



Behind Closed Doors at the White House:

How Politics Trumps Protection of Public Health, Worker Safety, and the Environment

By CPR Member Scholar Rena Steinzor, CPR Intern Michael Patoka, and CPR Policy Analyst James Goodwin

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

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Executive Summary

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, and environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

Executive Order 12,866, issued September 30, 1993 and still in effect today (attached as Appendix A).

Key Findings

Tucked in a corner of the Old Executive Office Building, an obscure group of some three dozen economists exerts extraordinary power over federal rules intended to protect public health, worker and consumer safety, and the environment. Known officially as the Office of Information and Regulatory Affairs (OIRA, pronounced oh-EYE-ra), this unit reports to the director of the White House Office of Management and Budget (OMB), but operates as a free-ranging squad that pulls an astounding number of draft regulatory actions—some 6,194 over the ten-year period covered in this report—into a dragnet that operates behind closed doors. No policy that might distress influential industries, from oil production to coal mining to petrochemical manufacturing, goes into effect without OIRA's approval. A steady stream of industry lobbyists—appearing some 3,760 times over the ten-year period we studied—uses OIRA as a court of last resort when they fail to convince experts at agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA) to weaken pending regulations.

OIRA keeps secret the substance of the changes it makes to 84 percent of EPA and 65 percent of other agencies' submissions. Despite this effort to obscure the impact of its work, every single study of its performance, including this one, shows that OIRA serves as a one-way ratchet, eroding the protections that agency specialists have decided are necessary under detailed statutory mandates, following years—even decades—of work. OIRA review is tacked on at the end of rulemakings that involve careful review of the authorizing statutes, lengthy field investigation, extended advice from scientific advisory panels, numerous meetings with affected stakeholders, days of public hearings, voluminous public comments,

and thousands of hours of staff work. When all else fails, regulated industries make a bee-line for OIRA's back door. (For an illustration of how OIRA's review fits into the rulemaking process, see Figure 1.)

This report is the first comprehensive effort to unpack the dynamics of OIRA's daily work, specifically with regard to the only information that is readily available to the public about its internal review process: records of its meetings with lobbyists. These records are perhaps the only accessible accounting of OIRA's influence, and they demonstrate that OIRA has persistently ignored the unequivocal mandates of three presidents—Bill Clinton, George W. Bush, and Barack Obama—by refusing to disclose the differences between regulatory drafts as they enter review and the final versions that emerge at the end of that process. Our study reveals that OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress in statutes such as the Clean Air Act, the Food Quality Protection Act, and the Occupational Safety and Health Act. In so doing, OIRA systematically undermines the clear congressional intent that such decisions be made by specified agencies' neutral experts in the law, science, engineering, and economics applicable to a given industry.

Our study covers OIRA meetings that took place between October 16, 2001 and June 1, 2011. During this decade-long period, OIRA conducted 6,194 separate "reviews" of regulatory proposals and final rules. According to the available data, these reviews triggered 1,080 meetings with OIRA staff involving 5,759 appearances by outside participants. Our analysis, which is the most exhaustive evaluation of the impact of White House political interference on the mandates of agencies assigned to protect public health, worker safety, and the environment, reveals a highly biased process that is far more accessible to regulated industries than to public interest groups.

Of course, it is possible—and senior OIRA officials have claimed—that meetings with outside parties do not drive their final decisions on agency proposals. To accept this claim, any objective observer must reject the dual assumptions that underlie the entire regulatory system: first, that a pluralistic process based on a level playing field is crucial to a wise result, and second, that experts in law, science, engineering, economics, and other disciplines are best equipped to evaluate the self-serving claims of private-sector stakeholders. Neither assumption guides OIRA. Instead, OIRA's playing field is sharply tilted toward industry interests, a process that demeans all disciplines except economists practicing OIRA's narrow brand of cost-benefit analysis, and a wide avenue that allows political considerations to trump expert judgments much of the time. As just one example of the impact of this disturbingly secretive process, consider the participation of William Daley, President Obama's Chief of Staff, in OIRA deliberations that eventually compelled EPA Administrator Lisa Jackson to promulgate a National Ambient Air Quality Standard (NAAQS) for ozone pollution that she had described as "legally indefensible" only a few months earlier.¹

OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress.

How OIRA's Review Fits into the Rulemaking Process

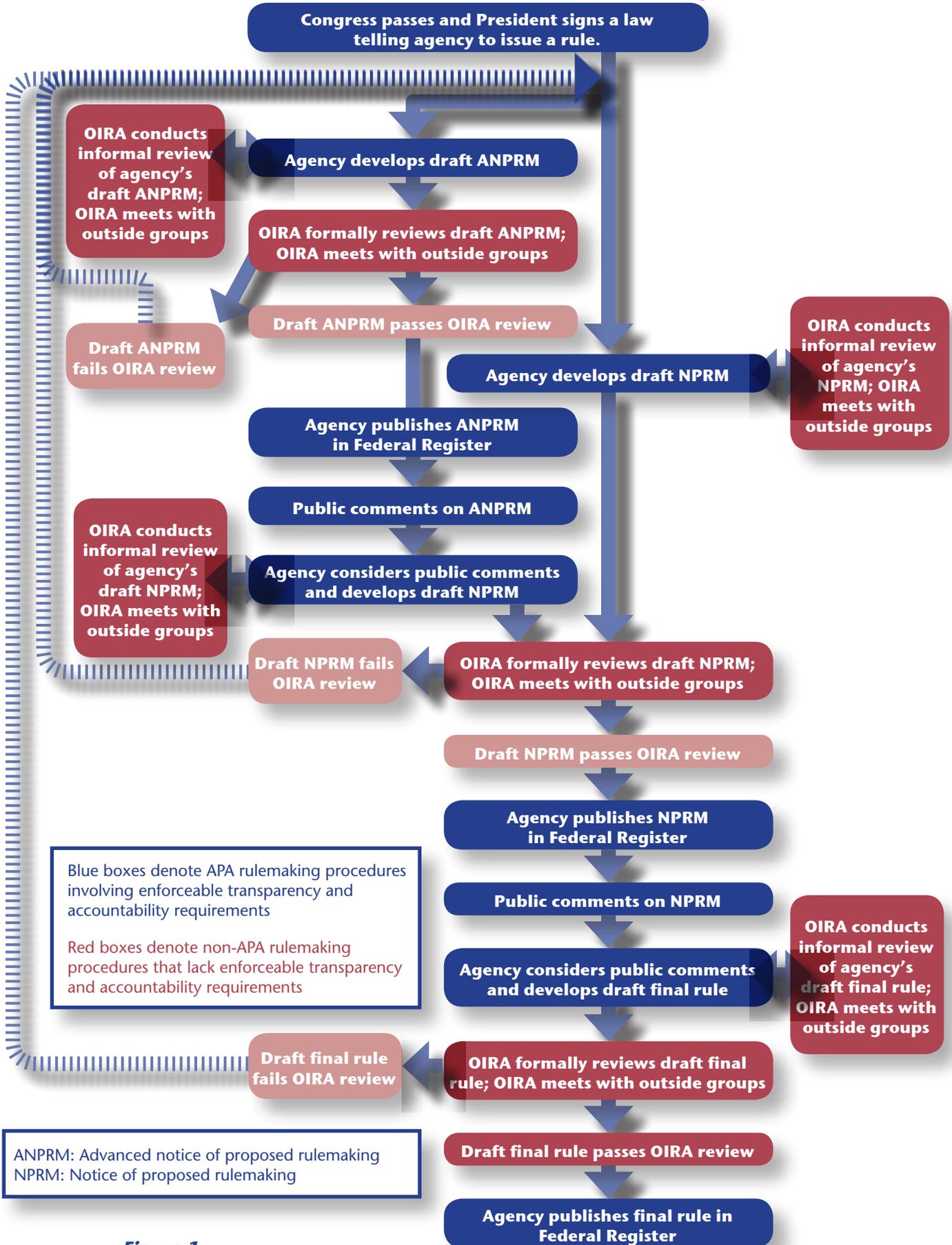


Figure 1

Our results tell a damning story of the relentless erosion of expert agency judgments by relatively junior White House staffers. OIRA economists use the window dressing of ostensibly objective cost-benefit analyses to camouflage politicized interventions that alter two-thirds of all regulatory drafts submitted by agencies other than EPA, and a shocking 84 percent of EPA submissions. Our specific findings include:

- 1. Routine Violations of Executive Order 12,866.** In 1993, President Bill Clinton attempted to reform OIRA's most significant shortcomings by issuing Executive Order (EO) 12,866, attached to this report as Appendix A. Underscoring the importance of these provisions, Presidents Bush and Obama continued EO 12,866 in effect with only minor amendments. The EO represented a compromise between regulated industries, urging strong presidential oversight of Executive Branch regulatory activities, and public interest groups, demanding greater transparency regarding the impact of such oversight on the protection of public health, worker and consumer safety, and the environment. Industry achieved broad oversight, while public interest groups achieved a set of disclosure requirements and deadlines that would allow public oversight of OIRA's work and prevent the Office from becoming a politicized sinkhole for proposals that moneyed special interests opposed.

In the 18 years since EO 12,866 was issued, OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted these disclosure and deadline requirements. The twin cornerstones of the transparency intended by EO 12,866 require (1) OIRA to make available "all documents exchanged between OIRA and the agency during the review by OIRA" and (2) all agencies to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." The Obama Administration's determined neglect of these requirements is just as bad as it was under President Bush. The most important consequence of these secretive practices is the nondisclosure of communications between OIRA and the agencies, which makes it impossible for the public to undertake a systematic, rule-by-rule analysis of the impact of OIRA review.

- 2. Blown Deadlines.** Under EO 12,866, OIRA has 90 days to complete its review from the date the originating agency (for example, EPA) submits it. This period can be extended by 30 days *once*, for a total of 120 days, but only if the agency head agrees to the longer period. Of the 501 completed reviews that we examined (those in which OIRA was lobbied by outside parties), 59 reviews (12 percent) lasted longer than 120 days and 22 extended beyond 180 days (about six months).

Among recent examples of such delays, EPA's proposed coal ash rule, written in response to the spill of 1 billion gallons of coal ash sludge in Kingston, Tennessee in 2008, was held captive at OIRA for six months. OIRA's review was so withering, and the proposal that emerged was so altered, that the rule will not come out until after the 2012

OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted its disclosure and deadline requirements.

The number of people representing regulated industries at OIRA meetings is five times the number appearing on behalf of public interest groups.

election. A proposal to issue a “chemicals of concern” list under the Toxic Substances Control Act has languished at OIRA for 17 months as of this writing. EPA’s failure to regulate toxic chemicals more aggressively has landed the program on the Government Accountability Office’s (GAO) short list of failed, “high risk” government initiative that should be a priority for reform.² And a Department of Labor rule defining which farm work is too hazardous for children to perform gathered dust at OIRA for nine months, even though no records of meetings with concerned outside parties were ever disclosed and no interest group has publicly emerged to protest the rule. The need for the rule, which updates 40-year-old standards, became obvious in a series of gruesome accidents, including one in early August in which two Oklahoma 17-year-olds were pulled into a heavy, mechanized grain auger, badly injuring their legs.

- 3. Overwhelming Industry Dominance.** Over the last decade, 65 percent of the 5,759 meeting participants who met with OIRA represented regulated industry interests—about five times the number of people appearing on behalf of public interest groups. President Obama’s OIRA did somewhat better than President Bush’s in this regard, with a 62-percent industry participation rate to Bush’s 68 percent, and a 16-percent public interest group participation level to Bush’s 10 percent. Nevertheless, even under this ostensibly transformative President, who pledged to rid his administration of the undue influence of well-heeled lobbyists and conduct government in the open, industry visits outnumbered public interest visits by a ratio of almost four to one. As disturbing, only 16 percent of rule reviews that involved meetings with outside parties garnered participation across the spectrum of interested groups. Seventy-three percent attracted participation only from industry and none from public interest organizations, while 7 percent attracted participation from public interest groups but not industry, for an overall ratio of more than ten to one in favor of industry’s unopposed involvement.

Among our list of the 30 organizations that met with OIRA most frequently, five were national environmental groups (Natural Resources Defense Council at number 2, Environmental Defense Fund at 5, Sierra Club at 6, Earthjustice at 8, and Consumer Federation at 30). Seventeen were regulated industries, including the American Chemistry Council at 1, ExxonMobil at 3, American Forest and Paper Association at 4, American Petroleum Institute at 7, Edison Electric Institute at 9, American Trucking Association at 12, National Association of Home Builders at 13, Air Transport Association at 15, National Association of Manufacturers at 16, National Cattlemen’s Beef Association at 17, and DuPont at 19. Washington, D.C.-based industry law firms placed at 10 (Hunton & Williams), 14 (Hogan & Hartson), 18 (Crowell & Moring), and 20 (Barnes & Thornburg).

- 4. EPA as Whipping Boy.** OIRA review is disproportionately obsessed with EPA. Fully 442 of OIRA's 1,080 meetings dealt with EPA rules. Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Services (HHS) with 137 meetings and the Department of Transportation (DOT) with 118 meetings. Compounding these disparities is the striking anomaly of this focus in the context of the overall number of rules reviewed: EPA submitted only 11 percent of the rulemaking matters reviewed by OIRA, but accounted for 41 percent of all meetings held.
- 5. OIRA Overreach.** EO 12,866 instructs OIRA to focus on “economically significant rules,” generally defined as rules imposing more than \$100 million in annual compliance costs for affected industries. The order allowed OIRA to extend the scope of its review in very limited circumstances: for example, with respect to rules that interfere with other agencies’ work, materially change entitlement programs, or present “novel” legal or policy issues.

For the past decade, OIRA has ignored these limits, extending its reach into every corner of EPA's and other agencies' work. While OIRA reviews approximately 500 to 700 rules each year, only about 100 are economically significant, with the remainder supposedly falling under the limited exceptions of EO 12,866. Or, in other words, “non-economically significant rules” are reviewed at a ratio of six to one with the rules that should be the primary focus of OIRA's work. It's worth noting in this regard that because OIRA has such a small staff, and rulemaking proceedings at agencies like EPA are so complex, the temptation to hold small rules hostage in order to inspire changes in more significant rules must exist, although OIRA's secretiveness about what happens during its review makes it impossible to confirm this hypothesis.

- 6. One-Way Ratchet.** The reasons why OIRA prefers to conduct reviews behind closed doors and agencies are too fearful to reveal these negotiations are obvious: OIRA changed 76 percent of rules submitted to it for review under President Obama, compared to a 64 percent change rate under President Bush. EPA rules were changed at a significantly higher rate—84 percent—than those of other agencies—65 percent—throughout the period of our study. And rules that were the subject of meetings with stakeholders were 29 percent more likely to be changed than those that were not, although the difference is not as severe under Obama—mainly because OIRA has been changing more rules even *without* meetings than it did under Bush, thus narrowing the gap. In light of previous studies suggesting that OIRA's changes exclusively weaken agency rules,³ as well as a number of well-known examples where OIRA altered rules in exactly the ways requested by industry lobbyists, this evidence of OIRA's frequent changes cements its reputation as an aggressive one-way ratchet.

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7. Premature Intervention. All of the above findings regarding industry dominance, lack of transparency, and inordinate OIRA interference with the substance of rules to protect public health and natural resources are compounded by OIRA's early interference in the formulation of regulatory policy. Of the 1,056 meetings that took place over the studied time period and that were identified with a rulemaking stage, 452 (43 percent) took place before the agency's proposal was released to the public. The percentage of meetings that occurred at this *pre-proposal* stage has actually been greater during the Obama Administration (47 percent) than it was during the Bush Administration (39 percent). Early interference frustrates transparency and exacerbates the potential for agencies to succumb to White House political pressure before they have even had the opportunity to seek public comment on more stringent proposals.

Such secret deliberations are especially prevalent when OIRA conducts "informal reviews" of agency rules. These informal reviews, conducted through phone calls and meetings between OIRA and agency staff, are very effective in changing the agency's regulatory plans. But the public has virtually no way of knowing what happens during these reviews, or even how long they last. Of the 1,057 meetings that could be linked to a formal review period, 251 (24 percent) were held prior to the formal review—in other words, during OIRA's *informal* review. To the Obama Administration's credit, the proportion of informal-review meetings was much greater under the Bush Administration (34 percent of all meetings) than it has been over the last two and a half years (10 percent).

A Word about EO 12,866

We have included EO 12,866, which governs the process OIRA must follow in undertaking regulatory reviews, as an appendix to this report for one unfortunate reason. The EO is written in simple, straightforward, and highly prescriptive language, clearly stating deadlines and requirements that OIRA and the agencies "must" follow. Among the most striking findings of this report is that OIRA routinely violates these provisions. The violations are clear, not debatable, and no credible interpretation of the EO excuses them. Nevertheless, in our many years of experience watching OIRA's activities under both Presidents Bush and Obama, we have talked to numerous journalists who said that OIRA spokespeople had told them that EO 12,866 explicitly allows OIRA to behave in the manner that EO 12,866 in fact prohibits.

For example, EO 12,866 anticipates that OIRA will meet with outside parties as it reviews agency rules, and requires OIRA to disclose certain minimal information about its meetings (the date, the attendees, and the subject matter).⁴ With regard to these meetings, OIRA has adopted an “open-door” policy, insisting that it is required by EO 12,866 to meet with all interested parties that request to do so.⁵ In the words of OMB spokesman Tom Gavin, “The office has not refused a meeting with anyone who has asked for one.”⁶ No matter how many similar meetings OIRA has already agreed to, or how lopsided the process becomes when most of the meetings are requested by regulated industries to complain about pending regulations, OIRA continues to grant meeting requests.

Despite OIRA’s assertion to the contrary, *nothing in the executive order requires such a policy*. In fact, all of these meetings are redundant of the extensive opportunities for regulated industries to file comments with EPA and other agencies, to testify at numerous public meetings, and to meet with agency staff innumerable times. If OIRA were truly concerned about appearing neutral and impartial, it would avoid the stampede of industry lobbyists that we have documented below. In actual practice, however, OIRA functions as little more—and nothing less—than a “fix it” shop for special interests and is oblivious to how its lopsided process and lack of transparency might appear to the American people.

We anticipate that OIRA’s efforts to distort the language of the EO will recur after we issue this report, as OIRA attempts to excuse the behavior catalogued below. We hope that journalists, Members of Congress and their staff, other government agencies and departments, private sector organizations, and the public will take the time to compare these justifications to the plain language of EO 12,866 attached as Appendix A.

Recommendations for Reform

At the beginning of the Obama Administration, CPR Member Scholars urged OIRA Administrator Cass Sunstein to shift OIRA’s emphasis from reviewing individual rules to concentrating on cross-cutting regulatory problems, such as the threats posed by unsafe imports.⁷ By the beginning of the third year of President Obama’s first term, it became clear that the Administration was determined to use OIRA as the leading edge of its political efforts to placate big business in an effort to neutralize its attacks on the Administration in general and its regulatory policies in specific. The most recent example is Cass Sunstein’s role as the White House official who instructed EPA Administrator Lisa Jackson to abandon efforts to tighten the NAAQS for ozone (known more familiarly as smog) that has been in effect since 1997 and is significantly weaker than the standard proposed by the Bush Administration.

So we have little hope that the Obama Administration will contemplate the fundamental overhaul of OIRA's role that is genuinely needed. For the record, however, such reform would include:

- Eliminating OIRA's review of individual regulatory proposals, and instead re-directing the Office to focus on cross-cutting regulatory problems that require coordinated actions by multiple agencies;
- Helping the agencies to develop proposals to strengthen their effectiveness administratively and legislatively; and
- Advocating targeted budget increases to enable the agencies to enforce existing laws.

Short of those meaningful, fundamental reforms, we offer here a series of more moderate proposals that should be regarded as a "first step" toward solving OIRA's burgeoning distortion of statutes like the Clean Water and Clean Air Acts, the Food, Drug, and Cosmetic Act, and the Mine Safety and Health Act. These suggested reforms are squarely within reach of the Obama Administration, certainly if it is granted a second term. Although we believe the reforms we offer fall far short of the wide-ranging reform that is needed, and even if followed, will not defuse OIRA's overly politicized process, one that trumps expert judgments on the protections Americans need and deserve, the changes below would at least eliminate blatant violations of EO 12,866 and make the review process fairer.

Transparency

1. Once OIRA has completed its review of either a proposed or final rule, the agency that originated the proposal should post on the Internet (including as part of the rule's electronic docket) a succinct explanation of the changes OIRA demanded, along with the version of the rule that was submitted to OIRA and the revised document that emerged at the end of the review period.
2. OIRA should post on the Internet (including, as part of the rule's electronic docket) all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.
3. OIRA should end the practice of undertaking "informal reviews" of agency policies before they are developed into regulatory drafts and officially submitted for review.

Level Playing Field

4. OIRA should stop meeting with outside parties during its consideration of a proposed or final rule, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation.
5. Nevertheless, if OIRA continues to meet with outside parties, it should assume an active role in balancing the participation, whether through consolidating meetings with like-minded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

Timeliness

6. OIRA should abide by the deadlines set forth in EO 12,866 that allow a maximum of 120 days for rule review, provided that the agency head agrees to a delay beyond 90 days.
7. If OIRA asks for a 30-day extension, its request and the agency head's approval should be in writing and made public as soon as they are issued.
8. If OIRA misses these deadlines, agency heads should proceed with their rulemaking schedules and the President should support those decisions.

Economically Significant Rules

9. OIRA should focus its review on economically significant regulatory proposals and stop reviewing non-economically significant rules and guidance documents that do not fit under the exceptions provided by EO 12,866: namely, that a proposal would interfere with another agency's work, materially change entitled programs, or pose novel legal or policy issues.
10. In the rare instance when OIRA believes it must exercise its authority to pull a non-economically significant rule into its review process, it should explain in writing how the proposal fits under the exceptions set forth in EO 12,866, and it should promptly post this explanation on the Internet (both on its website and in the rule's electronic docket).

OIRA review provides a redundant and unnecessary opportunity for industry lobbyists to overrun the White House, ensuring that politics trump substance.

Analysis

Who: The Kinds of Interest Groups Represented at OIRA Meetings

Background: A Process Dominated by Industry Participation at All Stages

The rulemaking process offers many opportunities for public participation, from meetings with the agency to the submission of written comments and even post-rule judicial review. Ideally, these opportunities allow for a broad range of public input and subject the rulemaking process to robust, pluralistic oversight. But study after study reveals a process overwhelmingly dominated by industry participants from beginning to end, with public interest groups providing only a small fraction of the input.

In general, individual businesses participate in more than twice the number of rulemakings as other kinds of organizations, according to a 2005 survey of Washington-based interest groups.⁸ This phenomenon is especially striking at the earliest stage of rulemaking: the development of an agency's proposed rule. In a study of EPA rules on hazardous air pollutants, industry groups communicated informally with the agency—through meetings, phone calls, and letters—170 times more than public interest groups did (about 84 informal contacts by industry per rule, as compared with 0.7 contacts by the public interest community).⁹ Interviews with EPA staff and stakeholders also confirm that corporations and trade associations “get involved in the development of nearly every significant EPA rule.”¹⁰

Once the agency releases a proposed rule, the interest-group imbalance is no less evident at the formal notice-and-comment stage. A study of 40 rules from four different agencies found that 57 percent of comments were submitted by industry groups, with only 6 percent coming from public interest groups.¹¹ Indeed, the imbalance was even more severe in the above-mentioned study of EPA rules, where industry groups submitted over 81 percent of the comments, and public interest groups submitted only 4 percent.¹² Industry commenters participated in virtually all the rules studied, while public interest groups submitted comments for less than half of them.¹³

Even after a rule has been finalized, industry groups are more likely to challenge the rule in court (for being too stringent) than public interest groups are (for being too weak), at least where environmental regulations are concerned. Between 1970 and 1985, industry complaints against the government exceeded environmental-group complaints for every year but one.¹⁴ And among 13 more recent rules on hazardous air pollutants challenged in court, 91 percent of the plaintiffs filing petitions were industry groups and only 8 percent were environmental groups.¹⁵

Despite subtle differences, these imbalances are all instances of the same general problem. Avenues of public input that are ostensibly neutral, permitting anyone to contribute to the rulemaking process, have fallen largely into the hands of the regulated industries themselves. With this study, we expand on the existing research by examining the patterns of interest-group participation in OIRA's centralized review, a less visible (and less studied) aspect of the rulemaking process.

As the data show, OIRA's "neutral" meeting process is just as biased toward industry participants as the other aspects of rulemaking described above. More importantly, OIRA review provides a redundant and unnecessary opportunity for industry lobbyists to influence regulatory decisionmaking, and to do so in the more politicized environment of the White House, thus allowing politics to trump agency expertise.

Results

At a Glance: The Kinds of Groups Represented at OIRA Meetings

During the nearly ten-year period between October 16, 2001 and June 1, 2011, individuals made 5,759 appearances at OIRA meetings. On average, each meeting was attended by five individuals (not counting any representatives from OIRA, OMB, or the agency issuing the rule), with every individual representing some larger affiliation or group with an interest in the rulemaking. We placed each group into one of ten separate categories in order to make generalizations about the kinds of special interests participating in the meeting process. (See Appendix B for a more detailed explanation of our categorization methodology.)

Category	Subcategory	Number of Distinct Groups That Met With OIRA
Industry Groups	Individual companies	550
	Trade associations and business organizations	371
	Private hospitals and healthcare systems	31
	Professional associations*	22
Public Interest Groups	Environmental organizations	93
	Public health and safety organizations	34
	Education, advocacy, and research organizations	21
	Labor unions	16
	Community advocacy, public service, and citizens groups	13
	Civil and human rights organizations	10
	Consumer organizations	6
	Public interest law firms and legal-aid organizations	4
	Professional associations*	8
	Individuals	4
	Public interest hospital and community-health organizations	3
	Other public interest groups	6
State Government	States and state agencies	29
	Interstate organizations	18
	Indian tribes and intertribal organizations	6
Local Government	Local governments and agencies	11
	Local-government associations	2
Other Federal Agencies	Examples: U.S. Small Business Administration, U.S. Department of Agriculture, U.S. Department of Energy	27
Members of Congress	U.S. Representatives and House Committees	32
	U.S. Senators and Senate Committees	25
Law, Consulting, and Lobbying Firms	Law firms	132
	Consulting and lobbying firms	171
Foreign or International Government	Foreign governments and embassies	11
	Multinational governmental associations	4
Higher-Education	Universities	32
	Associations of colleges and universities	9
	Professional associations*	4
Other White House Offices	Examples: Council on Environmental Quality, Council of Economic Advisers, Domestic Policy Council	19

* Categorization of professional associations is explained in greater detail in Appendix B.

