

THE OBAMA APPROACH TO PUBLIC PROTECTION: THE REGULATORY PROCESS



ACKNOWLEDGEMENTS

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ABOUT OMB WATCH

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INTRODUCTION

When Barack Obama took the oath of office in January 2009, the country faced problems unlike any the country had faced in generations. The economic system was near collapse, increasing numbers of citizens were losing health care because businesses could not afford to provide it to employees, and the country was mired in two wars.

Less publicly, there were other problems the country faced as a result of a decades-long crusade against government. Each year, for example, food-borne illnesses sickened millions, workplace hazards killed and injured thousands on the job, and air pollution triggered asthma attacks in millions of children and adults. Long procedural delays and political interference in the regulatory process caused deficits in safety and health standards, exacerbating these problems.¹

President Obama seemed to understand the magnitude of the problems and the need to reestablish a badly needed role for government to provide public protections for the economy, workers, consumers, and the environment.

“President Obama seemed to understand the magnitude of the problems and the need to reestablish a badly needed role for government...”

This report is the third of three OMB Watch reports evaluating the Obama administration's record on regulatory issues. This report focuses on the regulatory process, including transparency and participation, regulatory analysis, scientific integrity, and the role of the White House, especially the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), in shaping the administration's record. The first report addressed health, safety, and environmental rulemaking at federal agencies. The second report focused on federal agency enforcement.

This report is divided into five chapters. After the introduction is a brief history and summary of the existing regulatory process. The third section of the report addresses the role of the Obama White House in the regulatory process. Federal agencies' regulatory actions during the first 20 months of the administration are described in the fourth section, including both rulemaking activity and enforcement activity. Finally, there is a brief conclusion.

In evaluating the White House and the agencies, we used both quantitative and qualitative factors. We compared, for example, the number and speed of regulatory reviews at OIRA by the current administration with those of President George W. Bush's OIRA. We also examined the expectations set by the Obama White House and federal agencies and the policies and priorities the administration established.

1 For an analysis of the impacts of this attack on government, see, for example, Osha Gray Davidson, *The Bush Legacy: An Assault on Public Protections*, Washington, DC: OMB Watch, January 2009, <http://www.ombwatch.org/bushlegacy> (accessed Dec. 14, 2010).

We also evaluated the administration against reform recommendations produced by a group of experts that examined the many obstacles to effective and efficient rulemaking. From 2007 to 2008, anticipating the change in administration, OMB Watch convened a group of diverse regulatory process experts to consider the administrative state and develop ideas for reform. The group's discussions and recommendations were informed not only by recent experiences with the Bush administration, but by the long-brewing troubles with which many observers had grown frustrated: the complexity of the process, the length of the typical rulemaking, access by special interests, the difficulty the public faces in engaging in the process, and the integrity and quality of regulatory decision making.

The group of 17 experts produced a final report, *Advancing the Public Interest through Regulatory Reform*.² The authors presented this report to the Obama transition team and then the new administration. The report contains specific recommendations for five major issues: improving the quality of regulations, integrity and accountability, implementation and enforcement, transparency, and public participation. Additionally, the report recommended actions that both the incoming administration and the 111th Congress could take within their first 100 days.

Evaluating the Obama administration for what it has not done was more difficult, in part, because the administration is less than two years old. Given the number of challenges the administration faced upon taking office, it was difficult to establish a benchmark for evaluating the administration's priorities. In addition, disasters like the Upper Big Branch mine in West Virginia and the BP *Deepwater Horizon* oil spill diverted the administration – especially some key agencies – from pursuing what might have been very different agendas had these disasters not occurred. Nevertheless, a president has tremendous power to pursue administrative goals such as reforming the regulatory process.

Findings and Conclusions

The administration set very early a regulatory tone that was far different from that of the Bush administration by appointing talented professionals to head many of the regulatory agencies, restoring badly needed resources to agencies, revoking a Bush executive order that centralized more power in OIRA, and calling for a new regulatory executive order. In short, President Obama created expectations that there would be what he called a “fundamental transformation” of the regulatory process.

In regulatory agencies, a significant philosophical shift is evident. In stark contrast to the Bush administration, the Obama administration has taken its role of protecting the public seriously and has been far more active in pursuing its regulatory responsibilities. Obama's philosophy regarding the role of government is very different from the Bush philosophy, with many agencies aiming to prevent harm and trying to more aggressively find and police known bad actors.

