THE EVOLUTION OF REGULATORY REVIEW

RICHARD L. REVESZ*

Many standard accounts of the Office of Information and Regulatory Affairs (OIRA) present a relatively static and, ultimately, misleading view of the agency's role in leading the centralized review of regulations. Some of these accounts portray OIRA's responsibility to ensure that the benefits of a regulation justify its costs as a force thwarting socially beneficial regulation. Other accounts depict the White House's engagements during centralized review as impediments to advancing the most socially beneficial regulations. This Article challenges these perspectives, placing them into a broader historical context and revealing the many facets of OIRA's role in the regulatory process. Centralized review of regulations is an evolving tool by which OIRA ensures regulatory coordination within the Executive Branch and enhances the quality of the information undergirding regulatory action. By doing so, OIRA proactively improves internal Executive Branch processes so as to strengthen rulemaking.

Perhaps most prominently, OIRA ensures that agency regulations do not work at cross-purposes, are responsive to presidential priorities, and are more likely to be upheld if subject to legal challenge. OIRA also plays a significant role in ensuring that agency regulations rely on the best science and economics by providing general guidance on regulatory analysis to agencies. This guidance, among other things, helps agencies to better account for regulatory benefits in addition to costs. Moreover, OIRA serves an increasingly important role making sure that agencies benefit from effective public participation in the regulatory process, and also pushes agencies to reduce unnecessary administrative burdens. Recent institutional trends have made all this work more critical. A less deferential judicial landscape, including the recent overruling of Chevron; *the increase in White House policy councils; the growth in whole-of-government initiatives; and the heightened importance of regulatory timing considerations have significantly enhanced the value of OIRA's work.*

* AnBryce Professor of Law and Dean Emeritus, New York University School of Law; Administrator, Office of Information and Regulatory Affairs (January 3, 2023 to January 20, 2025). I am extraordinarily grateful for the collaboration of Alexander Mechanick and Edgar Melgar in the preparation of this Article, and for the comments of Nicholas Bagley, Sam Berger, Jonathan Gould, Sally Katzen, Michael Livermore, Jennifer Nou, Nicholas Parrillo, Martha Roberts, Noah Rosenblum, Max Sarinsky, and Cass Sunstein.

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INTRODUCTION

Regulatory review coordinated by the Office of Information and Regulatory Affairs (OIRA) has been criticized for inevitably imposing unnecessary

delay,[1] analytic bias,[2] and an anti-regulatory tilt.[3] OIRA's review has had these consequences under some administrations,[4] but its process can—and has—also been harnessed to issue regulations more expeditiously, address biases of benefit–cost analysis, and promote the priorities of the sitting President.[5] The regulatory delay attributed to centralized review is almost always a consequence of interagency disagreement, not of the analytical work that OIRA performs itself;[6] OIRA can help resolve disagreements expeditiously to avoid deadlock and ensure that an administration does not work at cross-purposes.[7] OIRA can insist on consideration of difficult-to-monetize regulatory benefits to address what otherwise would be biased benefit–cost

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1. *See, e.g.*, Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 368–69 (2014) [hereinafter Heinzerling, *Inside EPA*] ("[I]ndefinite delay [is] one of the intrusions [the Office of Information and Regulatory Affairs (OIRA)] visits upon the agencies" and "hits environmental protection especially hard.").

2. *See, e.g.*, Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1423 (2005) (arguing that the role of benefit–cost analysis in OIRA review "systematically devalu[es] regulatory benefits . . . so as to defeat regulatory initiatives").

3. *See, e.g.*, Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475 (2018) (analyzing OIRA's work from 2005 to 2011 and contending that OIRA is overwhelmingly likely to move regulatory policy in a more anti-regulatory direction).

4. *See, e.g.*, MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST–BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH 107–175 (2020) [hereinafter LIVERMORE & REVESZ, REVIVING RATIONALITY] (discussing the Trump Administration); Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 400–32 (2019) (same).

5. *See* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 103–04 (2011) (arguing that "the role of OIRA" is not "in promoting regulatory relief (rather than reform), to restrain the (natural impulses of the) regulatory agencies to regulate, and to stop or limit the imposition of regulatory costs on the economy"; instead, "Republicans and Democrats typically think differently about regulations and consequently about the role of OIRA," so "Republican appointees should reflect the policies of the presidents who appointed them, just as Democratic appointees should reflect the policies of the presidents who appointed them").

6. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1842, 1855–59 (2013) [hereinafter Sunstein, *OIRA Myths and Realities*].

7. The prior literature in this area has not considered the possibility that OIRA's process can be used to resolve disagreements or interagency deadlocks more quickly than would otherwise be the case or has attached less importance to resolving interagency disagreements. *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 363 (2019) (arguing that OIRA's process inherently delays agency action).

analyses.[8] And beyond benefit–cost analysis, OIRA can work with agencies to improve the information undergirding regulatory decisions in other ways, including ensuring more timely and effective opportunities for public input.[9] More broadly, rather than inevitably hewing to any particular ideology across administrations, OIRA can help to implement the priorities of the sitting President.[10]

Part of the misunderstanding stems from the conventional account that centralized regulatory review has its roots in the Reagan or Nixon Administrations, both of which pursued deregulatory agendas.[11] But the origins of centralized review, in fact, extend much further back in time than is commonly understood, to the ambitiously regulatory New Deal.[12] And both centralized review and the use of benefit–cost analysis have been tools employed by presidents of both parties, and often expanded in Democratic administrations, including by Presidents Franklin D. Roosevelt and Lyndon B. Johnson.[13] Better understanding this historical arc helps to appreciate the evolution of regulatory review: from a modest means of evaluating information collections to a robust bipartisan mechanism for strengthening the quality of regulations and disseminating shared learning from the public and the best available science.[14] Recent trends have made OIRA's role leading centralized review of regulations even more critical. Perhaps most importantly, the judicial landscape has become more challenging for regulations, increasing the importance of OIRA's role in strengthening the analytical grounding of regulations and coordinating the work of legal experts across the Executive Branch.[15] Significant developments include the demise of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*;[16] the emergence of new doctrines, such as the major questions doctrine;[17] and the increasingly rigorous form of arbitrary or capricious review on display in *Ohio v. Environmental Protection Agency*

8. *See* Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CAL. L. REV. 1423, 1437–39 (2014) [hereinafter Revesz, *Quantifying Regulatory Benefits*].

9. *See infra* Section IV.B.

10. *See* Katzen, *supra* note 5, at 103–04.

11. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2276–80 (2001); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824–30 (2003); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 487–88 (2003).

12. *See infra* notes 47–61 and accompanying text.

13. *See infra* notes 47–61 and accompanying text; *see also infra* note 65 and accompanying text.

14. *See infra* Section I.A.

15. *See infra* Section I.B.1.

16. 144 S. Ct. 2244 (2024).

17. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

(EPA).[18] Another significant legal development has been the growing number of nationwide injunctions secured by forum shopping litigants before aggressive district court judges.[19] More generally, courts have come to review agency action less deferentially, and the Executive Branch must account for this reality when developing regulations.

Furthermore, the Biden Administration came into office amid a global pandemic as well as enduring economic and environmental challenges.[20] These exigencies required an institution that could help the Executive Branch to deliver concrete outcomes quickly. The Biden Administration established multiple new policy councils and offices within the Executive Office of the President (EOP) to respond to these challenges, which in turn demanded more coordination both among those entities as well as between them and executive agencies.[21] And, new legislation, such as the Inflation Reduction Act,[22] as well as Executive Branch initiatives that required significant interagency coordination, further added to the need for centralized review: effective implementation could occur only by managing efforts that cut across agency lines and by coordinating non-regulatory policy decisions with regulatory actions.[23] Moreover, the increased use of the Congressional Review Act has enhanced the value of OIRA's management of regulatory timing.[24]

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18. Ohio v. EPA, 144 S. Ct. 2040 (2024).

19. *See Developments in the Law—District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1707 (2024).

20. Alvin Powell & Colleen Walsh, *And Now, the Way Forward*, HARV. GAZETTE (Jan. 20, 2021), https://news.harvard.edu/gazette/story/2021/01/harvard-faculty-reflect-on-the-challenges-facing-president-biden [https://perma.cc/38EK-7FAJ].

21. This Article refers to "executive agencies" as distinguished from "independent agencies," even though these categories are better conceptualized as two ends of a spectrum rather than as a dichotomy. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 826 (2013). Executive Order 12,866 exempts independent regulatory agencies as defined in 44 U.S.C. § 3502(10) from OIRA regulatory review, following in the tradition of prior executive orders. Exec. Order No. 12,866, § 3(b), 58 Fed. Reg. 51,735, 51,737 (Sept. 30, 1993); *see also* Exec. Order No. 12,291, § 1(d), 46 Fed. Reg. 13,193, 13,193 (Feb. 17, 1981); Exec. Order No. 12,044, § 6(b)(5), 43 Fed. Reg. 12,661, 12,664 (Mar. 23, 1978). OIRA also generally does not review Internal Revenue Service regulations. Memorandum of Agreement Between the Dep't of the Treasury & Off. of Mgmt. & Budget on the Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/06/Treasury-OMB-MOA.pdf [https://perma.cc/TKL8-L65T].

22. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

23. *See infra* Section I.B.3.

24. *See infra* Section I.B.4.

These developments, long in gestation, have heightened the need for presidents to centralize the review of regulatory actions in new ways—drawing not only from OIRA's governing executive orders but from its statutory responsibilities as well. Agencies could, in theory, broker agreements among themselves, improve the quality of the information underlying their regulatory actions and act consistently with the President's priorities. But presidents have increasingly turned to OIRA-coordinated review of the regulatory process for several compelling reasons.

First, OIRA deploys *specialized expertise*. By reviewing the regulatory actions of many different agencies, OIRA acquires expertise in cross-cutting regulatory issues.[25] For example, it gains specialized knowledge in how to produce high-quality analyses of common regulatory effects (which can help protect agencies from challenge under the Administrative Procedure Act[26]), or how to develop regulatory standards that are pro-competitive rather than unintentionally anti-competitive. Because agencies are experts in their particular substantive statutes and regulatory issues, OIRA's expertise in these cross-cutting issues complements agency expertise, rather than substituting for it.

Second, OIRA leverages *economies of scale*. OIRA improves regulations not only by reviewing the quality of information that agencies rely upon but also by providing them with helpful guidance on cross-cutting issues that extend beyond any particular agency's area of expertise.[27] With respect to economic information, OIRA not only reviews individual regulatory benefit–cost analyses prepared by agencies, but also plays a prospective role by issuing guidance on regulatory analysis generally. By providing such guidance, OIRA saves each agency the burden of developing guidance on broadly applicable issues like discount rates anew and helps ensure that agencies do not use inconsistent analytical approaches in the absence of a good justification. OIRA's toolkit also extends beyond economics as a repository of expertise and producer of guidance regarding the use of science, statistics, and privacy in regulatory policymaking (as well as other contexts). For example, the Information Quality Act tasks OIRA with developing guidance for federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of the information they collect and disseminate.[28]

25. *See* Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 115–16 (2011) [hereinafter Dudley, *Observations*].

26. 5 U.S.C. § 706(2)(A).

27. *See* Dudley, *Observations*, *supra* note 25, at 115–16.

28. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. 106-554, § 515, 114 Stat. 2763, 2763A-153–54 (2000) (codified at 44 U.S.C. § 3516 note).

Third, OIRA *diffuses best practices*. By seeing a variety of approaches to common regulatory problems, OIRA can identify good practices and suggest them to other agencies.[29] For example, some agencies have successfully experimented with broader public engagement regarding priority-setting prior to work on proposed regulations. OIRA has aggregated agency efforts and identified successful practices to encourage broader public participation in earlier stages of the regulatory process, when it is often well-suited to inform regulatory prioritization, rather than after a regulation has already been proposed.[30] The same logic extends to other regulatory areas as well.

Fourth, just as agencies regulate externalities like pollution, OIRA coordinates the regulatory actions to minimize *interagency externalities*: cases where the actions of one agency interfere with the actions of another agency.[31] Importantly, this work is not restricted to reacting to regulations after they arrive at OIRA.[32] OIRA actively anticipates potential disagreements before they arise and seeks to ensure that they are addressed before a rule is submitted for review.[33] An agency-led process without OIRA would inevitably mean longer and more intractable delays as complicated issues lingered unresolved. In these cases, OIRA speeds up and improves regulations by investing in process up-front: identifying issues, convening meetings to find common ground, moderating discussions, or elevating to higher-level decisionmakers

This Article refers to statutory provisions codified in subchapter I of chapter 35, title 44 of the U.S. Code and provisions of Executive Order 12,866 as tasking OIRA with various responsibilities or authorities in cases where the Office of Management and Budget (OMB) is tasked with those responsibilities or authorities, but primarily or fully delegates that work to OIRA. *See* 44 U.S.C. § 3503(b); Exec. Order No. 12,866, § 2(b), 58 Fed. Reg. 51,735, 51,737 (Sept. 30, 1993).

29. *See, e.g.*, Michael A. Livermore, *Cost–Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 641 (2014) [hereinafter Livermore, *Cost–Benefit Analysis*] (developing benefit–cost analysis guidelines has been an "iterative process in which OIRA tends to issue progressively more detailed guidance, with agencies (and especially [the Environmental Protection Agency (EPA)]) filling in the many interstices that exist in the interim").

30. For an overview, see Sam Berger, *Making Voices Heard in the Regulatory Process*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT (July 19, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/07/19/making-voices-heard-in-the-regulatory-process [https://perma.cc/5XLZ-538C].

31. *See* Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15, 17, 23 (2011); *see also* Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 201 (2013).

32. John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 971–73 (2006) [hereinafter Graham et al., *Managing the Regulatory State*].

33. *Id.*

for resolution, as appropriate.[34] And, without the structured interagency review process that OIRA provides, some agency perspectives might be overlooked.

The value of OIRA's work is also enhanced by its placement within the EOP. Some commentators have called for an independent actor to perform centralized review of regulations, as is the case in other countries.[35] But an independent actor would struggle to ensure that regulatory actions are consistent with presidential priorities.[36] Every day, agencies take *thousands* of actions that could not possibly be reviewed personally by the President. Even for high-profile regulatory actions, the President relies upon senior officials in the EOP to make judgments about how to handle tradeoffs among certain presidential priorities, the timing of regulatory actions and how to communicate regulatory actions to the public.[37] OIRA can leverage its location within EOP to work through issues regarding important regulations directly with policy officials at the appropriate level of seniority to ensure that agency actions reflect the views of the President. That would be considerably more difficult if OIRA also had to guard its independence from those same officials.

Finally, OIRA has three characteristics that help it run the centralized review of regulations more effectively than the policy councils or other EOP entities could. First, unlike the White House policy councils—such as the

34. *See* Paul J. Ray, *A Distinction Without a Difference: On the Case for OIRA Review of Rules by Independent Financial Regulators*, 19 J.L. ECON. & POL'Y 260, 261–62 (2024) (highlighting that OIRA improves the regulation process by compiling and transmitting feedback to agencies about their regulation drafts and by working with decision-makers to resolve policy disputes); *see also* Graham et al., *Managing the Regulatory State*, *supra* note 32, at 971 (explaining that OIRA review saves agency time in the long-run).

35. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59–72 (1993) (calling for an elite cadre of non-political regulators with a role rationalizing and coordinating regulations across agencies).

36. This Article does not address the ongoing debate about the appropriate role of the President in guiding or controlling agencies' regulatory actions. For different perspectives, see Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082–83 (1986) (arguing that agencies "exercise their statutory authority at the president's pleasure" and "it is his constitutional responsibility, not theirs, to take care that the laws are faithfully executed"); Kagan, *supra* note 11, at 2319–31 (arguing that "presuming an undifferentiated presidential control of executive agency officials thus may reflect, more accurately than any other, the general intent and understanding of Congress"); and Heinzerling, *Inside EPA*, *supra* note 1, at 365–67 (arguing that "there remains a significant legal issue whether OIRA may exercise decision-making authority . . . with respect to regulatory decisions lodged by statute in particular agencies"). This Article focuses instead on how centralized regulatory review operates in practice.

37. *See* John R. Steelman & H. Dewayne Kreager, *The Executive Office as Administrative Coordinator*, 21 LAW & CONTEMP. PROBS. 688, 688–92 (1956).

Domestic Policy Council, the National Economic Council, the Climate Policy Office, and the Gender Policy Council—OIRA has a career staff that persists across presidential administrations.[38] As a result, the benefits of expertise and experience that accrue over time can be leveraged by the political leadership of OIRA during each administration.[39] Second, OIRA has statutory responsibilities to guide agencies on the proper use of information (including statistical information) under the Information Quality Act[40] and to review information collections under the Paperwork Reduction Act (PRA).[41] With respect to the latter, because the implementation and enforcement of regulations commonly involves collecting information, OIRA's role reviewing these (often lower-profile) information collections makes it a more effective reviewer of regulations. And third, unlike the policy councils, OIRA is a generalist institution not confined to specific policy areas.[42]

The primary focus of this Article is OIRA's work executing centralized review of regulations during the Biden Administration and, in particular, between January 2023 and January 2025, when I served as its Senate-confirmed Administrator.[43] Part I contextualizes the centralized review of regulatory policy, which stretches back to the creation of the modern

38. Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, 16 REGUL. & GOVERNANCE 243, 257 (2022).

39. For perspectives on the relationship between political appointees and civil servants, see Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1669–71 (2023) ("Political appointees work with career civil servants in dense, interdependent networks to produce policy outcomes. . . . Participants explain their positions to others at various hierarchical levels in ways that have real effects on the ultimate decisions. Perhaps most importantly, participants' views can change in the process: policy preferences often develop dynamically through policymaking."); and Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1183–84 (2020) (arguing that how the tension between technocratic legitimacy and democratic legitimacy is managed determines "the capacity of the administrative state to make durable national commitments, grounded in science and data, even as it retains some conceptual and legal space for a more transient presidential judgment").

40. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. 106-554, § 515, 114 Stat. 2763, 2763A-153–54 (2000) (codified at 44 U.S.C. § 3516 note).

41. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 3503, 109 Stat. 163, 166 (1995).

42. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1362, 1365 (2013) [hereinafter Livermore & Revesz, *Regulatory Review, Capture, & Agency Inaction*].

43. In addition to its role in the regulatory process, OIRA "develops and oversees the implementation of government-wide policies in the areas of information technology, information policy, privacy, and statistical policy." OFF. OF MGMT. & BUDGET, *Office of Information and Regulatory Affairs (OIRA) Q&A's*, https://obamawhitehouse.archives.gov/omb/OIRA_QsandAs [https://perma.cc/ZJ3R-PZEG] (last visited Jan. 17, 2025). These aspects of OIRA's work are not a focus of this Article.

administrative state during the New Deal. While previous literature has discussed the development of centralized review from Presidents Richard Nixon through Jimmy Carter,[44] and particularly Presidents Ronald Reagan through Bill Clinton,[45] this Article sheds new light on the development of centralized review of regulatory policy prior to President Nixon. It does so to reveal that presidents of both parties have long found centralized review to be useful in furthering their priorities, particularly by ensuring that agencies do not work at cross-purposes. It also argues that centralized review became even more important during the Biden Administration and discusses actions that the Administration took to improve the regulatory process.

Parts II through V build upon Part I by exploring particular aspects of OIRA's role managing the regulatory process that the Biden Administration focused on in an effort to modernize and improve the regulatory process. Part II discusses reforms to the regulatory review process imposed by Executive Order 14,094, as well as shifts or newfound emphases in the practice. Part III turns to benefit–cost analysis, which presidents of both parties have found useful since the New Deal; it focuses on OIRA's recent improvements to the methodology, as well as efforts to quantify and monetize more regulatory effects and to consider unquantified or unmonetized effects, illustrating how more accurate benefit–cost analyses help policymakers to better understand and weigh the consequences of different courses of action. Part IV addresses the ways in which OIRA has sought to improve public engagement in the regulatory process, ensuring that agencies seek public input at a time and in a form that improves the effectiveness of regulatory policymaking. Finally, Part V focuses on how OIRA leverages its statutory responsibilities to review information collections for regulatory purposes generally, and how it has more recently leveraged those responsibilities to focus on reducing the administrative burdens that fall on the beneficiaries of regulatory programs.

I. CENTRALIZED REVIEW OF AGENCY ACTIONS

Conventional accounts of OIRA often present the centralized management of regulations as a conservative, anti-regulatory initiative of the Reagan

44. *See, e.g.*, Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 41, 45, 54–57 (2011); Graham et al., *Managing the Regulatory State*, *supra* note 32, at 956–59.

45. *See, e.g.*, MAEVE P. CAREY & CURTIS W. COPELAND, CONG. RSCH. SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2011); Kagan, *supra* note 11, at 2277–90; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–82 (2006); Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2502–13 (2011).

Administration.[46] Section A of this Part argues that this standard narrative is incomplete in three important ways. First, the centralized management of regulations (alongside other agency actions) has much deeper roots, going back as far as the New Deal. Second, centralized management of regulation has been of interest to presidents of both parties since that time. Third, centralized management was the product of accretional development, not a single avulsive change. Section B then turns to why the need for—and benefits of—centralized management of the regulatory process have significantly increased in recent decades.

A. The Genesis of OIRA's Role

Presidents have long recognized the need for some entity or entities, reporting directly to the President, that can manage and coordinate the work of executive agencies. During the New Deal, this practice grew to include managing and coordinating agencies' requests for information from the public. As information collections were often bound up with regulations, and more agencies came to be vested with regulatory powers over time, this managerial role broadened to include review of more regulations. And because policymakers wanted to understand the consequences of different policy proposals, benefit–cost analysis became a standard part of reviewing regulations with important effects. By the time of OIRA's establishment in 1980, the decision to task OIRA with managing the regulatory process was a natural extension, not a disruptive change, to the relationship between agencies and the President.

The need for coordination of information collections increased markedly with the enactment of the early New Deal programs because "they involved not only statistics but [also] the administrative figures required to establish and enforce . . . regulations for individual enterprises."[47] But effective implementation could be "bogged down in multiple sets of overlapping and shoddy statistics."[48] To address this problem, President Roosevelt established the Central Statistical Board (CSB) in July 1933 to coordinate and review plans to collect statistics from private parties to carry out the National Industrial

46. *See, e.g.*, Kagan, *supra* note 11, at 2277–80; Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 707–09 (2000).

47. JOSEPH W. DUNCAN & WILLIAM C. SHELTON, REVOLUTION IN UNITED STATES GOVERNMENT STATISTICS, 1926–1976, at 25 (Off. of Fed. Stat. Pol'y & Standards, U.S. Dep't of Com., 1978).

48. *Id.*

Recovery Act.[49] In 1935, the Central Statistical Act expanded the scope of the CSB's jurisdiction to cover other statistical needs—beyond those related to the National Industrial Recovery Act.[50] Even in these early days, the CSB took pains to underscore the connection between information collections and regulatory initiatives.[51] In a report responding to a request from President Roosevelt and delivered to Congress, the CSB emphasized that information was being collected not only for statistical purposes, but also to enable effective implementation of governmental functions such as spending programs, tax collection, and "the regulation of enterprises."[52]

In 1939, President Roosevelt transferred the CSB's functions and personnel to the Bureau of the Budget, which itself was transferred from the Department of the Treasury to the newly-created EOP.[53] This transfer would enable the President to better align the agency's work with presidential priorities,[54] consistent with a Progressive Era view that centralized authority is less vulnerable to capture by powerful interests than disparate agencies.[55] The Bureau had managed the creation and administration of the budget since 1921; by 1942, the President had expanded its role to also include centralized management and review of all proposed legislation, veto recommendations, and executive orders.[56] Along with these enhanced responsibilities came enhanced capacity: from 1938 to 1945, the Bureau of the Budget's staff grew from forty-five to more than 500 employees.[57]

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49. Exec. Order No. 6225 (July 27, 1933). In practice, "most economic statistics were included in [the Central Statistical Board's (CSB's)] scope" almost immediately, not just "the statistics related to the [National Industrial Recovery Act]." DUNCAN & SHELTON, *supra* note 47, at 29.

50. Central Statistical Act, Pub. L. No. 74-219, 49 Stat. 498 (1935).

51. CENT. STAT. BD., TRANSMITTING A REPORT OF THE CENTRAL STATISTICAL BOARD ON THE RETURNS MADE BY THE PUBLIC TO THE FEDERAL GOVERNMENT, H.R. DOC. NO. 27, at ix, 1 (1st Sess. 1939).

52. *Id.*

53. Reorganization Plan No. I of 1939, § 2, 4 Fed. Reg. 2727, 2727 (July 1, 1939).

54. Also significant was the establishment of various agencies within the White House during World War II, such as the War Production Board and the Office of Price Administration, designed to better manage wartime policymaking, including by resolving "conflicts arising from overlapping agency jurisdictions." Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1368–69 (2014).

55. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1055–56 (2013) ("New Deal reformers [argued] that . . . centralized bureaucracy is less vulnerable to capture"); *cf.* Livermore & Revesz, *Regulatory Review, Capture, & Agency Inaction*, *supra* note 42, at 1349, 1362 (noting that "OIRA can serve a useful anticapture function in the rulemaking process").

56. LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921–1979, at 10, 14 (1979).

57. RICHARD J. ELLIS, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 352 (3d ed. 2018).

Building on this emerging practice of centralized review, the Federal Reports Act of 1942 significantly expanded the Bureau of the Budget's role as a centralized reviewer of agency information collection requests.[58] Presaging the PRA in 1980, the Act empowered the Director of the Bureau of the Budget to determine if multiple agency information collections were duplicative or unnecessary and, in such cases, to bar agencies from collecting that information or requiring a consolidated information collection.[59] It directed that information collections "be obtained with a minimum burden upon . . . persons required to furnish such information, and at a minimum cost to the Government" while also "in a manner to maximize the usefulness of the information."[60] And it required that agencies not conduct or sponsor an information collection with identical items from ten or more people unless the agency submitted the plans or forms to be used in the collection and any relevant regulations to the Director for approval.[61]

The Bureau of the Budget's powers grew again through the Budget and Accounting Procedure Act of 1950, which granted the Bureau the power to promulgate regulations "for the improved gathering, compiling, analyzing, publishing, and disseminating of statistical information" by agencies.[62] Throughout the 1950s and 1960s, Presidents Truman, Eisenhower, and Kennedy also expanded the duties of the Bureau, which took on the role of mediating interagency disputes, including those involving regulations.[63] In particular, President Kennedy created an expectation that EOP staff would exercise oversight over all federal activity, regardless of legal form or subject matter.[64]

Notably, concerned that his Great Society anti-poverty and economic development programs were being implemented ineffectively, President Johnson tasked the Bureau with coordinating interagency administration of those programs, centralizing management, and review of both grantmaking and regulation.[65] President Johnson's newly-formed Office of Economic Opportunity (OEO) had originally been placed within the EOP with the intent that it both administer several new Great Society programs—including the

58. Federal Reports Act of 1942, Pub. L. No. 77-831, §§ 3, 5–6, 56 Stat. 1078, 1078–79.

59. *Id.* § 3(b), (d), 56 Stat. at 1078–79.

60. *Id.* § 2, 56 Stat. at 1078.

61. *Id.* § 5(a), 56 Stat. at 1079.

62. Budget and Accounting Procedures Act of 1950, Pub. L. No. 81-784, § 103, 64 Stat. 832, 834.

63. BERMAN, *supra* note 56, at 71.

64. ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION 49 (2002).