Table 1. The Kinds of Groups Involved in the OIRA Meeting Process

Table 1 above introduces the kinds of groups that met with OIRA during this time period, breaking down each category into more concrete subcategories and indicating just how many of these groups are involved in the meeting process.

As Figure 2 shows below, the industry groups participating in the meeting process outnumber the public interest groups by a ratio of 4.5 to 1—before even taking into account all the law, consulting, and lobbying firms that have met with OIRA on behalf of industry groups.

The Universe of Distinct Groups Involved in the OIRA Meeting Process (2001-2011)

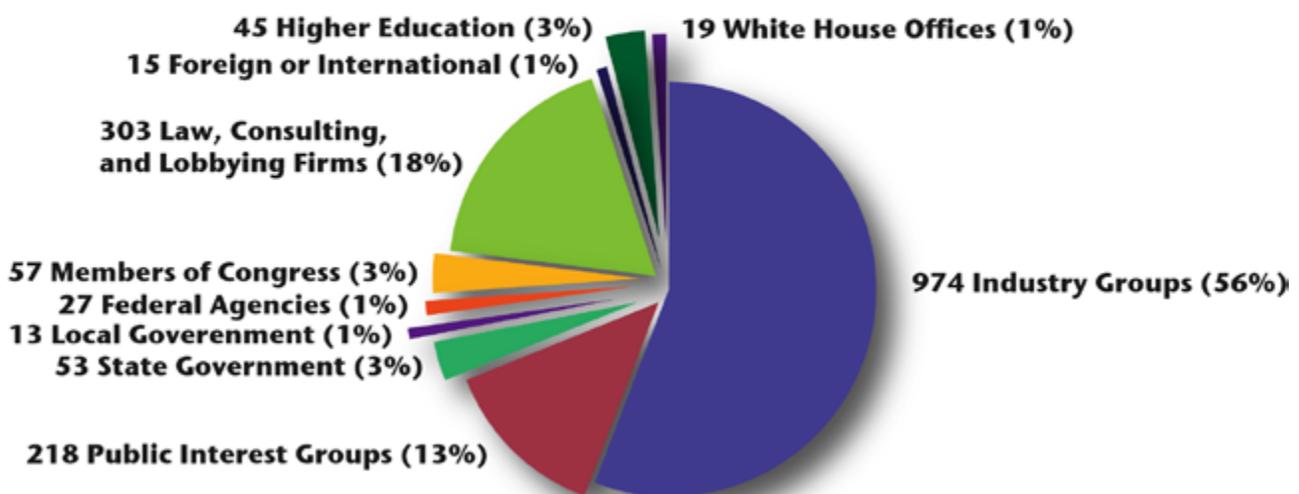


Figure 2

Approximately two-thirds of these groups (65 percent) met with OIRA more than once. Table 2 below puts names to the statistics by identifying those outside parties that have been the most active in the meeting process. Note that the table displays only groups outside the federal government and thus excludes federal agencies, members of Congress, and White House offices. Of the 30 organizations listed here, 17 are industry groups, 8 are law and lobbying firms, and 5 are public interest groups.

The fact that four prominent environmental organizations are among the eight most active groups is a promising sign that some public interest groups are capable of participating at levels similar to industry groups. However, it also demonstrates that a very small number of public interest groups become involved in the meeting process, either because their resources are quite limited or because they doubt their ability to influence OIRA, which they perceive as a hostile forum, or both.

Rank	Group Name	Description	Number of Meetings
1	American Chemistry Council	Trade association	39
2	Natural Resources Defense Council	Environmental organization	37
3	ExxonMobil	Industry	29
4	American Forest and Paper Association	Trade association	28
5	Environmental Defense Fund	Environmental organization	26
6	Sierra Club	Environmental organization	25
7	American Petroleum Institute	Trade association	24
8	Earthjustice	Environmental organization	24
9	Edison Electric Institute	Trade association	22
10	Hunton and Williams	Law Firm	22
11	Patton Boggs	Lobbying firm	20
12	American Trucking Association	Trade association	19
13	National Association of Home Builders	Trade association	19
14	Hogan and Hartson (now Hogan Lovells)	Law firm	17
15	Air Transport Association	Trade association	16
16	National Association of Manufacturers	Trade association	16
17	National Cattlemen's Beef Association	Trade association	15
18	Crowell and Moring	Law firm	15
19	DuPont	Industry	14
20	Barnes and Thornburg	Law firm	14
21	American Farm Bureau (Federation)	Trade association	13
22	American Meat Institute	Trade association	13
23	National Mining Association	Trade association	13
24	US Chamber of Commerce	Industry association	13
25	Latham and Watkins	Law firm	13
26	Mortgage Bankers Association	Trade association	12
27	Portland Cement Association	Trade association	12
28	Venable	Law firm	12
29	EOP Group	Lobbying firm	11
30	Consumer Federation of America	Consumer organization	10

Table 2. The "Top 30" Groups Represented in the Most Meetings with OIRA

The frequent participation of certain law, consulting, and lobbying firms is unsurprising, since they represent a number of different clients in their meetings with OIRA. As for the kinds of organizations that make use of these firms, however, the meeting records reveal them to be a remarkably homogenous set (see Table 3). Nearly 95 percent of the lawyers,

consultants, and lobbyists that attended these meetings (19 out of every 20) were acting on behalf of industry groups, with only 2.5 percent (1 out of every 40) representing public interest groups.

Type of Client	Number of Appearances by Lawyers, Consultants, and Lobbyists On Behalf of Clients	Percentage of All Appearances by Lawyers, Consultants, and Lobbyists
Industry Groups	853	94.3%
Public Interest Groups	23	2.5%
State Government	15	1.7%
Local Government	8	0.9%
Other Federal Agencies	2	0.2%
Other Lobbying Groups	1	0.1%
Higher-Education	1	0.1%
Other	2	0.2%
Total	905	100.0%

Table 3. A Breakdown of the Groups Represented by Lawyers, Consultants, and Lobbyists

A Deeper Look: Levels of Interest-Group Participation in OIRA Meetings

Looking now at the number of individuals representing each kind of interest group from October 16, 2001 to June 1, 2011, we find a similar degree of industry dominance (see Figure 3). A total of 65 percent of all individual meeting attendees were lobbying OIRA on behalf of industry interests (adding together the percentages for industry groups and the firms that represented them)—about five times the number of attendees appearing on behalf of public interest groups.

Interests Represented by Individual Attendees

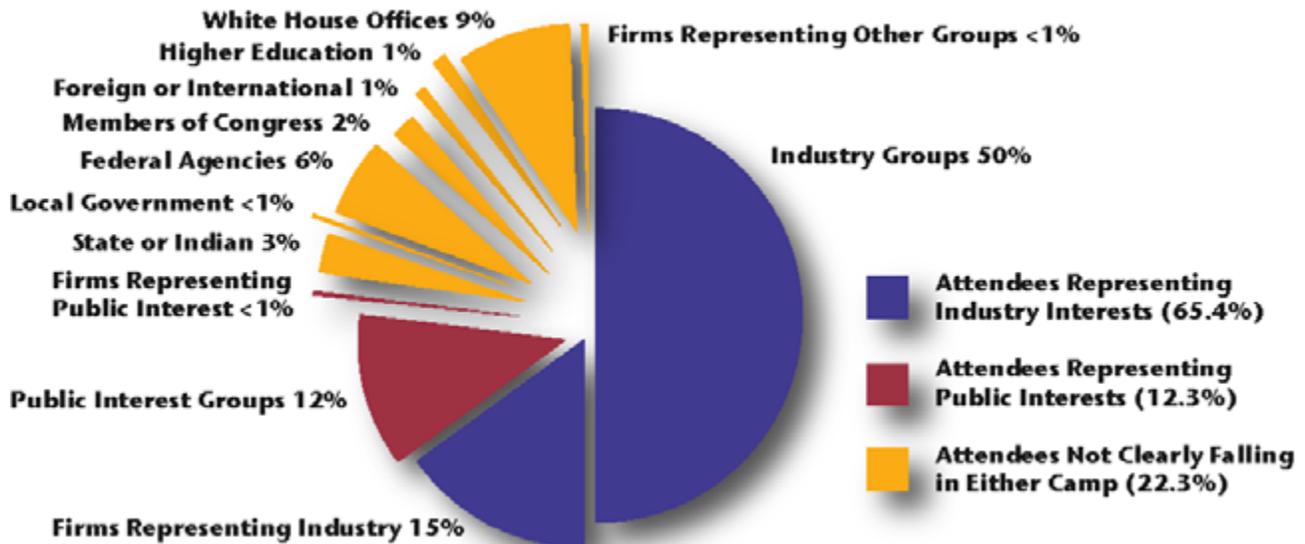


Figure 3

The basic pattern of industry dominance remained largely consistent across the Bush II and Obama Administrations (results not shown), with about two-thirds of attendees representing industry interests (68 percent in the Bush years, 62 percent in the Obama years). The proportion of individuals representing public interest groups grew slightly in the Obama years (from 10 percent under Bush to 16 percent under Obama). The representation of other interest groups remained much the same, with two exceptions: (a) the percentage of attendees from other federal agencies shrunk in half (from 8 percent under Bush to 4 percent under Obama), and (b) the percentage of attendees from other White House offices nearly doubled (from 7 percent under Bush to 12 percent under Obama). First and foremost, these data suggest that the dominance of industry groups over public interest groups in the meeting process is an inherent feature of OIRA review, essentially unaffected by changes in administration. Secondly, the Obama White House appears to have participated more actively in OIRA meetings than its predecessor, perhaps taking over partially for the participation of the other federal agencies themselves on matters of cross-cutting policy interest—in other words, a somewhat greater degree of centralization in the review process.

Not only does industry participate in the greatest number of individual meetings, they also spread their efforts over the greatest number of reviews, as Figure 4 confirms. A review takes place whenever an agency submits a draft regulatory action (*e.g.*, a proposed rule, a final

rule) to OIRA, and the same regulatory action will likely go through at least two reviews (*i.e.*, at the proposal stage and the final rule stage) before it is promulgated. A particularly controversial regulatory action can be the subject of several meetings during a single OIRA review. Consequently, the rate of interest-group participation in reviews provides an alternative measure of industry's dominance in OIRA's review process. Industry groups make themselves heard in the greatest number of reviews, followed by law, consulting, and lobbying firms (almost exclusively representing industry groups), and then White House offices and federal agencies, with public interest groups coming in fifth.

Number of OIRA Reviews in Which Each Type of Group Participated



Figure 4

Methods of participating in the rulemaking process are supposed to facilitate *pluralistic* input, where the viewpoints of various groups combine to produce better informed policies. Thus, the extent to which these OIRA reviews are informed by one-sided input or more balanced participation by several kinds of groups is crucial to the legitimacy of the process. Figure 5 below exhibits the degree of overlap between industry and public interest group participation.

Only 16 percent of reviews with meetings benefited from the input of both kinds of groups. A remarkable 73 percent of the reviews attracted participation by industry groups (and the firms representing them) but none by public interest groups, while only 7 percent attracted the latter but not the former—a ratio of more than ten to one in favor of industry's unopposed involvement.

Degree of Imbalanced Participation in Reviews with Meetings

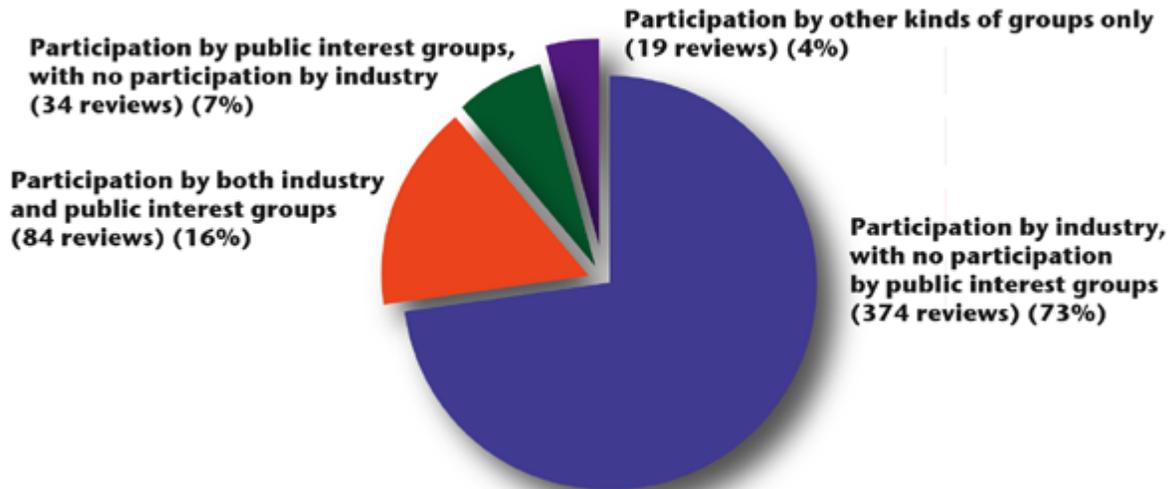


Figure 5

How OIRA's Meeting Policy Ensures Industry Dominance

These findings expose the hollow neutrality of OIRA's "all you can meet" policy. They confirm that equal access to OIRA does not ensure balanced participation. To the contrary, it serves instead to provide endless opportunities for industry groups to promote their interests in an influential forum, most of the time without scrutiny or opposition from public interest groups.

How and why does this imbalance arise? Some might argue that the public interest community is culpable for failing to engage in the meeting process to the same extent as industry, but such a view ignores the economic realities of interest-group advocacy. Once we consider that industry and public interest groups have vastly different resources and incentives, it becomes clear that "public participation" is far from a level playing field. Under such conditions, opening the door to any and all takers, and keeping it open until they have no more left to say, will inevitably reward those interest groups with the economic ability and self-interest to take maximum advantage of the process.

Imbalance in Resources

In general, the financial resources of regulated industries simply dwarf the resources of public interest groups. The majority of participating industry groups are large (often multinational) corporations and nationwide trade associations, not to mention lobbying organizations like

the U.S. Chamber of Commerce. These groups have vast, often pooled resources at their disposal, especially when it comes to intervening in regulations that could affect a number of businesses or even an entire industry sector. Public interest groups, on the other hand, are typically funded by donations and have to conserve their resources for the most strategically useful opportunities for participation.

In some ways, the levels of interest-group involvement in meetings with OIRA simply track the levels of involvement in the rulemaking process in general. The economic incentives for industry involvement are much stronger and more consistent than they are for public interest involvement. Virtually every rulemaking ensures that some affected industry sector will be actively involved due to its inevitable self-interest in the outcome. In contrast, public interest groups are an imperfect proxy for the degree of public interest actually at stake in a rulemaking. Despite their desire to engage in a wide set of rulemakings, their participation is often limited to those that are newsworthy or capable of mobilizing widespread interest.¹⁶ Less-salient regulatory issues are likely to be decided without robust advocacy from the public interest community, even though they may pose substantial risks to the public. Thus, while industry is guaranteed to be a constant presence in rulemakings (including meetings with OIRA), public interest groups will be more like occasional guests.

Within a particular rulemaking, industry groups have the resources to engage in wide-ranging lobbying efforts. They can cover all their bases by advancing their interests in multiple forums—meetings with OIRA, informal contacts with the agency, submission of formal comments, lobbying efforts in Congress, public-relations campaigns—in the hopes that at least some of them will work in their favor. They also have the financial stamina to sustain that intense level of involvement throughout the entire rulemaking cycle, from pre-proposal to notice-and-comment and even post-rule litigation. In other words, they have the luxury of taking many bites out of the apple, often bombarding the agencies and OIRA with the same information and arguments over and over again. This kind of repetitive lobbying wastes government resources and unnecessarily duplicates notice-and-comment practices, albeit in a far less transparent setting.

The disparity in resources between industry groups and public interest groups also has implications for *how* the groups go about lobbying OIRA. The immense resources of industry groups enable them to rely heavily on the specialized expertise of law, consulting, and lobbying firms. With their meters running by the hour, these hired consultants have every incentive to engage in excessive participation, lobbying the agency as well as OIRA with great frequency. To their clients, this overkill—“well beyond what is necessary to convey the message”¹⁷—is disguised as persistence and dedication, as if the advocates are simply doing everything they can to push the industry’s agenda at every opportunity. Public interest groups, in contrast, rarely have the resources to engage these firms in their lobbying efforts. Of the 905 appearances made by consulting, lobbying, and law firms in meetings with OIRA, 853 of them were representing industry groups, while only 23 were representing public interest groups.

With their meters running by the hour, lawyers and consultants retained by industry groups have every incentive to engage in excessive participation.

Information Costs of Lobbying OIRA

This imbalance in resources would be of little consequence if lobbying OIRA were cost-free. But effectively participating in any part of the rulemaking process is an information-intensive activity, and it takes resources (time, money, and personnel) to manage and produce information. Because industry has greater access to much of the relevant information, the costs of participating are often lower for industry than they are for the public interest community. And even where the costs would be similar for both groups, the greater resources of industry groups make their information burdens more manageable.

First, a participant has to decipher the lengthy rulemaking documents to become familiar with the issues and assumptions relevant to the outcome. Environmental rules, in particular, are filled with technical jargon and require a high level of specialized background knowledge to interpret.¹⁸ A rule's cost-benefit analysis—often the focal point of OIRA's review—is typically one of the rule's most impenetrable parts due to its complex calculations and economic models. Of course, as we show below, stakeholders very often meet with OIRA before a proposed rule is even released, when there are no rulemaking documents to speak of. Nevertheless, an industry's long-practiced familiarity with the regulatory issues that might affect its self-interest leaves it well-prepared to participate at the first sign of trouble.

Second, after mastering the relevant materials, participants must find and assemble the information that might sway decisionmakers to a particular position. Because OIRA is tasked with ensuring that “the benefits of the intended regulation justify its costs,”¹⁹ the information most likely to influence OIRA decisionmakers would address the estimated costs and benefits of the rule, preferably in economic terms. Much of this information, such as the expected cost to industry of complying with the regulation, lies within the particular knowledge of the industry itself. In order to dispute any inflated cost estimates supplied by industry, public interest groups would have to first gain access to “inside information” about the industry's operating costs.²⁰ Of course, public interest groups that study the harms of unregulated industry activity may have special knowledge of a regulation's expected *benefits*. However, they must expend considerable energy to make those benefits appear meaningful within the framework of OIRA's formal cost-benefit analysis, which reduces health and environmental benefits to dollars and cents in ways that grossly underestimate their true worth.

In addition to its greater access to relevant information, industry has another way to relieve its information burdens: hired help. With consulting, lobbying, and law firms at their disposal, large industry groups rarely feel discouraged by the avalanche of information that comes with participation. Within the public interest community, on the other hand, it falls to the groups themselves to sift through the prohibitively dense rulemaking docket and quickly compile the kind of technical documents and arguments that would prove influential with OIRA. Indeed, the speed with which groups can prepare their positions and present them to OIRA is crucial, given the importance of participating *early* in the rulemaking process, before the contours and boundaries of the proposed regulation become fixed.²¹

What these firms provide is processing power, which gives industry groups a significant edge in the race.

The only reliable method for redressing the acute imbalance in resources between private sector industry versus public interest groups is to focus review on what the originating agency's experts, including economists, engineers, public health and ecological scientists, and lawyers, have to say about the merits of a rule, as well as what information was provided by interest groups on the rulemaking record.

OIRA's Reputation as a Non-Neutral Forum

One last explanation for industry's dominance of the OIRA meeting process relates to the nature of the forum itself. As we demonstrate here, OIRA has earned a reputation as a business-friendly forum—a place where health and environmental regulations go to die, or at least be weakened. Consequently, public interest groups may prefer to focus on more productive lobbying opportunities, rather than have their arguments fall on deaf ears at OIRA.

Historically, OIRA's involvement in the rulemaking process has functioned as a “one-way ratchet,” characteristically weakening agency regulations in the interest of economic considerations, and rarely if ever working in the other direction.²² In a survey of 30 top political officials at EPA, encompassing both the Bush I and Clinton Administrations, 89 percent of them answered that OIRA often or always sought to make regulations less burdensome for regulated industries, and rarely or never sought to make regulations more protective of health and the environment.²³

Indeed, the centralized review of agency regulations was introduced from the beginning as an explicit counterweight to the “runaway” regulatory tendencies of the agencies—particularly EPA—and so it was intended to have a dampening effect on aggressive rulemaking.²⁴ Former OIRA Administrator Sally Katzen has contrasted EPA's “laser”-like focus on environmental protection with the “broader view” taken by OIRA, which “temper[s]” EPA's approach by emphasizing a rule's economic impact.²⁵ OIRA is likely to greet the arguments of public interest groups in favor of robust regulation with a similar degree of skepticism and condescension. Given their scarce resources, public interest groups are understandably hesitant to spend them on lobbying OIRA, a forum which is virtually designed to be unreceptive to their arguments.

Beyond OIRA's generally anti-regulatory stance, the analytical tool that OIRA uses—cost-benefit analysis—is structurally biased to inflate a regulation's expected costs and trivialize its expected benefits, making the regulation appear unsound or unwise.²⁶ For example, the future benefits of a regulation (*e.g.*, cancers prevented, lives saved, species protected) are first converted into dollar amounts²⁷ and then “discounted” to their present values according to an interest rate.²⁸ And many of the expected benefits are simply left out of the analysis because they cannot be easily “monetized.”²⁹ Public interest groups, aware that OIRA's

methodology is inherently hostile to their aims, have little incentive to rush into these meetings.

Some might have expected OIRA to earn a more neutral reputation under the Obama Administration, given the President’s campaign language signaling his support for a robust regulatory system.³⁰ But in an apparent effort to appease business interests, Obama and Sunstein have hewn closely to the same kind of anti-regulation rhetoric that characterized the Bush II Administration, focusing on the perceived threat of “over-regulation” instead of addressing pervasive regulatory failures.³¹ For example, in its 2011 report to Congress, OIRA reaffirmed its priorities—“economic growth, innovation, competitiveness, and job creation”—and suggested that “excessive regulation” is the main obstacle to their fulfillment.³² These familiar refrains, combined with OIRA’s aggressive watering down of EPA’s coal-ash proposal,³³ have done little to improve the public interest community’s perception of OIRA’s usefulness. As our data already suggest, the Obama Administration is unlikely to attract a game-changing boost in public interest participation.

The Implications of Interagency Participation in OIRA Meetings

Several bodies within the federal government participated vigorously in the meeting process, as displayed in Table 4 below. While the agency responsible for the rule under review was nearly always represented in meetings with OIRA, the federal agencies listed here are those that attended meetings concerning the rules of *other* agencies (for example, the U.S. Department of Agriculture attending a meeting about an EPA rule).

Rank	Name of Federal Entity	Description	Num. of Meetings
1	Council on Environmental Quality	White House office	148
2	Small Business Administration: Office of Advocacy	Federal agency	122
3	Council of Economic Advisers	White House office	62
4	Domestic Policy Council	White House office	48
5	National Economic Council	White House office	38
6	Office of the U.S. Trade Representative	White House office	32
7	Office of Science and Technology Policy	White House office	30
8	Department of Agriculture	Federal agency	29
9	Homeland Security Council	White House office	21
10	Department of Energy	Federal agency	21

Table 4. The “Top 10” Federal Entities Represented at the Most Meetings

By far, the most active federal agency was the U.S. Small Business Administration (SBA), whose tiny Office of Advocacy³⁴ attended 122 meetings, or 11 percent of all meetings held—three times the number of meetings attended by the most active industry group (compare Table 2 above). The Office claims to represent the interests of “small businesses” by fighting against “overly burdensome” and “costly” regulatory requirements.³⁵ In

reality, the office has engaged in consistent and sweeping attacks against virtually all regulatory efforts by other federal agencies, functioning like a trade organization perched within the SBA—an anomaly in the federal government.

Moreover, while the phrase “small business” evokes images of struggling storefronts on Main Street, many beneficiaries of the SBA’s advocacy efforts are not nearly so romantic. Under the SBA’s own rules, petroleum refineries, ammunition and aircraft manufacturers, line-haul railroads, and pipeline transporters of crude oil can have 1,500 employees and still qualify as “small businesses.”³⁶ Indeed, in their efforts to undermine health and environmental regulations, SBA’s Office of Advocacy representatives often shared OIRA meetings with industrial giants like the American Petroleum Institute, the American Chemistry Council, ExxonMobil, and Atlantic Southeast Airlines—all of them lobbying in tandem for weaker rules.³⁷

Earlier this year, the SBA’s Office of Advocacy commissioned a study on the annual cost of federal regulations,³⁸ and the resulting estimate of \$1.75 trillion was so outlandishly overstated and poorly supported³⁹ that even OIRA Administrator Cass Sunstein ultimately denounced it after widespread criticism.⁴⁰ It is more than a little troubling that this tiny bureau, which has worked tirelessly to discredit the regulatory system as a whole, is so heavily involved in OIRA’s review of agency rules.

Beyond the SBA, it is difficult to generalize about the viewpoints likely to be promoted by the various agencies and White House offices. At least some of the time, however, they have strong incentives to back up industry’s objections to regulation. White House offices may want to maintain the political support of influential business sectors. Indeed, a survey of senior political appointees at EPA (10 from the Bush I era and 20 from the Clinton era) suggested that White House offices were more responsive to business interests than environmental interests when they got involved in EPA rulemakings.⁴¹

Federal agencies (other than the one issuing the rule) may worry about the effects of regulation on their industry contractors or program beneficiaries. The “interagency review” of EPA’s recent proposal to regulate coal ash offers a memorable example. Every other agency involved—the U.S. Departments of Agriculture, Energy, Transportation, and the Interior—had already approved of many uses for recycled coal ash (*e.g.*, in highway construction or for agricultural purposes) and thus echoed the complaints of the ash-recycling industry verbatim, criticizing EPA’s proposal for the effects it might have on the industry.⁴² In fact, the White House Council on Environmental Quality (CEQ) voiced the same objections as well.⁴³

Of course, the involvement of these federal-government entities in the review process may not consistently result in the weakening of health and environmental regulations. We suggest only that in addition to the blatant dominance of industry representatives in meetings with OIRA, some extra support for industry viewpoints is likely to be found in the deceptively neutral involvement of federal agencies and White House offices.

The SBA’s Office of Advocacy often shared meetings with industrial giants like the American Chemistry Council and ExxonMobil—all of them lobbying OIRA in tandem for weaker regulations.

