	51	41
07/01/2013	133	71	45	36
08/01/2013	128	74	40	33
09/01/2013	127	67	40	30
09/18/2013	123	63	38	26

Source: OIRA database, available at www.reginfo.gov.

Figure 5: Number of Extended Ongoing Reviews Has Declined During 2013



Source: Regulatory Information Service Center.

Also, of the 38 rules that had been under review for more than a year as of June 30, 2013, OIRA had concluded review of 14 of the rules by September 18, 2013. (See **Appendix F** to identify these rules.) However, by making progress and closing these lengthy reviews, the average length of OIRA's completed reviews in 2013 increased from 140 days on June 30, 2013, to 147 days on September 18, 2013.

As noted earlier in this report, nearly 44% of the reviews completed during the first half of 2013 took more than 90 days, and nearly 30% took more than six months. However, many of those rules had been submitted to OIRA more than a year earlier, and OIRA's efforts to complete those reviews caused the percentage of lengthy completed reviews to increase. As **Table 6** below indicates, just looking at the review times for the 150 rules that were submitted between September 1, 2012, and February 28, 2013,[103] the review times are quite different. As of September 13, 2013, 32% of the reviews took more than 90 days, and 10% took more than six months. Although OIRA has clearly improved its performance (e.g., cutting reviews lasting more than six months from 30% to 10%), the review times for rules submitted during this period are still not as good as historic norms. From 1994 through 2011, an average of only 10.7% of the more than 11,000 completed reviews took more than 90 days, and only 1.6% of those reviews took more than six months.

Table 6: Percentage of Reviews Completed in More than Six Months Has Declined for Recent Submissions

Period	Percentage of Reviews Completed in	
	More than 90 days	More than Six Months
Reviews of rules submitted from 09/01/2012 through 02/28/2013 (150 reviews)	32.0%	10.6%
Reviews completed between 01/01/2013 and 06/30/2013 (212 reviews)	43.9%	29.7%
Average for reviews completed from 1994 through 2011 (11,327 reviews)	10.7%	1.6%

Source: OIRA database, available at www.reginfo.gov.

Note: Data for reviews submitted between September 1, 2012, and February 28, 2013, are as of September 13, 2013.

E. Actual Review Times May Be Longer Than Data Indicate

Although the data on OIRA review times discussed thus far are informative, they may not reflect the full amount of time that rules had been under review by OIRA. The data are from OIRA's public database and reflect the amount of time that the rules were under *formal review*. They do not include any time that the rules might have spent being reviewed *informally* by OIRA prior to

[103] This six-month time frame was selected to be as recent as possible while still allowing for the possibility of reviews lasting six months from the end date.

formal review. Interviews with senior agency employees for this report indicated that in recent years, many rules were informally reviewed by OIRA for weeks or months prior to formal submission. The interviews also indicated that at least some of the agencies have had to obtain permission from OIRA to submit their rules for formal review, and that some rules were not logged into the OIRA database as having been formally "received" until well after they were submitted by the agency. As a result, the actual amount of time that a number of recent rules were reviewed by OIRA is probably longer than the record amounts of time that are reflected in the public data.

As noted previously, this report draws on interviews with a limited number of senior agency employees that were speaking anonymously. The report does not seek to capture the extent to which their views are representative of the agencies for which they work, or the extent to which they reflect an agency's typical experience with OIRA. On the other hand, these senior employees were responsible for their departments and agencies' interactions with OIRA regarding all or a large range of their agencies' rules, and all of those departments and agencies experienced significant delays for many of their rules.

1. Informal Reviews

As GAO stated in its 2003 report on OIRA, although there was an increased emphasis during the first years of the George W. Bush Administration on adhering to the 90-day formal review period, "the formal review period itself may be somewhat of an artificial construct if OIRA and the agency had been substantively discussing the rule and/or exchanging drafts of the rule before formal submission."[104] GAO provided the following examples:

> On December 10, 2001, EPA formally submitted a draft rule to OIRA on proposed nonconformance penalties for heavy-duty diesel engines. OIRA's database indicates that it completed its review 10 days later on December 20, 2001. However, public documents indicate that EPA and OIRA met with outside parties in early October 2001 and mid-November 2001 to discuss the rule, and that EPA informally submitted a version of the draft rule and its economic analysis to OIRA in late October 2001—weeks before the 10-day formal review period began…. OIRA records indicate that the formal review period for an EPA Clean Water Act rule in which OIRA made significant changes was even shorter—1 day.[105]

As noted earlier in this report, informal reviews during previous administrations generally occurred when there was a statutory or legal deadline for a rule, or when a rule was extremely large and required discussion with other federal agencies and offices.

Most of the senior agency employees interviewed for this report indicated that OIRA had increased its use of informal reviews of rules in recent years. Employees in one agency said they must informally send OIRA a draft of *every* significant rule before formally submitting the rule for review. Other agency employees said OIRA does not informally review every rule from their agencies, but has done more informal reviews in recent years than in previous years. One agency employee said informal reviews used to ease the path for formal review, but said rules can now be under formal review at OIRA for hundreds of days even if they were previously reviewed informally. Because these informal reviews and other activities occur "off the clock," he said the information on review times available in OIRA's public database for some rules was misleading.

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[104] GAO-03-929, p. 47.

[105] Ibid.

For example, he said that when the database indicates that an economically significant rule was reviewed by OIRA in one or two days, it is a clear indication that the rule was reviewed informally before it was formally submitted. In confirmation of this point, several of the agency employees provided examples of significant or economically significant rules that OIRA's database indicated had been reviewed in less than two days, but that had informally reviewed by OIRA prior to formal submission – sometimes for weeks or months.

Sometimes, the senior agency employees indicated that informal review was required before OIRA would agree to accept a rule for formal review. One employee said that after informal OIRA reviews, the draft proposed rules often came back heavily edited. He said the desk officer would inform the agency that the delineated changes would need to be made before OIRA would allow the rule to be submitted for formal review. On other occasions, the agencies indicated that informal review had led to certain rules *not* being submitted to OIRA. For example, one employee said that after certain rules were reviewed informally, the OIRA desk officer told the agency that the rules would not be approved if submitted in their current form.

However, three senior agency employees said that OIRA did not informally review drafts of their agencies' rules before they were formally submitted to OIRA. One agency employee said informal reviews of her agency's rules were common during the George W. Bush Administration, but said her agency's leadership decided shortly after the start of the current administration not to agree to informal reviews because they were not transparent, resulted in misleading data regarding the length of time that rules were under review, and resulted in the agency not being able to document all of the changes that were made at OIRA's suggestion or recommendation.[106] Another agency employee said her agency stopped sending draft rules to OIRA prior to formal submission in early 2013 because the agency considered such informal reviews non-transparent. For example, if the review is done informally, she said the public never knows to ask questions about the changes made during such reviews. Although OIRA does not informally review their rules, all three agency employees said their agencies must obtain OIRA's permission to submit their rules for formal review.

During 2012 and 2013, OIRA completed review of several economically significant proposed and final rules on the same day that they were received,[107] and OIRA completed review of several other economically significant rules within two days of when they were received.[108] The agency employees said documentation of informal reviews was usually not included in the rulemaking dockets, so it is not possible to examine those dockets and verify that the informal reviews occurred or determine how long they lasted. However, OIRA documents its meetings with outside parties on rules,[109] and begins to do so when the agency begins informal review.[110]

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[106] After a rule has been published, Section 6(a)(3)(E) of EO 12866 requires agencies to disclose "those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." OIRA has interpreted this provision to require disclosure of only those changes suggested or recommended by OIRA during formal review. Some agencies also have statutory requirements to disclose changes made during OIRA review.

[107] Four such rules were reviewed by OIRA in the first half of 2013, three of which were submitted by the Centers for Medicare and Medicaid Services (CMS) within HHS: (1) the proposed rule on "Medicare Advantage (MA) and Prescription Drug Benefit Programs: Medical Loss Ratio Requirements (CMS-4173-P)," (received by OIRA and completed on February 14, 2013); (2) the proposed rule on "Prospective Payment System for Inpatient Rehabilitation Facilities for FY 2014 (CMS-1448-P)," (received and completed on April 30, 2013); and (3) the final rule on "Medicare Advantage (MA) and Prescription Drug Benefit Programs: Medical Loss Ratio Requirements (CMS-4173-F)" (received and completed on May 16, 2013). The other rule was a DOL interim final rule on "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program (received and completed on April 19, 2013).

[108] Two such rules reviewed by OIRA during the first half of 2013 were a CMS proposed rule on "Patient Status and Parts A and B Rebilling in Hospitals (CMS-1455-P) (received on March 12, 2013, and completed on March 13, 2013); and a CMS interim final rule on "Pre-Existing Condition Insurance Plan; High Risk Pool (CMS-9995-F)," (received on May 15, 2013 and completed on May 17, 2013).

[109] Section 6(b((4)(B) of EO 12866 requires that a representative from the agency issuing the rule be invited to any

Examination of OIRA's meeting records indicates that several economically significant rules with short formal review periods appear to have been under informal review before they were formally submitted to OIRA. For example:

- The OIRA database indicates that OIRA began formal review of a United States Coast Guard economically significant rule on "Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters" (RIN 1625-AA32) on February 24, 2012, and concluded its review the same day. However, the OIRA meeting log shows that OIRA met with outside parties regarding this rule on seven different dates between January 4, 2012, and February 8, 2012 – meetings that began more than seven weeks before the start of formal review.[111]
- The OIRA database indicates that OIRA began its review of a Centers for Medicare and Medicaid Services (CMS) economically significant rule on "Revisions to Payment Policies Under the Physician Fee Schedule and Part B for CY 2013 (CMS-1590-P) (RIN 0938-AR11) on July 2, 2012, and concluded its review within one week, on July 9, 2012. However, the OIRA meeting log shows that OIRA met with outside parties regarding this rule on June 21, 2012 – two weeks before the rule was formally submitted for review.[112]

Communication between OIRA and agencies prior to the submission of draft rules for review can clearly be beneficial. However, if OIRA is informally reviewing and commenting on complete drafts of rules for extended periods of time before the rules are formally submitted, then the formal review period becomes what GAO called an "artificial construct,"[113] and the data provided to the public on the length of the formal review period become misleading. Lengthy informal reviews of large numbers of rules are non-transparent and can distort agency and governmentwide statistics, understating how long rules are actually under review by OIRA.

Sally Katzen said that pre-submission consultation between OIRA and the agencies is very helpful in both drafting rules and in easing formal review, and that such consultations should continue. She said few complete drafts of rules were reviewed informally prior to formal submission during her tenure as OIRA administrator. If OIRA has recently done so as a matter of course for all or most draft regulatory actions, she said the OIRA review "clock" should probably start whenever OIRA receives a finished work product with sign-off from appropriate senior agency officials.

One former OIRA official said that informal review was relatively infrequent during the first few years of the Obama Administration, and that some agencies (without objection from OIRA) had firm policies against informal reviews. When an informal review did occur, he said it was usually agreed to by the agency because the agency was going to be unable to accommodate anything but the shortest formal OIRA review period, often because of statutory or judicial deadlines,

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meeting between OIRA personnel and persons not employed by the Executive Branch of the federal government regarding the substance of a regulatory action under OIRA review.

[110] See http://www.whitehouse.gov/omb/oira_meetings/ for the OIRA meeting log. OIRA began documenting these meetings during informal review in October 2001. (It had previously done so only during formal review periods.) OIRA considers a rule under informal review when OIRA has "started a substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft." For a copy of this disclosure policy, see http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b.

[111] In addition to the outside parties and representatives from OIRA, OMB, DHS, and the Coast Guard, the meetings also included representatives from the White House Council of Economic Advisors and the Council on Environmental Quality.

[112] In addition to the outside parties and the OMB and agency representatives, also at the meeting was a representative from the White House Domestic Policy Council.

[113] GAO-03-929, op. cit., p. 47.

significant remaining work at the agency on the rulemaking, or other policy imperatives. In these instances, he said informal reviews served as a valuable substitute for OIRA formal reviews.

2. Obtaining OIRA's Permission to Submit Rules

There have also been indications that during recent years, agencies have been required to receive permission from OIRA to submit rules to the office for review. For example, Lisa Heinzerling said in her 2013 article that it had been "widely reported that OIRA has lately been in the habit of not allowing agencies to send rules for review until OIRA has cleared them for review."[114]

In interviews for this report, several senior agency employees said that there had always been some type of pre-submission meeting with OIRA at a general level as to what rules or groups of rules their agencies would be submitting for review in the coming months, and a priority list was often developed. Then, they said, the agency would enter each rule into the OIRA data system whenever the agency believed it was ready to be submitted for review. Starting in 2012, however, these employees said they have had to meet with and/or brief the OIRA desk officer before submitting each significant rule for formal review (which were sometimes referred to by the agency employees interviewed for this report as "Mother-may-I" meetings), and have had to obtain OIRA's approval before submitting each rule.

One senior agency employee said that as part of the regulatory planning process, his agency develops deadlines for its significant rules (with 90 days worked in for OIRA review at both the proposed and final rule stages), showing (among other things) the date when the rules are scheduled to be submitted to OIRA. A week or two before that date, he said he calls the OIRA desk officer to set up a briefing on each rule, and to get permission to submit the rule. After the briefing, he said the desk officer then obtains permission from OIRA management to tell the agency that it can submit the rule.