65. BERMAN, *supra* note 56, at 80–81.

"largest and most far-reaching direct OEO operation," the Community Action program—as well as coordinate other aspects of the "[W]ar on [P]overty."[66] But "pressures . . . led [OEO] to lean more toward its functions as an operating agency, rather than toward those it possesses as a coordinating agency."[67] It was, therefore, the "Bureau of the Budget" that "serve[d] as a principal institutional coordinating mechanism" for actions related to the War on Poverty.[68]

Simultaneously, President Johnson brought expanded cost-effectiveness analysis to budgetary decisions in the form of the "planning-programming-budgeting system."[69] This system required agencies to choose the "most urgent" goals; identify "alternative means of reaching those goals most effectively at the least cost"; and "[m]easure the performance of our programs to insure" that the government achieves at least "a dollar's worth of service for each dollar spent."[70] Agencies were to "carry out the necessary studies" and needed "a central staff for program and policy planning accountable directly to" the agency head.[71] The Bureau of the Budget implemented these requirements through official "bulletins," and began an effort to institutionalize these changes through revision of Circular A-11 (which governs agency budget submissions).[72] President Johnson's efforts, though they did not yield fruit quickly, built up the expectation of—and capacity for—policy analysis that would set the stage for later efforts to merge centralized review of policy and policy analysis.[73]

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66. Michael S. March, *Coordination of the War on Poverty*, 31 LAW & CONTEMP. PROBS. 114, 124, 126 (1966).

67. *Id.* at 124.

68. *Id.* at 119.

69. *Id.* at 123.

70. Statement by the President to Cabinet Members and Agency Heads on the New Government-Wide Planning and Budgeting System, *in* 2 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1965, at 917 (1966).

71. *Id.*

72. Bureau of the Budget, Bulletin No. 68-2 (July 18, 1967); Bureau of the Budget, Bulletin No. 68-9 (Apr. 12, 1968). When the Nixon Administration finally issued Circular A-11 in 1971, it quietly killed the Johnson Administration's planning-programming-budgeting system. Allen Schick, *A Death in the Bureaucracy: The Demise of Federal PPB*, 33 PUB. ADMIN. REV. 146, 146 (1973). But while the formal requirement was withdrawn, "the spread of policy analysis and policy planning offices throughout the federal government in the 1970s was significantly spurred" by the effort, and led to action in the Ford, Carter, and Reagan Administrations to require benefit–cost analyses. Robert H. Nelson, *The Economics Profession and the Making of Public Policy*, 25 J. ECON. LIT. 49, 74 (1987).

73. *See* Nelson, *supra* note 72; ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 11–12 (2022).

In 1970, under a reorganization plan adopted by President Nixon to further "the broader management needs of the Office of the President,"[74] the Office of Management and Budget (OMB) absorbed the functions of the Bureau of the Budget.[75] President Nixon explained that this "represent[ed] far more than a mere change of name," but rather "a basic change in concept and emphasis, reflecting the broader management needs of the Office of the President."[76] The Nixon Administration was the first to task OMB with the centralized review of nearly all important agency regulations, regularizing and expanding centralized review of regulations beyond the ad hoc categories that the Bureau of the Budget had been assigned to manage and review over time (for example, regulations involving information collections, interagency disputes, or particular presidential priorities).[77] OMB now required that regulations be accompanied by "a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered" and "the reasons for selecting the alternative" chosen.[78]

In 1974, President Ford issued Executive Order 11,821, which required that "[m]ajor proposals for legislation, and for the promulgation of regulations or rules by any executive branch agency . . . be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated."[79] While this Executive Order explicitly referenced inflation,[80] "the officials responsible for the program . . . wanted to use the requirement to improve agency decision-making, and this meant getting the agencies to address the costs and benefits of their proposals."[81] OMB developed agency-

74. Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959 (May 23, 1970).

75. *Id.*

76. *Id.*; *3.12.70*, RICHARD NIXON FOUND. (Mar. 12, 2010), https://www.nixonfoundation.org/2010/03/3-12-70 [https://perma.cc/42QD-MDRJ].

77. Graham et al., *Managing the Regulatory State*, *supra* note 32, at 955–56; Tozzi, *supra* note 44, at 44; Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2149 (2024).

78. Memorandum from George P. Shultz, Dir., Off. of Mgmt. & Budget, to the Heads of Dep'ts & Agencies, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971).

79. Exec. Order No. 11,821, § 1, 39 Fed. Reg. 41,501, 41,501 (Nov. 29, 1974).

80. *See* THOMAS D. HOPKINS, AN EVALUATION OF THE INFLATION IMPACT STATEMENT PROGRAM i (1976), https://www.thecre.com/pdf/Ford_HopkinsReport.PDF [https://perma.cc/ZKG8-B4JT].

81. James C. Miller III, *Lessons of the Economic Impact Statement Program*, AM. ENTER. INST. (July 1, 1977), https://www.aei.org/articles/lessons-of-the-economic-impact-statement-program.

specific criteria for what was "major," but standard criteria emerged over time, including "costs of $100 million in any one year or $150 million in any two-year period."[82]

Two years later, in 1978, President Carter issued Executive Order 12,044, which built upon the analysis of alternatives and burden reduction components of centralized regulatory review and added a public participation component as well.[83] The Executive Order explicitly called for analysis of the impacts of regulations that would result in "an annual effect on the economy of $100 million or more" or major cost or price increases.[84] The Executive Order tasked OMB with "assur[ing] the effective implementation of" the Order.[85] President Carter also built upon the Federal Reports Act in Executive Order 12,174, creating additional structures that would later be codified in the PRA.[86]

The PRA—discussed in Part V, as relates to OIRA's burden reduction efforts[87]—formally established OIRA and largely ratified centralized review of regulations and information collections in OMB.[88] As the Senate's report on the PRA notes, several of the functions assigned to OIRA by the PRA were "already located in OMB" within the OMB "Office of Regulatory and Information Policy,"[89] including "overseeing agency activities under Executive Order 12044" and reviewing agency information collections to reduce unnecessary paperwork.[90] The Senate committee expected these existing "activities to form the core of the new office."[91] And it emphasized the "importance of [the] linkage between OMB's existing responsibility for

82. HOPKINS, *supra* note 80, at 15.

83. Exec. Order No. 12,044, § 1, 43 Fed. Reg. 12,661, 12,661 (Mar. 23, 1978).

84. *Id.* § 3(a)(1), 43 Fed. Reg. at 12,663. In addition, presaging Executive Order 13,563, Executive Order 12,044 called for periodic retrospective review of regulations. *Id*. § 4, 43 Fed. Reg. at 12,663.

85. *Id.* § 5(c), 43 Fed. Reg. at 12,664. More extensive review of regulations with $100 million of annual effects was routed through the Regulatory Advisory Review Group; it both reviewed the agency's analysis and elicited the views of all relevant cabinet departments and EOP components. Susan J. Tolchin, *Presidential Power and the Politics of RARG*, 3 REGUL. 44, 44–45 (1979).

86. Exec. Order No. 12,174, §§ 1-104–06, 44 Fed. Reg. 69,609, 69,609–10 (Nov. 30, 1979).

87. *See infra* Section V.B.

88. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3504, 94 Stat. 2812, 2815.

89. S. REP. 96-930, at 8 (1980). The office was established in December 1980. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3503, 94 Stat. 2812, 2814–15 (codified as amended at 44 U.S.C. §§ 3501–3521).

90. S. REP. 96-930, at 8.

91. *Id.*

overseeing the regulatory process with the closely related information management functions assigned by the bill."[92]

Though President Reagan's Executive Order 12,291 largely mirrored Executive Order 12,044, it, in fact, heralded a substantial change from the approach of the Carter Administration.[93] As was reported at the time, this change mostly stemmed from a sense that Executive Order 12,044 "was not followed up with a tough enough review and oversight structure"; not tough enough, at least, for the conservative critics of the Carter Administration.[94] The transition from President Carter to President Reagan was, therefore, much more of a change in political direction from the White House than a significant change in structure or process.[95] And while the Reagan Administration had hoped that its efforts to encourage more benefit–cost analysis would weaken or halt regulation,[96] that did not always bear out in practice. For example, when a high-quality benefit–cost analysis was carried out on one of the most controversial issues of the day—the regulation of lead in gasoline—the result of the analysis actually hastened and strengthened the phase-out of leaded gasoline.[97]

When political winds changed again with the election of President Clinton, the promulgation of Executive Order 12,866 largely kept the existing regulatory review structure intact. Executive Order 12,866 discussed benefit–cost analysis differently than Executive Order 12,291. It required that benefits must "justify" rather than "exceed" costs; emphasized the importance of costs and benefits "that are difficult to quantify, but nevertheless essential to consider"; and clarified that the analysis should consider "environmental" and "public health and safety" benefits as well as "distributive impacts" and "equity."[98] But, as noted in contemporary press reports, Executive Order 12,866 did not lead to a wholesale overhaul of OIRA's role.[99]

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92. *Id.*

93. Clyde H. Farnsworth, *Move to Cut Regulatory Costs Near: Reagan May Act on Wednesday*, N.Y. TIMES (Feb. 14, 1981), https://www.nytimes.com/1981/02/14/business/move-to-cut-regulatory-costs-near.html [https://perma.cc/LDH5-2GGZ].

94. *Id.* Nonetheless, at least one important regulation (on cotton dust standards) had been deemed too costly under the Carter Administration, and revised to reduce costs during OMB review. *Id.*

95. One exception is the increased staffing at OIRA, which facilitated the Reagan Administration's ability to pursue its goals. Tozzi, *supra* note 44, at 64.

96. Ahmed et al., *supra* note 77, at 2153–59.

97. ALBERT L. NICHOLS, LEAD IN GASOLINE, IN ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT 49 (Richard D. Morgenstern ed., 1997).

98. Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735–36 (Sept. 30, 1993).

99. David Lauter, *Clinton Order Lifts Regulatory Review Secrecy: Government: Executive Edict Requires that Contacts Between White House Aides, Lobbyists Be Made Part of Public Record*, L.A. TIMES

Each subsequent administration has reaffirmed Executive Order 12,866. President Obama's Executive Order 13,563 added to it, most notably in its direction that agencies "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome."[100] The Bush Administration and the first Trump Administration endorsed Executive Order 12,866 as well, but their executive orders otherwise altering the regulatory review process were subsequently revoked.[101]

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The legal literature too often views the management of the regulatory process as a fundamentally conservative enterprise, initiated by President Reagan or President Nixon.[102] But, no president has an interest in having agencies work at cross-purposes, fail to effectively prioritize, or not benefit from expertise that exists elsewhere in the Executive Branch. Perhaps it is not surprising, then, that President Roosevelt pushed for some of the earliest forms of centralized review of agency action, and President Johnson made use of OMB's predecessor to manage the implementation of his Great Society programs.[103] As the need for management has grown, OIRA has responded by reforming and improving various aspects of the regulatory process.

B. *The Increasing Need for Centralized Review*

Since 1981, when Executive Order 12,291 put in place the basic OIRA regulatory review system, a number of changes have taken place that have increased the importance of OIRA's role in managing the regulatory process. That is why President Biden, while affirming OIRA's basic role and structure

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(Oct. 1, 1993), https://www.latimes.com/archives/la-xpm-1993-10-01-mn-41053-story.html [https://perma.cc/J7DU-YF87].

100. Exec. Order No. 13,563, § 6(a), 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

101. Exec. Order No. 13,258, §§ 1–12, 67 Fed. Reg. 9385, 9385–86 (Feb. 26, 2002) (primarily removing the Vice President from the Executive Order 12,866 process); Exec. Order No. 13,422, § 1, 72 Fed. Reg. 2763, 2763 (Jan. 18, 2007) (primarily clarifying the applicability of Executive Order 12,866 to regulatory guidance; *cf.* Memorandum from Peter R. Orszag, Dir., Off. of Mgmt. and Budget, to the Heads & Acting Heads of Exec. Dep'ts & Agencies, Guidance for Regulatory Review (Mar. 4, 2009)); Exec. Order No. 13,771, §§ 1–2, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017) (establishing a two-for-one requirement of eliminating old regulations when issuing new regulations, and imposing a regulatory cost cap).

102. *See, e.g.*, Andrias, *supra* note 55, at 1057–58; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost–Benefit Analysis*, 150 U. PA. L. REV. 1489, 1505–06 (2002); DeMuth & Ginsburg, *supra* note 36, at 1075–76.

103. *See supra* notes 47–61, 65 and accompanying text.

in his day-one memorandum, also noted the importance of "evaluat[ing] the processes and principles that govern regulatory review to ensure swift and effective Federal action."[104] This Section highlights four new challenges in particular: the expansion of the EOP, the significant increase of legislative and administrative priorities that require interagency coordination and collaboration, a changing landscape of administrative law and judicial review of regulations, and the greater need to manage the timing and sequence of Executive Branch regulations.

1. A Changing Judicial Landscape

OIRA's review of regulations identifies aspects of a regulation that are inadequately justified, in order to determine if a better explanation is needed or a different policy approach should be considered.[105] While this work is valuable as a way to improve the quality of regulations, it also plays an important role in helping regulations survive judicial scrutiny.[106] OIRA also further helps to legally safeguard regulations by coordinating the work of legal experts across the Executive Branch when a regulation would benefit from their input.[107] Increasingly, agency regulations face a more challenging judicial landscape due to doctrinal shifts as well as changing litigation patterns and the increased use of nationwide injunctions.[108] OIRA's role in ensuring that regulations are supported by high-quality legal, scientific, and economic analysis has only become more essential as a result.

Administrative law doctrine looked quite different as recently as a decade ago. Agencies were given latitude to interpret ambiguities in the statutes they implemented under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*[109] and ambiguities in their own regulations under *Auer v. Robbins*.[110] And in a pair of 9–0 and 8–1 decisions—each with Justice Scalia's forceful agreement—the Supreme Court strongly rejected nondelegation challenges to important federal regulations.[111]

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104. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

105. *See* Sunstein, *OIRA Myths and Realities*, *supra* note 6, at 1851

106. *See id.* at 1853–56.

107. *See id.* at 1855.

108. *Trump Targets 'Environmental Agencies,' Raising Doubts on EPA Rules*, INSIDEEPA (June 6, 2024), https://insideepa.com/weekly-focus/trump-targets-environmental-agencies-raising-doubts-epa-rules [https://perma.cc/ZS5A-TLEE].

109. 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

110. 519 U.S. 452 (1997). Since OIRA reviews guidance as well as legislative rules, *Auer* is relevant to its work as well. *See* Memorandum from Peter R. Orszag, *supra* note 101.

111. Mistretta v. United States, 488 U.S. 361, 379 (1989); *id.* at 416 (Scalia, J., dissenting); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

All that has changed. *Chevron* has been overruled.[112] A newly muscular major questions doctrine has unsettled the bounds of agencies' authority to regulate.[113] There appears to be movement towards increasingly rigorous scrutiny of the analysis used to justify regulatory action.[114] And a revival of the nondelegation doctrine threatens to destabilize the foundations of the regulatory state.[115]

To begin, the Supreme Court announced in *Loper Bright* that agencies would no longer receive deference when interpreting statutory ambiguities.[116] While the effect of *Loper Bright* is somewhat difficult to predict, the end of *Chevron* will place greater pressure on agencies to justify how their action is consistent with the best interpretation of statutory authority. This shift will increase the litigation risk for most regulations and empower the judiciary relative to the Executive Branch.[117] *Loper Bright* will, therefore, increase the importance of OIRA providing a forum for legal experts throughout the Executive Branch to weigh in on an agency's regulation.[118]

Meanwhile, in a series of four cases from 2021 to 2023, the Supreme Court has constructed a new major questions doctrine.[119] Under this doctrine, "in certain extraordinary cases[,]" an agency must have "clear congressional authorization" to act.[120] Uncertainties remain as to what form the major questions doctrine will ultimately take.[121] Scholars have disagreed

112. *Loper Bright*, 144 S. Ct. at 2273.

113. *See* Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 484, 493 (2021).

114. *Id.* at 486.

115. *See id.* at 491–92; *see also* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 650 (2023).

116. *Loper Bright*, 144 S. Ct. at 2273.

117. *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T L.J. 1, 4 (2005) (describing how *Chevon* shifted "the power to interpret ambiguous or silent statutes" from the Judicial Branch to the Executive Branch).

118. *Cf. id.* at 11–13 (describing how *Chevron* shifted policymaking influence from legal experts to other experts).

119. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022); Biden v. Nebraska, 143 S. Ct. 2355 (2023).

120. *West Virginia*, 142 S. Ct. at 2609.

121. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring); *West Virginia*, 142 S. Ct. at 2616–20 (Gorsuch, J., concurring); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring) (all describing it as a clear statement rule or substantive canon protecting nondelegation). *But see, e.g.*, *Nebraska*, 143 S. Ct. at 2376 (Barrett, J.,

about the impact of the doctrine as well, with some arguing that judges have "carte blanche" to find that agency actions implicate major questions and are unlawful,[122] and others understanding it to be limited to a narrow category of agency actions that are "unheralded" and amount to a "transformative" change in the scope of the agency's authority.[123] The doctrine has been interpreted expansively in many lower courts.[124] One recent empirical analysis found that courts "have rested" determinations of major-ness "most heavily on the challenged actions' political significance, their novelty, and the estimated number of people they affect."[125] Regardless of how the doctrine continues to develop, agencies now must grapple with the major questions doctrine when they promulgate certain regulations.

Moreover, the increasingly rigorous application of "hard look" arbitrary or capricious review under the Administrative Procedure Act could also imperil regulatory action.[126] That was on display at the Supreme Court just this term in *Ohio v. EPA*, in which the Court held that an EPA action was arbitrary or capricious for failure to provide a reasoned response to a comment.[127] The majority seized on, as Justice Barrett's dissent noted, "a single sentence with no elaboration or explanation of the potential issue" that was "purely speculative" and had no empirical foundation.[128] The decision supports Cristina Rodríguez's concern that there is an increasing risk of litigants using "arbitrary and capricious review to demand ever clearer and more elaborate explanations" for agency action.[129]

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concurring); *id.* at 2398 n.3 (Kagan, J., dissenting) (agreeing that major questions doctrine should only be a tool to discern the most natural interpretation of a statute from context).

122. Chafetz, *supra* note 115, at, 652.

123. Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 49 (2022) (quoting *West Virginia*, 142 S. Ct. at 2610).

124. Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661 (2023).

125. Ling Ritter, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 STAN. L. REV. 1381, 1406 (2024).

126. 5 U.S.C. § 706(2)(A). Or, in other contexts, substantial evidence review. *Id.* § 706(2)(E). The two standards are best understood as the same, but applying to different administrative records. *See* Alexander Mechanick, *The Interpretative Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477, 499–500, 511 (2023).

127. Ohio v. EPA, 144 S. Ct. 2040, 2053–54 (2024). More precisely, the Court decided that those challenging the action were likely to prevail on that claim.

128. *Id.* at 2063 n.5, 2067–68 (Barrett, J., dissenting).

129. Cristina M. Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 32 (2020).

Finally, a more aggressive nondelegation doctrine may further restrict agency action in the future. As Justice Thomas has noted, "[a]t least five Justices have already expressed an interest in reconsidering [the] Court's approach to Congress's delegations of legislative power."[130] Such a reconsideration could mean, as Justice Kagan put it, that "most of Government is unconstitutional."[131]

Agency action has already been stymied in lower courts by changing litigation patterns—particularly forum and judge shopping[132]—and increasingly common nationwide injunctions. State attorneys general have become active litigants against federal regulations brought by administrations of the opposite party,[133] and have engaged in judge shopping—bringing suit in single-judge sections of district courts staffed by a judge hostile to government regulation[134]—seeking nationwide injunctions of agency action. A recent study has found that district courts are increasingly issuing nationwide injunctions of, or vacatur of, actions by the Executive Branch.[135] The same study also found that 92% of nationwide injunctions issued in response to actions of the first Trump Administration and 100% of nationwide injunctions issued in response to actions of the Biden Administration were issued by a judge appointed by a president of the opposing party.[136] The Judicial Conference of the United States has issued guidance in an attempt to limit the practice of judge shopping, but it remains to be seen whether this guidance will be implemented.[137]

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130. Allstates Refractory Contractors v. Su, 144 S. Ct. 2490, 2491 (2024) (Thomas, J., dissenting).

131. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

132. Libby Dimenstein, Donald L.R. Goodson & Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules*, TEX. A&M L. REV. (forthcoming) (manuscript at 37–42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4819477 [https://perma.cc/6T4K-QKGH] (tracing the rise of forum-shopping in recent decades).

133. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43 (2018).

134. *See* AM. BAR ASS'N, SECTION OF LITIGATION, REPORT TO THE HOUSE OF DELEGATES 10 (2023).

135. *District Court Reform: Nationwide Injunctions*, *supra* note 19, at 1705–07, 1712–15.

136. *Id.* at 1705.

137. Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping,'* WASH. POST (Mar. 16, 2024, 12:51 PM), https://www.washingtonpost.com/politics/2024/03/16/judge-shopping-guidance-abortion-patent-courts [https://perma.cc/47LR-G7PN].

2. *The Expansion of the EOP*

As noted previously, the establishment of the EOP in 1939—and its absorption of the Bureau of the Budget and CSB—was a key step in enhancing centralized review of agency actions.[138] Because OIRA (a component of OMB) is housed within the EOP, it can run an effective process that gathers input from across the EOP and ensures—if necessary—a presidential decision informed by the President's senior advisors.[139] This helps to ensure that inconsistent directions from the EOP do not lead agencies to work at cross-purposes across different regulations.[140]

Since Executive Order 12,291 was issued in 1981, the EOP has grown significantly. At that time, the EOP had seven policy components: the National Security Council, Office of Policy Development, OMB, Council of Economic Advisers, Office of Science and Technology Policy, Council on Environmental Quality, and Office of the U.S. Trade Representative.[141] Today, there are fifteen: the previously listed entities are still in place (with the Domestic Policy Council and the National Economic Council taking the place of the Office of Policy Development) and have been joined by the Office of National Drug Control Policy, Climate Policy Office, Gender Policy Council, Office of the National Cyber Director, Office of the Intellectual Property Enforcement Coordinator, National Space Council, Office of Pandemic Preparedness and Response Policy, and Office of Gun Violence Prevention.[142] But the effective count is even higher, as President Biden has used three "senior advisor" roles to elevate individuals—with staffs—to operate as quasi-EOP components in charge

138. *See supra* text accompanying notes 53–57.

139. *See* Richard J. Pierce, Jr., *An Expanded Version of OIRA Can Ensure Democratic Accountability in the Administrative State*, 21 GEO. J.L. & PUB. POL'Y 451, 454 (2023).

140. *See id.*

141. HAROLD C. RELYEA, CONG. RSCH. SERV., 98-606, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW (2008).

142. *Id.*; Exec. Order No. 13,803, § 2, 82 Fed. Reg. 31,429, 31,429 (June 30, 2017); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 4144 (codified at 6 U.S.C. § 1500); Exec. Order No. 14,008, § 202, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021); Exec. Order No. 14,020, § 2, 86 Fed. Reg. 13,797, 13,797 (Mar. 8, 2021); Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 5715 (2022) (codified at 42 U.S.C. § 300hh-3); Press Release, Exec. Off. of the President, President Joe Biden to Establish First-Ever White House Office of Gun Violence Prevention, To Be Overseen by Vice President Kamala Harris (Sept. 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/president-joe-biden-to-establish-first-ever-white-house-office-of-gun-violence-prevention-to-be-overseen-by-vice-president-kamala-harris [https://perma.cc/VDV9-AAGA].

of implementing particularly important pieces of legislation: the American Rescue Plan (American Rescue Plan Coordinator Gene Sperling),[143] the Infrastructure Investment and Jobs Act (Infrastructure Implementation Coordinator Mitch Landrieu, until his resignation in 2024),[144] and the Inflation Reduction Act (Office of Clean Energy Innovation and Implementation Senior Advisor John Podesta).[145] These advisors' offices are separate from other EOP components.[146]

143. President Joseph R. Biden, Remarks by President Biden on the Implementation of the American Rescue Plan (Mar. 15, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/15/remarks-by-president-biden-on-the-implementation-of-the-american-rescue-plan [https://perma.cc/AKR8-52ZH]. In July 2021, the White House reported that Sperling's office had three members. EXEC. OFF. OF THE PRESIDENT, ANNUAL REPORT ON WHITE HOUSE OFFICE PERSONNEL (2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/July-1-2021-Report-Final.pdf [https://perma.cc/7GD2-NS5Q].

144. Press Release, Exec. Off. of the President, President Biden Announces Former New Orleans Mayor Mitch Landrieu as Senior Advisor and Infrastructure Coordinator (Nov. 14, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/14/president-biden-announces-former-new-orleans-mayor-mitch-landrieu-as-senior-advisor-and-infrastructure-coordinator [https://perma.cc/LX9T-QN29]; Lauren Egan, *Mitch Landrieu, Biden's Infrastructure Czar, Steps Down to Join Campaign*, POLITICO (Jan. 8, 2024, 9:59 AM), https://www.politico.com/news/2024/01/08/mitch-landrieu-joins-biden-campaign-00134273 [https://perma.cc/VKH9-77ND]. In July 2022, the White House reported that Landrieu's office had eight members. EXEC. OFF. OF THE PRESIDENT, ANNUAL REPORT ON WHITE HOUSE OFFICE PERSONNEL (2022), https://www.whitehouse.gov/wp-content/uploads/2022/07/July-1-2022-Report-Final.pdf [https://perma.cc/MY73-R86S]. Upon his resignation, Landrieu's portfolio was assumed by Deputy Chief of Staff Natalie Quillian. *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby, January 10, 2024*, EXEC. OFF. OF THE PRESIDENT (Jan. 10, 2024), https://www.whitehouse.gov/briefing-room/press-briefings/2024/01/10/press-briefing-by-press-secretary-karine-jean-pierre-and-nsc-coordinator-for-strategic-communications-john-kirby-january-10-2024 [https://perma.cc/75EM-W7D5].

145. Press Release, Exec. Off. of the President, President Biden Announces Senior Clean Energy and Climate Team (Sept. 2, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/02/president-biden-announces-senior-clean-energy-and-climate-team [https://perma.cc/VPL9-5YKA]. In July 2023, the White House reported that Podesta's office had eight members. EXEC. OFF. OF THE PRESIDENT, ANNUAL REPORT ON WHITE HOUSE OFFICE PERSONNEL (2023) [hereinafter WHITE HOUSE OFFICE PERSONNEL 2023], https://www.whitehouse.gov/wp-content/uploads/2023/06/July-1-2023-Report-Final-Version.pdf [https://perma.cc/ZKB9-GXVD].

146. By contrast, White House coordination of the implementation of the CHIPS Act was housed within the National Economic Council, rather than in a new quasi-office. Press Release, Exec. Off. of the President, Biden-Harris Administration Announces CHIPS for

3. The Expansion of Whole-of-Government Initiatives

As Cass Sunstein, who served as the Obama Administration's first OIRA Administrator, has described, the bulk of OIRA's coordination and alignment work occurs across executive agencies, not the EOP.[147] And just as OIRA's role in centralized review has become more necessary due to further specialization within the EOP, it has also become more urgent as new statutes and executive initiatives increasingly involve the joint work of multiple agencies. To implement such programs effectively, agencies cannot work at cross-purposes, yet also must keep their focus on the aspects of the program that they are charged with developing and implementing. In these contexts, OIRA's work as a coordinator has acquired additional significance.

Policy initiatives that require many agencies to take regulatory action are not entirely new; and certainly, omnibus legislation is quite an old phenomenon.[148] But focusing merely on the array of regulatory responsibilities given to different agencies in one piece of legislation would be misleading. Instead, it is the *cross-cutting* nature of these responsibilities that has changed and has made OIRA's role more critical.

The most significant regulatory initiatives of the Clinton, George W. Bush, and first Trump Administrations were predominantly implemented by just one agency.[149] The Obama Administration was a partial exception to this pattern. The American Recovery and Reinvestment Act (ARRA)[150] was not only a broad piece of legislation, but also required a great deal of interagency implementation on regulation. And implementation of the Affordable Care

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America Leadership (Sept. 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/biden-harris-administration-announces-chips-for-america-leadership [https://perma.cc/8FNM-E75W].