What: The Kinds of Rules Discussed at OIRA Meetings

The Most Heavily Discussed Rules

Table 5 below lists the 20 rules that were the subject of the most meetings between October 16, 2001 and June 1, 2011 (in descending order). Each entry includes all the meetings held during all reviews of that particular rule (*i.e.*, at both the proposed-rule and final-rule stages).

Rank	Agency	Rule Title	Rule ID Number	Econ. Sig.?	Meetings
1	EPA/SWER	Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers	2050-AE81	Yes	47
2	HUD/OH	RESPA--Improving the Process for Obtaining Mortgages	2502-AH85	Yes	24
3	EPA/AR	Renewable Fuels Standard Program	2060-AO81	Yes	18
4	ED/OPE	Program Integrity: Gainful Employment Measures	1840-AD06	Yes	17
5	EPA/AR	Clean Air Interstate Rule; Formerly Titled Interstate Air Quality Rule	2060-AL76	Yes	15
6	DOT/OST	Computer Reservations System Regulations Comprehensive Review	2105-AC65	No	14
7	USDA/AMS	Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Fish, Perishable Agricultural Commodities, and Peanuts	0581-AC26	Yes	12
8	DOD/COE	Programmatic Regulations for the Comprehensive Everglades Restoration Plan	0710-AA49	No	12
9	USDA/FSIS	Mandatory Inspection of Catfish and Catfish Products	0583-AD36	Yes	10
10	DOT/PHMSA	Hazardous Materials: Revisions to Requirements for the Transportation of Lithium Batteries	2137-AE44	No	10
11	EPA/SWER	Definition of Solid Wastes Revisions	2050-AG31	Yes	10
12	HHS/FDA	Use of Ozone-Depleting Substances: Removal of Essential Use Designation; Albuterol	0910-AF18	Yes	9
13	HHS/OS	Modifications to Standards for Privacy of Individually Identifiable Health Information	0991-AB14	Yes	9

Rank	Agency	Rule Title	Rule ID Number	Econ. Sig.?	Meetings
14	DOT/NHTSA	Passenger Car and Light Truck Corporate Average Fuel Economy 2011 to 2015	2127-AK29	Yes	9
15	EPA/AR	National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters	2060-AQ25	Yes	9
16	EPA/AR	National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-Fired Electric Utility Steam Generating Units	2060-AP52	Yes	9
17	EPA/OCSP	TSCA Inventory Update Reporting Modifications	2070-AJ43	No	9
18	HHS/CMS	ESRD Bundled Payment System	0938-AP57	Yes	8
19	DOT/OST	Enhancing Airline Passenger Protections—Part 2	2105-AD92	No	8
20	EPA/AR	Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel	2060-AK27	Yes	8

Table 5. The “Top 20” Rules That Were the Subject of the Most Meetings with OIRA

The Disproportionate Targeting of EPA Rules

Background: OIRA’s Historic Fixation with EPA

The history of centralized review is inseparable from the history of EPA. The original mechanism for White House oversight of agency rulemaking (an executive taskforce created in 1970) had two noteworthy features: (1) it explicitly solicited the input of top business leaders (even permitting them to serve in a decisionmaking capacity), and (2) it was targeted exclusively to the newly created EPA.⁴⁴ As that early mechanism evolved into modern centralized review, both of those features began to fade away, with OIRA officially taking a position of *neutrality* in both respects. No longer favoring the business community, OIRA purports to be neutral with respect to public participation by permitting *all* outside parties to schedule and attend meetings about agency rules. And no longer tailored to one agency, OIRA is charged with reviewing significant regulatory actions by *all* executive agencies. But as a practical matter, OIRA is not as far removed from that original model as it appears to be in either case. Its pretense of neutrality simply hides the fact that its review process is still industry-dominated (as we demonstrated in the previous section) and EPA-obsessed (as we demonstrate here).

While EPA rules made up only 11 percent of all reviews by OIRA, 41 percent of all OIRA meetings targeted EPA rules.

Of course, EPA typically engages in many significant rulemakings and thus makes up a large percentage of the rules that OIRA reviews in the first place. Even so, OIRA's excessive attention to EPA rulemakings is out of proportion to EPA's level of activity. During the Reagan-Bush era, critics charged that OIRA's reviews were being used specifically to undermine EPA rules.⁴⁵ In Steven Croley's study of centralized review in the Clinton era (1993-2000), not only did he find that OIRA was much more likely to change EPA rules than those of other agencies, but he also observed that EPA rules were "especially likely to generate OIRA meetings."⁴⁶ EPA rules made up 54 percent of the rules discussed at meetings, even though they represented only 10 percent of all rules submitted to OIRA for review.⁴⁷ He ultimately concluded that "the Clinton White House clearly appears to have used the review process to put its mark on environmental rulemaking, however friendly the Clinton administration was toward environmental regulation."⁴⁸

In this part of our study, we extend Croley's analysis of EPA-related meetings into the years of Bush II and Obama (2001 to 2011). Whereas Croley focused on the number of EPA rules that were the subject of at least one meeting, we focus here on the number of meetings that concerned EPA rules, in order to gain some understanding of how the frequent, repetitive lobbying of OIRA might affect EPA's ability to function effectively.

Results

Over the entire time period (October 16, 2001 to June 1, 2011), OIRA held a total of 1,080 meetings with outside parties. Of these, 442 meetings were about EPA rules, a far greater number than for any other agency. On average, OIRA held a meeting about an EPA rule *every eight days*, or roughly once a week. Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Services (HHS) with 137 meetings, and the Department of Transportation (DOT) with 118 meetings.

The number of meetings about EPA rules was also far greater than would be predicted from looking at the number of EPA rules submitted for review. OIRA reviewed 671 rules from EPA and 994 rules from HHS, but there were many more meetings about the former than the latter. While EPA meetings made up 41 percent of all meetings, EPA rules made up only 11 percent of all reviews by OIRA, a ratio of 3.8 to 1. This ratio is a measure of the disproportionate attention paid to EPA rules. Essentially, it means that in these meetings OIRA and outside parties devoted almost four times as much attention to EPA rules as the rules merited by their numbers. If OIRA's meeting policy were neutral toward the agencies, as OIRA maintains it is, then ideally the share of meetings about an agency's rules should be somewhat proportional to the share of reviews devoted to that agency. See Figure 6 below for a comparison of reviews and meetings by agency.

Remarkably, under both the Bush and Obama Administrations, OIRA paid equally disproportionate attention to EPA rules in these meetings (results not shown in charts):

- In the Bush years (October 16, 2001 to January 19, 2009), EPA meetings made up 36 percent of all OIRA meetings, while EPA rules made up only 10 percent of all reviews by OIRA, a ratio of 3.6 to 1.
- In the Obama years (January 20, 2009 to June 1, 2011), EPA meetings made up 51 percent of all OIRA meetings, while EPA rules made up only 14 percent of all reviews by OIRA, a ratio of 3.6 to 1.

The fact that the ratio reflecting an undue focus on EPA is exactly the same (3.6 to 1) for both the Bush and Obama Administrations clearly indicates that the use of the meeting process to target EPA rules is an institutional characteristic of OIRA. In other words, it is not a problem only with a Republican OIRA or a Democratic OIRA, but rather a problem with OIRA itself, under any administration. These data also undercut criticisms by regulated industries and their congressional allies that the Obama Administration has not adequately supervised the rulemaking activities of EPA. After all, more than half of all meetings under the Obama Administration have been about EPA rules.

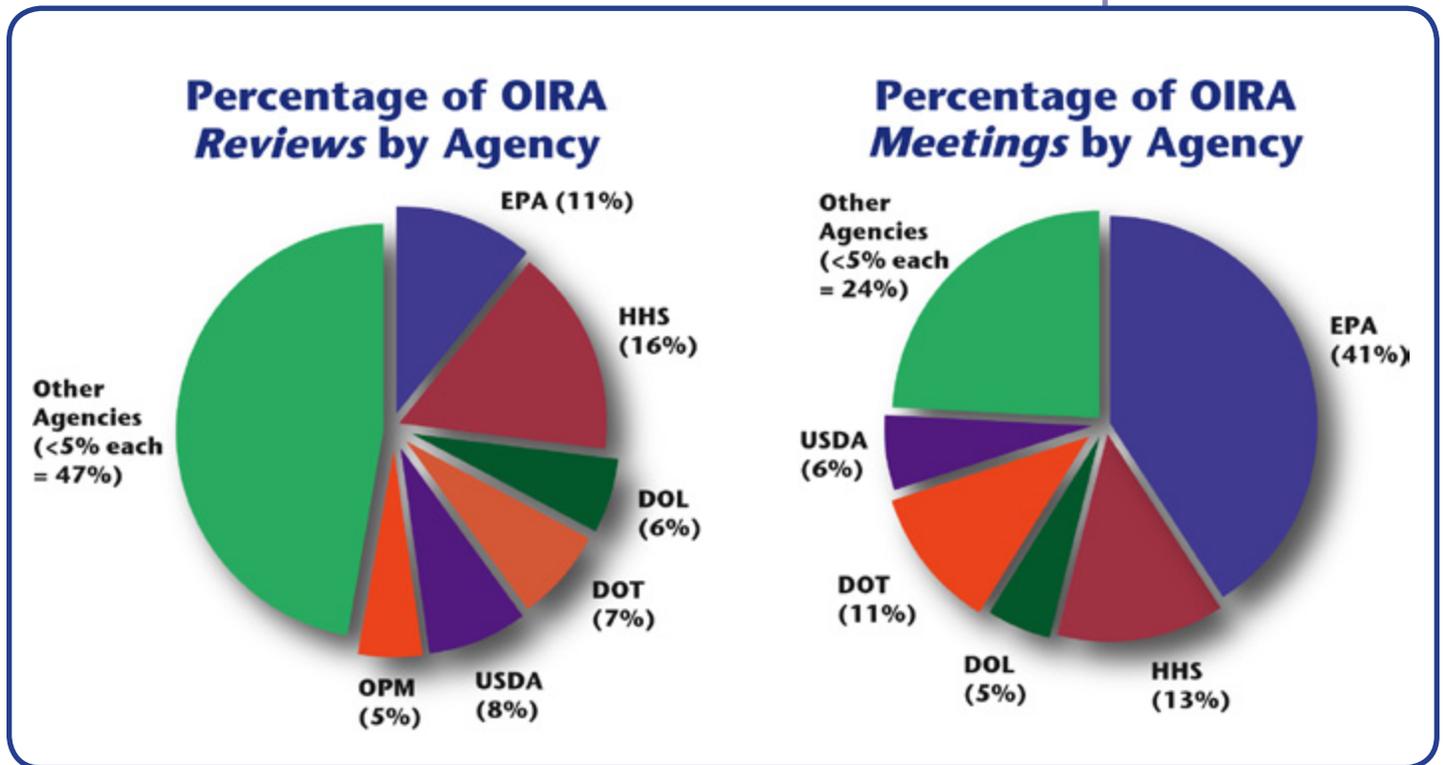


Figure 6

How OIRA's Meeting Policy Impairs EPA Rulemaking

Because OIRA's meeting policy places no limits on outside parties' opportunities to participate, the number and frequency of meetings is limited only by the resources and interests of the outside parties. As a result, rules promulgated by EPA are especially likely to attract vigorous industry participation. Throughout its existence, EPA has served as the number-one target of deregulatory efforts by industry groups.⁴⁹ And the average environmental rule presents countless issues that are bound to whip regulated entities into a frenzy (*e.g.*, the feasibility of a pollution control standard, the cost and performance of available technologies, the requirements for monitoring and reporting).⁵⁰ Ultimately, OIRA's "all you can meet" policy permits industry groups with resources to spare to browbeat EPA rules—their favorite target—with a predictably constant stream of meetings.

Aside from any substantive effects on the rules themselves, EPA ends up wasting resources and personnel on these meetings, when its hands are already more than full contending with the same kinds of arguments in its own communications with industry stakeholders. EPA prudently sends agency representatives to most of the meetings in order to defend its rules from industry attack in front of OIRA. Indeed, Croley found that "EPA staff are especially likely to attend meetings about their rules, relative to all other agencies," probably due to the intensely controversial nature of environmental regulations.⁵¹

OIRA, as an institution, has a history of viewing EPA regulations as overly aggressive and economically unsound, so industry complaints along the same lines are almost certain to find a receptive audience. For example, in OIRA's recent review of EPA's proposal to regulate coal ash,⁵² industry groups met with OIRA 33 times (out of 47 total meetings). They argued that EPA's rule would inadvertently impose a crippling "stigma" on the beneficial recycling of coal ash, spelling disaster for the reuse industry, and by extension, the environment.⁵³ Lo and behold, at the conclusion of its review, OIRA faulted the agency for neglecting such a compelling issue and demanded that the proposal incorporate industry's concerns before being released.⁵⁴ In its rush to accommodate industry stakeholders, OIRA ignored the fact that EPA had never observed such a stigma effect in its prior experience,⁵⁵ and it failed to address whether potential "market stigma" was even a permissible factor for consideration under the relevant statute.⁵⁶ When the proposed rule was finally released, its cost-benefit analysis suggested that the most effective regulatory option could result in an enormous stigma effect: *\$233.5 billion* in negative benefits (costs) to society.⁵⁷ Much to the detriment of communities affected by toxic coal ash, the weaker regulatory alternatives that would barely make a dent in the status quo were made to appear far more attractive—exactly the outcome that industry wanted in the first place.

EPA is already an embattled agency by any measure and is unable to count on the President for vital support when its authority or credibility is threatened.⁵⁸ And yet, among all agencies, EPA alone is confronted with this kind of steady, relentless information flow between industry groups and OIRA economists—a veritable tag team of opposition.

In the final section of this paper, we explore further the influence that these meetings might have on the outcome of OIRA's review of EPA rules.

Excessive Interference in Rules That Are “Not Economically Significant”

Background: The Scope of OIRA's Reviewing Authority

In the Reagan-Bush era, Executive Order (EO) 12,291 gave OIRA the authority to review *all* proposed and final rules promulgated by federal agencies (except independent agencies), and it reviewed between 2,000 and 3,000 rules per year.⁵⁹ OIRA's overbearing involvement in agency rulemaking sparked intense controversy in Congress and in the press, raising concerns about the separation of powers, the transparency of the review process, and rulemaking delay.⁶⁰

In 1993, soon after President Clinton was elected, he issued EO 12,866 to replace the previous executive orders (12,291 and 12,498).⁶¹ This executive order was meant to define OIRA's authority and obligations in a clear and systematic way. Toward that end, it permits OIRA to review only “significant regulatory actions,” which may be identified as such by either the agency or OIRA.⁶² According to section 3(f) of the order, a regulatory action is “significant” if it 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
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.⁶³

Rules that fall under subsection (1) are called “economically significant,” while rules that fall under subsections (2)-(4) are called one of several things: “not economically significant,” “non-economically significant,” “otherwise significant,” or “significant for noneconomic reasons.” For economically significant rules, agencies are required to prepare a full cost-benefit analysis, with extensive consideration of alternatives.⁶⁴ For non-economically significant rules, agencies must prepare only an “assessment” of costs and benefits (without the underlying “analysis”).⁶⁵

As a result of OIRA's newly limited authority, in 1994 the total number of rules reviewed by OIRA dropped sharply to 831, and ever since 1995, the number has hovered approximately between 500 and 700 per year.⁶⁶ The portion consisting of economically significant rules stayed roughly the same size as before the new executive order (when they were called "major" rules), around 100 per year, with the rest (400-600) representing non-economically significant rules.

The fact that, among all the rules reviewed by OIRA per year, non-economically significant rules greatly outnumber economically significant rules—at a ratio of 6 to 1—is at odds with the overriding purpose of EO 12,866. The order focused predominantly on the \$100 million threshold, the signature test for economically significant rules, as a way of constraining OIRA's authority.⁶⁷ OIRA's review of non-economically significant rules was meant to be the exception, not the rule. While the definitions of non-economically significant rules (sections 3(f)(2)-(4) above) are certainly capable of being applied generously—particularly the "novel legal or policy issues" criterion of subsection (4)—to do so would swallow the usefulness of limiting OIRA's authority in the first place.

Unlike section 3(f)(1), which implicates OIRA's significant authority to scrutinize a regulation's effects on the economy, the environment, and public health, sections 3(f)(2)-(4) of EO 12,866 are written in a way that evokes OIRA's more moderate "coordinating" role.⁶⁸ And yet OIRA appears to treat sections 3(f)(2)-(4) as "catch-all" provisions, under which it can simply move any rules it desires to review into its "to-do" pile and proceed to exercise its full authority over them. Indeed, former OIRA Administrator Sally Katzen saw these provisions as preserving OIRA's authority to review any "controversial regulations" that fail to meet the \$100-million threshold, while still not requiring agencies to submit all rules to OIRA, as they had to under EO 12,291.⁶⁹ If this is the case, then EO 12,866's limitation of OIRA's authority was just for show, protecting from review only those rules that OIRA has no interest in reviewing.

Moreover, the fact that the number of non-economically significant rules remains so steady from year to year suggests that OIRA simply converged on a manageable number of rules to select each year for review, regardless of whether they actually meet the order's criteria. After all, what are the chances that "serious inconsistenc[ies]" between agencies, "material[] alter[at]ions]" of budgetary impacts, and "novel legal or policy issues" arise at the same rate every year?

In this part of the study, we investigated the extent to which these non-economically significant rules, already on the border of OIRA's authority and over-selected for review, are also subjected to stakeholder meetings once brought into the system.

Results

Out of 409 rules that were the subject of at least one OIRA meeting from October 16, 2001 to June 1, 2011, 161 of them (39 percent) were economically significant, while 248 of them (61 percent) were non-economically significant, as illustrated in Figure 7 below. If a rule's "significance" designation was changed between different review periods (*e.g.*, between the proposed-rule stage and the final-rule stage), we used its final designation for the study.

Economic Significance of Rules Discussed at OIRA Meetings

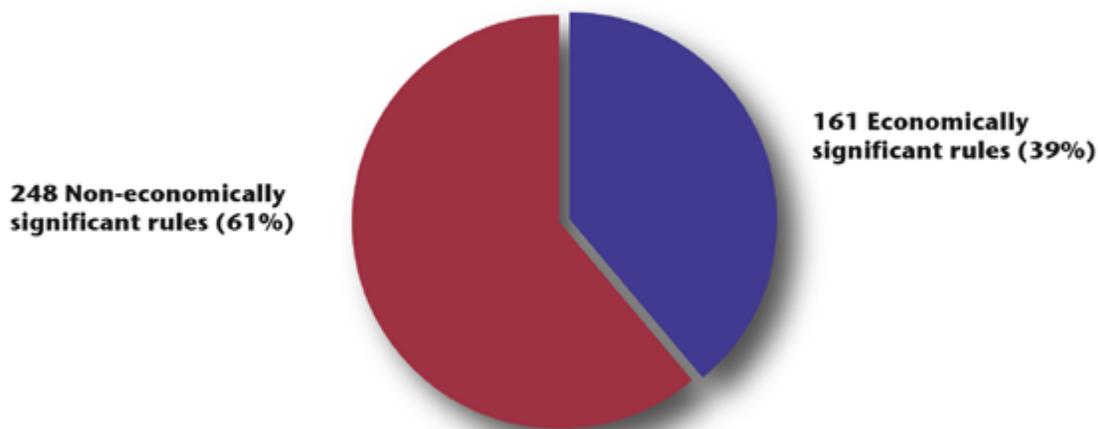


Figure 7

As for the number of meetings associated with each kind of rule, 592 meetings (56 percent) were held to discuss the 161 economically significant rules, while the other 462 meetings (44 percent) concerned the 248 non-economically significant rules. In other words, each economically significant rule generated an average of 3.7 meetings, while each non-economically significant rule generated an average of 1.9 meetings.

So, while economically significant rules generate roughly twice the number of meetings as non-economically significant rules, the number of non-economically significant rules that are discussed in *any* number of meetings is about 50 percent larger than the number of economically significant rules. These trends were relatively consistent across the Bush II and Obama Administrations, with the economically significant rules generating the most meetings (53 percent of meetings for Bush and 62 percent of meetings for Obama), but the non-economically significant rules making up the majority of rules that are the subject of meetings (63 percent of rules for Bush and 55 percent of rules for Obama). Even in the Clinton era, Croley found that most of the rules discussed at meetings (58 percent) were non-economically significant.⁷⁰

Even though large numbers of meetings are most often associated with rules that surpass the \$100 million threshold, five of the “top 20” rules listed in Table 5 above—those that were the subject of the most meetings—were *not* economically significant (producing between 8 and 14 meetings each). We examined these five rules to get a sense of why they were considered “significant” and thus in need of review by OIRA. Two of them parroted the language of section 3(f)(4), citing “novel legal or policy issues” without any further explanation of what those issues were.⁷¹ For another rule, the Department of Transportation cited “the amount of public interest” likely to be generated—not a valid criterion under EO 12,866, but a factor specified by the Department’s own regulatory policies.⁷² The other two simply declared that the rule “is” or “has been determined” a significant regulatory action, with no more detailed justification anywhere in the rulemaking docket.⁷³ A larger-scale examination of non-economically significant rules would be beyond the scope of this paper, but already this small sample suggests that the decision to label a rule “significant” for noneconomic reasons, and thus bring it under OIRA’s authority, is far from systematic or transparent.

Because they may lack the newsworthiness of many economically significant rules, non-economically significant rules seem particularly likely to attract one-sided participation from industry groups that are directly affected, while escaping the attention of public interest groups with limited resources. Figure 8 below suggests that for non-economically significant rules, the proportion of meeting attendees representing industry interests is 7 percent greater than it is for economically significant rules. Indeed, this difference is slight, and the representation of public interest groups appears to show no difference at all. But the fact that non-economically significant rules are at least as susceptible to excessive industry lobbying as economically significant rules—if not more so—underscores the importance of keeping most of them properly out of OIRA’s review process to begin with.

Percentage of Meeting Attendees Representing Industry and Public Interest, with Respect to Economic Significance of the Rule

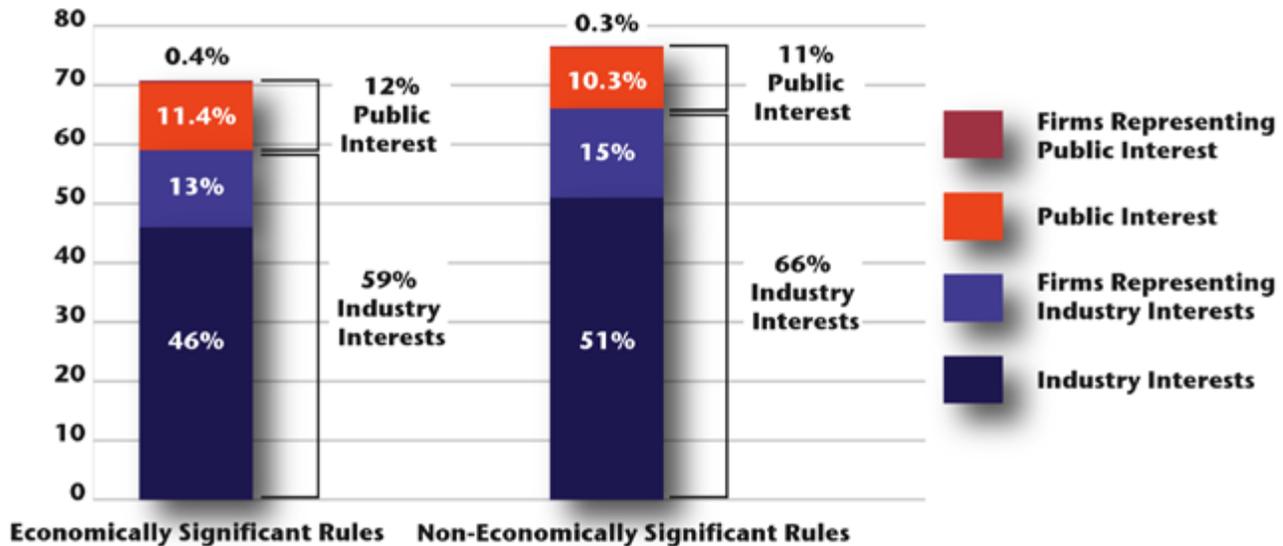


Figure 8

President Obama scored points with the public interest community⁷⁴ when he revoked George W. Bush's EO 13,422, which had extended OIRA's authority to review non-binding guidance documents issued by agencies—a significant expansion of its reach that threatened to further impede agency action.⁷⁵ But as our data suggests, OIRA's extensive and arbitrary involvement in non-economically significant rulemakings may represent an even greater intrusion, one that has gone unnoticed and unaddressed due to the low-profile nature of the rules.

President Clinton's EO 12,866 triumphantly claimed to “reaffirm the primacy of Federal agencies in the regulatory decision-making process.”⁷⁶ In reality, OIRA undermines the agency system by micromanaging so many routine regulations and exposing them to industry lobbyists outside the notice-and-comment period—conduct that violates the spirit, if not the letter, of EO 12,866.

When: The Timing of OIRA Meetings

The Stages of the Rulemaking Cycle

Background: The Problem of Pre-Proposal Discussions with Stakeholders

To a large extent, an agency's proposed rule defines and limits the possibilities of the final regulation. Courts have imposed the requirement that an agency's final rule must be a "logical outgrowth" of its proposed rule, such that the proposed rule should alert interested parties to all the relevant issues and alternatives that may play a part in the final rule.⁷⁷ If the final rule is materially different from the proposed rule in unanticipated ways, then stakeholders may have been deprived of a meaningful opportunity to comment on several aspects, and a court may order the agency to open another notice-and-comment period or even start over from scratch to remedy the defect.⁷⁸

In an effort to withstand judicial review, agencies often seek the input of influential stakeholders as they develop their proposed rules, so that they will not be faced with unforeseen issues arising during notice-and-comment that require material changes in the final rule. The problem with this way of operating is twofold. First, these pre-proposal discussions lack the transparency of the agency's notice-and-comment period. The public is not privy to their contents, or even the fact that they occurred, because agencies are required to log only those contacts that take place *after* the proposed rule has been released.⁷⁹ Second, the shell-shocked agency's desire to build consensus or appease litigious stakeholders even at the brainstorming stage of rulemaking leads to policy that merely "satisfices," instead of the kind of imaginative problem solving that the agency's experts are capable of.⁸⁰

When the proposed rule is ultimately released as part of the agency's Notice of Proposed Rulemaking (NPRM), what the public sees is the result of a long process of negotiation that took place behind closed doors.⁸¹ The available options and alternatives are largely fixed by this point, restricting decisionmakers to the task of choosing among them, and the compromises littered throughout the proposal render it muddled and nearly incoherent to those who were not involved in pre-proposal discussions.⁸² Considering that industry groups vastly outperform public interest groups in these pre-proposal communications with the agency—at a ratio of 170 to 1 for one subset of EPA rules⁸³—the battle for balanced and effective regulation is often lost before it begins.

