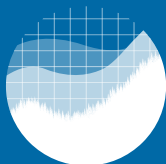


STRENGTHENING REGULATORY REVIEW

*Recommendations for the Trump Administration
from Former OIRA Leaders*



Prepared by



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

Copyright © 2016 by the Institute for Policy Integrity.
All rights reserved.

Institute for Policy Integrity
New York University School of Law
Wilf Hall, 139 MacDougal Street
New York, New York 10012

Jason A. Schwartz is the Legal Director at the Institute for Policy Integrity and Adjunct Professor of Clinical Law at New York University School of Law. Caroline Cecot is the 2016-2017 Legal Fellow at the Institute for Policy Integrity and Affiliate Faculty at George Mason School of Law. Thanks to Michael Livermore, Richard Revesz, Brigit Rossbach, Derek Sylvan, and the participants at the roundtable discussion hosted by the Institute for Policy Integrity in Washington, D.C. on September 8, 2016. Policy Integrity hosted the roundtable under a grant from the Laura and John Arnold Foundation. The Institute for Policy Integrity prepared this Report and its recommendations to reflect the general consensus reached among the former OIRA Administrators and Acting Administrators at the roundtable discussion.

This Report does not purport to present the views of New York University School of Law, George Mason School of Law, or the Laura and John Arnold Foundation, if any.

Cover photo © Daniel X. O'Neil

Executive Summary

For nearly half a century, Presidents from both political parties have sought to improve the quality of decisionmaking at administrative agencies through central oversight of significant regulatory actions. Carried out by the Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President, under the Office of Management and Budget (OMB), centralized review can enhance interagency coordination and promote careful consideration of the qualitative and quantitative costs and benefits of regulatory choices, consistent with agencies' statutory mandates and with presidential priorities.

This Report contains a set of recommendations for the Trump Administration that, if implemented, would strengthen the process of regulatory review. These recommendations reflect the general consensus of a group of former OIRA Administrators and Acting Administrators who served under both political parties. These recommendations can be accomplished by executive action.

Recommendation for Immediate Implementation

1. **Reaffirmation:** President Trump should reaffirm the existing regulatory review process and encourage new agency officials to adopt collaborative relationships with OIRA. As soon as practical after taking office, the President should issue a memorandum to agencies reaffirming Executive Orders 12,866 and 13,563. The memorandum should emphasize that OIRA's central roles include not just reviewing significant regulatory actions for their economic effects and consistency with the law and the President's priorities, but also coordinating interagency review and collaboration on regulations.

Recommendations for the First 100 Days

2. **Retrospective Reviews:** Every President since Carter has sought to improve existing regulations through a process of retrospective review of costs and benefits. That every administration feels compelled to call anew for retrospective review suggests that prior attempts at regulatory look-back have not been sufficient. To better promote retrospective review, federal agencies should, at the time of the initial rulemaking, prospectively develop plans to reevaluate their regulatory choices periodically, along with mechanisms to apply new insights to future decisions.

Within the first 100 days in office, President Trump should issue a supplemental executive order directing agencies to (1) identify metrics of success for each new economically significant regulation they promulgate and (2) prepare a prospective plan to collect information on the rule's performance under the metrics to allow an informed assessment of the rule's effectiveness and design over time. Each prospective plan for retrospective review, included in the preamble of each new economically significant regulation, would be subject to OIRA review. OIRA should provide guidance on developing these plans, including on the appropriate use of regulatory experimentation.

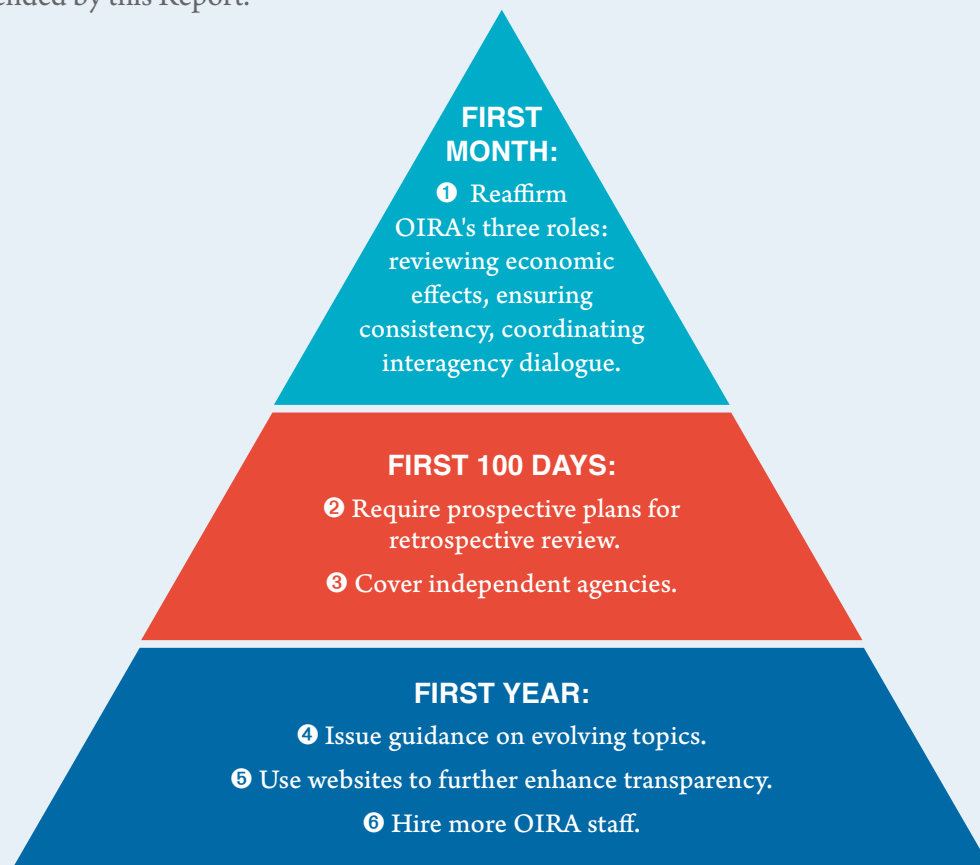
3. **Independent Agency Review:** Since the beginning of federal regulatory review, independent agencies have been exempt from many analytical requirements and from OIRA oversight. Yet independent agencies'

regulations present the same need for a centralized system to assess economic efficiency, ensure consistency with administration priorities, and facilitate interagency coordination. President Trump should adopt a supplemental executive order requiring independent agencies to prepare regulatory impact analyses for economically significant rules and directing OIRA to review the analyses.

