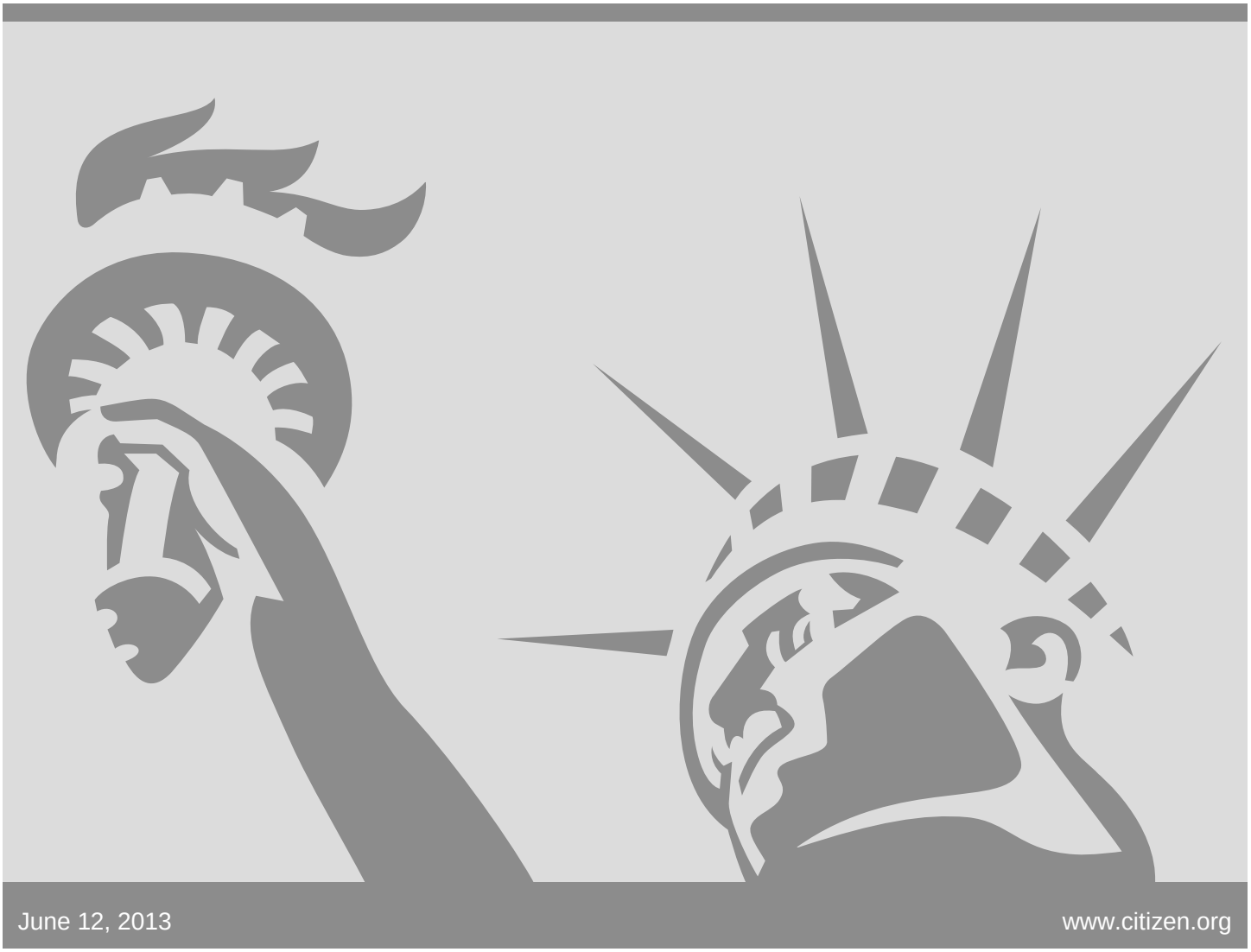

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The Perils of OIRA Regulatory Review

Reforms Needed to Address Rampant Delays and Secrecy

Acknowledgments

This report was written by Amit Narang, Regulatory Policy Advocate for Public Citizen's Congress Watch division, and edited by Lisa Gilbert, Director of Congress Watch.

