



Improving the Timeliness of OIRA Regulatory Review Committees on Administration & Management and Regulation

Proposed Statement | December 5–6, 2013

Proposed Amendments

**This document displays manager’s amendments and additional amendments from
Conference members (with the source shown in the margin)**

1 For more than three decades, the Office of Information and Regulatory Affairs (OIRA) in
2 the Office of Management and Budget has conducted centralized review of federal agencies’
3 draft proposed and final regulations. The fundamental structures and principles governing the
4 regulatory review process are currently set forth in Executive Order (EO) 12,866,¹ and
5 subsequent EOs have reaffirmed this system of regulatory review.² Among other things,
6 Executive Order 12,866 requires covered agencies to submit all “significant regulatory actions”
7 to OIRA for review.³ The purposes underlying the centralized OIRA regulatory review process
8 include: ensuring consistency with applicable laws and presidential priorities; enhancing
9 coordination of regulatory policy among federal agencies; examining economic analyses
10 accompanying the rule; and making the regulatory process more efficient.⁴ OIRA regulatory
11 review serves to monitor agency rulemaking activity to ensure adherence with administration

¹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). These basic structures were carried over from Executive Order 12,291, issued during the Reagan Administration. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

² See, e.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

³ Exec. Order No. 12,866 § 6(a)(3)(B)–(C); see also *id.* §§ 3(b) (generally defining covered “[a]genc[ies]” as federal departments and other executive branch establishments, but not independent regulatory agencies), 3(f) (defining “[s]ignificant regulatory action”).

⁴ *Id.* §§ 2(a)–(b), 6(a)(3)(B)–(C), 6(b); see also Exec. Order No. 13,563 § 1.

12 policy⁵ while also seeking to provide a “dispassionate and analytical ‘second opinion’ on agency
13 actions.”⁶

14 In order to ensure that OIRA review proceeds in a timely manner, EO 12,866 generally
15 requires OIRA to “waive review or notify the agency in writing of the results of its review”
16 within 90 calendar days following submission.⁷ The executive order also provides that the
17 review process may be extended “(1) once by no more than 30 calendar days upon the written
18 approval of the Director and (2) at the request of the agency head.”⁸

19 Executive review of agency rulemaking, and, more precisely, OIRA’s role in the review
20 process—though not without controversy⁹—are now firmly entrenched fixtures of the
21 administrative landscape,¹⁰ and each administration since at least that of President Ronald

⁵ *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (“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.”).

⁶ President Barack H. Obama, Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009).

⁷ Exec. Order 12,866 § 6(b)(2). Indeed, this Executive Order specifically underscores the importance of timeliness in the regulatory review when stating: “An efficient regulatory planning and review process is vital to ensure the Federal Government’s regulatory system best serves the American people.” *Id.* § 2.

⁸ *Id.* § 6(b)(2)(C).

⁹ See, e.g., Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 *FORDHAM URB. L.J.* 1097 (2006); Alan Morrison, *Commentary, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 *HARV. L. REV.* 1059 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 *ENVTL. L.* 1083 (2007); cf. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696 (2007).

¹⁰ See, e.g., Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *HARV. L. REV.* 1838 (2013).

22 Reagan has endorsed them.¹¹ For such reviews to be effective, however, they must be timely.
23 All stakeholders in the regulatory process—including the submitting agency, potentially
24 regulated entities, other interested participants, and the general public—have an interest in
25 seeing the OIRA review process operate as efficiently as possible for several reasons: agency
26 regulatory or scientific assessments may become out of date when reviews are overlong;
27 likewise, regulated markets or industries might experience uncertainty when proposed or final
28 rules remain stalled in the review process; and, for rules related to health or safety, delay in the
29 OIRA review process could well have serious social consequences.¹² In addition, the timing of
30 review process should be made as transparent as possible.

31 Historically, OIRA has completed most of its reviews of agency rules well within the 90-
32 day review period.¹³ For example, from 1994 - 2011, the average time for OIRA review was 50
33 days for all rules.¹⁴ Since 2011, however, average OIRA review times have trended significantly
34 upward. In 2012, the average time for OIRA review for all rules rose to 79 days, and in the first
35 half of 2013, the average review time increased even further to 140 days.¹⁵ It is important to
36 note that, as OIRA completes review for rules that have been in the backlog for some time, the

¹¹ See Special Edition, OIRA Thirtieth Anniversary Conference, 63 ADMIN. L. REV. 1 (2011). Jim Tozzi, who served at the Office of Management and Budget for over 10 years and was instrumental in the creation of OIRA, suggests that executive rulemaking review began during the Nixon Administration. *Id.* at 37.