Notwithstanding the consensus among the roundtable of former OIRA leaders that retrospective review and review of independent agency rules are desirable, all roundtable participants felt strongly that OIRA requires an increase in its staff before assuming additional responsibilities. (See Recommendation #6 below on revitalizing OIRA’s staff levels.)

Recommendations for the First Year

4. **Methodology Guidance:** The OIRA administrator should consider issuing new guidance to agencies on evolving topics in cost-benefit analysis, such as how it applies to financial regulations. OIRA should continue to facilitate agency communication, collaboration, and sharing of best practices.
5. **Transparency:** OIRA should work with agencies to make sure all regulatory-review documents to which the public is entitled are made available online.
6. **Capacity and Expertise:** Since its creation in 1981, OIRA’s staff levels have been cut nearly in half even as its responsibilities continue to expand. President Trump should direct OMB to develop a budget proposal that will return OIRA’s staff to adequate levels. This would allow OIRA to hire more expert staff, including but not limited to those in technical and scientific fields. Hiring more staff is essential to implement the new responsibilities recommended by this Report.



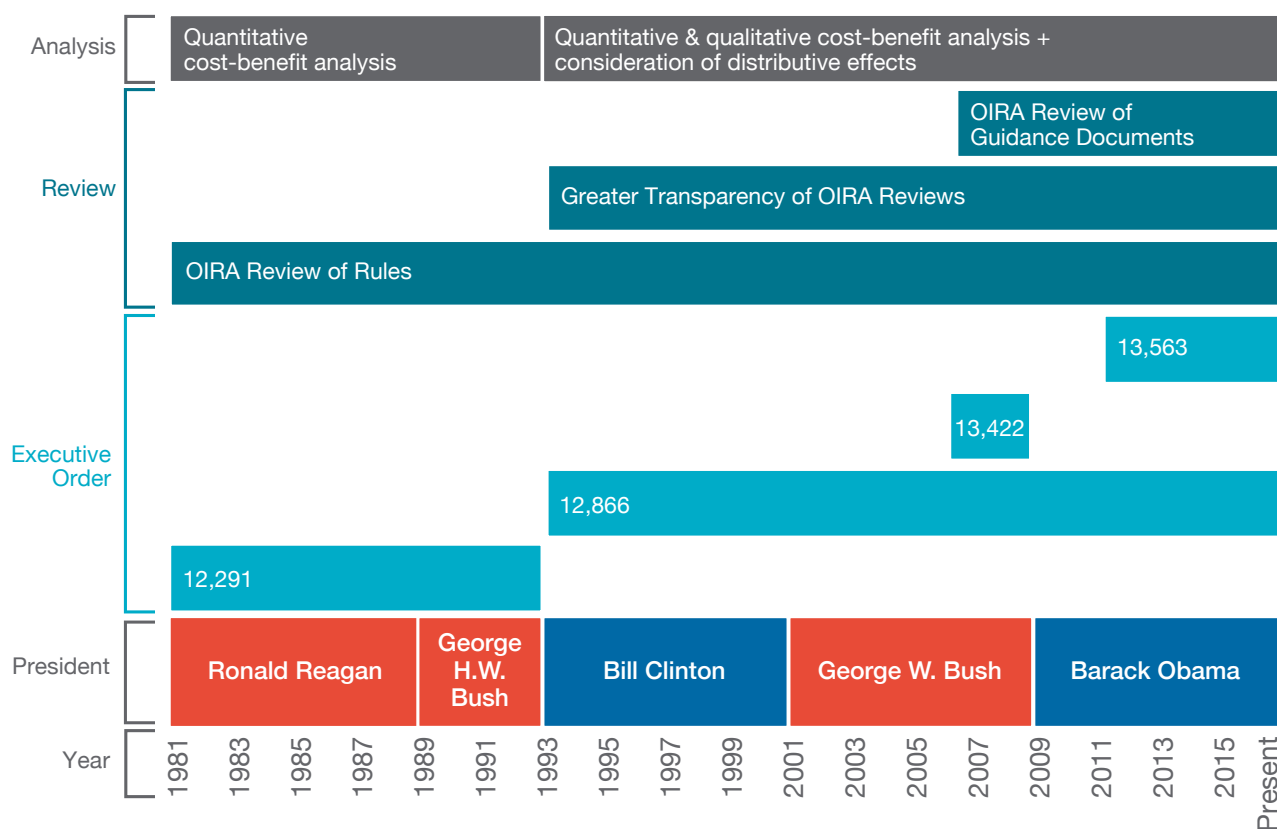
Charting a Course to Strengthen Regulatory Review

Regulatory Review and Presidential Agendas

All Presidents have looked to regulations to advance their policy agendas, to the extent permitted by law. Congress has entrusted agencies with protecting the quality of the air we breathe and the water we drink, safeguarding our access to pharmaceuticals or loans, and addressing a myriad of other issues, and the President ensures that these objectives are responsibly met through the regulatory process. It is important that the rulemaking process works smoothly and transparently, reflects the law and presidential priorities, and maximizes net benefits for society.