Another senior agency employee characterized these pre-submission meetings as one of the most significant hold-ups in the agency's rule development process.[115] She said the meetings began in 2012, and the attendees included OIRA officials and/or staff above the desk officer. She also said that even if the agency is given approval to issue the rule during these meetings, the agency was still required to call the desk officer to get final approval just before submitting their rules – even for rules with statutory or judicial deadlines. She said some rules had been sitting in her office for more than a year that OIRA would not permit the agency to upload. Another agency employee said that after pre-submission briefings, her agency was not allowed to formally submit the related rules until all of OIRA's recommended changes were made. In one case, she said the agency was forced to wait for months before submitting the rule. Other agency employees described similar instances of not being able to submit certain rules for review.

Another agency employee said OIRA receives a pre-submission briefing on just about every rule the agency plans to issue, not just on the rules the agency considers significant under the executive order. She said the agency is required to prepare a brief summary of each rule and related issues, and OIRA then determines which rules require a draft to be submitted for informal review, and which ones can be submitted to OIRA for formal review. She said career employees in her office who had served in multiple presidential administrations told her that they had never

[114] Heinzerling, op. cit., pp. 27-28.

[115] These meetings are not, however, a factor in the length of OIRA's formal reviews, since any time spent in these meetings would occur before rules are formally submitted to OIRA.

previously had to receive OIRA approval before submitting every rule. On the other hand, one agency employee indicated this requirement has changed in recent months, and the agency now holds monthly meetings with OIRA and provides the office with a list of rules that it expects to be submitted within the following month, with the list rank ordered in terms of which rules are most important to be issued.

OIRA and rulemaking agencies clearly must work together to ensure that rules are developed, reviewed, and published in an orderly fashion. Also, as described in more detail later in this report, OIRA's capacity to review and comment on rules is not unlimited, and the office's authorized staffing levels in recent years have been well below the levels authorized between 2002 and 2005. Therefore, it is reasonable to expect that the agencies and OIRA would have periodic discussions about how many rules would be submitted for review, and when those submissions would occur. Section 4 of EO 12866 requires that all executive branch agencies "prepare an agenda of all regulations under development or review,"[116] and the semiannual *Unified Agenda of Federal Regulatory and Deregulatory Actions*[117] has been used to satisfy that and other planning requirements.[118] In advance of the publication of the *Unified Agenda*, OIRA sends a memorandum to the agencies regarding the content and timing of agency submissions.[119] OIRA also typically has other conversations with agencies about their rulemaking plans.

However, the pre-submission meetings and other actions that the senior agency employees described appear to be qualitatively different than simply conversations regarding the timing of rules submissions, and do not appear to have occurred (at least on the scale described by these officials) in previous administrations. The preamble to the executive order states that one its objectives is to "reaffirm the primacy of Federal agencies in the regulatory decision-making process," and says that the regulatory process shall be conducted "with due regard to the discretion that has been entrusted to Federal agencies." Furthermore, EO 12866 does not indicate that OIRA is authorized to prevent an agency from submitting a rule that both the agency and OIRA agree is significant. If OIRA is refusing to permit certain rules to be submitted for review, or is requiring that agencies make changes to their rules in order to receive OIRA's permission for them to be submitted, then the balance of power between the agencies and OIRA described in EO 12866 appears to have changed dramatically. At a minimum, such actions are not transparent, can make it difficult for agencies to plan the issuance of their proposed and final rules, and can result in an understatement of the actual length of OIRA's review process.

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[116] Although most of the requirements in the executive order do not apply to independent regulatory agencies, this section includes these agencies. Section 4 also requires other regulatory planning mechanisms, including (1) an annual meeting between the Vice President, agency heads, and other advisors to coordinate regulatory efforts; and (2) a regulatory plan prepared by each agency and submitted to OIRA and published in the Unified Agenda each October describing the most significant regulatory efforts that the agency expects to issue that year or later.

[117] The Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda) arguably provides federal agencies with the most systematic, government-wide method to alert the public about their upcoming rules. To view the current Unified Agenda, see http://www.reginfo.gov/public/do/eAgendaMain.

[118] The Regulatory Flexibility Act (5 U.S.C. § 602) requires that all agencies publish semiannual regulatory agendas in the Federal Register describing regulatory actions that they are developing that may have a significant economic impact on a substantial number of small entities. Section 4 of EO 12866 also requires other regulatory planning mechanisms, including (1) an annual meeting between the Vice President, agency heads, and other advisors to coordinate regulatory efforts; and (2) a regulatory plan prepared by each agency and submitted to OIRA and published in the Unified Agenda each October describing the most significant regulatory efforts that the agency expects to issue that year or later.

[119] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/spring-2013-agenda-data-call.pdf for a copy of the March 2013 memorandum.

3. Delay in OIRA Logging in Formal Submissions

There are also some indications that delays have occurred between the date that agencies formally submit certain rules to OIRA for review and the date those rules are logged into OIRA's data system as having been "received." While apparently not as widespread as informal reviews and pre-submission briefings, several of the senior agency employees interviewed for this report indicated that at least some of their rules had been delayed in this manner within the past year or two, with the length of the delay highly variable. For example, although one employee said it might take as much as a week for OIRA to officially "receive" a rule after it is sent, employees in another agency said the agency had sent one rule to OIRA more than a year ago and it still had not shown up in the OIRA data system. Another agency employee characterized the delays as "a lot more than a day or two," and several indicated that OIRA's public database did not accurately reflect the real amount of time that OIRA reviewed their agencies' rules. A senior agency employee at another agency said that some rules submitted to OIRA in 2012 did not show up in the OIRA data system as "received" for months after the rules were submitted. In previous years, he said, the lag between "submitted" and "received" was usually no more than a day or two.

There are also some indications that this problem may be getting better. One agency employee said delays in OIRA logging in rules were commonplace in early to mid-2012, but said they were less common now. Another employee said that although some rules from her agency had been logged in a week or more after they were sent, OIRA seemed to be getting better at logging them in quickly.

A few departments and agencies have established websites that show the dates that all or at least certain rules were sent to OIRA, and some also show the dates that they are received by OIRA. [120] For example, EPA's "DaRRT" tracking system indicates when certain "priority" rules are sent to OIRA, and when OIRA officially "receives" them. The system indicates that most EPA rules are logged into the OIRA system within a few days of being submitted, but some rules have taken longer. For example, the agency's "NPDES Electronic Reporting Rule" (2020-AA47) was sent to OIRA on December 22, 2011, but was not "received" by OIRA until nearly a month later, on January 20, 2012.[121] Another rule, EPA's "Water Quality Standards Regulatory Clarifications" (2040-AF16), was reportedly sent to OIRA on November 15, 2011, but not logged in as "received" until 15 days later, on November 30, 2011.[122]

One former OIRA official said that in his experience, delays in the "receipt" of rules by OIRA were most often the result of disagreements between the agencies and OIRA about whether their rulemaking packages were complete and contained all of the necessary components in a form that was ready for OIRA review. For example, he said packages might be missing required economic analyses or have incomplete regulatory or preamble text, and therefore would not be logged in as "received" until those elements were provided.

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[120] DOT has a website that shows the date rules are sent to OIRA (see http://www.dot.gov/regulations/report-on-significant-rulemakings), but to determine the date the rules are received, viewers must go to OIRA's database at www.reginfo.gov.

[121] See http://yosemite.epa.gov/opei/rulegate.nsf/(LookupRIN)/2020-AA47. The OIRA database also indicates that the rule was not received at OIRA until January 20, 2012.

[122] See http://yosemite.epa.gov/opei/rulegate.nsf/(LookupRIN)/2040-AF16.

V. Perspectives on Causes of Lengthy OIRA Reviews

The senior agency employees interviewed for this report were each initially asked what they believed caused the increase in formal OIRA review times during 2012 and 2013. Although their answers were somewhat different, all of the interviews reflected one or more of the following themes: (1) concerns by some in the EOP about the issuance of potentially costly or otherwise controversial rules during an election year, (2) concerns about lengthy data or analytical requests from OIRA desk officers and the management of those desk officers, (3) a broadened definition of what constitutes a "significant" regulatory action, (4) lengthy coordinative reviews by other agencies and offices within the EOP, (5) the absence of any review time limit when OIRA directs the agencies to request review extensions, (6) a reluctance by OIRA to use return letters, and (7) OIRA staffing issues. The following sections discuss these themes, and (in some sections) the views of two previous OIRA administrators interviewed for this report – Sally Katzen (OIRA administrator during most of the Clinton Administration, and one of the authors of EO 12866) and Susan Dudley (OIRA administrator at the end of the George W. Bush Administration). Although all of the issues raised by the agency employees were viewed as causing delays, some appear to be longstanding issues, and may be a function of the very different perspectives of the agencies and OIRA.

A. Concerns About Controversial Rules

Several of the senior agency employees indicated that OIRA reviews took longer in 2011 and 2012 because of concerns about the agencies issuing costly or controversial rules prior to the November 2012 election. The employees said their agencies were instructed that such rules were not to be issued unless deemed absolutely necessary (e.g., a judicial deadline) or if it could be shown they were not controversial (e.g., clear net benefits). They said those instructions were not in writing, but shortly after their agency's political leaders went to meetings with certain EOP officials, agency staff were told that all sensitive rules would have to be pre-approved by OIRA before being sent to OIRA for review. When any such rules were submitted to OIRA, they said the reviews were often delayed. Several of the agency employees were quick to point out that they did not believe these delays were OIRA's fault; OIRA appeared to be simply carrying out the instructions of those in other parts of the EOP.

Some of the senior agency employees also indicated that sensitivity to rulemaking issues often increased during election years, and that political leaders in the EOP have always had an influence on agency rulemaking. One employee said that during previous administrations, the deputy secretary would take the department's regulatory plan to meetings with OIRA and other EOP officials, and they would decide which rules would go forward and which ones were not worth the amount of political capital that would have to be expended. However, the employee said that political sensitivities about rulemaking reached new heights during 2012, and some rules that had been completely uncontroversial in the past were delayed for weeks at OIRA because one or more officials in other parts of the EOP were unfamiliar with the underlying issues.

Several of the agency employees indicated that OIRA and other parts of the EOP had much more influence over agencies than in previous years, and had essentially set the agenda for agency

actions without the involvement of the agency. For example, one agency employee said the agency's OIRA desk officer told him that OIRA had developed a list of priorities for the agency, but also said that he (the desk officer) was not allowed to share it with the agency.

In his 2013 article on OIRA, former administrator Cass Sunstein wrote that consideration of politics is "not a significant part of OIRA's own role," but said political issues "might be taken into account by other offices," such as the White House Office of Legislative Affairs and the White House Office of Intergovernmental Affairs. He also said the following:

> In addition, others in the White House — including the Office of the Chief of Staff — will be alert to a wide range of considerations, including the relationship between potential rulemakings and the President's overall priorities, goals, agenda, and schedule. It is important to emphasize that with respect to the Administration as a whole, the Office of the Chief of Staff has an important role insofar as it works to advise on and help coordinate executive branch activity with close reference to the President's own commitments. All executive offices, including OIRA, work under the President and are subject to his supervision, to the extent permitted by law. Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly.[123]

Sally Katzen said in *every* election year, regardless of the administration, there is "heightened sensitivity" as to which proposed and final rules will be issued, and a subtle or not-so-subtle message goes out to political leaders in the agencies not to issue rules that would create problems. That message may come from the President himself, or it may come from someone speaking on behalf of the President. She said that while previous administrations were able to get the rulemaking agencies to either not submit or withdraw problematic rules (sometimes with the threat of a return letter), the current administration does not appear to have done so. Because the agencies suspected they were unlikely to receive a return letter from OIRA, and because they may not want the blame or the legal liability for not issuing certain rules, some rules remained under review at OIRA for extended periods of time.

Susan Dudley said that if OIRA has to get approval from the White House or other EOP offices for more and more rules, the rules that are not considered priorities are waiting at those offices, and no one at OIRA has the authority to finish the review without their approval. The 1990 ABA report made somewhat the same point, saying that based on the first few months of the George H.W. Bush Administration:

> the difficulty in obtaining senior White House attention to rules is inherent in the structure of the Presidency. Regulatory issues must compete with other policy problems calling for Presidential action; they are not so critical as to command a specific allocation of staff and resources dedicated exclusively to their resolution. Particularly critical regulatory issues…will continue to obtain attention of top-level decisionmakers. But repeated efforts show that the White House staff will not have the time to devote to anything less than the most significant regulatory items.[124]

B. OIRA Desk Officers and Management

Many of the senior agency employees interviewed said that OIRA reviews have taken longer than usual during the last two years because the OIRA desk officers often made extensive requests for

[123] Sunstein, op. cit., pp. 1873-1874.

[124] ABA Section of Administrative Law, op. cit., p. 2.

additional information, analysis, and documents. For example, one agency employee said several of her agency's rules each took more than a year to clear OIRA review, even though the bulk of the review had been completed during the first 90 days. For the next nine months or more, she said the OIRA desk officer kept asking for more analysis of what she considered to be relatively minor issues, and for copies of publicly available documents (e.g., comments on the proposed rule, which were available to anyone at regulations.gov). Another employee said the agency's desk officer reviewed the public comments on a proposed rule, saw one comment, and then wanted to have a meeting to discuss how the agency should respond to that one comment—which the employee believed unnecessarily lengthened the review.

