

Reorienting OIRA to Support Progressive Regulation

Given its unique position in the executive branch and the influence it wields, the White House Office of Information and Regulatory Affairs (OIRA) has significant potential to affirmatively advance the Biden-Harris administration’s policy agenda. To realize this potential, however, it is necessary to rediscover and restore the progressive role that Executive Order 12866 set for OIRA’ in the regulatory system —one that would not unnecessarily impede progress on the new administration’s policy priorities.

The Problem:

Executive Order 12866 charges OIRA with conducting centralized review of the most important draft proposed and final rules being developed by executive branch agencies. Because those agencies cannot proceed with those rules without clearance from OIRA, this review process positions OIRA as a powerful regulatory “gatekeeper.” Historically, OIRA has carried out this gatekeeping function with a strong fixation on reducing regulatory costs, and thus against stronger regulatory protections.

This anti-regulatory orientation departs from the progressive vision outlined in Executive Order 12866, which is built on the conviction that “The American people deserve a regulatory system that works for them.” As that order explains, the American people should have “a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy” as its top priority. Whatever might have been the wisdom behind the heavy focus on regulatory costs in the past, it is fundamentally ill-suited to the demands we face as a country now, many of which call for a robust and energetic regulatory response. It is also incompatible with the Biden-Harris administration’s ambitious policy agenda, much of which will involve aggressive implementation of existing laws through rulemaking.

Several factors contribute to OIRA’s drift away from Executive Order 12866’s progressive vision of regulation:

- **The role of cost-benefit analysis.** The economists at OIRA have over the years congealed on a hyper-formalistic version of cost-benefit analysis, one grounded in the doctrinally flawed program of welfare economics, as the prevailing measure of quality in regulatory decision-making. This approach is irrelevant to or directly incompatible with nearly all of the statutory provisions that executive branches implement, and thus serves to subvert agency decision-making. Decisions based on cost-benefit analysis are generally less protective than what most statutory standards call for, leading to systematically weaker regulations.
- **Staff.** Nearly all of OIRA’s professional staff are economists by training. This pattern of staffing reinforces the primacy of cost-benefit analysis in regulatory decision-making. OIRA’s organizational culture has been strongly influenced by the pronounced skepticism toward government action in general and toward regulation in particular that prevails in the economics discipline.¹

- **“Open door policy” for industry lobbying.** OIRA maintains that its longstanding policy is to accept meetings regarding rules undergoing review with anyone who requests one. The empirical evidence shows that in practice regulated industries seeking regulatory relief have substantially dominated those meetings.² The primacy of cost-benefit analysis and the OIRA staff’s cultural predisposition against regulation combine to make the bureau a sympathetic audience for industry lobbyists. The frequency of these contacts also reinforces the skewed view that OIRA personnel already take toward regulations.³

The upshot of this anti-regulatory orientation is that for decades, OIRA has operated to advance the unique interests of regulated industries at the expense of the general welfare. This dynamic has been made clear through the dominance of industry lobbying at OIRA combined with anecdotal evidence of OIRA working to block or water down regulations in response to industry demands.

As compared to other institutions within the regulatory system, OIRA carries out its work with a distinct lack of transparency. Its disclosure practices for communications with rulemaking agencies and interest group lobbyists as well as for how changes are made to draft rules during the review process have been inconsistent and incomplete.

The Solution:

President Biden should restore and expand upon the progressive role created for OIRA in Executive Order 12866 by issuing a new order that includes the following elements:

- **A legal and constitutional ‘reset’ for OIRA review.** A new executive order should overhaul OIRA’s review process with an eye towards bringing it within the bounds of the law and constitutional principles. The order should explain that the purpose of this constrained approach to regulatory review is to restore and ensure agency primacy in regulatory decision-making, which would take fuller advantage of agencies’ relevant expertise on policy matters, deploy administration resources more efficiently, and promote consistency with the law. To achieve this reset, the order should:
 - Limit OIRA’s review to only the largest of agency rules, and it should consist of a limited check on three issues: (1) process (*i.e.*, whether the agency complied with applicable procedural requirements; (2) legal authority (*i.e.*, whether the rule fulfills the agency’s statutory mandate), and (3) public communications (*i.e.*, whether the rule’s benefits are explained in a clear and compelling manner).
 - Reassert the primacy of agencies in the regulatory decision-making process by directing agencies to use the context-specific methods specified in their authorizing statutes for considering costs and benefits, rather than applying the now-prevalent hyper-formalistic version of CBA as a one-size-fits-all tool. [More information on this recommendation, see accompanying memo on “Restoring Progressive Values to Agency Cost-Benefit Analysis”]
 - Explicitly prohibit reviews of science and other technically complex matters that are best left to agency expertise.

- Direct OIRA to use its review role to promote interagency coordination and to serve as an honest broker to resolve interagency disputes.
- **New ethos and role for OIRA.** The new executive order should embrace a positive vision of regulation appropriate to the 21st century challenges the Biden-Harris administration will face. Building on the vision articulated in Executive Order 12866, the new order should emphasize how regulation is a legitimate institution within our democracy and how it plays an essential role in our society by promoting the general welfare, creating the conditions for a sound economy in which all are able to participate, and helping to advance broader social values such as equity and justice. To put this new vision into action, the order should charge OIRA with its unique perspective and expertise on cross-cutting, administration-wide regulatory policy issues to identify and promote reforms that will enable executive agencies to pursue their statutory missions in a more timely and effective manner. Issues OIRA might study include improving meaningful public engagement and participation (particularly among individuals from historically marginalized communities)⁴ and unnecessary procedural barriers in the rulemaking system that waste agency resources and cause delays without improving agency decision-making.⁵
- **Strengthened commitment to transparency.** The new executive order should reaffirm the strict transparency requirements contained in Executive Order 12866. It should establish a presumption of disclosure with regard to these transparency requirements that displaces the deliberative process exemption to the Freedom of Information Act.

