
COMMENTARY

THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: MYTHS AND REALITIES

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Since its creation in 1980, the Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and Budget, has become a well-established institution within the Executive Office of the President. This Commentary, based on public documents and the author's experience as OIRA Administrator from 2009 to 2012, attempts to correct some pervasive misunderstandings and to describe OIRA's actual role. Perhaps above all, OIRA operates as an information aggregator. One of OIRA's chief functions is to collect widely dispersed information — information that is held by those within the Executive Office of the President, relevant agencies and departments, state and local governments, and the public as a whole. Costs and benefits are important, and OIRA does focus closely on them (as do others within the executive branch, particularly the National Economic Council and the Council of Economic Advisers), especially for economically significant rules. But for most rules, the analysis of costs and benefits is not the dominant issue in the OIRA process. Much of OIRA's day-to-day work is devoted to helping agencies work through interagency concerns, promoting the receipt of public comments on a wide range of issues and options (for proposed rules), ensuring discussion and consideration of relevant alternatives, promoting consideration of public comments (for final rules), and helping to ensure resolution of questions of law, including questions of administrative procedure, by engaging relevant lawyers in the executive branch. OIRA seeks to operate as a guardian of a well-functioning administrative process, and much of what it does is closely connected to that role.

I. INTRODUCTION

The Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and Budget (OMB), has become a well-established, often praised, and occasionally controversial institution within the federal government.¹ OIRA was initially created by the

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¹ The literature is voluminous. For relevant discussion, see generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* (2008); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* (forthcoming June 2013); and Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *HARV. L.*

Paperwork Reduction Act of 1980,² with (among other things) the particular responsibility of approving (or disapproving) information collection requests from federal agencies. In one of his early actions, taken less than a month after assuming office, President Ronald Reagan gave OMB an additional responsibility, which is to review and approve (or decline to approve) federal rules from executive agencies, with careful consideration of costs and benefits.³ Within OMB, that responsibility is exercised by OIRA. The Administrator of OIRA is often described as the nation's "regulatory czar." While it is an understatement to say that this term is an overstatement (and that is one of my major claims here), it does give a sense of the range and responsibility of the office.

From September 2009 until August 2012, I was privileged to serve as OIRA Administrator.⁴ I had taught and written about administrative law for over two decades, and much of my work focused explicitly on OIRA.⁵ Nonetheless, there was a great deal that I did not know, and much of what I thought I knew turned out to be wrong or at best incomplete. Even among close observers — in the media, in the business and public interest communities, and among academics, including professors of law — the role of OIRA and the nature of the OIRA process remain poorly understood. It is frequently and mistakenly thought, for example, that OIRA review almost exclusively involves the views and perspectives of OIRA itself;⁶ that when rules are de-

REV. 1755 (2013). Because of my limited goals here, I do not engage directly with this literature, but the central claims do of course bear on a range of views about OIRA and its past and future role.

² Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–21 (2006 & Supp. V 2011)). For historical discussion, see generally Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37 (2011). For an overview, see generally Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257 (2006).

³ See Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128–30 (1982), *revoked* by Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011). The so-called independent agencies are not subject to OIRA review, though President Barack Obama did issue an important executive order asking such agencies to follow many of the principles that govern executive agencies. See Exec. Order No. 13,579 § 1, 3 C.F.R. 256, 257 (2012), *reprinted in* 5 U.S.C. § 601 app. at 102. An early and still-valuable discussion of the original theory behind the OIRA process, written by two former OIRA Administrators, is Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

⁴ Some of the work done in that period is outlined in CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013) [hereinafter SUNSTEIN, SIMPLER]; and Cass R. Sunstein, Essay, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011) [hereinafter Sunstein, *Empirically Informed Regulation*].

⁵ See generally, e.g., CASS R. SUNSTEIN, RISK AND REASON (2002).

⁶ See, e.g., Rachel Leven, *Unions, Watchdogs Decry Delays on Workplace Safety Rules*, HILL: HEALTHWATCH (Apr. 19, 2012, 5:37 PM), <http://thehill.com/blogs/healthwatch/worker-safety>

layed, it is almost always because of OIRA's own concerns;⁷ that when rules are long delayed or ultimately not issued, it is generally because OIRA opposes them; that analysis of costs and benefits is the dominant feature of OIRA review;⁸ and that OIRA review is highly political.⁹ Much of the discussion of OIRA focuses on OIRA's role as part of White House oversight of agency rulemaking.¹⁰ To be sure, that role is quite important, and it will receive considerable attention here. At the same time, the widespread misunderstandings overlook key features of OIRA's day-to-day operations, which largely involve inter-agency coordination and highly technical questions.

My primary goal in this Commentary is to dispel current misunderstandings. One of my central themes is that OIRA helps to collect widely dispersed information — information that is held throughout the executive branch and by the public as a whole.¹¹ OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government. We shall see that while the President is ultimately in charge, the White House itself is a “they,” not an “it.”¹² Outside of the White House, numerous agencies are also involved, and they may well be the driving forces in the process that is frequently misdescribed as “OIRA review.” It would not be excessive to describe OIRA as, in large part, an information aggregator.¹³

/222655-unions-watchdogs-decry-delays-on-workplace-safety-rules (suggesting that OIRA itself was responsible for certain delays, in part because of meetings with outside groups).

⁷ See, e.g., *Worker Safety Rule Under Review at OIRA for over a Year: A Tale of Rulemaking Delay*, CENTER FOR EFFECTIVE GOV'T (Feb. 22, 2012), <http://www.foreffectivegov.org/node/11984>.

⁸ This is a fair implication of REVESZ & LIVERMORE, *supra* note 1. Professors Richard Revesz and Michael Livermore do explore characteristics of OIRA review other than cost-benefit analysis, including its coordinating role, emphasized here.

⁹ See, e.g., *The Paperwork Reduction Act at 25: Opportunities to Strengthen and Improve the Law: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov't Reform*, 109th Cong. 118 (2006) (statement of J. Robert Shull, Director of Regulatory Policy, OMB Watch); CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 118 (2005) (describing OIRA as “a political office”); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1070 (1986) (objecting to political interference with agency rulemaking).

¹⁰ See, e.g., DeMuth & Ginsburg, *supra* note 3, at 1086.

¹¹ For a valuable discussion of dispersed information and its role in government, see Adrian Vermeule, *Local and Global Knowledge in the Administrative State* 10–13, 19 (Harvard Public Law Working Paper No. 13-01, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169939. Professor Vermeule draws attention to this role of OIRA at the theoretical level, and I have greatly benefited from his discussion.

¹² Cf. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (“Presidential control is a ‘they,’ not an ‘it.’”).

¹³ My focus throughout is on OIRA's role, not on the substantive regulatory record of the Obama Administration. The governing principles can be found in Exec. Order No. 13,563, 3

For example, the Department of Agriculture will know a great deal about how rules affect farmers, and the Department of Transportation will know a great deal about how rules affect the transportation sector, and the Department of Energy will know a great deal about implications for the energy sector; the OIRA process enables all of these perspectives to be brought to bear on rules issued by other agencies. Part of OIRA's defining mission is to ensure that rulemaking agencies are able to receive the specialized information held by diverse people (usually career officials) within the executive branch.

Another defining mission is to promote a well-functioning process of public comment, including state and local governments, businesses large and small, and public interest groups. OIRA and agencies work together to ensure that when rules are proposed, important issues and alternatives are clearly and explicitly identified for public comment. OIRA and agencies also work closely together to ensure that public comments are adequately addressed in final rules, perhaps by modifying relevant provisions in proposed rules.¹⁴ Indeed, a central function of OIRA is to operate as a guardian of a well-functioning administrative process, in order to ensure not only respect for law but also compliance with procedural ideals, involving notice and an opportunity to be heard, that may not always be strictly compulsory but that might be loosely organized under the rubric of "good government."¹⁵

In explaining these points, I emphasize four propositions that are not widely appreciated and that are central to an understanding of OIRA's role. These propositions are elaborated at various points in the discussion, and it will be useful to identify them at the outset.

(1) *OIRA helps to oversee a genuinely interagency process, involving many specialists throughout the federal government.* OIRA's goal is often to identify and convey interagency views and to seek a reasonable consensus, not to press its own positions.¹⁶ While OIRA's own views may well matter, OIRA frequently operates as a conveyer and a convener. The heads of the various departments and agencies are fully committed to the process; they understand, and agree, that significant

C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 101-02 (2006 & Supp. V 2011); for other important guidance, see Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012); Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 4, 2012); and Exec. Order No. 13,579, 3 C.F.R. 256 (2012), reprinted in 5 U.S.C. § 601 app. at 102. For detailed discussion of some aspects of the regulatory record, see generally SUNSTEIN, SIMPLER, *supra* note 4.

¹⁴ For both proposed and final rules, of course, the bulk of the relevant work — in identifying issues for comment and in responding to comments that have been received — is done by agencies themselves, and generally before OIRA becomes involved.

¹⁵ Of course, many agencies within the executive branch, including the Department of Justice, attempt to safeguard a well-functioning administrative process.

¹⁶ For related discussion, see Vermeule, *supra* note 11, at 19-26.

concerns should be heard and addressed, whether or not they are inclined to agree with them.¹⁷

(2) *When a proposed or final rule is delayed, and when the OIRA review process proves time consuming, it is usually because significant interagency concerns have yet to be addressed.* Frequently there will be general agreement that a rule is a good idea, and the delay will be a product, not of any sense that it should not go forward, but of a judgment that important aspects require continuing substantive discussion. The relevant concerns might be highly technical; they might, for example, involve a complex question of law, or one or several provisions that are difficult to get right. One goal is to ensure that if a rule is formally proposed to the public, or finalized, it does not contain a serious problem or mistake. A final rule containing a problem or mistake creates obvious difficulties, perhaps above all if it is a mistake of law.¹⁸ But (and this is a more subtle point) even a proposed rule can itself significantly alter people's behavior, and thus create difficulties as well, if people believe that it is likely to be finalized in the same form.

(3) *Costs and benefits are important, and OIRA (along with others in the Executive Office of the President, including the Council of Economic Advisers (CEA) and the National Economic Council (NEC)) does focus closely on them, but they are not usually the dominant issues in the OIRA process.* Especially for economically significant rules, the analysis of costs and benefits receives careful attention; to the extent permitted by law, the benefits must justify the costs, and agencies must attempt to maximize net benefits.¹⁹ But most of OIRA's day-to-day work is usually spent not on costs and benefits, but on working through interagency concerns, promoting receipt of public comments (for proposed rules), ensuring discussion of alternatives,²⁰ and promoting consideration of public comments (for final rules). OIRA also engages lawyers throughout the executive branch to help resolve questions of law, including questions of administrative procedure. As noted, OIRA considers itself a guardian of appropriate pro-

¹⁷ Any particular rulemaking agency is likely to comment on rules made by other agencies, and hence the process ensures that the commenting agency is heard with respect to the rules of those other agencies, just as those other agencies are heard with respect to the commenting agency's own rules.

¹⁸ OIRA does not have the lead on legal issues, which is the province of others, including agency lawyers, the OMB General Counsel, the Department of Justice, and the White House Counsel. But OIRA helps to ensure that the legal issues receive careful attention and that those within the executive branch believe that regulatory actions are consistent with law. Indeed, this responsibility is central.