¹² Institute for Policy Integrity, Public Comment 1–2 (Oct. 28, 2013) (noting that delays can postpone realization of benefits associated with proposed rules, create uncertainty amongst regulated parties, and damage public perception of OIRA). For example, at an FDA public meeting 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.”

¹³ CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 25 (Nov. 1, 2013), available at <http://acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf>.

¹⁴ See Off. Info. & Reg. Aff., Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Nov. 14, 2013) (allowing searches of OIRA review counts and average review times by date range).

¹⁵ *Id.*

37 average review times will likely increase, which evidences an improving situation.
38 Approximately four dozen reviews completed in 2013 have taken more than a year.¹⁶

39 However, average review times and the length of completed reviews are lagging
40 indicators of OIRA performance, and the recent increases in average review times reflect the
41 significant headway that OIRA has made during the past year in reducing the backlog of rules
42 and improving review timeliness. The number of ongoing reviews lasting more than one year
43 has been cut from 51 reviews in mid-May 2013 to 27 reviews in mid-September 2013. Of the
44 38 reviews that, as of June 30, 2013, had been ongoing for more than a year, 14 of them were
45 completed by mid-September 2013. Rules submitted more recently were also being reviewed
46 more quickly. Only 10 percent of the reviews of rules submitted between September 2012 and
47 February 2013 took more than six months to complete, compared to nearly 30 percent for
48 reviews completed during the first six months of 2013 (regardless of when they were
49 submitted).

50 Senior agency employees provided a variety of perspectives as to why they believe that
51 OIRA review times increased in 2012–13, including one or more of the following reasons: (1)
52 concerns by some in the Executive Office of the President (EOP) about the issuance of
53 potentially costly or otherwise controversial rules during an election year, (2) coordinative
54 reviews by other agencies and offices within EOP took more time than in preceding years,¹⁷ and
55 (3) a reluctance by OIRA to use return letters. Both senior agency employees and other

¹⁶ Off. Info. & Reg. Aff., Executive Order Review Search Results, <http://www.reginfo.gov/public/do/eoAdvancedSearch> (last visited Nov. 14, 2013) (allowing identification of the number and length of OIRA reviews completed within a date range). The time periods cited herein are for formal review after a complete rulemaking package is received by OIRA and do not reflect any informal review that may have occurred prior to receipt.

¹⁷ Notwithstanding these concerns about increased review times in the period from 2012–13, the Administrative Conference reaffirms the importance of the interagency review process to ensuring that rulemaking agencies consider input from sister agencies and the EOP. See Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 1, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“[Presidential review] can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities.”).

56 observers (including several former OIRA officials) also suggested that a decrease in OIRA
57 staffing in recent years may have been another contributing factor. In addition, the executive
58 review process has become more complicated for all parties involved as regulations have grown
59 increasingly complex, interagency coordination has become more important, and various
60 transparency and procedural requirements have grown more demanding.

61 The Administrative Conference has long supported effective executive review of agency
62 rulemaking, and has emphasized the importance of timeliness and transparency in this process.
63 In Recommendation 88-9, the Conference stated that “[t]he process of presidential review of
64 rulemaking, including agency participation, should be completed in a timely fashion by the
65 reviewing office and, when so required, by the agencies, with due regard to applicable
66 administrative, executive, judicial and statutory deadlines.”¹⁸ Similarly, in Recommendation 93-
67 4, the Conference asserted that “the reviewing or oversight entity should avoid, to the extent
68 possible, extensive delays in the rulemaking process.”¹⁹ The Conference has also issued several
69 recommendations advocating a transparent OIRA review process.²⁰

¹⁸ Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, ¶ 3, 54 Fed. Reg. 5207 (Feb. 2, 1989).

¹⁹ Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 22, 1994).

²⁰ Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 5, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.”); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, ¶ 2, 45 Fed. Reg. 86,407 (Dec. 31, 1980) (“When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding.”).