147. *See* Sunstein, *OIRA Myths and Realities*, *supra* note 6, at 1855–59.

148. *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1803–04 (2015).

149. For example, President Clinton's health care and welfare initiatives were primarily implemented by the Department of Health and Human Services, while its gun violence and violence against women initiatives were primarily implemented by the Department of Justice. Under President George W. Bush, the Department of Education led implementation of No Child Left Behind, the Department of Health and Human Services led implementation of Medicare Part D, and the Department of Treasury led implementation of two tax cut acts. Similarly, under President Trump, the Department of Treasury led implementation of the Trump tax cuts, while the Department of Justice and the Department of Homeland Security did so for the "zero tolerance" (family separation) policy.

150. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

Act[151] and the Dodd–Frank Act[152] similarly required substantial interagency coordination.

Interagency regulatory initiatives—including ones that need to be implemented by regulation—became more central during the Biden Administration. The American Rescue Plan Act—like ARRA—contained a large number of provisions requiring action from the Departments of Treasury, Education, Housing and Urban Development, Homeland Security, Transportation, Health and Human Services, among others.[153] The Infrastructure Investment and Jobs Act[154] and the Inflation Reduction Act[155] also conferred a wide range of responsibilities on multiple agencies. Consider that much of the Biden Administration's signature legislation provided authorities to address the COVID-19 pandemic, competition with China and other countries, or climate change. If agencies had executed their regulatory authorities without any input from a coordinated entity, they could have worked at cross-purposes, imposed needless inefficiency on regulated parties, and failed to implement the Administration's strategy to address the challenges to which these new statutory authorities responded.

4. *The Increasing Importance of Timing Considerations*

OIRA has traditionally concerned itself with managing the flow of regulations as the end of a presidential term approaches. For example, in 2008, President George W. Bush's Chief of Staff Joshua Bolten noted that OIRA would be coordinating an effort to complete Bush Administration priorities in its final year, and that agencies would need to provide information to OIRA and allow adequate time for review.[156] In December 2015, OIRA Administrator Howard Shelanski (Sunstein's replacement in the Obama Administration) issued a similar memorandum, clarifying that OIRA would work with "agencies to accomplish their remaining regulatory goals" before

151. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. The education portions of this act were largely implemented by just one department (the Department of Education).

152. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

153. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

154. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

155. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

156. Memorandum from Joshua B. Bolten, Chief of Staff, to the Heads of Exec. Dep'ts & Agencies, Issuance of Agency Regulations at the End of the Administration (May 9, 2008), https://presidentialtransition.org/wp-content/uploads/sites/6/2008/05/9a44f3efe29c6b0db9071e46c0de3fa3-1464020861.pdf [https://perma.cc/K329-3LXF].

the end of the Administration.[157] Like the Bolten memo, it reminded agencies to budget for the time and analysis necessary for review.[158]

The magnified salience of the Congressional Review Act (CRA) has increased the importance of ensuring that presidential priorities are implemented in a timely manner. The CRA allows for an expedited (and, in particular, filibuster-exempt[159]) congressional process for disapproving rules that raises the stakes of potential presidential transitions.[160] If the presidency flips to the non-incumbent party and that party also controls Congress, Congress can use the CRA to reverse regulations finalized by the previous administration during the so-called "look-back period."[161] Specifically, any rule finalized within sixty session days (in the Senate) or sixty legislative days (in the House)—whichever is longer—of the end of the Congress is eligible for filibuster-exempt disapproval.[162] The consequences of a CRA disapproval are severe.[163] Not only is the disapproved rule nullified, but the agency is also barred from ever promulgating a rule that is "substantially the same" without explicit congressional authorization.[164]

From its enactment in 1996 until 2016, the CRA was used to disapprove a rule only once, during the George W. Bush Administration in 2001, targeting a Clinton Administration ergonomics rule promulgated by the Occupational Safety and Health Administration.[165] At the beginning of the Obama presidency, the newly Democratic congressional majorities did not use the CRA to undo any of the thirty-two Bush Administration rules that may have

157. Memorandum from Howard Shelanski, Adm'r, Off. of Info. & Regul. Affs., Regulatory Review at the End of the Administration (Dec. 17, 2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/agencyinformation_circulars_memoranda_2015_pdf/regulatory_review_at_the_end_of_the_administration.pdf [https://perma.cc/22Y7-MLHX].

158. *Id.*

159. 5 U.S.C. § 802(d).

160. *Id.* § 802.

161. *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 14–16 (2019) [hereinafter Davis Noll & Revesz, *Regulation in Transition*].

162. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 14 n.79, 17–18 (2021).

163. *See id.* at 18.

164. 5 U.S.C. § 801(b)(2).

165. CONG. RSRCH. SERV., THE CONGRESSIONAL REVIEW ACT, *supra* note 162, at 28–33. Regarding the reasons for the more limited use of Congressional Review Act (CRA) disapprovals in 2021, see Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REG. 1100, 1116–18 (2022) [hereinafter Davis Noll & Revesz, *Presidential Transitions*].

been eligible for disapproval.[166] Rather than rejecting rules using the CRA, the Obama Administration and Senate Democrats focused the early days of the term in the Senate on filling cabinet and subcabinet positions.[167] Likely, a major force driving their decision was the fact that each CRA disapproval can be subject to ten hours of debate in the Senate.[168] However, during the last two presidential transitions, the calculus changed, with sixteen CRA disapprovals in 2017 and another three in 2021.[169] With both President Biden and President Trump having coordinated with their Senate allies to use the Act to disapprove of their predecessor's regulations, the CRA "will likely continue to feature prominently in future regulatory transition strategies."[170] As a result, as Sally Katzen, who served as OIRA Administrator during the Clinton Administration, has noted, "agencies are understandably anxious if not apoplectic to get their regulations done before the [CRA] look-back window begins."[171] With the growing concern of avoiding disapproval of regulations issued during the CRA's look-back period, OIRA's role coordinating timely completion of agency regulations is becoming increasingly critical.[172]

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In sum, a less-deferential judicial landscape, the growth of the EOP and whole-of-government initiatives, and the increased importance of timing considerations have significantly enhanced the value of and need for OIRA's work managing the regulatory process.

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166. Davis Noll & Revesz, *Regulation in Transition*, *supra* note 161, at 18.

167. *Id.* at 18–19.

168. 5 U.S.C. § 802(d)(2).

169. Davis Noll & Revesz, *Presidential Transitions*, *supra* note 165, at 1109–12, 1153.

170. *Id.* at 1107.

171. Kevin Bogardus, *Murky Deadline Looms for Biden's Regs*, E&E NEWS (Mar. 21, 2024, 1:21 PM), https://www.eenews.net/articles/murky-deadline-looms-for-bidens-regs [https://perma.cc/8XN3-9THB].

172. Kevin Bogardus & Robin Bravender, *How Biden Beat the Clock on Big Environmental Regs*, E&E NEWS (June 12, 2024, 1:16 PM), https://www.eenews.net/articles/how-biden-beat-the-clock-on-big-environmental-regs [https://perma.cc/6T3Y-ACRD]; Susan E. Dudley, *A Rush To Regulate*, FORBES (May 7, 2024), https://www.forbes.com/sites/susandudley/2024/05/07/a-rush-to-regulate [https://perma.cc/J9CT-JU73] (noting that "April [2024] was the busiest month on record for big ticket rules" for OIRA); Clyde Wayne Crews, Jr., *An Inventory of Biden Regulations To Overturn Quickly in the 119th Congress*, FORBES (Jan. 1, 2025, 8:58 AM), https://www.forbes.com/sites/waynecrews/2024/12/29/an-inventory-of-biden-regulations-to-overturn-quickly-in-the-119th-congress [https://perma.cc/WWF8-NFKK] (attributing a "rule surge in Spring 2024" to "Biden's election-year efforts at Trump-proofing his legacy").

II. IMPROVING REGULATORY REVIEW

OIRA's role in performing centralized regulatory review makes an administration more efficient and effective in accomplishing its policy goals by resolving disputes before agencies act at cross-purposes. As a result, centralized review of regulations has been useful to presidents of both parties and has thus grown and evolved over time. The first Section discusses President Biden's reforms to the OIRA regulatory review process, while the second addresses key practices of regulatory review well-suited to addressing recent challenges.

A. Executive Order 14,094

Despite critical management needs, the Biden Administration took office amid calls from some on the left to drastically change—or even abolish—OIRA's role in managing the regulatory process.[173] Nonetheless, on the first day of his administration, President Biden issued a memorandum to "reaffirm[] the basic principles set forth in" Executive Orders 12,866 and 13,563.[174] Subsequently, President Biden's Executive Order 14,094 similarly reaffirmed "the principles, structures, and definitions governing contemporary regulatory review" in Executive Orders 12,866 and 13,563.[175] But it also responded to the day-one memorandum's call to "evaluate the processes and principles that govern regulatory review to ensure swift and effective Federal action"[176] by reforming the OIRA review process.

One important reform was reevaluating which regulations OIRA reviews and how it reviews them. Executive Order 12,866 specifies four separate triggers for OIRA review of a regulation, but only one requires the agency to complete a more rigorous benefit–cost analysis (often referred to as a regulatory impact analysis).[177] That trigger—§ 3(f)(1) of Executive Order 12,866—has multiple prongs, but its dollar-figure prong is particularly important because of its clarity and specificity.[178] As noted previously, since President Carter's Executive Order 12,044, issued in 1978, this prong had

173. *See, e.g.*, Kalen Pruss, *It's Time for OIRA To Go*, AM. PROSPECT (Apr. 24, 2020), https://prospect.org/day-one-agenda/its-time-for-oira-to-go [https://perma.cc/H2SC-5W76].

174. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

175. Exec. Order No. 14,094, § 1(a), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023).

176. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7223.

177. *See* Exec. Order No. 14,094, § 1(b), 88 Fed. Reg. at 21,879 (amending Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993)).

178. Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. at 51,738.

been set at an "an annual effect on the economy of $100 million or more."[179] Over time, with the threshold left unchanged in dollar terms, this prong was sweeping in more regulations than had initially been intended. More colloquially, $100 million is not what it used to be.

In April 2024, President Biden's Executive Order 14,094 finally updated this value by amending § 3(f)(1) of Executive Order 12,866 to specify "an annual effect on the economy of $200 million or more," and to provide for regular updates of the value going forward.[180] As noted in OIRA's guidance implementing Executive Order 14,094, this threshold "was amended to enable OIRA and agencies to prioritize their analytical resources more effectively."[181] While more rigorous analysis has benefits, it also imposes costs on agencies. This change recognizes the tradeoff, allowing OIRA and agencies to devote more resources to rules where analysis is likely to have a bigger impact on the quality of the ultimate policy decision.[182]

In addition, Executive Order 14,094's amendment to the fourth trigger for OIRA review in § 3(f)(4) of Executive Order 12,866—Executive Order 14,094's only other amendment to these four triggers—helps reduce unnecessary time spent on the predicate question of whether a regulation meets the criteria for OIRA review. Previously, the section had covered regulatory actions "that may . . . [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."[183] This wording could lead to unhelpful and lengthy debates about whether a policy was "novel" (a term that did not appear to guide

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179. Exec. Order No. 12,044, § 3(a)(1), 43 Fed. Reg. 12,661, 12,663 (Mar. 23, 1978); Exec. Order No. 12,291, § 1(b)(1), 46 Fed. Reg. 13,193, 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. at 51,738. The $100 million threshold emerged earlier, during implementation of Executive Order 11,821's inflation impact statements requirement. *See supra* note 79 and accompanying text.

180. Exec. Order No. 14,094, § 1(b)(1), 88 Fed. Reg. at 21,879.

181. Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs., Memorandum on Implementation of Modernizing Regulatory Review Executive Order 3 (April. 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOImplementation.pdf [https://perma.cc/LD4F-LR3P].

182. Exec. Order No. 14,094, § 1(b), 88 Fed. Reg. at 21,879. Executive Order 14,094 also directed that this threshold be updated every three years for changes in gross domestic product (GDP). This ensures that the threshold adjusts for inflation, increases in population, and growth in per capita real output. While tracking GDP is only an imperfect proxy for a threshold that optimizes the prioritization of analytic resources, it is a much better default than a flat nominal dollar threshold, which had been used previously.

183. Exec. Order No. 12,866, § 3(f)(4), 58 Fed. Reg. at 51,738.

practice much) or "arising out of" the relevant terms.[184] These terms "required additional clarification," and caused unnecessary disputes to arise between OIRA and agencies about what regulations fell within this trigger.[185]

Executive Order 14,094 amended this language to cover regulatory actions likely to result in a rule that may "raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case."[186] This centers the question of whether review is appropriate on the right standard, and a clearer one. Confirming that the OIRA Administrator personally makes the determination puts the decision in the hands of the individual "best positioned to identify the President's priorities and interpret the relevant principles of E.O. 12866."[187] Indeed, the OIRA Administrator is in regular contact with the numerous White House policy councils and other officials who provide input on these matters. And by requiring that such determinations be made in a timely manner, the Executive Order further enables OIRA and agencies to better prioritize the use of their resources by cutting down on the length of predicate debates about whether a regulatory action should be reviewed.

B. The Practice of Regulatory Review

Beyond the reforms reflected in Executive Order 14,094, the practice of centralized review itself also has shown a flexible ability to adapt and improve in the face of the recent challenges to administrative rulemaking discussed earlier.

In this era of a judiciary that is more hostile to regulations, there are several reasons why OIRA's work increases the probability that regulations will be upheld in the courts. OIRA review helps to ensure that an agency clearly explains its statutory authority supporting each rulemaking, which is all the more important in light of the demise of *Chevron* and the newly strengthened major questions doctrine. OIRA also serves as a forum for the general counsel of the agency seeking to promulgate the rule to benefit from the insights of OMB's Office of General Counsel, White House Counsel's Office, the Department of Justice, and other agencies' general counsels, when relevant. OIRA helps to ensure orderly resolution of legal disagreements, just as it does for other regulatory questions.[188]

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184. Memorandum on Implementation of Modernizing Regulatory Review Executive Order, *supra* note 181, at 5.

185. *Id.*

186. Exec. Order No. 14,094, § 1(b), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023).

187. Memorandum on Implementation of Modernizing Regulatory Review Executive Order, *supra* note 181, at 5–6.

188. *See* Sunstein, *OIRA Myths and Realities*, *supra* note 6, at 1856–58.

Moreover, OIRA helps to ensure that the legal basis for the action is articulated and is consistent with both the justification for the regulation in the preamble and the analysis of the regulation's effects. OIRA also helps call agencies' attention to the importance of explaining the similarity of the agency's action to regulatory antecedents, a critical factor in major questions doctrine analysis, which can sometimes be omitted or underexplained (in part because antecedents are more obvious to agency drafters than to external reviewers).[189] Considering regulatory antecedents and agencies' interpretations of statutes contemporaneous with their enactment has become all the more important after *Loper Bright*, to support an agency's argument that its action is consistent with the best interpretation of the statute.[190] And OIRA review can also spur agencies to describe which parts of a regulation are severable and explain why, helping to minimize the consequences of any adverse judicial decisions.[191]

Furthermore, OIRA review helps to ensure that an agency's regulation is not arbitrary or capricious. OIRA's in-house policy, economic, statistical, and scientific expertise—as well as its ability to gather expertise from across the Executive Branch—pushes agencies to offer higher-quality justifications for their regulatory actions that are more likely to survive arbitrary or capricious review. For regulations that are significant under § 3(f)(1) of Executive Order 12,866,[192] OIRA's work to ensure that a rigorous and high-quality benefit–cost analysis accompanies the regulation is relevant to litigation risk. More generally, OIRA's work to improve the analytical underpinning of regulation has become even more important as courts take an increasingly hard look at agencies' explanations and analyses.[193] Even if some judges' decisions are unaffected by OIRA's work,[194] an effect on other cases (for example, on the significant proportion that are litigated in the D.C. Circuit)[195] makes OIRA's work worthwhile.

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189. *See, e.g.*, Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 GEO. ENV'T L. REV. 1, 1–2, 33 (2023).

190. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257–59, 2262–63 (2024).

191. These actions may be particularly important in light of *Ohio v. EPA*, 144 S. Ct. 2040 (2024) (analyzing the adequacy of EPA's explanation for why the regulation should be severable across states).

192. Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

193. *See* Jonathan S. Gould, *Cost–Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695, 758–60 (2023).

194. *See* Stephen I. Vladeck, *Why the Fifth Circuit Keeps Making Such Outlandish Decisions*, ATLANTIC (Nov. 28, 2023), https://www.theatlantic.com/politics/archive/2023/11/fifth-circuit-conservative-supreme-court/676116 [https://perma.cc/D8VF-RLDA] (referring to certain judges in the Fifth Circuit as "transparently results-oriented").

195. *See* Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, *in* 10 GEO. J.L. & PUB. POL'Y 1, 2–4 (2012) (showing that over a third of "significant administrative [law] cases nationwide" were "heard in the D.C. Circuit" as of 2010).

OIRA also addresses the additional complexities that arise as a result of the increase in the number of White House policy councils. Despite the increase in White House offices, the staff of the White House remains small,[196] and by its nature, the White House can focus only on a few of the most salient issues of the day. OIRA (which is part of the EOP, not the White House) operates a compact but focused team that specializes in managing the regulatory process,[197] with career desk officers who can maintain open lines of communication with career agency staff across administrations while OIRA's political officials forge connections with agency political officials during each administration. OIRA's ability to convene, deliberate, and elevate disagreements[198] efficiently reduces the costs of a more specialized EOP. Without OIRA managing EOP engagement in regulatory matters, the expansion of EOP components and offices in recent decades would make it more difficult for the EOP to serve its essential function of furthering the President's priorities. OIRA review helps to ensure that a single, consistent direction is established in the EOP—by elevating issues to the President's senior advisors or even the President, if necessary—and that agencies' regulations are consistent with the President's priorities.

The shift to a far greater use of cross-agency legislative and administrative initiatives has also created a greater need for the interagency coordination that is the mainstay of OIRA's work.[199] For example, shaping policy on electric vehicle chargers required not just collaboration between the Department of Transportation and the Department of Energy, but also input from many EOP components, EPA, Department of Agriculture, Department of Commerce, Department of Homeland Security, and Department of Interior. OIRA's effectiveness in managing the regulatory process is an important factor contributing to the success

196. In June 2023, the Biden Administration reported having 524 White House Office staff, of whom seventy were temporarily detailed from another agency. WHITE HOUSE OFFICE PERSONNEL 2023, *supra* note 145. The vast majority of these White House Office employees, of course, did not work on regulatory policy.

197. OIRA—including not only its regulatory branches but also its science and statistical policy as well as its privacy branches—has a little over sixty full-time employees. MARK FEBRIZIO & MELINDA WARREN, GEO. WASH. REGUL. STUD. CTR. & WEIDENBAUM CTR. ON THE ECON., GOV'T, & PUB. POL'Y, at 24 (2020), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/RegulatorsBudget/GW%20Reg%20Studies%20-%20FY2021%20Regulators%20Budget%20-%20MFebrizio%20and%20MWarren_Weidenbaum%20Center.pdf [https://perma.cc/2BTZ-VHDM].

198. *See* Sunstein, *OIRA Myths and Realities*, *supra* note 6, at 1856–58 (discussing the elevation process).

199. *Id.* at 1839–42.

of these whole-of-government approaches to implementing administration priorities.[200]

OIRA's work also addresses the increased importance of timing considerations in the regulatory process. Given the need for more coordinated timing of Executive Branch regulations against the backdrop of the CRA,[201] OIRA's unique role gives it insight into how far along each regulation is, how many regulations each agency and sub-component of an agency are working on, and how much effort it would likely take for them to be completed after submission to OIRA for interagency review. OIRA, therefore, can and does play a critical role in promoting the timely completion of regulations. To provide just one example, OIRA may be aware that while multiple sub-components of an agency could complete the necessary work, another that must review the regulation would be a potential bottleneck, allowing a discussion with that sub-component to take place to identify what is feasible for the agency to complete within a given time period. With knowledge of all relevant tradeoffs in hand, OIRA can consult with White House policy councils to arrive at clear administration-wide priorities, and then work closely with agencies to ensure that they are completed on time.[202]

OIRA's work to help manage the timing of agency regulatory activity sometimes extends beyond the conclusion of OIRA review of a given rule, to matters concerning the publication in the Federal Register. At the end of the George W. Bush Administration, OIRA's career staff coordinated with the Office of the Federal Register to provide guidance on the order regulations should be printed, given the overload.[203] Coordination with the Federal Register may also take place earlier to reduce delays between the finalization of regulations and official publication.[204] Also, OIRA can seek to avoid a backlog at the Federal Register that would result if each agency submitted

200. There is a large literature on other mechanisms by which agencies coordinate, beyond OIRA or outside of the regulatory context. *See, e.g.*, Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

201. *See supra* Section I.B.4.

202. Abigail Mihaly, *EPA Officials 'Very Focused' on Looming CRA Deadline for 'Priority' Rules*, INSIDEEPA (Feb. 26, 2024), https://insideepa.com/daily-news/epa-officials-very-focused-looming-cra-deadline-priority-rules [https://perma.cc/ZX5V-29C3].

203. Robin Bravender, *A Bureaucratic Printer Jam Holds Up a Major Biden Climate Rule*, POLITICO (Feb. 26, 2024, 12:27 PM), https://www.politico.com/news/2024/02/26/epa-climate-regulation-delay-00142667 [https://perma.cc/F9VN-MXLN].

204. *See, e.g.*, *id.*

regulations at the same time, which imposes an externality on other agencies because it makes it less likely that their regulations will be published at the desired time. As OIRA emphasizes, addressing externalities is a canonical basis for government action,[205] and OIRA can take actions to ensure that agencies submit rules to the Federal Register in a staggered fashion so that all are published in an efficient and timely manner.

III. MODERNIZING BENEFIT–COST ANALYSIS

Another important way in which OIRA manages the regulatory process is by addressing the quality of the information that agencies rely upon when regulating, as part of its responsibilities under the Information Quality Act and related authorities.[206] In this vein, OIRA's role includes providing guidance to agencies on assessing the consequences of regulations and ensuring that they properly follow this guidance in their analyses of individual regulations.[207] As indicated above,[208] under Executive Order 12,866, the benefits of all regulations must "justify" their costs.[209] Moreover, for particularly important regulations, agencies must assess the consequences of multiple alternatives and conduct a more formal benefit–cost analysis of their effects.[210] By providing centralized guidance on analyzing the effects of regulations, OIRA saves each agency from having to tackle difficult analytic problems anew.[211] In addition, OIRA ensures that analyses are broadly uniform in a way that helps policymakers better understand the information that they provide.[212] And high-quality guidance allows OIRA to diffuse best practices for benefit–cost analysis throughout the Executive Branch.

As is the case for centralized review, standard accounts of benefit–cost analysis in federal government policymaking tend to focus on recent decades. However, this Part shows that the federal government has also grappled with these issues since at least the New Deal. By showing how the interest in and use of benefit–cost analysis in important government decisionmaking dates

205. *See* OFF. OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 15–16 (2023) [hereinafter CIRCULAR A-4 (2023)], https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/KE7C-MWJH].

206. *See* 44 U.S.C. §§ 3504, 3516; Regulatory Right-to-Know Act, Pub. L. 106-554, § 624, 114 Stat. 2763, 2763A–161 (2000) (codified as amended at 31 U.S.C. § 1105 note).

207. *See* 44 U.S.C. §§ 3504, 3516.

208. *See* Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

209. *Id.* § 1(b)(6), 58 Fed. Reg. at 51,736.

210. *Id.* § 1(b), 58 Fed. Reg. at 51,736.

211. *See* Richard L. Revesz, *Managing Regulatory Review in the Biden Administration*, 13 REGUL. REV. IN DEPTH 19, 19–23 (2024).

212. *See id.*

to this much earlier time, this Article challenges the purportedly anti-regulatory origin of benefit–cost analysis during the Reagan Administration. It also challenges accounts that attribute the current support for benefit–cost analysis among progressives—not just conservatives—solely to a recent discovery of the tools' progressive potential and technocratic virtues.[213]

Instead, this historical review supports the view, which I previously expressed elsewhere, that benefit–cost analysis "is inevitable, but also . . . desirable" because when the government takes important actions, it will want to know the resulting consequences and because "the complex nature of governmental decisions" means that there is "no choice but to deploy complex analytic tools in order to make the best choices possible."[214] More generally, benefit–cost analysis can be a powerful tool for any president interested in managing and evaluating regulatory decisions by understanding their consequences.[215] In particular, it forces agencies "to justify their choices" not just against critics who argue that proposed regulations are "too weak," but also against those who argue that proposed regulations are "too strong."[216]

Section A briefly traces the growth and development of benefit–cost analysis in the federal government and the emergence of OIRA's role in ensuring compliance with presidential directions to perform benefit–cost analysis. This history underscores the connection between analysis and centralized review of agency action, as concerns about interagency inconsistency and the need for centrally-directed and rational policymaking sparked an interest in benefit–cost analysis leading up to the release of guidance on benefit–cost analysis (known as OMB Circular No. A-4). Section B turns to OIRA's November 2023 revisions to Circular A-4, which had not been updated in twenty years. This revision was consistent with one of OIRA's principal roles as the manager of the regulatory process: ensuring that agency regulations rely on the best science and economics.

A. The Connection Between Benefit–Cost Analysis and Regulatory Management

As was the case for centralized review itself—the focus of Part I—benefit–cost analysis was not an innovation of the Reagan Administration.[217] Its

213. *See, e.g.*, Gould, *supra* note 193, at 695.

214. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 3, 12 (2008).

215. *Id.* at 10.

216. *Id.* at 175.

217. Philip Shabecoff, *Reagan Order on Cost–Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html [https://perma.cc/PH6U-RDS4].

roots were in the expansion of the administrative state in the New Deal, as the Roosevelt Administration wanted a better grasp on the consequences of infrastructure spending proposals in particular.[218] A significant step occurred with the release of the National Resources Board's 1934 report on national planning and public works to President Roosevelt.[219] In its report, the Board noted that some benefits of public works are "immediate, tangible, and measurable," while others are less so "or even so remote as to appear intangible and immeasurable."[220] The Board conceded that given "present facilities for delineation and measurement," even the economic effects of such projects were often "from the point of view of [the] present . . . intangible."[221] But the Board also acknowledged that "it is urgent that studies in delineation and measurement be promoted on a large scale if we hope in general to achieve rational planning," including the "benefits and contributions to cost in public works programs."[222] This basic emphasis on assessing both benefits and costs—tangible and intangible—is recognizable today, as is the Board's call for the urgency of more research.

The Board's report also took pains to clarify that the reason monetized benefit–cost analysis is used is not because money is itself the object of concern, but rather because it represents real changes in people's lives.[223] Indeed, the report bemoaned that "[b]ecause many benefits do not have monetary equivalents, they are disregarded," presaging a similar focus by the Biden Administration,[224] and it urged that "immeasurable benefits . . . should be included as a factor in any evaluation procedure."[225]

This new focus on analyzing public projects in terms of benefit–cost analysis was reflected shortly thereafter in the implementation of the Flood

218. Even before the New Deal, the Army Corps had begun to consider the benefits and costs of projects informally pursuant to the River and Harbor Act of 1902, 32 Stat. 331, 372 (1902); however, prior to the New Deal, such benefit–cost analyses lacked rigor. Lawrence G. Hines, *Precursors to Benefit–Cost Analysis in Early United States Public Investment Projects*, 49 LAND ECON. 310 (1973).