The administration has not, however, succeeded in changing the process. Obama failed to issue a new regulatory executive order that could have dramatically changed the relationship between the White House, specifically OIRA, and federal regulatory agencies and addressed controversial elements of the process such as the use of cost-benefit analysis. OIRA is operating the same way it has for the last 30 years, focusing on the review of individual agency rules and information collection requests. The Obama administration missed an opportunity to significantly overhaul the regulatory process and create institutional change – an opportunity that is unlikely to come the administration's way again.

2 Gary D. Bass, Michael Byrd, Caroline Smith DeWaal, et al., *Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress*, OMB Watch, November 2008, <http://www.ombwatch.org/files/regulatoryreformrecs.pdf> (accessed Dec. 14, 2010).

By contrast, the Obama administration has clearly adopted an expansive vision for open government unmatched by previous administrations. Throughout the White House and executive agencies, there have been numerous efforts to provide greater government accountability through openness, including a Freedom of Information Act (FOIA) policy that favors disclosure and an Open Government Directive that is a long-term effort to address transparency, participation, and collaboration in the agencies.

Although OIRA has a leadership role in this openness agenda, its own actions often lag behind other agencies. For example, neither OIRA nor agencies typically make available the communications or edits that occur during the review of a draft proposed or final regulation. It is often nearly impossible for the public to determine what impact OIRA – and/or other agencies participating in the interagency review – have had on a rule. These stages of the regulatory process are still cloaked in secrecy.



In March 2009, Obama raised expectations that a new era of scientific integrity would be ushered in when he issued a memo aimed at restoring the importance of science in the decisions of the federal government. Many agencies, especially those charged with protecting the environment, workers, and public health and safety, rely heavily on scientific studies and conclusions to do their work. Obama's top science advisor has started to make progress in implementing the 2009 memo, but there is still much work to be done, and more details are needed on how agencies will promote scientific integrity and protect government scientists from undue political influence.

OIRA has taken incremental, positive steps to reform parts of the regulatory process. The office has issued several memos that, taken together, may ease agency compliance with the Paperwork Reduction Act and facilitate agency information disclosure. Evidence indicates that OIRA has allowed agencies more discretion over rulemakings than they have had in the recent past. OIRA acts more as a counselor to agencies than a gatekeeper and final arbiter of regulatory decisions – an improvement over the tight control exerted over agencies during the Bush administration. In the absence of broader management and process directives from OIRA, agencies wishing to reform their own regulatory disclosure, public participation efforts, and e-rulemaking practices, for example, have been left to chart their own courses.

THE REGULATORY PROCESS

The federal regulatory process is largely defined by the 1946 Administrative Procedure Act and regulatory executive orders that have changed as presidents have felt the need to revise or replace them. Obstacles have been installed over the years by Congress, presidents, and the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB). Agencies have their own internal processes, as well.

OIRA was created by the Paperwork Reduction Act (PRA) of 1980³ to serve as the clearinghouse for federal information collection requirements and to address other information resources management issues. OIRA reviews and approves any agency attempt to collect information from 10 or more people. Since its creation, OIRA's responsibilities have expanded.

Building on the centralized review frameworks of previous presidents, President Ronald Reagan was the first to require rulemaking agencies to submit all regulations to OIRA for review and approval, a power Congress did not grant to OIRA in the PRA. Reagan was also the first to place regulation squarely in the context of cost-benefit analysis.

Presidents from Reagan through George W. Bush issued executive orders that imposed additional analytical requirements on agencies. Congress also has added to the analytical burden on agencies by passing legislation aimed at slowing down the regulatory process or providing special interests with access to agencies, thus tilting the process toward those with the resources to participate in the regulatory process on a daily basis.

Presidents from Ronald Reagan through George W. Bush issued executive orders that imposed additional analytical requirements on agencies.

In 1993, President Bill Clinton signed Executive Order 12866.⁴ E.O. 12866 requires agencies to submit to OIRA drafts of proposed and final significant rules. By focusing only on significant rules, OIRA was able to dramatically cut its workload while maintaining its ability to oversee the most important of agencies' regulations. The order requires agencies to maximize the "net benefits" of rules, a calculation that reduces the complexity of highly technical and scientific rules to a single number after an extensive analytical exercise. The Clinton E.O. remains in place today.

