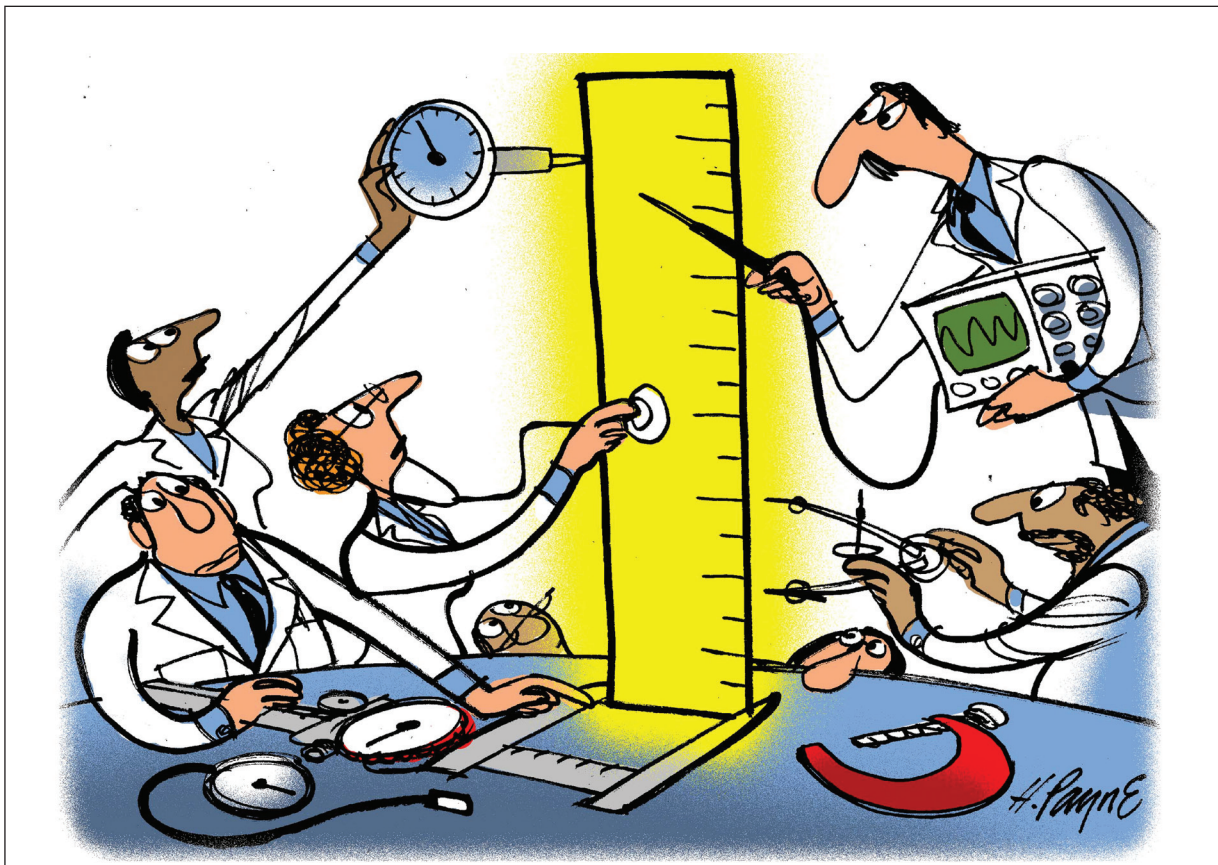


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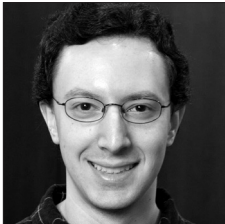
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The Bottleneck

What happens to regulations after they are developed by the Environmental Protection Agency? They go to the Office of Information and Regulatory Affairs in the White House, where even in a “transformative” administration too often they wither on the vine



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EDITOR'S NOTE: We invited OIRA director Cass Sunstein to submit an ANOTHER VIEW sidebar, but he declined.