219. NAT'L RES. BD., A REPORT ON NATIONAL PLANNING AND PUBLIC WORKS IN RELATION TO NATURAL RESOURCES AND INCLUDING LAND USE AND WATER RESOURCES WITH FINDINGS AND RECOMMENDATIONS iii, v (1934) [hereinafter NATIONAL RESOURCES BOARD].

220. *Id.* at 363.

221. *Id.*

222. *Id.* For discussion of the Biden Administration's efforts to address non-monetized regulatory effects, see *infra* Section III.B.3.

223. NATIONAL RESOURCES BOARD, *supra* note 219, at 363, 368.

224. *Id.* at 368; *see also infra* Section III.B.3.

225. NATIONAL RESOURCES BOARD, *supra* note 219, at 368.

Control Act of 1936.[226] In 1943, President Roosevelt issued Executive Order 9,384, which gave the Bureau of the Budget (OMB's predecessor) the authority to demand "data, reports, and information" on public works projects being planned.[227] A Federal Inter-Agency River Basin Committee was then formed to coordinate analysis of water resources public projects.[228] "[P]erhaps under pressure from the Bureau of the Budget" to address interagency inconsistencies in benefit–cost analyses of such projects,[229] in 1946, the Committee formed a Subcommittee on Benefits and Costs "for the purpose of developing acceptable principles and procedures for determining benefits and costs of water resources projects."[230] The work of this Committee was the first effort to create such benefit–cost analysis guidance in the federal government.

The Subcommittee's primary work product—a report first issued in 1950 that came to be known as the "Green Book" for the color of its cover[231]—would lay the foundation for future federal benefit–cost analysis.[232] In a manner congruent with the current Circular A-4,[233] it covered key questions such as the scope of analysis,[234] consideration of non-monetized effects,[235] risk and discount rates,[236] and the "criterion of maximizing net benefits" as the

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226. Flood Control Act of 1936, Pub. L. No. 74-738, § 1, 49 Stat. 1570.

227. Exec. Order No. 9384, § 5, 8 Fed. Reg. 13,782, 13,783 (Oct. 8, 1943).

228. MARTIN REUSS, RESHAPING NATIONAL WATER POLITICS: THE EMERGENCE OF THE WATER RESOURCES DEVELOPMENT ACT OF 1986, at 21 (1991).

229. Richard J. Hammond, *Convention and Limitation in Benefit–Cost Analysis*, 6 NAT. RES. J. 195, 198 (1966).

230. SUBCOMM. ON BENEFITS & COSTS, FED. INTER-AGENCY RIVER BASIN COMM., REPORT TO THE FEDERAL INTER-AGENCY BASIN COMMITTEE: PROPOSED PRACTICES FOR ECONOMIC ANALYSIS OF RIVER BASIN PROJECTS iii, vii, 1 (1950) [hereinafter PROPOSED PRACTICES FOR ECONOMIC ANALYSIS OF RIVER BASIN PROJECTS].

231. *Id.*

232. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-704G, STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT (2014).

233. *See* CIRCULAR A-4 (2023), *supra* note 205.

234. It is apparent that in Federal practice, a comprehensive public viewpoint should be taken; that is, a viewpoint that would include consideration of all effects, beneficial or adverse, short-range or long-range, that can be expected to be felt by all persons and groups in the entire zone of influence of the project.

PROPOSED PRACTICES FOR ECONOMIC ANALYSIS OF RIVER BASIN PROJECTS, *supra* note 230, at 6.

235. Such "effects need to be described with care and should not be overlooked or minimized, merely because they do not yield to dollar evaluation." *Id.* at 26.

236. The interest rate on investments such as longer-term government bonds would appear to be a reasonably satisfactory measure of the interest return with minimum risk

"fundamental requirement" for the "justification of a project."[237] An updated draft, issued in 1958, also foresightedly addressed the relevance of market rigidities and distortions, imperfect information, and the distribution of benefits and costs (albeit briefly).[238]

The Bureau of the Budget essentially adopted the Subcommittee's work product in the infrastructure spending context by promulgating Circular No. A-47.[239] Citing its authority under Executive Order 9,384, the Bureau required agencies submitting budget requests for any "Federal programs or projects for the conservation, development, or use of water and related land resources" to include an analysis of the need for the project, alternatives to the project, analysis of the project's benefits and costs, and analysis of the project's net effect on the Treasury.[240] Circular A-47's directions were fairly sparse, requiring agencies to refer to more comprehensive guidance in sources like the Green Book to conduct such analyses.[241] Indeed, when the Bureau of the Budget issued Circular No. A-94—the agency's first foray in providing any government-wide benefit–cost analysis guidelines—the Bureau stated that the discount rate used should not be lower than the rate established by the Water Resources Council, which governed water resources projects.[242] However, the Bureau of the Budget reserved the right in Circular A-94 to specify that agencies use other rates.[243]

When centralized review of a broader set of regulations began under President Nixon in 1971,[244] it was the budget analysts at OMB (experienced at

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> opportunities available for capital investment. . . . Since it is often impractical, if not impossible, to adjust estimates of deferred effects to a certain or risk-free basis, some element of risk still must usually be accounted for in the interest or discount rates applied to deferred effects.

Id. at 22–23.

237. *Id.* at 5.

238. *Id.* at 6–7. These considerations are discussed at greater length in the current Circular A-4. *See* CIRCULAR A-4 (2023), *supra* note 205.

239. BUREAU OF THE BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-47 (1952).

240. *Id.* at 2, 5–6.

241. *See* Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 ALA. L. REV. 55, 56–57 n.6 (2012) (comparing Circular A-47 and the Green Book's benefit–cost analysis methodologies regarding water resource projects).

242. *See* OFF. OF MGMT. & BUDGET, CIRCULAR A-94: DISCOUNT RATES TO BE USED IN EVALUATING TIME-DISTRIBUTED COSTS AND BENEFITS §§ 2, 7 (1972) [hereinafter CIRCULAR A-94 (1972)]; *see also* OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-94 § 8 (1992) [hereinafter CIRCULAR A-94 (1992)].

243. CIRCULAR A-94 (1972), *supra* note 242, at § 7.

244. *See* Graham et al., *Managing the Regulatory State*, *supra* note 77 and accompanying text.

reviewing benefit–cost analyses in the spending context, particularly for water resource projects) who were tasked with reviewing benefit–cost analyses associated with regulatory actions.[245] In turn, OMB issued Circular A-94 in revised form in 1972, setting a rate for discounting benefits and costs across the board (except for water resource projects) for the first time.[246] And Circular A-107, issued in 1975 to implement President Ford's inflation impact statement requirement in Executive Order 11,821,[247] added more guidance on regulatory analyses. However, its content was bare-bones, merely listing categories of effects that such an analysis should cover.[248]

Agencies continued to rely primarily on non-OMB sources for benefit–cost analysis guidance (either academic or from other federal entities, like the Green Book) through the early Reagan Administration. Initial OMB guidance implementing Executive Order 12,291 was sparse, mostly reiterating the Executive Order itself and the discount rate in Circular A-94,[249] and left agencies largely to refer to other influential sources of guidance on benefit–cost analysis or develop their own.[250] In 1988, OMB issued its first set of truly comprehensive benefit–cost analysis guidance, which—like the Green Book before it—covered such issues as risk and discount rates,[251] scope of analysis,[252] and one (extremely brief) discussion of non-monetized effects.[253] This guidance largely formed the basis for an updated Circular A-94 in 1992, which again applied to analysis of both spending programs and regulations: its major innovation was a significant lowering of the primary discount rate (from 10% to 7%).[254]

After President Clinton issued Executive Order 12,866 in 1993, his Administration also convened a working group to update the regulatory analysis

245. Tozzi, *supra* note 44, at 46–47.

246. CIRCULAR A-94 (1972), *supra* note 242, at 1, 4.

247. *See supra* notes 79–81 (discussing efforts to convert inflation impact statements into benefit–cost analyses during the Ford Administration).

248. OFF. OF MGMT. & BUDGET, CIRCULAR A-107 (1975).

249. At first, the guidance was less than five pages. *See* OFF. OF MGMT. & BUDGET, INTERIM REGULATORY IMPACT ANALYSIS GUIDANCE (1981).

250. Livermore, *Cost–Benefit Analysis*, *supra* note 29, at 641.

251. OFF. OF MGMT. & BUDGET, *Regulatory Impact Analysis Guidance*, *in* REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT 561, 566–67 (1988).

252. Including reasons to consider if a regulation has "adverse differential effect on foreign producers or consumers." *Id.* at 568.

253. Any "incremental benefits that cannot be monetized should be explained." *Id.* at 569.

254. CIRCULAR A-94 (1992), *supra* note 242, at 9. A separate set of discount rates was used for internal planning decisions of the federal government, which looked to real Treasury yields. *Id.* at 9–11. Water resource projects continued to be exempted. *Id.* at 3.

guidance required by the Order.[255] The working group produced updated guidance in 1996,[256] in effect superseding Circular A-94's guidance for regulatory benefit–cost analysis. This 1996 guidance included some small, but important, revisions to the previous guidance.[257]

In 2003, OMB first issued Circular A-4, formally creating separate guidance for regulatory benefit–cost analysis (leaving Circular A-94 to cover spending projects and formally making it no longer applicable to regulation).[258] Circular A-4 has been described as an effort to "aggregate[] best practices from twenty years of cost–benefit analysis practice in the federal government."[259] And like prior guidance on benefit–cost analysis, it "provides valuable advice that highlights several fundamental methodological essentials for a sound cost–benefit analysis."[260] While not significantly different from the 1996 guidance, its elevation to the status of an OMB "Circular"—a designation used by OMB "when the nature of the subject matter is of continuing effect"[261]—emphasized the enduring nature and importance of the document. In some areas, such as discounting, Circular A-4 moved closer to the economic consensus.[262] This updated guidance on discounting

255. Memorandum from Sally Katzen, Adm'r, Off. of Info. & Regul. Affs., to Members of the Regul. Working Grp., Economic Analysis of Federal Regulations Under Executive Order No. 12866 (Jan. 11, 1996), https://obamawhitehouse.archives.gov/omb/memoranda_rwgmemo [https://perma.cc/MDW6-8QLE].

256. OFF. OF MGMT. & BUDGET, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12866 (1996), https://georgewbush-whitehouse.archives.gov/omb/inforeg/riaguide.html [https://perma.cc/G8C3-G7Y5].

257. *Id.* (adding "market power" and "asymmetric information" to the list of major types of market failure; revising discussion of appropriate approaches to discounting; noting that "Delphi methods" (expert elicitation) can be used to quantify the probability of uncertain effects; a subsection devoted to "Nonmonetized Benefits and Costs"; a subsection devoted to "Distributional Effects and Equity"; discussion that willingness-to-accept measures "can provide an appropriate measure of benefits, depending on the allocation of property rights"; and emphasizing that regulation can speed—not just slow—innovations in a sector).

258. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-4: REGULATORY ANALYSIS (2003) [hereinafter CIRCULAR A-4 (2003)], https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf [https://perma.cc/4EYP-8HPK].

259. Michael A. Livermore, *Regulatory Rationality for the 21st Century*, 48 ADMIN. & REGUL. L. NEWS, Spring 2023, at 5, 5.

260. *Id.*

261. BUREAU OF THE BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-1 REVISED (1952).

262. *See* CIRCULAR A-4 (2003), *supra* note 258, at 33–34 (re-emphasizing the superiority of the shadow price of capital approach, as well as requiring analysis at both a 7% discount rate, "approximat[ing] the opportunity cost of capital," and a 3% rate, approximating the

reflected significant work done by both academic economists and EPA in crafting its own benefit–cost analysis guidelines.[263]

B. Addressing Emerging Challenges to Benefit–Cost Analysis

Circular A-4 sat unchanged after 2003, and by the time President Biden took office, it was showing its age.[264] The chorus of calls to reform the guidance to reflect the best available science and economics had grown louder over time.[265] At the same time, critics of benefit–cost analysis seized upon Circular A-4's flaws to condemn the entire enterprise.[266] Responding to changes in economic and scientific understandings, President Biden's day-one presidential memorandum called on OMB to revise Circular A-4 and "propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations."[267] In Executive Order 14,094, President Biden directed OIRA—in consultation with the Chair of the Council of Economic Advisers and representatives of relevant agencies—to complete the process of revising Circular A-4 within a year.[268]

Updating Circular A-4 in a careful and rigorous manner required rounds of painstaking discussions and revisions. First, OIRA reached consensus across the government on proposed revisions to Circular A-4, for which OIRA then sought public comments and an independent peer review.[269]

"social rate of time preference" or consumption rate using "the real rate of return on long-term government debt").

263. *See* Livermore, *Cost–Benefit Analysis*, *supra* note 29, at 643–44 (explaining OMB and EPA's development of benefit–cost analysis guidelines through the history of their approach towards discounting).

264. *See* K. Sabeel Rahman, *Rewiring Regulatory Review*, LAW & POL. ECON. PROJECT (May 1, 2023), https://lpeproject.org/blog/rewiring-regulatory-review [https://perma.cc/GT6A-AC7H] (reviewing some of the revisions to Circular A-4 that modernize its approach to policymaking).

265. *Id.*

266. *See, e.g.*, Melissa J. Luttrell, *The Social Cost of Inertia: How Cost–Benefit Incoherence Threatens to Derail U.S. Climate Action*, 25 DUKE ENV'T L. & POL'Y F. 131, 136 (2014) (using an analysis of Circular A-4 and Executive Order 12,866 to argue in part that "climate change is a policy problem that is particularly incompatible with the United States' current emphasis on [cost–benefit analysis] in regulatory policy").

267. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223, 7223–24 (Jan. 26, 2021).

268. Exec. Order No. 14,094, § 3(b), 88 Fed. Reg. 21,879, 21,881 (Apr. 6, 2023).

269. *See* Act of Dec. 21, 2000, Pub. L. No. 106-554, § 624, 114 Stat. 2763, 2763A-161–62 (codified at 31 U.S.C. § 1105 note) ("[OMB] shall provide for independent and external

After considering the public comments and peer reviewers' reports—and another round of interagency review—OMB published the revised Circular A-4 in November 2023.[270] To enhance the transparency of the process, OIRA undertook a cumbersome task rarely performed for guidance documents: it prepared an extensive explanation of the changes relative to the 2003 version and provided responses to public comments and peer reviewers' reports.[271]

The revised Circular A-4 received a predominantly positive response.[272] For example, over twenty prominent economists wrote that the revisions "bring the Circular A-4 guidance more in line with the teachings and research of modern economics."[273] A different group of over one hundred economists wrote that the revisions "bring the federal government's benefit–cost methodology closer to the current, best available economic research and theory."[274] Ted Gayer, a Deputy Assistant Secretary at the Department of the Treasury during the George W. Bush Administration, commented that the changes are mostly "align[ed] with developments in the economics literature since the guidelines were last issued in 2003."[275] And Nobel laureate Richard Thaler remarked that the Circular is "*very* thoughtful" and reflects "how government is supposed to work."[276]

But following the publication of the Circular, a few critics (primarily Susan Dudley, who served as OIRA Administrator in the George W. Bush Administration) have claimed that the revision of Circular A-4 was politicized—by which they appear to mean inconsistent with the best science and economics—suggesting that the revised Circular abandoned the scientific approach of the 2003 version.[277] These criticisms are misguided. Updating analytic

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peer review of the guidelines"). Consistent with OMB guidance, the peer review of Circular A-4 was managed by an independent, external contractor. *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2669 (Jan. 14, 2005).

270. CIRCULAR A-4 (2023), *supra* note 205, at 1.

271. Memorandum from the Off. of Mgmt. & Budget on OMB Circular No. A-4: Explanation and Response to Public Input 2 (Nov. 9, 2023) [hereinafter Circular A-4: Explanation & Response], https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf [https://perma.cc/2F2D-MQMJ].

272. *Id.*

273. *Id.*

274. *Id.* at 3.

275. *Id.*

276. Richard H. Thaler (@R_Thaler), X (Nov. 9, 2023, 12:17 PM), https://x.com/R_Thaler/status/1722664709273378962 [https://perma.cc/CH8J-Q425].

277. Dawn Reeves, *Former OIRA Chiefs at Odds over Impact of Biden Changes to Circular A4*, INSIDEEPA (Dec. 6, 2023) [hereinafter *Former OIRA Chiefs at Odds*], https://insideepa.com/daily-news/former-oira-chiefs-odds-over-impact-biden-changes-circular-a4

guidance in light of economic and scientific advances, as well as changes in relevant markets, was not politicizing that guidance. In fact, failing to do so in order to serve certain goals (such as impeding regulations that the critics believe are unwise, regardless of what a high-quality benefit-analysis of the regulation finds) would be politicizing the guidance through inaction.

The following subsections discuss four elements of benefit–cost analysis that were revised in Circular A-4: discounting, distributional analysis, analysis of non-monetized effects, and behavioral biases. These four are discussed in detail not only because they are particularly important, but also because they relate to four foundational issues that critics of benefit–cost analysis have presented as the basis for abandoning the use of the technique in regulatory analysis.[278] These four issues also led to criticisms that the guidance was politicized, which are useful to address because they reflect key misperceptions and mistakes about benefit–cost analysis.

1. Discounting

The social discount rate, usually called the "discount rate," refers to the rate—typically annual—that is necessary to apply to benefits and costs that occur in the future to convert them into the same "unit": present value.[279] So, for instance, if the discount rate is 5% (annually) and a regulation is expected to have a $100 benefit or cost one year in the future, the present value of the benefit or cost is $95.[280] Discounting is necessary because benefit–cost analysis looks to what individuals value, and individuals (generally) value present goods or services more than the same good or service received in the future.[281] They do so for two main reasons. First, people may prefer having things now rather than later. Consider that having a resource now allows an individual to either consume it now or to wait a year and consume it then. Getting the same resource a year later deprives the individual of one of these

[https://perma.cc/49D3-XGEA]; Susan Dudley & W. Kip Viscusi, *Biden's OMB Politicizes Cost–Benefit Analysis*, WALL ST. J. (Aug. 28, 2023, 5:44 PM), https://www.wsj.com/articles/bidens-omb-politicizes-cost-benefit-analysis-regulation-social-justice-2534e819 [https://perma.cc/4N3F-5YEE].

278. The revisions to Circular A-4 also deal with other important issues, such as uncertainty, general equilibrium analysis, the choice of analytic baselines, and valuation methods. *See generally* CIRCULAR A-4: EXPLANATION & RESPONSE, *supra* note 271 (noting the revisions to Circular A-4 and OMB's responses to public comments and criticisms on issues).

279. CIRCULAR A-4 (2003), *supra* note 258, at 33.

280. More precisely, the value is $95.24, after rounding. The general formula for discounting a future effect at a constant discount rate is $1/(1 + r)^t$, where r is the discount rate and t is the number of years that the effect occurs. *Id.* at 32.

281. CIRCULAR A-4 (2023), *supra* note 205, at 75.

options, providing a rational basis for a time preference.[282] Second, the value of the same good or service, measured in real—that is, inflation-adjusted—dollars, is typically worth less when an individual has more resources—a concept known as diminishing marginal utility.[283] Because individuals generally expect to become better off over time, discounting is appropriate.

One conventional approach to discounting looks to long-term government debt yields to estimate the discount rate on the theory that—much like the use of other prices in benefit–cost analysis—such yields reflect a real market price at which individuals can trade current (real) dollars for future (real) dollars.[284] While the net benefits of regulations with only short-term effects will not be greatly affected by the estimate of the discount rate, the estimate of net benefits for regulations with long-term effects—such as the benefits of lead remediation or greenhouse gas reductions—will be sensitive to the estimate of the discount rate.

In 2003, Circular A-4 recommended that agencies discount regulatory effects at 3%—an estimate of the real rate of return on long-term government debt—"[w]hen regulation primarily and directly affects private consumption," and at 7%—an estimate of the real rate of return on capital—"whenever the main effect of a regulation is to displace or alter the use of capital in the private sector."[285] However, Circular A-4 also stated that agencies "should provide estimates of net benefits using both 3 percent and 7 percent" discount rates.[286] The latter direction came to be more important than the former guidance, and as a result, agencies often discounted all regulatory effects at 3% and 7%, generally without discussion of which discount rate was more appropriate for their regulation.[287]

Prior to the recent revisions, Circular A-4's age was perhaps most visible in its guidance on discounting. The lower (3%) discount rate, referred to as the "social rate of time preference," had been set on the basis of federal bond data from 1973 to 2002, which were falling increasingly out of step with

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282. The example could be made more complicated by considering imperfect self-control or storage costs, but once accounted for, the same point—that time preferences can reflect a kind of option value—remains. For discussion of option value, see *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015); and Michael A. Livermore, *Patience Is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581, 589–605 (2013).

283. CIRCULAR A-4 (2023), *supra* note 205, at 65.

284. *Id.* at 76.

285. CIRCULAR A-4 (2003), *supra* note 258, at 33.

286. *Id.* at 34.

287. Brian F. Mannix, *The Discounting Dilemma*, GEO. WASH. U. REGUL. STUD. CTR. 1–3 (Aug. 6, 2020), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-06/pic_discounting_dilemma_circular_a4_bmannix_aug2020.pdf [https://perma.cc/J5LY-9AKE].

market rates over the following two decades.[288] The use of the previous Circular A-4's higher (7%) discount rate, meant to approximate "the opportunity cost of capital" and (implicitly) systematic risk, was no longer consistent with the best practices for accounting for capital effects in economic analyses.[289] And research on why long-run discounting should use declining rates, which had been cutting-edge in 2003,[290] has long since become the consensus in economics.[291] The result was regulatory analyses that systematically under-valued the future benefits of regulations. Critics responded to these limitations in different ways, with some seizing upon them to attack benefit–cost analysis as a methodology[292] and others instead calling for improved approaches to discounting.[293]

In 2023, OIRA updated and unbundled Circular A-4's analysis of discounting. For the social rate of time preference (previously 3%), the same analytic approach used in 2003 was updated, relying on the 1993–2022 average of the real return on ten-year federal government bonds, as opposed to a time series that was now twenty years out of date.[294] Only two relatively minor and technical changes were made to the 2003 approach.[295]

In conjunction with the updated data, these changes led to a new estimated real rate of return on long-term government debt (and therefore

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288. *See* Circular A-4: Explanation & Response, *supra* note 271, at 63.

289. *Id.* at 81–82.

290. *See* CIRCULAR A-4 (2003), *supra* note 258, at 36 (citing Martin L. Weitzman, *"Just Keep Discounting, But . . . ," in* DISCOUNTING AND INTERGENERATIONAL EQUITY 23 (Paul R. Portney & John P. Weyant eds., 1999)).

291. *See, e.g.*, Kenneth J. Arrow, Maureen L. Cropper, Christian Gollier, Ben Groom, Geoffrey M. Heal, Richard G. Newell et al., *Should Governments Use a Declining Discount Rate in Project Analysis?*, 8 REV. ENV'T ECON. & POL. 145 (2014).

292. *See, e.g.*, Douglas A. Kysar, *Discounting . . . on Stilts*, 74 U. CHI. L. REV. 119, 124 (2007); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1571 (2002) [hereinafter *Pricing the Priceless*].

293. *See, e.g.*, Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097, 1127, 1146–54 (2011); Peter Howard & Jason A. Schwartz, *Valuing the Future: Legal and Economic Considerations for Updating Discount Rates*, 39 YALE J. ON REGUL. 595, 616–24, 626–32 (2022).

294. CIRCULAR A-4 (2023), *supra* note 205, at 76–77.

295. First, rather than taking an average of Treasury bond yields and then adjusting for inflation, Treasury Inflation-Protected Securities (known as "TIPS") were used for the years they are available, which avoids the need for *ex post* inflation adjustment. Second, rather than using consumer price index inflation, an adjustment was made to measure inflation using the personal consumption expenditure price index. The latter index is generally viewed to be more accurate, primarily because it better accounts for how consumers shift their purchasing decisions as prices change. Circular A-4: Explanation & Response, *supra* note 271, at 62–63, 66–67.

default social rate of time preference) of 2%.[296] Both of the changes to the 2003 approach slightly increased the estimate of the discount rate.[297] Without these changes, the new estimate would have been 1.4%.[298] As mentioned previously, the estimate in the 2003 version of Circular A-4 failed to track changing market realities over time.[299] To ensure that the revised Circular A-4's value does not grow stale over time, the estimate of the discount rate will be updated every three years, starting in 2026.[300]

In 2003, Circular A-4's adoption of a second (7%) discount rate attempted to capture two concepts: capital effects and (implicitly) systematic risk. With respect to each, the revised Circular A-4 adopts an approach that is more consistent with developments in the economics literature. Capital effects refers to the extent to which regulations reduce or increase capital investment,[301] and—depending on the productivity of that investment—could, therefore, have a greater than dollar-for-dollar multiplier effect on consumption.[302] A regulation could increase capital investment on net; for example, a regulation that induces localities to up-zone and allow more housing construction. If this effect were dealt with through a discount rate adjustment, as the 2003 version of Circular A-4 purported to do, it would call for using a discount rate *lower* than 2%. Or a regulation could decrease capital investment on net; for instance, a regulation that limits small businesses' access to lines of credit. Accordingly, if these capital effects were dealt with through a discount rate adjustment, this would call for using a discount rate higher than 2%.

But the guidance in the 2003 version of Circular A-4 assumed that regulations only ever fell in the latter category, reducing capital investment.[303] To account for capital effects, the revised Circular A-4 now adopts the shadow price of capital approach—an estimate of the multiplier effect on consumption just mentioned—which OMB had long noted

296. CIRCULAR A-4 (2023), *supra* note 205, at 76.

297. Circular A-4: Explanation & Response, *supra* note 271, at 62–63, 67.

298. *Id.*

299. *See supra* notes 285–286 and accompanying text.

300. OFF. OF MGMT. & BUDGET, EXEC OFF. OF THE PRESIDENT, CIRCULAR NO. A-4: APPENDIX 1 (2023) [hereinafter CIRCULAR A-4 APPENDIX (2023)], https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Appendix.pdf [https://perma.cc/JX8M-EM86].

301. CIRCULAR A-4 (2023), *supra* note 205, at 77–78.

302. This concept is similar to the question of whether government investments "crowd out" (displace) or "crowd in" (induce) private investment. *See* David Aschauer, *Does Public Capital Crowd Out Private Capital*, J. MONETARY ECON. 171 (1989).

303. *See* CIRCULAR A-4 (2003), *supra* note 258, at 33.

was a more accurate way of treating capital effects.[304] Often, a regulation will not have capital effects either because the effects of a regulation accrue to consumption or because the affected entities have access to open capital markets.[305] In such cases, the 2% discount rate can be used without further adjustments.

Systematic risk refers to the correlation between a regulation's net benefits and changes in societal well-being (such as the value of changes in income, leisure, or health).[306] In essence, a regulation that (all else equal) will have greater net benefits in a future with more societal well-being has positive systemic risk; a regulation with greater benefits in a future with less societal well-being has negative systemic risk.[307] With respect to systematic risk, the revised Circular A-4 notes that the assumption that regulations always have positive systematic risk—the assumption that would justify the use of the higher 7% discount rate in the 2003 version of Circular A-4—is unfounded.[308] It is true that the benefits of some investments, such as roads or bridges, have larger benefits in good times and smaller benefits in bad times and, therefore, positive systematic risk. But other regulations, such as those that require emergency preparedness for earthquakes, hurricanes, or pandemics, have few benefits in good times but large benefits when things go badly, which means that the systematic risk is negative rather than positive.[309] If negative systematic risks were accounted for through an adjustment to the discount rate, it would call for the use of a rate lower than 2%.