President George W. Bush's administration continued to operate under E.O. 12866; but under Bush, OIRA took a more aggressive posture with respect to both the regulatory process at large and the individual, rule-by-rule review of agency draft proposed and final rules. Led by Administrator John Graham, OIRA

3 44 U.S.C. § 3501 *et seq.* <http://ombwatch.org/files/regs/library/prs.pdf> (accessed Dec. 14, 2010).

4 William J. Clinton, "Executive Order 12866 of September 30, 1993, Regulatory Planning and Review," The White House, Sept. 30, 1993, http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf (accessed Dec. 14, 2010).

imposed rigorous guidelines for cost-benefit analyses and peer reviews, for example. Under Graham, OIRA also began commenting on agency drafts earlier in their development, before the agency had officially submitted them for review.

These changes added a new level of political control over both regulatory information and the development of individual rules. The changes also further biased the system toward the administration's policies and priorities, which, in turn, further tilted the regulatory playing field in favor of regulated interests.

In January 2007, President Bush amended E.O. 12866 when he signed Executive Order 13422.⁵ The changes made by E.O. 13422 were controversial: agencies' regulatory policy officers, who many feared could be easily influenced by OIRA, were imbued with the authority to quash new rulemakings, and for the first time, agency guidance documents (voluntary, often interpretive statements of an agency's stance on a particular issue) were systematically swept into OIRA's centralized review.⁶ Centralized review of proposed and final rules, guidance documents, and scientific analyses at OIRA remains a prominent part of the regulatory process, as does review of agencies' information collection requests.

When Barack Obama took office in January 2009, his administration encountered a process of mind-numbing complexity. Critics of that process, including OMB Watch, lament the many procedural hurdles agencies must overcome to meet their congressionally mandated missions. The *Advancing the Public Interest* report characterized the procedural problems this way:

There are two related problems that affect the quality of regulations and the timeliness with which they are promulgated. First, the number of analytic requirements imposed on agencies has grown in number and complexity. These requirements are now so vast that their sum significantly delays most rulemakings without necessarily improving the quality of the regulations... Second, the application of some of these analytic requirements has tilted regulatory outcomes decidedly in favor of regulated interests. Regulatory outcomes are often determined by the application of analytical techniques that are mostly used to narrow the criteria by which regulatory standards are set or to justify not regulating at all. Agencies are increasingly forced into regulation-by-numbers.⁷

The result of this process is that agencies often cannot protect the public in a timely and effective manner. It takes years for most complex rules to be completed and, at some agencies, it can take nearly a decade to complete rules.

5 George Bush, "Executive Order 13422 of January 18, 2007, Further Amendment to Executive Order 12866 on Regulatory Planning and Review," The White House, Jan. 18, 2007, <http://edocket.access.gpo.gov/2007/pdf/07-293.pdf> (accessed Dec. 14, 2010).

6 For more information, see *A Failure to Govern: Bush's Attack on the Regulatory Process*, OMB Watch, March 2007, <http://ombwatch.org/node/3228> (accessed Dec. 14, 2010).

7 Bass, Byrd, et al, p. 22.

REFORMING THE REGULATORY PROCESS

This section assesses the Obama administration's efforts to reform the regulatory process. The assessment is only a snapshot because the administration has been in office less than two full years, and achieving change in government takes time. Even if Obama had unlimited resources, bipartisan political will on Capitol Hill, public support for changing a little-known regulatory process, and support from the special interests that dominate the process, it would take more than two years to rebuild regulatory agencies' capacity to meet their missions after three decades of attacks on the regulatory state. The political environment has not provided the administration with this level of support for reforming the system, however.

Nevertheless, there are things a president can do administratively to affect the regulatory process in the short term. In this section, we assess the administration based on expectations it has created, comparisons with the administration of George W. Bush, and recommendations for reforming the regulatory process made to the Obama administration before and since Obama took office.