¹⁹ Exec. Order No. 13,563 § 1, 3 C.F.R. 215, 215-16 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101-02 (2006 & Supp. V 2011).

²⁰ Of course, there will be analysis of the costs and benefits of alternatives, at least for economically significant rules. *See infra* section III.A.2(a).

cedure, and much of its role is associated with that guardianship (including the promotion of public comments).

(4) *Much of the OIRA process is highly technical.* OIRA may seek, for example, to ensure careful consideration of the views of the Department of Justice on a legal issue, or the views of the United States Trade Representative on an issue that involves international trade, or the views of the Department of Homeland Security and the National Security Council on an issue with national security implications, or the views of the Department of Energy on the effects of a rule on the energy supply. In such cases, career officials with technical expertise are frequently the central actors. When rules are delayed, it is often because technical specialists are working through the technical questions. Much of the time, the problem is not that OIRA, or anyone else, has a fundamental objection to the rule and the agency's approach. It is that the technical questions need good answers.

In light of these points, my broadest themes here might loosely be described as Hayekian, Frankfurterian, and Millian. The Hayekian theme emphasizes the dispersed nature of human knowledge²¹ and OIRA's role in attempting to acquire as much of that knowledge as possible, primarily through careful attention to public comments. The Frankfurterian theme emphasizes the importance of fair process, manifested here as what might be understood as "regulatory due process," requiring participation by a large number of people inside and outside the federal government.²² The Millian theme, drawing on John Stuart Mill's sympathetic but critical comments on Jeremy Bentham, emphasizes the importance of a form of utilitarian balancing (cost-benefit analysis, with commitments to ensuring that the benefits justify the costs and to maximizing net benefits), but also the need to acknowledge that some variables are qualitatively different from others, and are not easily quantified, but nonetheless deserve to count (such as human dignity).²³

²¹ See generally F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

²² Justice Frankfurter famously wrote, "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943).

²³ See generally John Stuart Mill, *Bentham* (1838), in *UTILITARIANISM AND OTHER ESSAYS* 132 (Alan Ryan ed., 1987). The key passage is worth quoting at length:

Nor is it only the moral part of man's nature, in the strict sense of the term — the desire of perfection, or the feeling of an approving or of an accusing conscience — that he overlooks; he but faintly recognizes, as a fact in human nature, the pursuit of any other ideal end for its own sake. The sense of *honour* and personal dignity — that feeling of personal exaltation and degradation which acts independently of other people's opinion, or even in defiance of it; the love of *beauty*, the passion of the artist; the love of *order*, of congruity, of consistency in all things, and conformity to their end; the love of *power*, not in the limited form of power over other human beings, but abstract power, the power of making our volitions effectual; the love of *action*, the thirst for movement and activity, a principle scarcely of less influence in human life than its opposite, the love of ease Man, that most complex being, is a very simple one in his eyes.

Id. at 153.

Some necessary qualifications: This Commentary is based on official documents and also on my own experiences as OIRA Administrator, and it is written with close reference to those experiences. For that reason, it has an impressionistic quality. Moreover, it is focused on practices and experiences from September 2009 until August 2012. On the basis of discussions with OIRA staff and with former Administrators, I believe that the general account offered here is consistent with the practices in other administrations. Insofar as I am stressing the role of OIRA as a convener and aggregator of information and highlighting its attention to procedural requirements, the central claims cut across administrations. But OIRA's practices are not static, and the future may hold surprises; other OIRA Administrators, past and future, may have somewhat different accounts and perspectives. While I do venture some normative comments, especially to correct misconceptions, I endeavor to make this account largely descriptive and free of evaluations, whether positive or negative. A full evaluation of OIRA's role, once it is accurately understood, is another matter.²⁴

Importantly, this Commentary focuses narrowly on OIRA's process for reviewing rules, not on OIRA generally. Insofar as OIRA has other important functions, including helping to establish regulatory priorities and principles,²⁵ I shall not discuss those functions here. Nor shall I be exploring (at least not in any detail) the role of other offices within the Executive Office of the President. These offices also help OIRA work closely with agencies and sometimes play an important part in the rulemaking process.

II. REVIEWING RULES: THE OIRA PROCESS

I have suggested that OIRA helps to oversee an interagency process, and that when the review process is lengthy or complicated, it is often because of continuing discussions by participants in that process. I have also said that the process can be highly technical. To understand these claims, it will be useful to describe how the process works, with an emphasis on the actual mechanics.

²⁴ Cost-benefit analysis receives some attention here, but with an emphasis on process, not substance. Some of the substantive issues are engaged in SUNSTEIN, SIMPLER, *supra* note 4; and Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, COLUM. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112.

²⁵ To take just one recent example, OIRA played an important role in helping to oversee the "regulatory lookback" required by Executive Order 13,563 and Executive Order 13,610. See, e.g., Cass Sunstein, *Regulatory Reform Process*, OMBLOG (Jan. 30, 2012, 5:07 PM), <http://www.whitehouse.gov/blog/2012/01/30/regulatory-reform-progress>. On some of those principles and priorities, see sources cited *supra* note 4. OIRA has also played, and will continue to play, an important role in international regulatory cooperation. See Exec. Order No. 13,609 § 2, 77 Fed. Reg. 26,413, 26,413 (May 4, 2012).

A. Basics

To begin with some basics: OIRA consists of about forty-five people, almost all of them career staff. They work in a number of “branches,” covering different agencies and areas. Each of the branches has a number of “desk officers,” all with substantive expertise in one or more areas, and spending most of their time on one or a small number of agencies. For example, a desk officer may specialize in regulatory actions from the Department of Health and Human Services, the Department of Transportation, or the Environmental Protection Agency. Each branch is managed by a “branch chief,” an OIRA staff member with longstanding experience and a great deal of expertise. Desk officers are carefully supervised by branch chiefs, who give them detailed advice on how to conduct reviews. OIRA reviews several hundred regulatory actions every year.²⁶

OIRA is headed by an Administrator, who is confirmed by the Senate and who works under the Director of OMB. OIRA’s Deputy Administrator, who helps to manage the office and offers advice on a wide range of subjects, is nonpolitical. In the Obama Administration, OIRA has also had an Associate Administrator and a Chief of Staff, political appointees who are part of OIRA’s leadership. OIRA may work closely with others in OMB, including the five Resource Management Offices, which help to oversee the allocation of federal funds and which may have important perspectives on questions of policy. For example, the Associate Director for Health Programs and his staff have a great deal of expertise on health care questions, especially to the extent that they affect the budget. If those offices within OMB have serious concerns about a rule, those concerns will receive attention, and OIRA will work closely with the rulemaking agency to see whether and how best they might be addressed.

Insofar as it reviews rules, OIRA’s central responsibilities are defined by Executive Order 13,563,²⁷ issued by President Obama in 2011, and by Executive Order 12,866,²⁸ issued by President Clinton in 1993. Executive Order 12,866 establishes the central requirements for

²⁶ The numbers are available on [reginfo.gov](http://www.reginfo.gov). For example, OIRA reviewed 690 rules in 2010 and 740 in 2011. See *Review Counts*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Mar. 30, 2013) (allowing searches of OIRA review counts by date range). It would be possible to wonder whether OIRA has sufficient personnel for its many functions, and the staff does work extremely hard. As explained at multiple points, however, numerous people outside of OIRA are involved in the process of regulatory review; the work is hardly done by OIRA alone.

²⁷ Exec. Order No. 13,563 § 6(b), 3 C.F.R. 215, 217 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2006 & Supp. V 2011).

²⁸ Exec. Order No. 12,866 § 6(b), 3 C.F.R. 638, 646–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91.

agencies and OIRA alike.²⁹ Executive Order 13,563 — a document of signal importance in the Obama Administration, indeed a kind of mini-constitution for the regulatory state — reaffirms and adds to Executive Order 12,866.³⁰ Significantly, it specifically invokes a number of provisions relating to cost-benefit balancing.³¹ Perhaps most important, it states that each agency must, to the extent permitted by law:

(1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).³²

At the same time, Executive Order 13,563 introduces several additional principles and requirements, involving public participation, integration and coordination, flexibility, and scientific integrity.³³ These principles and requirements play a significant role in agency thinking and in OIRA review.³⁴

After an agency formally submits a rule, OIRA has ninety days to review it unless an extension is given.³⁵ Before or after the expiration of the ninety-day period, OIRA may (1) conclude review, after which the rule is published in the Federal Register, either with or without change;³⁶ (2) return the rule to the agency for reconsideration via a formal return letter;³⁷ (3) encourage the agency to withdraw the rule in

²⁹ *Id.* § 6, 3 C.F.R. at 644–48.

³⁰ *See* Exec. Order No. 13,563, 3 C.F.R. at 215.

³¹ *Id.*

³² *Id.* § 1(b), 3 C.F.R. at 215. A valuable discussion of some of the foundational issues may be found in MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION (2011).

³³ Exec. Order No. 13,563 §§ 2–5, 3 C.F.R. at 216.

³⁴ Executive Order 13,563 section six calls for the regulatory lookback, discussed in detail in SUNSTEIN, SIMPLER, *supra* note 4.

³⁵ Exec. Order No. 12,866 § 6(b)(2)(B), 3 C.F.R. 638, 647 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

³⁶ *Id.* § 6(b)(2)(B), 3 C.F.R. at 647; *id.* § 6(b)(4)(D), 3 C.F.R. at 648; *id.* § 8, 3 C.F.R. at 648–49.

³⁷ *Id.* § 6(b)(3), 3 C.F.R. at 647. In the Obama Administration, OIRA has issued one return letter, involving a final EPA rule for ozone. *See* Letter from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm'r, Env'tl. Prot. Agency (Sept. 2, 2011), *available at* http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf (reproduced as an Appendix here). Previous administrations have issued more such letters. *See OIRA Return Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoReturnLetters> (last visited Mar. 30, 2013). While return letters can be exceedingly important in particular cases, and also in affirming OIRA's role, they are highly unusual in any administration, and the number of such letters does not provide helpful information about how OIRA and the agencies are working together in any period. In a calendar year, OIRA typically reviews hundreds of regulatory actions.

light of interagency concerns;³⁸ (4) work with the Director of OMB to obtain an extension of up to thirty days; or (5) work with the agency to obtain an extension of whatever length it deems appropriate.³⁹

The vast majority of rules proceed through the process within the ninety-day period, and they are generally changed (and improved) as a result. For example, OIRA reviewed 2304 regulatory actions between January 21, 2009, and August 10, 2012. In that period, 320 actions, or about 14%, were approved without change; 161 actions, or about 7%, were withdrawn; and 1758 actions, or about 76%, were approved “consistent with change.”⁴⁰ In assessing the importance of review, it is important to note that the words “consistent with change” reveal that the published rule is different from the submitted rule, but do not specify the magnitude of the change. In some cases, the changes are minor, perhaps even cosmetic; in others, they are substantial.

