



# Institute for Policy Integrity

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*new york university school of law*

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Committees on Administration & Management and Regulation  
Administrative Conference of the United States  
Comments@acus.gov

Subject: Committees on Administration & Management and Regulation — Initial Comments on Draft Recommendations for Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review (proposed October 21, 2013)

The Institute for Policy Integrity at NYU School of Law respectfully submits the following initial comments on the ACUS Committees on Administration & Management and Regulation draft recommendations for improving the timeliness, transparency, and effectiveness of OIRA regulatory review. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy. We intend to offer more thorough and detailed comments in the coming weeks.

OIRA delays can sometimes present serious negative effects, both in terms of lost benefits from efficient regulation and in terms of the damage to OIRA's legitimacy. Policy Integrity has four key recommendations for reducing OIRA delay: 1) If insufficient information is causing delay, OIRA should return the rule to the agency to collect more data; 2) If complexity is causing delay, OIRA should set a new timeline for review; 3) If insufficient resources are causing delay, OIRA should disclose the shortfall to the public and to Congress; and 4) OIRA should not hold rules indefinitely at OIRA for political reasons or due to pressure from special interests.

## **The Impacts of OIRA Delay**

Careful centralized regulatory review by OIRA is an important part of the regulatory process. OIRA review of agency cost-benefit analysis helps to ensure that the policy options selected by agencies maximize social welfare. Additionally, OIRA review facilitates harmonization and coordination among rules. Sometimes conducting an effective regulatory review will take longer than the 90 days allotted by Executive Order 12,866. The costs of these delays must be balanced against the potential benefit that additional review may produce better rules. If the review process requires more than the 90-day period, the public should be informed of the reason. Unjustified delay can harm the public, the agency, and OIRA's reputation.

Undue delay in the regulatory review process imposes costs on the public. In cases where OIRA is slow to reject a regulation that will not be ultimately justified through the cost-benefit analysis, then it is preventing the promulgating agency from developing a better, more efficient rule.<sup>1</sup> If

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<sup>1</sup> See Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Drugging*, 79 GEO. WASH. L. REV. 1381, 1401-02 (2011).

OIRA delays releasing regulations that are cost-benefit justified, then intended beneficiaries will not receive the benefits of the regulation.<sup>2</sup> For example, though OSHA estimates that the silica rule could save up to 60 statistical lives per year,<sup>3</sup> the rule was under OIRA review for over two years. Lost benefits compound when other agencies plan to base their own subsequent rules on a delayed rule. In this instance, the Mine Safety and Health Administration will develop a similar mining rule based upon OSHA's silica rule. However, the Mine Safety and Health Administration delayed action until the OSHA rule was completed.<sup>4</sup> Since mining is responsible for the plurality of all silica-related deaths, many additional benefits have been lost to regulatory delay.<sup>5</sup> Similarly, valuable data and information that could lead to more effective employer prevention efforts and OSHA enforcement is lost every year by delays in implementation of the injury and illness reporting rule.

Delay in the regulatory review process also creates uncertainty.<sup>6</sup> Such uncertainty may cause regulated entities to avoid investing in new, safer equipment. For instance, if adopted, the silica rule will likely require facilities to purchase HEPA vacuums for clean-up,<sup>7</sup> and require that some manufacturing facilities have on-site showers available for workers.<sup>8</sup> The regulatory uncertainty surrounding the industries likely subject to the silica rule ultimately affects a wide range of investment decisions. More generally, investors in industries likely to be affected by pending rules may delay their otherwise productive investments while waiting for additional information.

Moreover, delay can damage public perception of OIRA. The transparency and efficiency of the OIRA review process has made it an important and well-respected element of rulemaking. However, some groups continue to perceive OIRA as an anti-regulatory "black hole" for proposed regulations, given OIRA's past history.<sup>9</sup> Though OIRA has greatly improved its track record for transparency, the public may perceive unexplained regulatory delay as undermining that track record.

### **Proposals for Reform**

There are times when OIRA will need to spend more than 90 days reviewing a rule. Extended review time may sometimes be unavoidable to ensure thorough and thoughtful centralized regulatory review. However, OIRA could take steps to ameliorate the negative impacts of regulatory delay. In its final proposals on improving the timeliness, transparency, and effectiveness of OIRA regulatory review, the Committees on Administration & Management and Regulation should effectively incorporate the following concepts:

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<sup>2</sup> See *id.* at 1399-00.

<sup>3</sup> See SMALL BUSINESS ADVOCACY REVIEW PANEL, REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARDS FOR SILICA 5-6 (2003).

<sup>4</sup> See FALL 2011 UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, RIN 1219-AB36: RESPIRABLE CRYSTALLINE SILICA STANDARD (2011) ("MSHA intends to use OSHA's work on the health effects and risk assessment."); see also Adele L. Abrams, *Silica Sampling and Analysis: Legal Issues Evolving from Regulatory Standards and the Role of ASTM E1132*, J. of ASTM Int'l (2004) ("MSHA is awaiting OSHA action on silica, and is likely to follow that agency's lead.").

<sup>5</sup> See Carson R. Thomas & Timothy R. Kelley, *A Brief Review of Silicosis in the United States*, 4 ENVTL. HEALTH INSIGHTS 21 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2879610/#b4-ehi-2010-021>.

<sup>6</sup> See Sant'Ambrogio, *supra* note 1, at 1400-01.

<sup>7</sup> See OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, PRELIMINARY INITIAL REGULATORY FLEXIBILITY ANALYSIS OF THE DRAFT PROPOSED OSHA STANDARD FOR SILICA EXPOSURE FOR GENERAL INDUSTRY AND MARITIME 38 (2003).

<sup>8</sup> See *id.* at 23.

<sup>9</sup> See e.g., Molly Redden, *New Republic: OIRA Antagonizing Environmentalists*, NAT'L PUB. RADIO, Jan. 12, 2012, <http://www.npr.org/2012/01/12/145095539/new-republic-oira-antagonizing-environmentalists>.

**If insufficient information is causing delay, OIRA should return the rule to the agency to collect more data:** If insufficient information makes it impossible for OIRA to complete its review, OIRA should send the rule back to the promulgating agency. The agency can then issue a public request for information, and send the rule back to OIRA when there is sufficient information to support cost-benefit analysis and regulatory review. By sending the rule back to the agency, the public can participate in the regulatory process and rulemaking can continue.

**If complexity is causing delay, OIRA should set a new timeline for review:** Complex rules with many elements or difficult methodological problems may have particularly complicated cost-benefit analyses. In such instances, OIRA may not be able to complete the review in the usual 90-day period. When this is the case, OIRA should publically acknowledge the delay and explain the need for additional time. If possible, OIRA should provide a real and achievable updated timeline for completing review. Such a policy would increase transparency and make it clear to the public that OIRA has not lost track of the rule and is not merely delaying the rule without reason.

**If insufficient resources are causing delay, OIRA should disclose the shortfall to the public and to Congress:** If OIRA cannot complete a review in a timely manner due to lack of resources, OIRA should inform the public and Congress of its shortage. A lack of resources may be temporary due to staff turnover, or longer lasting, as in the case of a constrained OIRA budget. Publicizing these situations would increase transparency and allow the public an opportunity support additional monetary and staff support for OIRA necessary to carry out its review duties.

**OIRA should not hold rules indefinitely at OIRA for political reasons or due to pressure from special interests.** Politically motivated delays undermine the credibility both of OIRA as a neutral reviewing body and of cost-benefit analysis as a neutral tool for evaluating regulatory policies. Such delays particularly erode OIRA's credibility given its particular institutional history.

Sincerely,  
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Adam Axler

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