Undoing the Damage

The Obama administration waded into regulatory issues in its first days in office. First, on Jan. 20, 2009, White House Chief of Staff Rahm Emanuel issued a memo setting the Obama administration's strategy for reviewing regulations left over from the Bush administration. Emanuel targeted two categories of regulations: those still in the pipeline, which were to be halted until Obama administration appointees were in place, and those final but not yet in effect. The memo instructed agencies to "consider extending for 60 days the effective date" of those rules that were finalized but were not in effect as of Jan. 20.⁸



All recent presidents have tried to enact regulations in the last days of their administrations, and newly elected presidents have issued memos reviewing those last-minute regulations. Unlike other administrations, however, the Bush administration had plotted its rulemakings to allow sufficient time for

8 Rahm Emanuel, "Memorandum for the Heads of Executive Departments and Agencies: Regulatory Review," The White House, Jan. 20, 2009, <http://www.ombwatch.org/files/regs/midnightregfreezememo.pdf> (accessed Dec. 14, 2010).

the rules to take effect, handcuffing the incoming administration from quickly undoing them. As a result, the only options that remained were congressional disapproval or rule-by-rule review, revision, and, if appropriate, rescission by the Obama administration.

The Obama administration took a variety of approaches to revise or halt the implementation of many of these rules and began to address them in its first months in office. The administration addressed the Bush regulations on a case-by-case basis. It turned to strategies other than delaying effective dates in order to quash or limit the impact of those regulations already in effect. For example, the administration settled lawsuits challenging some last-minute rules; where necessary, the administration began new rulemakings to change the Bush rules.⁹ Many agencies continue to grapple with rules in effect, and some controversial rules have still not been addressed.

Second, on Jan. 30, 2009, Obama revoked E.O. 13422, President Bush's major modification of E.O. 12866.¹⁰ However, then-OMB Director Peter Orszag maintained the requirement from the Bush order regarding OIRA review of agency guidance documents. On March 4, 2009, Orszag issued a memo that states, "[S]ignificant policy and guidance documents [...] remain subject to OIRA's review."¹¹

Third, the administration began to restore badly needed resources to many essential agencies.¹² The Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Consumer Product Safety Commission (CPSC), and the U.S. Environmental Protection Agency (EPA) all received substantial budget increases in Fiscal Year (FY) 2010 that they used in their rulemaking and enforcement activities. Resource constraints remain at many agencies, and Obama has called for budget caps in coming years on federal discretionary spending (except for defense and homeland security programs). Rebuilding the agencies will take years of sustained commitment; it remains to be seen if the administration will continue this process.

Fourth, Obama appointed well-qualified officials to lead regulatory agencies responsible for protecting the public, workers, and the environment. Overall, the appointees are government and policy experts with valuable experience. Although Obama has been slow to nominate people for some positions, he has used his recess appointment powers when the Senate confirmation process broke down and produced roadblocks to filling administration positions.¹³

Addressing so-called midnight regulations, revoking Bush's executive order, restoring resources to agencies, and appointing well-qualified people to lead agencies were four of the first-100-days recommendations to the incoming administration in the *Advancing the Public Interest* report. These actions quickly set the tone for what many hoped would be a significant change from the anti-regulatory attitudes that characterized most previous administrations.

9 OMB Watch, *Turning Back the Clock: The Obama Administration and the Legacy of Bush-era Midnight Regulations*, October 2009, http://www.ombwatch.org/files/regs/PDFs/turning_back_the_clock.pdf (accessed Dec. 14, 2010).

10 Barack Obama, "Executive Order 13497 of January 30, 2009, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review," The White House, Jan. 30, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-2486.pdf> (accessed Dec. 14, 2010).

11 Peter R. Orszag, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies: Guidance for Regulatory Review," Office of Management and Budget, Executive Office of the President, March 4, 2009, M-09-13, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf (accessed Dec. 14, 2010).

12 Matt Madia, *The Obama Approach to Public Protection: Rulemaking*, Washington, DC: OMB Watch, September 2010, <http://www.ombwatch.org/files/regs/obamamidtermrulemakingreport.pdf> (accessed Dec. 14, 2010).

13 Ibid.

A New Regulatory Review Executive Order

What was expected to be President Obama's most significant foray into regulatory reform came on Jan. 30, 2009, when he called for a reconsideration of E.O. 12866. In a memo, Obama directed Orszag to produce within 100 days recommendations for a new executive order covering the regulatory review process.¹⁴ Orszag was to consult with agencies when developing recommendations.

Obama identified eight issues he wanted addressed in the recommendations:

- The proper relationship for OIRA and rulemaking agencies;
- Disclosure and transparency;
- Participation;
- The role of cost-benefit analysis;
- The role of distributional considerations and fairness and the need to consider future generations;
- Methods for avoiding unnecessary delay;
- The role of behavioral sciences; and
- Methods for achieving public goals.