Other senior agency employees indicated there had been a significant increase in economic analysis requirements from OIRA desk officers that had substantially increased review times. One such employee said his agency had to prepare uncertainty analyses for rules that had never required them in the past, and had to monetize regulatory benefits to a level that had not been previously required – both of which required a tremendous amount of time and effort. Another agency employee said the desk officer sometimes required his agency to study issues that would not change anything in the rule, and to rewrite text in a final rule that had received no comments in the proposed rule. He said that even though both business and labor groups told OIRA that one rule that had been under review for more than a year should be issued, the desk officer just kept asking for more information, and raising issues that had been addressed in hearings and in public comments on the proposed rule.

Other senior agency employees indicated that the desk officers often delayed regulatory actions that they did not believe required additional scrutiny. For example, two such employees in one agency said that their desk officer told them in 2012 that a short, non-economically significant advanced notice of proposed rulemaking that was just asking preliminary questions of the public would not be released. They also said that one draft final rule had been under review at OIRA for more than a year, even though the rule simply responded to public comments on an interim final rule that had been in place for more than a year, and the final rule did not alter the original interim rule.

Other senior agency employees indicated that the kinds of questions the OIRA desk officers asked frequently appeared to be outside the scope of the rule under review. One such employee said it often seemed that the desk officer was just curious about some aspect of the general policy, even though the rule was not directed at that aspect, and said the agency had to spend significant amounts of time and resources to satisfy the desk officer's curiosity. She said that after reviewing the desk officer's comments on one recent rule, she thought the questions were interesting, but also concluded that the answers would have no impact on the rule being reviewed. An employee from another agency said it was common for the desk officer to ask questions that appeared to have little to do with the rule being reviewed, and said one rule had been under review at OIRA for more than a year because the desk officer wanted the agency to ask the public a number of questions about issues that happened to be of interest to him.

Many of the senior agency employees interviewed also said they did not believe OIRA management had done enough during the past two years to control the desk officers, and to give them strategic direction. One such employee said that the desk officers would continue to ask for more analysis until someone at a high enough level in OIRA finally told them to stop. He also said that it did not appear that anyone in OIRA management had established clear priorities regarding the rules that desk officers should focus on and the types of analyses they should require. An employee in another agency said that during the Clinton and George W. Bush Administrations, OIRA leadership and the desk officers appeared to take the 90-day review limit more seriously, and when one of the agency's rules got close to that limit, the desk officer often indicated that OIRA management was paying close attention. During 2012 and early 2013, he

said there were no such indications of concern by the desk officers about time limits. Another employee speculated that some of the perceived management problems might have been caused by turnover during 2012 of the administrator, associate administrator, deputy administrator, and some branch chiefs.

Agency complaints about OIRA desk officers and the management of the desk officers are long-standing issues, and many of these same kinds of concerns were expressed in the National Academy of Public Administration's 1987 report on regulatory review. For example, the report stated that "Virtually every agency official has complained that OMB attention is often focused on 'nit-picking,' on relatively minor provisions of proposed regulations, on choice of wording, and on other differences that do not seem to have much importance."[125] The report also quoted OIRA critics as saying that "agencies are forced to go to inordinate lengths to justify their plans and proposed rulemaking, and that the process requires an excessive investment of resources, primarily in staff time, at both the OMB and agency levels."[126] The 1987 NAPA report also stated that agency officials "complained that OMB does not have much of an internal process to check the zealousness of the young desk officers," and said one official complained that there was "a management problem at OMB – they don't pay enough attention to what is important versus not important; they try to look at everything but they can't do that with the resources they have."[127]

OIRA and rulemaking agencies come at the regulatory review process from very different perspectives. While agencies may view certain questions as excessive and overly intrusive, OIRA desk officers may view those same questions as necessary to determine whether a rule is consistent with the underlying statute, the principles in EO 12866, and the President's priorities. Also, what agency officials and employees may view as a lack of management and control of the desk officers may actually be OIRA management support for the desk officers' positions.

Also, OIRA has historically taken on the personality, management style, and priorities of the administrator. If the administrator makes timeliness a priority (as John Graham did in 2001), then the number of lengthy reviews is likely to go down. Conversely, if the message communicated to OIRA staff is that timeliness is not as important as other things (e.g., additional analysis), then review times may increase. Section 1(c) of EO 13563 requires agencies to "quantify anticipated present and future benefits and costs as accurately as possible." Therefore, some of the desk officers' requirements may have been done to implement that and other requirements in the executive order, or at the direction of OIRA management. More generally, if OIRA was instructed by political leaders in other parts of the EOP to ensure that potentially controversial rules are not released, then requirements by the desk officers that rulemaking agencies provide extensive amounts of data and analysis may simply have been the mechanisms by which those instructions were carried out.

Sally Katzen said that, based on her experience as OIRA administrator, rulemaking agencies and OIRA each bring important but very different perspectives and talents to the rulemaking process. The agencies have expertise concerning the programmatic areas covered by the rules, while OIRA considers the broader effects of the rules on the economy and the President's priorities. It often takes time and talent to bring the two sets of perspectives together. She said OIRA desk officers may request addition work by the agencies because the data or analysis supporting a regulatory proposal is insufficient, or because certain issues have not received sufficient attention. When that happens, it is understandable that the agencies may resist those suggestions. Agencies often focus on their statutory mandates, and by the time a draft rule is submitted to OIRA for review, the agency is usually invested in what it has produced. Delays in the review process may come

[125] NAPA report, op. cit., p. 38.

[126] Ibid., p. 37.

[127] Ibid., pp. 38-39.

from the agencies' efforts to resist OIRA suggestions for improvement—not just because of OIRA's actions.

A former OIRA official said he was highly skeptical that OIRA desk officers suddenly and dramatically changed their approach to reviews in recent years. Instead, he said, the desk officers were simply part of a regulatory and interagency review process that had become more cautious in 2012 for reasons emanating from the highest levels of the administration. He pointed out that the OIRA desk officers in 2012 were basically the same desk officers who had cleared rules in an average of 50 days during the first three years of the Obama Administration. He also said that while the general caution about rulemaking during 2012 may have manifested in more thorough reviews, many of the complaints by agency officials seem to be the same complaints about OIRA review that were made during the previous two decades when OIRA review also averaged about 50 days.

C. Definition of "Significant"

Several senior agency employees indicated that EO 12866 reviews have taken longer in recent years because OIRA has adopted an expanded definition of what constitutes a "significant regulatory action" under EO 12866, with desk officers asking to be briefed on and to review rules that previously had not previously been considered "significant." One such employee said it was now extremely difficult to have a rule declared non-significant, and another employee said the presumption seems to be that all rules are significant. She also said her agency is often required to prepare some type of economic analysis demonstrating that certain rules are not significant (and therefore do not have to be formally submitted to OIRA). She said she has been interacting with OIRA for more than 10 years, and this type of analysis had never been required until the last year or two.

A senior employee in another agency pointed out that under the executive order, OIRA has 10 working days to respond to the agency's determination that a regulatory action is not significant.[128] If OIRA does not respond within that period, the rule is not subject to review. In the past, he said the OIRA desk officers would generally accept the agency's determination regarding the significance of rules. As a courtesy, just before sending non-significant rules to the *Federal Register*, he said he would send the desk officer an e-mail, and the desk officer would summarily agree. However, within the past two years, he said the desk officer receiving the e-mail would often tell the agency not to publish the rule, and would have to check with others in OIRA and elsewhere before agreeing that the rule was not significant. For other rules, the agency would have to submit documents and have a conference call with the desk officer to reach agreement on the significance of the rule. As a result, he said both the agency and OIRA now spend a lot of time and effort doing things they did not do previously.

Another agency employee also said the broadened definition of a "significant regulatory action" has resulted in OIRA spending less time on the rules that traditionally would have been classified as "significant." An employee in another agency said that although OIRA had always used the "novel legal or policy issues" element in the executive order's definition of "significant" to review certain rules, OIRA has invoked that provision more frequently in recent years, and reviewed a number of regulatory actions that would not previously have been characterized as significant. Yet another senior employee said OIRA sometimes agreed that a draft proposed rule

[128] Section 6(a)(3)(A).

was not significant, but then wanted to revisit that determination when the draft final rule was being developed. She said revisiting significance determinations makes it difficult for the agency to plan the development of regulations, and sometimes results in the agency making changes to non-significant rules just to keep them out of OIRA's review process.

As noted earlier in this report, Section 3(f) of EO 12866 defines a "significant regulatory action" as one that is "likely to result in a rule that may" (among other things) "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency," or that may "raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." OIRA represents the President in the rulemaking process, and the agencies (although headed by presidential appointees and cognizant of presidential priorities) are likely to view the rule more from the vantage point of their statutory responsibilities. Because of their potentially differing perspectives, rulemaking agencies and OIRA may legitimately reach very different conclusions regarding whether a draft rule is "likely" to result in a rule that "may" create a "serious inconsistency" with another agency's draft or existing rule, or whether a draft rule may "raise novel legal or policy issues."

Also, Section 6(a)(3) of EO 12866 states that agencies are to provide OIRA with their initial determinations regarding which rules are significant, but OIRA is permitted to notify agencies that it has determined that it believes other rules meet the definition of "significant" in the executive order. It goes on to state that agencies are to provide to OIRA "those matters identified as, *or determined by the Administrator of OIRA to be*, a significant regulatory action." (Emphasis added.) Therefore, even if OIRA has been using an expanded definition of a "significant regulatory action," it appears that OIRA is permitted to make the final determination of such matters.

D. Reviews by Other Agencies or Offices

In his 2013 article on OIRA, former administrator Cass Sunstein said that what is often mischaracterized as "OIRA review" is actually an interagency process in which OIRA acts as an "information aggregator," and a "conveyer and a convener."[129] He said shortly after a rule is submitted to OIRA, the desk officer generally circulates the rule to "a wide range of offices and departments, both within the Executive Office of the President and outside of it." [130] Sunstein said the list of agencies consulted depends on the nature of the rule, and noted that "the White House itself is emphatically a 'they,' not an 'it.'" Within the EOP, he said frequent recipients of regulatory actions include: the Council of Economic Advisers, the Council on Environmental Quality, the Domestic Policy Council, the National Economic Council, the National Security Council, the Office of Legislative Affairs, the Office of Management and Budget, the Office of Science and Technology Policy, the Office of the Vice President, the United States Trade Representative, and the White House Counsel.[131] Sunstein also said that "when the review process is lengthy or complicated, it is often because of continuing discussions by participants" in the interagency review process.[132]

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[129] Sunstein, op. cit., pp. 1840-1841.

[130] Ibid., p. 1854.

[131] Ibid., pp. 1854-1855.

[132] Ibid., p. 1844. See also p. 1842.

Several senior agency employees interviewed for this report indicated that OIRA reviews had gotten longer in recent years because of an increase in the number of agencies and organizations that are involved in the interagency review process. One senior employee indicated that because so many people want to have a say in the development of his agency's rules, rules can get stuck at any point, and no one is willing to give up influence to streamline the process. As a result, he said the OIRA review process is slower because the desk officers must get approval from each agency and organization before OIRA releases the rule.

Two senior employees in another agency said that in the past, OIRA primarily checked with the OMB budget officer for the agency, and there was relatively limited interagency review and coordination. Now, they said, the desk officer sends the rule to anyone who might have an interest, waits for comments (usually a week or two weeks), and then sends it to anyone else in the EOP who might have an interest. The employees said that anyone in the review process appears to have veto power over the rules. Another agency employee said that desk officers sometimes do not send the agency's draft rules out for comment until weeks after they are submitted to OIRA.

Another agency employee said that the length of interagency reviews is sometimes driven by extensive coordination with the White House or other parts of the EOP, and is sometimes driven by the reviews from other rulemaking agencies. She also said some rules involve setting highly technical standards that do not lend themselves to meaningful interagency reviews because most of the experts on that subject work within the agency that developed the rule. Even though interagency reviews of such rules are unlikely to result in any substantive changes, OIRA still sends them out to multiple agencies.

A senior employee in another agency said that when delays are caused by interagency reviews, it is almost always because of reviews within the EOP. He said drafts of rules are sent to other cabinet departments and other agencies, and they usually provide their comments quickly. When there are conference calls to discuss issues arising from the interagency reviews, he said it is almost always just parts of the EOP on the line, not other rulemaking agencies.

Delays in OIRA reviews caused by the interagency coordination process are not a new development. Susan Dudley said that most of the eight reviews in 2008 that took more than a year were because of concerns expressed during interagency reviews – which she nevertheless described as a legitimate and important part of OIRA's role, and which can improve the quality of regulations. She also said that when she became OIRA administrator, even though she had worked in OIRA previously, it was an "eye-opener" to see how the West Wing works, and the number of people who were interested in the issues addressed by draft regulations. She said the political appointees in the White House realize that regulations are an important policy tool, and they all want to be involved. By the time the OIRA administrator gets confirmed in an administration (which is usually one of the last positions to be confirmed), she said the White House offices are somewhat used to playing a decisional role in regulations, and it can be difficult for the OIRA administrator to take control. Also, as noted earlier in this report, unless a rule is considered a priority, Dudley said it may be delayed at the White House or other parts of the EOP until OIRA is given the authority to proceed with the rule. Nevertheless, the interviews indicate that these delays from interagency reviews have become much more significant in recent years.