70 Building upon these prior Conference initiatives addressing executive review, the
71 Conference now offers a discrete set of principles for improving the timeliness of review and
72 the transparency concerning the causes for delay. The OIRA review process involves many
73 components and participants. Delays may not be attributable to any single cause but rather
74 can arise from multiple factors (and complex interactions amongst them) involving numerous
75 players, including OIRA, agencies submitting rules for review, and other agencies and offices in
76 the interagency review process (including other parts of the EOP). As a result, the Conference
77 wishes to highlight a number of principles that OIRA and agencies should consider to improve
78 review times and enhance transparency concerning the timing of the review process.

79 The Conference reaffirms its long-term support of the basic presidential regulatory
80 review process²¹ and seeks to ensure that it functions as effectively and efficiently as
81 practicable. The values of transparency, credibility, management effectiveness, and the rule of
82 law apply to the executive review process, even if it is not subject to judicial oversight.

83 The following principles suggest ways that both OIRA and the agencies can promote
84 timely and transparent OIRA review:

85 1. ~~Whenever possible, t~~The Office of Information and Regulatory Affairs (OIRA) should,
86 ~~whenever possible,~~ adhere to the timeliness provisions of Executive Order (EO) 12,866. The
87 Administrator of OIRA should continue to focus on improving OIRA review times. In so doing,
88 the Administrator should consider preparing a publicly available document that identifies any
89 specific policies that OIRA, regulatory agencies, and other agencies participating in interagency

²¹ See, e.g., Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994) (“We continue to support presidential coordination of agency policymaking as beneficial and necessary.”); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989) (“Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities.”); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980) (“Because the President, as the nation’s Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant.”).

Comment [MA1]: The manager’s amendment for this proposal involves moving “whenever possible” to the middle of the sentence. Regardless of whether the manger’s amendment is accepted, the committee will then consider the Bass Amendment, which involves striking “whenever possible” entirely.

Comment [CMA2]: Bass Amendment: Gary Bass proposes striking the phrase “whenever possible.” His explanation for doing so is as follows: “Given that presidential executive orders have the full force of law, John Contrubis, *Executive Orders and Proclamations*, 95-722A, at 1–2 (Mar. 9, 1999) (“The most commonly cited description is that prepared by the House Government Operations Committee: ‘Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law’” (cite: Staff of House Committee on Government Operations, 85th Congress, 1st Session, *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Committee Print 1957))), all executive agencies, including OIRA, should comply. Executive Order 12866 already provides ample flexibility for OIRA; if changes are needed to the timeframes established in section 6(b)(2) of the Order then the president should amend the Order. Moreover, Principle 5 in the draft statement recognizes the scope and complexity of reviews and offers OIRA additional flexibility with respect to review timeframes.

90 review should undertake in order to ensure that the measures of timeliness return to historical
91 averages under this executive order. Additionally, OIRA should include in the annual Report to
92 Congress on the Benefits and Costs of Federal Regulations information on the timeliness and
93 effectiveness of the regulatory review process over the previous year. Distilling the data
94 generated by OIRA's online database, the Report should include: the number of reviews
95 initiated and completed in the previous year, the average length of completed reviews, and the
96 number of rules changed during the OIRA regulatory review process.

97 2. Agencies and OIRA should coordinate prior to the submission of a completed
98 rulemaking package. To the extent possible, OIRA should use the regulatory planning process
99 created by section 4 of EO 12,866 to identify all of the relevant entities, establish lines of
100 communication among them, and create workplans with timelines and responsibilities for
101 action. The section 4 process should be used to identify the principal factual and policy issues
102 likely to be raised by a proposed rulemaking and to convey any presidential priorities respecting
103 them. OIRA should hold itself available to mediate such disputes among the identified agencies
104 as may arise, and to assure that all participating agencies place a high priority on the resulting
105 processes, so as not to cause undue delays.

106 3. Though OIRA has the final authority for determining which rules will be classified as
107 "significant," the agency should decide the point at which it will submit a draft rule to OIRA for
108 review under EO 12,866. Once an agency has submitted a completed rulemaking package with
109 approval from the appropriate senior agency official(s) within the meaning of EO 12,866, the
110 clock for the review period should commence.

111 4. In connection with interagency review, OIRA should promptly send the draft rule to
112 all of the relevant entities and, to the extent feasible, establish a timeline by which these
113 entities should submit comments. All participating entities should place a high priority on the
114 review process so as to avoid undue delays.