Much of the time, the changes are not suggested by OIRA itself; agencies frequently make changes in response to interagency comments (for example, from the Department of Justice or the Department of Energy). Sometimes, of course, OIRA will have significant suggestions of its own, stemming in the first instance from OIRA staff, and will convey its views to the agency.⁴¹ It is important to see that when changes result from the agency’s acceptance of those suggestions, they are often highly technical or procedural ones, and made without any involvement on the part of OIRA’s political leadership. For example,

Because many rules are withdrawn and many change as a result of review, it is misleading to focus on the number of return letters as a measure of OIRA’s impact. A relatively large number of return letters need not indicate that OIRA and other interagency reviewers are acting aggressively, and a small number of return letters, including the complete absence of such letters, does not indicate that OIRA and other interagency reviewers are acting passively.

Note as well that a return letter from OIRA will almost certainly reflect a consensus among many people involved in the interagency process, including reviewers in the Executive Office of the President. OIRA may be the signatory, but the letter is not solely OIRA’s. OIRA’s actions, like those of others within the executive branch, are products of a highly consultative process.

³⁸ Note that rules may be withdrawn for many reasons. OIRA encouragement is merely one, and very often, agencies withdraw rules entirely on their own. It is noteworthy that 162 rules were withdrawn from OIRA review between January 21, 2009, and September 21, 2012. See *Review Counts*, *supra* note 26 (count of withdrawn rules obtained by entering the date range and selecting display option “By OIRA Conclusion Action”).

³⁹ “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.” Exec. Order No. 12,866 § 6(b)(2)(C), 3 C.F.R. at 647. This provision might be taken to be ambiguous because of the use of the word “and” rather than “or,” suggesting the possibility that both conditions must be met, but it has long been understood that the agency head may request an extension of any length, including an indefinite one. Within the executive branch, it is agreed that an agency head may request more time for review as discussions continue.

⁴⁰ See *Review Counts*, *supra* note 26 (count of regulatory actions obtained by entering the date range and selecting display option “By OIRA Conclusion Action”).

⁴¹ See *infra* section II.B.1 (discussing the basics of OIRA’s internal process); *infra* section II.B.2 (discussing “elevation”).

the proposed changes might be designed to promote compliance with the Paperwork Reduction Act or to ensure that the agency raises certain alternatives for public comment.

Agencies may and do decline to accept suggested changes with which they disagree. When changes are made, the agency assents to them. Indeed, there are countless instances in which the process of interagency comment during OIRA review, or the agency's own continuing consideration of the underlying issues, leads the agency to make changes quickly and with enthusiasm.⁴² In some cases, however, there is no consensus on whether and how to proceed during the ninety-day period. If so, agencies generally request extensions, which can be quite lengthy.⁴³

1. *Pre-OIRA.* — Under relevant statutes, of course, agencies are required or authorized to issue numerous rules. Agencies begin to draft rules long before OIRA is formally engaged — sometimes on their own, sometimes in consultation with other agencies, sometimes in consultation with one or more offices within the Executive Office of the President.⁴⁴ OIRA may be aware of such rules, perhaps because of general discussion within the executive branch, or perhaps because they were included in the Annual Regulatory Plan and Unified Agenda of Regulatory and Deregulatory Actions, whose components are submitted to OIRA every year.⁴⁵

The OIRA Administrator is frequently engaged in informal discussions with leadership at the agencies (sometimes the Deputy Secretary), and upcoming rules may well be mentioned in those discussions. OIRA staff may discuss upcoming rules with their colleagues at the agencies, which may lead to general awareness within OIRA and the Executive Office of the President. The OIRA Administrator is also frequently involved in informal conversations with people in the Executive Office of the President, and those conversations may refer to upcoming rules. For example, the Domestic Policy Council (DPC) has

⁴² It is true, of course, that agencies and interagency reviewers may disagree, and the disagreements may require considerable discussion. It is also possible that agency reviewers will offer inconsistent suggestions. See *infra* section II.B.2.

⁴³ For example, a rule involving the definition of “catfish” was under OIRA review for well over a year. See Matthew Madia, *One Year Later, Catfish Safety Rule Still at OIRA*, CENTER FOR EFFECTIVE GOV'T (Nov. 16, 2010), <http://www.foreffectivegov.org/node/11371>. OIRA is transparent about the length of time that rules are under review. See *Regulatory Review Dashboard*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp> (last visited Mar. 30, 2013) (allowing display of regulatory actions currently under review by length of review).

⁴⁴ See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012), on the general question of interagency coordination.

⁴⁵ See *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/doleAgendaMain> (last visited Mar. 30, 2013).

responsibilities in the areas of health care, immigration, education, energy, civil rights, and labor, and discussions with DPC may alert OIRA to rules that are to come. But at these stages, formal OIRA review is not involved.

For rules that are likely to attract interagency interest, or that would benefit from the expertise of other parts of the federal government, agencies may elect to consult with other offices or agencies well in advance of the OIRA process.⁴⁶ In that way, rulemaking agencies can and often will collect views on their own, largely to inform their own judgments about whether and how to proceed. For example, the Environmental Protection Agency might consult the Department of Energy before completing a draft of a rule that will affect the electricity sector. Agencies may also engage closely with White House offices when considering important and controversial rules. For example, they may work with NEC (which advises on a wide range of economic issues) and DPC. For such rules, especially those with budgetary implications, agencies may also engage with relevant officials in OMB who specialize in budgetary questions.

In important but unusual cases, a White House policy office will initiate a process to consider or promote rulemaking and to help coordinate discussions long before OIRA review begins. Such a process is especially likely to occur if an initiative is a presidential priority or otherwise of interest to the President and his closest advisers. If so, NEC or DPC might have an especially important role, perhaps in initiating agency activity, or perhaps in helping to coordinate different parts of the federal government.⁴⁷ The Office of Science and Technology Policy or the Council on Environmental Quality might play the same role for issues within their particular domains. For rules with a national security component, the National Security Council or the National Security Staff will likely have the White House lead, perhaps promoting agency consideration of activities that may ultimately be subject to OIRA review. While OIRA has written formal “prompt letters,” designed to promote agency action,⁴⁸ such “prompting” is far

⁴⁶ Indeed, interagency consultation is sometimes required by law. For valuable discussion of relevant issues of law and policy, see generally Freeman & Rossi, *supra* note 44.

⁴⁷ Livermore and Revesz contend that OIRA should play a greater role in initiating desirable rulemaking. Livermore & Revesz, *supra* note 1 (manuscript at 53–54). Whether or not the contention has merit, a number of White House officials are frequently engaged in considering, with agencies, whether new rulemaking would be desirable. For example, President Obama had a series of “We Can’t Wait” initiatives, many of which involved consultative processes including the Executive Office of the President, and some of which involved rules. See, e.g., Press Release, The White House, We Can’t Wait: President Obama Takes Action to Improve Quality and Promote Accountability in Head Start Programs (Nov. 8, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/11/08/we-cant-wait-president-obama-takes-action-improve-quality-and-promote-ac>.

⁴⁸ See Livermore & Revesz, *supra* note 1 (manuscript at 52).

more likely to occur informally and from other offices, which have a particular responsibility to explore desirable policy initiatives.

This process of early interagency coordination can be extremely important and valuable in compiling relevant information and in ensuring that from the very beginning, multiple and potentially diverse perspectives are taken into account. Such a process can simplify and ease the OIRA process, because much of the interagency thinking will have occurred in advance. It is also possible that interagency coordination will ultimately lead an agency to decide not to proceed with a rule, or not to do so at a certain time, and hence OIRA will never see it. For relatively less important rules, and those that do not implicate the interests or concerns of other parts of the government, agencies might engage in no interagency consultation in advance of the OIRA process.

2. *Significance.* — Under Executive Order 12,866, OIRA review is limited to “significant” regulatory actions.⁴⁹ Before OIRA becomes formally involved, a judgment has to be made (by OIRA) about whether a rule is “significant” within the meaning of that Executive Order. Agencies may of course have an interest in having their rules designated as nonsignificant because such a designation expedites the rulemaking process.⁵⁰ Executive Order 12,866 states, in relevant part, that:

“Significant regulatory action” means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

⁴⁹ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011). The predecessor Executive Order 12,291 had no such limitation, and hence OIRA reviewed far more rules in the period between 1981 and 1993 than it has since 1993. *Compare Review Counts*, *supra* note 26 (displaying results “By OIRA Conclusion Action” between February 7, 1981, and October 4, 1993 (comprising 29,790 actions)), *with id.* (displaying results “By OIRA Conclusion Action” between October 4, 1993, and March 6, 2013 (comprising 12,298 actions)).

⁵⁰ *See* Nou, *supra* note 1, at 1786–89. The question of agency incentives may be complicated. In some cases, agencies may strongly favor OIRA review as a way of obtaining comments through a formal process, of avoiding error, of ensuring that relevant officials are notified, and of eliciting interagency support. No agency would be comfortable “surprising” the Executive Office of the President with regulatory activity with which it should have been, but was not, aware. There are many ways of providing relevant notice; the OIRA process is the most formal.

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.⁵¹

Under this standard, many federal rules are not subject to OIRA review, because they do not impose high costs, are simple and routine, and are unlikely to attract interagency interest.⁵² And under the quoted standard, the significance question is usually easy. If a rule has an economic impact of \$100 million or more in any single year, it is economically significant, and it automatically qualifies for OIRA review.⁵³ In most periods, fewer than twenty percent of rules reviewed by OIRA count as economically significant.⁵⁴ One implication is that over eighty percent of such rules will not have a Regulatory Impact Analysis, which is a careful and detailed account of the costs and benefits of economically significant rules.⁵⁵

Under Executive Order 12,866, rules that raise novel issues of law or policy must also be subject to OIRA review. This category is extremely important. Many rules are reviewed by OIRA because they raise such issues and are thus of interest to a wide variety of people within the executive branch. Such rules might, for example, establish new policies with respect to discrimination on the basis of race, sex, or sexual orientation, or they might contain disclosure requirements that would affect large numbers of consumers.⁵⁶ It is also worth emphasizing that rules count as significant if they would create “a serious inconsistency or otherwise interfere with an action taken or planned by another agency.” These are of course the starkest cases of interagency concern.

⁵¹ Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641–42.

⁵² For a general picture of regulatory activity, including both significant and nonsignificant rules, see REGULATIONS.GOV, <http://www.regulations.gov> (last visited Mar. 30, 2013). The Obama Administration took significant steps to make this website as clear and user friendly as possible.

⁵³ Note the important point, to which I will return, that a rule can have such an impact because its benefits exceed \$100 million even if its costs do not — and that a budgetary transfer rule, required or authorized by Congress, might qualify because \$100 million or more is changing hands.

⁵⁴ For example, 18.69% of rules reviewed by OIRA between January 21, 2009, and September 21, 2012, counted as economically significant. See *Review Counts*, *supra* note 26 (displaying “Number of Rules and Economically Significant Rules Reviewed” within indicated timeframe).

⁵⁵ See OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, at 1–2 (2003), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>. Some rules that are not economically significant nonetheless are submitted and published with a Regulatory Impact Analysis, but this is not required. Rules that do not qualify as economically significant are likely to have some kind of account of both costs and benefits (if they are not trivial and if such an account is feasible).