To accomplish these goals, past Democratic and Republican Presidents have relied on central oversight of significant regulatory action through the Office of Information and Regulatory Affairs (OIRA) in the Executive Office of the President, under the Office of Management and Budget (OMB). Two longstanding features of centralized regulatory oversight are the requirements that agencies assess the costs and benefits of their rules and that they submit proposed rules and analyses to OIRA's review.

Regulatory Review's Longevity and Bipartisan Support



Though antecedents of today's regulatory review system emerged during the Nixon, Ford, and Carter administrations, President Reagan created the essential architecture for the centralized review process that governs today by issuing Executive Order 12,291.¹ That Executive Order required agencies to prepare regulatory impact analyses weighing the costs and benefits of "major"² proposed regulations and tasked officials at OIRA with reviewing those analyses. President

¹ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

² "Major" meant any regulation with an anticipated annual effect on the economy of \$100 million or more, or other significant economic effects.

George H.W. Bush, who as Vice President helped develop Executive Order 12,291, continued President Reagan's policies and procedures.

Although President Clinton came to office in 1993 with a different set of regulatory priorities, he recognized the benefits of the centralized review system Reagan had established, including quality control over a growing regulatory state and the introduction of a broader perspective into the rulemaking process. When he issued Executive Order 12,866, Clinton maintained the essential features of Reagan's review process, though with several crucial changes.³ OIRA still reviewed agencies' assessments of the costs and benefits of economically significant rules, but now agencies were directed to consider qualitative measures of costs and benefits, recognizing that some costs and benefits are difficult to quantify, and to weigh potential distributive impacts of regulations. Executive Order 12,866 also made the functioning of OIRA more transparent to the public, setting deadlines for review and requiring top officials to disclose meetings with interest groups and to make certain information available to the public.

For the first six years of his administration, President George W. Bush maintained Clinton's Executive Order and its broad regulatory review process, but he ensured that OIRA's regulatory oversight reflected his own administration's priorities. In 2007, President Bush issued the short-lived supplemental Executive Order 13,422, which, among other changes, directed OIRA to review agencies' significant guidance documents as well as their regulations.

In 2009, President Obama revoked the Bush order but maintained Clinton's Executive Order 12,866,⁴ though his OIRA continued the practice of reviewing significant guidance documents.⁵ In 2011, Obama reaffirmed his administration's commitment to OIRA's central oversight and regulatory review in Executive Order 13,563,⁶ which also, among other updates, renewed the call for retrospective review.

In addition to its reviews of hundreds of regulatory actions and guidance documents each year, OIRA is responsible for coordinating interagency reviews, reviewing all agencies' information collection activities, reducing paperwork burdens, developing government-wide statistics standards and policies, facilitating interagency data-sharing, promoting e-government services, overseeing agencies' information and peer review practices, guiding agencies on privacy and confidentiality policy, supervising agencies' retrospective reviews, participating in regulatory flexibility reviews, monitoring agency compliance with the Unfunded Mandates Reform Act, and, most recently, spearheading international regulatory coordination efforts. This growth in its responsibilities reflects OIRA's value to Congress and to each presidential administration.

President Trump should continue to embrace OIRA's role in regulatory oversight and coordination, the central features of which have endured for over three decades and through administrations of both parties. Consistent with President Trump's agenda, OIRA's regulatory review can play a valuable role to ensure federal agencies under the Trump administration are best serving the welfare of the American people. Nevertheless, despite the endurance of the regulatory review structure that exists today, even the Administrators and Acting Administrators of OIRA under Presidents Reagan, Clinton, Bush, and Obama believe some reforms could further improve the regulatory process. This Report reflects the consensus recommendations of a roundtable of OIRA's past leaders.

³ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

⁴ Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009).

⁵ PETER R. ORSZAG, MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, GUIDANCE FOR REGULATORY REVIEW (Mar. 4, 2009).

⁶ Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

A Roundtable of Former OIRA Administrators and Acting Administrators

This Report presents a set of recommendations that would strengthen the regulatory review process. The recommendations are drawn from a roundtable discussion hosted by the Institute for Policy Integrity in Washington, D.C. on September 8, 2016.⁷ The following individuals—all former Administrators or Acting Administrators of OIRA—participated in that discussion and shared their views:

- Christopher C. DeMuth, Administrator of OIRA (1981-1984);
- The Honorable Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit, Administrator of OIRA (1984-1985);
- Wendy Lee Gramm, Administrator of OIRA (1985-1988);
- The Honorable S. Jay Plager of the U.S. Court of Appeals for the Federal Circuit, Administrator of OIRA (1988-1989) and Associate Director of OMB (1987-1988);
- Sally Katzen, Administrator of OIRA (1993-1998) and Deputy Director for Management of OMB (1999-2001);
- John D. Graham, Administrator of OIRA (2001-2006);
- Susan E. Dudley, Administrator of OIRA (2007-2009);
- Boris Bershteyn, Acting Administrator of OIRA (2012-2013) and General Counsel of OMB (2011-2012).

The Institute for Policy Integrity prepared this Report and its recommendations to reflect the general consensus reached among the former OIRA Administrators and Acting Administrators at the roundtable discussion.⁸ Michael A. Fitzpatrick, Senior Advisor to the OIRA Administrator (1995-1997) and Associate Administrator of OIRA (2009-2011), also participated in the roundtable discussion and offered comments.

While Policy Integrity sought to capture the essence of the roundtable discussion in formulating these recommendations, the roundtable participants themselves did not compose this Report. Individual participants might have different views regarding the particular formulation of the recommendations or supporting materials presented here.

⁷ The Institute for Policy Integrity is a non-partisan think tank housed at New York University School of Law and dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity hosted the roundtable under a grant from the Laura and John Arnold Foundation. This Report does not purport to present the views of New York University School of Law or the Laura and John Arnold Foundation, if any.