Because systemic risk can be either positive or negative—and not always positive, as the 2003 version of Circular A-4 implicitly assumed—the revised Circular A-4 provides specific instructions on how best to account for systematic risk.[310] It primarily recommends handling systematic risk separately from discounting altogether, using a calculation known as certainty–equivalent valuations.[311] Alternatively, while not the "preferred" approach, the revised Circular A-4 allows agencies to account for systematic risk by directly

304. CIRCULAR A-4 (2023), *supra* note 205, at 78–80; Circular A-4: Explanation & Response, *supra* note 271, at 82 ("OMB has consistently noted that the 'shadow price' approach is 'analytically preferred' since 1992.").

305. CIRCULAR A-4 (2003), *supra* note 258, at 33.

306. CIRCULAR A-4 (2023), *supra* note 205, at 81.

307. *Id.* at 73.

308. *See id.* at 81; *see also* Circular A-4: Explanation & Response, *supra* note 271, at 81.

309. *See, e.g.*, CIRCULAR A-4 (2023), *supra* note 205, at 81; U.S. CHAMBER OF COM., ALLSTATE, & U.S. CHAMBER OF COM. FOUND., THE PREPAREDNESS PAYOFF: THE ECONOMIC BENEFITS OF INVESTING IN CLIMATE RESILIENCE 4 (2024).

310. CIRCULAR A-4 (2023), *supra* note 205, at 81.

311. *Id.*

adjusting the discount rate, but if they do so, they must recognize that the impact is not always one-sided.[312]

Finally, Circular A-4 made significant improvements to how discounting is approached for the longer-term effects of regulations. There are multiple prescriptive and descriptive reasons why longer-term discounting is distinct from discounting regulatory effects that will take place over the next few decades. A particularly important descriptive reason is that uncertainty about the discount rate leads lower discount rate scenarios to dominate the average over time, resulting in a declining discount rate as the time frame for the analysis gets longer.[313] Consider a 50–50 chance that the correct discount rate that applies to a $100 benefit is either 9% or 1% over the next twenty years: the expected discount rate is that which yields the average of the discounted present values in the 9% ($18) and 1% ($82) scenarios—that is, 3.5% ($50)—not the average of the discount rates (5%, which would yield $38). The more years of uncertainty, the more that the low discount rate dominates the average (in this example, converging to 1%). The revised Circular A-4 captures this last factor in an Appendix that provides a useful default set of declining long-term discount rates for agencies.[314] For example, when discounting effects from 2080 to 2094, a 1.9% rate is recommended; from 2106 to 2115, a 1.7% rate is recommended; from 2135 to 2143, a 1.4% rate is recommended.[315]

Some critics alleging that the updates to Circular A-4's discounting guidance was politicized have seized on the fact that "nobody can borrow at 2 percent" real (i.e., net of expected inflation) interest rates, "especially low-income families" who are riskier to lend to.[316] As a result, they reason that it is inappropriate to discount benefits and costs at rates that do not reflect the actual borrowing costs of individuals; they say that doing so is just "lowering the discount rate to create a better benefit–cost picture of costly regulations that promise future benefits."[317]

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312. This is done by "estimat[ing] an economy-wide systematic risk premium and the regulation-specific correlation of regulatory benefits and costs with that systematic risk." *Id.* at 81–82.

313. *See* Revesz & Shahabian, *supra* note 293, at 1112–13 (citing Martin L. Weitzman, *Why the Far-Distant Future Should Be Discounted at Its Lowest Possible Rate*, 36 J. ENV'T ECON. & MGMT. 201, 206 (1998)). Weitzman clarified the basis for this particular approach to modeling uncertainty in later work. *See* Christian Gollier & Martin L. Weitzman, *How Should the Distant Future Be Discounted when Discount Rates Are Uncertain?*, 107 ECON. LETTERS 350, 353 (2010).

314. CIRCULAR A-4 APPENDIX (2023), *supra* note 300, at 2.

315. *Id.* These recommended long-term rates will be updated every three years, alongside the estimate of the near-term rate.

316. Reeves, *supra* note 277. Such households can, of course, *lend* at those rates (roughly) by buying TIPS securities.

317. Dudley & Viscusi, *supra* note 277.

This criticism is misplaced, as was thoroughly discussed in the Explanation and Response to Public Input document published alongside Circular A-4.[318] The "high interest rates charged on credit card debt, payday loans," or other similar instruments "are risk-inclusive," and reflect both idiosyncratic risk (a borrower's risk of default) and systematic risk (the fact that a borrower is especially likely to default when other borrowers are defaulting).[319] Further, such rates may reflect "the value of other (e.g., banking/liquidity) services," deception or "information asymmetries," or "behavioral biases" for certain borrowers.[320] It is simply the case that "Treasuries are the market price at which individuals can make nearly risk-free loans, including low-income individuals."[321] When one person buys a Treasury, it is generally the case that another person is selling it.[322]

In fact, the exact same criticisms could have been levied against the recommended 3% discount rate in the 2003 revision to Circular A-4, since nearly the exact same approach to estimating the rate was used.[323] The fact that these criticisms were not raised over the intervening two decades suggests that the critics' objection is not with the procedure or the theory underlying the discount rate, but rather with the outcome of the update: a lower discount rate. It cannot be that using more recent data, rather than stale data, is a politicized approach to estimating the discount rate.

2. Distributional Effects

Considering who experiences particular benefits and costs has always been important, with both Executive Orders 12,866 and 13,563 directing agencies to "maximize net benefits (including . . . distributive impacts; and equity), unless a statute requires another regulatory approach."[324] Nonetheless, the 2003 version of Circular A-4 devoted only a scant two paragraphs to the

318. Circular A-4: Explanation & Response, *supra* note 271, at 61–62.

319. *Id.*

320. *Id.* at 62.

321. *Id.* at 61.

322. The exceptions are initial auctions of Treasury securities to authorized primary dealers, where the seller is the federal government (through the Federal Reserve Bank of New York), or purchases of Treasury securities by the federal government (also through the Federal Reserve Bank of New York). *See Primary Dealers*, FED. RSRV. BANK OF N.Y., https://www.newyorkfed.org/markets/primarydealers [https://perma.cc/9U6Q-ED2A] (last visited Jan. 22, 2025). Treasuries are incredibly frequently traded securities; very little of that trading volume consists of federal government sales or purchases.

323. Circular A-4: Explanation & Response, *supra* note 271, at 70.

324. Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993); Exec. Order No. 13,563, § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

subject.[325] In that brief passage, Circular A-4 seemed to imply that every single regulatory impact analysis should include at least a qualitative distributional analysis of how the regulation would affect "sub-populations of particular concern" and a quantitative one when "distributive effects are thought to be important."[326] Yet, empirical analyses found that agencies did not carry out the requirements of the executive orders or Circular A-4 and rarely performed distributional analyses.[327] The result was a widespread sense that regulatory analysis was unconcerned with who bore the costs and who reaped the benefits of regulations.

The perception that past policies had delivered the most benefits to the already well-off has led to increased focus on the issue of distribution in recent years.[328] Critics have alleged that benefit–cost analysis's treatment of distribution is a "fundamental defect."[329] For example, a benefit–cost analysis of a flood program might conclude that "protecting 10 families in $1 million houses has the same value as protecting 100 families in $100,000 houses," even though it is clearly the available resources of the two groups of families—not their preferences for protecting their homes—that differ.[330] It was not just the critics of benefit–cost analysis who raised this concern: in recent years, advocates of benefit–cost analysis were increasingly acknowledging the importance of better ways of analyzing the distribution of benefits and costs, when appropriate.[331]

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325. CIRCULAR A-4 (2003), *supra* note 258, at 14.

326. *Id.*

327. *See* Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. 53 (2022); Lisa A. Robinson, James K. Hammitt & Richard J. Zeckhauser, *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENV'T ECON. & POL. 308 (2016).

328. *See* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018). For instance, an early priority of the Biden Administration was Justice40, an initiative to ensure that "40 percent of the overall benefits" of "certain Federal investments" will "flow to disadvantaged communities." Exec. Order No. 14,008, § 223(a), 86 Fed. Reg. 7619, 7631–32 (Jan. 27, 2021).

329. *Pricing the Priceless*, *supra* note 292, at 1573–74; *see also* Sinden, *supra* note 2, at 1453.

330. Rebecca Hersher & Robert Benincasa, *How Federal Disaster Money Favors the Rich*, NPR (Mar. 5, 2019, 5:00 AM), https://www.npr.org/2019/03/05/688786177/how-federal-disaster-money-favors-the-rich [https://perma.cc/9XF5-XRZD]. *See generally* Zachary D. Liscow & Cass R. Sunstein, Efficiency vs. Welfare in Benefit–Cost Analysis: The Case of Government Funding (Oct. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589563 [https://perma.cc/D9T3-QCFA] (unpublished manuscript).

331. Regarding benefit–cost analysis advocates, see, for example, James K. Hammitt, *Accounting for the Distribution of Benefits and Costs in Benefit–Cost Analysis*, 12 J. BENEFIT–COST

Consistent with Executive Orders 12,866 and 13,563,[332] as well as with the 2003 version of Circular A-4, the 2023 revisions to Circular A-4 guide agencies on how to consider the distributional effects of their regulations, providing substantially expanded material on that subject, including for the first time, details on how to approach the estimation of incidence and identification of groups in an analysis.[333] The guidance notes that estimates of the income of different groups may need to be adjusted for household or family size, and account for income net of government taxes and transfer programs.[334] The guidance also notes that a distributional analysis is much more informative if the same groups are analyzed across different categories of benefits and costs, as it would otherwise be unclear what the regulation's net effects are on each group.[335] Circular A-4 is also clear that simpler "qualitative analyses" of the distribution of a regulation's effects may be appropriate in some cases.[336]

The revised Circular A-4 also recognizes a common-sense notion: that, in welfare terms, a $100 cost means more to a middle-class family than to a billionaire.[337] As John Graham—the OIRA Administrator for most of the George W. Bush Administration—observed, "if each poor person gains $100 per year" because of the regulation—tens of billions of dollars in benefits to the poor—but the rule imposes $100 more than that—just slightly more—in costs on the rich, then "the interests of the poor should prevail" when assessing "the magnitudes of the tradeoffs."[338] The principle behind this effect, the diminishing marginal utility of income, is textbook economics.[339] As Circular A-4 notes, when considering the distribution of regulatory effects by income, this principle can be considered not only qualitatively but also

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ANALYSIS 64 (2020); and Cass R. Sunstein, *Some Costs & Benefits of Cost–Benefit Analysis*, 150 DAEDALUS 208, 217 (2021).

332. As noted previously, Executive Orders 12,866 and 13,563 did direct that agencies, "in choosing among alternative regulatory approaches, . . . select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)." Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993); Exec. Order No. 13,563, § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

333. CIRCULAR A-4 (2023), *supra* note 205, at 61–67.

334. *Id.* at 63.

335. *Id.* at 64.

336. *Id.*

337. *Id.* at 65.

338. John D. Graham, *Regulatory Reform, Benefit–Cost Analysis, and the Poor*, REGUL. REV. (Mar. 8, 2022), https://www.theregreview.org/2022/03/08/graham-reform-benefit-cost-analysis [https://perma.cc/5RLA-Y6JF].

339. CIRCULAR A-4 (2023), *supra* note 205, at 65.

quantitatively.[340] Circular A-4 provides a simple, implementable quantitative approach (known as income weights) for agencies interested in thinking through how the welfare effects of its regulations may be different if this principle is taken into account, though it does not mandate the use of this technique.[341] It uses a value for the income elasticity of marginal utility, which measures how much the welfare value of one more dollar of income declines as a person's income rises, drawn from a meta-analysis of 1,636 empirical estimates.[342]

A benefit–cost analysis that includes a distributional analysis does not determine how the agency uses the information contained within the analysis.[343] For example, if a statute expresses specific concern for populations that are particularly sensitive to a certain risk (e.g., children for many pollutants), understanding the distribution of the consequences of different regulatory alternatives (e.g., by age of those affected) allows agencies to better further such a statutory directive.[344] A statute may also instruct an agency to regulate small businesses differently from larger firms, and a distributional analysis by affected firm size would allow the agency to more effectively implement that statutory scheme. Or a statute may require an agency to consider which regulatory approach is most in the interest of Tribes. Distributional analysis gives agencies a better picture of the consequences of a regulation, thereby allowing them to make decisions that better comport with applicable statutes.[345]

The changes to Circular A-4's treatment of distributional effects have largely been praised as improvements. A number of commenters on the proposed revisions to Circular A-4, including Graham, stated that the proposed "guidelines are appropriately nuanced about the use of distributional analysis in [a regulatory impact analysis] and the form it might take."[346] Similarly, Dudley—the other OIRA Administrator during the George W. Bush

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340. *Id.* at 64.

341. *Id.* at 65–67.

342. Circular A-4: Explanation & Response, *supra* note 271, at 52. Policymakers, however, may decide not to maximize social welfare. As Graham notes, they may want to "giv[e] special attention to the well-being of the worst-off citizens"; such "prioritarianism" would go beyond considering how regulatory effects can be calculated in consistent welfare units (or units of well-being). Graham, *supra* note 338.

343. CIRCULAR A-4 (2023), *supra* note 205, at 62.

344. *Id.*

345. *Id.* at 62, 65.

346. Arthur Fraas, John D. Graham, Kerry Krutilla, Randall Lutter, Jason F. Shogren, & Linda Thunström, Comment Letter on Proposed OMB Circular A-4, "Regulatory Analysis" at 20 (June 20, 2023), https://www.regulations.gov/comment/OMB-2022-0014-3917 [https://perma.cc/YSE7-2Y7R].

Administration—stated that the proposed guidance "adds needed detail to the very brief discussion of distributional effects in the 2003 Circular."[347]

But Dudley and W. Kip Viscusi criticized the last addition mentioned above—providing agencies with flexibility to assess the differential welfare effects of their regulations on people with low or high incomes—as "embed[ding] political objectives in" benefit–cost analysis.[348] Dudley has reasoned that the approach is nontransparent and obfuscatory.[349] And Dudley and Viscusi claimed that "'weighting' impacts by income" is merely a way "to exaggerate [regulations'] benefits to low[er] earners" and that doing so differs from traditional benefit–cost analysis by making "value judgments."[350] Both critiques miss the mark.

Regarding transparency, Circular A-4 specifically notes that agencies analyzing an income-weighted estimate of benefits and costs should also produce and publish traditionally-weighted estimates alongside them.[351] Further, agencies are already (implicitly or explicitly) analyzing how regulations may differentially affect low-income households and make policy decisions on that basis.[352] For example, the Department of Energy considers effects on low-income households when setting energy-efficiency standards.[353] Similarly, the Department of Education considers the effect on low-income students when determining which higher educational institutions are cut off from receiving federal student aid programs or have to warn students about how commonly their graduates cannot afford to service their debt.[354] Presenting a net benefits estimate in welfare terms allows policymakers to process such considerations in a more consistent fashion when relevant.[355] This

347. Susan E. Dudley, Comment Letter on Proposed OMB Circular A-4, "Regulatory Analysis" at 11 (June 14, 2023), https://www.regulations.gov/comment/OMB-2022-0014-0129 [https://perma.cc/86A8-JC2E].

348. Dudley & Viscusi, *supra* note 277.

349. Reeves, *supra* note 277.

350. Dudley & Viscusi, *supra* note 277. Despite this claim, income weights apply to both benefits and costs, as discussed previously.

351. CIRCULAR A-4 (2023), *supra* note 205, at 66.

352. As Circular A-4 notes, "Distributional effects exist whether or not a distributional analysis is produced"; agencies likely attempt to consider distribution informally in many cases where a monetized analysis is not produced. *Id.* at 62.

353. *See, e.g.*, Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 89 Fed. Reg. 19,026, 19,068–71 (Mar. 15, 2024) (discussing effects on low-income households in the explanation of selecting a trial standard level).

354. Financial Value Transparency and Gainful Employment, 88 Fed. Reg. 70,004, 70,170 (Oct. 10, 2023).

355. That is, when mapping dollar-effects to welfare-equivalent effects for different income groups.

increases transparency, rather than decreasing it, by helping the public to better understand a regulation's effects and why a particular regulatory alternative was ultimately adopted over alternatives.

The claim that this approach merely reflects the imposition of a value judgment is also misplaced. "Any approach to estimating aggregate net benefits uses distributional weights":[356] it could be a traditionally-weighted measure—in which a dollar is equally valuable to an indigent person, a middle-class family, or a billionaire—or it could be a welfare measure that adjusts for the diminishing marginal utility of income, consistent with the intuition that receiving $1,000 would make a far bigger difference to the life of an indigent person than to the life of a billionaire. An income-weighted estimate is useful because it helps to indicate *how much* more valuable $1,000 is to individuals of lower incomes.[357]

3. Non-Monetized Effects

The fact that a regulatory effect cannot be quantified and monetized does not mean that it is not important. Prior to the 1980s, the willingness to pay approach for mortality risk reductions, which is termed the value of a statistical life, was not widely adopted; prior to 2008, no agency monetized the costs of any greenhouse gas emissions.[358] Now, both are routinely monetized in agencies' regulatory impact analyses,[359] and any analysis that failed to do so would be clearly incomplete. Analytical improvements might similarly lead to the monetization of currently unmonetized impacts. Some categories of effects—like deprivations of civil liberties—may never be appropriate to monetize,[360] yet these effects are undoubtedly important to consider.

The 2003 version of Circular A-4 included key guidance on non-monetized effects.[361] It noted that some important benefits and costs may be too difficult to quantify or monetizeand called for "a careful evaluation of non-quantified benefits and costs," including "a discussion of the strengths and limitations of the qualitative information."[362] And it noted that if non-monetized benefits are important to the selection of a regulatory alternative, a "threshold" or "break-even" analysis may be useful to present.[363] These analyses determine how big the non-monetized benefits or costs would need

356. CIRCULAR A-4 (2023), *supra* note 205, at 65.

357. *Id.* at 65–67.

358. Revesz, *Quantifying Regulatory Benefits*, *supra* note 8.

359. *Id.* at 1437, 1441.

360. CIRCULAR A-4 (2023), *supra* note 205, at 44.

361. CIRCULAR A-4 (2003), *supra* note 258, at 26–27.

362. *Id.*

363. *Id.* at 2.

to be to result in a regulation with positive net benefits (break-even) or to change which regulatory alternative is most net beneficial (threshold).[364]

As Executive Order 12,866 indicated, non-monetized benefits and costs can be "essential to consider."[365] Subsequently, Executive Order 13,563 stressed that "[w]here appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, [and] fairness."[366] However, developing a methodologically sound approach for assessing unquantified and non-monetized effects has long posed a challenge.[367]

Non-monetized benefits are routinely relied upon in other contexts. A stark example is Transportation Security Administration airport regulations. Those who fly are familiar with a range of requirements on air travelers, such as a limit on one quart-sized bag of liquids like shampoo in a carry-on bag, with each individual liquid container limited to a 3.4-ounce container.[368] The Transportation Security Administration has justified these measures on homeland security grounds, though it has not quantified by how much these practices reduce the probability of a terrorist attack, or monetized the consequences of such an attack.[369]

But too often, non-monetized effects have been downplayed or ignored altogether in agency analyses.[370] Similarly, non-monetized effects have frequently played too small of a role in agencies' selection of regulatory alternatives.[371] This problem was exacerbated during the first Trump

364. *Id.*

365. Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993).

366. Exec. Order No. 13,563, § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

367. *See* Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost–Benefit Analysis*, 123 YALE L.J. 1732, 1761–63. (2014).

368. *Liquids, Aerosols, and Gels Rule*, TRANSP. SEC. ADMIN., https://www.tsa.gov/travel/security-screening/liquids-aerosols-gels-rule [https://perma.cc/VD9E-JNDX] (last visited Jan. 23, 2025).

369. Graham et al., *Managing the Regulatory State*, *supra* note 32, at 997–98. Some commenters have argued that these requirements may not have benefits in excess of costs, or even save lives on net, and have called for Transportation Security Administration to subject them to benefit–cost analysis. *See, e.g.*, Dylan Matthews, *The TSA Is a Waste of Money That Doesn't Save Lives and Might Actually Cost Them*, VOX (Sept. 11, 2016, 11:26 AM), https://www.vox.com/2016/5/17/11687014/tsa-against-airport-security [https://perma.cc/AP5N-XGPQ]; Matthew Yglesias, *Counterterrorism Measures Should Be Put Through The OIRA Benefit–Cost Analysis Wringer*, SLATE (June 8, 2013, 4:22 PM), https://slate.com/business/2013/06/counterterrorism-cost-benefit-send-security-measures-to-oira.html [https://perma.cc/2Q4V-YLWS] (both emphasizing that such measures divert some travelers to driving, which is more deadly).

370. LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 4, at 191.

371. *Id.*; Revesz, *Quantifying Regulatory Benefits*, *supra* note 8, at 1424–45.

Administration, which often "pretended that unquantified benefits do not exist."[372]

Critics of benefit–cost analysis, such as Heinzerling, have seized upon these limitations to argue that "[u]nless room is made in cost–benefit analysis for the nonquantifiable consequences of regulation, cost–benefit analysis will skew systematically against government action to address social problems."[373] Similarly, Sinden argues that the non-monetization "problem looms large and . . . calls into question not just the practice of [benefit–cost analysis] but the intellectual foundations on which it rests."[374] Even advocates of benefit–cost analysis have noted the need for more "meaningful recognition of qualitative benefits and a redoubled effort to quantify and monetize regulatory benefits."[375]

The 2023 revision to Circular A-4 made important, but subtle, improvements to the guidance on accounting for non-monetized effects.[376] These improvements will help spur agencies to monetize more effects that were previously not monetized. Perhaps most significantly, the revision broke difficult-to-monetize benefits and costs into four (non-exclusive) categories.[377] First, there are effects that can never be appropriately measured through individual choice, such as the value of civil rights and liberties.[378] The value of many rights (such as the right to vote and the freedom of speech) may not be conceptually reducible to the value individuals would pay for them, and their valuation in a benefit–cost analysis poses many difficulties.[379] Second, there are effects that cannot be measured through individual choice in particular contexts.[380] For example, infants are unable to make the choices necessary

372. LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 4, at 111–13.

373. Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CAL. L. REV. 1457, 1467 (2014) [hereinafter Heinzerling, *Quality Control*].

374. Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENV'T L. 73, 76 (2019).

375. *See* Heinzerling, *Quality Control*, *supra* note 373, at 1458 (citing Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369, 1375–79 (2014)).

376. CIRCULAR A-4 (2023), *supra* note 205, at 44–48.

377. *Id.* at 44–45. As Circular A-4 notes, these categories "are by no means exhaustive," but are still helpful. *Id.* at 45.

378. The same could be true of regulatory effects on nonhuman animals. *See* Cass R. Sunstein, Regulators Should Value Nonhuman Animals (Feb. 17, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729529 [https://perma.cc/D5KU-VZGM].

379. *See* Daniel Acland, *What's In, What's Out? Towards a Rigorous Definition of the Boundaries of Benefit–Cost Analysis*, 38 ECON. & PHIL. 34, 44–45 (2022).

380. *Id.*

to value even ordinary regulatory consequences that affect them.[381] Third, there are effects that cannot currently be measured because it is too difficult to collect data.[382] To illustrate, it may not yet be possible to estimate the harmfulness of physical exposure to a newly discovered material. Fourth, there are effects that fall into none of the three previous categories, but that would take an unreasonable amount of time or resources to monetize.[383] For example, the necessary data may be excessively expensive for an agency to gather. By advising agencies to separate the first two categories of effects from the latter two, effects that could be monetized in the future can be more easily identified. The Circular notes that for these latter two categories of effects, "it is helpful to outline the data collection or analysis that would enable quantification or monetization, even if doing such data collection or analysis is currently infeasible. Doing so may encourage research that would allow for such effects to be quantified or monetized in future regulations."[384]

If an agency is unable to monetize or quantify important effects of their regulation, Circular A-4 notes that the agency should provide robust qualitative descriptions of those effects.[385] The emphasis is on presenting any information that would help a policymaker and the public understand these effects.[386] And just as agencies should generally discuss the strengths and limitations of data undergirding a monetized estimate, agencies should also discuss the strengths and limitations of their qualitative information.[387]

Dudley and Viscusi have argued that these revisions to Circular A-4 politicized it because they "open[] the door to putting scientific-sounding numbers on inherently qualitative values" such as "environmental stewardship," and thereby "vitiate[s] the transparency and integrity of regulatory-impact analysis."[388] This criticism gets things backwards. As Circular A-4 notes—both in its 2003 version and its 2023 revision—if important benefits or costs are not monetized in an analysis, the estimate of monetary net benefits no longer provides evidence of the regulatory alternative that most improves

381. Both academics and government agencies continue to grapple with, and make progress on, the valuation of regulatory effects on children. *See, e.g.*, Notice of Availability of Final Guidance for Estimating Value per Statistical Life, 89 Fed. Reg. 27,740 (Apr. 18, 2024) (discussing the Consumer Product Safety Commission's guidance on applying a higher Value per Statistical Life for children).

382. CIRCULAR A-4 (2023), *supra* note 205, at 45.

383. *Id.*

384. *Id.*

385. *Id.* at 45–46.

386. *Id.*

387. *Id.* at 46.

388. Dudley & Viscusi, *supra* note 277.

social welfare.[389] It is critical, then, to monetize what can be monetized—and appropriately consider what cannot be monetized—to have benefit–cost analysis inform policymaking.

Agencies should also consider unquantified or unmonetized effects with methodological rigor. Qualitative analyses of equity, dignity, and fairness, for example, do not have to rely upon abstract generalizations but can instead analyze specific, concrete examples. When an agency issues a proposed regulation, public comment can provide a way to gather input on these nonmonetized effects that can either allow for their monetization or strengthen a qualitative discussion.[390] Existing research or statements submitted to the agency through public comments can help capture important effects—like the feelings of frustration experienced by a disabled patient who cannot make use of medical diagnostic equipment at their physician's office, or by a disabled student who cannot make use of learning resources because a school's website is not accessible—that would otherwise be overlooked.[391]

One of the great successes of benefit–cost analysis, over the years, has been to capture more values that once could be analyzed only qualitatively. Over time, significant strides have been made in monetizing important effects that were previously not monetized: the willingness to accept compensation for increased mortality risk (value of a statistical life); the social cost of carbon dioxide, methane, and nitrous oxide; ecosystem services; emotional harms such as fear, anxiety, and stress; and the value of real options when deciding whether to use up nonrenewable resources.[392] And where important effects

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389. CIRCULAR A-4 (2023), *supra* note 205, at 3; *see also* CIRCULAR A-4 (2003), *supra* note 258, at 2 (discussing the same point in terms of "the largest net benefits to society (ignoring distributional effects)").

390. CIRCULAR A-4 (2023), *supra* note 205, at 47.

391. *See, e.g.*, OFF. FOR C.R., DEP'T OF HEALTH & HUM. SERVS., SECTION 504 OF THE REHABILITATION ACT OF 1973 FINAL RULE: REGULATORY IMPACT ANALYSIS 124, https://www.hhs.gov/sites/default/files/sec-504-ria-final-rule-2024.pdf [https://perma.cc/XQ2S-X5MA] (last accessed Feb. 8, 2024); C.R. DIV., DEP'T OF JUST., ACCESSIBILITY OF WEB INFORMATION AND SERVICES OF STATE AND LOCAL GOVERNMENT ENTITIES: REGULATORY IMPACT ANALYSIS 169 (June 24, 2024), https://www.ada.gov/assets/pdfs/web-fria.pdf [https://perma.cc/S54F-C2LC].

392. *See* Revesz, *Quantifying Regulatory Benefits*, *supra* note 8, at 1436–50. Regarding the expansion of the social cost of greenhouse gases from just carbon dioxide to also including methane and nitrous oxide, see INTERAGENCY WORKING GRP. ON THE SOC. COST OF GREENHOUSE GASES, ADDENDUM TO TECHNICAL SUPPORT DOCUMENT ON SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866: APPLICATION OF THE METHODOLOGY TO ESTIMATE THE SOCIAL COST OF METHANE AND THE SOCIAL COST OF NITROUS OXIDE (2016), https://www.epa.gov/sites/default/

cannot or should not be quantified or monetized, agencies can still thoughtfully and rigorously assess such effects qualitatively.

