Affirmatively Supporting Regulation: New Responsibilities for OIRA

The White House Office of Information and Regulatory Affairs (OIRA) has the capacity and potential to speed up the regulatory process government-wide. With new responsibilities and affirmative approval from the Biden-Harris administration, OIRA can ensure regulations are issued expeditiously and effectuate presidential priorities.

The Problem:

In previous Democratic administrations, OIRA has stymied agencies from implementing life-saving regulations, killing rules, slowing the rulemaking process to a crawl, and weakening those rules that are enacted.1

Since 1993, OIRA has had this authority pursuant to Executive Order 12866, which requires executive agencies to analyze every regulation through the lens of formalistic monetized cost-benefit analysis (MCBA) and authorizes OIRA to review these analyses and regulations to ensure they “are consistent with applicable law, the President’s priorities, and the principles [of MCBA] and do not conflict with the policies or actions of another agency.” Only upon OIRA’s approval may an agency finalize a regulation, giving OIRA’s roughly 50-person staff immense control over the government’s regulatory process.

For example, the Obama administration’s Food and Drug Administration (FDA) proposed regulating e-cigarettes and banning the sale of flavored e-cigarettes due to their attractiveness to young adults. Yet, the final 2016 rule – promulgated following OIRA’s review – no longer banned flavored e-cigarettes, despite agency experts explaining a ban would be necessary for public health. OIRA overruled the FDA’s scientists, epidemiologists, and economists because, in the words of one former official, “Is it reasonable to effectively shut down all of these vape shops and businesses when the benefits and harms were still inconclusive?” This OIRA intervention cost the government its best chance to stymie the prevalence of youth use of e-cigarettes and the widespread cases of lung disease and death that have ensued.2 The OIRA review process also contributed well over a year of delay to the issuance of the final rule – the reviews for the draft proposal and draft final rule each lasted nearly seven months.

The Solution:

Instead of second-guessing agencies’ policy decisions, OIRA should be tasked with ensuring that agencies regulate quickly and in a manner that effectuates the protective goals and objectives of their authorizing statutes. Similar to President Bush’s Executive Order 13258, President Obama’s Executive Order 13563, and President Trump’s Executive Order 13771, President Biden should issue an executive order describing the Biden-Harris vision for the regulatory process and explicitly placing in OIRA the responsibility to ensure agencies regulate efficiently and effectively. The order would require OIRA to undertake the following activities.

First, OIRA should facilitate robust and speedy interagency review. [For more information on this recommendation, see accompanying memo on “Reorienting OIRA to Support Progressive Regulation.”] OIRA could also take advantage of this interagency review process to promote the
administration’s other progressive goals, such as ensuring that agencies take into account cumulative burdens on vulnerable communities that cut across multiple agencies’ jurisdictions.

Second, OIRA should develop new policy ideas, based on the Biden-Harris administration’s priorities, that agencies can implement through regulation. For example, when OIRA reviews an agency’s proposed regulation, it could suggest amendments that would help address global climate change or antitrust concerns. Of course, the agency would not be bound to implement this suggestion, but it would be an additional venue for ensuring the president’s priorities are effectuated by agencies throughout the government.

Third, OIRA should take steps aimed at helping to ensure that agencies’ policies are upheld in court. OIRA would be well positioned to fulfill this role if it limits review function to checking that agencies have fulfilled applicable procedural requirements for their draft rules and that the draft rules’ substance fulfills agency’s relevant statutory mandates. [See accompanying memo on “Reorienting OIRA to Support Progressive Regulation.”] On the basis of these reviews, OIRA could, for example, submit amicus briefs in support of agency rules that are being subjected to judicial review.

Fourth, OIRA should use 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) and unnecessary procedural barriers in the rulemaking system that waste agency resources and cause delays without improving agency decision-making.

Fifth, OIRA should train Biden-Harris political appointees on alternative policymaking tools that would enable them to accomplish their agencies’ mission quickly and effectively. In addition to the traditional notice-and-comment rulemaking policy, agencies may also quickly enact new policies through using enforcement discretion (e.g., DACA), adjudication, and plenty of other processes, yet political appointees are frequently unfamiliar with these tools.

The Administrator of OIRA in the Biden-Harris administration could reinforce these efforts by taking appropriate steps to diversify the professional staff at OIRA. Among other things, the OIRA administrator could seek to promote greater disciplinary diversity as well as greater diversity in terms of the life experiences of OIRA’s staff. [See accompanying memo on “Reorienting OIRA to Support Progressive Regulation.”]

**Potential Opposition:**

Many corporate interest groups would likely be opposed to this proposal. If enacted, the proposal would help ensure regulations are issued more quickly than in prior Democratic administrations. Yet, because the Biden-Harris administration may have only four years to effectuate meaningful policy, it should be concerned about regulating expeditiously.
Further, some Democrats would likely be opposed to the expanded role for OIRA, as its traditional mission has been, and the staff’s core competencies are, that of reviewing agencies’ cost-benefit analyses. Although this is true, agency priorities frequently shift with leadership and OIRA should be no exception. Further, as old staff quit or retire, new staff could be hired to add greater disciplinary diversity (e.g., law, community organizing, and sociology) that would enable it to fulfill the Office’s new mandates.

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3 See, e.g., K SABEE RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS (2019).
To reorient OIRA so that it affirmatively supports effective and timely regulatory implementation, a Biden executive order on reforming OIRA could include the following provisions:

- Define a new more progressive vision of the regulatory system. In particular, this vision should include the following elements:
  - Make clear that government in general – and regulations in particular – are a legitimate and essential part of our democracy.
  - Reiterate that regulations are an example of democracy in action – providing an institutional forum in which ordinary members of the public are empowered to work with democratically accountable public servants within the executive branch to implement congressionally enacted legislation by translating their provisions into actionable, on-the-ground policies.
  - Emphasize that regulations reflect and give life to many of our shared values as Americans, including justice, equity, human dignity, and fairness.
  - Put people at the center of our regulatory system.

- Establishing a new role for OIRA aimed at promoting effective and timely regulatory implementation:
  - Train political appointees on alternative policymaking tools beyond notice-and-comment rulemaking, such as enforcement discretion and adjudication.
  - 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.
  - 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.
  - 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.
  - Identify systemic barriers to participation in regulatory implementation, particularly among marginalized communities.
    - This could include overhauling regulations.gov to make it more user friendly.
  - 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.
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:
  - Sociology
  - Community organizing
  - Communications
  - 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).