Here, we extend this account by investigating the extent of pre-proposal communications with *OIRA*, which exacerbate the transparency and accountability issues present at the agency level.

Results

Of the 1,056 meetings that took place over the studied time period and were identified with a rulemaking stage, 452 of them (43 percent) took place at the pre-proposal stage. These include a few meetings at the “prerule” stage (during which agencies “determine whether or how to initiate rulemaking”), but mostly they occurred at the “proposed rule” stage (during which agencies formulate and prepare to release their proposed rule),⁸⁴ as Figure 9 illustrates below.

Percentage of OIRA Meetings Held at Various Stages of Rulemaking

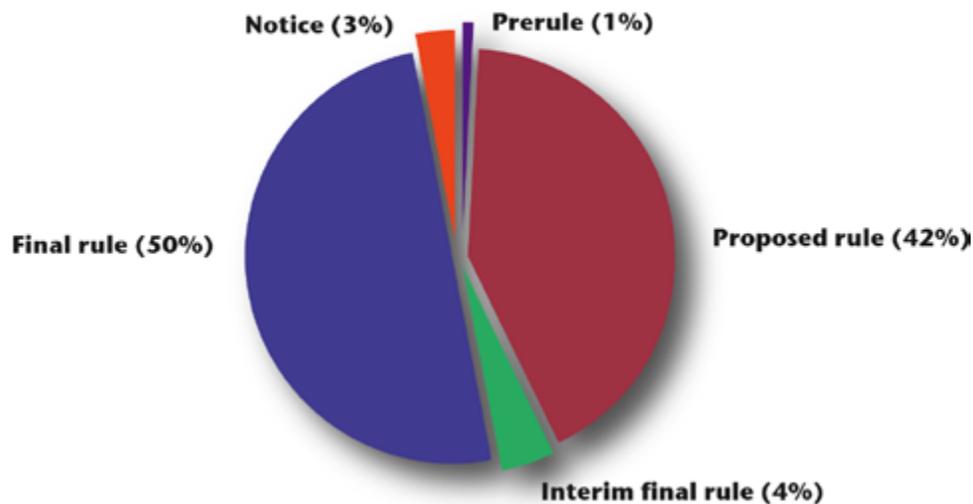


Figure 9

The percentage of meetings that occurred at the pre-proposal stage has actually been greater during the Obama Administration (47 percent) than it was during the Bush II Administration (39 percent), indicating an increasing degree of stakeholder influence over the shape of agency proposals that come out of OIRA’s review process.

These pre-proposal meetings were marked by roughly the same imbalance in interest-group representation as all OIRA meetings generally (see Figure 3 above), with 63 percent of individuals representing industry interests (industry groups and the firms attending on their behalf) and only 14 percent representing the public interest community (public interest groups and the firms attending on their behalf). A similar, if not somewhat greater, imbalance also persisted through the final-rule stage (69 percent industry attendees, 10 percent public interest).

The consistency of industry's dominance throughout the rulemaking process is likely no coincidence. Often, the interest-group imbalance at an earlier phase of rulemaking sets the stage for an imbalance at a later stage.⁸⁵ Public interest groups that are not in on the ground floor of the OIRA review process—at the pre-proposal stage—will find it harder to penetrate the proposed rules and cost-benefit analyses informed by the process. As a result, these groups may have more trouble engaging critically with these documents in further OIRA reviews or in the notice-and-comment period.

Also of interest are the 50 percent of meetings that occurred at the “final rule” stage, immediately before the agency publishes its final rule. While not presenting exactly the same problems as pre-proposal meetings, these meetings are the most blatantly duplicative of the agency's notice-and-comment process. Even if the agency itself is unconvinced by a stakeholder's comments and plans not to bend to them in its final rule, the same stakeholder may have greater success convincing the technocrats at OIRA after the end of the agency's comment period. In other words, OIRA's final-rule review period enables participants with ample resources to make an end run around the agency's notice-and-comment process.

Undermining the Agencies' Autonomy in the Rule's Formative Stages

When pre-proposal meetings are held with OIRA instead of the agency, the problems with transparency and accountability are sharpened. Because the body making the judgment calls is an outside group of economics-minded generalists instead of the agency's own experts, the lack of clarity about what concessions were made and who is responsible for them takes on a new significance.

On the transparency front, at least OIRA is required to log the *occurrence* of these pre-proposal meetings, unlike agencies.⁸⁶ But without detailed minutes of what was discussed, the public is afforded no window into the specific compromises and negotiations embedded within the resulting proposal. While OIRA is required by executive order to disclose “all documents exchanged between OIRA and the agency during the review by OIRA”⁸⁷—at the least, the proposed rule originally submitted by the agency and the revised proposal returned by OIRA—it characteristically fails to comply with this provision. Without the two documents to juxtapose, any attempt to hold the agency or OIRA accountable for the proposal is confounded.

While the agencies themselves too often cede ground to regulated industries during the development of their proposed rules, at least when they refuse to do so, they should not be undermined at the last minute by bureaucrats at OIRA. For example, EPA was surely bombarded by industry lobbyists during the development of its proposal to regulate coal ash, but it resisted such pressures and submitted a straightforward, effective proposal to

OIRA.⁸⁸ When the proposal came through the other side of OIRA's looking-glass—after 33 meetings with industry groups—it had grown 50 percent longer, included two weaker options more desirable to industry, and was accompanied by an overhauled cost-benefit analysis that dramatically rigged the numbers against EPA's original plan.⁸⁹ Were it not for EPA voluntarily posting the before-and-after versions of the document in its rulemaking docket,⁹⁰ observers would never have known which parts represented EPA's expertise and which represented OIRA's misguided fiddling.

Much better for EPA to simply release its candid proposal and solicit comments, putting all stakeholders on an equal footing, than for OIRA to pre-process the proposal before it ever sees the light of day, with early participants (mostly industry representatives) serving as a sort of focus group. OIRA's meeting policy permits privileged stakeholders to jump the gun on the agency process, enlisting OIRA's aid to establish their own footholds in the agency's proposal, which is then presented as if those compromises had been there from the start.

OIRA's Formal Review Period

Background: OIRA's Preference for "Informal" Reviews

Thus far, we have focused exclusively on OIRA's "formal reviews" of agency rulemaking actions, those that operate under the provisions of EO 12,866. But this stylized process is just the tip of the iceberg of OIRA's involvement. The executive order imposed several restrictions on formal reviews, limiting them to "significant" rules,⁹¹ imposing a 90-day maximum duration (with a possible extension of 30 days),⁹² and requiring OIRA and the agencies to disclose the changes made during review.⁹³ OIRA, presumably frustrated with these constraints and fearing that its reviews would be ineffective if relegated to a few months at the "end of the pipeline," ramped up its usage of "informal reviews."⁹⁴ According to OMB, a rule is under informal review once "OIRA has started a substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft."⁹⁵

These informal reviews begin well before the formal-review period, and OIRA's involvement is apparently quite extensive. Donald Arbuckle, a former Deputy Administrator of OIRA, has emphasized the "continuous nature of OIRA–agency communication," adding that "an OIRA analyst may talk with agency counterparts several times daily, sometimes hourly."⁹⁶ In 2002, OIRA began to boast that agencies were becoming more receptive to these ongoing communications, eagerly soliciting OIRA's feedback early in the rulemaking process.⁹⁷ Some even prefer to call them "consultations" instead of "reviews" to impart a sense of friendly collaboration instead of supervision.⁹⁸

At the same time, OIRA has made it clear that an agency faces the risk of having its rule ultimately "returned for reconsideration" if it waits until the formal-review period to get OIRA's input—an explicitly designed "incentive" to bring OIRA into the process as early as possible.⁹⁹ The agencies, well aware that OIRA holds the fate of their rules in its hands,

Ironically, for an executive order designed to enhance the transparency and accountability of OIRA's review process, EO 12,866 seems to have encouraged OIRA to push its activities even further into the shadows to escape the order's requirements.

are more than willing to keep OIRA in the loop. But it would be a mistake to read such cooperation, however cordial, as anything more than reluctant self-preservation. After all, a survey of top political appointees at EPA suggested that OIRA's feedback was fixated on reducing regulatory costs, often at the expense of the agency's substantive positions.¹⁰⁰ One respondent remarked that even when OIRA was helping to fend off attacks from other White House offices, "dealing with [OIRA] was excruciating,"¹⁰¹ with another explaining that the White House Competitiveness Council "was much more sympathetic to what we wanted to do [than OIRA]."¹⁰²

These informal reviews, conducted through phone calls and meetings between OIRA and agency staff, are said to be very effective at changing the agency's regulatory plans, according to EPA and DOT officials.¹⁰³ But the public has virtually no way of knowing what happens during these reviews, or even how long they last. OIRA has chosen to narrowly interpret the disclosure requirements of EO 12,866 so that the changes OIRA makes during informal review do not have to be identified for the public.¹⁰⁴ Both defenders and critics of OIRA's informal reviews point out that the resulting changes are not subject to the transparency requirements triggered by formal review.¹⁰⁵ What is especially puzzling about this distinction is that it assumes that OIRA and the agencies *do* in fact disclose the changes made during formal review, when nothing could be further from the truth. As we explore further below, OIRA seemingly never complies with its obligation to disclose the before-and-after documents connected with its formal reviews, and the agencies comply with their respective disclosure requirements only sporadically and in ways that often confound public scrutiny.

In any event, the changes made during informal review simply become part of the agency's original submission to OIRA, which can then pass quickly through OIRA's formal review—sometimes a mere formality by this point, since OIRA's work may already be done—and the result shows none of OIRA's fingerprints.¹⁰⁶ Needless to say, OIRA pays no mind to the 90-day deadline when conducting informal reviews, allowing its involvement to stretch much longer and thus delay the release of crucial regulations, as observed in a few closely watched cases.¹⁰⁷

Ironically, for an executive order designed to enhance the transparency and accountability of OIRA's review process, EO 12,866 seems to have encouraged OIRA to push its activities even further into the shadows to escape the order's requirements. Somewhat inconsistently, though, OIRA *does* abide by the provisions requiring disclosure of its meetings with outside parties during informal reviews (deciding for itself which parts of the executive order are important enough to comply with).¹⁰⁸ These stakeholder meetings held before the formal review period are some of the only traces left behind by the informal review process. In many ways, they represent the earliest point in time that OIRA was provably involved in an agency's rulemaking. In this part of the study, we examine these meetings for what they reveal not only about the nature of interest-group participation, but also about the way that OIRA uses informal reviews to circumvent EO 12,866.

Results

Of the 1,057 meetings that could be linked to a formal review period, 251 of them (24 percent) were held prior to the formal review—in other words, during OIRA’s *informal* review—as shown in Figure 10. The proportion of informal-review meetings was much greater under the Bush II Administration (34 percent) than it has been under the Obama Administration (10 percent), although the practice clearly continues to a significant extent.

Percentage of OIRA Meetings Held Before or During the Formal Review Period

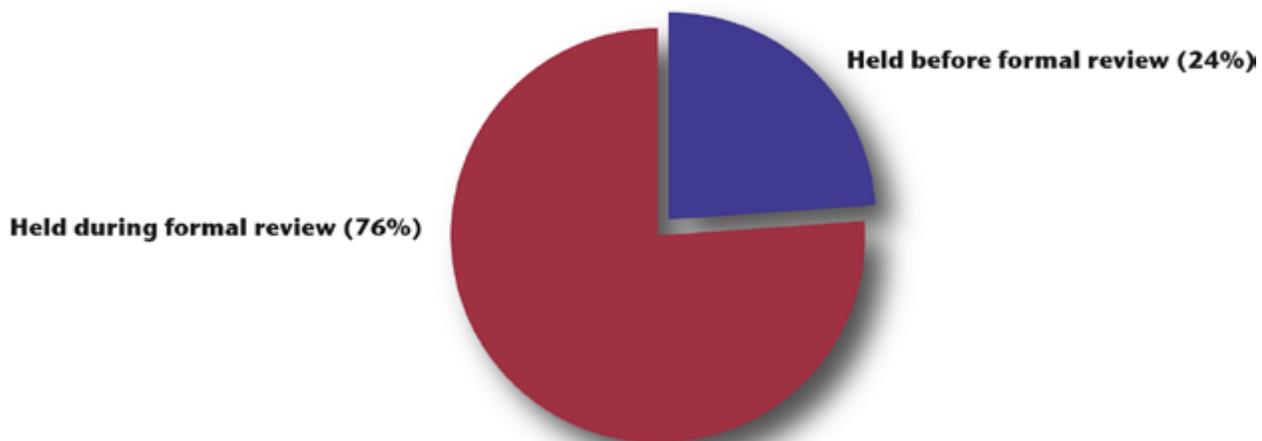


Figure 10

The agency most often subjected to these premature meetings is EPA, with HHS coming in second. Of the 251 meetings held before the formal review period, 101 (40 percent) concerned EPA rules and 72 (29 percent) concerned HHS rules, as shown in Figure 11. As one might predict, the agencies responsible for protecting the environment and the public health—the favorite targets of regulated industries—*disproportionately* bear the brunt of OIRA’s informal-review meetings (recall from Figure 6 above that EPA rules and HHS rules constitute only 11 and 16 percent of all rules submitted to OIRA, respectively).

OIRA Meetings Held Before Formal Review Period (by Agency)

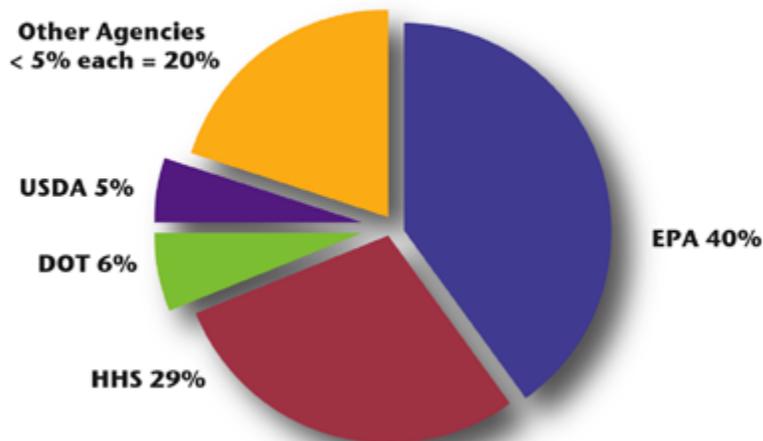


Figure 11

For each rule that was the subject of a meeting prior to formal review, we identified the earliest such meeting and calculated the time between that first meeting and the beginning of the formal review period—a rough proxy for the length of OIRA’s informal review. This time-span is a reasonable estimate, given how little information is disclosed about the informal-review period. In reality, however, OIRA may become involved in agency rules well before these initial meetings, and no one knows whether these informal reviews ever “end” at some point before the start of the formal-review period. Nevertheless, we take OIRA at its word when it insists on the continuous nature of its informal communications (in an effort to show how impractical it would be to disclose them)¹⁰⁹ and so we assume that, once started, OIRA’s informal involvement continues until the beginning of its formal review. Figure 12 below juxtaposes the durations of the informal and formal review periods for each rule discussed in one of these early meetings.

Estimating the Durations of OIRA's Informal Reviews and Comparing Them to the Durations of Its Formal Reviews

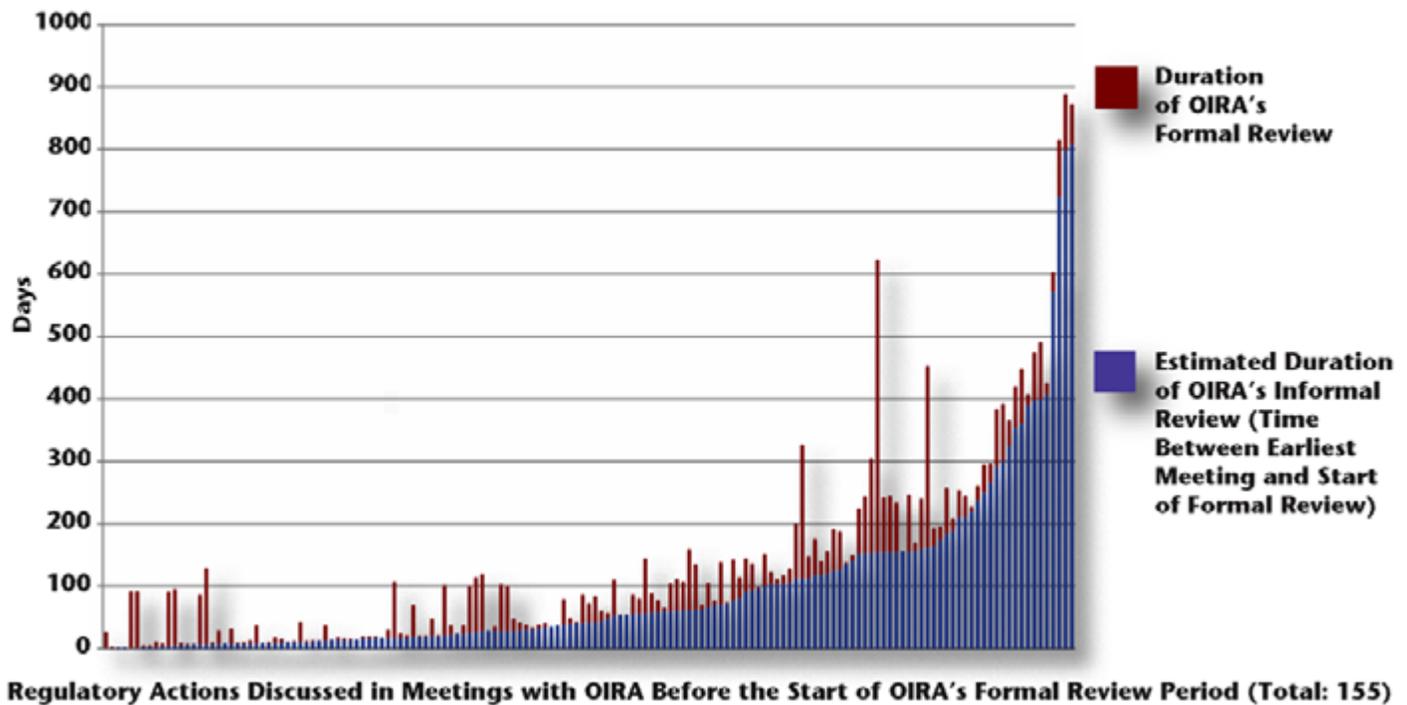


Figure 12

A total of 155 regulatory actions are displayed in the chart (three others were the subject of meetings during informal review as well, but their formal review periods have not ended yet, so a comparison would not be possible). The average estimated length of informal review was 95 days. As the chart illustrates, many of these informal reviews were significantly longer in duration than the formal reviews that followed. In many cases, the length of formal review is represented by a barely visible red “cap” of just a few days, on top of a long blue timeline of informal review (sometimes lasting hundreds of days, even more than a year on some occasions). In 16 cases, the formal review period lasted *zero* days—that is, it ended the same day it began. In another 15, the formal review period lasted just *one* day. Coming after extensive informal reviews, these perfunctory formal reviews suggest that OIRA had already made its desired changes and was simply “rubber-stamping a pre-negotiated outcome.”¹¹⁰

Figure 13 further indicates that when OIRA engages actively in informal review, the period of formal review is shortened. When OIRA meets with stakeholders exclusively during informal review (about one-fifth of the time), the average length of formal review (27 days) is one-third of what it is when OIRA seems to have waited until the formal review period to get

involved (84 days). In other words, the use of informal review appears to obviate the need for a typically extensive formal review, suggesting that both reviews fulfill the same function. OIRA apparently uses informal review not as an additional tool, but rather as a more convenient *substitute* for formal review—one that allows it to exert an even earlier influence over agency rules while keeping its suggestions off the record and evading the disclosure requirements of EO 12,866.

Average Duration of Formal Reviews, with Respect to Timing of Meetings

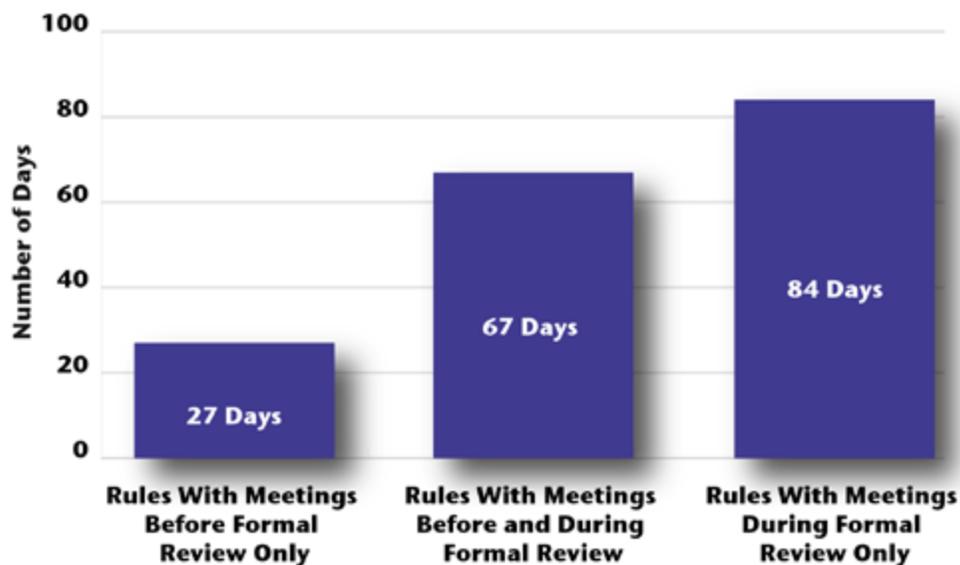


Figure 13

Indeed, we found some evidence that a larger proportion of rules pass through formal review supposedly “without change” in cases where OIRA may have already accomplished most of its changes during informal review. OIRA discloses the general outcome of each formal review that it conducts. The two most common outcomes are “consistent with change” and “consistent without change” (“consistent” meaning that the final document complies with the principles of EO 12,866).¹¹¹ The label “consistent with change” is not very revealing since it does not specify whether the changes made during review were trivial or significant—but given OIRA’s scant disclosures, it is the best indication we have that OIRA altered an agency’s rule. The third most common outcome is “withdrawn,” indicating that the agency withdrew its draft rule from OIRA’s review process. In some cases, however, the circumstances suggest that OIRA may have pressured the agency into “withdrawing” a rule that OIRA disliked, so that OIRA could avoid officially “returning” the rule and thus having to spell out its objections for all to see in a Return Letter.¹¹²

As Figure 14 shows, if all the meetings about a given rule occurred during *informal* review (before formal review), the rule was over four times more likely to be passed through formal review “without change” than if all the meetings occurred during *formal* review (13 percent compared to 3 percent, respectively). The chart suggests that as the meetings increasingly occur during formal review, these “unchanged” rules start to dwindle, being replaced by more “changed” and “withdrawn” outcomes.

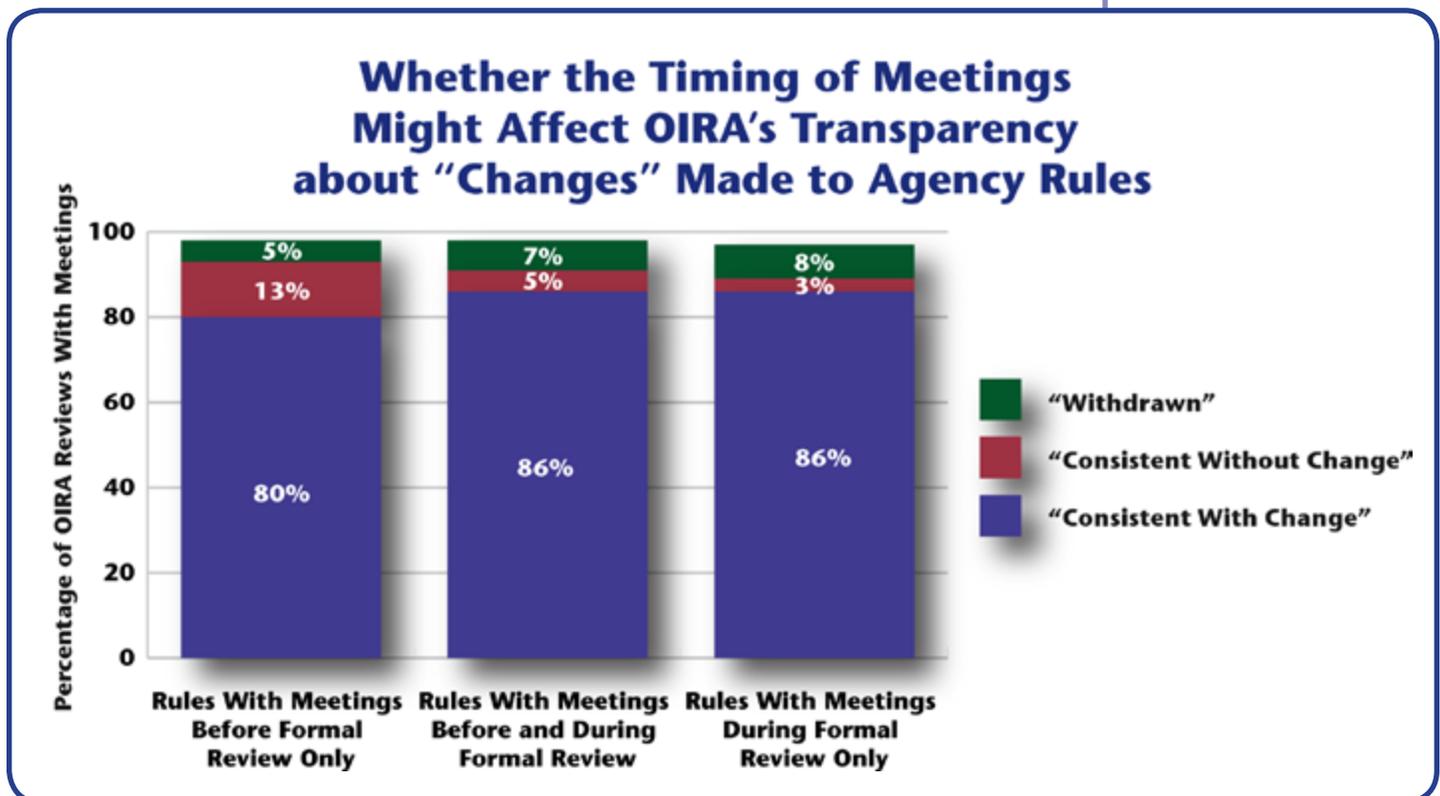


Figure 14

Although we cannot know for sure how to explain these statistics, we can supply a reasonable hypothesis. Meetings held before the formal-review period indicate that OIRA was actively involved in informal review and presumably making many of its changes then, so that by the time of formal review, it could simply approve the agency’s submission “without change”—that is, without *further* change. On the other hand, when OIRA’s involvement was concentrated in the formal-review period, and OIRA suddenly encountered agency rules that were developed largely without its input, it was more likely to officially demand changes at that time (hence the greater proportion of “changed” rules: 86 percent instead of 80 percent). Also, OIRA’s first impression of disapproval may trigger the agency to withdraw the rule (hence the slightly greater proportion of “withdrawn” rules: 8 percent instead of 5 percent).