Sally Katzen said that, in her experience, agencies only grudgingly accept the concept of inter-agency review and see little value in it unless and until another agency proposes something that affects its own jurisdiction. She noted that the issues affecting the nation are rarely the responsibility of only one agency, and OIRA plays a much-needed role in identifying and reconciling potential conflicts. To the extent that other offices within the EOP have played a

larger role in interagency review during the current administration, she described that as the President's choice as the elected head of the Executive Branch.

A former OIRA official cautioned that it is important not to confuse longer OIRA review times due to a fundamental change in the interagency review process (which he does not think occurred) with a high level of caution about rulemaking during 2012 that was translating through the same interagency review process that has been used successfully for two decades. He said it was not his experience during this administration that interagency participants (including White House and other EOP offices) were more or less active than they were during prior administrations. He also pointed out that the interagency review is the most fundamental, value-added, and inclusive aspect of the executive order process, and does more to yield sound regulatory decisions than any other part of the process.

E. Extensions and Deadlines

As noted earlier in this report, OIRA interprets the extension provision in Section 6(b)(2)(C) of EO 12866 to mean that agency-initiated requests can be of an unlimited duration. Most of the senior agency employees interviewed for this report were aware of OIRA's interpretation, but generally disagreed. One employee said he read the provision to be that both OIRA and the agency had to request the extension, and that the total review period should be limited to 120 days. He said his agency sometimes limits its requested extensions to 30 days, but does so knowing that OIRA views the agency-requested extensions as unlimited. The agency employees also indicated that virtually all agency requests for extensions of review were actually made because OIRA suggested that they do so.

Several of the agency employees also indicated that within the past year, OIRA has sometimes not suggested that agencies request an extension, and has simply kept certain rules beyond the 90-day deadline in the executive order. They also said that many of the rules with the notation "Review Extended" in OIRA's public data system were not the subject of an extension request from either the agency or OIRA. A senior employee in one agency said he once notified the OIRA desk officer that the 90-day review limit was approaching, and the desk officer indicated that the deadline was not important. Another employee said that although OIRA interprets the executive order's extension provision differently than most of the agencies, no agency is going to publish a rule before review is completed, and the order's time limits are not legally enforceable.

As also noted earlier in this report, former OIRA administrator Sally Katzen said the extension provision in the executive order should be read as allowing agency-requested review extensions to be of unlimited duration. However, she also said that OIRA should not take advantage of this period, and desk officers should make such extended reviews a top priority. She noted that during her tenure at OIRA, some agencies attempted to "play games" with the 90-day review period, waiting until just before the end of the period to respond to OIRA comments, thereby putting the pressure on OIRA to clear the rules. Katzen said that there may need to be a reconsideration of the way the 90-day clock operates, perhaps with the clock stopping when OIRA was waiting for the agency to respond to comments.

One former OIRA official noted that, in the normal order, extensions can be critical because they reflect a widespread consensus among senior agency and White House officials that significant issues remain to be resolved in the rulemaking. In many cases, the issuing agency itself acknowledges that more work needs to be done, and views the extension as appropriate. In other cases, the agency often views an extension as preferable to the alternative of withdrawal or a

return letter. He added that the issuing agency is headed by a Cabinet official who can press their case with the President and senior officials at OIRA or the White House.

One agency employee admitted that in the past, particularly when there was a statutory or judicial deadline, his agency would try and "jam" OIRA by intentionally responding to OIRA comments late in the 90-day review process. However, he also indicated that this was not an effective long-term strategy, as doing so would poison the agency's working relationship with OIRA. And now, he said, with OIRA ignoring the 90-day review period entirely, such tactics would not work at all. He also said the problem with having the review clock stop when OIRA sends its comments to the agency is a logistical one, keeping track of when OIRA's part of the review stops and the agency's part begins. Also, for rules with statutory or judicial deadlines, he said stopping and starting the "clock" is irrelevant because the court will not care whose fault it is, and the rulemaking agency responsible for the statutory or judicial deadline will get the blame.

Given the somewhat ambiguous wording of the extension provision in Section 6(b)(2)(C) of EO 12866, reasonable people can disagree as to whether agency-requested extensions of OIRA's review can be of an unlimited length. Although OIRA has always interpreted the provision to mean that agency-requested extensions are not limited, OIRA has not previously held on to substantial numbers of rules for hundreds of days. It seems clear that for reviews to go beyond 90 days, either OIRA or the rulemaking agencies must request an extension. Holding on to rules for hundreds of days without an extension (as several agencies indicated OIRA has done during the past year) appear to be violations of the executive order's requirements. On the other hand, EO 12866 does not establish any penalty for such violations, and the executive order's review time limits are not enforceable through the courts.

F. Withdrawals and Returns

Several senior agency employees said that OIRA not only suggests that agencies request extensions of reviews, but sometimes also suggests that they withdraw rules from review. They pointed out that unlike returns (which the executive order requires be accompanied by a written explanation, which OIRA posts on its website), withdrawals can be done without disclosing the reason. Withdrawals may also be a way for OIRA to manage its workload. One agency employee said that during pre-submission meetings with the agency, OIRA would sometimes offer to allow the agency to submit a rule if it would agree to withdraw one.

One employee said OIRA had suggested that his agency withdraw two rules (both of which had been at OIRA for more than a year), but his agency has so far refused to do so. He said one rule was not withdrawn because of concerns about how certain interest groups who favor the rule would react, and OIRA ultimately agreed to hold on to the rule for the agency. He said the other rule was developed after an emergency, and was related to a group of other rules that were still being developed. OIRA said it would not clear the rule under review until it could determine whether other rules in the "suite" were consistent. He said the agency would not withdraw the rule because of concerns that it might not be accepted again by OIRA, so the rule continues to be shown as under review at OIRA.

Though there has historically been a stigma associated with an agency's receiving a return letter, many of the senior agency employees indicated that they would prefer a return letter to the significant delays in the review process that they have experienced of late. One agency employee

said his agency's general counsel once asked him why OIRA did not just return rules to the agency that had been under review for hundreds of days, noting that a return letter could be used to counter the views of some that OIRA is not actively reviewing agencies' rules. Another agency employee pointed out that there is no penalty in the executive order if OIRA does not waive review or issue a return letter after 90 or 120 days, and said he believed that OIRA should either approve the rule or return it to the agency. An employee in another agency said he would welcome a return letter from OIRA telling the public on the record why the issuance of the rule has been delayed.

Susan Dudley said that in her experience, withdrawals are not as simple as OIRA telling the agency to request a withdrawal. If a review goes beyond 90 days, she said OIRA sometimes will draft a return letter spelling out the reasons the rule fails to meet the executive order's requirements, show it to the agency, and because the agency does not want the public to know of its perceived failings, most of the time the agency will voluntarily withdraw a rule. She said when she was OIRA administrator, she "drafted more return letters than were sent," and agencies often withdrew their rules. She also said one of the reasons that the review periods have been as long as they have been recently may be that "there is no credible threat of a return letter," so agencies have no incentive to withdraw their rules. She said it is in the agency's interest to leave rules at OIRA, because if the media or stakeholders call and ask where a particular rule is, the agency can simply point out that the rule is under review at OIRA. She said she considers a return letter a "model of transparency."

Sally Katzen said that during her tenure as OIRA administrator, she considered return letters to be "pernicious and a public slap" at the agencies, to be avoided whenever possible. However, she also said that greater use of return letters that clearly state OIRA's concerns may be a better alternative than the current situation in which rules just sit at OIRA for hundreds of days.[133] Ideally, she said, the agencies and OIRA should have honest conversations and negotiations about the content of their rules, and avoid both return letters *and* extended reviews.

G. OIRA Staffing Issues

Several senior agency employees indicated that OIRA reviews might have taken longer than usual in recent years because OIRA staffing levels had been reduced within the past few years, and as a result, OIRA was less able to turn around rules quickly. One such employee said that OIRA staff are diligent people, and they have to work extremely hard to keep up with all of the requirements placed on them by statute and executive order, and by the White House demands. An employee in another agency said he understood OIRA staff was at an all-time low, and he believed the number of desk officers should be doubled to match the current workload. Such an increase, he said, could pay huge dividends in improving regulatory review.

Some of the agency employees also indicated that there had also been a decline in the number of experienced OIRA staff. They said that many of the OIRA staff who had served in previous administrations and who had extensive experience reviewing agency rules had retired, been promoted, or otherwise moved on in the last few years, and the staff who have replaced them at

[133] Similarly, in an interview with the Bureau of National Affairs, Ms. Katzen noted that some recent regulations had been withdrawn from OIRA, which she said "is preferable to using OIRA as a parking lot." Cheryl Bolen, "OIRA Backlog of Lengthy Rule Reviews Reduced by 50 Percent Since January," *BNA Daily Report for Executives*, October 1, 2013, p. AA-1.

OIRA have less experience with the program, the industry, or the history of regulation in the areas at issue.

Several agency employees expressed the opinion that OIRA's staffing difficulty is at least partially a result of an increased workload caused by classifying more rules as "significant regulatory actions," increasing the use of pre-submission reviews, and issuing lengthy requests for more information and analysis. They indicated that if OIRA would reduce these kinds of actions, the staffing difficulties could also be reduced.

OIRA does not have a specific line item in the federal budget, so its funding and staffing is part of OMB's appropriation. OIRA's staffing authorization levels are delineated in the annual congressional budget submissions submitted for the EOP as a whole. When OIRA was created in 1981, the office had a full-time equivalent (FTE) authorization of 90 staff members.[134] By 1992 (the last full year under EO 12291), the number of FTEs allocated to OIRA had declined to 60, and by 1997 (after EO 12866 was implemented, and OIRA reviews were limited to "significant" rules), OIRA's staffing authorization fell to 47 FTEs.[135] OIRA noted in its December 2002 report on the costs and benefits of regulations that the decline in OIRA staffing during this period was more pronounced than the decline in OMB as a whole, and occurred at a time when OIRA was given several new statutory responsibilities (e.g., concerning unfunded mandates, small business, regulatory accounting, and information policy) and when regulatory agencies' staffing and budgetary levels were increasing.[136] OIRA staffing authorizations began to increase in 2001, and by 2002 stood at 55 FTEs. Some observers at the time believed that OIRA's staffing should be increased even further, arguing that a relatively small amount of additional resources for OIRA could yield substantial benefits.[137]

As shown in **Table 7** below, OIRA's staffing authorization has fluctuated somewhat in recent years, and other than in FY2010, has not been above 46 FTE positions since 2006. From 2001 through 2010, OIRA's staffing authorization has been between 9.3% and 11.3% of the staffing authorizations for OMB as a whole. Since 2010, however, OIRA staffing has often fallen somewhat below those levels. The OIRA staffing estimate for FY2014 is 44 FTE positions – 8.7% of the estimated staffing level for OMB as a whole in that year (506 FTE positions).

Table 7: OMB and OIRA FTE Staffing Authorizations: FY 2001 through FY2014

Fiscal Year	FTE Staffing Authorization		OIRA Staffing as Percentage of OMB Staffing
	OMB	OIRA	
2001	502	49	9.8%
2002	512	55	10.7%
2003	491	55	11.2%
2004	497	56	11.3%
2005	484	54	11.2%

[134] Not all OIRA staff are involved in regulatory reviews. Some are administrative staff, and some are involved in the office's information technology and statistical policy activities.

[135] GAO-03-929, op. cit., p. 60.

[136] See http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf, p. 30.

[137] See, for example, Robert W. Hahn and Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, AEI-Brookings Joint Center for Regulatory Studies, Policy Matter 03-33, October 2003.

2006	466	50	10.7%
2007	475	46	9.7%
2008	475	46	9.7%
2009	497	46	9.3%
2010	532	50	9.4%
2011	513	46	9.0%
2012	507	46	9.1%
2013	495	44	8.9%
2014	506	44	8.7%

Source: EOP congressional budget submissions for FY 2011 through FY 2014 are available at http://www.whitehouse.gov/administration/eop. Other years available from the author.

Note: Data for FY2001 through FY2012 are actual. Data for FY2013 are for the continuing resolution. Data for FY2014 are estimated.

The above data are FTE staffing authorizations; the actual number of staff on board at OIRA may be less than these authorized levels. In his 2013 article on OIRA, former administrator Cass Sunstein said "It would be possible to wonder whether OIRA has sufficient personnel for its many functions, and the staff does work extremely hard." [138] Testifying at a House Small Business Committee hearing on July 24, 2013, OIRA administrator Shelanski said "All of OIRA and OMB is at bare-bones level of staffing because we're not filling vacancies." [139] He also said the office had lost some capacity because of furloughs brought about by sequestration. During testimony before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, former OIRA administrator Sally Katzen said OIRA staff were each furloughed eight days during the summer of 2013.[140]

VI. Conclusions and Recommendations

For more than 30 years, OIRA has played a central role in the federal rulemaking process for most agencies, and it clearly can have a major influence on the rules that it reviews. OIRA is located within the Executive Office of the President and is the President's direct representative in the rulemaking process. The office is uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on significant rules just before they are published in the *Federal Register*) to enable it to exert maximum influence. Therefore, it is extremely important that OIRA's role in the rulemaking process be carried out in as effective and efficient manner as possible.