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Public Citizen's Congress Watch
215 Pennsylvania Ave. S.E
Washington, D.C. 20003
P: 202-546-4996
F: 202-547-7392
http://www.citizen.org

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Introduction

In the 112th Congress, the attack on public health and safety protections reached new, dizzying heights. Claims of "job-killing regulations" by conservatives were ubiquitous, and the Obama Administration's so-called "regulatory tsunami" was the chosen, ready-made scapegoat for our country's economic troubles. Republicans in Congress and their allies missed no opportunity to raise the rhetorical stakes, for example branding potential air pollution standards from the Environmental Protection Agency (EPA) a "train wreck" for the economy. If early signs are any indication, the 113th Congress will be following suit in short order.[1]

Yet, if you look behind the curtains of this aggressive campaign by conservatives to brand Obama as an "over-regulator, " you see a curious phenomenon: The same members of Congress who loudly support radical pieces of legislation like the Regulations from the Executive in Need of Scrutiny (REINS) Act[2] under the guise of "reining in the Executive Branch"[3] also support legislation such as the Regulatory Accountability Act (RAA)[4] which explicitly expands the scope and authority of a small regulatory review office within the White House.[5] Indeed, the list of House members who voted to pass both REINS and RAA, within days of each other, includes the vast majority of Republicans. In a "twilight zone" world where House Republicans are seeking to give more authority to the Obama Administration over regulatory policy, the natural question is why?

This paper focuses on the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, which the House Republicans seek to further empower, while decrying the Obama Administration's "excessive" regulation, because of the perception, based on strong evidence, that OIRA has taken a consistently anti-regulatory posture across both Republican and Democratic administrations. However, OIRA's true impact, including its slow-walk of regulations is not completely understood due to a basic lack of transparency unique to OIRA. Although many pieces of legislation besides the RAA have been proposed to increase OIRA's authority, and by extension further enable their anti-regulatory impact, legislation has yet to be proposed to impose basic transparency measures at OIRA and allow the public to fully assess its impact in delaying

[1] The first Hearing in the House Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law for 113th Congress was provocatively titled "The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness" February 28, 2013.

[2] H.R. 10, S. 299, 112th Cong. (2011); H.R. 367, S. 15 113th Cong. (2013).

[3] *About the REINS Act,* Website of Congressman Todd Young, *http*://toddyoung.house.gov/reins/about-the-reins-act.

[4] H.R. 3010, S. 1606 112th Cong. (2011); S. 1029 113th Cong (2013).

[5] http://sensiblesafeguards.org/assets/documents/raa_fact_sheet.pdf

and blocking public health and safety standards. Such legislation is long overdue and must be put in place before allowing OIRA to have even more influence.

OIRA's Anti-Regulatory Influence

A true appreciation for the impact of OIRA's centralized regulatory review on the substance of the regulations it reviews is not yet possible due to a basic lack of transparency measures in force at OIRA, as discussed later in this paper. Nonetheless, the process OIRA employs when reviewing regulations can be seen to result in an anti-regulatory influence in two respects. First, the process of regulatory review at OIRA has historically been a source of significant delay before agencies can issue proposed and final relays, with the delays particularly pronounced in recent years. Second, the mechanics of the review process allow for, even enable, the asymmetric treatment of pro-regulatory versus deregulatory measures at OIRA.

OIRA Review Delays Crucial Regulatory Protections

The most immediate and apparent anti-regulatory effect stemming from OIRA review is the delay it adds to an already cumbersome and lengthy rulemaking process. Agencies are required to submit their "significant" rules, which include but are not limited to "economically significant" rules that are determined to have a one hundred million dollar impact on the economy annually, to OIRA for review before the agency can propose a rule or finalize a rule. Thus, OIRA review introduces delay at both the proposed and final stages of the rulemaking process.

Making matters worse, OIRA is not required to complete their review within any particular time period, meaning that OIRA review could last indefinitely in theory, and examples abound of OIRA reviews extending months if not years. Indeed, OIRA under the Reagan and George H.W. Bush administrations routinely kept rules under review for long periods of time, thereby using the process of centralized regulatory review to block regulations that it opposed on substance.[6] In response, the Clinton Administration adopted an executive order that imposed a ninety day cap (with the possibility of a single thirty day extension) on the time OIRA could review regulations.[7] Unfortunately, the voluntary nature of OIRA's compliance with the executive order has done little to stem abuses, and it often exceeds the ninety day window.

Current State of Delays at OIRA

[6] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L. J., 1385-1462 (1992).
[7] Exec. Order No. 12866.