Of course, we should not overlook the fact that at least 80 percent of these rules were “changed” during formal review in all three scenarios. Further studies might try to determine the significance of these changes, to investigate whether those made after a long period of informal review tend to be more trivial than others (*i.e.*, polishing changes).

Also, the significant percentage of “withdrawals,” especially where there seems to have been little involvement by OIRA prior to formal review (8 percent of rules were withdrawn), raises the suspicion that they are indeed being used as a less-transparent way for OIRA to “return” rules that it finds unacceptable. Recall that OIRA uses the threat of a “returned” rule as an incentive for agencies to cooperate with informal reviews, and then consider the fact that among the reviews we examined (those marked by meetings with outside parties) OIRA used its formal “return” mechanism only four times in ten years, while 36 reviews ended in “withdrawals.” Indeed, the U.S. General Accounting Office (GAO) found in 2003 that several withdrawals were at OIRA’s request or by “mutual decision” by OIRA and the agency.¹¹³ The circumstances surrounding such withdrawals merit further study.

As for the kinds of interest groups that lobby OIRA during informal review, industry groups dominate the field once again, to an even greater extent than during formal review (see Figure 15 below). In meetings held during formal review, industry representatives outnumber public interest representatives by about 4 to 1. But during informal review, the ratio is nearly 10 to 1—an imbalance more than twice as severe. The more that OIRA pushes its process away from well-demarcated formal reviews and toward nebulous informal reviews, the more that public interest groups are left in the dust, most likely because they cannot afford to devote their attention or resources to modes of participation that are so speculative and premature.

Taken all together, these data suggest that OIRA’s use of informal reviews is a way of gaming the system to avoid accountability for its role in agency rulemaking, a twisting of EO 12,866 that reduces the main event—formal review, with its various safeguards and restrictions—to a vestigial afterthought. And by maintaining its meeting policy during informal review, OIRA gives regulated industries an even earlier opportunity to disparage the agencies’ barely formed rules, with almost no balance from other viewpoints. Ironically, any public interest groups that join the process at the scheduled time (formal review) are likely to find that they arrived too late.

Percentage of OIRA Meeting Attendees Representing Industry and Public Interest, with Respect to Timing of the Meetings

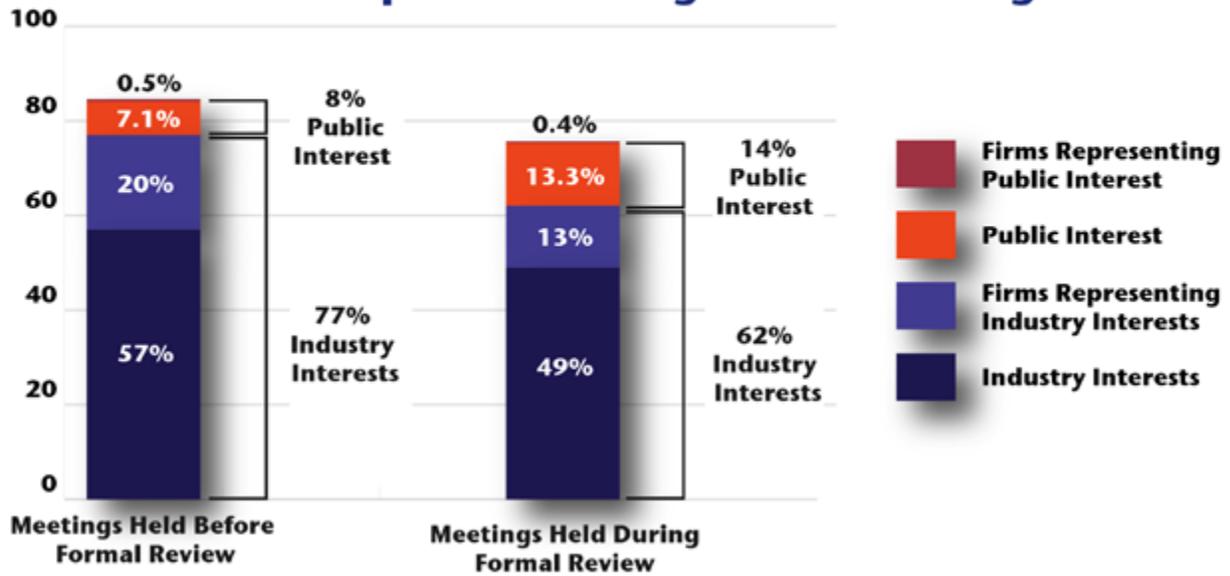


Figure 15

These delays are particularly troubling and wasteful when they occur at the pre-proposal stage, in light of the additional delays still to come after the agency is permitted to publish its proposed rule.

Why: The Purpose and Impact of OIRA Meetings

Delaying the Publication of Agency Rules

Background: The Problem of Rulemaking Delay

From the beginning, OIRA's review process led to substantial delays in getting rules published in the *Federal Register*, sometimes holding up significant regulatory initiatives for years.¹¹⁴ In 1993, EO 12,866 introduced a deadline of 90 days, allowing for a one-time extension of 30 days (with the approval of OIRA's director *and* at the request of the agency head),¹¹⁵ and in most cases OIRA completes its work within the allotted time. But in a number of very noteworthy rulemakings, OIRA's reviews extend well beyond the maximum of 120 days. For example, OIRA's review of EPA's proposed coal-ash regulation lasted over six months, and EPA's proposal to list five dangerous chemicals under the Toxic Substances Control Act (TSCA) has been languishing in review ever since May 2010 (over 15 months, as of this writing).

These delays are particularly troubling and wasteful when they occur at the pre-proposal stage, in light of the additional delays still to come after the agency is permitted to publish its proposed rule. For example, in the coal-ash rulemaking, after OIRA held onto EPA's proposal for six months, EPA was finally able to open its public comment period, which normally lasts 90 days but was extended by another 60 days to accommodate the flood of comments (many of which, incidentally, covered the same arguments presented to OIRA over the prior six months).¹¹⁶ With 450,000 comments to sift through, EPA predicted it would take a year or more to issue a final rule.¹¹⁷ As time ticks away, communities living near coal-ash dumps continue to suffer from poisonous groundwater, blowing piles of dry ash, and enormous ash ponds that threaten to spill.¹¹⁸

Indeed, these delays are not merely frustrating or inconvenient; they permit ongoing hazards to go unabated (pollution, dangerous work conditions, food contamination) on a daily basis. Consider this current example: in early August 2011, while child labor rules proposed by the Department of Labor gathered dust on OIRA's desk for their ninth month, two 17-year-old boys had their legs severed by a large grain auger while on the job.¹¹⁹ The rules, which classify certain farm work as too dangerous for minors, may have prevented such an accident if they had not been inexplicably stalled in review for so long.¹²⁰

In this part of the study, we investigate the relationship between meetings with OIRA and the length of OIRA's review—specifically, whether stakeholder participation tends to prolong OIRA's review period and exacerbate delays.

Results

Of the 501 completed reviews that we examined (those in which OIRA met with outside parties), 59 reviews (12 percent) lasted longer than 120 days and were thus in violation of EO 12,866, as shown in Figure 16. Within these, 22 reviews extended beyond 180 days (about six months).

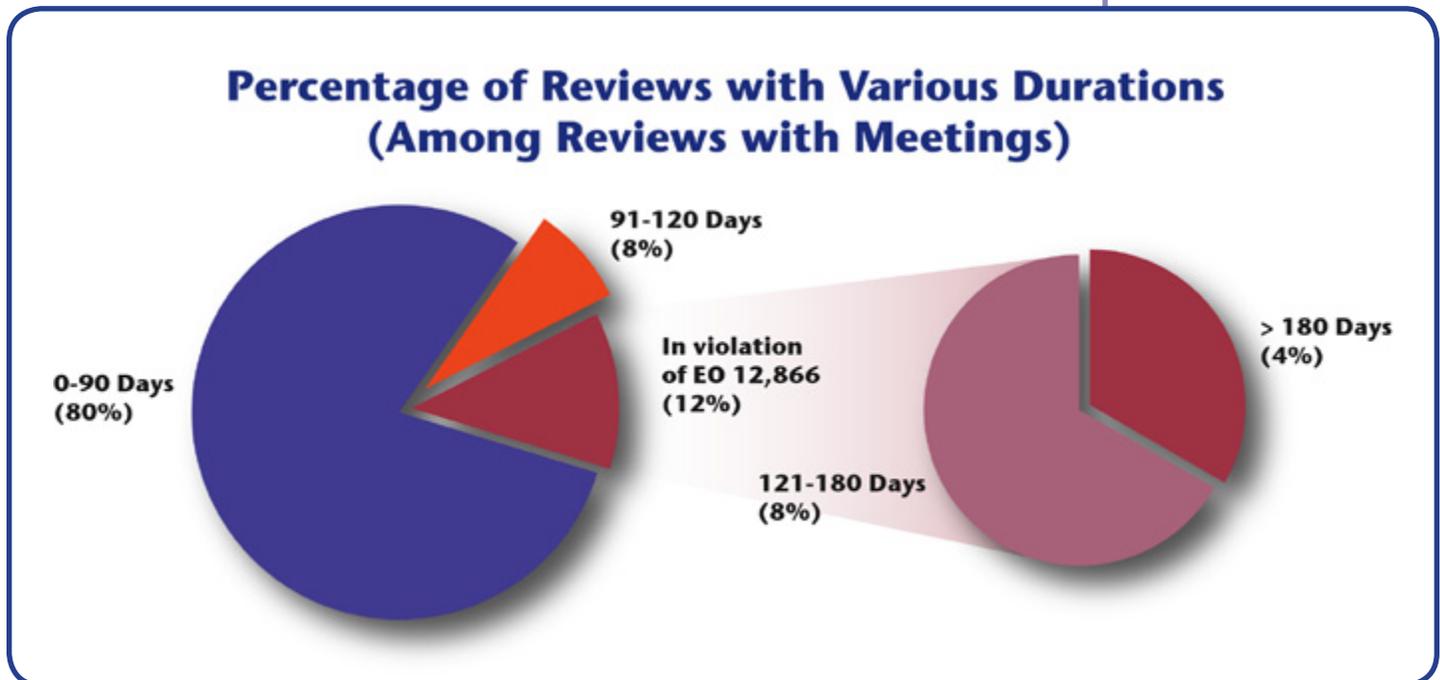


Figure 16

Of the 99 completed reviews that were longer than 90 days (and thus would require the 30-day extension under the executive order), 36 of them were not marked as “Review Extended” in OIRA’s online historical reports.¹²¹ While this may indicate a simple omission on the website, it may also suggest that the 90-day deadline was permitted to lapse about one-third of the time, without OIRA going through the official procedure of obtaining the extension. Already it seems likely that OIRA extends these reviews without the consent of the agency head, in violation of EO 12,866. For example, we are unaware that EPA Administrator Lisa Jackson ever agreed to OIRA’s extended review of EPA’s coal-ash proposal.

As for any correlation between meetings and the length of review, Figure 17 suggests that reviews with meetings last, on average, 20 days longer than reviews without meetings. This disparity is twice as large under the Obama Administration (31 days longer) than it was under the Bush II Administration (16 days longer).

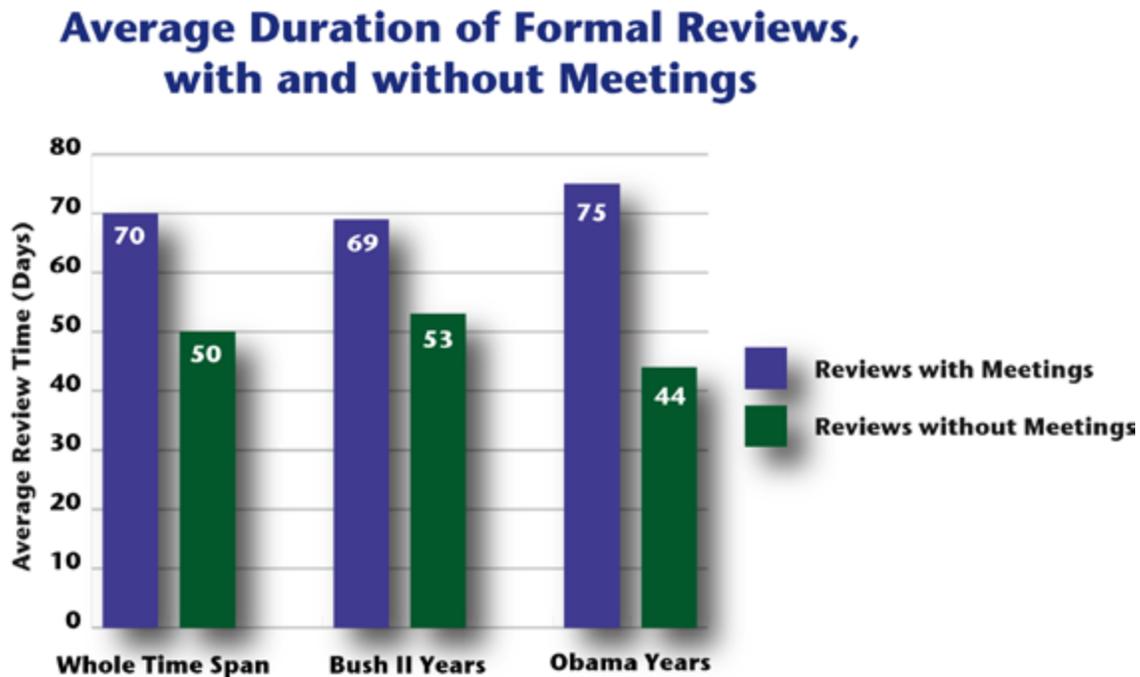


Figure 17

The Relationship between Meetings and Lengthy Reviews

Whether this pattern is evidence of a cause-and-effect relationship between meetings and longer review periods is unclear. On one hand, meetings and longer durations may be reflections of a common underlying factor. For example, rules that are particularly controversial may be more likely to generate meetings among interested parties, and they may also take OIRA longer to evaluate because of the issues involved.

On the other hand, meetings may actually lengthen the review process. The need to schedule meetings with a large number of groups, in addition to the time and attention spent on the arguments of attendees instead of on the review itself, may unnecessarily prolong OIRA's review. Such delays might be especially likely when an entire industry launches an extensive campaign of participation, drawing on all its member companies and associations to hammer the same points in a succession of meetings (*e.g.*, 33 meetings attended by 88 industry representatives during the coal-ash review that lasted 200 days; 17 meetings attended by 67 industry representatives during the review of a rule on obtaining mortgages that lasted 97 days).¹²² The association between meetings and longer reviews only encourages industry groups to act strategically by overwhelming the meeting process. Even if a regulation is sure to be issued at some point, large businesses can save an enormous amount of money in compliance costs just by delaying it for a few weeks or months.

Then again, quantity isn't everything: even a small handful of meetings with influential industry groups may be enough to alert OIRA to the high political stakes involved, and OIRA may simply stall the review in order to protect industry interests for as long as possible. For example, the FDA's final rule on cattle feed standards (to prevent the spread of mad cow disease) provoked only two meetings, attended by 14 individuals representing the "Who's Who" of the feed and rendering industries.¹²³ Yet OIRA still sat on the rule for 172 days. What ultimately jogged OIRA into action was a decision by South Korea to lift trade restrictions on U.S. beef if the U.S. would adopt cattle feed restrictions—the very ones that had been growing moldy at OIRA for nearly six months.¹²⁴ Two days after the trade announcement, OIRA suddenly wrapped up its review, thereby confirming that there had been no legitimate reason for the delay in the first place.¹²⁵ The only thing preventing OIRA from completing its review on time was its desire to appease powerful agribusiness companies that strongly objected to the rule under review.

Changing the Substance of Agency Rules

Background: Inadequate Documentation of Changes Made During Review

Above, we concluded that OIRA uses informal reviews in part to make changes to agency rules without having to comply with EO 12,866's disclosure requirements. But even when OIRA waits until the formal review period to meddle with the agency's submission, it continues to shirk its transparency obligations and instead shifts all responsibility for making disclosures to the agencies themselves.

EO 12,866 assigns separate disclosure requirements to OIRA and the agencies. OIRA, for its part, is required to "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA" after the rule is published in the *Federal Register* or the agency decides not to issue it.¹²⁶ At a minimum, these documents would include the agency's original draft as it was submitted and OIRA's final version returned to the agency (typically a "redlined" document showing OIRA's revisions), if not additional notes and suggestions passed between them.

But OIRA does not disclose these before-and-after documents anywhere on its website. OIRA insists that the requirement applies only to "exchanges made between OIRA staff at the branch chief level and above, not documents exchanged between OIRA desk officers and staff in regulatory agencies."¹²⁷ Because review documents are virtually always exchanged between agency staff and OIRA desk officers¹²⁸ (perhaps by design), this self-serving interpretation seems to alleviate OIRA of its responsibility.

The agency issuing the rule is required to identify the “substantive changes” between its pre-review draft and its final action “in a complete, clear, and simple manner,” specifying those changes “that were made at the suggestion or recommendation of OIRA.”¹²⁹ Without any government-wide guidance on what exactly to disclose, or monitoring of agency compliance, the transparency of agency disclosures has been wildly inconsistent.¹³⁰ Agencies often fail to identify changes, or specify whether any of them were attributable to OIRA, even upon personal request (on one occasion in 2002, a Department of Labor representative insisted that it would be illegal to disclose such information).¹³¹ At the same time, some agencies (especially EPA) often go above and beyond their duties by disclosing before-and-after documents and other exchanges with OIRA.¹³² The GAO found that it was actually harder to find the relevant documentation in 2009 than in 2003 due to the difficulty of searching the online “Federal Docket Management System” (www.regulations.gov).¹³³ Rules typically do not even indicate whether any such documents are available in the docket, and the documents themselves are labeled and filed (by hired contractors) in non-uniform ways.¹³⁴

In short, the reality of these disclosures is anything but “complete, clear, and simple.” As for now, the only readily available indications of OIRA’s changes are the terse labels that OIRA uses to describe its “completed action” for each review:

- **“Consistent with change”** where “consistent” means that the final document is consistent with the principles of EO 12,866
- **“Consistent without change”**
- **“Withdrawn”** by the agency
- **“Returned for reconsideration”** by OIRA
- A **“statutory or judicial deadline”** by which the rule was required to be issued, thus cutting short OIRA’s review
- Other outcomes that occur only rarely: **“sent improperly”** and **“emergency”**¹³⁵

Admittedly, these labels are a crude instrument for measuring the extent of OIRA’s changes. Whether OIRA makes minor alterations to a rule’s punctuation or drastically rewrites its central provisions, the label is the same: “consistent with change.”¹³⁶ The label also gives no indication of the *direction* of any changes made, whether the rule was weakened or strengthened. Even worse, OIRA claims that the “changes” may have been made entirely on the issuing agency’s initiative while the rule was under review.¹³⁷ We would much prefer to evaluate OIRA’s influence in a more fine-grained, qualitative way, but the dearth of other sources of information leaves us to work with these labels as best we can.

In this part of the study, we examine any correlations between rules discussed in meetings with OIRA and rules that are “changed” during OIRA’s review, to estimate (very roughly) whether stakeholders are successful at obtaining their desired changes from participating in the process.

Results

Over the entire time period studied (October 16, 2001 to June 1, 2011), reviews in which OIRA met with outside parties were 29-percent more likely to be “changed” than those with no meetings (85 percent divided by 66 percent, see Figure 18). During the Bush II years, reviews with meetings were 35-percent more likely to be changed than those without (85 percent divided by 63 percent). During the Obama years, the difference has been much less severe: reviews with meetings have been only 8-percent more likely to be changed (82 percent divided by 76 percent). Thus, among reviews with meetings, the proportion of “changed” rules has stayed remarkably consistent across both Administrations (85 percent under Bush, 82 percent under Obama). What has changed is that under Obama, OIRA has been changing more rules even without meetings (76 percent, compared to 63 percent under Bush), thus narrowing the gap.

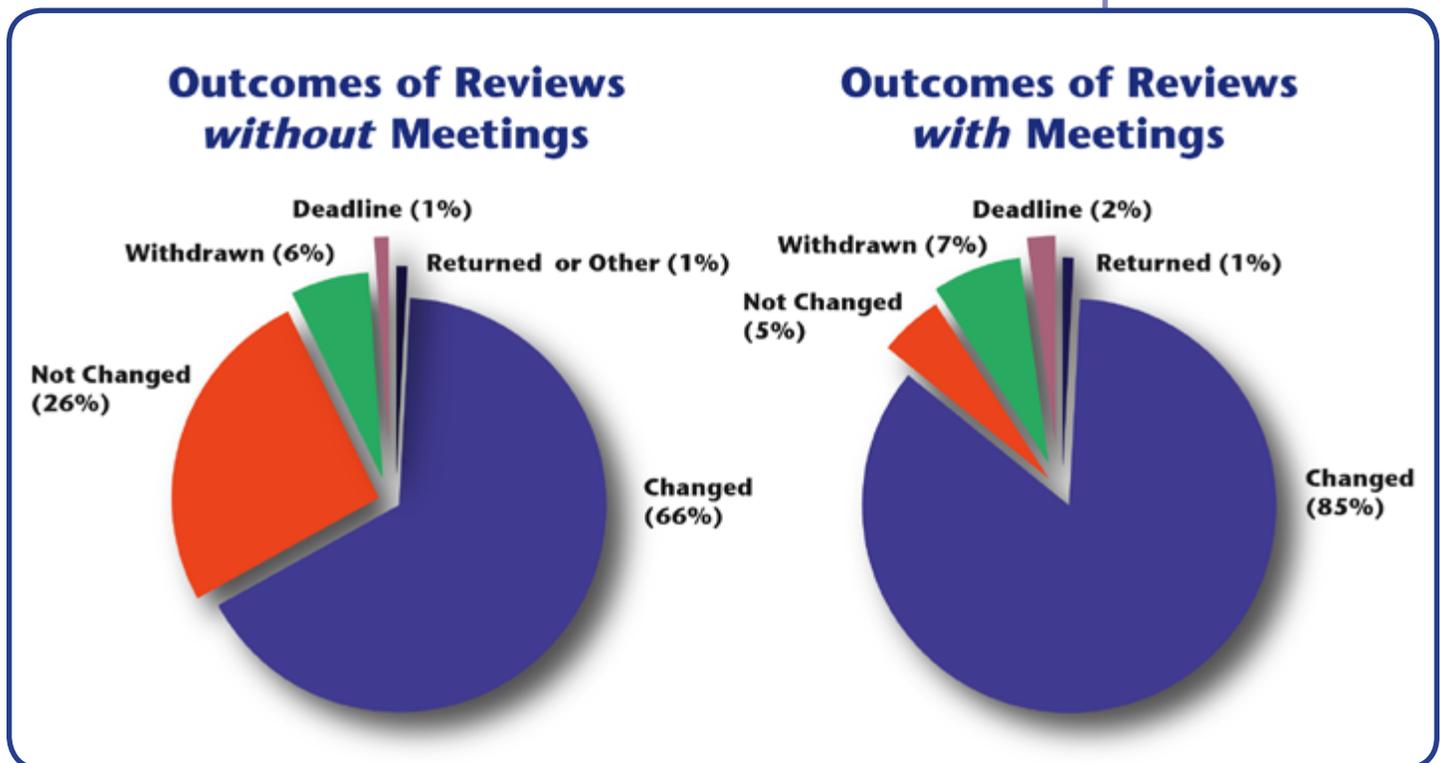


Figure 18

In Steven Croley’s study of OIRA meetings in the Clinton era, he found that EPA rules were particularly likely to be “changed,” as compared to rules from other agencies, even if they were not the subject of meetings with OIRA.¹³⁸ Indeed, Figure 19 below demonstrates that among *all* OIRA’s reviews (those with meetings and those without), a greater proportion of EPA rules were changed (84 percent) than those of other agencies (65 percent). This pattern is further evidence that OIRA disproportionately targets EPA.

