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Committee on Administration & Management and Regulation
Administrative Conference of the United States
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Re: **Initial Comments on ACUS Project on Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review**

Advisory Council

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The Center for Progressive Reform (CPR) is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR works to advance the public's understanding of the issues addressed by the country's regulatory laws. In particular, CPR seeks to educate the public and policymakers about how the government's authority and resources may best be used to preserve collective values and to hold accountable those who ignore or trivialize them. The views expressed in these comments are those of the authors and do not necessarily reflect the views of CPR.

We appreciate that the Administrative Conferences of the United States (ACUS) is undertaking the critical task of investigating the problems that OIRA's role in the rulemaking process presents through its "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review" project, but the report, "Length of Rule Reviews by the Office of Information and Regulatory Affairs," and its recommendations address only one of the many problems with OIRA's regulatory review function: the unacceptable delays that it creates. While this is undoubtedly an important and pressing problem, we are also concerned with a lack of transparency in OIRA's activities; unwarranted interference in agency decision-making; the growing role of political influence in executive oversight; and OIRA's disregard for the multidisciplinary nature of agency expertise. We urge ACUS to take up these issues as part of its "Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review" project.

Even with respect to this narrow project, we urge the committee to ensure that all of its recommendations are consistent with the clear language of Executive Order 12866—and to reject any recommendations that are not consistent with this clear language. The order very clearly states that regulatory reviews may not exceed 90 days in length with a limited, one-time extension of no more than 30 days permitted, *regardless of whether such extensions comes at the request of OIRA or the submitting agency*. If ACUS is unwilling to recommend formal changes to these clear deadline requirements, then it should

advocate nothing short of strict adherence to them. In particular, this means that ACUS should not recommend that OIRA seek only to improve the timeliness of its reviews such that they “return to at least historic averages.”¹

Our recommendations for eliminating OIRA violations of regulatory reviews deadlines can be summarized as follows:

- 1. OIRA should focus its resources on reviewing economically significant rulemakings, as it is directed to do by Executive Order 12866. OIRA appears to have sufficient resources to complete these reviews in a timely fashion;*
- 2. The interagency review process has become a significant source of additional delay and should be limited; and*
- 3. OIRA’s “all you can meet” policy for meeting without outside groups should be eliminated.*

Our recommendations also include the rejection of certain other recommendations for addressing OIRA delay, which include the following: increased use of “informal” review; “clock-stopping”; and increased OIRA staffing.

I. RECOMMENDATIONS FOR ENSURING OIRA COMPLIANCE WITH REGULATORY REVIEW DEADLINES

A. OIRA Should Focus Its Resources on Reviewing Economically Significant Rulemakings, As It Is Directed to Do by Executive Order 12866. OIRA Appears to Have Sufficient Resources to Complete These Reviews in a Timely Fashion.

OIRA has expanded its jurisdiction significantly over the last few decades, yielding an unmanageable workload for OIRA staff that contributes to the excessive delays in its regulatory reviews. OIRA would save significant resources if it generally restricted its reviews to the economically significant rulemakings that are the focus of Executive Order 12866. Limiting OIRA’s workload in this fashion would go a long way toward eliminating delayed reviews that violate the deadlines established in Executive Order 12866.

Executive Order 12866 instructs OIRA to focus on “economically significant rules,” generally defined as rules imposing more than \$100 million in annual compliance costs for affected industries. The order also allows OIRA to extend the scope of its review in very limited circumstances.

For the past decade, OIRA has ignored these limits, extending its reach into every corner of agencies’ work. As ACUS’ study notes, the vast majority of the rules that OIRA reviews—approximately 500 to 800 rules per year—are non-economically significant rules. Meanwhile, economically significant rules, which are intended to be the central focus of OIRA’s activity,

¹ CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 55 (2013).

make up only about 100 reviews per year.² Thus, in any given year, minor matters outnumber economically significant rules by about a six-to-one ratio. OIRA has been able to extend its reach by expanding the vague non-economic components of the definition of “significant regulatory action,” especially the “Raise novel legal or policy issues” component to include more and more rules.

To make matters worse, OIRA also frequently reviews a large universe of non-regulatory actions, including agency guidance documents, speeches, and congressional testimony. Notably, the authority to review many of these types of agency documents does not come from Executive Order 12866. Rather, it comes from an obscure memorandum issued by OMB a few months into the first term of the Obama Administration.³

Not only is OIRA reviewing too many agency products, but many individual reviews have become too intrusive. As part of the review process, OIRA personnel will often make extensive suggestions to draft rules, often on marginal matters that appear to have little substantive impact on the rule itself or that are outside the scope of their review authority. In addition, the OIRA personnel often demand that submitting agencies conduct extensive and elaborate economic analyses that are irrelevant, and in some cases prohibited by the law under which the rulemaking is being undertaken. Agency rulemakings often involve complex technical and scientific matters that are well beyond the expertise of OIRA’s desk officers. Nevertheless, OIRA personnel often appear to second-guess agency experts on these matters, seeking to substitute their non-expert judgment. If the submitting agency refuses to relent on these matters, then they must engage in lengthy negotiations or undertake extensive analyses to satisfy OIRA’s misplaced criticisms.