Policy Integrity and its staff have produced their own extensive scholarship and advocacy materials on reforming the regulatory review process. See e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008); Richard L. Revesz & Michael A. Livermore, Regulatory Review, Capture, and Agency Inaction, 101 *GEO. L.J.* 1337 (2013); Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 *YALE J. REG.* (forthcoming); Institute for Policy Integrity, Comments to the Administrative Conference of the United States on Improving the Timeliness, Transparency, and Effectiveness of OIRA Regulatory Review (Nov. 14, 2013), available at http://policyintegrity.org/documents/Policy_Integrity_Nov_13_Comments_on_ACUS_Project_on_OIRA.pdf; Institute for Policy Integrity, Comments on OIRA's 2012 Draft Report to Congress (June 11, 2012), available at http://policyintegrity.org/documents/Policy_Integrity_Comments_on_Draft_2012_Report_to_Congress.pdf.

⁸ Judge Ginsburg takes no position on this Report's final recommendations.

Recommendation for Immediate Implementation

Recommendation #1—Reaffirmation

Recommendation: President Trump should reaffirm the existing regulatory review process and encourage new agency officials to adopt collaborative and not adversarial relationships with OIRA, in order to promote OIRA’s roles in ensuring that significant regulatory actions maximize net benefits for society, comport with presidential priorities, and address interagency concerns.

Background: Through its history, OIRA has not always enjoyed the most collaborative relationship with all federal agencies. Some agencies have, at times, viewed OIRA as a nuisance or adversary, as a regulatory “gatekeeper” or “black hole.”⁹ By contrast, OIRA sees itself as a faithful steward of the administration’s directives and Executive Order 12,866, a role that requires OIRA to review and coordinate regulatory actions.

To be successful, OIRA needs a culture of support throughout the executive branch, starting with the President. As soon as practical after taking office, the Trump Administration should reaffirm OIRA’s three important roles: reviewing the economic effects of regulatory actions, ensuring consistency with the law and presidential priorities, and facilitating interagency review of regulatory actions. Emphasizing interagency review especially may help convince some skeptical agency officials of OIRA’s value.

Economic Effects. The Trump Administration should reaffirm that the benefits of new regulatory actions must justify their costs and should endorse OIRA’s authority to review agencies’ cost-benefit analyses. The administration could use this opportunity to remind agencies that the goal of cost-benefit analysis is to maximize net benefits for society, which requires identification of a compelling public need for regulation and consideration of all reasonable regulatory alternatives and all significant social welfare effects, including any indirect or difficult-to-quantify costs or benefits. By encouraging agencies to assess the costs and benefits of regulatory alternatives thoroughly, OIRA’s review of economic effects can help agencies issue rules that best fulfill their regulatory goals and that are most defensible to the White House, Congress, the courts, and the American public.

Presidential Priorities. Though at times some agencies have resented OIRA’s review of their expert regulatory determinations, the reality is that Presidents are accountable to the public for the actions of federal agencies. Even as agencies rightly focus on their own limited regulatory missions, conflicts may emerge with the administration’s broader domestic and foreign policy agendas. OIRA review helps Presidents focus their limited time for agency oversight on only the most intractable regulatory disputes of the greatest importance. OIRA review may also help Presidents ensure that agencies do not fall capture to narrow special interests. The Trump Administration should reaffirm OIRA’s role as a faithful steward of the administration’s directives.

⁹ Richard L. Revesz & Michael A. Livermore, *Fixing Regulatory Review* (Inst. for Policy Integrity, Report No. 2, 2008).

Interagency Review. Although less publicized, OIRA plays a crucial role in ensuring coordination among agencies. Because risks do not adhere to agencies' jurisdictional boundaries, without interagency coordination there could be turf battles, rule inconsistencies, redundant or unnecessarily costly regulation, or diffusion of responsibility leading to inaction. Failures of coordination waste resources, provoke criticism of the entire regulatory process, and, sometimes, are simply embarrassing. OIRA strives to prevent such failures through the interagency review process, which allows all agencies to have a voice in important regulatory matters. When a regulation comes under OIRA review, OIRA circulates the regulation to other federal agencies that might have an interest at stake. Because agencies value the ability to voice concerns about their sister agencies' actions, reaffirming OIRA's responsibility for coordinating interagency review could help ease historic tensions between OIRA and the agencies.

Implementation: As soon as practical after taking office, President Trump's Chief of Staff should issue a memorandum to agencies reaffirming the longstanding Executive Orders 12,866 and 13,563, and emphasizing the benefits of interagency review facilitated by OIRA.

Recommendations for the First 100 Days

In the first 100 days, the Trump Administration should consider how OIRA can build on its existing functions to better promote effectiveness across all federal regulations. Specifically, President Trump should require agencies to prepare prospective plans for reassessing each new significant regulation's successes, failures, costs, and benefits over time, and should consider expanding OIRA's oversight to cover independent agencies.

Notwithstanding the consensus among the roundtable of former OIRA leaders that these two reforms are desirable, all roundtable participants felt strongly that OIRA requires an increase in its staff before assuming additional responsibilities. (See Recommendation #6 below on revitalizing OIRA's staff levels.)

Recommendation #2—Retrospective Reviews

Recommendation: President Trump should direct agencies to identify metrics of success for each new economically significant regulation they promulgate. In the preamble for each new economically significant regulation, agencies should include a prospective plan to collect sufficient information on the rule's performance under the metrics to permit an informed assessment of the rule's effectiveness and design over time. OIRA would then examine these prospective plans for retrospective review in the course of its regular review of the proposed rules and the accompanying regulatory impact analyses. OIRA should issue guidance on developing these plans, including on the appropriate use of regulatory experimentation.