4. Behavioral Biases

Discussion of behavioral biases did not appear in the 2003 version of Circular A-4. In 2003, the application of behavioral economics to public policy was still in its infancy. While Daniel Kahneman and Amos Tversky published their seminal article on prospect theory in 1979,[393] and Thaler's first work on behavioral economics followed in 1980,[394] more formal theoretical treatments and empirical support were developed throughout the following decades.[395] Only in the years leading up to the 2003 publication of Circular A-4 did the behavioral economics literature begin to focus more on policy-relevant publications, initially focusing on policies related to retirement savings.[396]

Since 2003, the use of behavioral economics in public policy contexts has exploded; Kahneman won the 2002 Nobel Prize in economics, and Thaler

files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf [https://perma.cc/DCD8-QMH5]. Regarding ecosystem services contributions to human welfare from the environment or ecosystems, OIRA has recently published guidance to help agencies better account for such benefits and costs. *See infra* note 426 and accompanying text.

393. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (describing the tendency for individuals to treat risky losses as weightier than otherwise-equivalent risky gains as their reference point changes).

394. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980).

395. *See, e.g.*, Richard H. Thaler & H. M. Shefrin, *An Economic Theory of Self-Control*, 89 J. POL. ECON. 392 (1981); Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 ECON. LETTERS 201 (1981); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON 1325 (1990); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193 (1991); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); Colin Camerer, Linda Babcock, George Loewenstein & Richard Thaler, *Labor Supply of New York City Cabdrivers: One Day at a Time*, 112 Q.J. ECON. 407 (1997); Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DECISION MAKING 183 (1999).

396. Richard H. Thaler, *Psychology and Savings Policies*, 84 AM. ECON. REV. 186 (1994); Shlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans*, 91 AM. ECON. REV. 79 (2001); Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164 (2004).

won it in 2017, each for contributions to behavioral economics.[397] As the field has matured, proponents of benefit–cost analysis have recognized that benefit–cost analyses can lead to misleading results if they are not attentive to behavioral biases.[398] For example, if individuals over-emphasize a car's greater up-front cost and under-emphasize future fuel savings, fuel-efficiency standards can make them better off.[399] Similarly, if individuals do not optimally account for tradeoffs between faster or distracted driving and the increased likelihood and harm of a car crash, requiring the installation of safety equipment in vehicles can make them better off.[400] And if individuals do not attend to the calories listed in the nutritional information on the back of a package, but would change their behavior if those calories were displayed prominently on the front of the package, requiring prominent placement of that information can make them better off.

Critics of benefit–cost analysis have seized upon findings in the behavioral economics literature to criticize the technique itself, often asserting that benefit–cost analysis assumes (or even requires) perfectly rational agents for producing meaningful results.[401] This is not, in fact, the case. So long as the analysis can identify a non-behaviorally distorted utility function, the net benefits of a regulation addressing a behavioral bias can be estimated.[402] As Raj Chetty has noted, three common approaches to identification are

397. Press Release, The Royal Swedish Acad. of Sci., The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002 (Oct. 9, 2002), https://www.nobelprize.org/prizes/economic-sciences/2002/press-release [https://perma.cc/C35A-DQ5R]; Press Release, The Royal Swedish Acad. of Sci., The Prize in Economic Sciences 2017 (Oct. 9, 2017), https://www.nobelprize.org/prizes/economic-sciences/2017/press-release [https://perma.cc/5D7V-QMYL].

398. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); Cass R. Sunstein, *Behaviorally Informed Mandates? Internalities, Externalities, and Fuel Economy Rules*, 29 N.Y.U. ENV'T L.J. 493 (2021) [hereinafter Sunstein, *Behaviorally Informed Mandates*].

399. *See* Sunstein, *Behaviorally Informed Mandates*, *supra* note 398, at 496 (noting the use of fuel may also involve externalities arising from how the fuel is produced).

400. *See id.* at 495, 497–98 (emphasizing unsafe driving can also involve externalities arising from fuel production, or if others are involved in a crash).

401. *See, e.g.*, Thomas O. McGarity, *A Cost–Benefit State*, 50 ADMIN. L. REV. 7, 64 (1998); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 634–35 (1999).

402. Raj Chetty, *Behavioral Economics and Public Policy: A Pragmatic Perspective*, 105 AM. ECON. REV. 1, 23 (2015).

gathering data on self-reported utility, using valuations obtained in an environment where the behavioral bias is absent, and determining how valuations vary as a function of the degree of behavioral bias before extrapolating to a no-bias case.[403] To the extent identification is uncertain, there are standard ways of accounting for model uncertainty in a benefit–cost analysis.[404]

The 2023 revision to Circular A-4 acknowledges the burgeoning literature on behavioral economics by noting that regulations may be needed to improve suboptimal outcomes caused by behavioral biases.[405] It separates behavioral biases into two categories. The first, "limitations on information processing," may explain why people find it difficult to calculate if a car with a higher up-front cost but lower fuel costs is actually cheaper over the life of the car.[406] Limitations on information processing lead to the use of heuristics that "can produce serious errors."[407] One of these is the availability heuristic, a tendency to estimate the frequency or probability of something based on the ease of recalling instances of or associations with that thing.[408] This heuristic explains why "the risk of airplane travel [is] overestimated following an airplane crash due to intense media coverage."[409] Regulation can address this phenomenon, for example, by requiring that regulated firms meet minimum risk standards, which favors products that are actually lower risk over those that are higher risk, even if the higher risk is less available and salient to consumers.

The second category is "decision-making biases," or tendencies that individuals have to not make decisions that are most likely to maximize their well-being.[410] Decisionmaking biases involve "imperfect self-control" or phenomena like "loss aversion [or] present bias" that lead individuals to make contradictory decisions.[411] These kinds of biases may explain why many individuals continue to consume products that they wish they would cease to consume. Regulation can address this, for example, by banning or regulating highly addicting and harmful substances.

In addition, the Circular adds a discussion of "nudges"—"modifications of choice architecture that alter behavior"—to its previous discussion of

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403. *Id.* at 23–27.

404. *See id.* at 27–28.

405. CIRCULAR A-4 (2023), *supra* note 205, at 17–18.

406. *Id.* at 17.

407. *Id.* at 18.

408. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207, 208 (1973).

409. CIRCULAR A-4 (2023), *supra* note 205, at 17–18.

410. *Id.* at 17–18.

411. *Id.* at 18.

informational approaches to regulations.[412] Nudges, a concept pioneered by Sunstein and Thaler, can allow regulations to "improve consumer welfare without restricting choice,"[413] like the example of displaying calories on the front of a package above. This kind of nudge approach can be more or less net-beneficial than the previous examples, depending on what is being regulated.

Dudley has also argued that Circular A-4 "sought to codify the Biden Administration's policy preferences" because it asserts that the federal government can override "individual preferences" (as revealed by individuals' actions) and "that by overriding their preferences can make them better off."[414] But it would be inappropriate to ignore high-quality evidence establishing that there are situations in which people predictably fail to make decisions that maximize their own well-being.[415] Consider the case of drug addiction. When individuals addicted to a dangerous drug are using that drug, they may not be maximizing their own well-being.

Of course, the mere possibility that individuals can exhibit behavioral biases does not justify any and all government action. That is why Circular A-4 notes that agencies "should carefully consider the degree to which the evidence available indicates that behavior reflects fully rational preferences and the degree to which it indicates that such behavior is the product of a behavioral bias observed in, or applicable to, the specific regulatory context."[416] To deny evidence that indicates behavioral biases explain some behavior would be antithetical to the purpose of conducting a benefit–cost analysis.

C. Further Efforts to Assess the Consequences of Regulation

OIRA has also taken additional steps to improve the quality of information on which agencies rely in analyzing the impacts of regulation. The Frontiers of Benefit–Cost Analysis initiative—launched in March 2023—catalyzes collaboration between the federal government and the broader research community in order to help agencies improve policymaking by

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412. *Id.* at 25–27.

413. *Id.* at 26; *see also* Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 8 (2021).

414. Reeves, *supra* note 277.

415. Even as far back as the Ford Administration, agencies were (implicitly) directed to consider behavioral biases—in the form of whether risk preferences were rational—even though the literature was far less developed. *See* CIRCULAR A-107, *supra* note 248, at 1.

416. CIRCULAR A-4 (2023), *supra* note 205, at 18.

monetizing the important effects of their policies.[417] The first report of this initiative, published in December 2023, describes how outside researchers can helpfully engage with agencies before policies are already deep in development, ensuring that available evidence shapes policy formulation at the earliest stages.[418] Subsequent reports will be issued on an annual basis.[419]

The Frontiers initiative is also working to identify particularly important areas where new evidence would improve regulatory policymaking. Its first report identifies wildfires and extreme weather, the effects of public benefit programs, non-fatal health effects, ecosystem services, and information and transparency as areas that would benefit from more research.[420] The report also contains an appendix with a lengthy list of more granular topics regarding which evidence would be particularly informative for agency policymaking.[421] The Frontiers group is also convening seminars, roundtables, and workshops to highlight the latest advances from the research community.[422] More comprehensive research targeted to fill data gaps will lead to more informed and responsive action and policies that better improve well-being.

OIRA has helped agencies to better account for difficult-to-monetize effects through new guidance on ecosystem services and competition. As noted previously, ecosystem services have traditionally not been monetized and often, not even described qualitatively.[423] This omission makes benefit–cost analyses considerably less useful than they would otherwise be, as ecosystem services can be important. Forests provide the timber that we harvest, pollinators enhance agricultural productivity, wetlands protect against flooding, and clean rivers provide opportunities for fishing.[424] Monetizing the value of these ecosystem services has become much more feasible in recent years.[425]

417. SUBCOMM. ON FRONTIERS OF BENEFIT–COST ANALYSIS, NAT. SCI. & TECH. COUNCIL, ADVANCING THE FRONTIERS OF BENEFIT–COST ANALYSIS: FEDERAL PRIORITIES AND DIRECTIONS FOR FUTURE RESEARCH 1 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/12/FINAL-SFBCA-Annual-Report-2023.pdf [https://perma.cc/V3UV-M3TK].

418. *Id.* at 3.

419. *Id.* at 1.

420. *Id.* at 1–2.

421. *Id.* at 40.

422. *Id.* at 34.

423. *See supra* text accompanying note 392.

424. OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, GUIDANCE FOR ASSESSING CHANGES IN ENVIRONMENTAL AND ECOSYSTEM SERVICES IN BENEFIT–COST ANALYSIS 8–10 (2024) [hereinafter OMB GUIDANCE ON ENVIRONMENTAL SERVICES IN BENEFIT-COST ANALYSIS], https://www.whitehouse.gov/wp-content/uploads/2024/02/ESGuidance.pdf [https://perma.cc/Z9ZH-YFJ6].

425. *See supra* text accompanying note 392.

Capitalizing on these scientific advances, OIRA has produced guidance for agencies on accounting for ecosystem services in benefit–cost analysis.[426]

The competition effects of regulations have also often given short shrift, even though regulatory design can have important implications for competition in affected sectors. The Biden Administration recognized that a whole-of-government approach—not just traditional merger review and antitrust enforcement—was necessary to address insufficient competition in the American economy.[427] That is why Executive Order 14,036 made the OIRA Administrator a member of the Competition Council and tasked OIRA with developing guidance on accounting for competition effects in regulatory analyses as part of its work to modernize regulatory review.[428] OIRA has done so by issuing guidance that helps agencies design regulations that promote competition while also achieving other important policy goals.[429] In some cases, the guidance notes that "a slight modification of a regulation's design will substantially enhance competition."[430] For example, a regulation can enhance competition by reducing switching costs, such as when customers have a right to retain their cell phone number if they switch providers.[431] "In other cases, slight design modification[s] may preserve [a] regulation's benefits while providing substantially greater competition benefits (or substantially reduced competition harms)."[432] To illustrate, allowing hearing aids to be sold over-the-counter (rather than only with a prescription) when establishing safety standards for hearing aids lowers barriers to entry for new entrants to the market.[433]

OIRA is also working to help agencies better understand which groups are affected by regulatory actions. Part of that effort involves improving the quality of the data the government collects on race and ethnicity. OMB first issued Statistical Policy Directive No. 15 (SPD 15) on Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity in

426. OMB GUIDANCE ON ENVIRONMENTAL SERVICES IN BENEFIT-COST ANALYSIS, *supra* note 424, at 2.

427. Exec. Order No. 14,036, § 2(g), 86 Fed. Reg. 36,987, 36,989 (July 9, 2021).

428. *Id.* §§ 4(f)(ix), 4(h), 86 Fed. Reg. at 36,990–91.

429. OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, GUIDANCE ON ACCOUNTING FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS (2023), https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf [https://perma.cc/GG63-AY2E].

430. *Id.* at 4.

431. *See* Telephone Number Portability, 61 Fed. Reg. 38,605, 38,611 (July 25, 1996).

432. GUIDANCE ON ACCOUNTING FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS, *supra* note 429, at 4–5 (2023).

433. *See* Medical Devices; Ear, Nose, and Throat Devices; Establishing Over-the-Counter Hearing Aids, 87 Fed. Reg. 50,698 (Aug. 17, 2022).

1977 "to provide consistent data on race and ethnicity . . . throughout the Federal Government."[434] SPD 15 ensures that federal agencies can effectively collect and compare data on race and ethnicity.[435] OIRA coordinates this process, setting standards that all agencies adopt.[436] This data is important because it allows agencies to understand the demographic makeup of program beneficiaries and participants and assess proposed actions' distributional impact on particular communities.[437] But the standard had not been updated since 1997, and since then, there have been social, political, economic, and demographic shifts in the United States, including increased racial and ethnic diversity and more people who identify as more than one race or ethnicity.[438] Because the standards had not been updated to reflect these shifts, the data collected did not necessarily fully capture the diversity of the American people, leading to less informed policymaking. In 2022, OMB began a process to review SPD 15, which concluded with revisions published in March 2024.[439] Among other things, the revisions use a combined question for race and ethnicity and encourage respondents to select as many options as apply to how they identify, add Middle Eastern or North African as a separate category, and require the collection of additional details beyond broad race and ethnicity categories.[440] These changes will ensure that agencies make decisions based on higher-quality information.[441]

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434. *1977 Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, OMB STAT. POL'Y DIRECTIVE 15 ON RACE & ETHNICITY STANDARDS, https://spd15revision.gov/content/spd15revision/en/history/1977-standards.html [https://perma.cc/B8LW-ZJGH] (Sept. 23, 2024).

435. *History of Statistical Policy Directive No. 15*, OMB STAT. POL'Y DIRECTIVE 15 ON RACE & ETHNICITY STANDARDS, https://spd15revision.gov/content/spd15revision/en/history.html [https://perma.cc/C34X-NB9B] (Sept. 23, 2024).

436. *See* Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 89 Fed. Reg. 22,182, 22,195–96 (Mar. 29, 2024).

437. *The 2024 Statistical Policy Directive No. 15*, OMB STAT. POL'Y DIRECTIVE 15 ON RACE & ETHNICITY STANDARDS, https://spd15revision.gov/content/spd15revision/en/2024-spd15.html [https://perma.cc/J8PM-X8YU] (June 12, 2024).

438. *Frequently Asked Questions: About OMB's Review Process of Statistical Policy Directive 15*, OMB STAT. POL'Y DIRECTIVE 15 ON RACE & ETHNICITY STANDARDS, https://spd15revision.gov/content/spd15revision/en/faqs.html#accordion-7526c528ff-item-2fe32f1345 [https://perma.cc/2MAT-2XK2] (Aug. 27, 2024).

439. Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 89 Fed. Reg. at 22,182.

440. *Id.*

441. Recently, OIRA also engaged in another important effort to improve the quality of the data the government collects, which focused on sexual orientation and gender identity.

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Those that view the centralized regulatory review as a fundamentally conservative enterprise often also view benefit–cost analysis as inherently antiregulatory.[442] This Part shows that this is not the case. Benefit–cost provides a useful and structured way to analyze complex regulatory problems,[443] and has roots in pro-regulatory administrations dating back to President Roosevelt. Similarly, some commenters claim that OIRA only weakens, and never strengthens, regulation.[444] To the contrary, OIRA frequently and extensively inquires about why agencies have not selected more stringent, higher net-benefits regulatory alternatives.[445] This should be no surprise: OIRA, in advocating for high-quality

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See OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, RECOMMENDATIONS ON THE BEST PRACTICES FOR THE COLLECTION OF SEXUAL ORIENTATION AND GENDER IDENTITY DATA ON FEDERAL STATISTICAL SURVEYS (2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SOGI-Best-Practices.pdf.

442. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8–10 (2004); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 15–16 (2010).

443. Relatedly, the progress in benefit–cost analysis documented in this Part helps to illustrate an error that some make: describing changes in economic thought without understanding those changes as (imperfectly and partially) reflecting genuine progress in better understanding the world. *See, e.g.*, BERMAN, *supra* note 73. The broader failure to acknowledge that economics can shed genuine light on the best approach to public policy—and therefore that new economic understanding can, and should, sometimes lead policymakers to conclude that policies they previously favored are undesirable—leads to misguided assertions that heeding economic analysis is foolish. *See, e.g.*, Lisa Heinzerling, *Thinking like a President*, LPE PROJECT (Sept. 20, 2022), https://lpeproject.org/blog/thinking-like-a-president [https://perma.cc/N2QY-FDQ4] ("Democratic presidents have been more foolishly consistent. They have often held on tight to economic analysis even when it disrupts their larger policy platforms.").

444. *See, e.g.*, Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475, 476 (2018); David M. Driesen, *Is Cost–Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 380 (2006). *But see* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 450, 452–56, 460–63, 465–480 (2008) (arguing that "[w]hat is missing from the legal literature is recognition of OIRA's proregulation role," both in the period from 1981 to 2000 and in the period from 2001 to 2006).

445. *See, e.g.*, Arianna Skibell & Kelsey Brugger, *EPA Rejected White House Effort To Toughen Car Rules*, E&E NEWS (Jan. 13, 2022, 6:44 AM), https://www.eenews.net/articles/epa-rejected-white-house-effort-to-toughen-car-rules [https://perma.cc/C3PE-TS8T]; Benjamin Storrow & Scott Waldman, *White House Pushed for Stronger, Faster Climate Rule as Court Challenges Loom*, E&E NEWS (May 17, 2023, 6:57 AM), https://subscriber.politicopro.com/article/

benefit–cost analysis, helps to address both regulations that are too stringent or not stringent enough. By continuing to develop high-quality evidence and guidance for benefit–cost analyses, OIRA plays an important proactive management role in improving regulatory analyses and the regulatory choices they inform.

IV. IMPROVING PUBLIC PARTICIPATION

The Biden Administration put an increased focus on the importance of public participation, and OIRA took a broader role improving public engagement in the regulatory process.[446] Effective public participation early in the regulatory process can help agencies receive valuable information about a proposed regulation's impacts or gauge early public reactions to a proposed action, making better policy outcomes more likely.[447] Public participation can also strengthen the democratic legitimacy of the regulatory process by affording interested members of the public, including affected and underserved communities, an opportunity to express their viewpoints.[448] Ineffective public participation, by contrast, can cause unnecessary delays or even, in some cases, worsen regulatory policymaking.[449] Poorly structured avenues for public participation can also have inequitable effects, undermining the democratic legitimacy of the regulatory process.[450]

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eenews/2023/05/17/white-house-pressed-epa-to-toughen-power-plant-rule-00097283 [https://perma.cc/Q2XK-RMQK]; Coral Davenport, *You've Never Heard of Him, but He's Remaking the Pollution Fight*, N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2023/05/28/climate/ricky-revesz-oira-regulation-biden.html [https://perma.cc/L3XG-XVJY].

446. "Public participation" refers to "any process that involves members of the public in government decision-making," which "seeks and facilitates the involvement of those affected by, or interested in, a government decision." "Community engagement is a more specific concept within public participation that involves agency actions to build trust-based, long-term, and two-way relationships with communities, including underserved communities that have been historically left out of government decision-making." *See* Memorandum from Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs., to the Heads of Exec. Dep'ts & Agencies, Broadening Public Participation and Community Engagement in the Regulatory Process 4 (July 19, 2023) [hereinafter OIRA Public Participation Memorandum] (emphases omitted).

447. MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 9–17 (2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf [https://perma.cc/B5E6-2PUM].

448. *Id.* at 12–15.

449. *See, e.g.*, Bagley, *supra* note 7, at 385–91; Jerusalem Demsas, *Community Input Is Bad, Actually*, ATLANTIC (Apr. 29, 2022, 6:00 PM), https://www.theatlantic.com/ideas/archive/2022/04/local-government-community-input-housing-public-transportation/629625 [https://perma.cc/Q8ZT-XKAD].

450. *See, e.g.*, Bagley, *supra* note 7, at 385–91; Demsas, *supra* note 449.

In emphasizing better public participation in the regulatory process as a key component of its responsibilities, OIRA implemented a priority of the Biden Administration. On his first day in office, President Biden issued a Presidential Memorandum on Modernizing Regulatory Review, calling for steps to improve the regulatory process, including "ensur[ing] that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, [and] marginalized communities," and "promot[ing] the efficiency, transparency, and inclusiveness of the interagency [regulatory] review process."[451] Executive Order 13,985 of January 20, 2021, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, further instructed agencies to "consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs."[452] Executive Order 14,094 subsequently identified specific actions agencies and OIRA should take to strengthen public participation in the regulatory process.[453]

First, Executive Order 14,094 calls on agencies to assess how to improve public engagement in rulemaking.[454] It stresses that "[t]o the extent practicable and consistent with applicable law, regulatory actions should be informed by input from interested or affected communities."[455] Moreover, Executive Order 14,094 further emphasizes that "[o]pportunities for public participation shall be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities."[456] To that end, Executive Order 14,094 calls on agencies "to proactively engage interested or affected parties, including members of underserved communities," in ways that incorporate, "consistent with applicable law, best practices for information accessibility and engagement with interested or affected parties, including . . . expansion of public capacity for engaging in the rulemaking process."[457]

Second, Executive Order 14,094 instructs OIRA to review how it meets with members of the public during the review of proposed and final rules.[458] Noting that "[p]ublic trust in the regulatory process depends on protecting

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451. Presidential Memorandum on Modernizing Regulatory Review, §§ 2(b)(ii), (iv), 86 Fed. Reg. 7223, 7223–24 (Jan. 26, 2021).

452. Exec. Order No. 13,985, § 8, 86 Fed. Reg. 7009, 7011 (Jan. 20, 2021).

453. Exec. Order No. 14,094, § 2, 88 Fed. Reg. 21,879, 21,879–80 (Apr. 6, 2023).

454. *Id.*

455. *Id.* § 2(a), 88 Fed. Reg. at 21,879.

456. *Id.*

457. *Id.* § 2(c), 88 Fed. Reg. at 21,880.

458. *Id.* § 2(e), 88 Fed. Reg. at 21,880.

regulatory development from the risk or appearance of disparate and undue influence," Executive Order 14,094 stipulates OIRA will work to make meetings with the public more transparent and inclusive.[459] To do so, OIRA will provide greater information on how members of the public may request meetings with OIRA during regulatory review, particularly those "who have not historically requested such meetings," and OIRA will "improve procedures and policies" for processing meeting requests.[460]

In the past, OIRA played a relatively limited role in managing agency efforts to secure public input. The notice-and-comment process, under which the agency informs the public of a proposed rulemaking and receives and considers public comment, has been the primary mechanism for public participation in rulemaking.[461] Past executive orders, while recognizing that public input is a key principle of the regulatory process,[462] did not require that OIRA support an agency's public participation efforts. OIRA's primary role was limited to ensuring that agencies properly responded to public comments and hosting meetings between the public, EOP components, and agencies while rules were under its review, known as "E.O. 12866 meetings."[463]

In response to the Biden Administration's emphasis on transparent, participatory, and equitable decisionmaking,[464] OIRA revamped its approach to public participation in the regulatory process. OIRA is working to assist agencies in assessing how to better engage with the public during the regulatory process.[465] At the same time, OIRA has sought to make its own interactions with the public during Executive Order 12,866 review more transparent and inclusive.

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459. *Id.*

460. *Id.*

461. *See* Administrative Procedure Act, 5 U.S.C. § 553(b). While reviewing proposed rules, for example, OIRA might have suggested that the agencies request feedback on specific questions. And, when reviewing draft final rules, OIRA may have ensured that an agency has satisfied the notice-and-comment requirements of the Administrative Procedure Act and adequately responds to comments received. *See* Sunstein, *OIRA Myths and Realities*, *supra* note 6, at 1841. OIRA takes those same actions today, but, as explained below, its role in helping agencies secure public input has expanded.

462. *See, e.g.*, Exec. Order No. 13,563, § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) ("Our regulatory system must . . . allow for public participation and an open exchange of ideas."); Exec. Order No. 12,866, § 6(a)(1), 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993) ("Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process.").

463. *See supra* Section II.B.

464. *See supra* notes 455–457 and accompanying text.

465. *See supra* Section III.C.

OIRA's role in improving public participation embraces a more comprehensive view of regulatory review. A narrow view may suggest that public participation is outside OIRA's traditional role of ensuring the quality of regulatory impact analyses. But without effective opportunities for public engagement, an agency may not receive input that would help it to better assess expected benefits and costs. And, although regulatory review has not historically emphasized public participation, Executive Order 12,866 charges OIRA with ensuring rulemaking is consistent with key principles, which include public participation.[466]

Moreover, even while agencies remain primarily responsible for developing strategies for strengthening public participation, there are reasons why OIRA is well-placed to coordinate and assist agencies in these efforts. Given its role in reviewing regulations from multiple agencies, as well as its responsibility for preparing the regulatory agenda, OIRA can operate as an information aggregator, collecting and identifying best practices in aspects of rulemaking like public participation, all while working with other EOP components developing whole-of-government approaches to public engagement.[467]

This Part focuses on OIRA's increased focus on managing public participation in the regulatory process. Section A provides an overview of public participation as a value in the regulatory process and why it would be a mistake to ignore consideration of public engagement as an important part of regulatory review. Section B discusses OIRA's new guidance on participation in the regulatory process, particularly at the agenda-setting stages. Section C describes the Biden Administration's approach to OIRA's meetings with the public about rules it reviews pursuant to Executive Order 12,866, which seek to improve access and transparency.

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466. For instance, Executive Order 12,866 discusses an agency's responsibility to "provide the public with meaningful participation in the regulatory process" in the section titled "Centralized Review of Regulation," which lays out the regulatory review process OIRA will coordinate. *See* Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. at 51,740.

467. Executive Order 13,985 and its subsequent companion, Executive Order 14,091, for example, task OMB with "consider[ing] opportunities to review and update internal processes, directives, and Government-wide guidance . . . to support equitable decision-making . . . and assist agencies in advancing equity, as appropriate and wherever possible." *See* Exec. Order No. 14,091, § 4(a), 88 Fed. Reg. 10,825, 10,829 (Feb. 16, 2023); *see also* Exec. Order No. 13,985, §§ 1–8, 88 Fed. Reg. 7009, 7010–11 (Jan. 20, 2021). As the EOP component tasked with ensuring the integrity and quality of the regulatory process, OIRA is also implicitly tasked with disseminating these principles of transparent, participatory, and equitable government.

A. Public Participation as a Value in the Regulatory Process

Agencies can benefit from public participation in different ways. Public participation can ensure that agencies have the best available information before they design a proposed regulation, offer an opportunity for members of the public to raise objections to a given policy choice, and enhance the democratic legitimacy of the regulatory process.