The preamble to EO 12866 describes the objectives of the executive order as follows:

[138] Sunstein, op. cit., footnote 26.

[139] Charles S. Clark, "Sequestration, Furloughs Slow Down Review of Federal Regs," *Government Executive*, July 25, 2013, available at http://www.govexec.com/oversight/2013/07/sequestration-furloughs-slow-down-review-federal-regs/67436/.

[140] See http://judiciary.house.gov/hearings/113th/hear_09302013.html to view this hearing.

> to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.

However, the data on OIRA review times and the interviews with senior agency employees paint a picture of a review process between 2011 and 2013 that strayed from what was envisioned when EO 12866 was issued in 1993. For example, during the first six months of 2013:

- The average length of completed OIRA reviews (140 days) was nearly three times the average from 1994 through 2011 (50 days) (which also indicated that OIRA was finally closing some extraordinarily lengthy reviews).
- The number of agencies with average review times exceeding 90 days (17 agencies) was more than eight times higher than in 2011 (two agencies).
- The number of completed reviews lasting more than one year (27) was nearly 18 times the average of the previous 19 years (1.5 per year). The average length of those 27 reviews was 483 days.
- The percentage of completed reviews lasting more than six months (29.7%) was more than 18 times greater than the average for the period from 1994 through 2011 (1.6%).
- As of June 30, 2013, reviews of 38 rules had been ongoing at OIRA for more than a year, and six had been under review for more than two years.

Allowing OIRA reviews to go on for hundreds of days or even multiple years does not "enhance planning and coordination," or "restore the integrity and legitimacy of regulatory review." If, as the agency employees indicated, OIRA is requiring agencies to obtain OIRA's permission to submit rules for review and ignoring the deadlines in the executive order, those actions do not "reaffirm the primacy of Federal agencies in the regulatory decision-making process." If OIRA is conducting informal reviews of draft rules "off the clock" for weeks or months prior to the formal reviews depicted in OIRA's public database, that does not "make the process more accessible or open to the public."[141]

Some of the perspectives offered by agency employees regarding what they believe to be the causes of the lengthy OIRA reviews during the past two years seem to be perennial issues of concern. More than 25 years ago (as documented by the National Academy of Public Administration in its 1987 report on OIRA), agency officials complained about "'nit-picking' on relatively minor issues" by OIRA desk officers, and on a "management problem" in that OIRA was not focusing on the most important issues. Also, some elements of the definition of a "significant regulatory action" are subject to interpretation, and OIRA may understandably view certain rules as meeting the definition that agencies do not. Ultimately, it appears that the executive order permits OIRA to make the final determination as to the significance of agency regulatory actions.

Furthermore, if the lengthy reviews in recent years were a consequence of concerns about controversial rules prior to the November 2012 election, OIRA desk officers may have just been carrying out instructions from OIRA management or other officials in the EOP (as several senior agency employees believed to be the case). OIRA represents the President's interests in the rulemaking process as conveyed by the political leadership of the White House and other parts of the EOP. As Cass Sunstein wrote in his article on OIRA, the Office of the Chief of Staff and others in the White House are alert to the implications that draft rules may have on the President's

[141] Quotes are from the preamble to EO 12866.

priorities, and OIRA "will of course be made aware of their views and act accordingly."[142] However, as Sunstein also pointed out, EO 12866 makes it clear that OIRA may act only "to the extent permitted by law." Therefore, while it may be appropriate for OIRA desk officers to extend the length of reviews in response to direction from political leaders within the EOP, such actions cannot be done contrary to other legal requirements (e.g., statutory deadlines requiring the issuance of rules by a certain date).[143] Ideally, any such extensions of OIRA review would be done in as transparent a manner as possible.

A. Is A Strict Review Limit the Answer?

In the wake of the unprecedented length of OIRA reviews in recent years, and to prevent a reoccurrence of such delays in the future, the temptation is to simply recommend that strict deadlines be established governing the length of OIRA reviews – just as the ABA Section of Administrative Law and Regulatory Practice did in 1990, when the average review times were substantially less than they are now. The time limits on OIRA's review in EO 12866 were put there for a reason – because OIRA had been previously accused of "sitting on" agencies rules for extended periods of time. OMB stated in its first report on the implementation of EO 12866 that the review deadlines were established "to eliminate unwarranted delays in the regulatory review process."[144] However, the senior agency employees interviewed for this report indicated that OIRA has suggested that the agencies request unlimited reviews, or has ignored those time limits altogether – actions that do not seem consistent with the reason the time limits were established. As a result, dozens of OIRA reviews have gone on for hundreds of days.

To correct this situation and establish clear limits on length of OIRA reviews, the President could amend the extension provision in EO 12866 and specifically state that neither OIRA nor agency-requested extensions can exceed 30 days. Or, OIRA could simply revise its "Frequently Asked Questions" page and change its official interpretation of the extension provision. Either approach could end the currently conflicting interpretations of the extension provision, eliminate the surreptitious process of OIRA "suggesting" agency requests for extensions, and establish an agreed-upon length of OIRA reviews – 90 days, with a one-time extension of up to 30 days.

However, a strict limit on the length of OIRA reviews may not always be advisable, and may not be necessary to solve the problem of lengthy reviews during the past two years. The data in **Table 4** of this report illustrate that in most of the years between 1994 and 2010, between 20 and 70 reviews (about 3% to 10% of the total each year) took longer than 90 days, and some of those reviews required more than the 120 days. Some of the significant rules that agencies submit to OIRA each year are extremely complex, and may understandably require more than 120 days for OIRA and the agencies to reach agreement on certain issues. Therefore, one could argue that an inflexible "hard cap" on the length of OIRA reviews may not be in the best interest of either the agencies or OIRA (since the rule would likely just be returned to the agency or withdrawn and resubmitted shortly thereafter, starting a new review "clock" at zero). A hard cap could also make it more likely that OIRA would refuse to accept a rule for review until it was sure that the

[142] Cass Sunstein, "Myths and Realities," op. cit., pp. 1873-1874.

[143] Although a number of the lengthy reviews discussed in this report involved rules with statutory or judicial deadlines, there are no clear indications that OIRA reviews caused the submitting agency to miss the deadlines.

[144] See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

review could be completed within the time allotted, and could also result in regulatory reviews being done in other parts of the EOP that are less transparent than OIRA.

Also, for nearly 20 years, OIRA has interpreted EO 12866 as allowing unlimited agency-requested extensions, but it was only during the last few years that the length of OIRA reviews has greatly exceeded historic norms. For example, as **Table 4** earlier in this report shows:

- From 1994 through 2010, an average of about 8 reviews per year (about 1.6% of all completed reviews) took more than six months. However, in 2012 there were 43 such reviews, and in just the first half of 2013 there were 63 completed reviews lasting more than six months (nearly 30% of the reviews during the period).
- From 1994 through 2012, an average of about 1.5 reviews per year took more than one year to complete. However, during just the first half of 2013 there were 27 such completed reviews, and as of June 30, 2013, another 32 reviews of one year or more were still awaiting completion at OIRA.

In some years (including as recently as 2009) there were no OIRA reviews that took more than six months. In 12 of the 17 years between 1994 and 2010 (including 2010) there were fewer than 10 six-month reviews. In any of those years, OIRA could have gotten the agencies to request dozens of unlimited extensions, but OIRA did not do so. Therefore, it does not seem that OIRA's interpretation of the executive order's extension provision, by itself, is the cause of the numerous lengthy reviews that have occurred recently.

B. Making Timeliness A Priority

Instead, it appears that OIRA can constrain the length of its reviews if and when OIRA leadership makes timeliness a priority. For example, in 2000 there were 159 reviews that lasted more than 90 days, including 26 that lasted more than six months. In 2001, there were 149 reviews that lasted more than 90 days, including 29 that lasted more than six months. After John Graham became OIRA administrator in July 2001, he made reducing the number of lengthy reviews a priority, and instructed his staff that no rule would stay at OIRA for more than 90 days without his personal authorization, and said both rulemaking agencies and the public "deserve a rigorous yet prompt review from OMB." [145] Also, OIRA said that it regarded the 90-day review limit as "a performance indicator for a strong regulatory gatekeeper."[146] As a result of this initiative, the number of OIRA reviews that exceeded 90 days fell by more than 90%, from 149 in 2001 to nine in 2002. None of the 2002 reviews lasted more than six months. The next year (2003), only 10 OIRA reviews took more than 90 days, and only one of those reviews took more than six months. Administrator Graham's initiative clearly made a difference.

OIRA appears to have recently undertaken a similar initiative and has taken steps to improve the timeliness of its regulatory reviews. During his confirmation hearing in June 2013, current OIRA administrator Howard Shelanski said that speeding up the review process would be "one of my highest priorities."[147] In testimony before the House Judiciary Committee's Subcommittee on

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[145] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," Remarks prepared for the American Hospital Association, July 17, 2002, available at http://georgewbush-whitehouse.archives.gov/omb/inforeg/graham_ama071702.html.

[146] Office of Management and Budget, *Stimulating Smarter Regulation*, p. 19, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2002_report_to_congress.pdf.

[147] Sean Reilly, "Nominee Promises Speedier Regulation Review," *Federal Times*, June 12, 2013, available at http://www.federaltimes.com/article/20130612/DEPARTMENTS06/306120013/Nominee-promises-speedier-regulation-review. To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-

Regulatory Reform, Commercial and Antitrust Law in September 2013, administrator Shelanski described unnecessary delays in review as "harmful to everyone," and noted the progress that had been made to reduce the number of ongoing lengthy reviews even before he took office.[148]

OIRA's efforts have already had an effect. For example, the number of ongoing reviews lasting more than one year was cut from 50 reviews in January 2013 to 27 reviews in mid-September 2013. Of the 38 reviews that, as of June 30, 2013, had been under review for more than a year, 14 of the reviews had been completed by mid-September. Only 10% of the reviews of rules submitted between September 2012 and February 2013 took more than six months to complete, compared to nearly 30% for reviews completed during the first six months of 2013 (regardless of when they were submitted). However, OIRA still appears to have work to do in order to return the timeliness of its reviews to historical norms. From 1994 through 2011, an average of only 1.6% of all reviews took more than six months.

Although it is unlikely that every OIRA review will be completed within 90 days or even 120 days, a realistic goal would be to return OIRA review times to at least their historic averages (measured in terms of both average review times, and the number of reviews lasting more than 90 days). OIRA should publicly announce this initiative, and the specific steps it intends to take to improve the timeliness of its reviews. It may be understandably difficult for OIRA to do so in the short term, however, as clearing out the existing backlog of reviews is likely to take considerable amounts of time and effort. After a sufficient period of time (e.g., one year), and periodically thereafter, OIRA should report to the public on the results of this initiative (e.g., on its website, or in its annual reports to Congress).

The timeliness improvement initiative could take any number of forms (e.g., making review timeliness a performance indicator for OIRA as a whole, or by making timeliness an indicator of individual desk officer performance). As part of this initiative, the new OIRA administrator could take certain steps that one or more of his predecessors have taken to improve timeliness (e.g., require his personal approval for any review to go beyond 90 or 120 days, have OIRA management track all rules under review for more than 60 days, and/or require desk officers to make extended reviews their top priority once agencies have responded to OIRA suggestions). Submitting and reviewing agencies also have a role to play in improving review timeliness, and can take steps on their own or in concert with OIRA to ensure that reviews are done as quickly as possible. (See the recommendations to these agencies later in this report.) The OIRA administrator may want to set goals for these agencies as part of the timeliness initiative.

Recommendation 1: The OIRA administrator should continue the current initiative to improve OIRA review times, and announce specific steps the office plans to take to ensure that the measures of timeliness return to at least historic averages. After one year, and periodically thereafter, OIRA should report to the public on the results of this initiative.

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howard-a-shelanski.

[148] See http://judiciary.house.gov/hearings/113th/09302013/Shelanski%20testimony.pdf to view a copy of this testimony.

C. Return Letters and Review Letters

When agency employees were asked what they believed would prevent a recurrence of the large number of lengthy OIRA reviews their agencies have experienced in recent years, several suggested that OIRA simply adhere to the requirements stated in EO 12866. Specifically, they said that if OIRA cannot complete its review of an agency rule within certain time limits (e.g., 90 days or 120 days), OIRA should either waive review or return the rule to the agency with a public explanation of its concerns.

In addition to improving review timeliness, return letters can help improve the transparency of OIRA reviews and, more generally, the transparency of the rulemaking process. On January 21, 2009, the President issued a memorandum on "Open Government and Transparency" stating that transparency "promotes accountability and provides information for citizens about what their Government is doing."[149] Implementing the President's memorandum, OMB's December 2009 Open Government Directive specifically instructs the OIRA administrator to "review existing OMB policies…to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government."[150] When many rules have been under review at OIRA for extended periods of time, greater use of return letters that describe the nature of OIRA's concerns can help promote such openness.