When the White House told Environmental Protection Agency Administrator Lisa Jackson to stand down on her plan to issue a new air quality standard for ozone pollution this past September, President Obama's point man was Cass Sunstein, the Harvard Law School professor who heads the Office of Information and Regulatory Affairs. OIRA is a small division inside the Office of Management and Budget, part of the executive office of the president. Sunstein's decision on ozone means that EPA will have to implement — and defend in court — a standard promulgated by the George W. Bush administration that Jackson called “legally indefensible” a few months earlier.

The decision enraged green groups, a core Democratic constituency. Along with business interests and many states, all had lobbied EPA on the merits and the West Wing on the politics with every resource they could muster. The president's men and women had spent much of the spring and summer working hard to nurture business-friendly optics on regulatory matters. In the final scrum, the environmental community ended up with a thumb in its eye, as it has whenever the EPA administrator is overwhelmed by OIRA's relentless drive to quell controversial rules going back forty years.

From an historical perspective, Sunstein was merely continuing an unbroken track record amassed by OIRA and its predecessors, tracing back to the Nixon White House. As the ink was drying on the spate of new environmental statutes enacted in the progressive salad days of 1970-73, Richard Nixon's own point man, Commerce Department Secretary Maurice Stans, persuaded Chief of Staff John Ehrlichman to initiate a task force that would monitor the infant EPA's activities. Gradually expanded to cover all executive branch agencies, and institutionalized by the 1980 Paperwork Reduction Act and an executive order issued in the Clinton administration, OIRA has operated in a remarkably consistent manner ever since, under Democratic and Republican presidents, through recessions, boom times, war, and peace, and regardless of how specifically statutory mandates have instructed agencies what to do. In fact, two distressing aspects of the ozone decision demonstrate OIRA's disregard for clear legislative intent: First, Congress delegated the mandate to issue new National Ambient Air Quality Standards based on emerging science directly to the EPA administrator, not the president. Second, OIRA justified its inter-

vention for the sake of reducing regulatory costs, but the Clean Air Act prohibits Jackson from considering costs when setting NAAQSs — costs come into play when the NAAQSs are applied to State Implementation Plans.

Six months ago, the Center for Progressive Reform undertook an empirical study of OIRA's activities, assembling an unprecedented portrait of its behavior during the decade from October 16, 2001, when Bush II director John Graham first began to post notices of meetings with outside parties on the Internet, until June 1, 2011, 28 months into the Obama administration and Cass Sunstein's reign as director. OIRA conducted 6,194 separate reviews of regulatory submissions, holding 1,080 meetings that involved 5,759 appearances by outside participants. Both our final report and the database we assembled are available on the CPR website, at progressivereform.org.

OIRA is a surprisingly small division with a staff of approximately thirty desk officers (mostly economists) who are responsible for reviewing 500 to 700 agency regulations each year. Executive Order 12,866, issued by President Clinton in 1993, and continued by Presidents Bush and Obama, authorizes it to review "significant regulatory actions" to ensure that they comply with the central goal of the order: that "the benefits of the intended regulation justify its costs."

As CPR and others have pointed out in the past, the analytical tool that OIRA uses to determine a regulation's fate, cost-benefit analysis, is structurally biased to inflate expected costs and trivialize benefits, often making protective, statutorily mandated regulations appear inordinately expensive if not ridiculous. Some of the future benefits of a regulation (e.g., cancers prevented, lives saved) are first converted into dollar amounts to allow for apples-to-apples comparison with regulatory costs. These benefits are then discounted to their present values according to standardized annual interest rates (three and seven per-

