



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committees on Administration & Management and Regulation
Date: October 21, 2013
Re: Draft Statement

The following draft statement is based on the Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review Project and related draft report and proposals by project consultant (and ACUS Special Counsel) Curtis Copeland. This draft is intended to facilitate the Committees' discussion at their October 29, 2013 public meeting and not to preempt the Committees' consideration of the proposed statement. Conference statements, like recommendations, go through the committee process and are voted upon at plenary sessions, but they generally highlight important considerations and examine possible solutions to regulatory problems rather than providing detailed policy prescriptions for affected entities to implement. The Conference has issued a total of 17 statements over the course of its history. The complex nature of the OIRA review process and the multiple potential causes for recent delays make the statement approach appropriate. In addition, in light of the desirability of gathering widespread input and the tight timeframe for committee consideration of the project, we have decided to pursue a joint committee approach.

PROPOSED STATEMENT # 18

Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review

For more than three decades, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has conducted centralized review of federal agencies' draft proposed and final regulations. The fundamental structures and principles governing the current regulatory review process were set forth in Executive Order (EO) 12,866,¹ and subsequent EOs have reaffirmed this system of regulatory review.² Among other things, Executive Order 12,866 requires executive branch agencies to submit all "significant regulatory

¹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

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



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actions” to OIRA for review and clearance.³ The purposes underlying the centralized OIRA regulatory review process include: ensuring consistency with applicable laws and presidential priorities; enhancing coordination of regulatory policy among federal agencies; examining economic analyses accompanying the rule; and making the regulatory process more efficient.⁴ OIRA regulatory review is also intended to offer a “dispassionate and analytical ‘second opinion’ on agency actions.”⁵

In order to ensure that OIRA review proceeds in a timely manner, EO 12,866 generally requires OIRA to “waive review or notify the agency in writing of the results of its review” within 90 calendar days following submission.⁶ The executive order also provides 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.”⁷

Executive review of agency rulemaking, and, more precisely, OIRA’s role in the review process—though not without controversy⁸—are now firmly entrenched fixtures of the administrative landscape,⁹ and each administration since that of President Ronald Reagan has

³ Exec. Order No. 12,866 § 6(a)(3)(B)–(C); *see also id.* § 3(f) (defining “significant regulatory action”).

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

⁵ President Barack H. Obama, Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009).

⁶ 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.

⁷ *Id.* § 6(b)(2)(C).

⁸ 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).

⁹ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Michael A. Livermore and 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).



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endorsed them.¹⁰ For such reviews to be effective, however, they must also be timely and transparent. All stakeholders in the regulatory process—including the submitting agency, potentially regulated entities, other interested participants, and the general public—have a vested interest in seeing the OIRA review process operate as efficiently as possible for several reasons: agency regulatory or scientific assessments may become out of date when reviews are overlong; likewise, regulated markets or industries might experience uncertainty when proposed or final rules remain stalled in the review process; and, for rules related to health or safety, delay in the OIRA review process could well have serious social consequences. In addition, the timing of review process should be made as transparent as possible. OIRA should generally notify agency officials and the public of the reasons for any delays, to the extent consistent with applicable law.

Historically, OIRA has completed most of its reviews of agency rules well within the 90-day time limit. For example, from 1994 - 2011, the average time for OIRA review was 43 days for economically significant regulations, and 51 days for all rules.¹¹ Since 2011, however, average OIRA review times have trended significantly upward. In 2012, the average time for OIRA review for all rules rose to 79 days, and in the first half of 2013, the average review time increased even further to 140 days.¹² Nearly two dozen reviews completed in 2013 have taken more than a year.¹³

Lately, OIRA has made significant headway in reducing the backlog of rules. For instance, the number of reviews lasting more than one year has been cut from 51 reviews in mid-May 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 were completed by mid-September 2013. Only 10% of the reviews of rules submitted between September 2012 and

¹⁰ See Special Edition, OIRA Thirtieth Anniversary Conference, 63 ADMIN. L. REV. 1 (2011). Jim Tozzi, who served as chief career deputy at OIRA for over 20 years, suggests that executive rulemaking review began much earlier, during the Nixon Administration. *Id.* at 37.

¹¹ See Review Counts, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited July 30, 2013) (allowing searches of OIRA review counts and average review times by date range).

¹² *Id.*

¹³ List of Regulatory Actions Currently Under Review, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Sept. 13, 2013).