Background: When promulgating new rules, agencies necessarily make estimates about what the rules' future costs and benefits will likely be. OIRA's reviews help ensure that these *ex ante* estimates reflect the best available data, scientific models, and economic tools. Nevertheless, *ex ante* estimates remain precisely that: estimates made in the face of uncertainty. Changing economic conditions, new technological innovations, or emerging scientific understandings can cause a rule's actual costs and benefits to diverge greatly from the agency's *ex ante* estimates. Consequently, after a rule takes effect, *ex post* calculations of actual costs and benefits may reveal that the rule was poorly calibrated. A more or less stringent regulation might actually better maximize net benefits; a rule based on antiquated technology may now seem either too lax or obsolete; other government actions and external events may render a rule either redundant or overly narrow in scope.

Every President since Carter has sought to identify and address inefficient existing regulations, through a process of retrospective review of regulatory costs and benefits. Most recently, President Obama's Executive Order 13,563 called on each agency to "periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."¹⁰ That every administration feels compelled to call anew for retrospective review suggests that these repeated attempts at regulatory look-back have not been sufficient. In addition, federal agencies need prospective plans to assess periodically whether we are getting the most out of our regulations.

¹⁰ Exec. Order No. 13,563, *supra* note 6, § 6(b). See also Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (encouraging independent agencies to pursue retrospective review); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012).

Rather than waiting until years after a rule has taken effect and circumstances are already changing to look back at the rule's effectiveness, agencies should look ahead when drafting each new rule toward addressing uncertain costs and benefits over time. Agencies should be rigorous in identifying sources of uncertainty in their new regulatory actions and, where feasible, should design a plan to address those uncertainties. In particular, for each new "economically significant"¹¹ rule, agencies should be required to set a timeline for future retrospective reviews and define the goals, metrics, and milestones against which the rule's success will be evaluated. Agencies should develop plans to collect information on the rule's performance under the metrics—ideally, the actual, *ex post* costs and benefits of the rule (both quantitative and qualitative)—to permit an informed assessment of the rule's effectiveness and design. OIRA should examine agencies' prospective plans for retrospective review, which would be contained in the preambles of new economically significant regulations, as part of its standard oversight of new regulatory actions.¹²

OIRA should develop guidance on designing these plans, including the use of regulatory experimentation. In some cases, regulatory experimentation may be necessary and appropriate to develop counterfactuals and baselines. OIRA should develop guidance on when experimentation is appropriate.

After an agency conducts its retrospective review at the pre-determined time, it should issue a reasoned statement on whether the retrospective review warrants any regulatory changes.¹³

In addition to adding new responsibilities for OIRA, these requirements for retrospective review will place new burdens on agencies' resources. However, the information generated from such retrospective reviews would have the potential to facilitate future regulatory analyses by informing *ex ante* predictions of costs and benefits of other rules, thereby making it easier for agencies to address uncertainty.

Implementation: President Trump should issue a supplemental executive order directing agencies to include, in the preambles of new economically significant regulations, prospective plans to conduct retrospective review, which would be subject to OIRA review. OIRA should issue guidance on such plans.

¹¹ "Significance" is defined by Executive Order 12,866 § 3(f), and "economically significant" is usually understood to refer to that definition's first clause: "Any regulatory action that is likely to . . . [h]ave 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."

¹² Some roundtable participants supported giving agencies a choice between prospectively planning for retrospective review and including a mandatory but rebuttable sunset period in each new regulation; other participants vehemently opposed sunset periods or noted the ineffectiveness of state-level mandatory sunsets.

¹³ There was some disagreement among roundtable participants about whether the agency's findings should be available for public comment.

Recommendation #3—Independent Agency Review

Recommendation: President Trump should require independent agencies to prepare regulatory impact analyses for economically significant rules and direct OIRA to review the analyses.

Background: Since the beginning of the modern regulatory review system under President Reagan, so-called “independent” agencies have been exempt from the requirements of cost-benefit analysis. President Obama’s Executive Order 13,579 encourages independent agencies to assess costs and benefits and conduct retrospective reviews, but stops short of mandatory language. Yet, as the table below shows, independent agencies are responsible for issuing just as many important or “major” rules as “executive” agencies (where “major” means having an annual effect of \$100 million or more).¹⁴

Major Rules Issued by Covered and Currently Exempt Agencies

Agency	Number of “major” rules, 2004-2014 (data on independent agencies only since 2005) (some counts reflect joint rules from multiple agencies)
Securities & Exchange Commission (SEC)	62
Environmental Protection Agency (EPA)	35
Dept. of Transportation (Dept. of Energy (DOE) DOT)	31
Federal Reserve	21
Dept. of Energy (DOE)	20
Commodity Futures Trading Comm’n (CFTC)	20
Dept. of Health & Human Services (HHS)	16
Nuclear Regulatory Commission (NRC)	15
Federal Communications Comm’n (FCC)	14
Dept. of Labor (DOL)	8
Consumer Financial Protection Bureau (CFPB)	7
Federal Deposit Ins. Comm’n (FDIC)	6
Dept. of Agriculture (USDA)	4
Dept. of Justice (DOJ)	4
Comptroller of Currency	4
Consumer Product Safety Commission (CPSC)	3
Dept. of Homeland Security (DHS)	2
Federal Energy Regulatory Comm’n (FERC)	2
Federal Trade Commission (FTC)	2
Dept. of Housing & Urban Dev. (HUD)	1

¹⁴ See OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT (2015), available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

Many experts on the regulatory process agree that independent regulatory agencies should comply with regulatory review for the simple reason that the public deserves well-designed and effective regulations from all federal agencies.¹⁵ The Administrative Conference of the United States (ACUS) has recommended presidential review of independent agency rulemakings since 1988 and has periodically reaffirmed its support for such review.¹⁶ This idea has further received support from the American Bar Association (ABA)¹⁷ and former heads and senior officials of independent agencies,¹⁸ among others.