Currently, the delays at OIRA have reached historically unprecedented levels. As of May 2013, 51 rules have been under review at OIRA for more than one year.[8] In total, 87 rules had been under review for more than the 90 day window permitted by Executive Order.[9] 23 of these rules have been under review for since 2011 and three rules have been under review at OIRA since 2010.[10]

A recent Report from the Congressional Research Service (CRS) compares the current delays at OIRA to delays at OIRA under previous years and previous administrations.[11] The results paint a picture of current delays at OIRA that are far worse than in the past. Surveying data going back to 1994, CRS found that the average number of days that OIRA took to review rules in 2012 was 79 days. The next closest average OIRA review period was 61 days, in 2007 and 2008 during the George W. Bush administration. This is a stunning indictment of the current state of delay at OIRA. The numbers for 2013 are even worse. As of May 14, the average time it has taken OIRA to review a rule has risen to 119 days, more than double the average review period of the Bush administration.[12]

OIRA Review Process: Slanted Against Strong Regulation

Beyond the delays created by OIRA review, which allows OIRA and the White House to mask substantive opposition to a regulation under the guise of procedural delay, the process of centralized regulatory review, as it is practiced by OIRA across administrations, itself exerts an anti-regulatory influence. First, OIRA's role in reviewing regulations is exclusively designed to determine whether the benefits of a regulation outweigh its cost, not to ensure that an agency is adopting a regulation that provides the greatest net benefits even if that would result in higher costs.[13] In other words, OIRA does not encourage agencies to submit versions of their regulations for review where the agency has sought to maximize the benefits in excess of its costs. In essence, OIRA review is wholly ineffective at identifying instances of *underregulation* and encouraging agencies to adopt stronger regulatory stances that provide greater protections to the American public.

Second, there is a fundamental lack of balance when comparing OIRA review of pro-regulatory measures to its review of deregulatory measures. Such an imbalance is not surprising given the historical impetus for the creation of OIRA under the Reagan administration. Reagan officials viewed OIRA as a necessary counterweight to agencies that

[8] www.reginfo.gov

[9] *Id*.

[10] *Id*.

[11] Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register, Cong. Res. Serv. (2013), http://www.fas.org/sgp/crs/misc/R43056.pdf

[12] www.reginfo.gov

[13] Nicholas Bagley and Richard Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1269-72 (2006).

were regulating too much rather than a check on agencies who were zealous in their deregulation.[14] Thus, during the 1980's and early 1990's, OIRA did not subject proposals to eliminate regulation to rigorous analytical scrutiny and did not require cost analysis for proposals that relaxed existing regulations.[15] In fact, deregulation was the whole point of OIRA.

One recent example demonstrates that the OIRA's tilt favoring more scrutiny of pro-regulatory actions and less scrutiny of deregulatory actions has not abated:

Case Study: OIRA review of Silica Rule vs. OIRA review of Poultry Rule

One of the rules that has been stuck at OIRA the longest is the silica rule. OSHA's draft of the proposed rule has been under review at OIRA for an incredible 814 days, or approximately two years and three months. The reasons for this staggering delay are not known, since, as discussed below, OIRA is not required to disclose why a rule is under review well past the 90 day window imposed by executive order.[16] Nonetheless, the benefits of the rule are no mystery.

Silica dust is a known and deadly carcinogen that, according to the Centers for Disease Control and Prevention, kills up to 200 people a year, has claimed up to 14,000 lives since 1968, and is exposed to 1.7 million workers per year.[17] The current standard for silica exposure in the workplace is horribly outdated, as OSHA admitted when initiating the process to adopt an update standard.[18] The human cost of the delay at OIRA could not be clearer.

Compared to the silica rule, a deregulatory initiative regarding poultry inspection at poultry processing plants has flown through the OIRA review process with barely a hiccup, despite serious concerns about the impact on workplace safety at those processing plants. Known as the "poultry rule" and first proposed by the USDA, it would allow current lines speeds at poultry processing plants, where line workers visually detect defects in the poultry to ensure proper food safety, to increase from a current speed of 90 birds per

[14] Erik Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 Va. J. Nat. Res. (1984).

[15] Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 Am. U. L. Rev. 535, 542 (1987).

[16] http://www.citizenvox.org/2013/02/14/silica-dust-rule-two-year-anniversary-public-citizen-worker-safety/

[17] "New OSHA Silica Rules Looming." Paint Square. April 14, 2011. http://bit.ly/LL6IzR

[18] OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79.603 (2010, Dec. 20).

minute to 175 birds per minute.[19] In other words, workers would have one-third of a second to inspect chickens at the new line speed.