115 5. If OIRA concludes that it will be unable to complete the review of an agency's draft
116 rule within a reasonable period of time after submission, recognizing-adhering to the

Comment [CMA3]: Revesz Amendment: OIRA's website already contains a wealth of raw data on the timeliness of review. But beyond academia and the advocacy community that pays close attention to OIRA, such information may not be as easily accessible for members of Congress and the public. This information could be easily summarized and added to OMB's existing annual *Report to Congress on the Benefits and Costs of Federal Regulations*, to help Congress and the public better understand the number of reviews conducted by OIRA annually, the average length of reviews, and the number of rules changed during the OIRA review process.

117 timeframes established in section 6(b)(2) of EO 12,866 ~~and the nature of the matter—but in no~~
118 ~~event beyond 180 days after submission—~~, OIRA should inform the public as to the reasons for
119 the delay or return the rule to the submitting agency. OIRA should disclose its reasons with as
120 much specificity as feasible, using categories that will be informative to the public, agencies,
121 and Congress. Such categories could include: prolonged inter-agency review; additional
122 information or analyses required on costs, benefits, or alternatives; insufficient OIRA resources;
123 or other reasons tied to pertinent provisions of EO 12,866. When disclosing the reasons for
124 delay, OIRA should also announce a realistic timeline to complete the review.

Comment [CMA4]: Bass Amendment: “The amendment has two parts and cannot be separated. The reference to 180 days is not mentioned or recommended in the consultant’s report and has no basis in existing policy or legal research. Its addition was made on the basis that OIRA should not have an unlimited clock before explaining to the public the reason for delay or returning the rule to the submitting agency. By deleting the 180 day reference it opens the door to unlimited time that OIRA can hold the rule without explanation or return. However, by replacing “recognizing” with “adhering to” it would require OIRA to follow the timeframe established in EO 12866 and if it cannot, OIRA would be required to explain or return the rule.”

125 6. OIRA’s staffing authorization should be increased to a level adequate to ensure that
126 OIRA can conduct its regulatory reviews under EO 12,866 in a timely and effective manner.
127 Congress and OMB should take steps to establish secured funding for OIRA, either through a
128 separate budget line or through appropriations language that dedicates additional funding to
129 OMB for use by OIRA. In addition, or as an alternative, staff from rulemaking agencies and from
130 other White House offices could be detailed to OIRA under appropriate guidance and through a
131 process that maintains sufficient independence from agency staff responsible for writing and
132 implementing the regulation under review.

Comment [CMA5]: Revesz Amendment: Professor Revesz has provided a detailed explanation for this change in comments that he submitted, which are available on the ACUS website. I have prepared a short paraphrase of Professor Revesz’s comment: ACUS’s Statement should both reinforce some best practices that OIRA has already begun to adopt and identify additional improvements to the regulatory review process that have widespread support. There are times when OIRA will need to spend more than 90 or 120 days reviewing a rule. Extended review may sometimes be unavoidable to ensure thorough and thoughtful centralized regulatory review. However, OIRA could take steps to ameliorate the negative impacts of regulatory delay. If insufficient information is causing delay, OIRA should either announce a timeline for acquiring the necessary information or return the rule to the agency to collect more data. If rule complexity or prolonged inter-agency review is causing delay, OIRA should set a new timeline for review. If insufficient resources are causing delay, OIRA should disclose the shortfall to the public and, as much as possible, take steps to address staffing shortfalls.

Comment [CMA6]: Revesz Amendment: In the long run, increasing staffing at OIRA is a legitimate approach to addressing delay in the regulatory review process. OIRA should advocate for greater funding from Congress.

Comment [CMA7]: Revesz Amendment: ACUS’s suggestion on loaning agency staff to OIRA has potential to help temporarily reduce delays. However, there are potential pitfalls of assigning agency staff who may either know the substance of the rule and have a professional stake in the outcome, or else may be unfamiliar with the substance of the rule. ACUS should borrow from language that OIRA developed when advising agencies on how to secure the independence of internal retrospective review committees. OIRA, M-11-10, Executive Order 13,563, “Improving Regulation and Regulatory Review” 5-6 (Feb. 2, 2011). ACUS should also propose possible staff loans from White House offices outside of rulemaking agencies, such as CEA or CEQ.