The rationale for greater presidential oversight of independent agencies boils down to capacity and accountability. The regulatory activities of independent agencies are functionally indistinguishable from the activities of executive agencies. Their mandates often overlap, and there is a growing need to coordinate their regulations with those of executive agencies. The President, through OIRA, is in the best position to coordinate the regulatory process. In addition, the President is “uniquely well-situated to design regulatory policy in a way that is responsive to the interests of the public as a whole.”¹⁹ And the President will be held electorally accountable for ill-conceived regulations whether promulgated by independent or executive agencies.

Independent agencies would gain, too, by having OIRA review the cost-benefit analyses underlying their regulations. Independent agencies face growing incentives for producing sound cost-benefit analyses to support their regulations. The U.S. Supreme Court has recently affirmed the importance of sound cost-benefit analysis,²⁰ and other courts have already directed independent agencies to step up their cost-benefit analysis skills.²¹ OIRA could help independent agencies improve their analyses by providing expert feedback that would serve as a form of quality control and by providing a dispassionate second opinion with a broader perspective of the regulatory landscape.²²

One way for President Trump to facilitate such a mutually beneficial review is by adopting a supplemental executive order requiring independent agencies to perform regulatory impact analyses of “economically significant”²³ rules and directing OIRA to review these analyses. Most legal scholars agree that the President has the authority to expand OIRA’s scope to review independent agency actions through an executive order.²⁴

¹⁵ Some scholars do not agree that OIRA’s review of independent agency action is desirable, arguing that such review would undermine the agencies’ “independent” status. The roundtable participants did not hold this view.

¹⁶ ACUS Recommendation 88-9, Presidential Review of Agency Rulemaking 4 (adopted Dec. 8, 1988); *see, e.g.*, ACUS Recommendation 2013-2, Benefit-Cost Analysis at Independent Regulatory Agencies (adopted June 13, 2013) (reaffirming support).

¹⁷ ABA, Support for S. 1607, the “Independent Agency Regulatory Analysis Act of 2015” (July 23, 2015) [hereinafter ABA Support Letter] (reaffirming its longstanding position (since 1986) that the President’s executive orders should be extended to independent agencies).

¹⁸ Nancy Nord et al., Support for the Independent Agency Regulatory Analysis Act of 2015 (June 17, 2015).

¹⁹ ABA Support Letter, *supra* note 17.

²⁰ *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (stating it is not “rational” “to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits”).

²¹ *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). *See also Revesz, supra* note 7.

²² *See Revesz, supra* note 7.

²³ The definition of “economically significant” is similar to the definition of “major,” and comes from Executive Order 12,866 § 3(f)(1): “Any regulatory action that is likely to . . . [h]ave 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.”

²⁴ *See, e.g.*, *Revesz, supra* note 7; ABA Support Letter, *supra* note 17; Mem. for the Hon. David Stockman, Director of OMB, from Larry L. Simms, Acting Ass’t Atty. Gen., Off. of Legal Counsel 7 (Feb. 12, 1981), *reprinted in* Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158, 162 (1981). Admittedly, some scholars think that, as a legal matter, the President could not expand OIRA’s scope to review independent agency actions through an executive order. The roundtable participants did not hold this limited view of the President’s authority to supervise independent agencies, but, in any event, it is not the intention of this Report to provide a legal analysis of this issue.

Just as thorough cost-benefit analyses and heightened OIRA scrutiny are reserved for executive agencies' "economically significant" regulations, OIRA's review of independent agencies' regulations should focus on their "economically significant" actions, following the same definition of "significance" established by Executive Order 12,866. Independent agencies would make an initial determination of each rule's significance, but OIRA should get a screening period to review this significance determination.

OIRA review of independent agency action is not unprecedented. OIRA already reviews information collection requests from independent agencies under the Paperwork Reduction Act. The Act's process for this review could provide a model for how OIRA's review of cost-benefit analyses from independent agencies could work in practice. In particular, OIRA could review the independent agency's rule before it goes on the agenda for a commission meeting. The independent agency's commissioners would vote on the rule, deciding whether or not to follow OIRA's advice.²⁵ Of course, the agency could choose to override OIRA's comments. This method would balance the need for review with concerns about agency independence.

To ensure consistent and thorough analyses, OIRA should encourage each independent agency to develop, through a peer review and public comment process, written guidance on how it will conduct economic analysis. Independent agencies should be encouraged to use existing guidance documents, such as *Circular A-4* or *EPA's Guidelines for Preparing Economic Analysis*, as models and to share best practices. OIRA should consider preparing targeted guidance for the financial regulatory agencies.

Implementation: President Trump should issue a supplemental executive order requiring independent agencies to prepare cost-benefit analyses for economically significant rules and directing OIRA to review the analyses.

²⁵ There was some disagreement among roundtable participants about whether OIRA's nonbinding comments on the independent agency's analysis would become part of the record upon judicial review.

Recommendations for the First Year

Recommendation #4—Methodology Guidance

Recommendation: The OIRA administrator should consider issuing new guidance to agencies on evolving topics in cost-benefit analysis, such as how it applies to financial regulation. OIRA should facilitate agency communication, collaboration, and sharing of best practices.

Background: The guidance to agencies on conducting cost-benefit analysis, *Circular A-4*, has not been updated since its publication by OMB in 2003 (though OIRA issued an explanatory “primer” in 2011). For some methodological issues, *Circular A-4*’s instructions continue to reflect best practices, or at least no new methodological approach has emerged in the economics literature as the consensus choice. Other emerging topics, however, are not yet covered in *Circular A-4* and would benefit from additional guidance from OIRA. For example, the need for cost-benefit analysis of financial regulation has become more prominent only in recent years, as court cases and new statutory authorities have highlighted financial agencies’ institutional inexperience with cost-benefit analysis. Key topics include how to apply cost-benefit analysis to the macroeconomic questions raised by financial regulation.²⁶ An OIRA memorandum or possibly a new OMB circular on cost-benefit analysis of financial regulation may be appropriate.