Already, the current line speeds at poultry processing facilities have led to a wide range of demonstrated workplace injuries. Last week, the National Institute of Occupational Safety and Health (NIOSH) released a study showing alarming rates of carpal tunnel syndrome, a repetitive motion injury, among poultry plant workers at a facility in South Carolina. Increasing line speeds would make an industry that is already inherently dangerous[20] even more so. Nonetheless, the White House appears to be assuming that the rule will be finalized before the start of fiscal year 2014, as they include the rule in the U.S. Department of Agriculture's (USDA) budget.[21]

What is most shocking is OIRA's lack of due diligence in reviewing the rule. Despite clear interagency concerns regarding workplace safety that would normally implicate involvement from OSHA, USDA did not consult OSHA. Given the importance OIRA places interagency review,[22] it is surprising to see that OIRA did not insist on interagency review and coordination for this rule. Even more surprising, OIRA did not compute the costs and benefits of the rule, stating plainly that "the costs and benefits are not publicly available at this time"[23] despite the fact that OIRA had designated the rule as "economically significant." For its part, USDA claimed that it would not consider workplace injury costs of the rule in adopting the rule, choosing instead to allow NIOSH to do a study on the workplace injury consequences of the rule only *after* the rule is in place.[24]

Here, OIRA is not insisting that the poultry rule be held to the same standard as other rules it reviews, where costs and benefits of the rule are clearly laid out before the rule is approved by OIRA. This inconsistent treatment only further adds to the suspicion that OIRA reviews pro-regulatory measures in an asymmetric fashion and with more scrutiny that deregulatory measures, a suspicion that has only grown stronger during this administration.

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[19] Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (to be codified at 9 C.F.R. pts. 381 and 500), http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/2011-0012.pdf

[20] U.S. Gen Accounting Office Workplace Safety and Health: Safety in the Meat and Poultry Industry, While Improving, Could Be Further Strengthened (2005,).

[21] http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/agr.pdf

[22] At a hearing of the House Judiciary Subcommittee on Commercial and Administrative Law in July 2010, Cass Sunstein testified that OIRA had coordinated more than 900 interagency reviews since January 20, 2009, http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/oira/sunstein_testimony_07272010.pdf

[23] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=0583-AD32

[24] Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (to be codified at 9 C.F.R. pts. 381 and 500), http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/2011-0012.pdf

The Need for Transparency at OIRA

Despite strong circumstantial evidence, OIRA's real effect on the regulatory system generally, and specific regulations in particular, has been almost entirely hidden from public view due to a fundamental lack of transparency at OIRA. As long as OIRA is able to operate in the dark, without any ability for outsiders to scrutinize their decision-making and the justifications for those decisions, the public will not be allowed the complete picture of OIRA's influence and OIRA will remain unaccountable for its actions.

The most crucial reform, in terms of creating transparency at OIRA that is on par with the rest of the government, would be for OIRA to disclose the substance of the changes it makes to draft proposed and final rules submitted to them for review. One of the virtues of the notice-and-comment rulemaking process by which agencies adopt significant regulations is its inherent transparency. Agency justifications for its decisions regarding the substance of the rule, including its response to comments and agency studies or analyses of the rule, form the transparent basis for adopting the rule. The *Federal Register*, where agencies publish their regulatory actions and accompanying analyses, is the cornerstone of transparency in the regulatory process.

By contrast, almost none of the substantive changes that OIRA makes to draft agency rules during its review are required to be disclosed to the public.[25] Irrespective of the number and importance of those changes, the public only gets to see the version of the rule in the *Federal Register* with those changes already incorporated. In practical terms, this means that OIRA is able to escape accountability for any changes to a regulation. In fact, only the issuing agency can be held to task if it produces a weak regulation, even if the rule was actually altered or weakened by OIRA.

The solution for bringing transparency to OIRA is simple and straightforward. Congress must require federal agencies to make available to the public the substance of any changes made to a draft regulation submitted to OIRA for review and the ensuing proposed or final rule that the agency publishes for comment. Further, those changes must be identified in a complete, clear, and concise manner. Finally, OIRA must identify for the public whether those changes were made at the suggestion of OIRA or at the suggestion of another agency besides the issuing agency as a result of the interagency review process.