As indicated above, a strict 90-day or 120-day limit on the length of OIRA reviews may not be advisable or necessary. Some flexibility may be needed to allow certain reviews to extend beyond those limits without triggering a return letter (e.g., when OIRA and the agency are close to agreement, or when interagency reviews are taking somewhat longer than normal). However, it is difficult to envision a scenario in which OIRA reviews should last more than six months without the rulemaking agency and the public being informed about the nature of OIRA's or other agencies' concerns, or any other reason for the extended nature of the review (e.g., the agency not responding to OIRA's suggestions or recommendations promptly). Several agency employees interviewed for this report indicated that while return letters are not the review outcome they would prefer, a return letter would be better than the current situation in which their rules remain "under review" at OIRA for unlimited amounts of time.

Another alternative could be increased use of OIRA "review letters." According to OIRA's website, review letters are issued at the administrator's discretion, and may occur at various stages of the rulemaking process.[151] Some such letters have been issued after the conclusion of OIRA's review, but could also be issued during that process. As Senator Blumenthal said in his May 2013 letter to the OMB Director, when OIRA reviews go beyond a certain point, "the public should be informed of the delay, the justification and the amount of time the Administration estimates it will take to complete review."[152] If OIRA determines that a return letter would not be in the best interest of either the agency or the rulemaking process, it could publish a review letter on its website explaining why the rule has remained under review at OIRA past the 90- or 120-day deadlines in the executive order.

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[149] See http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

[150] See http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

[151] See http://www.reginfo.gov/public/jsp/EO/letters.jsp. To view copies of review letters that have been sent, see http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp.

[152] See http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-urges-end-to-regulation-delay-endangering-workers-and-children for a copy of this letter.

In its 1990 report to the ABA House of Delegates, the Section of Administrative Law and Regulatory Practice said that EO 12291 suggested that if OIRA concluded that a rule was inconsistent with the President's policy preferences, it should return those rules to the agencies with a written explanation. In practice, however, the report said OIRA was "hesitant" to use this authority because a "written OIRA explanation of the deficiencies in a rule was thought poisonous to further working relationships."[153]

> As a result, the pattern for controversial rules has been that OIRA would neither formally return the submission nor clear it, and OIRA and the agency would negotiate in an attempt to resolve their policy differences. Absent a statutory or judicial deadline for issuance of the rule, there was no action forcing event, and the negotiations could (and did) drag on for lengthy periods. These periods of extended, but unexplained, delay created suspicions about OMB's motives in the minds of persons skeptical of the process or who had a preview.

The ABA Section report said two solutions were required: (1) establish "reasonable time deadlines" for different categories of rules, with OIRA "required to complete its review within those deadlines;"[154] and (2) require OIRA to state its objections to rules in writing. The ABA report said more regular use of return letters would reduce the stigma associated with them, and also said the following:

> Requiring OIRA to respond within manageable but prompt deadlines will have several salutary effects. First, OIRA will have incentives to focus its review on the most significant and most problematic rules, thus avoiding the problem of excessive White House micromanagement of agency rulemaking. Second, policy problems will be identified and raised for consideration within OMB promptly. Third, inter-agency regulatory disputes can be elevated to the political level more quickly than is now possible, for consideration by the agency heads, the White House staff, or the President as appropriate. If White House dispute resolution procedures are not available, the interested agencies will know promptly and can seek other solutions. Finally, early passback of OIRA views will permit the agency head to make a timely decision whether to proceed with the rule, despite indications of conflict with Administration policy, or whether to conduct further discussions with other interested officials to seek to resolve those problems.[155]

The following recommendation is both more flexible and more generous than the ABA recommendation in its treatment of deadlines and return letters. Nevertheless, adherence to the recommendation could have many of the same salutary effects that were outlined by the ABA 23 years ago.

Recommendation 2: To improve the timeliness and transparency of OIRA reviews, if OIRA is unable to complete its examination of an agency's regulatory action within 120 days after the date it began its review, OIRA should return the regulatory action to the agency as soon as practicable, with a letter explaining the reasons for the return. The return letter should be posted on OIRA's website. Alternatively, OIRA may want to consider using review letters to explain to the public why certain rules have remained under review at OIRA past the review deadlines in the executive order.

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[153] ABA Section report, op. cit., p. 2.

[154] Specifically, the report said OIRA would be required to either complete its review and return the rule to the agency for reconsideration, or its review "would be deemed complete and the agency could proceed with the rule."

[155] ABA Section report, op. cit., p. 4.

D. Informal Reviews and Transparency

OIRA has always consulted with agencies prior to the formal submission of certain rules, and such consultations can be mutually beneficial. Agencies can obtain an additional perspective during the rule-development process, and discussing the rule with OIRA can smooth the path for formal review. OIRA can benefit by understanding the agency's decision-making process before the rule is formally submitted, and may be able to have more influence on an agency's actions before its positions become too entrenched. During the Clinton Administration, agencies occasionally shared a draft of the entire rule with OIRA as part of those consultations. During the George W. Bush Administration, the rate of these "informal reviews" of rules (i.e., consultations involving the review of the text of draft rules) increased. Senior agency employees interviewed for this report indicated that informal reviews have become even more common during the Obama Administration – so much so, that in some departments and agencies, the employees indicated that all or most of their recent rules were reviewed informally before being formally submitted.

For some rules, the bulk of the OIRA review process appears to occur before formal submission. As a result, the review times provided on OIRA's public database become not just non-transparent but misleading, and the formal review period becomes what GAO in 2003 called an "artificial construct." Several agency employees interviewed for this report referred to informal reviews as a "shadow" review process, and said OIRA's practice of reviewing draft rules "off the clock" gives the public a false impression of how long OIRA reviews really take.

One of the transparency provisions of EO 12866 requires OIRA to publicly disclose meetings, letters, and other communications with outside parties "regarding a regulatory action under review."[156] For the first eight years of the executive order, OIRA only disclosed communications that occurred during formal review. In October 2001, then-OIRA administrator John Graham changed the policy and considered a rule to be "under review" for purposes of this disclosure requirement if OIRA had started a "substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft." In its 2001 report on the costs and benefits of federal regulations, OIRA said the change in the disclosure practice was needed "to protect the integrity of OIRA and the administrative record." Therefore, OIRA said communications during informal reviews would be treated as covered by the executive order "as soon as a rulemaking has proceeded to a point where OIRA desk officers have received from agencies copies of preliminary draft regulatory text or analysis."[157]

A similar change may be needed to improve OIRA review transparency and to protect the integrity of public information about the length of those reviews. The OIRA administrator could change the way the review period under EO 12866 is measured, starting the review "clock" whenever OIRA begins to review and comment on drafts of agency rules. Because OIRA and agency staff should be able to discuss matters related to an upcoming regulatory review without starting the review period, a draft rule starting the clock for OIRA review should be far enough along in the agency's rule-development process to represent the agency's considered position – not just a working draft of a rule developed at the staff level without input from political appointees. As part of this policy change, OIRA may want to explore other ways to measure the length of OIRA reviews and provide greater transparency (e.g., separately measuring the amount

[156] Section 6(b)(4)(B) of EO 12866.

[157] Office of Management and Budget, Office of Information and Regulatory Affairs, Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulation, p. 44, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport.pdf.

of time it takes for OIRA to provide comments to the agency, and the time it takes for the agency to respond to those comments).

Recommendation 3: Communication between rulemaking agencies and OIRA before formal submission of a rule to OIRA for review should be encouraged, and should not count as part of the OIRA review period. However, as soon as OIRA has received a draft rule for review that represents that agency's considered opinion (with appropriate input from political appointees), the "clock" recording the length of OIRA's reviews should begin.

E. Submitting Agencies

Improving the timeliness of OIRA reviews will also require action by the agencies that submit their rules to OIRA – particularly if OIRA institutes changes designed to adhere more closely to the deadlines delineated in EO 12866. Previous OIRA administrators and some of the agency employees interviewed for this report said that agencies have sometimes tried to "jam" OIRA by delaying their responses to OIRA comments until late in the 90-day review period, or until just before certain statutory or judicial deadlines. In order to meet those deadlines, OIRA would presumably have to quickly agree to the agency's proposed revisions. This tactic is unlikely to work when OIRA reviews are effectively of unlimited duration, but it may be viewed as an effective strategy as OIRA begins to improve the timeliness of its reviews. As the National Academy of Public Administration said in 1987, rulemaking agencies should not try to shift the blame to OIRA to "disguise their own rulemaking problems."[158]

As part of its overall timeliness initiative, OIRA should provide comments to submitting agencies as soon as possible after the rule is submitted, thereby allowing sufficient time for the agencies to consider and respond to those comments, and for the agencies to reach agreement with OIRA on any issues of contention before the expiration of the 90- or 120-day review period. Submitting agencies, for their part, should respond to OIRA's comments as quickly as possible, and not attempt to "game the system" by responding to OIRA late in the review period or just before statutory or judicial deadlines. Doing so could result in an OIRA return letter exposing the tactic, which would further delay the date that the rule would ultimately be promulgated. As the OIRA administrator said the agencies in her October 1993 guidance on the recently-issued EO 12866, "we must work closely together to ensure that requests for clarification or information are responded to promptly."[159]

Recommendation 4: OIRA should provide comments to agencies on rules submitted for review as soon as possible after the review period begins. Agencies should respond to OIRA's comments as soon as possible after receiving those comments.

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[158] NAPA, 1987, p. 40.

[159] To view this guidance, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf.

F. Non-Submitting Agencies and Offices

In addition to OIRA and the agencies submitting their rules for review, the other key players in the OIRA review process are the non-submitting agencies and offices that are involved in interagency coordination and reviews. Former administrator Cass Sunstein noted in his 2013 article that OIRA review is at least in part an interagency process in which OIRA acts as an information aggregator, and that process is often the cause of lengthy reviews. Several of the agency employees interviewed for this report identified this interagency review process as one of the reasons why so many recent rules have been under review at OIRA for extended periods of time. Some of the agency employees interviewed for this report said they believed that OIRA did not always send draft rules to the non-submitting agencies and offices early in the review process, or provide for concurrent review by all such agencies and offices.

Reviews of draft rules by other agencies and by other offices within the EOP can be extremely important, and can ensure that draft rules do not conflict with existing and forthcoming rules of other agencies, and are consistent with the President's priorities. As part of its overall timeliness initiative, OIRA should provide the draft rules or summaries to non-submitting agencies and offices as soon as possible after the rule is submitted. These interagency reviews could also be concurrent with (and not sequential to) OIRA's own initial reviews. Non-submitting agencies and offices, for their part, should provide OIRA with comments on the draft rules as quickly as possible, or should indicate that they have no comments.

The senior agency employees interviewed for this report also indicated that they believed OIRA has recently been sending draft rules to more non-submitting agencies and offices than ever before, particularly more offices within the EOP. Although OIRA should not solicit the views of more non-submitting agencies and offices than are necessary, the number of such solicitations will likely vary with the significance and the political sensitivity of the rule. Therefore, this report will not recommend that the number of parties involved be limited to a specific number.

Recommendation 5: OIRA should send draft rules or summaries of the rules submitted for review to all of the non-submitting agencies and offices promptly after the start of the review process. The non-submitting agencies and offices should provide any comments to OIRA promptly after receiving the draft rules or summaries.

G. Submission of Significant Rules to OIRA

The report indicated that OIRA has always met with rulemaking agencies periodically to determine which significant rules are likely to be submitted in the coming months, and to be sure that the agencies and OIRA agreed on priorities. Such meetings, which may serve as a supplement to the twice-yearly process used to compile the *Unified Agenda of Regulatory and Deregulatory Actions*, can be extremely helpful in ensuring that the agencies' upcoming rulemaking actions are known and understood, and that the agencies understand the President's priorities.

However, most of the senior agency employees interviewed for this report indicated that OIRA has recently required them to obtain the office's approval before submitting each significant rule for review, and that the agencies have not been permitted to submit certain significant rules. This

development seems inconsistent with the statement in EO 12866 that it is intended to "reaffirm the primacy of Federal agencies in the regulatory decision-making process," and that the regulatory process is to be conducted "with due regard to the discretion that has been entrusted to the Federal agencies." The executive order established a process by which the agencies and OIRA determine which rules are significant, but with OIRA making the final determination. And OIRA can certainly counsel agencies as to the advisability of submitting particular significant rules for review. However, for rules that both OIRA and the agencies agree are significant (or that OIRA determines to be significant), the agencies themselves should ultimately make the determination as to whether, and if so, when the rules will be submitted to OIRA for review.

Recommendation 6: OIRA and the agencies should be encouraged to discuss which significant rules should be submitted for review, and when they should be submitted. However, for rules that both OIRA and the agencies agree are significant (or that OIRA determines to be significant), the agencies should make the final determination as to whether, and if so, when the rules will be submitted to OIRA for review.

H. OIRA Staffing

As noted earlier in this report, OIRA had a staff ceiling of about 90 FTEs when its regulatory review function was established in 1981, but that number diminished to about 47 by FY1997 (when OIRA was reviewing fewer rules under EO 12866). OIRA's staff ceiling increased to 51 FTEs in FY2001, and stood at 55 FTEs in FY2003. By FY2009, however, OIRA's staffing authorization had fallen to 46 FTEs, and was projected to be at 44 FTEs by FY2014. Actual staffing is reportedly already below that level. In 2012, former OIRA administrator John Graham was quoted as saying "I do not know how many more OIRA staffers are needed but they definitely need more than their diminished current size."[160]

Although the reduction in OIRA's staffing during the past 10 years (both in terms of its overall numbers and the loss of certain experienced staff) may have been one of the causes of the recent increase in the length of OIRA reviews, is not clear what level of staffing is needed to permit OIRA to improve the timeliness of its reviews. OIRA may be able to review rules somewhat more quickly by improving the efficiency of its operations, and by eliminating any non-essential functions. However, all other things being equal, some increase in OIRA staffing may be needed. No one expects a return to the 90 FTEs that OIRA had more than 30 years ago, but a return in staffing authorizations to the levels it had five or ten years ago (when OIRA's authorization was between about 9% and 11% of that of OMB as a whole) would seem appropriate.