Public input can provide information that helps agencies design better policies, and to do so more quickly. While an agency may have access to data it regularly receives through information collections and to data prepared by its own experts and researchers, that information may offer an incomplete picture.[468] To make well-reasoned decisions, agencies benefit from information held by regulated industries, regulatory beneficiaries, unaffiliated experts, and individuals with first-hand experience.[469] Bringing the public into the regulatory process can help identify problems that agencies overlooked, clarify the benefits and costs of proposed actions, and highlight administrative burdens faced by members of the public.[470] Ensuring that agencies have adequately sought and considered this type of valuable information is precisely the type of responsibility Executive Order 12,866 assigns to OIRA.

In particular, public participation can provide useful information about impacts that are not easily assigned a quantitative or monetary value, such as a proposed action's impact on equity, dignity, and fairness.[471] Without public input, an agency may overlook or only partially examine such unquantified or unmonetized impacts, even where those impacts could help identify the best outcome. Revisions to Circular A-4 underscore that benefit–cost analysis cannot ignore these unquantifiable and unmonetized impacts,[472] and OIRA's review of regulatory impact analyses, by extension, will consider whether agencies have adequately sought public input to assess these types of impacts.[473]

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468. *See* Michael Sant'Ambrogio & Glen Staszweski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 796 (2021).

469. Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281–85 (2004); Sant'Ambrogio & Staszweski, *supra* note 468, at 796.

470. Sant'Ambrogio & Staszweski, *supra* note 468, at 796; Jim Rossi & Kevin Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 13 (2023).

471. *See* Christopher Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 792 (2023) (noting that members of the public may provide useful, non-technical information); Bayefsky, *supra* note 367, at 1772–74 (calling for benefit–cost analyses to consider the dignitary impacts of proposed regulatory action, by focusing on the type of "qualitative specificity" offered by public comments).

472. *See supra* Part III.B.3.

473. *See supra* Section III.C.

Engagements with the public also allow agencies to sound-test early policy choices. Public input, particularly before a regulation is developed, can inform an agency's priority-setting and make it aware of important unmet needs.[474] Further along in the regulatory process, public participation can help agencies understand whether a proposed course of action significantly departs from public preferences.[475] For instance, notices of proposed rulemaking give the public an opportunity to sound "fire alarms," and fix potential problems in a proposed rule.[476] In this respect, public participation complements regulatory review by providing a further opportunity for agencies to ensure that they have adequately considered the regulatory alternatives. And early input can allow agencies to recalibrate their regulatory strategies in a manner that is significantly less costly than having to rewrite a regulation after a legal challenge.

Involving the public in the regulatory process can also strengthen the democratic legitimacy of administrative actions, fostering a dialogue about policy issues among people and communities with different experiences.[477] By welcoming input from underserved groups, particularly those historically excluded from the political process, agencies can ensure their decisionmaking process is, and is perceived to be, inclusive.[478] Strengthening inclusive public participation is consistent with how the Biden Administration emphasized advancing equity and inclusion throughout government.[479]

While the benefits of effective public participation are evident, there are also clear costs of ineffective public participation. Public participation can

474. *See* Sant'Ambrogio & Staszweski, *supra* note 468, at 806–07; Cary Coglianese & Daniel Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 94 (2016).

475. And agencies do appear to value these opportunities for public accountability. *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1651, 1659 (2023) ("[A]gencies use the notice-and-comment process strategically, including to test run theories about their legal authority or to send up trial balloons about policies to see how the interested and regulated world might react.").

476. *See* Miriam Seifter, *Second-Order Participation in Administrative Law,* 63 UCLA L. REV. 1300, 1329 (2016); Rossi & Stack, *supra* 470, at 14–15.

477. *See* Nina A. Mendelson, *Regulation, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (stating that the notice-and-comment process "can help us view the agency decision as democratic and thus essentially self-legitimating").

478. *See* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 67–72, 75–79 (2022); Jud Mathews, *Minimally Democratic Administrative Law,* 68 ADMIN. L. REV. 605, 645–46 (2016); Evan Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2206–07 (2023).

479. *See supra* text accompanying note 453; *see also* Exec. Order No. 14,094, § 2, 88 Fed. Reg. 21,879, 21,879–80 (Apr. 6, 2023).

be dominated by sophisticated actors who have the expertise to comfortably navigate the regulatory process and are better situated to draft comments that advance their specific interests.[480] Underserved communities, often including regulatory beneficiaries, tend to face more challenges in engaging with agencies and submit fewer (if any) comments, even when proposed rules may have a direct impact on their lives.[481] Members of these communities may face other barriers when they seek to convey their perspectives, including challenges around accessibility, language, culture, or worldviews.[482] Opportunities to provide public input, particularly when they focus exclusively on the public comment process, may come too late in the regulatory process. And, even when they do seek public input, agencies may not clearly indicate how the public input received informed the agency's final decision. If members of the public perceive that their comments are ignored or disrespected, they are less likely to participate in the regulatory process in the future, and any prevailing distrust in government is likely to grow. These are, precisely, the types of limitations to effective public participation that Executive Order 14,094 instructs agencies to address.[483]

Some critics have argued that procedural requirements, such as increased public participation, can be counterproductive to an agency's regulatory goals if they "drain[] agency resources, introduce[] delays, and thwart[] agency action."[484] Such concerns, while serious, need to be balanced against other considerations. For example, an agency changing course after it has already issued a final rule and loses a legal challenge likely imposes more delay than waiting to receive public input early in the process and changing course then. Also, effective implementation of a regulatory scheme may require public buy-in that, for instance, takes the form of applying for a benefit.

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480. *See* Bagley & Revesz, *supra* note 45, at 1284–85; Wendy E. Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 123 (2011); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–29, 133 (2006).

481. *See* Exec. Order No. 13,985, § 2(b), 88 Fed. Reg. 7009, 7009 (Jan. 20, 2021) ("'[U]nderserved communities' refers to populations . . . as well as geographic communities[] that have been systematically denied a full opportunity to participate in aspects of economic, social, and civil life . . . .").

482. *See, e.g.*, Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking Value in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186–87 (2012) (finding that factors discouraging public participation include "the type of evidence and claim substantiation that is valued" and "the form of argumentation that is privileged").

483. *See* Exec. Order No. 14,094, § 2(e), 88 Fed Reg. at 21,880.

484. Bagley, *supra* note 7, at 363.

Without public engagement, potential beneficiaries may be skeptical and unwilling to become participants in a program, leading to inefficient regulatory schemes. Furthermore, rather than promoting regulatory lethargy, public engagement can invigorate an agency into taking action by showing widespread support for a particular action or by identifying areas of public concern overlooked by an agency. More fundamentally, without any opportunities for effective public participation, public trust in regulatory agencies would likely decline, and agencies would likely face a more skeptical public and the additional costs that accrue from that skepticism. And the expressive value of public participation—giving members of the public an opportunity to be heard—should not be dismissed.

To be sure, public participation poses risks, including the possibility of capture by interest groups and the additional burdens placed on agencies. Those risks alone, however, do not outweigh the benefits of public participation. Rather, the challenge for both agencies and OIRA is to perform a familiar task: to balance the benefits and costs of different forms of public participation by identifying and developing improved approaches to engagement. By doing so, public participation can be made both effective and inclusive.

B. Participation in the Rulemaking Process

Following President Biden's direction, OIRA has taken on a broader and more active role to make public participation in the regulatory process more effective. It has done so through a multi-faceted approach that leverages its experience collecting and aggregating best practices developed by various agencies, its expertise in designing cross-agency processes, and its role as an interface between agencies and the EOP.

First, OIRA has provided agencies with advice on how to develop processes that will improve public engagement in the regulatory process. In July 2023, it issued a Memorandum, *Broadening Public Participation and Community Engagement in the Regulatory Process*, designed to assist agency efforts to improve public participation by encouraging input from a broader set of actors, including underserved communities, and seeking input at early stages in the regulatory process.[485] The Memorandum was informed by "extensive engagement with both regulatory agencies and the public . . . [including] four listening sessions and []two public comment periods."[486] Many of the leading

485. OIRA Public Participation Memorandum, *supra* note 446, at 4.

486. *Id.* at 2. This is consistent with the Modernizing Regulatory Review Presidential Memorandum's instruction that recommendations on how to improve regulatory review should "be informed by public engagement with relevant stakeholders." Presidential Memorandum on Modernizing Regulatory Review, § 2(a), 86 Fed. Reg. 7223, 7223 (Jan. 26, 2021).

practices discussed in the report are also consistent with prior recommendations and reports by the Administrative Conference of the United States.[487]

The Memorandum highlights several desirable practices: (1) proactively seeking public input, even before a notice of proposed rulemaking has been published; (2) strengthening the public comment process, by providing members of the public with clear and accessible information about the proposed rule's content and about opportunities for submitting public comments; (3) making engagements with the public accessible and inclusive to a broad range of the public, including underserved communities; and (4) demonstrating the impact public input has had on the final version of a rule.[488] The Memorandum stresses the importance that "agency policies on communication during the rulemaking process promote accessible, equitable, and meaningful participation and engagement, especially early on in setting regulatory priorities and in the early stages of rule development before a proposed regulation is issued for comment."[489] Strategies for strengthening participation identified by the Memorandum include making regulatory material more accessible, understandable, and usable by the public; holding listening sessions, including online or technology-enabled sessions, while agencies are still defining regulatory practices; and providing multiple means of submitting public comments.[490] The best practices identified in the Memorandum are consistent with the broad principles of "equitable and meaningful participation" and "proactive[] engage[ment]" set out in Executive Order 14,094.[491]

The Memorandum does not suggest the implementation of uniform approaches to public engagement across all agencies. For example, the guidance stresses that "engagement strategies will be different for each regulation, and . . . in some cases, it may be more useful to focus engagement on broad policy areas or regulatory programs rather than each regulation in isolation."[492] Strict requirements could impose implementation costs that some agencies are unable to bear and could have the unintended consequence of

487. *See, e.g.*, ACUS Recommendation 2023-2, Virtual Public Engagement in Agency Rulemaking, 88 Fed. Reg. 42,680 (June 15, 2023); ACUS Recommendation 2021-3, Early Input on Regulatory Alternatives, 86 Fed. Reg. 36,082 (June 17, 2021); ACUS Recommendation 2018-7, Public Engagement in Rulemaking, 84 Fed. Reg. 2146 (Dec. 14, 2018); ACUS Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 6, 2014).

488. OIRA Public Participation Memorandum, *supra* note 446, at 3, 10, 15–19.

489. *Id.* at 3.

490. *Id.* at 15–19.

491. *See* Exec. Order No. 14,094, §§ 2(a), (c), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023).

492. OIRA Public Participation Memorandum, *supra* note 446, at 9.

slowing down the regulatory process.[493] By setting forth broad principles and best practices, that some agencies have already partly implemented, the guidance encourages agencies to adopt an approach to public participation that fits their particular circumstances.[494] Even while not binding agencies to a specific process, guidance from OIRA is helpful in underscoring that implementing effective forms of public participation is a presidential priority, and that agencies should seriously consider how to improve public input in their regulatory processes. Indeed, since the Memorandum was issued, agencies have begun developing agency-wide strategies around public engagement, which incorporate practices also identified by the OIRA Memorandum.[495]

By setting out an initial roadmap, OIRA's guidance reduces the initial costs and technical trepidation an agency may face when developing a strategy around public participation. During meetings with OIRA that preceded the Memorandum, for example, agencies expressed concerns over limitations the PRA may impose on information collections, which can include some forms of public engagement.[496] As OIRA is responsible for reviewing information collection requests under the PRA, OIRA is well-placed to offer agencies recommendations around the PRA, including identifying activities for agency engagement that are excluded from PRA review.[497] And OIRA review of future information collection requests associated with public engagement can help both OIRA and agencies clarify the PRA's application to public participation, without inhibiting agencies from seeking broader public engagement.

Second, OIRA has sought to aggregate information about agency interactions with the public, both to better inform the public about upcoming opportunities for public engagement with agencies, and to inform other agencies about practices adopted by peer agencies to strengthen public engagement.

Recognizing the need for public input into the regulatory agency-setting process, OIRA has also worked with agencies to turn the semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions (Agenda), a periodic public catalog of rules under development and anticipated regulatory

493. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 178 (1997).

494. OIRA Public Participation Memorandum, *supra* note 446, at 8–9.

495. *See e.g.*, U.S. ENV'T PROT. AGENCY, ACHIEVING HEALTH AND ENVIRONMENTAL PROTECTION THROUGH EPA'S MEANINGFUL INVOLVEMENT POLICY (PUBLIC REVIEW DRAFT) 8 (2023), https://www.epa.gov/system/files/documents/2023-12/final_meaningful-involvement-policy_eams_11.7.2023_508.pdf [https://perma.cc/ZC6C-LNFC].

496. OIRA Public Participation Memorandum, *supra* note 446, at 19.

497. *Id.*

priorities,[498] into a tool for strengthening public participation. OIRA's guidance directs agencies to modify their submissions to the Agenda to "expand public awareness of the opportunities agencies have provided, and potentially will provide, for public participation and community engagement."[499] Pursuant to this guidance, agencies are directed to discuss how participation and engagement informed the development of their priorities, publicize their plans for future participation and engagement over the next calendar year, and describe the resources the public can use to identify opportunities for future engagement.[500] Since Fall 2023, agency agendas have included a description of the agency's public participation efforts.[501] The twice-yearly Agenda now serves as a moment for agencies to consider their own efforts at public participation and share that information more broadly with the public, who can also compare the efforts of different agencies across government.

Moreover, to highlight agency engagements with the public that have incorporated the best practices identified in OIRA's Memorandum, in August 2024, OIRA published a report on public participation.[502] The report complements OIRA's Memorandum by providing concrete examples that illustrate how agencies are developing public engagement strategies, including by implementing the best practices outlined in the Memorandum.[503] The report examines case studies of public engagement strategies developed by agencies.[504] The strategies used in these case studies include some of the best practices identified in the Memorandum, but also other elements that were particularly well-suited to a specific rule.[505] The report identifies particular ways in which input received through public participation informed and even changed the final rules in these case studies.[506] By describing specific ways

498. Exec. Order No. 12,866, § 4(b), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

499. OIRA Public Participation Memorandum, *supra* note 446, at 11.

500. *Id.*

501. The 2023 Fall Agenda also showcased notable examples of past public participation. For a discussion of some of these examples, see Sam Berger, *Making Voices Heard in the Regulatory Process*, OFF. OF MGMT. & BUDGET (July 19, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/07/19/making-voices-heard-in-the-regulatory-process [https://perma.cc/2RV4-A3AK].

502. OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, WITH THE PEOPLE, FOR THE PEOPLE: STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS (2024), https://www.whitehouse.gov/wp-content/uploads/2024/08/OIRA-2024-Public-Participation-Report.pdf [https://perma.cc/X6NH-VA3X].

503. *Id.* at 12–13.

504. *Id.* at 12–22.

505. *Id.* at 23–29; OIRA Public Participation Memorandum, *supra* note 446, at 15–19.

506. STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS, *supra* note 502, at 20–22.

in which agencies have sought to strengthen public participation in the rulemaking process, it provides models for other agencies that are also seeking to better incorporate public input into their decisionmaking.

Third, while focused on strengthening public participation in the regulatory process, OIRA has sought to collaborate with other EOP components seeking to strengthen public engagement in other aspects of policymaking.[507] For example, OMB is currently developing government-wide guidelines on public participation and community engagements.[508] Given its experience drafting OIRA's Memorandum on Public Participation, OIRA can assist other OMB components in designing these guidelines, while concentrating its own focus on its area of expertise—the regulatory process.

OIRA's expanded role in strengthening public participation in the regulatory process reflects a more robust understanding of the goals of regulatory review. This is hardly a departure from OIRA's traditional role in ensuring that rulemaking is informed by a high-quality analytical input informs rulemaking. Making sure that agencies have access to all the relevant information, including through public participation, is squarely within OIRA's remit. And it is precisely the structural advantages that OIRA has developed in the context of regulatory review, including an ability to identify cross-agency processes as well as to collect and aggregate information across agencies, that make OIRA particularly effective at coordinating and supporting agency efforts to strengthen public participation.

C. Executive Order 12,866 Meetings

OIRA has also sought to improve how it engages with the public through Executive Order 12,866 meetings, by making meetings more transparent, and by making it easier for members of the public to request meetings with OIRA.[509] While criticized by some as ineffective,[510] Executive Order 12,866 meetings offer a unique opportunity for members of the public to express their views to EOP components, and can have concrete impacts on rulemaking and public perceptions of the regulatory process.[511]

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507. *Id.* at 6–8.

508. *See* Request for Information: Methods and Leading Practices for Advancing Public Participation and Community Engagement with the Federal Government, 89 Fed. Reg. 19,885 (Mar. 20, 2024).

509. STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS, *supra* note 502, at 7–8.

510. *See id.* at 5.

511. *Id.* at 14–17.

OIRA's interactions with the public have been subject to particular scrutiny.[512] Largely in response to concerns about OIRA's transparency during the George H.W. Bush and Reagan Administrations, Executive Order 12,866 sought to make OIRA's meetings more transparent.[513] To that end, it required that OIRA maintain a public log of all interactions between OIRA officials and persons outside the Executive Branch regarding rules under OIRA review, including the dates and names of individuals involved in those communications, as well as the "subject matter discussed during such communications."[514] Despite Executive Order 12,866's efforts to increase transparency around OIRA interactions with the public, OIRA's disclosures with respect to its Executive Order 12,866 meetings have continued to be criticized as either incomplete or inaccessible.[515] And OIRA's meetings with outside parties have been characterized as a backdoor for regulatory capture by industry and business interests.[516]

To address some of these concerns, OIRA issued guidance in December 2023 that reforms the process for requesting Executive Order 12,866 meetings.[517] This guidance makes Executive Order 12,866 meetings more transparent and accessible to the public.[518] The final version of this guidance was informed by a series of engagements with the public, including public comments on draft guidance.[519]

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512. Livermore & Revesz, *Regulatory Review, Capture, & Agency Inaction*, *supra* note 42, at 1356–61; Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget,* 109 AM. POL. SCI. REV. 507, 513 n.21 (2015).

513. Kagan, *supra* note 11, at 2358.

514. Exec. Order No. 12,866, § 6 (b)(4)(C)(iii), 58 Fed. Reg. 51,735, 51,743 (Sept. 30, 1993).

515. Livermore & Revesz, *Regulatory Review, Capture, & Agency Inaction*, *supra* note 42, at 1356–57; Bagley & Revesz, *supra* note 45, at 1310.

516. Livermore & Revesz, *Regulatory Review, Capture, & Agency Inaction*, *supra* note 42, at 1358; Bagley & Revesz, *supra* note 45, at 1306.

517. OFF. OF INFO. & REGUL. AFFS., GUIDANCE IMPLEMENTING SECTION 2(E) OF EXECUTIVE ORDER 14094 (MODERNIZING REGULATORY REVIEW) 3 (Dec. 20, 2023) [hereinafter Executive Order 14,094 § 2(e) Guidance], https://www.whitehouse.gov/wp-content/uploads/2023/12/Modernizing-EO-Section-2e-Guidance_FINAL.pdf [https://perma.cc/8LW6-G9WJ].

518. Executive Order 14,094 § 2(e) Guidance, *supra* note 517.

519. *Id.*; *Hearing from You: How OIRA Meets with the Public*, OFF. OF MGMT. & BUDGET, https://www.whitehouse.gov/omb/information-regulatory-affairs/modernizing-regulatory-review/hearing-from-you-how-oira-meets-with-the-public [https://perma.cc/3YC7-S3KV] (last visited Jan. 24, 2025).

The Executive Order 12,866 Meetings Guidance describes new steps OIRA is taking to increase engagement by underserved communities that may not have had the information or the opportunity to provide their input during OIRA review.[520] To ensure robust engagement from a wide range of people and groups, OIRA has set out to increase publicly available information regarding these meetings and to make requesting meetings easier.

First, to reduce the gap between sophisticated and less-resourced parties, OIRA is making it easier to schedule Executive Order 12,866 meetings. OIRA has also changed its website to create multiple pathways for members of the public to request Executive Order 12,866 meetings.[521] Moreover, OIRA has recently provided detailed step-by-step instructions on how to schedule a meeting, as well as an instructional video, on its website.[522] A Spanish-language version of its instructional video, which I recorded, as well as a translated copy of the step-by-step instructions, have also been published on OIRA's website.[523] In addition, OIRA will be offering periodic and accessible public trainings on effective participation in Executive Order 12,866 meetings.[524] Two training sessions were held in July 2024, with over ninety participants attending the first session and over one hundred joining the second.[525] A Spanish-language training session was also held in August 2024.[526] These training sessions explain not only how to request a meeting, but also how to effectively prepare for and provide input at a meeting.[527]

Second, OIRA is seeking to make Executive Order 12,866 meetings more accessible. Executive Order 12,866 meetings are now almost exclusively held virtually using conferencing technology, making it easier for members of the public from outside Washington, DC, to meet with OIRA.[528] Meetings are also available over telephone, so as to make it possible for persons without Internet service to join.[529] OIRA is also strengthening its commitment to the inclusion of people with disabilities, and requestors with

520. Executive Order 14,094 § 2(e) Guidance, *supra* note 517.

521. *Hearing from You: How OIRA Meets with the Public*, *supra* note 519.

522. Executive Order 14,094 § 2(e) Guidance, *supra* note 517.

523. *Id.*

524. *See* Notice of Training Sessions: Effective Participation in Executive Order 12866 Meetings with the Office of Information and Regulatory Affairs, 89 Fed. Reg. 51,375 (June 17, 2024).

525. *See id.*

526. *See* Notice of Training Session: Effective Participation in Executive Order 12866 Meetings with the Office of Information and Regulatory Affairs (in Spanish), 89 Fed. Reg. 65,940 (Aug. 13, 2024).

527. *Id.*

528. Executive Order 14,094 § 2(e) Guidance, *supra* note 517, at 4.

529. *Id.* at 5.

disabilities who may need a reasonable accommodation can include that information in their meeting request.[530]

To strengthen transparency, OIRA anticipates expanding the information regarding Executive Order 12,866 meetings posted publicly on its website. Previously, OIRA had required the name of the individual requesting the meeting, and the requester was given the option of stating their organization as well as the individual whose interests would be represented at the meeting.[531] Because it was optional, this meant that it was not always clear who was actually requesting to share their views with OIRA. Under the guidance, requestors must now disclose: the name of the individual requesting the meeting; the requester's affiliation, if any; the requestor's client, if relevant; and the client's organizational affiliation, if relevant.[532] In the future, OIRA plans to allow requestors to submit narrative descriptions of the purpose of the meeting and a brief informal summary of the views they anticipate presenting, which will be made publicly available.[533] By doing so, OIRA seeks to increase transparency around Executive Order 12,866 meetings, providing clear information on the parties who attend these meetings, and the interests they may represent.

Some critics suggest that Executive Order 12,866 meetings do not have a clear impact on regulations and are redundant to the public comment process.[534] These criticisms, however, overlook the unique features of Executive Order 12,866 meetings. Executive Order 12,866 meetings distinctly offer an opportunity for members of the public to present their views not only to agencies drafting the proposed rule, but also to EOP components.[535]

Moreover, Executive Order 12,866 meetings do have an impact on the regulatory process, and input received during an Executive Order 12,866 meeting can influence an agency's response to a given policy problem, either by changing course in a proposed rule or by reexamining the agency's rulemaking priorities. Consider a recent example from the Social Security

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530. *Id.* at 4–5.

531. *Id.* at 8.

532. *Id.* at 7.

533. *Id.* at 8.

534. *See generally* Lisa Heinzerling, *20 Years of 12,866*, CTR. FOR PROGRESSIVE REFORM (Sept. 30, 2013), https://progressivereform.org/cpr-blog/20-years-of-12866 [https://perma.cc/3XHF-MQUP]. *But see* Lia Cattaneo, *Influenced or Influencer? OIRA's 12,866 Meetings in Review,* 45 CAMPBELL L. REV. 1, 1 (2022) (highlighting empirical evidence that "supports the view that 12,866 Meetings have a beneficial effect on the rulemaking process").

535. *See* JohnCarl McGrady, "Devastating" Speed Restriction Proposal Gains Momentum in D.C., Prompting Alarm on Nantucket, NANTUCKET CURRENT (May 23, 2024), https://nantucketcurrent.com/news/town-officials-ferry-operators-scramble-as-proposed-speed-restriction-gains-momentum [https://perma.cc/RA5C-TWC7].

Administration (SSA). At an Executive Order 12,866 meeting with stakeholders regarding a proposed rule that sought to ensure that receiving food from a family member would not count as income that would lower an otherwise eligible beneficiary's Supplemental Social Security Income,[536] SSA also heard from stakeholders about the importance of expanding the definition of a public assistance household to help underserved families access benefits more easily.[537] SSA responded to this input provided by stakeholders by subsequently reexamining and changing the definition of a public assistance household in a different rulemaking.[538]

And it is relevant that members of the public regularly seek Executive Order 12,866 meetings, suggesting that they find them valuable. Between December 2023 and August 2024, OIRA completed over 960 Executive Order 12,866 meetings, and over 800 meetings between December 2022 and December 2023.[539] These meetings were requested by a variety of stakeholders, including industry groups, national environmental organizations, unions, community-based organizations, and individual farmers.[540] Executive Order 12,866 meetings sometimes receive significant attention: one local newspaper highlighted these meetings as opportunities for members of the public to present their views on a rule that was perceived as having impacts on their

536. Notice of Proposed Rulemaking: Omitting Food From In-Kind Support and Maintenance Calculations, 88 Fed. Reg. 9779 (Feb. 15, 2023).

537. Notice of Proposed Rulemaking: Expand the Definition of a Public Assistance Household, 88 Fed. Reg. 67,148, 67,152 n.57 (Sept. 29, 2023). The Social Security Administration subsequently docketed details about this Executive Order 12,866 meeting and posted them publicly on that rule's regulatory docket. *See* SOC. SEC. ADMIN., RULEMAKING DOCKET: OMITTING FOOD FROM IN-KIND SUPPORT AND MAINTENANCE CALCULATIONS, SUPPORTING & RELATED MATERIAL: EXECUTIVE ORDER 12866 COMBINED LISTENING SESSION NOTES (Fall 2022).

538. Expand the Definition of a Public Assistance Household, 89 Fed. Reg. 28,608, 28,608 (Apr. 19, 2024).

539. Data gathered using the public search tool on OIRA's website, RegInfo.gov, and setting the relevant dates as a search term. *See* Off. of Info. & Regul. Affs., *E.O. 12866 Meetings*, REGINFO.GOV, https://www.reginfo.gov/public/do/eom12866SearchResults [https://perma.cc/8JEL-XF97] (Oct. 8, 2024).

540. Take, for example, July 17, 2024. On that day, OIRA completed eight Executive Order 12,866 meetings, regarding seven different rules, with stakeholders that included three industry coalitions, a member of Congress, a state Attorney General's office, a community-based environmental group, and an individual farmer. *See* Off. of Info. & Regul. Affs., Exec. Off. of the President, *Search of EO 12866 Meetings Search Results*, REGINFO.GOV, https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=&viewType=month&typeCd=C&searchCalendarDate=7/17/2024.gov [https://perma.cc/MYK8-KEVJ] (Oct. 8, 2024).

community, and several community organizations subsequently requested Executive Order 12,866 meetings.[541]

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OIRA helps ensure that decisionmakers have the best possible information. To gather information more effectively, OIRA has identified best practices to structure public participation in a manner and at a time when it has the most impact, and to overcome barriers that limit the ability of underserved communities to have their voices heard during the policymaking process. By doing so, OIRA is helping agencies formulate policies in a manner that is more effective and inclusive.