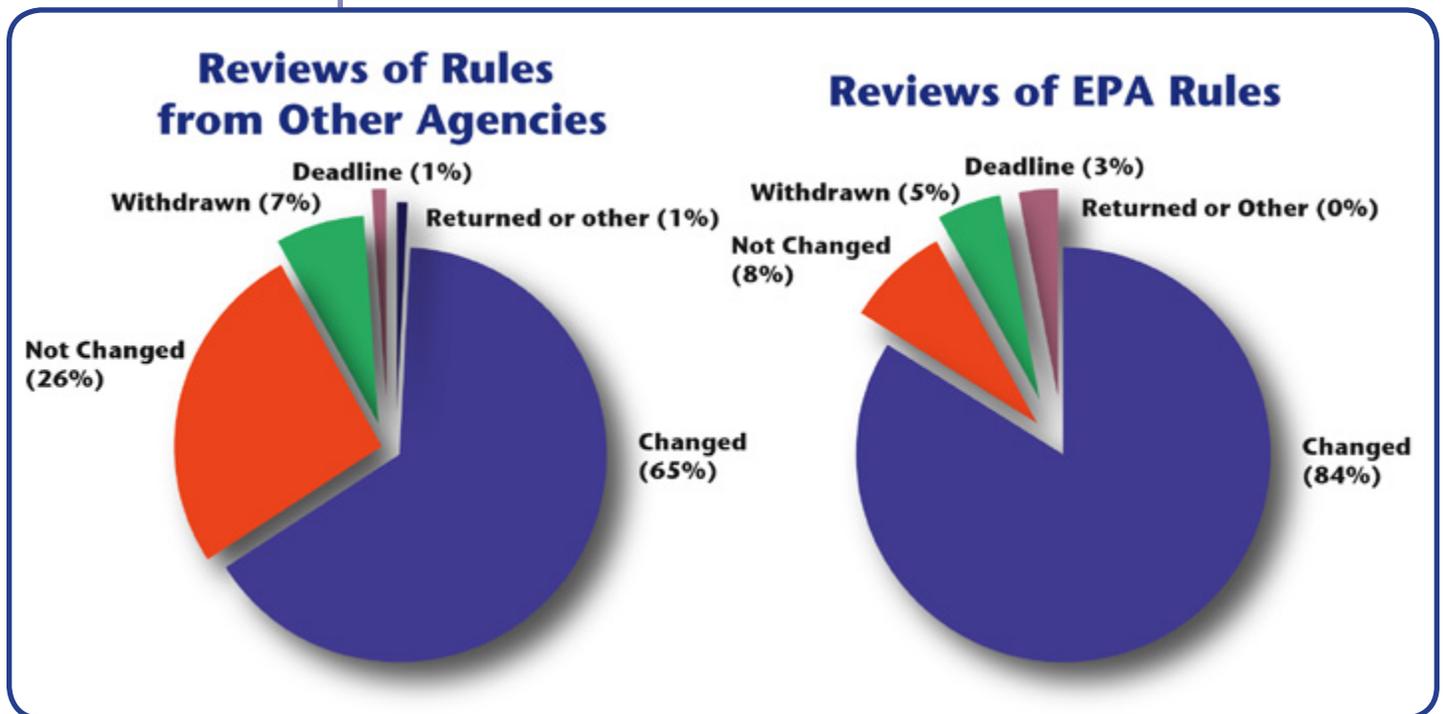


Figure 19

At first glance, the occurrence of meetings appears not to make a difference in OIRA's treatment of EPA rules. EPA rules that were the subject of meetings were changed 85-percent of the time, while EPA rules that were *not* discussed in meetings were changed 83-percent of the time (results not shown here)—hardly a significant difference. But when each Administration is examined separately, a different pattern emerges.

Under Bush II, OIRA's meetings with outside parties did in fact seem to result in more frequent changes to EPA rules (see Figure 20). Rules were 7-percent more likely to be "changed" when meetings occurred (89 percent divided by 83 percent) and were one-sixth as likely to pass through review "without change" (2 percent compared to 12 percent).

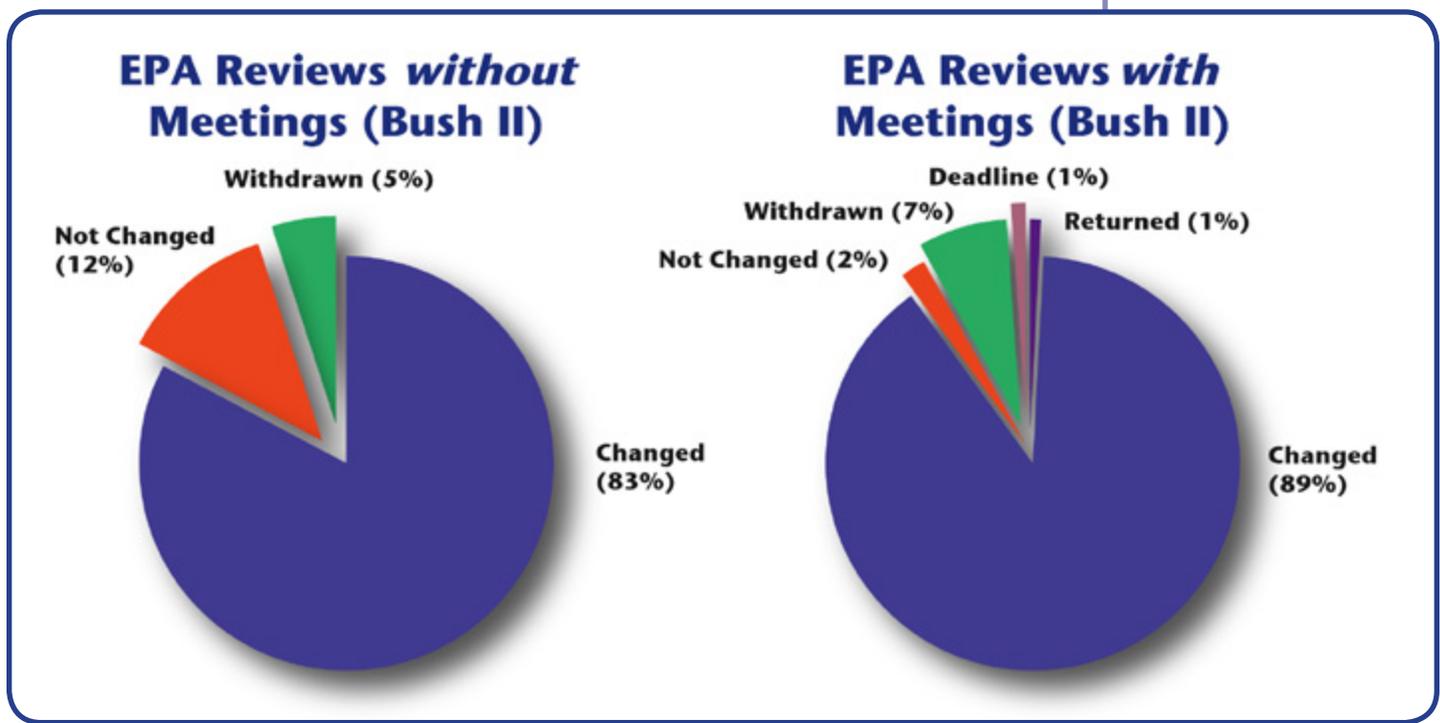


Figure 20

Under Obama, OIRA strangely appears less likely to change EPA rules when it meets with outside parties (see Figure 21). But some of the data demand a closer look. First, it is somewhat remarkable that among reviews with meetings, none of the rules passed through “without change.” Second, the results show a surprising number of “deadline” outcomes (19 percent of reviews with meetings) when OIRA met with outside parties, something that was exceedingly rare under Bush. When OIRA’s review is cut short by statutory or judicial “deadline,” the label gives no indication of whether any changes were made during the truncated review. Indeed, it is essentially useless as an indication of what happened during review.

So, we identified the ten EPA rules comprising the 19-percent “deadline” outcomes and searched through the online rulemaking docket for evidence of OIRA’s changes. For nine of them, EPA had posted redlined documents showing OIRA’s revisions, and in most cases, email correspondence between OIRA and EPA implying that changes were made. In seven of these, OIRA had made what seem like extensive changes to the rule—typically both the preamble and the text of the regulation itself.¹³⁹ In the other two, OIRA appears to have changed, at the least, the impact assessments that accompany the agency’s rule.¹⁴⁰ Without a clear summary of the changes made, we could not ascertain how substantive or significant these changes were. But given that OIRA uses the label “consistent with change” when even clerical corrections were made, we find it misleading that so many of these rules were simply labeled “deadline.”

If we were to consider these nine “deadline” rules to be “changed,” then EPA rules that are the subject of meetings would have been changed *94 percent* of the time instead of 77 percent. Coincidentally, that is the same exact percentage that Croley found in his Clinton-era study, for EPA rules discussed at meetings with OIRA.¹⁴¹ With this new figure, it would appear that meetings *do* in fact correspond with the likelihood that OIRA will change EPA rules under Obama, although it is difficult to estimate by what percentage, since we do not know how many “deadline” outcomes among reviews *without* meetings are also hiding OIRA’s changes.

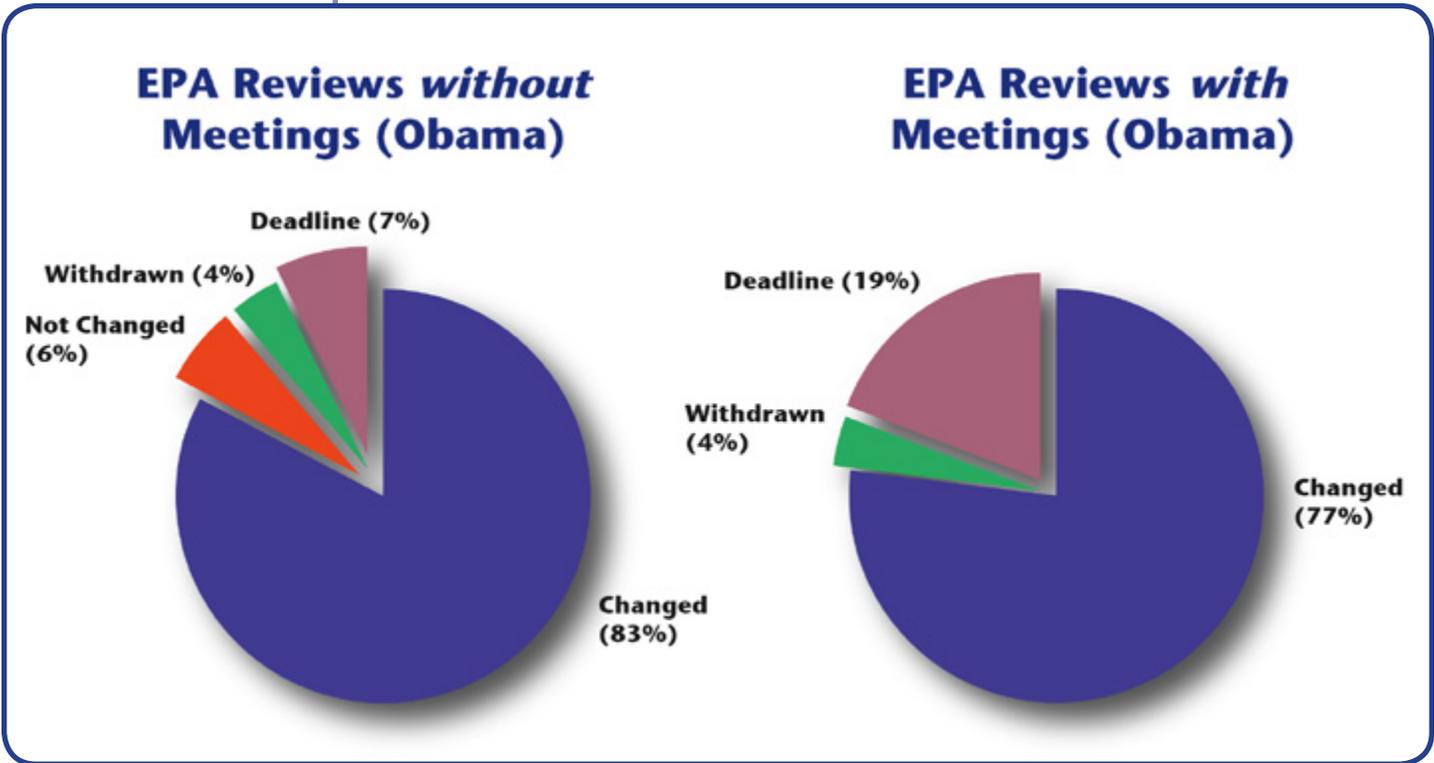


Figure 21

In any case, rules from agencies other than EPA are much more sensitive to the effects of meetings, to a greater extent under Bush than under Obama (results not shown here). In the Bush years, when a non-EPA rule became the subject of a meeting, the likelihood that OIRA would change the rule increased by 38 percent (84 percent divided by 61 percent). In the Obama years, the likelihood that OIRA would change the rule increased by only 13 percent (85 percent divided by 75 percent), although the agencies were also 50 percent more likely to withdraw the rule from review when meetings were held (12 percent divided by 8 percent).

Returning to the set of all reviews (from all agencies and under both Administrations), we find that the percentage of rules that are changed increases along with the number of meetings held, as shown in Figure 22. Technically, the percentage of “changed” rules reaches a peak of 96 percent at four meetings (from a low of 67 percent at zero meetings). However, after three meetings, the handful of rules that are not “changed” are listed as “deadline” outcomes, so it is quite likely that virtually *all* reviews with four or more meetings are in fact changed.

Relationship between the Number of Meetings and the Outcome of Review

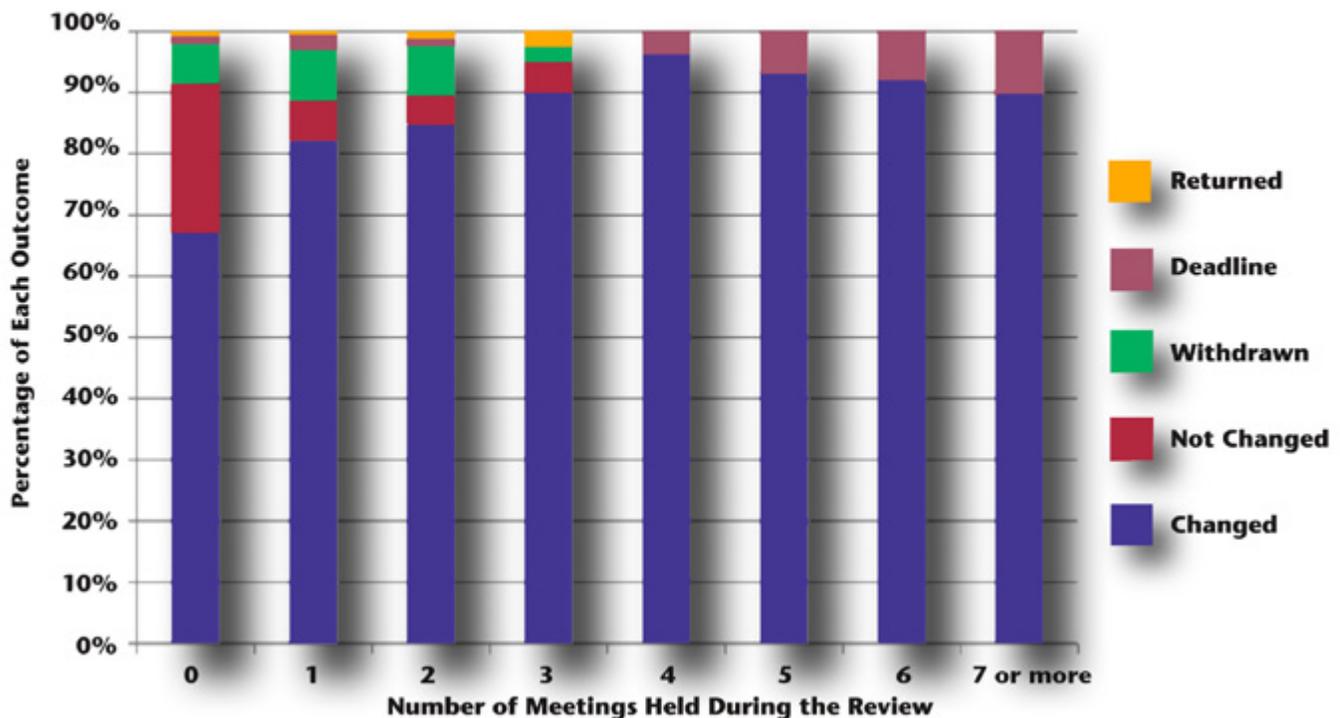


Figure 22

This dynamic should only encourage groups of stakeholders to arrange several meetings with OIRA, if they have the resources or wisdom to do so. Among reviews with meetings, 39 percent were marked by more than one meeting (see Figure 23). At the same time, even one meeting with OIRA increases the likelihood that the rule will be changed by 15 percentage points (67 percent to 82 percent, as shown in Figure 22 above), with further meetings bringing diminishing returns. So overall, scheduling just one meeting with OIRA is not an unwise strategy.

Percentage of Reviews with Various Numbers of Meetings (Among Reviews with Meetings)

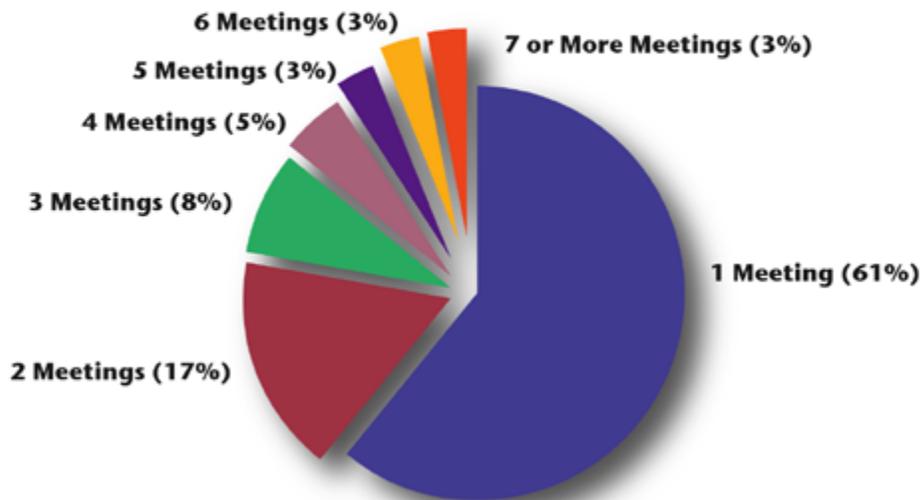


Figure 23

OIRA as a One-Way Ratchet That Only Weakens Agency Rules

While OIRA's vague disclosures give us no indication of *how* it changes any of these rules, a number of studies suggest that OIRA almost exclusively weakens agency rules. A survey of top political appointees at EPA under Bush I and Clinton suggested that OIRA *never or rarely* made changes that would enhance protection of human health or the environment, and *often or always* made regulations less burdensome for regulated entities.¹⁴²

In another study, the GAO identified 25 rules that were “significantly changed” by OIRA between June 2001 and July 2002.¹⁴³ CPR Member Scholar David Driesen then examined these changes and concluded that for *24 of the 25 rules*, OIRA's suggested changes “would weaken environmental, health, or safety protection” (in the remaining rule, the change had no impact on safety, one way or another).¹⁴⁴ OIRA met with outside parties about only 11 of these 25 rules, so obviously many of the changes were coming from OIRA itself.¹⁴⁵ Indeed, as our data suggest, even though OIRA is *more* likely to change rules when it meets with outside parties, it still changes rules at an alarming rate (65 to 83 percent) even without meetings. Its institutional role (serving as a “check” on “excessive” regulation) and the biased methodology that it uses (cost-benefit analysis) are more than enough to undermine protective regulations, with or without the shrill complaints of regulated industries to help it along.

At the same time, it would be a mistake to write off the influence of industry participation. Although Croley found a correlation between meetings and rule changes in the Clinton era, he argued that there was no cause-and-effect relationship, simply chalking it up to the underlying controversy of the rules: politically controversial rules would be more likely both to generate meetings and to attract OIRA's more aggressive scrutiny.¹⁴⁶ But in the GAO's study, for 7 of the 11 rules that were the subject of meetings, the changes made by OIRA were directly traceable to the suggestions of industry groups.¹⁴⁷ And in several highly publicized EPA rulemakings during the Obama Administration, industry participants have gotten exactly what they wanted from lobbying OIRA:

- *Coal ash*: The ash-recycling industry insisted that a hazardous-waste designation on disposed coal ash would impose a crippling *stigma* on its “beneficial uses.” OIRA adopted the industry’s argument with such blind enthusiasm that it estimated a “stigma cost” of \$233.5 billion, in a calculation so careless and arbitrary that it should have been embarrassing to an office that prides itself on mathematical rigor.¹⁴⁸
- *Boiler MACT*: Chemical plants and other manufacturers objected “ferociously” to EPA’s proposed “maximum achievable control technology” (MACT) standard for industrial and commercial boilers, arguing that its costs would be unacceptably high.¹⁴⁹ After meetings with OIRA, at which they argued for a weaker rule and offered letters from members of Congress in support of their attack,¹⁵⁰ the final rule that emerged had been modified so as to cut the costs in half.¹⁵¹ The resulting protections are “modest” by comparison to EPA’s original proposal.¹⁵²
- *Lead Renovation, Repair, and Painting Program (RRP)*: A key testing provision was dropped from EPA’s proposed lead paint rule following intensive lobbying by the home-renovation industry.¹⁵³ One top executive wasted no time boasting of the industry’s influence: “The Window and Door Dealers Alliance made this battle a top priority and organized industry leaders to attend a White House meeting with OIRA officials in order to present the industry case against the regulation ... In the end, we prevailed.”¹⁵⁴

How Industry’s Dominance of the Meeting Process Translates into Influence

Whenever OIRA is confronted over its meeting policy, it dismisses any implication that industry groups are actually gaining an advantage by meeting with OIRA more often: “The numbers of meetings that ‘one side’ gets versus another is not indicative of one side getting more input into the process.”¹⁵⁵ Indeed, OIRA’s “all you can meet” policy is premised on the idea that more information is always better, and that OIRA is capable of objectively filtering through all the information that comes its way—a highly idealized picture of decisionmaking.

In many ways, though, the amount of information that one side is allowed to inject into the system *does* give it an advantage over other groups that have trouble keeping up. In the

context of lobbying agencies, CPR Member Scholar Wendy Wagner has written about the phenomenon of “information capture,” by which stakeholders use “costly communications—well beyond what is necessary to convey the message—to gain control over regulatory outcomes.”¹⁵⁶ Those with greater access to relevant information, superior resources, and higher stakes are better situated to dominate the game.¹⁵⁷ According to Wagner, information capture is the result of “filter failure.”¹⁵⁸ The administrative process typically fails to impose limits on the content and volume of information submitted by participants, often out of a well-intentioned “commitment to open government and full participation.”¹⁵⁹

Of course, information capture in the context of OIRA is not exactly the same as it is in the context of the agencies themselves. For example, an agency’s public-comment period creates different incentives for information overload (to preserve claims in future litigation)¹⁶⁰ and spits out whatever information it takes in (by publishing all the comments), further adding to the complexity that other groups have to navigate.¹⁶¹ But the operating principles are the same: (1) given a sharply uneven playing field, failing to regulate the flow of information will result in a gross imbalance in participation, and (2) in a regulatory system that runs on information, “quantity does matter.”

Indeed, the inherent malleability of cost-benefit analysis—OIRA’s principal decisionmaking tool—renders it particularly susceptible to industry’s influence. Cost-benefit analysis is founded upon the idea that “numbers [are] attachable to the probabilities and magnitudes of possible outcomes,” when in reality “such numbers are rarely available, [so] they are usually assumed or invented.”¹⁶² For instance, when OIRA needs specialized information about how an industry operates, in order to predict how a given regulation will affect its bottom line, the industry is put in a uniquely powerful position. Industry-supplied estimates of technology costs and market effects ultimately become etched in stone. To OIRA, numbers that are biased, speculative, or even arbitrary are preferable to no numbers at all (OIRA’s adoption of the industry’s “stigma” prediction in EPA’s coal-ash rulemaking is a prime example).

Conclusion

Those familiar with the scholarly work of Cass Sunstein might expect him to understand better than anyone how an overwhelming quantity of industry input could sway decisionmakers. As a scholar and an administrator, Sunstein is fascinated with “behavioral economics,” a theory that emphasizes the cognitive biases and heuristics that limit the rationality of human thinking.¹⁶³ Just as Sunstein wastes no opportunity to discuss how the average person’s decisions—what we eat, what we buy, how we spend our time—are shaped by context, we must also recognize the unique institutional and informational context that is likely to influence decisionmaking at OIRA.

The overwhelming abundance of industry-supplied information makes it far more cognitively “available” to OIRA analysts than the rarely heard voices of the public interest community. And in a political context that elevates even the most mundane regulatory dispute to a battle over the soul of the country—determining once and for all whether the President supports

the business community or stubbornly adheres to “big government” tactics—OIRA is hardly immune from the pressure of appeasing powerful business interests. Finally, OIRA’s institutional biases toward economically minded arguments and sober-minded probabilities favor the arguments of industry groups over those of public interest groups, which are often in the position of urging greater protection against unknowable or unprecedented risks.

Theorizing aside, we can at least rely on common sense: if regulated industries consistently failed to get results from their expensive lobbying of OIRA, would they continue spending their resources on a fruitless endeavor?

Recommendations for Reform

At the beginning of the Obama Administration, CPR Member Scholars urged OIRA Administrator Cass Sunstein to shift OIRA’s emphasis from reviewing individual rules to concentrating on cross-cutting regulatory problems, such as the threats posed by unsafe imports.¹⁶⁴ By the beginning of the third year of President Obama’s first term, it became clear that the Administration was determined to use OIRA as the leading edge of its political efforts to placate big business in an effort to neutralize its attacks on the Administration in general and its regulatory policies in specific. The most recent example is Cass Sunstein’s role as the White House official who instructed EPA Administrator Lisa Jackson to abandon efforts to tighten the NAAQS for ozone (known more familiarly as smog) that has been in effect since 1997 and is significantly weaker than the standard proposed by the Bush Administration.

So we have little hope that the Obama Administration will contemplate the fundamental overhaul of OIRA’s role that is genuinely needed. For the record, however, such reform would include:

- Eliminating OIRA’s review of individual regulatory proposals, and instead re-directing the Office to focus on cross-cutting regulatory problems that require coordinated actions by multiple agencies;
- Helping the agencies to develop proposals to strengthen their effectiveness administratively and legislatively; and
- Advocating targeted budget increases to enable the agencies to enforce existing laws.

Short of those meaningful, fundamental reforms, we offer here a series of more moderate proposals that should be regarded as a “first step” toward solving OIRA’s burgeoning distortion of statutes like the Clean Water and Clean Air Acts, the Food, Drug, and Cosmetic Act, and the Mine Safety and Health Act. These suggested reforms are squarely within reach of the Obama Administration, certainly if it is granted a second term. Although we believe the reforms we offer fall far short of the wide-ranging reform that is needed, and even if followed, will not defuse OIRA’s overly politicized process, one that trumps expert judgments on the protections Americans need and deserve, the changes below would at least eliminate blatant violations of EO 12,866 and make the review process fairer.

'First Step' Proposals

Transparency

1. Once OIRA has completed its review of either a proposed or final rule, the agency that originated the proposal should post on the Internet (including as part of the rule's electronic docket) a succinct explanation of the changes OIRA demanded, along with the version of the rule that was submitted to OIRA and the revised document that emerged at the end of the review period.
2. OIRA should post on the Internet (including, as part of the rule's electronic docket) all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.
3. OIRA should end the practice of undertaking "informal reviews" of agency policies before they are developed into regulatory drafts and officially submitted for review.