This is not the first time that such a solution has been proposed. In 2003, the Government Accountability Office (GAO) studied the lack of transparency at OIRA and made eight

[25] Rules promulgated under the Clean Air Act by the Environmental Protection Agency do require that substantive changes made by OIRA to draft proposed and final rules be disclosed.

recommendations to increase transparency.[26] In 2009, GAO went back to assess how many of the eight recommendations had been put in place by OIRA.[27] They found that OIRA had only implemented one of the eight transparency recommendations, and that it was the most inconsequential one.[28] Following the GAO recommendation, OIRA now provides the public with the identities of individuals that OIRA meets with on a particular rule under review at OIRA, but does not disclose the substance of what was discussed at the meeting. Even this bare minimum in terms of transparency has not been adequately implemented, as errors in this recordkeeping often leave the public guessing as to who actually attended meetings with OIRA.[29]

While giving the public the opportunity to see what changes OIRA has made to draft proposed and final rules would significantly enhance the little transparency that currently exists, further measures are needed to paint the complete picture of OIRA's role in impacting rules. OIRA should disclose documents exchanged not only by high-level officials between OIRA and the issuing agency, but also documents exchanged between OIRA desk officers and lower-level issuing agency staff, since most of the document exchange during OIRA review occurs at that level. OIRA should also make clear to the public why rules are withdrawn by issuing agencies from OIRA review, and if the rule was withdrawn at the behest of the issuing agency, an explanation from the agency as to why. Disclosure of changes by OIRA that do not impact the language of the rule is also necessary, particularly in cases where OIRA indicates a preference between alternative versions of a rule presented by an issuing agency.

Finally, none of the preceding transparency requirements will be fully effective if the loophole that allows OIRA to theoretically continue their review of rules indefinitely without any accountability remains in place. As discussed previously, the time limits for OIRA review are derived from executive order making them self-enforcing and, in hundreds of instances over the years, OIRA has viewed the time limits as far more voluntary than a strict obligation. The key is that OIRA does not disclose why their review of a particular rule has exceeded the ninety day, or in certain instances, one hundred twenty day time limit. Currently, no accountability mechanism exists to force OIRA to justify their unwillingness to complete their review of a rule. Since, the basic transparency measures suggested in this paper all rely on OIRA completing their review and allowing the

[26] U.S. Gen. Accounting Office, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews (2003).
[27] U.S. Gen Accounting Office, Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews (2009).
[28] *Id*.
[29] 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 a*t http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

issuing agency to publish a proposed or final rule, OIRA could completely evade any new transparency requirements in cases where it prefers not to be transparent, particularly in cases where it considers a rule to be politically sensitive, by simply "sitting" on a rule and not releasing it for publication. Given the numerous current examples of OIRA reviews that have exceeded the time limits stipulated by executive order, in some cases by years, new transparency measures will remain ineffective until this loophole is addressed.

Thus, Congress must either impose time limits for OIRA review directly, or require OIRA to abide by the time limits prescribed in Executive Order. One potentially effective way to hold OIRA accountable in this vein would be for Congress to enact a law that empowers issuing agencies to directly publish proposed and final rules once the OIRA review period has expired, irrespective of OIRA's desire that the review period continue. Alternatively, if the issuing agency is unwilling to directly publish the rule, a member of the public can petition the issuing agency to publish the rule and the agency would be required to do so within a brief period of time or explain why that is not in the public interest. Legislation modeled on this concept would bring long overdue accountability to OIRA and provide the public a means to fix a process which permits endless delays of crucial regulatory standards without any justification.

Conclusion

When a small and obscure office within the White House has the power to oversee, and overturn, important rules from all executive branch agencies, and can do so without any accountability, the American public loses faith in the legitimacy of the process. Under OIRA's current system, the public cannot assume that decisions at OIRA are being made on the merits rather than on cold political calculations.

Basic transparency measures at OIRA are an essential first step and necessary precondition to gaining a real appreciation for OIRA's impact when it comes it public health and safety. The numerous legislative proposals introduced last Congress, and likely to be re-introduced this Congress, that would expand the scope of OIRA's regulatory review authority, without instituting any transparency regarding the nature of that review, all trade on the assumption that OIRA serves the anti-regulatory aims of the legislation's supporters. These proposals would make an already bad situation worse. What the American public needs is Congressional action to finally make OIRA decision-making fully transparent, and with that will come real democratic accountability in the rulemaking process.