The memo explained that E.O. 12866 is outdated and that government and the public know more about regulatory effectiveness after 15 years with the Clinton order. The memo notes that while Obama supports the concept of centralized OIRA review of agency rules, "Years of experience have also provided lessons about how to improve the process of regulatory review. In this time of fundamental transformation, that process—and the principles governing regulation in general—should be revisited."

**President Obama's new
regulatory review order
has not come to fruition.**

On Feb. 26, 2009, OIRA took the remarkable step of requesting public comment on the development of the recommendations for a new regulatory review order.¹⁵ More than 160 organizations and individuals submitted comments. The groundwork for writing a new regulatory executive order was laid and the administration raised expectations that the first major revision of the regulatory process since early in the Clinton administration was imminent.

Yet President Obama's new regulatory review order has not come to fruition. Presumably, OMB developed a set of recommendations as instructed under the Jan. 30, 2009, memo, but these recommendations have not been released to the public. OMB has not publicly spoken of any progress on the recommendations or the order. The public does not know what regulatory changes the agencies recommended to OMB; none of the agencies' submissions have been disclosed. The Obama administration continues to operate under E.O. 12866.

14 Barack Obama, "Memorandum of January 30, 2009, Regulatory Review, Memorandum for the Heads of Executive Departments and Agencies," The White House, Jan. 30, 2009, http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf (accessed Dec. 14, 2010).

15 Kevin F. Neyland, "Federal Regulatory Review," Office of Management and Budget, Feb. 26, 2009. 74 FR 8819, http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_FR_Notice_on_Regulatory_Review.pdf (accessed Dec. 14, 2010).

Transparency and Participation

In his first full day in office, the president issued two memos that set out transparency principles intended to drive his administration. The first memo,¹⁶ *Transparency and Open Government*, called for “an unprecedented level of openness in Government.” The second memo¹⁷ outlined how the Freedom of Information Act (FOIA) was to be applied during the Obama administration: a presumption of disclosure should inform agencies’ FOIA decisions. As a corollary to Obama’s FOIA memo, on March 19, 2009, Attorney General Eric Holder issued new guidelines for FOIA implementation that require agencies to adopt a presumption of openness.¹⁸

Pursuant to the transparency memo, Orszag issued the Open Government Directive (OGD) on Dec. 8, 2009,¹⁹ which established actions to be taken by agencies in an effort to move toward a government that is transparent, participatory, and collaborative. The directive contains four main components centered on very simple but important themes – publishing information, creating a culture of openness, improving data quality, and updating policies to allow for greater openness. This directive and several additional actions by the new administration have begun to forge an expansive vision for open government that is unmatched by previous administrations.

OIRA Transparency

OIRA has a leadership role in implementing the OGD throughout the government, but as part of OMB, OIRA is also required as an agency to comply with the requirements. The OGD requires federal agencies to maintain open government webpages and open government plans. OMB’s open government plan has not yielded significant gains as it relates to regulatory issues. The OGD requires agencies to release new, high-value data sets, but the data released on behalf of OIRA was already available and downloadable on a separate government website.

More generally, the OGD required OIRA to review, by April 7, 2010, existing OMB policies “to identify impediments to open government.” As of July 22, 2010, OIRA has issued at least six memos under this instruction, including an April 7 Regulatory Identifier Numbers memo and a May 28 dockets memo, three memos related to the Paperwork Reduction Act, and a memo on disclosure and simplification in regulations (discussed below).²⁰

In February 2010, OIRA launched a regulatory review “dashboard” on RegInfo.gov, the site that displays information on current and past OIRA reviews. OMB Director Orszag billed the site as a tool that “democratizes the data.”²¹ The increased use of graphics and sort functions has expanded usability of the site, but no new data has been added.

16 Barack Obama, *Transparency and Open Government*, Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009, http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government (accessed Dec. 14, 2010).

17 Barack Obama, *Freedom of Information Act*, Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009, http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act (accessed Dec. 14, 2010).

18 Eric Holder, *Freedom of Information Act (FOIA)*, Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009, <http://www.justice.gov/ag/foia-memo-march2009.pdf> (accessed Dec. 14, 2010).

19 Peter R. Orszag, “Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive,” Office of Management and Budget, Executive Office of the President, Dec. 8, 2009, M-10-06, <http://www.ombwatch.org/files/m10-06.pdf> (accessed Dec. 14, 2010).