Level Playing Field

4. OIRA should stop meeting with outside parties during its consideration of a proposed or final rule, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation.
5. Nevertheless, if OIRA continues to meet with outside parties, it should assume an active role in balancing the participation, whether through consolidating meetings with like-minded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

Timeliness

6. OIRA should abide by the deadlines set forth in EO 12,866 that allow a maximum of 120 days for rule review, provided that the agency head agrees to a delay beyond 90 days.
7. If OIRA asks for a 30-day extension, its request and the agency head's approval should be in writing and made public as soon as they are issued.
8. If OIRA misses these deadlines, agency heads should proceed with their rulemaking schedules and the President should support those decisions.

Economically Significant Rules

9. OIRA should focus its review on economically significant regulatory proposals and stop reviewing non-economically significant rules and guidance documents that do not fit under the exceptions provided by EO 12,866: namely, that a proposal would interfere with another agency's work, materially change entitled programs, or pose novel legal or policy issues.
10. In the rare instance when OIRA believes it must exercise its authority to pull a non-economically significant rule into its review process, it should explain in writing how the proposal fits under the exceptions set forth in EO 12,866, and it should promptly post this explanation on the Internet (both on its website and in the rule's electronic docket).

Appendix A: Text of EO 12,866

Federal Register

Vol. 58, No. 190

Monday, October 4, 1993

Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them; a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.*

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is

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intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

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(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. Definitions. For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means 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

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of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "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
- (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.

Sec. 4. Planning Mechanism. In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

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(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

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duplicate or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. Centralized Review of Regulations. The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) **Agency Responsibilities.** (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

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of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule-making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

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(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) 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.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

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(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

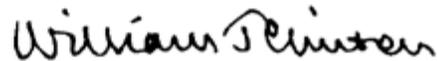
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regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,
September 30, 1993.

[FR citation 58 FR 51735]

Appendix B: Methodology

To gauge the relative involvement of various types of interest groups in the meeting process, we first obtained from the OIRA website all records of meetings that occurred between October 16, 2001 and June 1, 2011 (and that were posted as of June 8, 2011).¹⁶⁵ The starting date corresponds with the beginning of OIRA's practice of posting online certain information about its meetings with outside parties.¹⁶⁶ Our data set is necessarily limited by the amount of information that OIRA posted as of June 8, 2011, the day we finished collecting data and began our analysis. Since that date, records of meetings that took place during our period of study continued to show up sporadically on OIRA's website.¹⁶⁷ Because these late-posted meetings could not be incorporated into our study, our results actually understate the number of meetings that occurred from October 16, 2001 to June 1, 2011.

For each meeting, OIRA records the names of every individual who attended the meeting along with his or her affiliation, and if applicable, the client represented (if the affiliation is a law firm, for instance). Where we needed statistics on the number of rules reviewed by OIRA, the average length of review, or OIRA's completed actions, we obtained them from the "Review Counts" page on OIRA's website.¹⁶⁸

We also connected each meeting to the rule it was about and the OIRA review period to which it related. To do so, we checked the list of meetings against the list of OIRA reviews, available on OIRA's website,¹⁶⁹ and attempted to match them up using the agency, the date, and the topic of the meeting. These review records yielded much more useful information about each meeting's context, including:

- The Rule Identification Number (RIN) for the rule discussed
- The rulemaking stage to which the meeting applied (*e.g.*, Proposed Rule, Final Rule)
- The "economically significant" status of the rule discussed (Yes or No)
- The outcome of OIRA's review (*e.g.*, whether the rule was changed, returned to the agency for reconsideration, withdrawn by the agency, etc.)
- The starting and ending dates of OIRA's review (*i.e.*, the date on which OIRA received the agency's draft rule, and the date on which OIRA completed review)

If a meeting occurred between two OIRA review periods—for example, after OIRA's review of the proposed rule had concluded, but before its review of the final rule had begun—we assumed that the meeting related to the upcoming rulemaking stage (the final rule in this example). This assumption was often confirmed by the written materials submitted at the meeting, where such materials were disclosed.

Inadequate Transparency of OIRA Meeting Information

For each meeting, OIRA discloses only the date, the attendees, a one-line description of the topic, and any documents submitted at the meeting—the bare minimum required by EO 12866.¹⁷⁰ CPR has urged that OIRA enhance its transparency by releasing detailed minutes of these meetings.¹⁷¹ After all, without knowing what was discussed at these meetings, observers are unable to divine their significance or connect them to the shape of the resulting rule. But what is more troubling is that even OIRA's basic disclosures are disappointingly unclear, often undermining the very transparency they are supposed to foster.

Despite having ready access to OIRA's meeting records, it was often difficult for us to identify the groups represented at the meetings. To begin with, the attendees' affiliations are typically identified by cryptic abbreviations instead of their full names. For example, the American Hospital Association and the American Heart Association are both identified as "AHA,"¹⁷² not even considering the countless other organizations that might share that same abbreviation.¹⁷³ To determine the full name of the organization, one often has to perform an Internet search, combining the abbreviation with the name of the individual representative, and hope that some website happens to link the two. Otherwise, one must guess from the topic discussed at the meeting which of several organizations with the same abbreviation would have been likely to attend. The extra time and effort required to identify these participants renders the meeting process quite opaque, as a practical matter. OIRA has recognized this problem since at least 2003, when it promised to improve the clarity of its disclosures and, more specifically, to stop identifying the affiliations of outside parties by abbreviations¹⁷⁴—yet the practice continues.

The names of individuals and affiliations are made even more obscure by rampant misspellings throughout the records, whether caused by careless typing or some flawed data-entry technology (*e.g.*, auto-complete or optical character recognition). With so few pieces of information to go on, the presence of an undetectable typo is likely to frustrate even a lengthy Internet search for the correct identity. See Table 6 for just a few examples, from the subtle to the bizarre, that we were fortunate enough to resolve.

Year	Misspelling from OIRA's Record	Correct Spelling and Identification
2002	John Ikend, University of MD/Siemen Club ¹⁷²	John Ikerd, University of MO/Sierra Club
2003	Lewis Layman & Walter ¹⁷³	Lewis Longman & Walker
2003	Arecia ¹⁷⁴	Avecia
2003	Warner Norcross & Juan ¹⁷⁵	Warner Norcross & Judd
2004	USAA ¹⁷⁶	USDA (U.S. Department of Agriculture)
2006	The Levin Group ¹⁷⁷	The Lewin Group
2006	Sen. Rul ¹⁷⁸	Senator Jon Kyl
2007	SecuFit ¹⁷⁹	Securit
2008	NOOPA ¹⁸⁰	NODPA (Northeast Organic Dairy Producers Alliance)
2009	BAM ¹⁸¹	IAM (International Association of Machinists and Aerospace Workers)
2009	Buzillnicem USA ¹⁸²	Buzzi Unicem USA
2009	Greenberg Training, LLP ¹⁸³	Greenberg Traurig, LLP
2009	CML ¹⁸⁴	CMC (Consumer Mortgage Coalition)
2010	POW ¹⁸⁵	Dow (Chemical Company)
2010	MUA LTE Network ¹⁸⁶	MHA LTC Network

Table 6. Some Examples of Misspellings in OIRA Meeting Records

It was scarcely any easier to determine the rule that each meeting was about. Differences in wording between the “topic” of a meeting and the “title” of the rule often made it necessary to search the Internet for a clearer description of regulations that were being considered around that time. The use of generic labels, specialized jargon, and numeric codes in the meeting topics only added to the confusion (not even mentioning any typographical errors). Again, OIRA acknowledged in 2003 that it could improve its description of the rule being discussed,¹⁹⁰ but there has been no noticeable improvement. See Table 7 for some examples of the disparities between meeting topics and rule titles since 2003.

Year	Meeting Topic	Title of the Rule Discussed (from Historical Reports)
2003	Part 541 Regulation	Defining & Delimiting the Term "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity" ¹⁸⁸
2004	Housing Goals Proposed Rule	Secretary of HUD's Regulation of Fannie Mae & Freddie Mac ¹⁸⁹
2004	Wetlines Rule	Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids ¹⁹⁰
2005	Definition of Distrub	Protection of Bald Eagles and Definition ¹⁹¹
2007	LM-30	Labor Organization Officer and Employee Reports ¹⁹²
2007	Blending	Renewable Fuels Standard Program ¹⁹³
2007	"20-in-10"	Passenger Car and Light Truck Corporate Average Fuel Economy 2011 to 2015 ¹⁹⁴
2008	1CD-10	Revisions to HIPAA Code Sets ¹⁹⁵
2008	Prior Converted Croplands	Wetlands Reserve Program ¹⁹⁶
2008	HZA	Modernizing the Labor Certification Process and Enforcement for Temporary Agricultural Employment of H-2A Aliens in U.S. ¹⁹⁷
2008	10+2	Importer Security Filing and Additional Carrier Requirements ¹⁹⁸
2009	Meaningful Use	Electronic Health Record (EHR) Incentive Program ¹⁹⁹
2010	NPRM	Definition of "Welfare Plan" ²⁰⁰
2010	300 Column	Occupational Injury and Illness Recording and Reporting Requirements--Musculoskeletal Disorders (MSD) Column ²⁰¹

Table 7. Some Examples of Wording Differences between Meeting Topics and Rule Titles

The fact that the meeting dates often fell outside of any formal review period by OIRA—many times in a different year—added to the difficulty of identifying the rule from OIRA's review records. For meetings where documents were submitted, they were somewhat helpful in pinning down the rule, but many (if not most) of the meetings do not have any documents posted. With little extra effort, OIRA could make the connections explicit by simply posting the rule's RIN in the meeting record (or adding it to the record once the rule is released) or, even better, cross-referencing the review records and the meeting records with hyperlinks. Instead, the meeting data is kept separate from the review data, and members of the public bear the information costs of connecting the two.

Ironically, OIRA is charged with implementing the Plain Writing Act of 2010 among all executive agencies, which “calls for writing that is clear, concise, and well-organized.”²⁰⁵ In addition, Section 6(b)(5) of EO 12,866 requires that “[a]ll information provided to the public by OIRA shall be in plain, understandable language.”²⁰⁶ Yet OIRA stubbornly refuses to clarify even its minimal disclosures for the public.

Categorization of Meeting Participants

We assigned a category to each meeting attendee based on the kind of interest group he or she represented (see Table 1 above for a list of the categories and subcategories that we used).

We did not categorize or include in our data two groups of meeting participants: (1) representatives from OMB or OIRA and (2) representatives from the agency responsible for the rule that is the subject of the meeting. As hosts, at least one OMB or OIRA representative attends every meeting. Similarly, agencies responsible for the rule that is the subject of the meeting generally attend every meeting as well, since EO 12,866 requires that they be invited to such meetings.²⁰⁷ Consequently, data on the participation of these two groups would have no practical bearing on our results.

While the vast majority of affiliations were easy to categorize, the lines between the categories were not always clear in every case. Given the practical difficulty of determining the views of the various attendees from OIRA’s scant disclosures, we could not always delve into such details. For those organizations that lie at the boundary between an industry group and a public interest group, we attempted to categorize them as best we could, in light of (a) the interests promoted by the group, (b) whether the group itself is subject to regulation, and (c) the other organizations that shared its meetings. Ultimately, how we classified these ambiguous groups is of minor consequence to our results because their appearances before OIRA were few and far between as compared to the other organizations (mostly corporations and trade associations), as suggested in Table 1 above. In other words, had we classified these groups differently, our results would have been virtually unaffected. Below, we identify the common types of ambiguous groups that were challenging to categorize and explain in further detail how we resolved these challenges, acknowledging that reasonable minds may differ:

- *Professional associations:* Often preferring to regulate their professions internally, these associations may resist governmental regulation that would impose additional or conflicting burdens on practitioners or closely related industries. For example, in a presentation before OIRA, several associations of pathologists argued against a proposed regulation that would strengthen the proficiency-testing requirements for certain laboratory professionals, citing the rule’s costly impact on the laboratory industry and doubting its health benefits.²⁰⁸ On the other hand, some professional

associations have become well-known advocates for public interest policies that protect public health and the environment, quite apart from the interests of the profession itself. For instance, the American Academy of Pediatrics voiced its support for stronger air quality standards for ozone at a meeting with OIRA.²⁰⁹

When setting standards of ethics for their practitioners or advancing the noble principles of their professions, these associations may serve the public interest. At the same time, when forcefully defending the interests of their practitioners, and of the profession as a whole, they resemble an industry or trade group more than a public interest group. How we categorized these associations depended on which aspect seemed to dominate.

- *Private hospitals:* While hospitals undoubtedly serve their communities, they are also heavily regulated institutions with an interest in reducing regulatory burdens. Despite the fact that most private hospitals are officially “nonprofit,” both nonprofit and for-profit hospitals seek to maximize profits and cut costs.²¹⁰ Likewise, both kinds deliver a similar amount of uncompensated care to patients, much lower than the amount delivered by public, government-owned hospitals (incidentally, we did not observe any public hospitals participating in these meetings).²¹¹ If anything, nonprofit hospitals are even more heavily regulated than for-profit hospitals because there are many conditions they must satisfy in order to retain their preferential tax status.²¹²

For these reasons, we concluded that private hospitals are generally closer to a “regulated industry” than a public interest group for the purposes of our study. Indeed, hospitals sometimes appeared alongside industry groups in their meetings with OIRA. For example, Harbor-UCLA Medical Center shared a meeting with Abbott Laboratories, a health-care products company.²¹³ And the associations of pathologists (mentioned above) were joined by several hospitals in their opposition to proficiency-testing requirements.²¹⁴ Most meetings with hospitals were concerned with Medicare payment rules²¹⁵ and the requirements for implementing electronic health records,²¹⁶ areas in which hospitals are likely to advocate their considerable financial interests.

- *Labor unions:* We made the conservative assumption that all labor unions function as public interest groups, through advancing workplace health and safety, and the rights and benefits of workers. Although we recognize that labor unions are regulated stakeholders, and that they may promote industry positions in the interest of preserving jobs, it would be difficult to determine such details in each case. This way, even if we mistakenly classified too many of them as public interest groups, at least we would not be gratuitously adding to the already-enormous “industry group” tally.

- *For-profit and online colleges:* In 2010 and 2011, a large number of for-profit career colleges met with OIRA about regulations that would heighten the scrutiny of businesses offering for-profit and online higher education.²¹⁷ We categorized these as “industry groups” instead of “higher-education institutions” because their involvement was as a regulated industry, not as scholars providing expertise on a separate matter,²¹⁸ or as college representatives giving voice to the unique regulatory needs of academic research.²¹⁹

Endnotes

- ¹ See Lawrence Hurley & Gabriel Nelson, *Lawyers Plot Next Steps in Legal Battle Over Ozone Rule*, N.Y. TIMES, Sept. 7, 2011, <http://www.nytimes.com/gwire/2011/09/07/07greenwire-lawyers-plot-next-steps-in-legal-battle-over-o-59778.html>; Mark Drajem & Kim Chipman, *Daley Lobbied by Business, Health Groups on U.S. Ozone Rule*, BLOOMBERG, Aug. 16, 2011, <http://www.bloomberg.com/news/2011-08-16/daley-lobbied-by-business-environment-groups-on-u-s-ozone-rule.html>.
- ² See U.S. Gov't Accountability Office, High Risk Series, <http://www.gao.gov/docsearch/featured/highrisk.html>.
- ³ See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA never or rarely made changes that would enhance protection of human health or the environment, and often or always made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").
- ⁴ Exec. Order No. 12,866 § 6(b)(4)(C)(iii), 3 C.F.R. 638, 648 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 note (West 2010).
- ⁵ See Michael Collins, *Environmentalists Critical of Number of Meetings Regulatory Office Has Had with Opponents to New Coal Ash Rules*, KNOXVILLE NEWS SENTINEL, Mar. 19, 2010, <http://www.knoxnews.com/news/2010/mar/19/environmentalists-critical-coal-ash-rules-debate>; Patrick Reis, *Recycling Questions Complicate EPA Coal Ash Decision*, THE NEW YORK TIMES, Jan. 13, 2010, <http://www.nytimes.com/gwire/2010/01/13/13greenwire-recycling-questions-complicate-epa-coal-ash-de-90614.html?pagewanted=all>; Patrick Reis, *GOP Superfriends Have Complicated History with Subsidies - Oil Up despite Market Tumble - DOE's Nat Gas Panel to Release Recommendations Today - NRC Facing Suii*, POLITICO MORNING ENERGY, Aug. 11, 2011, <http://www.politico.com/morningenergy/0811/morningenergy310.html>.
- ⁶ Collins, *supra* note 5.
- ⁷ John S. Applegate et al., Center for Progressive Reform, *Reinvigorating Protection Health, Safety, and the Environment: The Choice Facing Cass Sunstein* (Jan. 2009), <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.
- ⁸ Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005).
- ⁹ Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 125 (2011).
- ¹⁰ Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 75 (1994) (unpublished Ph.D. dissertation, University of Michigan), *cited in* Wagner, Barnes & Peters, *supra* note 9, at 126.
- ¹¹ Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131-33 (2006). The remainder of the comments were submitted by governmental interests and other non-governmental groups. *Id.* Another study reveals that, for eight rules promulgated by EPA and NHTSA, between 66.7 percent and 100 percent of comments came from industry, while public interest comments topped out at 11 percent. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252-53 (1998).
- ¹² Wagner, Barnes & Peters, *supra* note 9, at 128-29.
- ¹³ *Id.* at 128. Another study, this time of a different subset of EPA rules, found a very similar imbalance in participation, with industry participating in almost all the rulemakings (96 percent) and environmental groups participating in less than half of them (44 percent). See Coglianese, *supra* note 10, at 50 tbl.2-2.
- ¹⁴ Lettie McSpadden Wenner, *The Reagan Era in Environmental Regulation*, in CONFLICT RESOLUTION AND PUBLIC POLICY 41, 48 (Miriam K. Mills ed., 1990).
- ¹⁵ Coglianese, *supra* note 10, at 70.
- ¹⁶ See Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1326, 1379 (2010).
- ¹⁷ See *id.* at 1329 (discussing the excessive communications by stakeholders who engage, inadvertently or strategically, in "information capture").
- ¹⁸ See *id.* at 1347 n.92.
- ¹⁹ See Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. at 638.
- ²⁰ See Wagner, *supra* note 16, at 1379 ("Regulated industries, for example, enjoy considerably more inside information about how their plants run, how pollution control equipment might or might not work once in place, what approaches have and have not been considered or tried, and a host of other technical issues central to the rulemaking.")
- ²¹ See Wagner, *supra* note 16, at 1366-69 (describing the implications of pre-proposal participation for the transparency and equitability of the rulemaking process).
- ²² See Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, MICH. J. ENVT'L. & ADMIN. L. (forthcoming 2011).
- ²³ Bressman & Vandenbergh, *supra* note 3, at 72-73.
- ²⁴ Steinzor, *supra* note 22.
- ²⁵ Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State"*, 105 MICH. L. REV. 1497, 1505 (2007).
- ²⁶ See generally Winston Harrington et al., *Controversies Surrounding Regulatory Impact Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS 10, 14-16 (Winston Harrington et al. eds., 2009), available at <http://www.rff.org/RFF/Documents/RFF-Rpt-ReformingRIA.pdf> ("To its critics, CBA is a flawed technique that, among other things, emphasizes the quantification and monetization of risks, trivializes the future through discounting...and ignores distributional concerns"); Lisa Heinzerling, *Cost-benefit Environmentalism: An Oxymoron*, GRIST, May 14, 2008, <http://www.grist.org/article/cost-benefit-environmentalism-an-oxymoron> ("[C]ost-benefit was never unbiased. Low values for human life, monstrously high discount rates, the shunting aside of effects that cannot be counted, a free pass for deregulatory activities—all of these have been with us since the beginning.").
- ²⁷ See OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 28-31 (2003) (describing how to monetize the health and safety effects of regulation).
- ²⁸ See *id.* at 31-37 (describing the rationales and techniques for discounting).
- ²⁹ See, e.g., RENA STEINZOR & MICHAEL PATOKA, CENTER FOR PROGRESSIVE REFORM, COMMENTS – HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM; IDENTIFICATION AND LISTING OF SPECIAL WASTES; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES 11-12 tbl. 3 (Nov. 19, 2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-8847> (comparing the few benefits that were quantified to the many benefits that were left out of EPA's cost-benefit analysis for its coal-ash proposal).

- ³⁰ See, e.g., Barack Obama, Closing Speech at Campaign Rally in Canton, Ohio (Oct. 27, 2008) (transcript available at http://blogs.suntimes.com/sweet/2008/10/obama_closing_argument_speech_1.html) (“I do believe that government should do that which we cannot do for ourselves.... [Our government] should also make sure businesses ... play by the rules of the road.”).
- ³¹ See Rena Steinzor, *Cass Sunstein and the Obama Legacy*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=D6F898F5-D9E4-E872-C9E03C7BF0F704EB> (June 28, 2011).
- ³² OFFICE OF MANAGEMENT AND BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 5 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.
- ³³ See STEINZOR & PATOKA, *supra* note 29 (critiquing OIRA’s interference in the coal-ash rulemaking).
- ³⁴ See U.S. Small Bus. Admin., Office of Advocacy Staff, <http://www.sba.gov/advocacy/858/12135> (accessed Sep. 17, 2011).
- ³⁵ See U.S. Small Bus. Admin., Office of Advocacy – About Us, <http://www.sba.gov/category/advocacy-navigation-structure/about-us> (accessed Aug. 11, 2011).
- ³⁶ See SBA Size Standards Used to Define Small Business Concerns, 13 C.F.R. § 121.201 (2000).
- ³⁷ See, e.g., Office of Info. & Regulatory Affairs, Meeting Record Regarding: Non-Road Diesel (Mar. 14, 2003), http://www.whitehouse.gov/omb/oira_2060_meetings_208 (SBA sharing a meeting with the American Petroleum Institute, the National Petrochemical and Refiners Association, Exxon Mobil, and Marathon Oil); Office of Info. & Regulatory Affairs, Meeting Record Regarding: Cooling Water Intake (Mar. 24, 2011), http://www.whitehouse.gov/omb/2040_meeting_03242011 (SBA sharing a meeting with the American Chemistry Council and the American Petroleum Institute); Office of Info. & Regulatory Affairs, Meeting Record Regarding: Aircraft Drinking Water Rule (Aug. 12, 2009), http://www.whitehouse.gov/omb/2040_081209 (SBA sharing a meeting with Atlantic Southeast Airlines, the Regional Airline Association, and Express Jet Airlines).
- ³⁸ NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) (developed under a contract with the Small Business Administration’s Office of Advocacy), available at <http://www.sba.gov/sites/default/files/rs371tot.pdf>.
- ³⁹ See Sidney A. Shapiro, Ruth Ruttenberg & James Goodwin, Center for Progressive Reform, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Feb. 2011), http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.
- ⁴⁰ James Goodwin, *Sunstein Denounces SBA’s ‘Deeply Flawed’ Study of Regulatory Costs*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937> (June 3, 2011).
- ⁴¹ Bressman & Vandenbergh, *supra* note 3, at 85-88.
- ⁴² Interagency Working Comments on Draft Rule Under EO 12866, at 21-31, 41-42, available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0350>.
- ⁴³ *Id.* at 16-20.
- ⁴⁴ See Steinzor, *supra* note 22.
- ⁴⁵ See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 865 (2003) (citing Claudia O’Brien, *White House Review of Regulations Under the Clean Air Act Amendments of 1990*, 8 J. ENVTL. L. & LIT. 51, 58-80 (1993); Margaret Carde, *Comment: Can Bambi Ride Herd over Godzilla? The Role of Executive Oversight in EPA’s Rulemaking for the Waste Isolation Pilot Plant*, 36 NAT. RES. J. 643, 666 (1996)).
- ⁴⁶ *Id.* at 866, 868.
- ⁴⁷ *Id.* at 866.
- ⁴⁸ *Id.* at 868.
- ⁴⁹ See Steinzor, *supra* note 22.
- ⁵⁰ See Wagner, *supra* note 16, at 1346.
- ⁵¹ Croley, *supra* note 45, at 862, 867.
- ⁵² Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128, 35,211 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, 302), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0352>.
- ⁵³ See STEINZOR & PATOKA, *supra* note 29, at 15-17 (outlining and critiquing the stigma argument).
- ⁵⁴ See, e.g., Interagency Working Comments, *supra* note 42, at 13.
- ⁵⁵ STEINZOR & PATOKA, *supra* note 29, at 46-47.
- ⁵⁶ See *id.* at 16 (discussing whether the language of the Bevill Amendment permits agencies to consider the cost of “stigma” in listing coal ash as a “hazardous waste” under the Resource Conservation and Recovery Act (RCRA)).
- ⁵⁷ See U.S. Env’tl. Prot. Agency, Regulatory Impact Analysis for EPA’s Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry 11, 187-88 (Apr. 30, 2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003> (estimating the cost of stigma as \$233.5 billion). See also STEINZOR & PATOKA, *supra* note 29, at 17, 43-46 (breaking down the arbitrary assumptions underlying this estimate).
- ⁵⁸ See Steinzor, *supra* note 22.
- ⁵⁹ See U.S. GEN. ACCOUNTING OFFICE, RULEMAKING: OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 3-4 (2003), available at <http://www.gao.gov/new.items/d03929.pdf> [hereinafter GAO 2003 REPORT].
- ⁶⁰ *Id.* at 21-22.
- ⁶¹ *Id.* at 23.
- ⁶² Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. 638 at 646.
- ⁶³ *Id.* §§ 3(f)(1)-(4), 3 C.F.R. at 641-42.
- ⁶⁴ *Id.* § 6(a)(3)(C), 3 C.F.R. at 645-46.
- ⁶⁵ *Id.* § 6(a)(3)(B), 3 C.F.R. at 645.
- ⁶⁶ See GAO 2003 REPORT, *supra* note 59, at 24 fig.3 (graph depicting the number of rules reviewed by OIRA before and after Executive Order 12,866); Office of Info. & Regulatory Affairs, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (accessed July 30, 2011) (providing the number of rules reviewed by OIRA for user-specified time periods, also specifying how many are “economically significant” and “not economically significant”).
- ⁶⁷ See Croley, *supra* note 45, at 850.