⁵⁶ See, e.g., Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,480 fig.I-1 (July 6, 2011), amending 40 C.F.R. pts. 85–86, 600 (2012), 49 C.F.R. pt. 575 (2011).

On occasion, however, it is not clear whether a regulatory action is significant, and there will be discussions about that question.⁵⁷ In the vast majority of cases, the issue is resolved at the staff level without involving the OIRA Administrator. But the category of “novel” issues is hardly self-defining, and while disagreements are infrequent, they do occur between agencies and OIRA. An agency might contend that the rule is minor, routine, and not novel at all. OIRA staff might question this conclusion. In the very rare cases in which the issue is difficult to resolve, agency policy officials and the Administrator or Associate Administrator of OIRA might engage in further discussion, and the Administrator will ultimately decide the significance question — sometimes following the recommendation of OIRA staff, and sometimes following the recommendation of the agency.⁵⁸

If a regulatory action is ultimately found to be significant, it is usually because it would have a major economic impact or raise serious policy questions (for example, if it would involve a serious question of civil rights or civil liberties). However, a rule might be projected to cost \$50 million, well below the \$100 million threshold, but its impact might be concentrated in a small sector, or the agency’s cost estimate might seem optimistic, and thus deserve a degree of interagency scrutiny. Recall that a rule counts as economically significant if it will “adversely affect in a material way . . . a sector of the economy,” and even if a \$50 million price tag does not automatically make a rule economically significant, it might well be enough to trigger a judgment of significance in certain circumstances.

Noneconomic considerations can also play a role. Serious congressional interest might inform the significance determination. If members of Congress are concerned about a rule, there is some reason to think that it raises novel questions, and that use of the OIRA process would be a good idea. A rule might also be deemed significant because other offices and agencies are interested in the rule and would likely have views. If a rule is connected with presidential priorities, it is highly likely to be deemed significant.

In this respect, the significance determination itself has an interagency dimension. To say the least, it would be unusual for OIRA to conclude that a rule is not significant if two other Cabinet departments have substantial concerns, or if DPC thinks that it should be subject to an interagency process. Indeed, such a conclusion would be highly inappropriate. A chief goal of the OIRA process is to ensure that diverse voices are heard, and OIRA cannot legitimately refuse to engage in

⁵⁷ For relevant discussion, see Nou, *supra* note 1, at 1786–89.

⁵⁸ See Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

that process if diverse voices within the federal government seek some kind of hearing.

Under Executive Order 12,866, OIRA does not merely review regulations. It reviews regulatory actions, defined to include “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.”⁵⁹ Under this provision, OIRA review unambiguously applies to (significant) requests for information, advance notices of proposed rulemaking, guidance documents, or interpretive rules that initiate a process that will culminate in rulemaking. It is relevant here that the OIRA staff has a great deal of experience with relevant forms and formalities, and thus can reduce the risk of technical mistakes, both large and small, with various documents (including advance notices of proposed rulemaking).

But what about a guidance document or an interpretive rule that is freestanding, in the sense that it is not expected to be followed by a final rule or regulation? Across multiple administrations, OIRA has long reviewed such documents and rules so long as they count as “significant,” and that understanding was reaffirmed in March 2009 in a short but significant memorandum from OMB Director Peter Orszag.⁶⁰ A central idea here is that important guidance documents and interpretive rules may well have large economic consequences, raise novel issues of law or policy, or trigger interagency interest, and a process of review and interagency comment may turn out to be helpful. Here as elsewhere, no administration is likely to want to issue important regulatory documents that have not been seen by, or (if appropriate) incorporated the perspectives of, senior officials inside the administration.

A particular problem is that guidance documents and interpretive rules may turn out to be actually or nearly the equivalent of rulemaking, either as a matter of law or as a matter of practice. For example, an agency might issue a guidance document and denominate it as such, even though it is actually a rule. There is a great deal of litigation on this topic, and the process of OIRA review can explore (with

⁵⁹ *Id.* § 3(e), 3 C.F.R. at 641.

⁶⁰ See Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/mo9-13.pdf. It would be possible to object that OIRA has no authority to review regulatory actions that do not strictly meet the definition of “regulatory action” within Executive Order 12,866. As noted, however, review of such actions has occurred for a long period, and in any case OMB is authorized to require such review so long as the requirement is not inconsistent with relevant statutes and Executive Orders. The issuance of the Memorandum cited in this note reflects broad support for such review within the Executive Office of the President.

the engagement of relevant lawyers, including OMB General Counsel and the Department of Justice) the question of whether guidance documents and interpretive rules are overstepping their legal bounds.⁶¹ Even if such a document or such a rule oversteps no such bounds, it may nonetheless have major effects on the private sector. If so, OIRA review might be important to ensure a process for interagency comments on that document; other departments may well have views. OIRA is also interested in promoting public comment on all significant regulatory actions, including guidance documents and interpretive rules — not because such comment is required as a matter of law,⁶² and not because it is necessary or desirable in every instance, but because when the stakes are high and the issues novel, obtaining public comment is good practice as a way of avoiding mistakes.

When draft regulatory actions are ready, they are submitted to OIRA via the Regulatory Information Service Center and OIRA Consolidated Information System (ROCIS). Within a short period (ordinarily less than twenty-four hours), the fact that a rule has been submitted is usually visible to the public on [reginfo.gov](http://www.reginfo.gov), along with relevant information, often including a summary of the rule. The goal here is to promote transparency for the public (and indeed the Obama Administration has taken many steps to make [reginfo.gov](http://www.reginfo.gov) as transparent as possible).⁶³

Submission to OIRA immediately triggers two sets of activities, both of which involve the acquisition of dispersed information. The first is internal. The second involves those outside the executive branch.

B. Internal Process

1. *The Basics.* — Very soon after submission, the relevant OIRA desk officer — as noted, a member of the career staff — will generally circulate the rule to a wide range of offices and departments, both within the Executive Office of the President and outside of it. Recall that while the President is ultimately in charge, the White House itself is emphatically a “they,” not an “it.”⁶⁴ Within the Executive Office of

⁶¹ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

⁶² It is not. See 5 U.S.C. § 553 (2006) (exempting guidance documents and interpretive rules from notice and comment requirements).

⁶³ For example, the Administration created “dashboards” that show, in graphical forms, both rules and information collection requests under OIRA review. See *ICR Dashboard*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/PRA/pradashboard.jsp> (last visited Mar. 30, 2013); *Regulatory Review Dashboard*, *supra* note 43.

⁶⁴ Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (describing the legislature as similarly being composed of many different actors and viewpoints); Adrian Vermeule, *The Judiciary Is a They, Not an It:*

the President, frequent recipients of regulatory actions include: the Council of Economic Advisers, the Council on Environmental Quality, the Domestic Policy Council, the National Economic Council, the National Security Council, the Office of Legislative Affairs, the Office of Management and Budget, the Office of Science and Technology Policy, the Office of the Vice President, the United States Trade Representative, and the White House Counsel.

Within the executive branch as a whole, OIRA may well ask multiple departments and agencies for their views. The specific list of agencies consulted will depend on the subject matter and content of the rule. For example, a rule from the Environmental Protection Agency might be reviewed by the Department of Energy, the Department of Transportation, the National Oceanic and Atmospheric Administration (within the Department of Commerce), the Department of Agriculture, the Department of Justice, and the Department of the Interior, among others. On matters that particularly affect small business, the independent Office of Advocacy, within the Small Business Administration, will be consulted.⁶⁵ The governing idea is that relevant agencies have information and expertise, and the rulemaking agency should benefit from their perspectives before finalizing or even proposing rules.⁶⁶ A central goal of the OIRA process is to ensure that rulemaking agencies have access to the wide variety of perspectives that can be found throughout the executive branch.

For this reason, one of OIRA's jobs is to work with agencies to ensure that interagency comments are properly considered, and indeed, agencies generally give careful consideration to such comments without the slightest prodding from OIRA. In many cases, the interagency comments are quite technical. For example, the Department of Justice, the White House Counsel's Office, and the OMB General Counsel's Office might all have views on a legal issue, and OIRA staff will ensure that they work with the agency's general counsel to produce a mutually agreeable result. The general counsel at the rulemaking agency is likely to listen carefully to these offices and departments, not least because the Department of Justice must ultimately defend agency rules. If the Department of Justice believes that the agency's original position would create a serious litigation risk, the agency might decide

Interpretive Theory and the Fallacy of Division, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005) (describing the judiciary as similarly being composed of many different actors and viewpoints).

⁶⁵ For more information about the Office of Advocacy, see the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2006 & Supp. V 2011), an important statute that helps define the Office's role.

⁶⁶ Recall that even a proposed rule can have serious effects and create dislocations, especially if those in the private sector believe that the handwriting is on the wall in such a way as to lead them to reorder their affairs.

not to run that risk. In most cases, the Administrator of OIRA is likely to be informed of that discussion, but not directly involved.

Alternatively, there might be a scientific question on which diverse scientists have relevant questions and perspectives. It is important, of course, for all participants to give careful consideration to the technical expertise of the rulemaking agency. The agency's own views are likely to provide the scientific foundation for what is proposed or finalized. But the federal government may well have multiple scientific experts (perhaps at the Office of Science and Technology Policy and perhaps in one or more agencies), and OIRA works to ensure that they are consulted. It is possible that technical experts at the rulemaking agency will decide to revise their analysis and even their conclusions in light of insights provided by other technical experts.

Much of the time, the discussion thus far captures OIRA's entire role. In such cases, OIRA acts largely as a convener or a facilitator. Of course OIRA may also have its own views on both process and substance; it may believe that certain interagency comments are important and convincing, or instead that they are unimportant or mistaken. In the former cases, OIRA may be a relevant voice, working with the rulemaking agency to see how the comments might best be accommodated. In the latter cases, OIRA may work with the commenting agencies to explain why the rulemaking agency need not accommodate their concerns. It is not unusual for OIRA to work either to accommodate the comments or to suggest that the comments ought not to be accommodated. In either case, however, it would not be appropriate for OIRA to be dismissive of those who have a point of view. Diverse agencies may well participate in such conversations — perhaps in writing, perhaps by telephone, perhaps in person. The resulting discussions typically produce stronger rules.

In addition, members of OIRA's staff might well have independent views of their own, informed by their exposure to a large volume and variety of regulatory actions. They might believe, for example, that the draft rule will impose an excessive paperwork and reporting burden and that steps should be considered to reduce that burden. They might believe that the agency should discuss an alternative on which it has thus far remained silent. They might believe that the agency should consider asking for public comments on how to reduce costs. Often the agency will agree with such suggestions. The OIRA Administrator might well be informed of them; whether or not he is, OIRA staff will respond both to his general direction, which emerges from repeated discussions within OIRA, and to OIRA's institutional culture, which favors reducing paperwork burdens and promoting public comments.

2. "*Elevation.*" — In some cases, it is not easy for the relevant staff to work out the competing concerns. In that event, the issue may be "elevated," which means that it has to be resolved at a higher level.

The staff at the rulemaking agency may disagree with suggestions in the interagency process, and they may specifically ask that the issue be “elevated,” perhaps to political officials. Or perhaps the commenters in the other agencies do not agree with the rulemaking agency, and they may also ask for discussion at a higher level.