Another alternative would be for OIRA to have rulemaking agencies detail staff to OIRA for short periods of time. Doing so could not only improve OIRA's capacity for reviews, but could also provide other benefits. The detailed agency staff could gain an appreciation of OIRA's role in the rulemaking process, and could provide OIRA staff with a perspective of that process from the vantage point of rulemaking agencies. Procedures would have to be put in place to ensure that detailees do not work on rules from their sponsoring agencies.

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[160] Andrew Zajac, "Regulators surge in numbers while overseers shrink," *Washington Post*, June 24, 2012, available at http://articles.washingtonpost.com/2012-06-24/business/35461319_1_regulators-federal-agencies-current-administrator. While some have questioned whether there has been a "surge" in the number of regulators, the diminished size of OIRA has not been questioned.

Recommendation 7: OIRA's staffing authorizations should be increased to a level adequate to ensure that OIRA can conduct its reviews in a timely manner. In addition, or as an alternative, staff from rulemaking agencies could be detailed to OIRA for short periods of time, under appropriate guidance.

Appendix A. Selected Cases Addressing OIRA Delays and Statutory Deadlines

The following discussion is not meant to be a comprehensive treatment of court cases involving OIRA, or even just of cases that mention the length of OIRA reviews in the context of statutory deadlines for the issuance of rules. Rather, the cases discussed below illustrate that during periods covering both EO 12291 and EO 12866, courts have indicated that statutory deadlines take precedence over any perceived need for the rules to be reviewed by OIRA.

Environmental Defense Fund v. Thomas

Section 3004(w) of the Resource Conservation and Recovery Act (RCRA) required EPA to issue final permitting standards for hazardous waste in underground tanks by March 1, 1985. EPA submitted the rule to OIRA for review on March 4, 1985, and (because it was not a major rule) expected that the office would complete its review within 10 days. However, on March 25, 1985, OIRA notified EPA that it was extending its review, and requested that EPA gather additional information. At a meeting on April 16, 1985, OIRA reportedly described the four changes it wanted EPA to make to the proposed rule. Plaintiffs filed the lawsuit on May 30, 1985, seeking an order directing EPA to issue the rule by a date certain and an injunction against OIRA to prevent similar types of delays in the future. OIRA cleared the proposed rule for publication on June 12, 1985, and it was published in the *Federal Register* on June 26, 1985.[161]

In its January 1986 decision, *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986), the district court stated that it was "clear that OMB did contribute to the delay in the promulgation of the regulations by insisting on certain changes."[162] Documents reportedly indicated that EPA was prepared to announce the proposed rule as early as March 31, 1985, but OIRA had delayed the agency from doing so for three months. The court said:

> [T]he use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline.

The court also noted that the delay of this rule was not the only instance in which OIRA had delayed the issuance of EPA rules that were to be issued pursuant to certain deadlines.

> Through answers to interrogatories, plaintiffs show that EPA submitted 169 regulations to OMB which were subject to statutory or judicial deadlines, and on 86 occasions OMB extended its review beyond the time periods outlined in EO 12291. OMB's propensity to extend review has become so great that EPA keeps a running record of the number of its

[161] 50 *Federal Register* 26444.

[162] To view a copy of this decision, see http://elr.info/sites/default/files/litigation/16.20250.htm.

> rulemaking actions under extended review by OMB and the resulting delays. The average delay per regulation is 91 days; total delays were more than 311 weeks. Apparently Section 8(a)(2) of EO 12291 is simply ignored.

After noting that the report by the House Committee on Energy and Commerce on the legislation containing the statutory requirement stated that EPA's ability to meet the deadlines in the bill "shall not be impaired in any way whatsoever by Executive Order 12291," the court declared that

> OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations arising from the 1984 Amendments of the RCRA beyond the date of a statutory deadline. Thus, if a deadline already has expired, OMB has no authority to delay regulations subject to the deadline in order to review them under the executive order. If the deadline is about to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed. [163]

Paralyzed Veterans of America

In an August 2010 decision by the United States Court of Appeals, Federal Circuit, the Court concluded that the Department of Veterans Affairs was required to issue a final rule establishing presumptions of service connection for three diseases that the Secretary had determined to be associated with exposure to herbicides in the Vietnam War.[164] The department indicated that it had drafted the final rule, but could not issue it until after OIRA completed its review. In its decision, the Court said the following:

> The Secretary's argument that delay is required under Executive Order 12,866, until OMB reviews and clears the regulation is also unpersuasive. The Executive Order makes clear that OMB review cannot interfere with a clear directive of Congress regarding the timing of issuance. First, Section 6(a)(3)(D) of the Executive Order provides that when, as here, regulatory action is governed by a statutory-imposed deadline, the agency should attempt to permit sufficient time for OMB review, but only "to the extent practicable." Section 9 further provides that "[n]othing in this order shall be construed as displacing the agencies' responsibilities, as authorized by law." In addition, the Executive Order states in Section 8 that while publication of a rule is not ordinarily allowed until after OMB review, it is allowed when "required by law." By creating a deadline such as this, Congress has effectively altered the agency's discretion and "required by law" that the final rule be published notwithstanding the deadlines that appear in the Executive Order for action by OMB.

OIRA cleared the rule shortly after the Court's determination, and the department published the rule less than a week later.[165]

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[163] For more information on this case, see Robert V. Percival, "Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget," *Environmental Law Reporter*, volume 17 (1987), pp. 10017-10023. To view a copy of the article, see http://elr.info/sites/default/files/articles/17.10017.htm#op_1_fn_25. Mr. Percival was lead attorney for the NRDC in the case.

[164] In re Paralyzed Veterans of America, National Veterans Legal Services Program, Non-Commissioned Officers Association, and United Spinal Association/Vetsfirst, Petitioners, Misc. No. 949, August 2, 2010.

[165] U.S. Department of Veterans Affairs, "Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease, and Ischemic Heart Disease)," 75 *Federal Register* 53202, August 31, 2010. OIRA formally received the draft final rule on July 8, 2010, and completed review on August 25, 2010. OIRA had reviewed the proposed rule for more than 90 days earlier in the year.

Appendix B: Results of OIRA Reviews

OIRA can conclude its review of a draft rule by coding the rule (1) "consistent with change" (meaning some element of the rule changed during review, and as a result it is now consistent with Executive Order 12866), (2) "consistent without change" (meaning the rule was unchanged during review and is consistent with the executive order), (3) withdrawn, (4) returned to the agency for reconsideration, or (5) some other code (e.g., improperly sent, emergency rules, and statutory or judicial deadline). "Consistent with change" does not necessarily mean that the rule changed because of a suggestion by OIRA (the agency may have made the change at its own initiative), and does not mean that the change was substantive (e.g., the change may have corrected a legal citation or a spelling error). As the table below indicates, "consistent with change" has been the most commonly used code since 1996, and it has been even more frequently used in recent years. Starting in 2010, more than three-quarters of all reviews have been coded "consistent with change."

Most Recent Completed OIRA Reviews Are Coded "Consistent With Change"

Year	Number of Reviews	Percentage of Reviews Coded:				
		Consistent with Change	Consistent Without Change	Withdrawn	Returned	Other
1994	831	37.3	53.4	4.3	0.2	4.9
1995	620	39.0	53.1	5.2	0.5	2.3
1996	507	51.5	41.4	5.1	0.0	2.0
1997	505	56.0	37.4	5.1	0.8	0.6
1998	487	59.3	36.1	3.1	0.0	1.4
1999	587	62.2	31.5	3.1	0.0	3.2
2000	582	60.4	34.3	3.9	0.0	1.4
2001	700	45.6	28.1	22.0	2.6	1.7
2002	669	54.3	31.7	7.6	0.7	5.6
2003	715	60.3	30.1	6.9	0.3	2.2
2004	626	62.7	29.8	6.5	0.2	0.8
2005	611	65.4	27.0	6.6	0.2	1.0
2006	600	69.2	26.5	3.7	0.0	0.7
2007	589	72.3	21.1	6.3	0.2	0.2
2008	673	69.8	23.5	5.6	0.3	0.8
2009	595	71.6	17.1	10.4	0.5	0.4
2010	690	78.7	14.1	5.7	0.0	1.6
2011	740	76.8	11,6	6.2	0.4	5.0
2012	424	77.1	13.0	5.9	0.0	4.0
2013	212	78.3	11.8	7.5	0.0	2.4

Source: OIRA database at www.reginfo.gov.

Note: "Other" includes rules that were sent improperly, emergency rules, and rules with a statutory or judicial deadline. Numbers may not total to 100.0 due to rounding. Data for 2013 are through June 30.

Appendix C: Return Letters

As the table below indicates, OIRA has issued a total of nine return letters since 2002. The table indicates the date of the return letter, the department or agency involved, the title of the rule, and the stated reason for the return.

OIRA Return Letters Since 2002

Date	Department/ Agency	Title of Rule	Reason for Return
06/13/2003	DOT	Regulations To Be Followed by All Departments, Agencies, and Shippers Having Responsibility to Provide a Preference for U.S. Flag Vessels in the Shipment of Cargoes on Ocean Vessels	Analysis does not address concerns raised by other agencies. Returned to "provide additional time to address these unresolved concerns."
08/22/2003	DOT	Hazardous Materials: Transportation of Lithium Batteries	Regulatory Flexibility Analysis needed to support certification.
02/11/2004	DOT	Regulations to be Followed by All Departments, Agencies, and Shippers Having Responsibility to Provide a Preference for U.S. Flag Vessels in the Shipment of Cargoes on Ocean Vessels	Analysis does not address concerns raised by other agencies. Returned "to provide additional time to address these unresolved concerns."
12/09/2005	OFHEO	Corporate Governance – Prohibition on Indemnification Payments	Analysis does not consider all alternatives and does not consider consequences of the rule.
10/30/2007	DOC	Amendment 12 to the Coastal Pelagic Species Fishery Management Plan	Additional analysis needed; returned to allow agency staff time to do so.
07/03/2008	EPA	Pesticide Container Recycling	Costs exceed benefits, and no alternatives considered.
08/13/2008	DHS	Coastwise Transportation of Passengers	No evidence of need, no statement of costs and benefits, no discussion of alternatives.
01/06/2009	SBA	Size Standard Rules on Accommodations and Food Service Industries, Other Services Industries, and Retail Trade Industries (three rules)	Agency proposed further analysis; returned to provide time needed for that analysis.
09/02/2011	EPA	Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards (three rules)	President does not support; not mandatory, may not be based on current science, and other actions taken.

Source: OIRA website, at http://www.reginfo.gov/public/do/eoReturnLetters. Information is as of June 30, 2013.

Note: "OFHEO" is the Office of Federal Housing Enterprise Oversight, which is now part of the Federal Housing Finance Agency.

Appendix D: Number of Final Rules Issued

Since shortly after the Congressional Review Act (5 U.S.C. §§801-808) was enacted in March 1996, GAO has maintained a database showing the number of "major" final rules, "significant or substantive" final rules,[166] and total final rules that were published each year in the *Federal Register*.[167] The table below shows those data for each full year from 1997 through 2012, and for the first half of 2013. From 1997 through 2011, federal agencies published an average of 3,206 final rules per year, with the highest number published in 1998 (4,388 rules), and the lowest number in 2007 (2,947 rules). In 2012, federal agencies published only 2,638 final rules – the lowest number since GAO began keeping data in 1997, and a drop of 1,229 rules (32%) from the previous year's total. The pace of final rulemaking during the first half of 2013, if continued for the remainder of the year, suggests that a new record low may be established in 2013 (about 1,600 final rules), which would be about half of the average number of final rules published per year during the 15-year period from 1997 through 2011.

Number of Final Rules Published Declined in 2012 and the First Half of 2013

Calendar Year	Major Rules	Significant or substantive Rules	Total Final Rules
1997	61	1,489	3,930
1998	76	1,433	4,388
1999	51	982	4,336
2000	76	1,069	4,079
2001	69	897	3,423
2002	50	1,003	3,559
2003	50	1,007	3,744
2004	65	977	3,661
2005	56	907	3,301
2006	56	979	3,065
2007	61	910	2,947
2008	94	1,063	3,085
2009	83	926	3,472
2010	100	1,023	3,261
2011	80	1,039	3,867
2012	**68**	**853**	**2,638**
2013 (as of 06/30/3013)	**31**	**330**	**802**

[166] The "significant or substantive" category includes rules considered "significant" under EO 12866, as well as rules that are "substantive" but not significant. According to the Unified Agenda, "substantive" includes rules that are more than "routine and frequent" or "informational/administrative," but that do not rise to the level of "significant." GAO does not provide data on the number of only significant rules.

[167] See http://gao.gov/legal/congressact/fedrule.html.

