De-Politicizing OIRA Review

The White House Office of Information and Regulatory Affairs (OIRA) cannot effectively or credibly play a role in improving substantive regulatory policy while simultaneously serving as the primary locus of political power in the regulatory system. The Biden-Harris administration can make structural changes to OIRA that are aimed insulating the institution against legally irrelevant political considerations, allowing it to focus more clearly on issues of policy.

The Problem:

Since its creation, OIRA has been tasked with two major functions: promoting the substantive quality of executive branch agency regulations and advancing the president’s political priorities. The second of these functions is susceptible to corruption by industry lobbyists, who are able to leverage their economic and political power advantages to advance policies that serve their interests at the expense of the public welfare. When these situations arise, they can create a conflict between OIRA’s two functions, rendering it unable to perform either well or with any credibility.

This conflict is particularly noteworthy because defenders of OIRA review process claim that it serves to promote rationality and objectivity in rulemaking. The opposite happens, however, when that review process becomes a political tool – particularly one dominated by corporate interests.

To be sure, given OIRA’s close proximity to the White House and the powerful “regulatory gatekeeper” role it performs under Executive Order 12866, it offers a logical venue for resolving political disputes over regulatory decision-making. And to be sure, there is nothing wrong with politics per se. Problems arise, however, when (1) an institution such as OIRA is skewed to favor one set of narrow interests at the expense of the broader problem or (2) political dynamics allow or encourage decision-making based on factors that are irrelevant to are prohibited by the law. Both of these problems have frequently occurred at OIRA.

Regulated industry, through its lobbyists, have come to dominate OIRA’s review process. This dominance has been enabled by several factors. One is the “open door policy” that OIRA has longer operated under, which dictates that it accept any meeting with a member of the public that requests one regarding a draft rule undergoing review. Lobbyists for regulated industries overwhelmingly dominate these meetings, with one study finding that over a nearly 10-year period they represented 65 percent of all meeting participants.

A second factor is the prevalent role of economics in OIRA’s review, which makes OIRA more predisposed to industry influence. Many of OIRA’s professional staff are trained as economists and are particularly steeped in the orthodox views of neoliberalism, which engenders a strong skepticism toward government’s role in society in general and toward regulation particular. The heavy concentration on economics also means that OIRA has less in-house scientific and technical expertise to defend the merits of strong regulations against economics-based arguments. Moreover, OIRA’s review process is primarily conducted through the lens of a form of cost-benefit analysis that is heavily influenced by neoliberal economics with its particular
focus on monetizing all regulatory impacts and the maximization of net benefits. This form of cost-benefit analysis is heavily skewed against stronger regulations, given that it tends to exaggerate regulatory costs and ignore or underestimate many regulatory benefits. ³

A third factor is OIRA’s general lack of effective transparency measures. The transparency of the regulatory system is only as strong as its weakest link; for years, OIRA’s centralized review process has been the weakest link. Consequently, that has made OIRA a preferred venue for industry to exert improper dominance over rulemaking and for steering decisions based on factors that are irrelevant or prohibited by an agency’s authorizing statute.

The decision to pull back Environmental Protection Agency’s (EPA) rule strengthening ozone standards right before the 2012 election illustrates how OIRA review has permitted improper political considerations to trump agencies’ legal authorities and the public interest. An oil industry lobbyist argued during one meeting with OIRA that the pending rule would harm President Obama and congressional Democrats in the upcoming election. The lobbyist used maps to demonstrate that many of the areas of the country that would be the most impacted by the rule change were also home to critical swing voters. ⁴ Obviously, electoral success was not a permissible factor for the EPA to consider in setting the standard. And environmentalists and public health advocates had no real recourse for countering this argument. That this argument seems to have prevailed was in small part aided by the lack of transparency at OIRA and by the economists on OIRA’s staff who by training are already sympathetic to concerns about regulatory costs.

The Solution:

President Biden should issue an executive order to overhaul OIRA and its role in the regulatory system that includes provisions aimed preventing improper politicization of its work.

First, the order should moderate the scope and authority of OIRA’s centralized review function, to bring it more in line with applicable law and constitutional principles. The effect would be to shift greater authority to the rulemaking agencies, which have greater expertise regarding the substance of the rule, and thus would be better equipped to resist or respond to economics-focused arguments brought by industry groups. [For more information on this recommendation, see accompanying memo on “Reorienting OIRA to Support Progressive Regulation.”]

Second, the order should establish stronger transparency requirements for OIRA’s centralized review process, including mandating the public disclosure of (1) all communications between OIRA and rulemaking agencies related to reviews of their rules and (2) all changes made to a rule during OIRA’s review process along with a clear explanation of the legal or policy basis for the change. 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.

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.

**Potential Opposition:**

Some within the Democratic Party may defend the current institutional design for OIRA as necessary for promoting the agencies’ accountability to the President and as a political check on agency policies. They may argue that these benefits justify the trade-off of undermining the quality and credibility of the administration’s regulatory policies.

The president has other tools available for ensuring accountability of agencies and their regulatory policies – tools that can be as effective as centralized review but without the costs to regulatory quality and credibility. Greater presidential control over agency policies will do little, if anything, to prevent political criticism of regulations, particularly in today’s highly partisan political climate. Because criticism cannot be avoided, the better course is to focus on defending regulations directly to the American public, and that task will be easier for rules that contain the strongest and effective protections possible and that are perceived as credible.

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To address the problem of the politicization of OIRA’s review process, a Biden executive order on OIRA’s role in the rulemaking process could include the following provisions:

- **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:
      - Priority on facilitating interagency coordination.
    - Draft final rules:
      - 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.
      - Explicit bar on reviewing questions of science or other complex technical issues better resolved by agency experts.

- **Increased transparency:**
  - Reaffirm strict transparency requirements of Executive Order 12866:
    - Communications between OIRA and rulemaking agency
    - Documentation of changes that occur during the review process and explanation of legal or policy bases for those changes
  - Establish a presumption of disclosure for these requirements that overrides the “deliberative process” exemption to the Freedom of Information Act.

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
- Increase racial diversity and diversity of background experiences (e.g., living in poverty, previous employment in manual labor, etc.).
  o 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).