To prevent improper delays caused by the OIRA review process, OIRA should curtail its intrusive interference in agencies’ work. In particular, OIRA should eliminate its extensive review of non-economically significant matters and commit to re-focusing on economically significant rules that are supposed to be its highest priority under Executive Order 12866. Similarly, the memorandum granting OIRA review authority over agency guidance documents should be revoked. Likewise, OIRA should cease reviewing any other non-regulatory actions not covered by the memorandum, including speeches and congressional testimony. Finally, OIRA desk officers should limit the intrusiveness of their individual reviews. In particular, they should confine their reviews to only broad questions of quality control, and leave to the agencies the resolution of complex technical questions or policy judgments.

This scaled-back workload is consistent with the clear directions that Executive Order 12866 provides to OIRA. It would also prevent OIRA from unnecessarily expending its resources on matters that Executive Order 12866 was not intended to address. By focusing its resources on reviewing economically significant regulations, as Executive Order 12866 contemplates, OIRA would be better able to complete its reviews in a timely fashion, preventing violations of the deadlines established under Executive Order 12866.

² *Id.* at 25 tbl.2.

³ Memorandum from Peter Orszag, Director, White House Office of Management and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

B. The Interagency Review Process Has Become a Significant Source of Delay and Should Be Reformed.

As noted in ACUS' study, the review of individual rules by offices within the Executive Office of the President other than OIRA and by agencies other than the submitting agency has become a more prominent feature of OIRA's review process. This development has become a major source of delays in OIRA's reviews, since more and more components of the Executive Branch are intervening in each review. Each of these agencies and offices are demanding what amounts to veto authority on individual rules, such that interagency review has transformed into a consensus-based decision-making process.

In many cases, we question the appropriateness of non-submitting agencies reviewing draft agency rules outside of public scrutiny. The participation of non-submitting agencies in the interagency review process seems particularly problematic in those cases where the non-submitting agency effectively stands in the shoes of regulated entities. For example, in one particularly egregious case, an inadvertently leaked interagency review document revealed that the Tennessee Valley Authority (TVA) had participated in the interagency review process for the EPA's draft proposed rule on the regulation of coal ash disposal. This rule was in large motivated by a massive coal ash spill at a TVA facility, and the TVA will likely be subject to the rule's requirements if and when it is ever released. Under these circumstances, non-submitting agencies should be forced to participate in the public notice and comment process established under the APA, just like any other interested party.

More generally, if agencies want to make comments on the substance of agency draft rules, they should make use of the public notice and comment process established by the APA. If, however, agencies continue to rely on the interagency review process outside of the APA's notice and comment period, then the substance of these interagency discussions should be made public. This does not presently occur, because these interagency review comments are often categorized as matters of "deliberative process," and therefore shielded from public disclosure. The presumption should be reversed, and all interagency comments should be included in the record and rulemaking docket unless there is a very good reason for keeping them secret. Nothing short of the full disclosure of all interagency comments will satisfy the heightened transparency provisions mandated by the clear language of Executive Order 12866.

In addition, we reject the notion that interagency review is necessary for coordinating agency regulatory activities. Other tools exist for undertaking coordination, and should be used instead of the interagency review process. For example, the exercise of developing agency regulatory agendas offers an obvious opportunity for coordination. Similarly, the President has broad authority to issue executive orders that can coordinate agency regulatory activities. President Obama's recent executive order to coordinate a regulatory response to the West, Texas, chemical facility explosion⁴ offers a good example for how this tool can be used.

Accordingly, we recommend that the practice of interagency review be significantly curtailed if not eliminated. If other components of the Executive Branch wish to comment on an agency rule, they can participate in the APA notice-and-comment process like any other interested party. If interagency review continues, however, then the substance of all interagency comments

⁴ Exec. Order No. 13,650, 78 Fed. Reg. 48,029 (August 7, 2013).

should be fully disclosed and included in the rulemaking docket. In addition, several other tools for coordinating agency regulatory actions exist outside the interagency review process. These tools should be used instead for coordinating agency regulatory actions.

C. OIRA's "All You Can Meet" Policy for Meeting with Outside Groups Should be Eliminated.

One cause of OIRA review delay that should be included in ACUS' study is the large number of meetings that OIRA holds with outside groups during its rule reviews. It will be nearly impossible for OIRA to comply with the Executive Order deadlines unless these meetings are limited.