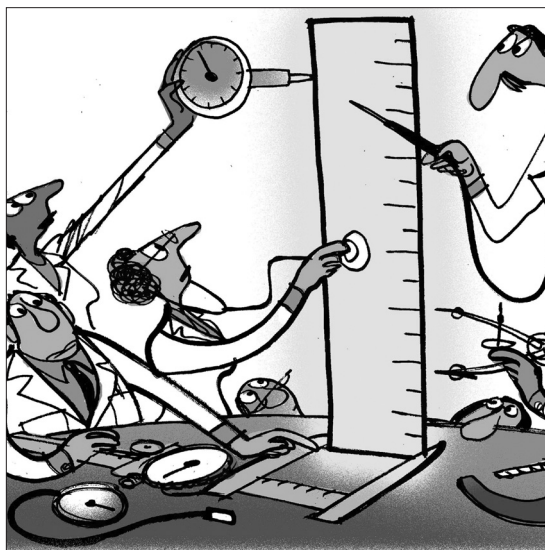
cent). As a result, future harms to public health or the environment count for only a fraction of more immediate effects, such as short-term compliance costs — a normative assumption directly at odds with the preventive premise of environmental laws. More fundamental than these distortions is the fact that many expected benefits of a regulation (e.g., neurological damage, diminished fertility) are simply left out of the analysis because they are harder to monetize.

The office's overbearing intervention in regulatory affairs, especially during the presidencies of Ronald Reagan and George H. W. Bush, 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. Executive Order 12,866 responded to the most trenchant of these criticisms — OIRA's penchant for delaying rules, dragging informal proposals into its

net, and operating behind closed doors. It sets deadlines, circumscribes the scope of what the office may review, and requires broad disclosure. For example, the order instructs OIRA to focus on "economically significant rules," generally defined as rules imposing more than \$100 million in annual compliance costs. It allows the office to extend the scope of its review in very limited circumstances, namely when a proposed rule would interfere with other agencies' work; materially change entitlement programs; or present

"novel" legal or policy issues. And it requires that the office make available "all documents exchanged between OIRA and the agency during the review by OIRA," and that all agencies "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." The office and the agencies routinely ignore these unequivocal mandates, and have done so since the executive order was issued.

OIRA has extended its reach into every corner of the agencies' work. Of the approximately 500-700 rules reviewed by the office each year, only about 100 are economically significant; the rest are "non-economically significant," supposedly a small exception to the EO's rule. Or, in other words, non-econom-



ically significant rules are reviewed at a ratio of six to one with the rules that EO 12,866 establishes as the primary focus of OIRA's work. To make matters worse, these non-economically significant rules — already on the border of OIRA's authority and over-selected for review — are also frequently the subject of meetings between OIRA representatives and outside lobbyists. Of the 409 rules discussed at such meetings during the period we studied, 248 (61 percent) were non-economically significant. By micromanaging so many small-scale, routine regulations, the office not only undermines agency prerogatives, it sets up a dynamic where it can hold minor rules hostage in exchange for the release of major proposals.

OIRA has adopted perhaps the most extreme open-door policy in Washington with respect to rulemaking proposals, agreeing to meet with anyone who asks for such an audience, whether or not the originating agency has officially submitted the matter for review. It insists that it is required by EO 12,866 to sit down with all comers. This assertion is a blatant misreading because nothing in the executive order requires such a policy; it merely requires OIRA to make certain disclosures when it does meet with individuals from outside the executive branch.

Equal access to OIRA does not produce balanced participation. Over the last decade, 65 percent of the 5,759 participants who met with OIRA represented industry interests — about five times the number appearing on behalf of public interest groups. President Obama's OIRA did only somewhat better than President George W. Bush's, 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. 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.

We made a ranked list of the 30 outside organizations that met with OIRA most frequently. Five were national environmental groups: the Natural Resources Defense Council (ranked 2 overall), Environmental Defense Fund (5), Sierra Club (6), Earthjustice (8), and Consumer Federation of America (30). Seventeen were large corporations and trade associations, including: the American Chemistry Council (1), ExxonMobil (3), American Forest and Paper Association (4), American Petroleum Institute (7), Edison Electric Institute (9), American Trucking Associations (12), National Association of Home Builders

(13), Air Transport Association (15), National Association of Manufacturers (16), National Cattlemen's Beef Association (17), and DuPont (19). The remaining eight were law and lobbying firms representing industry viewpoints. Remarkably, among OIRA's most persistent guests was the U.S. Small Business Administration (not an outside organization, hence not ranked). Its tiny Office of Advocacy, which functions like a trade association perched within the federal government, attended 122 meetings, always on the side of large industry groups.