There are multiple levels of elevation. For example, the issue might rise to the level of an Assistant Secretary at one of the departments, who might discuss the question with relevant counterparts at other offices or departments, with OIRA acting as convener.⁶⁷ If, for example, there is a dispute about the assessment of costs and benefits, and if a member of CEA has a strong view, OIRA might arrange a call or a meeting with the relevant Assistant Secretary. In that discussion, OIRA’s Associate Administrator or Deputy Administrator might be involved. It is possible that OIRA’s leadership will work directly with someone at the relevant agency — say, the Assistant Secretary at the rulemaking department and the Assistant Secretary at the department that has concerns — to seek a resolution.

The focus of these discussions is intensely substantive. If, for example, a reviewing agency believes that it is important to ask for public comments on what it sees as a reasonable alternative to the main proposal, and if the rulemaking agency believes that such a request would be unhelpful and distracting, then a key question is whether the proposed alternative is a reasonable one that might actually be chosen in the final rule. To answer that question, it is necessary to ask some questions about the content of the alternative, its legality, and its potential effects. Similarly, there may be discussions about what should be chosen as the primary proposal and what should be discussed as an alternative.

OIRA may well help serve as a mediator in these discussions, with the principal goal of ensuring that there is a mutually agreeable outcome. Of course OIRA leadership may also have a view on the merits, perhaps even a clear view, and it may encourage the rulemaking agency or the commenting agency to move in a certain direction. Typically, OIRA supports the inclusion of a wide range of alternatives for public comment. Recall that OIRA understands itself as a guardian of the rulemaking process and hence tends to promote public comment on a range of questions.

In relatively rare cases, discussion at the Assistant Secretary level does not resolve the issue, and it must be elevated still further. The Deputy Secretary (who serves directly under the Cabinet head) of a

⁶⁷ Once a regulatory action is under OIRA review, it would generally be deemed inappropriate for interagency discussions to occur without OIRA involvement, even if OIRA’s role is purely that of convener. It is important to ensure that the process of review is coordinated and organized.

department (either the rulemaking agency or one with concerns) might believe that the issue is worth discussing. The OIRA Administrator would likely organize a call or convene a meeting, and other officials, at comparable levels, might be present as well. In very rare cases, the issue might go to “principals,” meaning the heads of Cabinet departments. OIRA, the Director of OMB, or (in very rare cases) the Chief of Staff’s Office may arrange for a call or meeting. These discussions are typically substantive; they might well be highly technical. Sometimes elevation, even at very high levels, will consist of a phone call in which a Deputy Secretary or Cabinet head calls the OIRA Administrator to talk through a complex issue.

In a well-known case, President Obama himself resolved a question about whether the Environmental Protection Agency (EPA) should finalize an ozone rule.⁶⁸ Although that resolution was reported to be based on political grounds,⁶⁹ the report was erroneous. As is typically the case for agency rulemaking, the decision was based on judgments about the merits, as reflected in the return letter that the President directed me to write.⁷⁰

3. *OIRA as Convener*. — In popular and academic discussions of the OIRA process, a great deal of attention is devoted to cost-benefit analysis and to OIRA’s own views.⁷¹ Costs and benefits can matter a great deal, and OIRA’s views can be important. OIRA and others involved in the process are interested in increasing net benefits (which may mean decreasing costs). But it should now be clear that OIRA is often operating as a convener — perhaps with a point of view, but perhaps not even that, and frequently OIRA is not the most important interlocutor on the rule. Recall that the White House itself is a “they,” not an “it.” OIRA is often in the position of transmitting comments with which it does not necessarily agree or on which it is neutral. Its goal is to find a reasonable and mutually agreeable resolution.

In the face of significant interagency concerns, the process of OIRA review typically continues until such a resolution is found. If, for example, a high-level presidential adviser⁷² does not believe that a pro-

⁶⁸ The President directed me to return the draft rule to the EPA Administrator for reconsideration. See Letter from Cass R. Sunstein to Lisa P. Jackson, *supra* note 37.

⁶⁹ See, e.g., John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 17, 2011, at A1.

⁷⁰ See Letter from Cass R. Sunstein to Lisa P. Jackson, *supra* note 37. The President himself issued a statement on the question. See Press Release, The White House, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

⁷¹ See, e.g., Livermore & Revesz, *supra* note 1.

⁷² Within the White House, the highest level is Assistant to the President. For example, the Director of NEC, the Director of DPC, and the White House Counsel have that title.

posed rule should go forward in its current form, or if a member of the President's Cabinet has severe reservations, OIRA cannot simply ignore his or her concerns. Its obligation is to work closely with others and with the relevant officials to address those concerns — by seeing if proponents of the rule can convince the skeptics that the concerns are unwarranted or by seeing if skeptics can convince the agency that the concerns need to be accommodated. As part of the executive branch, agencies fully appreciate this process, certainly at the level of Cabinet heads. Of course OIRA might have some views of its own, perhaps even clear views. When it does, it is often because of OIRA's institutional commitment to fair procedure and to compliance with Executive Order 13,563.⁷³ OIRA might, for example, urge that a rule should not be an interim final rule and that the agency should seek public comments.

Why might an agency accept one or more of the comments made during the interagency process? Consider some possible reasons. In response to the Department of Justice, the agency might conclude that it has taken an approach, on one of a large number of issues, that does indeed raise a serious legal problem, and that it might do better to proceed in a way that avoids the legal difficulty (sometimes described as a “litigation risk”). In response to CEA, the agency might conclude that its assessment of costs is too optimistic and that it would do better to offer higher figures or a range. In response to DPC, the agency might agree that it should take comment on a plausible alternative to the approach that it is proposing. The role of OIRA itself is often to seek a sensible path forward — helping to identify an approach that addresses reasonable concerns while also enabling the agency to proceed. Of course it is also true that for some rules, the concerns are sufficiently serious, and sufficiently appreciated by the rulemaking agency, that the rule will be unlikely to proceed.

C. *External Meetings*

Before formal submission of a rule to OIRA, members of the public may be able to meet with the rulemaking agency and with relevant offices within the Executive Office of the President. Such meetings are in fact common.⁷⁴ Under Executive Order 13,563, agencies are directed to obtain views from members of the public even before they issue a proposed rule.⁷⁵ Until a regulatory action is formally submitted,

⁷³ Public participation, for example, may prove important under that Executive Order. See Exec. Order No. 13,563 § 2, 3 C.F.R. 215, 216 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2006 & Supp. V 2011).

⁷⁴ See *Meeting Records*, OFF. MGMT. & BUDGET, http://www.whitehouse.gov/omb/oira_meetings (last visited Mar. 30, 2013).

⁷⁵ See Exec. Order No. 13,563 § 2(c), 3 C.F.R. at 216.

OIRA itself is usually unavailable for meetings with members of the public; the standard practice is to wait until the time of submission, when a rule is under formal review.⁷⁶ At that time, OIRA is immediately available for meetings, known as “12,866 meetings,” after Executive Order 12,866.⁷⁷

1. *Open Doors.* — OIRA has an open-door policy. It accepts all comers.⁷⁸ If representatives of affected companies want to come in person to make an argument for or against a draft rule, OIRA is available.⁷⁹ The same is true for public interest groups, state and local governments, and members of congressional staffs. In these meetings, OIRA’s role is passive. It does not encourage or spur meetings, nor does it affirm positions, volunteer information, or answer questions. The central goal is to hear what people have to say.

When OIRA holds a meeting, it always invites the agency whose rule is being discussed. Other offices may be present as well. For example, it would be typical for DPC to attend a meeting relating to health care, because it plays a significant role on health care issues. If a scientific question is involved, the Office of Science and Technology Policy will be invited. On environmental questions, both the Council on Environmental Quality and DPC will be invited. When a rule is under formal OIRA review (which is to say after the rule has been uploaded into ROCIS), it is usually OIRA that will convene any meeting with outsiders or with people in the Executive Office of the President. In general, it would not be appropriate for DPC or NEC to convene such a meeting, though they are certainly entitled to be present. The reason for this practice is to avoid forum shopping and to ensure that the review process is orderly and well coordinated.

2. *A Skewed Process and Epistemic Capture?* — In some circles, considerable attention has been devoted to the role of meetings in the OIRA process, with the suggestion that they compromise the process and lead to a form of interest-group “capture,” or at least capitulation.⁸⁰ Ironically, one reason for the attention is that OIRA has a high

⁷⁶ OIRA does receive a large number of meeting requests with respect to rules that are not under review. The general view in OIRA has been that the time is not ripe for such meetings, not least because OIRA staff is not yet formally engaged (and may never be if the agency decides not to go forward with the relevant rule).

⁷⁷ See generally Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 86–91.

⁷⁸ It is easy to imagine circumstances in which this would not be feasible because of demands on the time of staff, but I am aware of no case in which a meeting was turned down.

⁷⁹ OIRA staff involved in reviewing the rule will attend. On some occasions, OIRA leadership may attend as well.

⁸⁰ See, e.g., RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE 62 (2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf; Eric Lipton, *Ties to Obama Aided in Access for Big Utility*, N.Y. TIMES, Aug. 23, 2012, at A1.

degree of transparency. Meetings with those outside the federal government are docketed on the OIRA website, and OIRA also works to make available all documents received during meetings.⁸¹ Nonetheless, the concerns remain. For those who express such concerns, the essential problem is that businesses and others subject to regulation arrange a strong majority of meetings, and public interest groups arrange far fewer.⁸² With regard to many regulatory actions, those who are in opposition, or seek to scale them back, meet with OIRA far more often than do those who support such actions and seek to make them more protective.

Of course OIRA, with its open-door policy, is not responsible for this asymmetry. OIRA cannot and does not pick and choose the parties with whom it meets. There is no problem of differential access in any formal sense. But at least in theory, there is a possible risk of “epistemic capture,”⁸³ in the sense that a view might develop, at OIRA or within the Executive Office of the President, because of the distinctive set of people who have provided relevant information. Some people have speculated that the asymmetry, in terms of who requests meetings, has real consequences and that rules are affected and even compromised (or “weakened”) as a result.⁸⁴

At least in the abstract, the speculation cannot be dismissed. Suppose that public officials are hearing mostly from people with a particular stake in the outcome — for example, people who would be burdened by rules protecting worker safety or the environment. Even if the officials are neutral and seeking merely to obtain relevant information, their perspectives might well be shaped by the limited class of people to whom they are listening. From a neutral starting point, and with all the goodwill in the world, they might be subject to epistemic capture in the sense that they will ultimately form a view that matches what those around them are telling them. The result could be a set of skewed judgments as officials move toward the people with whom they engage. Ironically, not listening to anyone at all might, in principle, mean greater neutrality.

Consider the important idea of “crippled epistemology,” applied to extremists who think as they do because they are listening only to people with extreme views.⁸⁵ In principle, regulators could also have a

⁸¹ See *OIRA Communications with Outside Parties*, OFF. MGMT. & BUDGET, http://www.whitehouse.gov/omb/oira_default (last visited Mar. 30, 2013). At the same time, oral comments are not summarized or docketed.