As other methodological topics continue to evolve in the economics literature, additional guidance may be necessary. Though the roundtable of OIRA experts did not unanimously agree on specific issues that might be ripe for updated guidance, the literature is rapidly evolving, and the roundtable experts did agree that OMB and OIRA should consider whether *Circular A-4* still reflects best practices from the economics literature. Any changes made to *Circular A-4* should be subject to informal peer review.

In addition, OIRA should do more to facilitate agency communication and collaboration on best practices for key shared methodological challenges. Many agencies confront similar methodological issues in their rule development and regulatory impact analyses. For example, what assumptions, models, and methods should be used in risk assessments of carcinogenic substances? How should agencies value the reduction of a one-in-a-million risk of death? While the roundtable experts did not reach a consensus that such methodological practices should be fully harmonized across agencies, there was general agreement that—as one roundtable participant articulated—“it is embarrassing for the federal government to have five different policies on the safe level of formaldehyde exposure.” Agencies should learn from each other’s methodological approaches, and OIRA is well suited to coordinate this communication and collaboration. For example, OIRA is authorized by Executive Order 12,866 to convene regulatory working groups.²⁷ OIRA should make more use of this authority and convene interagency working groups to discuss methodological challenges and to highlight issues where additional guidance from OIRA would be appropriate.²⁸

²⁶ Revesz, *supra* note 7.

²⁷ Exec. Order No. 12,866, *supra* note 3, § 4(d).

²⁸ For example, President Obama called for OIRA to convene a Regulatory Working Group on International Regulatory Cooperation in Executive Order 13,609. See Exec. Order No. 13,609 § 2, 77 Fed. Reg. 26,413 (May 4, 2012). This is the only discussion of the Regulatory Working Group mentioned on OIRA’s website. See https://www.whitehouse.gov/omb/inforeg_regmatters.

Implementation: The OIRA administrator should consider increasing the use of interagency working groups to share best practices and recommend subject matters ripe for additional OIRA guidance. The OIRA administrator should also evaluate whether to issue guidance on new and evolving methodological issues, subject to informal peer review.

Recommendation #5—Transparency

Recommendation: OIRA should work with agencies to ensure that all regulatory-review documents to which the public is entitled are made available online.

Background: Though some advocates will continue to push for more transparency from OIRA, in many ways OIRA is one of the most transparent federal entities. For example, unlike other federal agencies, OIRA discloses on its website when it has begun deliberating on a rule, it logs all meetings with non-governmental entities, and it makes certain interagency communications with top-level officials, as well as the submitted and concluded versions of each rule, available to the public.

Nevertheless, OIRA can do more to facilitate access to regulatory-review documents to which the public is entitled. For example, OIRA should work with agencies to ensure that the versions of proposed and final rules submitted by agencies to OIRA (in addition to the versions published in the *Federal Register* after OIRA's review is complete) are automatically available online on agency websites, instead of only upon public request.

Implementation: The OIRA administrator should consider sending a memorandum to all agencies regarding the online availability of regulatory-review documents.

Recommendation #6—Capacity and Expertise

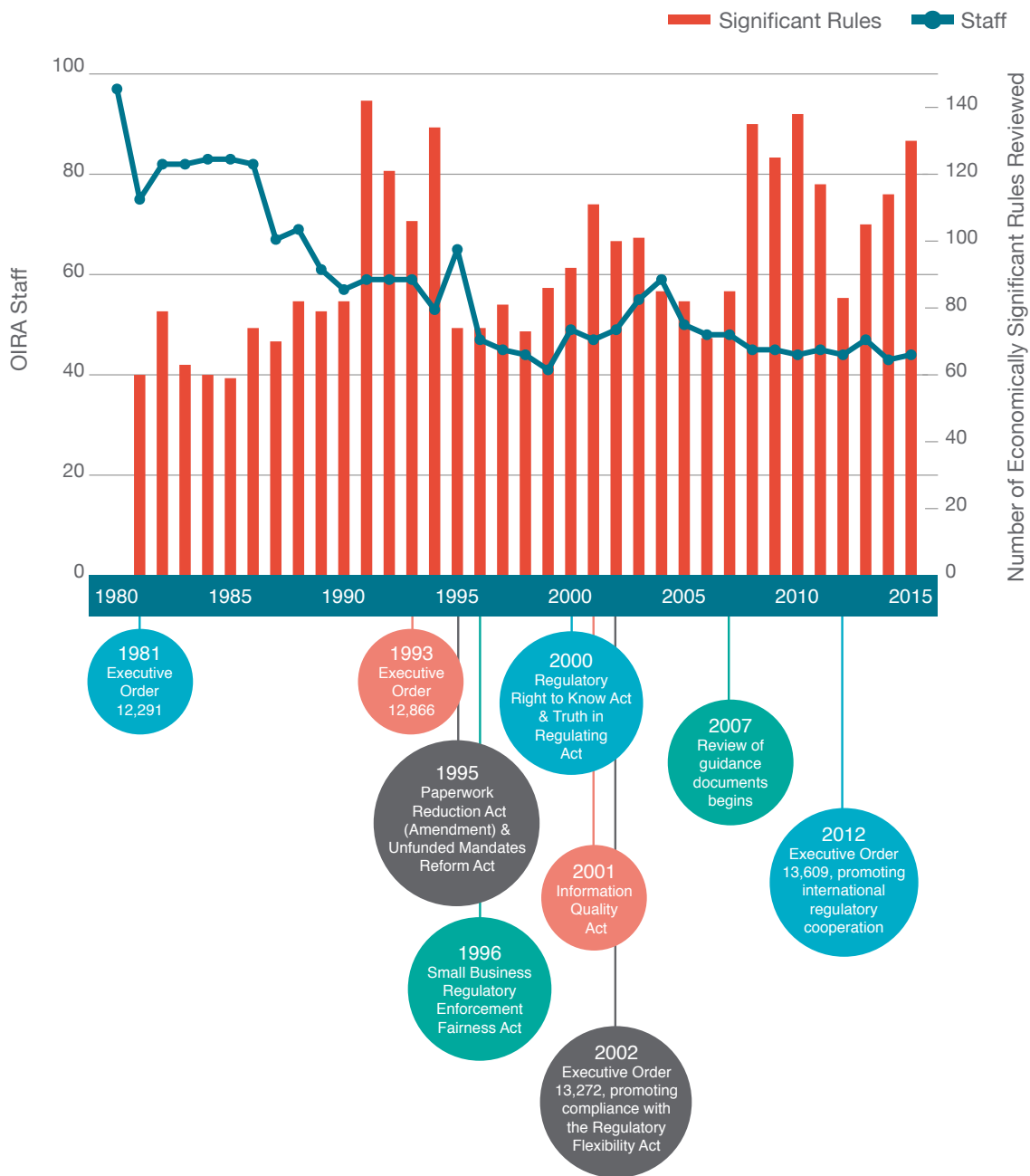
Recommendation: President Trump should direct OMB to develop a budget proposal that will return OIRA's staff to adequate levels, thereby allowing OIRA to perform its existing responsibilities more effectively and to carry out the additional responsibilities recommended in this Report. OIRA should have the capacity to hire more expert staff, including but not limited to those in technical and scientific fields.