The economic incentives driving such participation are skewed toward repetitive presentations on the same issues, especially in light of industry's heavy reliance on lobbying and law firms. With their meters running by the hour, these firms appear as frequently as they can at OIRA, often at the beginning, middle, and end of a controversial rulemaking. Of the 905 appearances made by such firms in meetings with OIRA, 94.3 percent were on behalf of industry groups, while 2.5 percent were on behalf of public interest groups.

The most disturbing consequence of industry dominance of the OIRA process is that 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 groups, while 7 percent attracted participation from public interest groups but not industry: a ratio of more than ten to one in favor of industry's unopposed involvement.

Part of what draws industry groups to OIRA, but repels public interest groups, may be the office's well-earned reputation as a court of last resort for industry lobbyists who have failed to convince scientific and legal experts at the agencies. Public interest groups are understandably hesitant to spend their scarce resources on lobbying OIRA, a forum designed to be unreceptive to their arguments given its institutional track record as a "check" on "excessive" regulation and its use of cost-benefit analysis. Some might have expected OIRA to earn a more neutral reputation under the Obama administration but, again, we found only small differences.

How and why does this imbalance arise? The resources of large corporations and national trade associations dwarf those of public interest groups, whose activities are largely funded by foundation grants and

individual donations. And every rulemaking ensures that some affected industry sector will be actively involved due to its self-interest in the outcome, while public interest groups are bound to be only occasional guests, given the wide range of issues demanding their attention. With such an uneven playing field, 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.

OIRA 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, under the Administrative Procedure Act's notice-and-comment system. Virtually all the groups meeting with the office will have already lobbied the agency extensively and will continue to do so after OIRA's review is over. This kind of repetitive lobbying wastes government resources and unnecessarily duplicates notice-and-comment practices, albeit in a far less transparent setting. Without access to the detailed minutes of these meetings, or to the communications between OIRA and the agencies that follow, observers are unable to divine their significance and impact. Worse still, the minimal meeting information that OIRA posts online is frustratingly unclear — the groups that attend are identified by cryptic abbreviations, and the meeting topics often bear little relation to the title of the rule discussed.

The office's scant disclosures indicate only whether it changed an agency's rule during review, without specifying the nature or significance of any alterations. Again, this practice directly violates the transparency mandates of EO 12,866. Necessarily relying on this unsatisfying data, we found that OIRA changed 76 percent of rules submitted to it for review under Obama, compared to a 64 percent change rate under George W. 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.

The extent to which the meetings drive the outcomes of OIRA reviews is an open question, one that

is virtually impossible to study on a large scale given the office's limited disclosures. But in a forum that is biased against regulation and highly sensitive to political pressure, groups that dominate the process seem most likely to prevail, especially because their message systematically bypasses statutorily mandated evaluations by an agency's scientists, engineers, lawyers, and other technical experts.

Take, for instance, OIRA's reliance on industry-supplied estimates of technology costs and expected market effects. In its review of EPA's proposal to regulate coal ash, after 33 meetings with industry representatives OIRA bought their argument that the most effective regulatory option would impose a ruinous "stigma" on the beneficial recycling of coal ash. At the same time, EPA reported that in decades of implementing the Resource Conservation and Recovery Act, the agency had never observed such an effect. Nevertheless, the revised cost-benefit analysis that emerged from OIRA review predicted that a stigma effect would result in \$233.5 billion in "negative benefits" (i.e., costs) to society. The weaker regulatory alternatives were thus presented as the only cost-effective options.

Other notable examples where industry achieved its desired result from lobbying OIRA include: EPA's final rule on industrial and commercial boilers, which will cost industry half as much as the proposed rule and provide reduced protection, and the agency's proposed lead paint rule, whose key testing provision was eliminated following a successful lobbying effort by the home renovation industry.