Source: GAO rules database, available at http://www.gao.gov/legal/congressact/fedrule.html. Data were based on the date the rules were published in the *Federal Register*, and were collected on July 30, 2013.

The number of "significant or substantive" final rules published also fell to a new low in 2012 (853 rules), down 186 rules (18%) from the previous year, and down about the same percentage from the average of the previous 15 years (1,047 rules), but only slightly below the previous low of 897 significant or substantive rules published in 2001. The pace of significant or substantive rulemaking during the first half of 2013 (330 rules), if continued for the rest of the year, would also establish a new record low (about 660 rules), which would be about 37% below the average number of significant or substantive final rules published during the 15-year period from 1997 through 2011.

Notably, however, the 68 "major" final rules published during 2012 was not a record low for this period (50 major rules were published in both 2002 and 2003), and was about average for the 15-year period from 1997 through 2011 (69 rules). The pace of major rulemaking during the first half of 2013 (31 rules), if continued for the rest of the year, would not represent a record low (about 62 rules), and would be only slightly below the average number of major rules published during the 15-year period from 1997 through 2011. Examination of the major final rules published in 2012 and 2013 reveals that many of them were issued in response to rulemaking provisions in the Patient Protection and Affordable Care Act (P.L. 111-148) and Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203).[168] Also, as the Congressional Research Service reported in 2011, many rules are considered "major" "because they involve the transfer of federal funds [e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments], not because of the agencies' estimates of regulatory costs or benefits.[169]

[168] For descriptions of the rulemaking authorities in these acts, see CRS Report RL41180, *Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148)*, April 13, 2010, by Curtis W. Copeland, available at http://www.ropesgray.com/files/upload/RegulationsPursuanttothePPACA.pdf; and CRS Report R41472, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, November 3, 2010, by Curtis W. Copeland, available at http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf.

[169] CRS Report R41651, *REINS Act: Number and Types of "Major Rules" in Recent Years*, February 24, 2011, , p. 25, by Curtis W. Copeland and Maeve P. Carey, available at http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830_crs_majorrules.pdf.

Appendix E: Longest Reviews Completed in 2013

The table below shows the 27 longest reviews completed by OIRA during the first half of calendar year 2013 (i.e., January 1, 2013 through June 30, 2013) by department and agency. All of the reviews took at least one year to complete.

Longest Reviews Completed During First Half of 2013

Department/ Agency	Title of Draft Rule (RIN)	Date Received by OIRA	Date OIRA Review Completed	Days Under OIRA Review
USDA/Food and Nutrition Service	Supplemental Nutrition Assistance Program: Nutrition Education and Obesity Prevention Grant (0584-AE07)	02/16/2012	03/25/2013	404
DOC/Bureau of Industry and Security	Revisions to the Export Administration Regulations: Control of Firearms and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF47)	01/04/2012	05/17/2013	499
DOC/BIS	Revisions to the Export Administration Regulations: Control of Ammunition and Ordinance the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF49)	01/04/2012	05/17/2013	499
DOC/BIS	Revisions to the Export Administration Regulations: Control of Guns and Armament and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF48)	01/04/2012	05/17/2013	499
DOE/Energy Efficiency and Renewable Energy (EE)	Federal Building Standards Rule—Update—90.1-2010 (1904-AC60)	12/19/2011	06/27/2013	556
HHS/Food and Drug Administration (FDA)	Laser Products; Amendment to Performance Standard (0910-AF87)	05/24/2011	05/31/2013	739
HHS/CMS	Requirements for Long-Term Care Facilities: Hospice Services (CMS-3140-F) (0938-AP32)	12/02/2011	06/12/2013	558
HHS/FDA	Hazard Analysis and Risk-Based Preventive Controls (0910-AG36)	11/22/2011	01/04/2013	410
HHS/FDA	Produce Safety Regulation (0910-AG35)	12/09/2011	01/04/2013	393
HHS/FDA	Effective Date of Requirement for Premarket Approval for Two Class	12/28/2011	01/17/2013	387

	III (0910-AG78)			
HHS/Administration for Children and Families (ACF)	Child Care and Development Fund Reforms to Support Child Development and Working Families (0970-AC53)	01/23/2012	05/15/2013	478
DOI/National Park Service (NPS)	Demonstrations, Public Assembly and Distribution of Printed Material (1024-AD91)	01/05/2012	05/23/2013	504
DOJ/Federal Bureau of Investigation	Proposed Changes to NICS Intended To Promote Public Safety, To Enhance the Efficiency of NICS Operations, and To Resolve Difficulties Created by Unforeseen Processing Conflicts Within the System (1110-AA27)	12/08/2011	01/16/2013	406
DOL/Office of Federal Contract Compliance Programs	Notice of Proposed Rescission, Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation (1250-ZA00)	01/17/2012	02/25/2013	405
State	Exchange Visitor Program – Teachers (1400-AC60)	12/15/2011	04/04/2013	477
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category II (1400-AD05)	01/05/2012	05/17/2013	498
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category III (1400-AD04)	01/05/2012	05/17/2013	498
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category I (1400-AC90)	01/05/2012	05/17/2013	498
DOT/National Highway Traffic Safety Administration	Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors (2127-AK43)	11/16/2011	06/20/2013	583
Treasury/ Departmental Offices	Garnishment of Accounts Containing Federal Benefit Payments (1505-AC20)	12/05/2011	04/23/2013	506
EPA/Air and Radiation (AR)	Protective Action Guidance for Radiological Incidents (2060-ZA19)	07/22/2011	03/29/2013	617
EPA/AR	Notice of Availability for Federal Guidance Report No. 14: Radiation Protection Guidance for Diagnostic and Interventional X-Ray Procedures (2060-ZA20)	11/04/2011	03/21/2013	503
EPA/Office of Chemical Safety and Pollution Prevention	Pesticides; Data Requirements for Antimicrobials (2070-AD30)	10/03/2011	03/13/2013	527

(OCSPP)				
EPA/Solid Waste and Emergency Response (SWER)	Modifications to RCRA Rules Associated With Solvent-Contaminated Industrial Wipes (2050-AE51)	04/23/2012	06/24/2013	428
EPA/OCSPP	Formaldehyde; Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products (2070-AJ44)	05/05/2012	05/20/2013	381
EPA/OCSPP	Formaldehyde Emissions Standards for Composite Wood Products (2070-AJ92)	05/05/2012	05/20/2013	381
Pension Benefit Guarantee Corporation	Reportable Events; Pension Protection Act of 2006 (1212-AB06)	01/26/2012	03/07/2013	406

Source: OIRA database, available at www.reginfo.gov.

Note: Days under OIRA review calculations do not include the last day of the review period, as the review was completed on that day.

Appendix F: Ongoing One-Year Reviews

The table below provides a list of the 38 rules that, as of June 30, 2013, had been under review at OIRA for at least one year by department and agency. The table shows the department and agency that submitted the rule, RIN numbers, the date the rule was received by OIRA, and the number of days under OIRA review as of June 30, 2013. As of September 18, 2013, OIRA had concluded review of 14 of these 38 rules, and those rules are identified by an asterisk (*) in the "Days Elapsed" column of the table. Ten of the closed reviews were concluded as "consistent with change," but four rules were withdrawn from review.

Rules Under Review at OIRA for More Than One Year (as of June 30, 2013)

Department/ Agency	Title of Draft Rule (RIN)	Date Received by OIRA	Days Elapsed Since Receipt (as of 06/30/2013)
USDA/Animal and Plant Health Inspection Service	Animal Welfare: Marine Mammals; Nonconsensus Language, and Interactive Programs (0579-AB24)	02/27/2012	489
DOE/Energy Efficiency and Renewable Energy (EE)	Energy Efficiency and Sustainable Design Standards for New Federal Buildings, Solar Hot Water Requirements, Water Efficiencies, and Green Building Ratings (1904-AC13)	08/18/2011	683
DOE/EE	Fossil Fuel Energy Consumption Reduction for New Construction and Major Renovations of Federal Buildings (1904-AB96)	08/31/2011	*670
DOE/EE	Energy Conservation Standards for Walk-In Coolers and Walk-In Freezers (1904-AB86)	09/23/2011	647
DOE/Office of General Counsel	Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation (1990-AA39)	10/18/2011	622
DOE/EE	Energy Efficiency Standards for Manufactured Housing (1904-AC11)	12/21/2011	558
DOE/EE	Energy Efficiency Standards for Metal Halide Lamp Fixtures (1904-AC00)	02/17/2012	*500
DOE/EE	Energy Conservation Standards for ER, BR, and Small Diameter Incandescent Reflector Lamps (1904-AC15)	02/17/2012	500
DOE/EE	Energy Conservation Standards for Commercial Refrigeration Equipment (1904-AC19)	02/17/2012	*500
HHS/Food and Drug Administration (FDA)	Foreign Supplier Verification Program (0910-AG64)	11/28/2011	*581
HHS/FDA	Current Good Manufacturing Practice and Hazard Analysis and Risk-Benefit Preventive Controls for Food for Animals (0910-AG10)	12/05/2011	574

DOI/Bureau of Land Management (BLM)	Coal Management: Lease Modifications; Lease and Logical Mining Unit Diligence; Advance Royalties; Royalty Rates; Bonds (1004-AD93)	01/26/2012	*522
DOI/Office of Natural Resources Revenue (ONRR)	Reporting and Paying Royalties on Federal Leases on Takes or Entitlement Basis (1012-AA02)	03/06/2012	*482
DOI/BLM	Waste Mine Methane Capture, Sale, or Destruction (1004-AE23)	05/03/2012	424
DOI/National Park Service (NPS)	Native American Graves Protection Act--Disposition of Unclaimed Cultural Items on Federal and Indian Lands (1024-AE00)	05/03/2012	424
DOL/Occupational Safety and Health Administration (OSHA)	Occupational Exposure to Crystalline Silica (1218-AB70)	02/14/2011	*868
DOL/Employment and Training Administration	Equal Employment Opportunity in Apprenticeship and Training, Amendment of Regulations (1205-AB59)	05/24/2011	769
DOL/Mine Safety and Health Administration (MSHA)	Proximity Detection Systems for Mobile Machines in Underground Mines (1219-AB78)	09/16/2011	654
DOL/OSHA	Occupational Injury and Illness Recording and Reporting Requirements--Modernizing OSHA's Reporting System (1218-AC49)	1218-AC49	587
DOL/MSHA	Criteria and Procedures for Proposed Assessment of Civil Penalties (1219-AB72)	12/02/2011	577
DOL/OSHA	Electric Power Transmission and Distribution; Electrical Protective Equipment (1218-AB67)	06/27/2012	369
State	National Security Information Regulations (1400-AC75)	03/23/2012	*465
DOT/Pipeline and Hazardous Materials Safety Administration	Hazardous Materials: Revisions to Requirements for the Transportation of Lithium Batteries (2137-AE44)	10/05/2010	1,000
DOT/Federal Aviation Administration	Flight Crewmember Mentoring, Leadership, and Professional Development (HR 5900) (2120-AJ87)	05/19/2011	774
VA	Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program (2900-AO23)	01/20/2012	528
EPA/Office of Chemical Safety and Pollution Prevention (OCSPP)	Chemicals of Concern List (2070-AJ70)	05/12/2010	*1,146
EPA/OCSPP	Nanoscale Materials; Reporting Under TSCA Section 8(a) (2070-AJ54)	11/22/2010	952
EPA/Office of Environmental	Modification of Toxics Release Inventory (TRI) Reporting Requirements Primarily	05/13/2011	780

Information	Associated With Metal Mining (2025-AA11)		
EPA/Office of Water	National Pollutant Discharge Elimination System (NPDES): Use of Sufficiently Sensitive Test Methods for Permit Applications and Reporting (2040-AC84)	08/08/2011	693
EPA/Air and Radiation (AR)	Withdrawal of Prior Determination That Compliance w/CAIR or the NOx SIP Call Constitutes Reasonably Available Control Technology or Measures (2060-AQ07)	11/14/2011	595
EPA/Office of Water	Water Quality Standards Regulatory Clarifications (2040-AF16)	11/30/2011	*579
EPA/OCSPP	Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production; TSCA Section 21 Petition; Agency Response (2070-ZA17)	12/14/2011	*565
EPA/OCSPP	CBI: PMN Amendments Claiming Chemical and Microorganism Identity as Confidential in Data From Health and Safety Studies Submitted Under TSCA Prior to the Commencement of Manufacture (2070-AJ87)	12/27/2011	*552
EPA/Office of Enforcement and Compliance Assurance	NPDES Electronic Reporting Rule (2020-AA47)	01/20/2012	*528
EPA/Office of Water	Clean Water Protection Guidance (2040-ZA11)	02/21/2012	*496
EPA/Office of Water	2012 Implementation Guidance on FAFO Regulations: CAFOs that Discharge (Pork Producer Guidance) (2040-ZA16)	03/06/2012	482
EPA/Office of Water	Revisions to the Nov. 22, 2002 Memorandum "Establishing TMDL Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on those WLAs" (2040-ZA17)	03/13/2012	475
Agency for International Development	Participation by Religious Organizations in USAID Programs (0412-AA69)	08/11/2011	690

Source: OIRA database, available at www.reginfo.gov.

Note: Days elapsed calculations include the last day, as OIRA review was not completed as of the end of June 30, 2013.