- ⁶⁸ See, e.g., Exec. Order No. 12,866 § 2(b), 3 C.F.R. at 640 (outlining the roles of OMB/OIRA in the regulatory system, including the “[c]oordinated review of agency rulemaking [] necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency”).
- ⁶⁹ Notes: *OIRA Avoidance*, 124 HARV. L. REV. 994, 998 n.37 (2011), available at http://www.harvardlawreview.org/media/pdf/vol124_%20OIRA%20avoidance.pdf (citing Telephone Interview with Sally Katzen, former Adm’r, OIRA (Sept. 2, 2010) (on file with the Harvard Law School Library)).
- ⁷⁰ See Croley, *supra* note 45, at 855. While Croley appears to conclude that 58 percent of meetings were about non-economically significant rules (instead of 58 percent of rules that are the subject of meetings), that is merely an accident of his idiosyncratic methodology. In his study, “multiple meetings about a single given rule are lumped together as one ‘meeting,’” so when he counts “meetings,” he is actually counting the number of rules that are the subject of meetings. *Id.* at 853.
- ⁷¹ See Programmatic Regulations for the Comprehensive Everglades Restoration Plan, 67 FED. REG. 50,540, 50,550 (proposed Aug. 2, 2002) (to be codified at 33 C.F.R. pt. 385); U.S. ENVTL. PROT. AGENCY, ECONOMIC ANALYSIS FOR THE PROPOSED INVENTORY UPDATE REPORTING (IUR) MODIFICATIONS RULE 9-1 (2010), available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-OPPT-2009-0187-0018>.
- ⁷² See Computer Reservations System (CRS) Regulations, 69 FED. REG. 976, 1026 (Jan. 7, 2004) (to be codified at 14 C.F.R. pt. 255).
- ⁷³ See Hazardous Materials: Transportation of Lithium Batteries, 75 FED. REG. 1302, 1314 (proposed Jan. 11, 2010) (to be codified at 49 C.F.R. pts. 172, 173, 175); Enhancing Airline Passenger Protections, 75 FED. REG. 32,318, 32,332 (proposed June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399).
- ⁷⁴ See Statement by Brad Miller (D-NC), Chairman, House House Committee on Science and Technology, Subcommittee on Investigation & Oversight, Feb. 4, 2009: “While the President’s order on Guantanamo Bay may get more of the national spotlight, his decision to rollback this Bush Executive Order is just as important to restoring open government and Constitutional separation of powers,” available at <http://science.house.gov/Press/PRArticle.aspx?NewsID=2350> (accessed Mar.12, 2010).
- ⁷⁵ See Exec. Order No. 13,497 § 1, 3 C.F.R. 218, 218 (2009) (revoking EO 13,258 and EO 13,422). Of course, President Obama’s apparent commitment to circumscribing OIRA’s influence and preserving agency prerogatives was undermined a month later by an OMB memorandum insisting that OIRA still has preexisting authority to review guidance documents under EO 12,866. See Memorandum from OMB Director Peter Orszag to the Heads and Acting Heads of Executive Departments and Agencies, “Guidance for Regulatory Review” (March 4, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf (accessed on August 1, 2011). For a deeper exploration of the issues involved, see Letter from the Center for Progressive Reform to Robert Bauer, White House Counsel (Mar. 17, 2010), available at http://www.progressivereform.org/articles/WH_Counsel_re_OIRA_March2010.pdf.
- ⁷⁶ See Exec. Order No. 12,866, 3 C.F.R. at 638.
- ⁷⁷ See, e.g., *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1104-07 (4th Cir. 1985) (adopting the “logical outgrowth” test and ordering the agency to reopen its comment period because its proposed rule gave “insufficient notice” that a certain change would be considered in the final rule, thus depriving the plaintiff the opportunity to comment on it).
- ⁷⁸ Wagner, *supra* note 16, at 1367 (citing, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.3 (5th ed. 2010)).
- ⁷⁹ See Wagner, *supra* note 16, at 1368 (citing, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977)).
- ⁸⁰ To remedy this issue, CPR Member Scholar Wendy Wagner has proposed a “policy in the raw” reform that would allow a team within the agency to develop a pre-proposal while isolated from outside pressures. They would work forward from the statutory text rather than backward from the limits and preferences imposed by powerful stakeholders. See Wagner, *supra* note 16, at 1422-27.
- ⁸¹ *Id.* at 1366.
- ⁸² See *id.* at 1366, 1368-69.
- ⁸³ See *supra* notes 9-10 and accompanying text.
- ⁸⁴ Office of Info. & Regulatory Affairs, Search of Regulatory Review, <http://www.reginfo.gov/public/do/eoAdvancedSearchMain#> (accessed Aug. 13, 2011) (explanations of rulemaking stages that appear when hovering over the search field “Stage of Rulemaking”).
- ⁸⁵ For example, if a public interest group has not submitted a comment on a rule, it will not be able to challenge the rule in court because it has not exhausted its administrative remedies. See Wagner, *supra* note 16, at 1390-91. And if public interest groups are not involved in the agency’s rule-development phase like industry groups are, it will be more difficult for them to quickly master the significance of details inserted into the proposed rule by the agency in response to industry’s pre-proposal communications. *Id.* at 1385 n.238.
- ⁸⁶ See Exec. Order No. 12,866 § 6(b)(4)(C), 3 C.F.R. at 647-48 (requiring disclosure of meeting information for all “regulatory actions under review,” clearly including those that take place at the pre-proposal stage).
- ⁸⁷ *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.
- ⁸⁸ See U.S. Env’tl. Prot. Agency, Draft: Coal Combustion Residuals (CCR) Proposal Provided to the Office of Management and Budget (OMB) October 16, 2009, available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-RCRA-2009-0640-0013>.
- ⁸⁹ See *supra* notes 52-57 and accompanying text.
- ⁹⁰ EPA posted a redlined version of its proposal, illustrating the changes made during OIRA’s review. See Comparison of October 16, 2009 OMB Review Draft and Final CCR Proposed Rule (2010), available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-RCRA-2009-0640-0012>.
- ⁹¹ Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. at 646.
- ⁹² *Id.* §§ 6(b)(2)(B)-(C), 3 C.F.R. at 647.
- ⁹³ See *id.* §§ 6(a)(3)(E)(ii)-(iii), 3 C.F.R. at 646 (requiring agencies to identify substantive changes); *id.* § 6(b)(4)(D), 3 C.F.R. at 648 (requiring OIRA to disclose all documents exchanged during review).
- ⁹⁴ See Curtis W. Copeland, *The Role of the Office of Info. & Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1280 (2006) (“OIRA has informally reviewed agencies’ draft rules since its reviewfunction was established in 1981, but informal reviews reportedly became more common when Executive Order 12,866 was adopted in 1993 and OIRA’s reviews were focused on ‘significant’ rules.”).
- ⁹⁵ OIRA Disclosure Memo-B, Memorandum from OIRA Administrator John D. Graham to OIRA Staff § 1(a)(3) (Oct. 18, 2001), available at http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b.

- ⁹⁶ Donald R. Arbuckle, OIRA and Presidential Regulatory Review: A View from Inside the Administrative State 34 (2008) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald_arbuckle.
- ⁹⁷ See Copeland, *supra* note 94, at 1280.
- ⁹⁸ See, e.g., Arbuckle, *supra* note 96, at 35.
- ⁹⁹ See Rebecca Adams, *Regulating the Rulemakers: John Graham at OIRA*, CQ WEEKLY, Feb. 23, 2002, 520-26 (quoting OIRA Administrator John Graham: “I think that agencies that wait until the last minute and then come to us—well, in a sense, they’re rolling the dice.”), quoted in Copeland, *supra* note 94, at 1280.
- ¹⁰⁰ See Bressman & Vandenberg, *supra* note 3, at 74.
- ¹⁰¹ *Id.* at 69.
- ¹⁰² *Id.* at 69 n.132.
- ¹⁰³ See U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: IMPLEMENTATION OF THE REGULATORY REVIEW EXECUTIVE ORDER 10 (1996), available at <http://www.gao.gov/archive/1996/gg96185t.pdf> [hereinafter GAO 1996 REPORT].
- ¹⁰⁴ GAO 2003 REPORT, *supra* note 59, at 14. At first, OIRA had urged President Clinton to reconsider those disclosure provisions of EO 12,866, worried that they would interfere with its informal review process, but ultimately decided that it could simply interpret around the problem. See GAO 1996 REPORT, *supra* note 103, at 10.
- ¹⁰⁵ See, e.g., Arbuckle, *supra* note 96, at 33-35; Bressman & Vandenberg, *supra* note 3, at 96; Stephen M. Johnson, *Ossification’s Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. REV. 767, 787 n.125.
- ¹⁰⁶ See Testimony of Wesley Warren, Natural Res. Def. Council, on the Role of Science in Regulatory Reform before the Investigations and Oversight Subcommittee of the House Science and Technology Committee 24, Apr. 30, 2009, available at <http://gop.science.house.gov/Media/hearings/oversight09/april30/warren.pdf> [hereinafter NRDC Testimony].
- ¹⁰⁷ See *id.* at 24-25 (describing a 6-month-long informal review of an EPA rule in 2006); Copeland, *supra* note 94, at 1280 (describing a 41-day-long informal review of an EPA rule in 2001).
- ¹⁰⁸ See GAO 2003 REPORT, *supra* note 59, at 14; Arbuckle, *supra* note 96, at 34 (“Though communications with outside parties are disclosed during informal review, as agreed to by former Administrator Graham, further disclosure is both impractical and, in any case, unlikely to be instituted.”).
- ¹⁰⁹ See Arbuckle, *supra* note 96, at 34.
- ¹¹⁰ See NRDC Testimony, *supra* note 106, at 24.
- ¹¹¹ See GAO 1996 REPORT, *supra* note 103, at 10.
- ¹¹² See James Goodwin, *The Costs of Regulatory Delay: Could We Have Stopped 1,470 from Being Sickened by Salmonella-Laced Eggs?*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=CD84F2F3-D48B-4A61-513F8624205315D2> (Sep. 1, 2010) (questioning the FDA’s unexplained “withdrawal” of its salmonella rule from OIRA’s review, which occurred after egg industry representatives met with OIRA to complain about the rule).
- ¹¹³ See GAO 2003 REPORT, *supra* note 59, at 10.
- ¹¹⁴ See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1431-32 (1992) (identifying an EPA rule that spent two years in review as OIRA and EPA fought over its substance).
- ¹¹⁵ Exec. Order No. 12,866 §§ 6(b)(2)(B)-(C), 3 C.F.R. at 647.
- ¹¹⁶ See Env’tl. Prot. Agency, Coal Combustion Residuals – Proposed Rule, <http://www.epa.gov/osw/nonhaz/industrial/special/fossil/ccr-rule/index.htm> (accessed Aug. 18, 2011) (explaining the extension of the public comment period).
- ¹¹⁷ See Ken Ward Jr., *EPA Won’t Complete Coal-Ash Rules in 2011*, THE CHARLESTON GAZETTE, Mar. 4, 2011, available at <http://wvgazette.com/News/201103040756>.
- ¹¹⁸ See STEINZOR & PATOKA, *supra* note 29, at 5-7, 35-40 (exploring the public health hazards of coal ash disposal).
- ¹¹⁹ Dave Jamieson, *Child Labor Rules Stalled at White House as Farm Accidents Continue*, THE HUFFINGTON POST, Aug. 15, 2011, http://www.huffingtonpost.com/2011/08/15/child-labor-rules-white-house_n_927551.html.
- ¹²⁰ *Id.*
- ¹²¹ See Office of Info. & Regulatory Affairs, Historical Reports, <http://www.reginfo.gov/public/do/eoHistoricReport> (accessed Aug. 18, 2011) (permitting users to search for review records by agency and year).
- ¹²² See Table 5 *supra* (listing both of these rules).
- ¹²³ See Matthew Madia, *White House Sitting on Mad Cow Rule*, OMB Watch, <http://www.ombwatch.org/node/8820> (Apr. 16, 2008). Cf. *Cow Sense: The Bush Administration’s Broken Record on Mad Cow Disease*, White Paper of the Ctr. for Sci. in the Pub. Interest, OMB Watch & Consumer Fed’n of Am. (2006), available at <http://www.ombwatch.org/files/regs/2006/cowsense.pdf> (similarly describing the meeting participants during OIRA’s review of the same rule at an earlier stage in 2005).
- ¹²⁴ Matthew Madia, *With White House Blessing, FDA Finalizes Mad Cow Rule*, OMB Watch, <http://www.ombwatch.org/node/8871?page=0%2C9> (Apr. 25, 2008).
- ¹²⁵ The review was completed on April 21, 2008, and the announcement about the U.S.-Korea trade deal had been made on April 19, 2008. Joint Press Conference at Camp David with President George W. Bush and President Lee Myung-Bak of the Republic of Korea, Apr. 19, 2008, available at <http://www.cfr.org/trade/president-bush-participates-joint-press-availability-president-lee-myung-bak-republic-korea-april-2008/p16068>.
- ¹²⁶ See Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648.
- ¹²⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 32 n.40 (2009), available at <http://www.gao.gov/new.items/d09205.pdf> [hereinafter GAO 2009 REPORT].
- ¹²⁸ See GAO 2003 REPORT, *supra* note 59, at 16.
- ¹²⁹ See Exec. Order No. 12,866 §§ 6(a)(3)(E)(ii)-(iii), 3 C.F.R. at 646.
- ¹³⁰ See GAO 2009 REPORT, *supra* note 127, at 32; *OMB Changes Difficult to Document*, OMB Watch, <http://www.ombwatch.org/node/1006> (Sep. 4, 2002).
- ¹³¹ See *OMB Changes Difficult to Document*, *supra* note 130.
- ¹³² See GAO 2009 REPORT, *supra* note 127, at 34.
- ¹³³ *Id.*
- ¹³⁴ See *id.*; *OMB Changes Difficult to Document*, *supra* note 130.
- ¹³⁵ See GAO 1996 REPORT, *supra* note 103, at 10.
- ¹³⁶ See *OMB Changes Difficult to Document*, *supra* note 130.
- ¹³⁷ See GAO 1996 REPORT, *supra* note 103, at 11.
- ¹³⁸ See Croley, *supra* note 45, at 868.

- ¹³⁹ For Rule Identification Number (RIN) 2060-AO91 (Proposed Rule), see Document Changes During Office of Management and Budget (OMB) Review, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0600-0230> (posted Oct. 21, 2010). For RIN 2060-AQ25 (Final Rule), see Correspondence between Brian Shrager, USEPA and OMB regarding Final Rule February 17, 2011, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2002-0058-3257> (posted Mar. 21, 2011). For RIN 2060-AO12 (Final Rule), see CISWI – Summary of EPA Interagency Communications, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2003-0119-2499> (posted Mar. 21, 2011). For RIN 2060-AP90 (Final Rule), see SSI – Summary of USEPA Interagency Communications February 20, 2011, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0559-0166> (posted Mar. 21, 2011). For RIN 2070-AJ57 (Proposed Rule), see Documentation of Review Under Executive Order 12866 (LRRP Clearance NPRM): Cover Form, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2005-0049-1127> (posted May 6, 2010). For RIN 2060-AP52 (Proposed Rule), see OMB Submittal (03/15/11), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0234-3012> (posted May 3, 2011). For 2060-AO91 (Final Rule), see Changes to Package During Period of OMB Review, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0600-0429> (posted Apr. 21, 2011).
- ¹⁴⁰ For RIN 2060-AO48 (Proposed Rule), see Email from Ron Evans, USEPA, to Heidi King, OMB, with Subject: Revised SO2 (Sulfur Dioxide) NAAQS (National Ambient Air Quality Standard) RIA (Regulatory Impact Analysis) Ex Summ 11/16/09 1:44 p.m., <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0769-0033> (posted on Nov. 19, 2009). For RIN 2060-AQ25 (Proposed Rule), see Correspondence with OMB Regarding Technical Memos and RIA (3/30/2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2003-0119-0041> (posted on June 4, 2010).
- ¹⁴¹ See Croley, *supra* note 45, at 868.
- ¹⁴² See Bressman & Vandenberg, *supra* note 3, at 72-73 (89 percent of respondents agreed with these assertions).
- ¹⁴³ See GAO 2003 REPORT, *supra* note 59, at 9.
- ¹⁴⁴ Driesen, *supra* note 3, at 365.
- ¹⁴⁵ GAO 2003 REPORT, *supra* note 59, at 11.
- ¹⁴⁶ See Croley, *supra* note 45, at 864-65.
- ¹⁴⁷ GAO 2003 REPORT, *supra* note 59, at 11.
- ¹⁴⁸ See STEINZOR & PATOKA, *supra* note 29, at 43-46.
- ¹⁴⁹ Anne C. Mulkern, *Lobbying: Chemical Company Adds Muscle for Push on Energy, EPA*, GREENWIRE, Nov. 24, 2010, <http://www.eenews.net/public/Greenwire/2010/11/24/1>.
- ¹⁵⁰ *Id.*
- ¹⁵¹ See Renee Schoof, *EPA Sets Pollution Controls for Boilers and Incinerators*, McCLATCHY, Feb. 23, 2011, <http://www.mcclatchydc.com/2011/02/23/109291/epa-sets-pollution-controls-for.html>.
- ¹⁵² Press Release, Sierra Club, EPA Issues Final Standard to Protect Americans from Boilers' Toxic Air Pollution (Feb. 23, 2011), available at http://action.sierraclub.org/site/MessageViewer?em_id=197724.0&dlv_id=169761.
- ¹⁵³ See *EPA Will Not Impose Lead Clearance Rule for Residential Projects; Commercial Buildings Still Under Evaluation*, GLASS MAGAZINE, July 15, 2011, <http://www.glassmagazine.com/news-item/retail/epa-will-not-impose-lead-clearance-rule-residential-projects-commercial-buildings-s; WDDA Urges Regulators to Stop Additional RRP Rules>, WINDOW & DOOR, May 16, 2011, <http://www.windowanddoor.com/news-item/organizations/wdda-urge-regulators-stop-additional-rrp-rules> (describing the industry's meeting with OIRA).
- ¹⁵⁴ See *EPA Will Not Impose Lead Clearance Rule for Residential Projects*, *supra* note 153.
- ¹⁵⁵ Patrick Reis, *Recycling Questions Complicate EPA Coal Ash Decision*, *supra* note 5.
- ¹⁵⁶ See Wagner, *supra* note 16, at 1329.
- ¹⁵⁷ *Id.*
- ¹⁵⁸ *Id.*
- ¹⁵⁹ *Id.* at 1329-30.
- ¹⁶⁰ See *id.* at 1363-64.
- ¹⁶¹ See *id.* at 1334-36.
- ¹⁶² JOHN ADAMS, RISK 25-26 (1995).
- ¹⁶³ See generally CASS R. SUNSTEIN, WORST-CASE SCENARIOS (2007); Cass R. Sunstein, *The Laus of Fear*, 115 HARV. L. REV. 1119, 1123 (2002) (reviewing Paul Slovic, *The Perception of Risk* (2000)); Cass R. Sunstein, Memorandum for the Heads of Executive Departments and Agencies 9-12, June 18, 2010, available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf (plans to incorporate the concepts of behavioral economics into regulation). See also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640-693 (1999) (overview of various biases and heuristics posited by behavioral research).
- ¹⁶⁴ John S. Applegate et al., Center for Progressive Reform, *Reinvigorating Protection Health, Safety, and the Environment: The Choice Facing Cass Sunstein* (Jan. 2009), <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.
- ¹⁶⁵ See Office of Info. & Regulatory Affairs, Meeting Records, http://www.whitehouse.gov/omb/oira_meetings (accessed June 8, 2011).
- ¹⁶⁶ See OIRA Disclosure Memo-B, *supra* note 95. While the memorandum is dated October 18, the earliest meeting posted online is in fact dated October 16, so that was the starting date we chose for our study.
- ¹⁶⁷ See Office of Info. & Regulatory Affairs, Meeting Records – Selected Agency: Office of Prevention, Pesticides and Toxic Substances, http://www.whitehouse.gov/omb/oira_2070_meetings (accessed Sep. 18, 2011) (displaying four meetings that took place in May 2011 but only appeared on OIRA's website well after June 8, 2011).
- ¹⁶⁸ Office of Info. & Regulatory Affairs, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (accessed June 21, 2011).
- ¹⁶⁹ Office of Info. & Regulatory Affairs, Historical Reports, <http://www.reginfo.gov/public/do/eoHistoricReport> (accessed July 9, 2011).
- ¹⁷⁰ See Exec. Order No. 12,866 § 6(b)(4)(C)(ii)-(iii), 3 C.F.R. at 647-48.
- ¹⁷¹ See James Goodwin, *Recent Obama Administration Open Government Milestone; Tearing the Wall of Separation Between the American People and Their Government Isn't Easy*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=43197A84-FE58-305E-0059154FAD1B91B0> (Apr. 28, 2010).

- ¹⁷² Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Solicitation for Combined Federal Campaign (Oct. 18, 2006), http://www.whitehouse.gov/omb/oira_3206_meetings_545 (identifying American Heart Association as “AHA”) with Office of Info. & Regulatory Affairs, Meeting Record Regarding: ARRA Health IT Rules (Mar. 22, 2010), http://www.whitehouse.gov/omb/0938_meeting_03222010 (identifying American Hospital Association as “AHA”).
- ¹⁷³ Other “AHA” candidates include: the American Historical Association, the Arabian Horse Association, the American Homebrewers Association, the American Humanist Organization, the American Humane Association, etc.
- ¹⁷⁴ GAO 2003 REPORT, *supra* note 59, at 55.
- ¹⁷⁵ Office of Info. & Regulatory Affairs, Meeting Record Regarding: CAFO Rule (Oct. 9, 2002), http://www.whitehouse.gov/omb/oira_2040_meetings_175.
- ¹⁷⁶ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Corps of Engineers Program Regs (Feb. 7, 2003), http://www.whitehouse.gov/omb/oira_0710_meetings_193.
- ¹⁷⁷ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Definition of Solid Waste (June 10, 2003), http://www.whitehouse.gov/omb/oira_2050_meetings_233.
- ¹⁷⁸ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Iron and Steel Foundries MACT (Aug. 13, 2003), http://www.whitehouse.gov/omb/oira_2060_meetings_244.
- ¹⁷⁹ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Country of Origin Labeling Rule (Jul. 19, 2004), http://www.whitehouse.gov/omb/oira_0581_meetings_357.
- ¹⁸⁰ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Prospective Payment System for Inpatient Rehabilitation Facilities for FY2007 (Jul. 21, 2006), http://www.whitehouse.gov/omb/oira_0938_meetings_551.
- ¹⁸¹ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2007 (Jul. 21, 2006), http://www.whitehouse.gov/omb/oira_0938_meetings_550.
- ¹⁸² Office of Info. & Regulatory Affairs, Meeting Record Regarding: WOSB Fed. Contract Assistance Pgm. (June 14, 2007), http://www.whitehouse.gov/omb/oira_3245_meetings_618.
- ¹⁸³ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Access to Pasture (Sep. 26, 2008), http://www.whitehouse.gov/omb/oira_0581_meetings_786.
- ¹⁸⁴ Office of Info. & Regulatory Affairs, Meeting Record Regarding: FAR Buy America Civilian Agency Acquisition Council (Mar. 18, 2009), http://www.whitehouse.gov/omb/0750_031809.
- ¹⁸⁵ Office of Info. & Regulatory Affairs, Meeting Record Regarding: NESHAP: Portland Cement Notice of Reconsideration (Apr. 15, 2009), http://www.whitehouse.gov/omb/2060_meetings_041509.
- ¹⁸⁶ Office of Info. & Regulatory Affairs, Meeting Record Regarding: GHG Reporting (Sep. 9, 2009), http://www.whitehouse.gov/omb/2060_meeting_090909_2.
- ¹⁸⁷ Office of Info. & Regulatory Affairs, Meeting Record Regarding: SAFE Mortgage Licensing Act (Oct. 1, 2009), http://www.whitehouse.gov/omb/2502_meeting_100109.
- ¹⁸⁸ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Boiler MACT (Apr. 9, 2010), http://www.whitehouse.gov/omb/2060_meeting_04092010.
- ¹⁸⁹ Office of Info. & Regulatory Affairs, Meeting Record Regarding: Policy and Technical Changes to the Medicare Advantage and Prescription Drug Benefit Program (Sep. 22, 2010), http://www.whitehouse.gov/omb/0938_meeting_09222010.
- ¹⁹⁰ GAO 2003 REPORT, *supra* note 59, at 55.
- ¹⁹¹ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Part 541 Regulation (Jan. 30, 2003), http://www.whitehouse.gov/omb/oira_1215_meetings_188 with Office of Info. & Regulatory Affairs, View Rule (RIN: 1215-AA14), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200304&RIN=1215-AA14>.
- ¹⁹² Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Housing Goals Proposed Rule (Mar. 29, 2004), http://www.whitehouse.gov/omb/oira_2501_meetings_328 with Office of Info. & Regulatory Affairs, View Rule (RIN: 2501-AC92), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200404&RIN=2501-AC92>.
- ¹⁹³ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Wetlines Rule (Sep. 28, 2004), http://www.whitehouse.gov/omb/oira_2137_meetings_395 with Office of Info. & Regulatory Affairs, View Rule (RIN: 2137-AD36), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200410&RIN=2137-AD36>.
- ¹⁹⁴ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Definition of Distrub (Apr. 8, 2005), http://www.whitehouse.gov/omb/oira_1018_meetings_431 with Office of Info. & Regulatory Affairs, View Rule (RIN: 1018-AT94), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200510&RIN=1018-AT94>.
- ¹⁹⁵ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: LM-30 (June 13, 2007), http://www.whitehouse.gov/omb/oira_1215_meetings_613 with Office of Info. & Regulatory Affairs, View Rule (RIN: 1215-AB49), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200710&RIN=1215-AB49>.
- ¹⁹⁶ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Blending (Nov. 6, 2007), http://www.whitehouse.gov/omb/oira_2000_meetings_671 with Office of Info. & Regulatory Affairs, View Rule (RIN: 2060-AO81), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200904&RIN=2060-AO81>.
- ¹⁹⁷ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: “20-in-10” (Nov. 15, 2007), http://www.whitehouse.gov/omb/oira_2000_meetings_675 with Office of Info. & Regulatory Affairs, View Rule (RIN: 2127-AK29), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200804&RIN=2127-AK29>.
- ¹⁹⁸ Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: 1CD-10 (Mar. 13, 2008), http://www.whitehouse.gov/omb/oira_0938_meetings_711 with Office of Info. & Regulatory Affairs, View Rule (RIN: 0938-AN25), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=0938-AN25>.
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- ²¹⁵ See, e.g., Office of Info. & Regulatory Affairs, Meeting Record Regarding: Medicare Hospital Outpatient Prospective Payment System (Oct. 25, 2007), http://www.whitehouse.gov/omb/oir_0938_meetings_678.
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