When centralized regulatory review began in the Nixon White House, it targeted the newly created EPA. In the four decades since, OIRA has steadily expanded its authority over all executive agencies and even begun an initiative a few months ago to pull independent agencies like the Federal Trade Commission into its cost-benefit dragnet. Nevertheless, OIRA remains obsessed with EPA: fully 442 of OIRA's 1,080 meetings over the 10-year period of our study dealt with EPA rules. The agency submitted only 11 percent of the rulemaking matters reviewed by OIRA, and yet its rules accounted for 41 percent of all meetings held. This preoccupation was virtually the same across the Bush and Obama years (a ratio of 3.6 to 1 in both cases). Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Ser-

vices (137 meetings) and the Department of Transportation (118 meetings).

Executive Order 12,866 grants OIRA 90 days to review a regulatory action from the date the originating agency 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 in which outside parties lobbied OIRA, 59 reviews (12 percent) lasted longer than 120 days and 22 (four percent) extended beyond 180 days.

These delays permit ongoing hazards to go unabated on a daily basis. Among recent examples of such delays: EPA's proposed coal ash rule was held captive at OIRA for six months; a non-economically significant proposal to issue a "chemicals of concern" list has languished at OIRA for 20 months at press time; a rule on cattle feed standards was stalled at OIRA for 172 days, at which point it was released only because South Korea insisted on such regulation before it would lift trade restrictions on U.S. beef; and child labor rules for agricultural facilities gathered dust for nine months — only the outcry over grievous injuries suffered by two Oklahoma teenagers dislodged it.

All the above findings 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 even 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 II administration (39 percent). Early interference frustrates transparency and maintenance of a level playing field because the public sees the agency's proposal only after it has been reshaped by lobbyists and OIRA economists. It also exposes agencies to White House political pressure before they have even had the opportunity to seek public comment on more stringent proposals.

Transparency and accountability reach their all-time nadir 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. To the Obama administration's credit, the proportion of informal-review meetings was much greater under the Bush II administration (34 percent

of all meetings) than it has been over the last two and a half years (10 percent).

The Office of Information and Regulatory Affairs habitually stretches its authority and violates its obligations under EO 12,866. Such casual disregard for an executive order with bipartisan support — it has been adopted by the Bush and Obama administrations after being promulgated by President Clinton — should be offensive on a bipartisan basis, regardless of how one feels about particular regulatory disputes. By allowing political considerations to trump expert judgments, OIRA distorts regulatory outcomes in favor of its most active lobbyists: regulated industries seeking to eviscerate pending rules, no matter the cost to public health or the environment, and the law firms and lobbyists that represent them. The well-established modes of advocacy in environmental law — based on knowledge of intricate statutory frameworks, scientific expertise, and familiarity with the scope of the EPA's delegated authority — are reduced to nothing more than an elaborate charade, with the real decisions being made for altogether political reasons.

OIRA's deeply rooted dysfunctions require nothing less than a fundamental overhaul. The office should not review individual regulatory proposals. Instead, its focus should be redirected toward cross-cutting regulatory problems that require coordinated action by multiple agencies. By helping to enhance the agencies' administrative and legislative effectiveness, and advocating targeted budget increases to enable the agencies to enforce existing laws, OIRA could redefine itself as a key player in stemming regulatory failures rather than a hostile gatekeeper on the wrong side of history.

But given the Obama administration's track record on OIRA, we have little hope that such fundamental reforms will be contemplated. The least that can be done is to rein OIRA in and make it comply with its responsibilities under EO 12,866. The requirements for transparency and accountability should cover all written communication between OIRA staff and the originating agency. The office should terminate its practice of meeting with any and all outside parties, repetitively. And if OIRA continues to meet with outside parties, it must assume an active role in balancing the participation, by consolidating meetings with like-minded participants — seeing them all at once and only once — and reaching out to relevant public interest groups to encourage their input. These reforms are inadequate, but would at least eliminate blatant violations of EO 12,866. •