Background: OIRA's responsibilities continue to grow. Besides its crucial reviews of hundreds of regulatory actions and guidance documents each year—including the coordination of interagency reviews—OIRA is responsible for reviewing all agencies' information collection activities, reducing paperwork burdens, developing government-wide statistics standards and policies, facilitating interagency data-sharing, promoting e-government services, overseeing agencies' information and peer review practices, guiding agencies on privacy and confidentiality policy, supervising agencies' retrospective reviews, participating in regulatory flexibility reviews, monitoring agency compliance with the Unfunded Mandates Reform Act, and, most recently, spearheading international regulatory coordination efforts.²⁹

²⁹ See generally Testimony of Howard Shelanski, Administrator for the Office of Information and Regulatory Affairs Office of Management and Budget, Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, United States House Of Representatives (July 15, 2015), available at <http://docs.house.gov/meetings/JU/JU05/20150715/103752/HHRG-114-JU05-Wstate-ShelanskiH-20150715.pdf>; CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW (June 17, 2013), available at <https://www.fas.org/sgp/crs/misc/RL32240.pdf>. See also Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995); Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995); Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121 (1996); Regulatory Right to Know Act, 31 U.S.C. § 1105 note, enacted as Title VI, §624 of the FY 2001 Treasury

Despite its expanding role in managing the growing regulatory process, OIRA's staff has continued to decrease over time. In 1981, OIRA had 97 full-time staff members, a subset of which performed regulatory reviews. By the time President Clinton took office in 1993, OIRA's total staff was reduced to 59 employees. By 2015, OIRA had only 44 total staff members. The chart below illustrates this dramatic decrease in OIRA's staff as compared to the number of economically significant (proposed and final) rules OIRA reviews each year (a number that has remained relatively constant or, at least, has not decreased) and its other increasing responsibilities over time.³⁰

OIRA: Staff Versus Responsibilities, 1980-2015



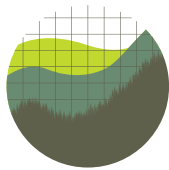
Appropriation, Pub. L. No. 106-554; Information Quality Act, Pub. L. No. 106-554 (2001); Exec. Order No. 12,866, *supra* note 3; Exec. Order No. 13,563, *supra* note 6; Exec. Order No. 13,609, *supra* note 28; Exec. Order No. 13,610, *supra* note 10.

³⁰The staffing information comes from a database maintained by the George Washington University Regulatory Studies Center and the Weidenbaum Center at Washington University in St. Louis, while the number of economically significant rules reviewed is available on RegInfo.gov (using the “Review Counts” search located under the “Regulatory Review” tab).

As this Report outlines, OIRA's role in reviewing and coordinating the regulatory process should be expanded even further—for example, to cover economically significant rules from independent agencies—but these reforms will not be effective without an increase in OIRA's staff. In fact, OIRA will struggle to perform its core duties—meaningfully reviewing and coordinating executive agency action—unless the Trump Administration decisively supports returning OIRA's staff to adequate levels. In addition, it is critical that OIRA has a diversity of staff expertise to cope with the growing complexity and scientific rigor of cost-benefit analysis. By hiring more individuals, especially with expertise in technical and scientific fields, OIRA will be able to fulfill its potential of providing valuable expert feedback, coordinating agency action, and advancing the Trump Administration's domestic and international regulatory priorities.

In the medium term, OIRA should make greater use of qualified agency staff. But as soon as possible, President Trump should ensure that OIRA is sufficiently staffed. To this end, the President should direct OMB to develop a budget proposal that significantly increases OIRA's staff.

Implementation: President Trump's Chief of Staff should issue a memorandum encouraging OIRA's use of qualified agency staff, and should direct OMB to prepare a budget that prioritizes hiring more staff with relevant expertise for OIRA.



Institute *for*
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

Institute for Policy Integrity
New York University School of Law
Wilf Hall, 139 MacDougal Street, New York, New York 10012
policyintegrity.org