20 For more information, see the White House Office of Information and Regulatory Affairs website at http://www.whitehouse.gov/omb/inforg_default/ (accessed Dec. 14, 2010).

21 Peter R. Orszag, “OIRA Dashboard Goes Live,” Office of Management and Budget, Feb. 16, 2010, <http://www.whitehouse.gov/omb/blog/10/02/16/OIRA-Dashboard-Goes-Live/> (accessed Dec. 14, 2010).

OIRA Review Meetings

OIRA has long engaged in the practice of meeting with outside stakeholders to discuss rules under review. OIRA has discretion over with whom it meets and when. Under E.O. 12866, OIRA is required to invite a representative of the rulemaking agency to attend the meetings, though the agency is not obligated to accept. OIRA is to disclose all written communications exchanged during the meetings, as well as a description of relevant information about oral communications. “Only the Administrator of OIRA (or a particular designee) shall receive oral communications,” the order states. This last policy was first put forward in an agreement between Sen. Carl Levin (D-MI) and then-OIRA Administrator Wendy Gramm. Levin pushed for the policy to address criticism that career staff were involved in actions that should have involved political appointees.

Accelerating a pattern started during the Bush administration, the Obama White House has liberalized the requirement that the administrator be present for all meetings. John Graham and Susan Dudley, OIRA administrators under President Bush, did not personally attend many of the meetings held during their tenures, preferring to send a designee. OIRA Administrator Cass Sunstein has not attended a single meeting regarding a rule under review, according to OIRA’s disclosure records.

OIRA has continued the Bush administration’s practice of posting on the White House website a list of individuals with whom OIRA and rulemaking agencies have met while agencies’ rules are under review. However, little information is provided about the substance of the meetings.

Neither OIRA nor agencies typically make available the communications or edits that occur during the review of draft proposed or final regulations. Unless an agency chooses to disclose its dealings with OIRA in the online rulemaking docket, it is nearly impossible for the public to determine what impact OIRA – or other agencies participating in the interagency review – have had on the rules.

E-Rulemaking

On the participation front, the Obama administration has made minor progress in reforming e-rulemaking – the term used to describe websites and systems that allow agencies to manage rulemaking dockets electronically, allow users to access those dockets, and provide tools for the public to submit comments to agencies.

The American Bar Association (ABA) submitted to the administration a report calling for an overhaul of the current e-rulemaking system, both the “backend,” the Federal Docket Management System (FDMS), and the online public portal, Regulations.gov. The report represents the consensus opinion and recommendations of a diverse group of e-rulemaking experts and advocates (including OMB Watch’s executive director). The report calls for dedicated funding for e-rulemaking, a distributed systems approach, and an improved public interface, among other recommendations.²² To date, minor changes have been made to the functionality of Regulations.gov, some consistent with the report’s recommendations, but significant change has yet to occur.

Funding for e-rulemaking efforts is a particular problem. E-rulemaking is currently funded through the equivalent of a pay-per-use system. The EPA, which manages the system, asks agencies to contribute to e-rulemaking from their existing budgets. The fees go up the more an agency uses the services (e.g., more regulations and more public comments). Obviously, this can serve as an unintended disincentive

22 Committee on the Status and Future of Federal e-Rulemaking, *Achieving the Potential: The Future of Federal E-Rulemaking*, American Bar Association, November 2008, <http://ceri.law.cornell.edu/documents/report-web-version.pdf> (accessed Dec. 14, 2010).

for agency rulemaking or for encouraging public comments – thereby undermining a core tenet of our democratic framework. Additionally, the lack of a dedicated funding source discourages system improvements and innovation. The ABA report calls for the establishment of a line-item appropriation for e-rulemaking. The administration has not sought that change.

OIRA has taken discrete but significant steps to improve e-rulemaking practices. On May 28, 2010, Sunstein issued a memo that urges federal agencies to make their paper-based and electronic rulemaking dockets consistent with each other.²³ Many agencies have had more complete paper dockets available to the public in agency reading rooms physically located at the agencies; their electronic dockets have often been incomplete. The memo also says agencies should make their dockets more complete by including additional supporting materials, not just copies of proposed and final rules, and should do so in “a timely manner.”

“In the absence of a broader directive from the White House, agencies wishing to reform their own e-rulemaking practices have been left to chart their own courses.”

