



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committees on Administration & Management and Regulation
Date: November 1, 2013
Re: Draft Statement

The following draft statement is based on the Improving the Timeliness 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 November 6, 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 in its history. The complex nature of the OIRA review process, the multiple potential causes for recent delays, and the efforts by OIRA during the past year to reduce the backlog of delayed rules 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 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 regulatory review process are currently set forth in Executive Order (EO) 12,866,¹ and subsequent EOs have reaffirmed this system of regulatory review.² Among other things,

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).



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Executive Order 12,866 requires covered agencies to submit all “significant regulatory actions” to OIRA for review.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 serves to monitor agency rulemaking activity to ensure adherence with administration policy⁵ while also offering a “dispassionate and analytical ‘second opinion’ on agency actions.”⁶

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.⁷ 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.”⁸

Executive review of agency rulemaking, and, more precisely, OIRA’s role in the review process—though not without controversy⁹—are now firmly entrenched fixtures of the

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

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).



administrative landscape,¹⁰ and each administration since at least that of President Ronald Reagan has endorsed them.¹¹ For such reviews to be effective, however, they must be timely. All stakeholders in the regulatory process—including the submitting agency, potentially regulated entities, other interested participants, and the general public—have an 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.¹² In addition, the timing of review process should be made as transparent as possible.

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 51 days for all rules.¹³ 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.¹⁴ Nearly two dozen reviews completed in 2013 have taken more than a year.¹⁵

¹⁰ 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).

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).

¹³ See Off. Info. & Reg. Aff., Review Counts, <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).

¹⁴ *Id.*

¹⁵ Off. Info. & Reg. Aff., List of Regulatory Actions Currently Under Review, <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Sept. 13, 2013).



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However, average review times and length of completed reviews are lagging indicators of OIRA performance, and the recent increases in average review times reflect the significant headway that OIRA has made during the past year in reducing the backlog of rules and improving review timeliness. 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 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).¹⁶

Senior government employees have provided a variety of perspectives as to why they believe OIRA review times had increased in 2012–13, including (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 coordinative reviews by other agencies and offices within the EOP, and (3) a reluctance by OIRA to use return letters. Both these senior employees and other observers (including several former OIRA officials) also suggested that a decrease in OIRA staffing in recent years may have been another contributing factor. In addition, the executive review process has become more complicated for all parties involved as regulations have grown increasingly complex, interagency coordination has become more important, and various transparency and procedural requirements have grown more demanding.

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.”¹⁷ Similarly, in Recommendation 93-

¹⁶ 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.

¹⁷ Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, ¶ 3, 54 Fed. Reg. 5,207 (Feb. 2, 1989).



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4, the Conference asserted that “the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process.”¹⁸ The Conference has also issued several recommendations advocating a transparent OIRA review process.¹⁹

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 involves many components and participants. Delays may not be attributable to any single cause but rather can arise from multiple factors (and complex interactions amongst them) involving numerous players, including OIRA, agencies submitting rules for review, and other agencies and offices in the interagency review process (including other parts of the EOP). As a result, the Conference wishes to highlight a number of proposals that OIRA and agencies should consider to improve review times and enhance transparency.

The Conference reaffirms its long-term support of the basic presidential regulatory review process²⁰ and seeks to ensure that the review process EO 12,866 creates functions as effectively and efficiently as practicable. Whenever possible, OIRA should adhere to the

¹⁸ Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4,670 (Feb. 22, 1994).

¹⁹ 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).

²⁰ See, e.g., Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4,670 (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. 5,207 (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.”).



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timeliness provisions of EO 12,866. The values of transparency, credibility, management effectiveness, and the rule of law apply to the executive review process, even if it is not subject to judicial oversight.

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

1. The Administrator of the Office of Information and Regulatory Affairs (“OIRA”) should continue to focus on improving 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.

2. In connection with interagency review, OIRA should promptly send the draft rule to all of the relevant entities and, to the extent feasible, establish a timeline by which these entities should submit comments. All participating entities should place a high priority on the review process so as not to cause undue delays.

3. If OIRA concludes that it will be unable to complete the review of an agency’s draft rule within a reasonable period of time after submission, OIRA should weigh the appropriateness of returning the draft rule to the submitting agency accompanied by a letter informing the agency and the public of the pertinent provisions of Executive Order (“EO”) 12,866 on which OIRA is relying.

4. To facilitate greater timeliness of the regulatory review process, and building upon the results of the Regulatory Planning process set forth in EO 12,866, OIRA and each submitting agency should coordinate on a periodic basis to discuss the anticipated submission of draft rules for review, the principal factual and policy issues likely to be raised during the review of those rules, and the other agencies that are likely to be interested in the review of the rules.



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5. Prior to the formal submission of a draft rule for review under EO 12,866, OIRA and the submitting agency should further consult regarding the anticipated review process for the consideration of that rule. The following suggestions apply to such consultations:

(a) Any informal discussions that predate the submission of a draft rule should not count towards the review timeline, but, once OIRA has received a draft rule 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 draft rule to OIRA for review under EO 12,866. Prior to the agency’s determination to submit a rule, it should coordinate to the extent practicable with OIRA to ensure that both it and OIRA will have adequate staff to dedicate to conducting the necessary review and analysis.

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 under appropriate guidance for short periods of time.