⁸² For one account, see STEINZOR ET AL., *supra* note 80, at 14–27.

⁸³ I am grateful to Professor Adrian Vermeule for this term.

⁸⁴ STEINZOR ET AL., *supra* note 80, at 25.

⁸⁵ See generally Russell Hardin, *The Crippled Epistemology of Extremism*, in *POLITICAL EXTREMISM AND RATIONALITY* 3 (Albert Breton et al. eds., 2002) (discussing the limited information that gives rise to extremism).

crippled epistemology simply because of the particular people from whom they hear. All of us learn from those with whom we speak, and it is possible that those inside the government develop skewed views because they engage exclusively, or too much of the time, with people having one point of view.

Though the speculation is not implausible on its face (and though it might be far more than plausible in some times and places), I believe that it should be viewed with considerable skepticism in this context, because it is based on a highly inaccurate understanding of the role of meetings in the OIRA process. In fact it is largely a product of a “focusing illusion,” in which people err because they focus excessively on a single aspect of a complex situation and give it undue prominence.⁸⁶ In discussions of the OIRA process, the role of meetings tends to be greatly exaggerated.⁸⁷ In general, the review process relies above all on interagency comments and written comments from the public. When rules change as a result of review, it is usually because of interagency or public comments, not because of meetings.

The sheer number of meetings is quite uninformative. Some meetings have no effect at all, because the presentations supply no new information. Sometimes presenters speak in vague and general terms and for that reason offer nothing new. Sometimes presenters offer arguments that are significant but that are already well known within the federal government, because officials have raised the arguments on their own. If presenters offer arguments that are significant, it is overwhelmingly likely that they are already in public comments (or were previously outlined, by essentially the same presenters, to staff at the rulemaking agency during the formulation of the rule), and are already well known for that reason. Sometimes presenters offer the equivalent of enthusiastic support or extreme skepticism, not so different from loud applause or sustained hissing. Because support and skepticism are rarely informative, and almost never surprising, such meetings do not have any impact on actual decisions. Sometimes presenters erroneously believe that OIRA’s central concerns are political, which they emphatically are not. It is not at all helpful for those in meetings to refer to opinion polls or to suggest that the Administration will in some vague sense be helped or hurt by proceeding with a rule.

It follows that OIRA could hold two hundred meetings with affected industry, and no meetings with anyone else, and there might be no effect on the rule under review — even if the rule in fact changes during the review, and indeed even if it changes in exactly the direction sought by affected industry. It also follows that if public interest

⁸⁶ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

⁸⁷ See, e.g., Lipton, *supra* note 80.

groups were to meet with OIRA even more often than affected industry does, there might well be no effect on what happens as a result of the review. For all of these reasons, the sheer number of meetings, and the identity of those who ask for meetings, say very little about the nature of the OIRA process.

Nothing I have said means that meetings never matter or cannot affect the content of a rule. On some occasions, they are helpful and important — when they provide relevant information, and in particular, when they offer concrete suggestions about how best to proceed. Many of the most useful meetings are specific and technical. For example, presenters might emphasize potential unintended consequences, legal difficulties, unexpectedly high costs, or international trade implications — and suggest a concrete way of handling the relevant problems, perhaps by changing one or two provisions while nonetheless achieving the agency's basic goals. Suggestions of this kind can be valuable and informative.

I have noted that meetings will rarely include information that is not available through public comments, and in fact, I cannot recall a single case in which a meeting offered entirely novel information.⁸⁸ Nonetheless, a meeting can focus the government's attention on certain questions and problems, and those who request meetings will sometimes single out one or a few concerns for special consideration, thus highlighting them in ways that public comments may not have. Even if the public comments include all of the substance, a meeting's focus on those concerns, especially when accompanied with a proposed way of addressing them, can be informative for those who are seeking to put the rule in the best possible form. But it is important to emphasize that the rulemaking agency, and those involved in the review, may believe that however well-presented, the arguments made by those at meetings are unconvincing and should be rejected.

It remains true that the helpful meetings can matter, especially when people outside of the federal government have information that public officials lack. A key value of the public comment period is that agencies frequently learn something that bears on the ultimate content of a rule — even after a thorough process of interagency review. On some occasions, OIRA's meetings are a useful supplement to the public comment period. But in practice, the supplement does not present a problem of epistemic capture. On the contrary, it adds usefully to the stock of information that is held by government.

⁸⁸ The vast majority of meetings are run and attended by OIRA staff, not the Administrator, and hence my recollection should not be taken as decisive. Note, however, that the substance of the meetings is often conveyed to the OIRA Administrator.

III. COSTS, BENEFITS, AND POLITICS

I have said that costs and benefits matter a great deal but that they are usually not the dominant issue in the process of OIRA review. My goals in this Part are to elaborate these points, to explore OIRA's role as one of several guardians of administrative procedure, and also to discuss the place of "politics" in the OIRA process.

A. *The Important but Limited Role of Costs and Benefits*

1. *Costs and Benefits in Actual Practice.* — Much of the academic discussion of the OIRA process focuses on the analysis of costs and benefits and the role of such analysis in the review process.⁸⁹ Cost-benefit analysis can be exceedingly important, and in the Obama Administration, several steps were taken to strengthen it, contributing to a situation in which the net benefits of economically significant rules were extraordinarily high.⁹⁰ I have noted that by Executive Order, OIRA is charged with ensuring (to the extent permitted by law) that the benefits of rules justify the costs and that the agency has selected the approach that maximizes net benefits.⁹¹ These two principles are exceedingly important, and they matter both to rulemaking agencies and in OIRA review.

To carry out their responsibilities under Executive Order 13,563, OIRA and other interagency reviewers (including CEA and NEC) must carefully assess the agency's estimates of both costs and benefits, and they must also ensure that the costs and benefits of relevant alternatives are considered. Without consideration of alternatives, it is not

⁸⁹ See, e.g., REVESZ & LIVERMORE, *supra* note 1.

⁹⁰ In the first three years of the Obama Administration, the net benefits of economically significant regulation exceeded \$91 billion — more than twenty-five times the corresponding figure for the Bush Administration, and more than six times the corresponding figure for the Clinton Administration. See OFFICE OF MGMT. & BUDGET, DRAFT 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 54 (2012) [hereinafter DRAFT 2012 REPORT], available at http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf. For a checklist that provides a brief summary of the relevant questions in the analysis, see OFFICE OF INFO. & REGULATORY AFFAIRS, AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS (2010), available at http://www.whitehouse.gov/sites/default/files/omb/info/regpol/RIA_Checklist.pdf. For a document that answers key questions about cost-benefit analysis, see OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQS) (2011), available at http://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf. For a primer on such analysis, see OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER (2011), available at http://www.whitehouse.gov/sites/default/files/omb/info/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

⁹¹ See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 101–02 (2006 & Supp. V 2011); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 86–91. This role extends back to 1981. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), revoked by Exec. Order No. 12,866 § 11, 3 C.F.R. at 649.

possible to know whether the agency has chosen the approach that maximizes net benefits.

In actual practice, this role is important for a variety of reasons.⁹² If the quantifiable benefits are lower than the quantifiable costs, agencies must explain why they seek to proceed. Perhaps they should not proceed as planned, or perhaps they should adopt a different approach that has net benefits. Agencies are acutely aware of the cost-benefit requirements of Executive Order 13,563 and Executive Order 12,866. These requirements undoubtedly affect the design of rules pre-submission, and they certainly are an important part of interagency review and an enduring feature of OIRA's own role. OIRA itself may offer views about how costs and benefits are most accurately assessed, and also about how best to proceed in light of the economic impacts. If the benefits of the agency's chosen approach do not appear to justify the costs,⁹³ OIRA (along with others in the Executive Office of the President) will, under Executive Order 13,563, raise questions about whether the agency should proceed with that approach.

But even if the rule does not have net benefits, and even if the benefits do not appear to justify the costs, agencies may have plausible explanations. Perhaps the law requires them to proceed even if the monetized benefits are lower than the monetized costs.⁹⁴ Perhaps the relevant rule has nonmonetizable benefits that are hard to quantify but nonetheless important to consider. Under the governing Executive Orders,⁹⁵ agencies must show that the benefits "justify" the costs, not that they "outweigh" the costs,⁹⁶ in a clear recognition that even if the monetized benefits are lower than the monetized costs, the costs might nonetheless be justified — as, for example, when there are significant benefits that cannot be quantified. Executive Order 13,563 explicitly states that "each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."⁹⁷

⁹² Recall that in the first three years of the Obama Administration, the net benefits of economically significant regulation exceeded \$91 billion. See DRAFT 2012 REPORT, *supra* note 90, at 54. On some of the relevant details, see Sunstein, *supra* note 24.

⁹³ In my experience, this was rare, and when it happened, it was generally a result of legal requirements.

⁹⁴ An example is the "positive train control" rule, which requires certain technology to be placed on trains, in the interest of safety. See Press Release, Fed. R.R. Admin., U.S. Transportation Secretary LaHood Announces Changes to Positive Train Control Regulations that Will Ensure Safety, Allow Flexibility and Save Money (May 10, 2012), available at <http://www.fra.dot.gov/eLib/details/Lo11106>.

⁹⁵ Exec. Order No. 13,563, 3 C.F.R. at 215; Exec. Order No. 12,866, 3 C.F.R. at 638.

⁹⁶ A predecessor order, Exec. Order No. 12,291 § 2(b), 3 C.F.R. at 128, used the word "outweigh," which was changed to "justify" in Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. at 639.

⁹⁷ Exec. Order No. 13,563 § 1(c), 3 C.F.R. at 216.

In the Obama Administration, it has been very rare for a rule to have monetized costs in excess of monetized benefits, but nonquantifiable benefits have in some cases been important. A disclosure requirement, for example, may have benefits that cannot be quantified, but an agency is nonetheless entitled to conclude that, all things considered, they are likely to justify the costs.⁹⁸ Or consider a rule from the Department of Justice, designed to reduce the incidence of prison rape.⁹⁹ In explaining the effects of the rule, the Department described the costs, which involved hundreds of millions of dollars that state and local governments would have to spend on monitoring and training.¹⁰⁰ The Department also described the benefits, which involved a significant reduction in the incidence of rape in prison.¹⁰¹ The Department did its best to specify that reduction and even to say how reductions in rape could be turned into monetary equivalents. But it frankly acknowledged the limits of this effort, emphasizing that human dignity was involved and had to be taken into account:

[T]his analysis inevitably excludes benefits that are not monetizable, but still must be included in a cost-benefit analysis. These include the values of equity, human dignity, and fairness. Such non-quantifiable benefits will be received by victims who receive proper treatment after an assault [N]on-quantifiable benefits will accrue to society at large, by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community.¹⁰²

There are other examples. As part of a regulation increasing building access for disabled people, the Department of Justice included a provision designed to protect wheelchair users by requiring new bathrooms to contain sufficient space for them. The cost of this provision was relatively high.¹⁰³ The Department acknowledged that “the monetized costs of these requirements substantially exceed the monetized benefits.”¹⁰⁴ The Department’s response to this concern is worth quoting at length:

[T]he additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation — benefits that the Department’s economic model could not put in monetary terms — are, in the Department’s experience and consid-

⁹⁸ See, e.g., Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,480 fig.I-1 (July 6, 2011), *amending* 40 C.F.R. pts. 85, 86, 600 (2012), 49 C.F.R. pt. 575 (2011).

