

OIRA at a Crossroads: The Evolution of a Proactive Role for OIRA

Alternatives for the Management of the Administrative State

It has been forty years since OIRA, the Office of Information and Regulatory Affairs located in the White House Office of Management and Budget, was established. As a result of the lengthy time period that has elapsed it is only befitting for the Administration to solicit comments on a “modernization” program. The resultant question is what type of “modernization” program should prevail recognizing that OIRA stakeholders have at times had very divergent views which have resulted in considerable discord.

As we discuss the issue there should be complete recognition of one governing fact; OIRA is a creation of the Congress and it must comply with prevailing statutes. Nonetheless if the President is determined to establish a new regulatory process he will either work with OIRA or seek a less visible and *ad hoc* process working through the White House staff. For starters we believe that the single most significant element in the President’s “modernization” program is to utilize OIRA on a continuous basis as a *proactive* overseer of the administrative state. To that end It appears that the Biden Administration is adopting Option 2 in a paper CRE disseminated to affected parties in December 2020.

More specifically CRE outlined [three options](#) regarding the management of OIRA on December 2020 , one of which was to implement a “**Proactive Intervention Program to Address Existential Threats**”. In January 2021 the Biden Administration issued an Executive Order stating that OMB should “*consider ways that OIRA can play a more **proactive** role in partnering with agencies to explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits.*”

OIRA Statutory and Administrative Authorities

The Editor is of the opinion that an essential first step in doing anything new is to understand the previous actions taken by others dealing with comparable issues notwithstanding the nanosecond interest in history by many of the participants in this discussion. To this point there is not a single website on the Web which has more historical information regarding the establishment of centralized regulatory review than does the [CRE website](#); its [associated website](#) focuses on the Biden

Administration's regulatory program. Interested readers may augment this information base by utilizing the CRE [search engine](#).

Let us first review the statutory authorities delegated by the Congress to OIRA in the enactment of the [Paperwork Reduction Act \(PRA\)](#). The PRA established a process for controlling the recordkeeping and reporting requirements imposed on the public by federal agencies. That said, as far back as forty years ago the Congress foresaw the emergence of the information age and provided mechanisms which lead to the passage of the [Information Quality Act](#) which set the stage for addressing cosmic issues such as the [Internet of Things](#).

Consequently although OIRA has a statutory basis for addressing information issues it has no direct statutory authority to address regulatory matters. OIRA's regulatory authorities derive from Executive Order 12291, now after forty years referred to as the *Iconic* [Executive Order 12291](#) (1981) because as [Time Magazine](#) states it is "one of the nine executive orders which changed American history". It should be noted that Executive Order 12291 replicated in large part a memorandum issued by OMB nearly ten years earlier in 1971 which implemented the first OMB program to review agency regulations titled the [Quality of Life Review](#). It is often overlooked that it took nearly twenty years and five administrations to get to Executive Order 12291 and it was not achieved by the simple signing of an Executive Order but instead the deliberate work of dedicated [civil servants](#) over more than a decade.

The Elephant in the Room: A Proactive Role for OIRA

In our opinion the cosmic change in the centralized regulatory review process championed by the President is the utilization of OIRA as a proactive agent for the implementation of regulations as opposed to an agent dedicated to their review to ensure that they are economically beneficial and in compliance with prevailing statutes.

There is much to say in support of OIRA's traditional mission of reviewing individual regulations because there are thousands upon thousands of regulators but OIRA has only in the neighborhood of fifty plus employees to hold the regulators accountable for issuing economically efficient regulations. It can easily be concluded that regulators are not in need in assistance from OMB.

That said in the year 2021 the nation faces breathtaking issues such as COVID-19, Climate Change and a dilapidated infrastructure all of which need immediate attention and require an interagency approach to each issue. Therein lies the justification for a proactive strategy for OIRA accompanied by well-defined constraints not to mention that it is also preferred to an ad hoc strategy employed by White House staff to promote regulations outside the jurisdiction of a publicly accountable organization, OIRA.

OIRA should operate in a manner commensurate with what mathematicians describe as a bounded set, one which “ has both upper and lower bounds; for example a set of real numbers is bounded if it is contained in a finite interval”. The upper and lower bounds for a proactive OIRA would be established by the political process involving the Congress, the public and stakeholders. Within the aforementioned bounds it is our view that OMB’s proactive role should be limited to regulations in a well-defined program and not any regulation outside the aforementioned program(s). In doing so care should be taken as not to overburden OIRA with a significant number of proactive intervention programs because they will detract from OIRA’s mission to conduct reviews of individual regulations.

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