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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).¹⁴

The Administrative Conference has long supported effective executive review of agency rulemaking, and has emphasized the importance of timeliness and transparency in this process. In Recommendation 88-9, the Conference stated that “[t]he process of presidential review of rulemaking, including agency participation, 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.”¹⁵ Similarly, in Recommendation 93-4, the Conference asserted that “the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process.”¹⁶ The Conference has also issued several recommendations advocating a transparent OIRA review process.¹⁷

Building upon these prior Conference initiatives addressing executive review, the Conference now offers proposals for improving the timeliness and transparency of the regulatory review process under EO 12,866. The OIRA review process is, of course, exceedingly complex and involves many components and participants. Delays cannot be attributed to any single cause but rather arise from separate factors (and complex interactions amongst them) involving several different players, including OIRA, agencies submitting rules for review, and other agencies and offices in the interagency review process (including other parts of the Executive Office of the President). As a result, instead of providing formal recommendations, the Conference wishes to

¹⁴ It is important to note that, as OIRA completes review for rules that have been in the backlog for some time, the average review times will likely increase, which evidences an improving situation.

¹⁵ Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, ¶ 3, 54 Fed. Reg. 5,207 (Feb. 2, 1989).

¹⁶ Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4,670 (Feb. 22, 1994).

¹⁷ Specifically, the Conference has recommended that all factual information as well as official written policy guidance that agencies receive from the President or the Executive Office of the President should be made publicly available (though policy guidance need not be made available until after the issuance of a notice of proposed rulemaking or final rule). Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 5, 54 Fed. Reg. 5,207 (Feb. 2, 1989); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, ¶¶ 1–2, 45 Fed. Reg. 86,407 (Dec. 31, 1980).



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highlight a number of proposals that OIRA and agencies should consider in enhancing transparency and bringing review times back to historical averages.

The Conference reaffirms the procedures established by EO 12,866 and seeks to ensure that the review process it creates functions as transparently and effectively as practicable. Much as agencies are bound to follow the regulations they promulgate,¹⁸ OIRA should adhere to the timeliness provisions of executive orders. Considerations of transparency, management effectiveness, and the rule of law apply to the executive review process, even if it is not subject to judicial review.

The following proposals give both OIRA and the agencies ways to promote timely, transparent, and effective OIRA review:

1. The Administrator of the Office of Information and Regulatory Affairs (“OIRA”) should continue the current initiative to improve OIRA review times. In so doing, the Administrator should consider preparing a publicly available document that identifies any specific policies that OIRA, regulatory agencies, and other agencies participating in interagency review should undertake in order to ensure that the measures of timeliness return to at least historical averages. OIRA should report periodically to the public on the results of this initiative.

2. OIRA, submitting agencies, and other entities participating in the interagency review process should, as applicable, strive to provide and respond to comments as quickly as possible. In connection with interagency review, OIRA should promptly send the draft rule to all of the relevant agencies and, to the extent feasible, establish a timeline by which reviewing entities should submit their comments.

3. When a submitting agency takes a significant amount of time to review and respond to OIRA’s comments, OIRA may wish to consider stopping the review “clock” or exploring other possible mechanisms for tolling the review period while the agency responds.

¹⁸ *Panhandle E. Pipe Line Co. v. Fed. Energy Regulatory Comm’n*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“It has become axiomatic that an agency is bound by its own regulations.”).



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4. If OIRA is unable to complete its review of an agency's proposed regulatory action within 120 days of submission but anticipates completing review without extensive additional input from the submitting agency, it should consider issuing a publicly available review letter explaining why the review has required more than 120 days and provide an estimate of when it will complete the review. If OIRA anticipates that review cannot be completed within 120 days because the agency must undertake significant additional analysis, it should consider issuing a publicly available return letter to the agency explaining the reasons for the return.

5. OIRA and the agencies should coordinate prior to the formal submission of a rule for review. These preliminary discussions should generally highlight potential substantive concerns that will be relevant as the agency drafts a proposed rule and address scheduling issues concerning the proper allocation of OIRA and agency resources. In addition, the following specific suggestions apply:

- (a) Any relatively informal discussions that predate the submission of a draft rule should not count towards the 120-day timeline, but, once OIRA has received a finished work product with approval from the appropriate senior agency official(s), the clock for the review period should commence.
- (b) Though OIRA has the final authority for determining which rules will be classified as "significant," the agency should ultimately determine the point at which it will submit a proposed or final significant rule to OIRA for review under EO 12,866.
- (c) OIRA and submitting agencies should coordinate in advance of submission to ensure that both OIRA and agencies will have adequate staff to dedicate to conducting the necessary review and analyses for the rule at issue. To the extent practicable and permitted by law, agencies should sequence their submission of rules to ensure that review can occur in a timely manner.

6. If necessary, OIRA's staffing authorization should be increased to a level adequate to ensure that OIRA can conduct its regulatory reviews under EO 12,866 in a timely manner. In addition, or as an alternative, staff from rulemaking agencies could be detailed to OIRA for short periods of time.