In addition to the executive order described above, the Biden-Harris administration should take appropriate steps to **increase diversity among the OIRA staff** as a means for transforming its institutional culture. In particular, OIRA should refrain from seeking out more economists for open positions, and seek instead to promote greater disciplinary diversity with a focus on candidates with expertise in sociology, community development, communications, and law. Special attention should also be given to increasing racial diversity and diversity in life experiences to ensure greater practical understanding of the real world impacts of regulations.

Potential Opposition:

Some within the Democratic Party may contend that the traditional approach to OIRA review is necessary to ensure political accountability for regulations and to ensure policies are consistent with presidential priorities. They also might contend that systematic efforts to minimize regulatory costs are necessary to avoid or reduce political attacks against the administration's policies – attacks, which could undermine the reelection efforts for the president or Democrats in Congress.

Strong centralized control of agency regulatory decision-making comes at a very high cost with relatively little benefit. In today's polarized political climate, Republicans and their industry allies routinely attack any regulation a Democratic president issues, even ones that have been watered down to minimize costs. Centralization also forgoes the many benefits that come from devolving decision-making responsibilities to agencies as much as possible – the most notable of which is leveraging agency expertise. Because criticism cannot be avoided, the better course is to

focus on defending regulatory safeguards directly to the American public, and that task will be made easier if those safeguards are set not by economists at OIRA but by the agencies with the relevant expertise.

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¹ Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 283 (2012).

² RENA STEINZOR ET AL. BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (Ctr. for Progressive Reform, White Paper 1111, 2011), available at https://cpr-assets.s3.amazonaws.com/documents/OIRA_Meetings_1111.pdf.

³ David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006).

⁴ *See, e.g.*, K SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS (2019).

⁵ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

APPENDIX

Specific provisions of a Biden executive order on reorienting the role of OIRA could include:

- Reforms to OIRA's review process:
 - o Resetting OIRA's review function:
 - New priorities for review:
 - Economically significant rules (defined as X% of GDP).
 - Rules that implicate the policies of sister agencies (use the regulatory agenda as a means for identifying such rules early in their development).
 - Reoriented function of review:
 - Draft proposals:
 - o Priority on facilitating interagency coordination.
 - Draft final rules:
 - o Limited check on agency decision-making process that covers the following issues:
 - Compliance with applicable procedural requirements.
 - Fulfillment of statutory mandates:
 - Including the overarching goals and objectives of the statute.
 - In contrast to “minimizing regulatory costs.”
 - Quality of discussion of the benefits of the rule and how the rule will deliver those benefits:
 - This discussion should be clear and compelling.
 - Necessary for advancing the administration's overarching positive vision of regulation.
 - o Explicit bar on reviewing questions of science or other complex technical issues better resolved by agency experts.
 - Reaffirm strict transparency requirements of Executive Order 12866:
 - Establish a presumption of disclosure for these requirements that overrides the “deliberative process” exemption to the Freedom of Information Act.
 - o Interagency coordination:
 - The goal of the review of draft proposed rules should be to promote interagency coordination and identify potential inconsistencies between agency policies.
 - OIRA should strive to serve as an honest broker to resolve any resulting interagency disputes.

- Establishing a new role for OIRA aimed at promoting effective and timely regulatory implementation:
 - o Train political appointees on alternative policymaking tools beyond notice-and-comment rulemaking, such as enforcement discretion and adjudication.
 - o Help support agencies in defending their final rules in judicial review by submitting *amicus* briefs that detail how the supporting regulatory analyses were conducted consistent with law and best practices.
 - o Identify unmet regulatory needs.
 - Use the review process for proposed rules to identify new policy ideas that agencies can implement through regulation. Specifically, this could come in the form of suggested amendments to the proposed regulations that would help to address other administration policy priorities (*e.g.*, climate change).
 - Produce an annual report to congress on “Unmet Regulatory Needs.” This report could replace the current annual report to congress on regulatory costs and benefits.
 - o Assist agencies with identifying barriers to the achievement of their statutory missions, including inadequate budgetary resources and gaps in legal authorities; identify and advocate for needed reforms to address those barriers.
 - o Identify systemic barriers to participation in regulatory implementation, particularly among marginalized communities
 - This could include overhauling regulations.gov to make it more user friendly.
 - o Identify unnecessary procedural burdens in the rulemaking process that waste agency resources and delay rulemakings without improving the quality of decision-making; identify and advocate for needed reforms to address those barriers.
 - o Identify reforms that would enable agencies to better account for and promote non-economic values in their regulations, such as justice and equity.

In addition to a new executive order, the next OIRA Administrator can help contribute to these efforts to reorient OIRA so that it affirmatively supports effective and timely regulatory implementation by taking appropriate steps to diversify the bureau’s personnel. These steps could include:

- To fill open positions in the future, refrain from hiring additional economists and instead seek to increase disciplinary diversity by hiring experts on the following issues:
 - o Sociology
 - o Community organizing
 - o Communications
 - o Law
- Increase racial diversity and diversity of background experiences (*e.g.*, living in poverty, previous employment in manual labor, etc.).

- Should seek to build a staff that “looks like America” and that can better identify with and understand the experiences of the individuals who will benefit from regulations.
- When hiring economists, seek out those with heterodox views (*i.e.*, those with record of being critical of the prevailing neoliberal tradition in economics).