⁹⁹ National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

¹⁰⁰ *Id.* at 37,110.

¹⁰¹ *Id.* at 37,111.

¹⁰² *Id.*

¹⁰³ See Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,170 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

¹⁰⁴ *Id.*

ered judgment, likely to be quite high. Wheelchair users, including veterans returning from our Nation's wars with disabilities, are taught to transfer onto toilets from the side. Side transfers are the safest, most efficient, and most independence-promoting way for wheelchair users to get onto the toilet. The opportunity to effect a side transfer will often obviate the need for a wheelchair user or individual with another type of mobility impairment to obtain the assistance of another person to engage in what is, for most people, among the most private of activities. . . . [I]t is important to recognize that the ADA is intended to provide important benefits that are distributional and equitable in character. These water closet clearance provisions will have non-monetized benefits that promote equal access and equal opportunity for individuals with disabilities¹⁰⁵

In these cases, then, protection of human dignity and other nonquantifiable benefits have helped to inform the ultimate decisions. Nonetheless, it is true that monetized benefits and costs are central considerations in the process of OIRA review, especially for economically significant rules.

Because of the requirements of Executive Order 13,563, the agency's assessment of costs and benefits is likely to be subject to considerable internal scrutiny. I have noted that if the benefits do not justify the costs, there will be a significant question about whether a proposed or final rule should move forward, and a number of officials will carefully review the numbers themselves. Here as well, OIRA's own views are highly relevant, but OIRA is far from the only actor. Economists and other analysts at OIRA will scrutinize the agency's numbers and reasoning, and if the benefits or costs seem to be overestimated or underestimated, OIRA and the agency will discuss how to produce the most accurate assessments. In such cases, CEA and NEC may well be involved. Indeed, CEA may turn out to be the agency's most important interlocutor, because of its expertise and central role in economic analysis. If CEA believes that the agency's estimates are correct or that they include serious errors, CEA's view will receive considerable attention.¹⁰⁶ Questions about costs and benefits will typically involve a number of agencies and offices.

It is not at all unusual for the agency to adjust its initial estimates as a result of this process. Beyond adjusting the numbers, the agency may elect to shift one or another aspect of its approach. For example, the agency might end up selecting an approach that has higher net benefits. Nor is it at all unusual for the agency's initial estimates to turn out to be fundamentally right, and for the agency to have sufficient answers to the various questions raised during the review. The

¹⁰⁵ *Id.*

¹⁰⁶ In my experience, CEA is a particularly valuable participant in interagency review because of its professionalism and expertise.

outcome depends on discussions that are substantive and often highly technical.

It has been suggested that in its annual report to Congress on the benefits and costs of federal regulations,¹⁰⁷ OIRA should reassess, and not simply use, the agencies' estimates.¹⁰⁸ It should now be clear why OIRA does not conduct such a reassessment. Because of the intense level of interagency engagement, and because the internal process has reached agreement on a set of figures, it would be awkward, to say the least, for OIRA (or any other office that is part of the internal process) to provide its own independent assessment of costs and benefits. When a rule is published, OIRA (along with other offices and agencies) has already given the assessment considerable scrutiny. To say that OIRA has not reassessed the agency's estimates is not always to say that OIRA would, in the first instance, have landed exactly where the agency has. But it is to say that OIRA has decided that the agency's assessment is sufficiently reasonable to justify concluding the review process, and that the interagency process has reached the same conclusion.

2. *Why Costs and Benefits, While Frequently Important, Are Not Usually the Central Issue.* — A reading of the literature on OIRA's role might be taken to suggest that cost-benefit analysis is always or usually the central issue.¹⁰⁹ Not so. As noted, more than eighty percent of rules reviewed by OIRA are not economically significant, in the sense that they do not have an annual economic impact of at least \$100 million.¹¹⁰ Recall that rules that are not economically significant need not have a Regulatory Impact Analysis, which is the most formal and detailed assessment of both costs and benefits.¹¹¹

In a sense, the numbers given thus far overstate the number of rules that require cost-benefit analysis. I have noted that a significant percentage of economically significant rules — in some years a majority — count as such because they involve high transfer payments, not

¹⁰⁷ OIRA's annual reports to Congress are available at *OIRA Reports to Congress*, OFF. MGMT. & BUDGET, http://www.whitehouse.gov/omb/infomag_regpol_reports_congress (last visited Mar. 30, 2013).

¹⁰⁸ See Richard A. Epstein, *Reforms? What Reforms?*, DEFINING IDEAS (May 31, 2011), <http://www.hoover.org/publications/defining-ideas/article/80536>. OIRA may make certain technical judgments, but it usually uses, in the annual report, the numbers that the agencies used publicly.

¹⁰⁹ See, e.g., REVESZ & LIVERMORE, *supra* note 1, at 152.

¹¹⁰ It is true that under Executive Order 12,866, a rule can qualify as economically significant even if it does not meet that threshold — for example, because of its adverse effect on “a sector of the economy,” see Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011) — but that is unusual.

¹¹¹ See *id.* § 6(a)(3)(C), 3 C.F.R. at 645 (limiting the requirement of cost-benefit analysis to economically significant rules).

high regulatory costs.¹¹² Such rules do not require the kind of cost-benefit analysis, and the kind of justification, that is typically mandatory for rules that impose high regulatory costs on the private sector.¹¹³ For example, Congress may require or authorize certain expenditures, and because of the sums involved, the relevant rules would be subject to OIRA review even if they did not impose significant regulatory costs. If Congress requires \$200 million to be given for a certain purpose, a transfer payment is involved, making it difficult to use the standard tools to determine whether the benefits justify the costs. To be sure, agencies do provide Regulatory Impact Analyses for budgetary transfer rules, but they typically outline only the budgetary costs and do not discuss social costs and benefits (which are challenging to measure¹¹⁴). When OIRA reviews budgetary transfer rules, its role may be limited to working closely with budgetary specialists in OMB and elsewhere to ensure that the numbers are right and to avoid excessive or unjustified expenditures.

It is true that even when rules are not economically significant, agencies must give some account of costs and benefits¹¹⁵ and must show (to the extent permitted by law) that the benefits justify the costs — and hence they must attempt to be accurate. A rule that is projected to impose \$50 million in annual costs, and to produce \$80 million in annual benefits, is likely not to be economically significant within the meaning of the governing Executive Orders.¹¹⁶ But those are hardly trivial numbers, and it is possible that the agency's projections are not correct. The interagency process is concerned with ensuring accuracy, maximizing social benefits, and avoiding unjustified costs, and hence OIRA and others might well devote considerable attention to such numbers.

In the majority of cases, however, costs and benefits are not the key issue. For a rule that is not economically significant, the question of costs and benefits will not usually be the main one. Of course the review process will ask how and if the rule fits with the law and with presidential commitments, goals, and priorities. More specific issues, typical of the review process, include the following:

(a) *Alternatives.* — In the context of a proposed rule, OIRA might ask the agency whether it would consider listing several alternatives in

¹¹² In fiscal year 2011, for example, thirty of fifty-four economically significant rules were transfer rules. See DRAFT 2012 REPORT, *supra* note 90, at 3.

¹¹³ On some of the complications with performing cost-benefit analysis on transfer regulations, see generally Eric A. Posner, Essay, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067 (2003).

¹¹⁴ See *id.* at 1068–69. To be sure, additional work would be valuable on this complex topic.

¹¹⁵ See Exec. Order No. 13,563 § 6, 3 C.F.R. 215, 217 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02; Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641.

¹¹⁶ See the qualification in *supra* note 110.

addition to its preferred option, on the ground that receiving public input on those alternatives would be valuable. As noted, the agency might not want to identify alternatives to which it does not intend to give serious attention. Interagency reviewers might believe that those alternatives are reasonable and deserve some kind of public hearing.

(b) *Explicitly Seeking Public Comments on Relevant Issues.* — Sometimes OIRA asks the agency explicitly whether it would consider seeking public comments on a range of specific issues, including (for example) the reasonableness of exempting small businesses or the accuracy of the analysis of costs and benefits. Sometimes the agency may not be initially inclined to seek comments on such questions, on the ground that explicit requests for comments might suggest more tentativeness than is real or warranted.

(c) *Logical Outgrowth.* — Under the Administrative Procedure Act, agencies are not permitted to finalize provisions of a rule that are not a “logical outgrowth” of the proposal.¹¹⁷ As a result, OIRA might ask the agency whether the provisions of a final rule under interagency review are a logical outgrowth of the rule that the agency initially proposed. A great deal of the OIRA process can be devoted to the issue of logical outgrowth. Some apparently reasonable approaches might be unlawful because they do not count as logical outgrowths. Considerable attention might have to be devoted to the question whether substantively desirable provisions qualify as logical outgrowths.

(d) *Interim Final Rule.* — An agency might submit a draft in the form of an interim final rule, which would become effective without a public comment period. OIRA and others might ask the agency whether it would be better to proceed with a proposed rule subject to public comment — in order to ensure that a final rule, even if temporary, does not impose mistakes on the public. There may be good justifications for proceeding with an interim final rule — for example, some kind of legal deadline — but bypassing the public comment period can produce serious interagency concerns.¹¹⁸ In addition, Executive Order 13,563 places a large emphasis on public participation and on ensuring a period of public comment on rules.¹¹⁹

(e) *Statutory Process Requirements.* — OIRA spends a great deal of time helping to promote compliance with various statutory requirements, including those associated with the Regulatory Flexibility Act,¹²⁰ which is designed to protect small businesses from excessive

¹¹⁷ See, e.g., Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996).

¹¹⁸ For a useful discussion of interim final rules, see generally Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999).

¹¹⁹ Exec. Order No. 13,563 § 2, 3 C.F.R. at 216.

¹²⁰ 5 U.S.C. §§ 601–612.

regulation, and the Paperwork Reduction Act,¹²¹ which is relevant to rulemaking that includes an information collection request.

(f) *Science.* — Sometimes the underlying issue involves science. OIRA may consult a range of scientists within the federal government, perhaps including those from the Office of Science and Technology Policy and the Centers for Disease Control and Prevention. In the process, there might be discussion of whether the agency considered relevant scientific studies and responded to comments and concerns raised during peer review of those studies. OIRA will not reach a scientific conclusion on its own (though in recent years it has generally had two scientists on its staff), but it will promote discussion of the underlying issues. There might also be discussion of whether policy choices are compelled by, or being conflated with, the scientific evidence.

B. Technical Issues, Policy Issues, and Politics

To the extent that the OIRA process produces controversy, it is often because of a concern that “politics,” in some pejorative sense, plays a role in that process.¹²² To sharpen the concern, let us describe it in the most stark fashion. Agencies consist of specialists. Their concerns are the facts and the law. They attempt to implement statutes faithfully, applying their technical (and sometimes scientific) expertise. By contrast, OIRA consists largely of unelected bureaucrats, who may have agendas of their own. OIRA is also part of the White House, and for that reason, it is necessarily part of a politicized process. OIRA lacks the specialized competence of agencies. Insofar as other White House offices, with their own agendas, are involved in the OIRA process, the problem of comparative ignorance may be compounded.