V. LEVERAGING OIRA'S RESPONSIBILITIES UNDER THE PRA

OIRA is tasked with reviewing agencies' proposed information collections under the PRA.[542] As noted in Part I, this statutory responsibility grew alongside OIRA's centralized review of regulations prescribed by Executive Order 12,866.[543] Not only regulations on businesses, but also regulations governing spending programs, often must be implemented through information collections that entail administrative burden.[544] In particular, information from the public is usually necessary to determine individuals' eligibility for government programs. As a result, operating those programs requires promulgating regulations that specify both who is eligible for the program (in more specific terms than the statute) and how the agency will collect information about eligibility from the public. OIRA engages in this process as part of both its regulatory and information collection review responsibilities.[545] Section A discusses how OIRA leverages its role reviewing information collections to improve regulatory review in a variety of ways.[546]

OIRA has also recently focused on harnessing the PRA to reduce administrative burdens imposed by the government. OIRA undertook this effort not just to better fulfill the statutory purpose of the PRA—to maximize the

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541. McGrady, *supra* note 535.

542. There were a series of Paperwork Reduction Acts (PRAs); this Section uses the term to refer to the law as codified at 44 U.S.C. 3501 et seq.

543. *See supra* Part I.B.3.

544. *See supra* note 52 and accompanying text.

545. While not the focus of this piece, OIRA's roles related to statistical and science policy as well as privacy also stem from the relationship between those roles and information collections.

546. This Part is not meant to be a defense of the PRA in its current form. But reforming the PRA would require congressional action. In the meantime, this Part describes on how OIRA is harnessing the PRA to reduce burdens that are unnecessary.

usefulness of information collections and minimize the burdens they impose[547]—but also to advance a key priority of the Biden Administration. In 2021, President Biden issued Executive Order 14,058, which notes that agencies must work with partners to "reduce administrative burdens" and "simplify both public-facing and internal processes to improve efficiency."[548] The Executive Order more specifically indicates that "[a]gencies should continually . . . reduce administrative hurdles and paperwork burdens to minimize 'time taxes'" and "redesign compliance-oriented processes to improve customer experience and more directly meet the needs of the people of the United States."[549] These directives build upon the previously discussed Executive Order 13,985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," which calls on agencies to review "[p]otential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs."[550]

And President Biden recently announced a parallel effort focused on the private sector burdens rather than those imposed by the government.[551] The "Time Is Money" initiative focuses on making it "as easy [to] cancel a subscription or membership as it is to enroll"; "as easy to obtain rebates and refunds as it was to purchase"; and also making it clear that Americans are "able [sic] receive customer service on their terms and their own time without significant hassle or hardship" and are not "subject to confusing, manipulative, or deceptive practices online."[552] Time Is Money "builds on landmark efforts by the Biden-Harris Administration to improve customer service for people accessing government programs and services," including OIRA's burden reduction initiative,[553] as well as related OMB initiatives.[554]

Imposing administrative burden—the time, money, and psychological costs involved in interacting with the government—is an inescapable part of

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547. 44 U.S.C. §§ 3504(c)(3)–(4).

548. Exec. Order No. 14,058, § 1, 86 Fed. Reg. 71,357, 71,357 (Dec. 9, 2021).

549. *Id.* § 2, 86 Fed. Reg. at 71,358.

550. Exec. Order No. 13,985, § 5(a), 86 Fed. Reg. 7009, 7009–10 (Jan. 25, 2021).

551. *Fact Sheet: Biden-Harris Administration Launches New Effort to Crack Down on Everyday Headaches and Hassles That Waste Americans' Time and Money*, EXEC. OFF. OF THE PRESIDENT (Aug. 12, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/08/12/fact-sheet-biden-harris-administration-launches-new-effort-to-crack-down-on-everyday-headaches-and-hassles-that-waste-americans-time-and-money [https://perma.cc/A49A-NXA6].

552. *Id.*

553. *Id.*

554. *See* Gen. Servs. Admin., *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*, PERFORMANCE.GOV, https://www.performance.gov/cx/executive-order [https://perma.cc/BAN8-XHJD] (last visited Jan. 23, 2025).

governance. Collecting the taxes necessary to fund the provision of government services, for example, is the predominant source of administrative burden stemming from federal information collections.[555] The production of statistical information also creates inevitable administrative burdens. But Section B describes how, during the Biden Administration, OIRA increased its focus on reducing administrative burdens that are unnecessary.

A. How Review of Information Collections Improves Regulatory Review

OIRA's dual regulatory review and PRA responsibilities are synergistic in several ways. In some cases, as discussed regarding the historical emergence of centralized review, a regulation itself includes an information collection.[556] For instance, in 1939, the CSB discussed regulations requiring the submission of "annual financial statements" to various agencies: in such cases, the information collection may be the entirety of the regulation, and there is no distinction between the two.[557] The CSB similarly described how the "[r]egulation of the production and sale of alcoholic production accounted for over 3,000,000" responses to information collections in a single year.[558] A century later, OIRA regularly reviews regulations with accompanying information collections.[559] In these cases, centralized review of regulations and information collections blend together, and it would be inefficient to pull them apart.

OIRA also leverages its role reviewing even those information collections that are not embedded in regulatory actions to make centralized regulatory review more useful in five primary ways. First, reviewing information collections often illuminates potential regulatory improvements that would otherwise have gone unnoticed. Second, OIRA can become aware of unnecessary duplication of information collections supporting regulatory actions across or

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555. In FY 2022, 64% of all federal paperwork burden hours were attributable to the Treasury department (largely due to the tax collection functions of the Internal Revenue Service). *See* OFF. OF INFO. & REGUL. AFFS., EXEC. OFF. OF THE PRESIDENT, TACKLING THE TIME TAX: HOW THE FEDERAL GOVERNMENT IS REDUCING BURDENS TO ACCESSING CRITICAL BENEFITS AND SERVICES, APPENDIX B: PAPERWORK BURDEN ACCOUNTING 3 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/08/FY2022-ICB-Burden-Reduction-Report-Appendix-B.pdf [https://perma.cc/6HC2-MGWZ].

556. *See supra* Section I.A.

557. *See* CENT. STAT. BD., *supra* note 51, at 3.

558. *Id.* at 8.

559. *See, e.g.*, Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88,732, 88,802 (Dec. 22, 2023); *View ICR – OIRA Conclusion, OMB Control No.: 1506-0077*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202312-1506-001 [https://perma.cc/3B2M-SFA6] (last visited Oct. 12, 2024).

within agencies. Third, OIRA is more able to improve regulatory compliance and enforcement mechanisms that involve information collections. Fourth, reviewing information collections that are necessary prerequisites to regulation helps make review of subsequent regulations more effective. And fifth, OIRA can coordinate with agencies to collect information that will improve the quality of information used in future regulatory actions.

To see how the review of information collections can illuminate potential regulatory improvements that would otherwise go unnoticed, consider an example involving the SSA. In reviewing an SSA information collection on overpayment waivers and repayment rate changes, OIRA conditioned approval of the collection on SSA identifying how its current rules and information collections led to overpayments and how the waiver process could be improved.[560] As noted in subsequent press coverage, overpayments can be devastating for SSA beneficiaries, who are often elderly or disabled and lack the means to repay the agency.[561] As a result of SSA's collaborative work with OIRA, SSA has already improved its information collections in this space, and has announced a forthcoming notice of proposed rulemaking to revise its rules relating to overpayments.[562]

OIRA review can also identify unnecessary duplication of information collections pursuant to regulatory actions, both within and across agencies. For example, two components of the Department of Homeland Security—Customs and Border Protection (CBP) and the Coast Guard—require commercial vessels and their operators to provide several data submissions when arriving in the United States and when departing it.[563] In reviewing CBP and Coast Guard information collections, OIRA identified overlap, leading CBP to develop short-term solutions to eliminate redundant data submissions;[564] these solutions will be fully codified in several upcoming

560. *View ICR – OIRA Conclusion, OMB Control No.: 0960-0037*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202106-0960-008 [https://perma.cc/GB6Q-NLHN] (last visited Oct. 12, 2024).

561. Anderson Cooper, Aliza Chasan, Andy Court & Annabelle Hanflig, *Social Security Recipients Struggle to Pay Back Agency After Unexpected Overpayments*, CBS NEWS (Nov. 5, 2023, 7:00 PM), https://www.cbsnews.com/news/social-security-overpayment-woes-60-minutes [https://perma.cc/7FP5-8YPQ].

562. *View Rule: SSA, Title: Changing Our Waiver of Overpayment Recovery Rules*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=0960-AI76 [https://perma.cc/4P6B-8JCR] (last visited Oct. 12, 2024).

563. *See, e.g.*, 19 C.F.R. §§ 4.61(a)–(c); 33 C.F.R. § 160.206(a).

564. *See, e.g.*, Vessel Entrance Clearance System (VECS), 88 Fed. Reg. 59,932, 59,932 (Aug. 30, 2023).

rules.[565] As another example, the Department of Health and Human Services's Centers for Disease Control and Prevention (CDC) recently updated the process by which individuals can import dogs into the United States, which included required information collections.[566] Because CBP also plays a critical role at U.S. ports of entry, OIRA ensured coordination between CDC and CBP; for example, regarding when each agency should receive or verify various forms.[567] This culminated in a rulemaking that created a single unified approach to the importation of dogs.[568]

Because information collections are often bound up in how regulations are implemented and enforced, OIRA's review of the former can help it guide improvements to the latter. To illustrate, based on its prior review of a Federal Motor Carrier Safety Administration (FMCSA) information collection related to Driver Vehicle Inspection Reports (DVIRs),[569] OIRA identified that the vast majority (95%) of DVIRs were filed after a driver found no defects.[570] This finding led the agency to promulgate a rule that waived the requirement to file unnecessary DVIRs when no defect was found, eliminating most of the relevant burden and allowing the agency to focus on reports noting defects.[571]

In certain cases, information collections are inextricably bound up in future regulatory action, so effective regulatory review is enhanced by review of a predicate information collection. Consider EPA Maximum Achievable Control Technology (MACT) standards.[572] Under the Clean Air Act,

565. *See, e.g.*, *View Rule: DHS/USCBP, Title: Automation of CBP Form I-418 for Vessels*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1651-AB18 [https://perma.cc/78KC-CXLV] (last visited Jan. 24, 2025); *View Rule: DHS/USCBP, Title: Automated Commercial Environment (ACE) Electronic Export Manifest for Vessel Cargo*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1651-AB59 [https://perma.cc/U4TT-HCHC] (last visited Oct. 12, 2024).

566. *See, e.g.*, Control of Communicable Diseases; Foreign Quarantine: Importation of Dogs and Cats, 89 Fed. Reg. 41,726, 41,727 (May 13, 2024).

567. *See id.* at 41,769.

568. *Id.* at 41,726.

569. *See View ICR – OIRA Conclusion: OMB Control No.: 2126-0003*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201206-2126-002 [https://perma.cc/CN8R-LPBM] (last visited Jan. 23, 2025).

570. Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report (DVIR), 79 Fed. Reg. 75,437, 75,448 (Dec. 18, 2014).

571. *Id.*

572. *See* ENV'T PROT. AGENCY, DEVELOPMENT OF MAXIMUM ACHIEVABLE TECHNOLOGY STANDARDS (1995), epa.gov/sites/default/files/2015-10/documents/mactsrep.pdf [https://perma.cc/8ZVT-J4BY].

MACT standards emission reduction is set partially in reference to the best-performing 12% of existing sources or the best-performing five sources (when there are fewer than thirty sources in total).[573] EPA typically makes this determination by issuing an information collection to determine the best-performing sources in a category[574] in advance of proposing a rule to adopt emission standards.[575] By reviewing these types of information collections, OIRA can help ensure that the information collection will support a regulatory action that aligns with relevant statutory criteria.

Review of information collections also allows OIRA to identify cases where a change to the information collected could improve the quality of information in future regulatory actions. For example, OIRA has approved two FMCSA information collections for research related to automated driving, a new technology that is likely to be a subject of future regulation.[576] While the agency has many non-regulatory reasons for collecting this information, OIRA engaged with FMCSA to ensure that this research is being conducted in a statistically rigorous manner, and can provide data that would be as informative as possible for any future regulation.[577] OIRA also ensures that information collections aid in analyzing the effectiveness of existing regulations, which can also inform future regulation. For instance, the Federal Railroad Administration recently promulgated a rule on train crew size safety requirements;[578] during OIRA's review of the rule, OIRA and the Federal Railroad Administration ensured that the accompanying information collection requirements covered information about one-person train crews necessary to inform future regulatory actions.[579]

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573. *Id.*; 42 U.S.C. § 7412(d)(3).

574. *See, e.g.*, *View ICR – OIRA Conclusion, OMB Control No: 2060-0544*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-2060-013 [https://perma.cc/3GQY-ZQTY] (last visited Jan. 23, 2025).

575. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Amendments, 88 Fed. Reg. 805 (Jan. 5, 2023).

576. *View ICR – OIRA Conclusion, OMB Control No.: 2126-0080*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-2126-002 [perma.cc/9KPF-YLN8] (last visited Jan. 25, 2025); *View ICR – OIRA Conclusion, OMB Control No.: 2126-0083*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202308-2126-001 [https://perma.cc/W7MH-HJ8Q] (last visited Jan. 23, 2025).

577. *View ICR – OIRA Conclusion*, *OMB Control No.: 2126-0083*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202308-2126-001 [https://perma.cc/HR7P-YG3N] (last visited Jan. 25, 2025); *see also View ICR – OIRA Conclusion, OMB Control No.: 2126-0080*, *supra* note 576.

578. Train Crew Size Safety Requirements, 89 Fed. Reg. 25,052 (Apr. 9, 2024).

579. *Id.* at 25,057.

Capitalizing upon review of information collections to improve regulations is also a key part of OIRA's initiative to reduce unnecessary administrative burdens, which is further discussed in Section B. When reviewing an information collection, OIRA works with agencies to determine if there are any regulatory actions that the agency can take (immediately or long-term) to reduce unnecessary burden.[580] Similarly, during the review of a regulation, OIRA engages with the agency to think through how the design of the regulation—for example, the categories that regulated entities are sorted into, methods of ensuring compliance, time periods for compliance—interacts with the information that the agency would need to collect to effectively implement the rule. During this process, OIRA expanded its focus on reducing burden by working with the agency on changes not only to the proposed information collection, but also the regulation itself.[581] Because so many public benefits programs are implemented through regulation, OIRA has been able to make reducing burden in those programs (either through changes to the regulation being reviewed or a future regulatory action) a routine part of regulatory review. Indeed, when OIRA collected information on the first year of efforts to implement this new burden reduction initiative, agencies identified over one hundred actions that they had already taken.[582]

B. OIRA's Burden Reduction Initiative

1. Reducing Administrative Burdens in Public Benefits Programs

While previous administrations have engaged in some important burden–reduction reforms,[583] President Biden's OIRA brought a newfound focus to

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580. *See, e.g.*, 44 U.S.C. §§ 3504(c)(3)–(4).

581. OFF. OF INFO. & REGUL. AFFS., EXEC. OFF. OF THE PRESIDENT, TACKLING THE TIME TAX: MAKING IMPORTANT GOVERNMENT BENEFITS AND PROGRAMS EASIER TO ACCESS 26–27 (2024), https://www.whitehouse.gov/wp-content/uploads/2024/07/OIRA-2024-Burden-Reduction-Report.pdf [https://perma.cc/CAD5-E3VT].

582. OFF. OF INFO. & REGUL. AFFS., EXEC. OFF. OF THE PRESIDENT, TACKLING THE TIME TAX: HOW THE FEDERAL GOVERNMENT IS REDUCING BURDENS TO ACCESSING CRITICAL BENEFITS AND SERVICES 6 (2023) [hereinafter TACKLING THE TIME TAX], https://www.whitehouse.gov/wp-content/uploads/2023/07/OIRA-2023-Burden-Reduction-Report.pdf [https://perma.cc/M3YW-LW3E].

583. *See, e.g.*, Exec. Order No. 13,610, § 1, 77 Fed. Reg. 28,469, 28,469 (May 10, 2012); Memorandum from Cass R. Sunstein, Adm'r, Off. of Info. & Regul. Affs., to the Heads of Exec. Dep'ts & Agencies, Reducing Reporting and Paperwork Burdens (June 22, 2012), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf [https://perma.cc/U5XF-

the twin directives of the PRA: to maximize the usefulness of information collections and to minimize the burdens they impose.[584] This focus has centered, consistent with the PRA's directive, on minimizing administrative burdens "with particular emphasis on those individuals and entities most adversely affected":[585] for example, low-wage workers with inflexible work hours who cannot access benefits to which they are entitled; small businesses without a specialized compliance team that have trouble competing with big firms in new lines of businesses; and individuals struggling to get by who may not even be aware of the programs that they qualify for but are not enrolled in.[586] These administrative burdens are not trivial. One individual with a disability remarked that completing the forms necessary for recertifying their eligibility for disability insurance benefits was "[m]ore frightening than having cancer—twice."[587]

A focus on those most adversely affected is particularly important in light of the fact that, across federal benefit programs, there is often a substantial gap between the number of eligible beneficiaries and those actually receiving benefits. To demonstrate, recent studies suggest that slightly less than half of adults eligible for health insurance benefits through Medicaid actually received those benefits.[588] Similarly, only half of the women, infants, and

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MHCM]; Memorandum from Cass R. Sunstein, Adm'r, Off. of Info. & Regul. Affs., & Jeffrey D. Zients, Deputy Dir. for Mgmt. & Fed. Chief Performance Officer, to the Heads of Exec. Dep'ts & Agencies, & Indep. Regul. Agencies, New Fast-Track Process for Collecting Service Delivery Feedback Under the Paperwork Reduction Act (June 15, 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-26.pdf [https://perma.cc/M7C5-9BVL].

584. 44 U.S.C. §§ 3504(c)(3)–(4).

585. *Id.* § 3504(c)(3).

586. *See* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013); CASS R. SUNSTEIN, SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT (2021).

587. TACKLING THE TIME TAX, *supra* note 582, at 5.

588. Sandra L. Decker, Salam Abdus & Brandy J. Lipton, *Eligibility for and Enrollment in Medicaid Among Nonelderly Adults After Implementation of the Affordable Care Act*, 79 MED. CARE RSCH. & REV. 125, 130 (2022). Note that while "a short-run analysis of" increasing Medicaid uptake "would conclude that the causal effects of the policy would lead to an increase in" government deficits, estimates from the literature imply that the expansion of Medicaid to pregnant women and children 1979–1992 resulted in "a long-run net government surplus." Nathaniel Hendren & Ben Sprung-Keyser, *A Unified Welfare Analysis of Government Policies*, 135 Q.J. ECON. 1209, 1231–33 (2020). How increased program uptake affects social benefits and costs, as well as net government deficits, should be carefully assessed on a case-by-case basis.

young children eligible for nutrition assistance actually received benefits.[589] Further, research indicates that administrative burdens play an important role in explaining why participation rates vary across programs.[590] And many of these programs have an extraordinary impact on those who benefit from them.[591] For instance, one study found that children in low-income households who received nutrition assistance when they were very young (or whose mothers received nutrition assistance when pregnant) were much more likely to go to college, be employed, earn more, be physically healthier, and live longer as adults, when compared to children in low-income households who did not receive such benefits.[592]

As a result, OIRA announced a new initiative to use its authorities under the PRA to reduce unnecessary administrative burdens related to accessing public benefits programs.[593] To facilitate this initiative, OIRA has developed guidance for agencies that will facilitate the production of more relevant information for decisionmakers and the identification of high-impact changes.[594]

OIRA has increasingly emphasized that agencies should "more completely and transparently articulate burdens and associated costs experienced by the public when accessing essential public benefits programs," and to do so "with a particular focus on members of underserved and marginalized communities."[595] The reason is similar to the rationale for regulatory analysis: reducing unnecessary regulatory burdens is facilitated by identifying and measuring those burdens. To this end, OIRA issued guidance to help

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589. TACKLING THE TIME TAX, *supra* note 582, at 9 (citing Food & Nutrition Serv., *National and State Level Estimates of WIC Eligibility and Program Reach in 2020*, U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/research/wic/eligibility-program-reach-estimates-2020 (July 23, 2024)).

590. *See* Wonsik Ko & Robert A. Moffitt, *Take-up of Social Benefits* 32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30148, 2022), https://www.nber.org/papers/w30148 [https://perma.cc/FZ73-WULY].

591. This is part of why these programs are a focus of OIRA's Frontiers of Benefit–Cost Analysis initiative, as discussed previously. *See supra* notes 418–421 and accompanying text.

592. Martha J. Bailey, Hilary W. Hoynes, Maya Rossin-Slater & Reed Walker, *Is the Social Safety Net a Long-Term Investment? Large-Scale Evidence from the Food Stamps Program*, 91 REV. ECON. STUD. 1291 (2024).

593. Memorandum from Shalanda D. Young, Dir., Off. of Mgmt. & Budget, & Dominic J. Mancini, Deputy Adm'r, Off. of Info. & Regul. Affs., to the Heads of Exec. Dep'ts & Agencies, Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (Apr. 13, 2022) [hereinafter M-22-10], https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf [https://perma.cc/SHY9-QSP6].

594. *Id.*

595. *Id.* at 10–12.

agencies identify burdens that are produced by agency processes related to applying for and maintaining eligibility for public benefits programs.[596] OIRA has also worked with agencies in individual information collections to better estimate burden and aid in the identification of burden reduction opportunities. For example, OIRA worked with the SSA to improve its estimate of the burden of the Continuing Disability Review Report.[597]

In addition, OIRA has emphasized that it expects agencies to regularly identify short- and long-term initiatives to reduce administrative burdens.[598] But to prioritize among the large number of information collections related to public benefits programs, OIRA has identified four categories of actions for particular focus.

First, agencies should work on simplifying submission requirements. Agencies often require submission of documents in their original or physical formats rather than as an electronic copy, despite the absence of a statutory obligation to do so. Similarly, requirements to print, sign, and scan a document—rather than to simply add an electronic signature—are burdensome and often not statutorily required. And ideally, an agency could use information it (or another agency) already possesses to make the submission of duplicative information unnecessary.

Second, agencies should improve tools that make it easier to understand how to receive benefits, reducing learning costs. Agencies may be able to notify those who are likely eligible to apply for a particular program based on administrative data matching. And agencies can also make it easier to learn about eligibility by providing information not just through paper mail, but also email or text messages.

Third, agencies should consider how specific groups may be disproportionately affected by barriers to access and seek to address them. For example, some individuals do not have stable housing. For such beneficiaries, agencies may want to conduct specialized, proactive outreach.

Finally, OIRA emphasized the importance of adopting modern design practices and evidence-supported ways to design content so that it is easy to

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596. *See* GUIDANCE FOR ASSESSING CHANGES IN ENVIRONMENTAL AND ECOSYSTEM SERVICES IN BENEFIT–COST ANALYSIS, *supra* note 426, at 2–3.

597. In 2022, OIRA asked the Social Security Administration to consider revising the burden estimate of this form. *View ICR – OIRA Conclusion OMB Control No.: 0960-0072*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201912-0960-003 [https://perma.cc/L494-H4D8] (last visited Jan. 23, 2025). In 2023, OIRA approved a tranche of changes to the form, which included revising the burden estimate from one hour to closer to nine hours. *View ICR – OIRA Conclusion, OMB Control No.: 0960-0072*, OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202111-0960-010#section7_anchor [https://perma.cc/JLF4-9CT6] (last visited Jan. 23, 2025).

598. M-22-10, *supra* note 593, at 10.

understand. Research has identified principles of user-centered design that can be used across similar forms to help with readability and data quality.[599] Using these design practices results in higher-quality data collections and reduced administrative burden. Agencies are also encouraged to employ user experience research to identify the most effective and least burdensome way to collect particular types of information. To help agencies with this work, OIRA provided a separate guidance document collecting relevant research findings and successful agency actions taken in response to the COVID-19 public health emergency to demonstrate high-impact burden-reduction strategies.[600]

2. *Institutionalizing the Burden Reduction Initiative*

OIRA has proactively spurred burden reduction, rather than waiting for an information collection or regulation to review. One way it has done so is by engaging a variety of interagency fora to urge agencies to focus on burden reduction, particularly in their public benefits programs. For example, OIRA presented to members of the Legal Aid Interagency Roundtable, lent support to member agencies in identifying burden-reduction opportunities, and encouraged evidence-based approaches to reduce burden.[601] In addition, OIRA has helped agencies identify areas where public engagement has noted opportunities for burden reduction.

In addition, OIRA has devoted more time and resources to the production of the annual Information Collection Budget so that the report can showcase burden–reduction efforts, allow outside stakeholders and agencies to take stock of progress to date, and spur further burden-reduction actions. In its first report on tackling administrative burden in public benefits programs, OIRA highlighted a number of these actions.[602] For instance, OIRA worked with the Department of Agriculture Farm Service Agency to reduce its direct loan program application from ten different forms that took five hours and twenty minutes to complete to one form that takes under three hours to complete;[603] the SSA to streamline continuing disability reviews and allow online submission with pre-populated

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599. *Id.* at 14.

600. Memorandum from the Off. of Mgmt. & Budget & Off. of Info. & Regul. Affs. Strategies for Reducing Administrative Burden in Public Benefit and Service Programs (Dec. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/BurdenReductionStrategies.pdf [https://perma.cc/P7BU-Y8B6].

601. LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE THROUGH SIMPLIFICATION: A ROADMAP FOR PEOPLE-CENTERED SIMPLIFICATION OF FEDERAL GOVERNMENT FORMS, PROCESSES, AND LANGUAGE 46 (2022).

602. *See* TACKLING THE TIME TAX, *supra* note 582.

603. *Id.* at 31–32.

information;[604] and the Department of Homeland Security to reduce over 200 million hours of paperwork burdens on the public in 2021.[605]

This is not a one-time effort. Spurring agency burden reduction initiatives, particularly ones addressing members of underserved communities, is part of OIRA's continuing responsibilities. To further this ongoing effort and spur innovative agency efforts to address administrative burdens, OIRA will publish an annual report highlighting successful burden-reduction efforts; its second report has already been published.[606]

CONCLUSION

Regulatory review coordinated by OIRA has sometimes been derided as imposing cumbersome requirements that stifle and weaken the regulatory process to further the wishes of anti-regulatory administrations. As this Article shows, however, its roots can, in fact, be traced back to the efforts of ambitiously regulatory presidents, and the nature and role of OIRA has grown and evolved over time. And as presidents have confronted new challenges from Congress and the courts, the need for centralized review has grown as well. In this manner, OIRA-coordinated review can strengthen the regulatory process, ensuring that agencies work in concert and not at cross-purposes; that agencies, and regulatory impact analyses, rely on the best science and economics; that members of the public—particularly affected and underserved communities—have opportunities to effectively engage with the regulatory process; and that agencies collect information from the public in ways that minimize burdens and maximize benefits. OIRA is well-suited to do this work because of its overarching role performing centralized review of regulations.

The Biden Administration charged OIRA with modernizing the regulatory process. President Biden's Executive Order 14,094 raised the threshold for OIRA reviews, in order to ensure that staff resources are more focused on the regulations that benefit most from centralized review. OIRA updated Circular A-4 and published additional guidance to help ensure that agencies' analyses are informed by the best available science and economics. OIRA has reexamined agencies' approach—and its own approach—to public engagement, in order to make public participation more effective and inclusive. And OIRA's burden reduction initiative pushes agencies to find ways to reduce unnecessary administrative burdens on public benefit recipients. These undertakings reflect both OIRA's increasingly important role performing the centralized review of regulations and how that review has evolved over time to meet modern challenges.

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604. *Id.* at 33–35.

605. *Id.* at 44–45.

606. MAKING IMPORTANT GOVERNMENT BENEFITS AND PROGRAMS EASIER TO ACCESS, *supra* note 581.