OIRA has long employed an "all you can meet" policy, under which it will grant any request from an outside group to meet regarding a rule undergoing review. OIRA defends policy as neutral, but in fact it risks producing a skewed view of the rules undergoing review. Industry has taken advantage of this policy, and, as a result, meetings involving representatives of regulated industries greatly outnumber meetings involving public interest groups. A 2011 CPR study found that over a 10-year period, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups. OIRA makes no effort to balance its meeting schedule by hearing from even a rough equivalence of organizations supporting protective regulations. In only 16 percent of reviews involving meetings did OIRA meet with organizations from across the spectrum of interested groups, while in 73 percent OIRA met only with industry representatives.⁵

The CPR study also found that these meetings correlated with delays in OIRA reviews. Of the 501 completed reviews examined in the study (those in which OIRA met with outside parties), 59 reviews (12 percent) lasted longer than 120 days and were thus in violation of Executive Order 12866. Within these, 22 reviews extended beyond 180 days (about six months). The study's findings also suggest that reviews with meetings last, on average, 20 days longer than reviews without meetings.⁶

To address the problem of OIRA review delay, OIRA's policy for meeting with outside groups must be reformed. We recommend that OIRA cease meeting with these outside groups during its review, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation. If, however, OIRA continues to meet with outside groups, it should assume an active role in managing these meetings, including through the consolidation of meetings involving like-minded participants (*i.e.*, seeing them all at once). In addition, all meetings with outside parties should be transcribed and entered in the rulemaking record.

⁵ Rena Steinzor, Michael Patoka, & James Goodwin, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* 19-21 (Ctr. for Progressive Reform, White Paper 1111, 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

⁶ *Id.* at 51.

II. RECOMMENDATIONS FOR ADDRESSING OIRA DELAYS THAT MUST BE REJECTED

A. Increased Use of “Informal” Review

Recommendation 3, which states in part that “[c]ommunication between rulemaking agencies and OIRA before formal submission of a rule to OIRA for review should be encouraged,” flaunts the transparency requirements of Executive Order 12866.⁷ OIRA’s informal review has historically lacked any documentation whatsoever.⁸ Under current OIRA practice, it is impossible to determine whether and to what extent OIRA has influenced the substance of agency rulemakings before the formal review. Affirmatively recommending still more of this nontransparent, upstream influence by OIRA directly contravenes both the text and the intent of Executive Order 12866, which creates a short, formal clearance role for OIRA. Executive Order 12866 also demands that OIRA’s influence during this pre-review period be completely and carefully documented and made available to the public.⁹ As long as OIRA is engaged in influencing agency projects at earlier, undefined stages, and this influence is completely unrecorded, it undermines the agency’s authority and the ability of the public to participate meaningfully in the rulemaking process.

We also doubt that increased use of informal reviews will do much to address the problem of OIRA delay during the formal review—there is at least no evidence that it will have this effect given the fact that these informal reviews by OIRA are already occurring without any apparent limit. At the same time, this extended OIRA influence into earlier and earlier stages of agency rulemakings will further undermine the legitimacy and scientific integrity of the resulting rules.

As such, we urge ACUS to eliminate this recommendation in its entirety.

B. “Clock-Stopping”

We oppose any recommendation that would allow OIRA to “stop the clock” on the review during the period in which it is waiting for any agency response to its feedback on a draft rule undergoing review.

Implementing this recommendation has no basis in Executive Order 12866 and may perversely lead to even more extensive and nontransparent interventions into agency rulemakings by OIRA. In particular, this recommendation might encourage OIRA to inundate agencies with even more comments and burdensome analysis requests than it does currently. Because the clock would be stopped while agencies are responding to these comments and requests, this tactic would enable OIRA to significantly increase review times. The difficulty of responding to these comments and requests might also induce agencies to accept changes to their draft rules that they might not otherwise accept.

This recommendation should be rejected as not only lacking support in Executive Order 12866, but also as directly violating both its letter and spirit.

⁷ COPELAND, *supra* note 1, at 58-59.

⁸ See, e.g., Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1128 (2010)

⁹ Exec. Order No. 12,866 §§ 6(a)(3)(E)(ii)–(iii), (a)(F) and (b)(3), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

C. Increased OIRA Staffing

We disagree with Recommendation 7, which provides in part that “OIRA’s staffing authorizations should be increased to a level adequate to ensure that OIRA can conduct its reviews in a timely manner.”¹⁰ Providing OIRA with more staffing resources would only enable OIRA to continue and expand its interference in agency rulemakings in ways never authorized in Executive Order 12866. Instead, the better approach to OIRA’s resource constraints is to limit its workload to the role set out for OIRA in Executive Order 12866, as described above. In particular, this should include reviewing far fewer non-economically significant rules and agencies’ non-regulatory activities, such as guidance documents, testimony, and speeches, and limiting the intrusiveness of OIRA’s reviews into individual rules. By limiting its workload to only those duties assigned to it by the President, OIRA will no doubt find that it has more than enough resources to carry out the modest tasks that are its charge.

III. CONCLUSION

We appreciate your attention to these comments. At your request, we are happy to continue engaging with these committees further on the ACUS “Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review” project.

Sincerely,

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¹⁰ *Id.* at 61-62.