The result — on the view that I am describing — is that agencies are sometimes unable to achieve their goals and to implement their understanding of the law, simply because of interference (“meddling”) from either unelected bureaucrats at OIRA or political actors at the White House. Note that so summarized, the concerns involve two different points. The first has to do with the role of OIRA itself and, in particular, its career staff. The second has to do with the role of the White House as such.

What this account ignores is that most of the OIRA process is technical, not political, and it is technical in an appropriate sense, involving an extraordinarily wide range of officials, many of them out-

¹²¹ 44 U.S.C. §§ 3501–3521 (2006 & Supp. V 2011).

¹²² See, e.g., Broder, *supra* note 69; *Politicizing the Regulatory Process*, CENTER FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/OIRASpecInterests.cfm> (last visited Mar. 30, 2013).

side of the White House. I have emphasized that the underlying issues may well involve the law. The rulemaking agency's lawyers work closely with the Department of Justice, White House Counsel, the OMB General Counsel's office, and other relevant offices to produce the best judgments about what the law requires. Here OIRA's role will involve convening, not deciding.

If the issue is one of economics, OIRA is likely to play a substantive role, but as I have emphasized, a number of other economists will be involved. Not infrequently, a question of science will be relevant, and scientific assessments will be made after consultation with specialists throughout the government. Here too OIRA will play the role of convener.¹²³ When scientific issues are engaged, there is no political interference with science (in my experience). Scientific issues are explored as such, by people who are competent to explore them. Some questions can be seen as those of "science policy," in the sense that they involve not strictly scientific questions, but questions about how to proceed in the face of scientific uncertainty. Those questions will also be engaged as such. Technical work is the bread and butter of daily life at OIRA.

Sometimes, of course, the issues include significant questions of policy, including the kind that might be "elevated." Suppose, hypothetically, that interagency reviewers, including OIRA, CEA, and the Office of Advocacy at the Small Business Administration, are arguing in favor of flexibility for small businesses, in the form of a lower level of stringency or a delayed compliance date. Their shared argument might be that it would be costly or difficult for small businesses to comply and that little would be lost, from the standpoint of the agency that proposed the rule, by greater flexibility. The agency that proposed the rule might respond that such flexibility would create legal problems or that it would compromise important goals, such as public health or safety.

At that point, the legal issue would be engaged directly. If the law does not give the agency discretion, the issue is at an end. If the law does grant discretion, reasonable questions would be to what extent flexibility would be important or beneficial to small businesses, and to what extent public health or safety goals would actually be compromised by greater flexibility. At that stage, relevant executive orders and presidential memoranda would be consulted, and additional technical work, above all involving the facts, would be necessary to answer these questions. Most of the time, clarification of the underlying questions, along with the technical work, produces a solution that is both sensible and agreeable to those involved.

¹²³ See generally Vermeule, *supra* note 11.

It is true, of course, that OIRA has a good deal of formal authority under Executive Orders 12,866 and 13,563.¹²⁴ That authority matters. But in some important cases, the agency convinces OIRA and others, on the merits, that its position is indisputably correct, or that it is reasonable enough even if not indisputably correct. And in other important cases, the agency concludes that the views suggested by OIRA, or pressed by interagency reviewers, are clearly correct, or that they are reasonable enough even if not clearly correct. In a well-functioning process, the substance is what matters. Of course any OIRA Administrator will pay a great deal of respectful attention to the views of others. The Administrator is not likely to feel so confident about his personal judgment, and that of his staff, if they differ from the considered judgments of the agency and lack substantive support within other offices and agencies involved in the interagency process.

What about “politics”? If the term refers to public reactions and electoral factors, consideration of “politics” is not a significant part of OIRA’s own role. To be sure, political issues might be taken into account by other offices. The White House Office of Legislative Affairs and OMB’s Office of Legislative Affairs work closely with Congress, and those offices have the lead in coordinating discussions between the Administration and Congress, including discussions about regulations. For example, members of Congress may send letters to the OIRA Administrator, and members and their staffs may seek a 12,866 meeting. OMB’s Office of Legislative Affairs or the White House Office of Legislative Affairs might help coordinate that meeting. Members of Congress may well have valuable information about the likely effects of rules.

The White House Office of Intergovernmental Affairs is in charge of relations with state and local governments, and it might help to ensure that the views of state and local officials are communicated to OIRA, usually through public comments, but sometimes through 12,866 meetings. State and local officials may also have important information to convey. White House Communications and OMB Communications are in charge of relationships with the media, and when proposed and final rules need to be explained to the public, they help develop press releases and other relevant documents.

In addition, others in the White House — including the Office of the Chief of Staff — will be alert to a wide range of considerations, including the relationship between potential rulemakings and the President’s overall priorities, goals, agenda, and schedule. It is important to

¹²⁴ On the formal mechanism for resolution of disagreements, see Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91. Ultimately, of course, any conflicts are subject to resolution by the President.

emphasize that with respect to the Administration as a whole, the Office of the Chief of Staff has an important role insofar as it works to advise on and help coordinate executive branch activity with close reference to the President's own commitments.¹²⁵ All executive offices, including OIRA, work under the President and are subject to his supervision, to the extent permitted by law.¹²⁶ Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly. Those involved in the OIRA process are alert to the concerns and priorities of the President himself, and they take direction from him.

IV. CONCLUSION

The federal government is exceedingly large, and it is important to ensure that before important rules are proposed or finalized, rulemaking agencies have an opportunity to consider the diverse perspectives and information of those who work for it.¹²⁷ I have suggested that while the President is ultimately in charge, the White House itself is a "they," not an "it," and the same is even more true of the executive branch as a whole. While OIRA's own views may be significant and will be conveyed, OIRA is the convener of an interagency process that draws on the specialized competence of experts throughout the federal government.

In many cases, the vast majority of the comments that OIRA transmits come from other agencies, not from OIRA itself. To be sure, costs and benefits are an important and sometimes critical part of the review process, especially for economically significant rules. But most rules do not qualify as economically significant, and in most cases, costs and benefits are not the central issue.

One of OIRA's most important missions is to increase the likelihood that rulemaking agencies will benefit from dispersed information inside and outside the federal government. OIRA sees itself as a guardian of a well-functioning administrative process. Federal officials, most of them nonpolitical, know a great deal, and the OIRA pro-

¹²⁵ On oversight by the White House in particular, see generally DeMuth & Ginsburg, *supra* note 3.

¹²⁶ There is a great deal of academic discussion about whether the President may "overrule" those within the executive branch, including Cabinet heads, who may be delegated a degree of statutory discretion. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319-31 (2001). The issue has more theoretical interest than practical importance. This is so for a simple reason: those who work for the President want to act consistently with his goals, priorities, and views. If he favors a certain course of action, his subordinates are likely to agree to do as he wishes, and they do so voluntarily and generally without hesitation; and if there is any hesitation, it will probably be brief. In addition, the leaders of various agencies and departments fully understand the OIRA process and the importance of addressing interagency concerns.

¹²⁷ See Vermeule, *supra* note 11.

cess helps to ensure that what they know is incorporated in agency rulemakings. In addition, those outside of the federal government often have indispensable information, and OIRA understands one of its crucial tasks as encouraging the receipt and careful consideration of that information.

In these respects, OIRA does not so much promote centralized direction of regulatory policy as incorporation of decentralized knowledge. Of course OIRA plays an important role in the process of White House oversight of executive branch rulemaking. What I have emphasized here is that a key part of that role is the function of information aggregator.

APPENDIX: OZONE RETURN LETTER

September 2, 2011

Dear Administrator Jackson:

On July 11, 2011, the Environmental Protection Agency (EPA) submitted a draft final rule, "Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards," for review by the Office of Information and Regulatory Affairs (OIRA) under Executive Orders 13563 and 12866. The President has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time.

OIRA shares EPA's strong and continued commitment to using its regulatory authorities, including the Clean Air Act (the Act), to protect public health and welfare. Over the last two and a half years, EPA has issued a significant number of rules to provide such protection. We also recognize that the relevant provisions of the Clean Air Act forbid EPA to consider costs in deciding on the stringency of national ambient air quality standards, both primary and secondary.

Nonetheless, we believe that the draft final rule warrants your reconsideration. We emphasize three related points:

1. Under the Act, finalizing a new standard now is not mandatory and could produce needless uncertainty. The Act explicitly sets out a five-year cycle for review of national ambient air quality standards. The current cycle began in 2008, and EPA will be compelled to revisit the most recent standards again in 2013. The new scientific work related to those forthcoming standards has already started (see point 2 below). A key sentence of Executive Order 13563 states that our regulatory system "must promote predictability and reduce uncertainty." In this light, issuing a final rule in late 2011 would be problematic in view of the fact that a new assessment, and potentially new standards, will be developed in the relatively near future.
2. The draft reconsideration necessarily depends on the most recent recommendations of the Clean Air Scientific Advisory Committee (CASAC), which in turn rely on a review of the scientific literature as of 2006. Executive Order 13563 explicitly states that our regulatory system "must be based on the best available science." As you are aware, work has already begun on a new and forthcoming scientific review, "based on the best

available science.” We urge you to reconsider whether to issue a final rule in late 2011, based on evidence that is no longer the most current, when a new scientific assessment is already underway.

3. Under your leadership, EPA has taken a series of strong and unprecedented steps to protect public health by reducing harmful air pollution in general and ozone in particular. For example, EPA and the Department of Transportation recently finalized the first joint rule reducing air pollution (including ozone) from heavy-duty trucks, with overall net benefits of \$33 billion. EPA also recently finalized its Cross-State Air Pollution Rule, which will reduce air pollution (including ozone) and which is projected to prevent 13,000 to 34,000 deaths annually, producing annual estimated net benefits in excess of \$100 billion. In addition, EPA has proposed national standards for mercury and other toxic pollutants; EPA’s preliminary estimates, now out for public comment, suggest that these standards will prevent 6,800 to 18,000 premature deaths annually. These standards, whose annual net benefits are currently estimated to exceed \$40 billion, are projected to reduce ozone as well. Cumulatively, these and other recently proposed and finalized rules count as truly historic achievements in protecting public health by decreasing air pollution levels, including ozone levels, across the nation.

As noted, Executive Order 13563 emphasizes that our regulatory system “must promote predictability and reduce uncertainty.” Executive Order 12866, incorporated in Executive Order 13563, states that each “agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations” Executive Order 12866 also states that the “Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with . . . the President’s priorities” In light of these requirements, and for the foregoing reasons, I am requesting, at the President’s direction, that you reconsider the draft final rule.

More generally, the President has directed me to continue to work closely with all executive agencies and departments to implement Executive Order 13563 and to minimize regulatory costs and burdens, particularly in this economically challenging time. The President has instructed me to give careful scrutiny to all regulations that impose significant costs on the private sector or on state, local, or tribal governments.

We look forward to continuing to work with you to create, in the words of Executive Order 13563, a regulatory system that will “protect

public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”

Sincerely,

Cass R. Sunstein