In December 2010, the administration released to the public a best practices document for agencies that post material on Regulations.gov.²⁴ The document builds on Sunstein’s May 2010 memo and emphasizes the need to present more information on the “lifecycle” of a rulemaking. To that end, the document says that Regulations.gov will begin to display timelines of agency rulemakings.

In the absence of a broader directive from the White House, however, agencies wishing to reform their own e-rulemaking practices have been left to chart their own courses. For example, the Department of Transportation (DOT), in partnership with Cornell University, is piloting RegulationRoom.org, an interactive website designed to inform and engage users on high-profile DOT rulemakings. Even EPA, the host of Regulations.gov, has launched its own agency-specific interface, called the Rulemaking Gateway (located at yosemite.epa.gov/oepi/RuleGate.nsf/). Efforts like these are innovative and hold the potential to generate more robust participation. However, it remains unclear whether or how they fit into a larger, government-wide e-rulemaking agenda that allows greater public participation.

23 Cass R. Sunstein, “Memorandum for the President’s Management Council: Increasing Openness in the Rulemaking Process – Improving Electronic Dockets,” Office of Management and Budget, Executive Office of the President, May 28, 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf (accessed Dec. 14, 2010).

24 “Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies,” eRulemaking Program, Nov. 30, 2010, http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf (accessed Dec. 14, 2010).

Scientific Integrity

On March 9, 2009, Obama issued a memo aimed at restoring scientific integrity in the federal government.²⁵ Many agencies, especially those charged with protecting the environment, workers, and public health and safety, rely heavily on scientific studies and conclusions.

The memo stated, “Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues ... The public must be able to trust the science and the scientific process informing public policy decisions.” The memo argued for the importance of disclosure and transparency. It also assigned to the director of the Office of Science and Technology Policy (OSTP) “the responsibility for ensuring the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.” The memo identified six principles OSTP should consider when producing recommendations to the president.

The scientific community and good government groups applauded Obama’s March 2009 memo, hoping the effort would restore scientific integrity in government decision making. However, OSTP missed Obama’s 120-day deadline by well over one year.



On Dec. 17, 2010, OSTP Director John Holdren issued a memo to agencies implementing Obama’s 2009 memo.²⁶ Holdren’s memo requires agencies to report to OSTP within 120 days on the actions they have taken in support of the memo’s goals. The memo specifically identifies three issues in need of agency attention: federal scientists’ right to communicate their work to the media and the public; scientific and technical advice developed and presented by federal advisory committees; and professional development of federal scientists and engineers. It also expressly states, “[P]olitical officials should not suppress or alter scientific or technological findings.”

25 Barack Obama, “Memorandum of March 9, 2009, Scientific Integrity, Memorandum for the Heads of Executive Departments and Agencies,” The White House, March 9, 2009, http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/ (accessed Dec. 14, 2010).

26 John P. Holdren, “Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity,” Dec. 17, 2010, <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf> (accessed Dec. 20, 2010).

On Oct. 19, 2010, the nonprofit organization Public Employees for Environmental Responsibility (PEER) sued the Obama administration over the long-delayed policy. PEER filed a complaint in federal district court in the District of Columbia against OSTP, which alleged that the office is illegally withholding documents related to the development of scientific integrity policy, including internal White House and interagency communications and draft recommendations for the policy.²⁷

PEER's complaint was filed under FOIA. The group filed a FOIA request on Aug. 11, but the White House did not provide the requested documents. According to the complaint, OSTP did not respond to PEER within 20 days as required by FOIA, and OSTP could not identify a date when it would fulfill the request.

Review of Agency Rules

As we noted in the first report in this series, OIRA continues to operate largely the way it has for three decades. The office continues to focus on the transactional review of agencies' draft and final rules. This administration has been less involved in addressing the major obstacles to efficient and effective rulemaking that agencies must negotiate.

Statistically, in roughly the first year of the Obama administration, OIRA appeared to be working quickly, operating with an average review time of 37.5 days for rules received and reviewed between Jan. 20, 2009, and the end of the year. However, the office slowed the pace of its reviews in 2010. The average review time through from Jan. 1, 2010, through Nov. 30, 2010, was 51.7 days.

The Obama administration has reviewed a greater number of rules than the Bush administration.

Compared to the Bush administration, OIRA appears to be operating similarly under Obama. From Jan. 20, 2009, through Nov. 30, 2010, OIRA has reviewed rules at an average rate of 45.1 days, compared to 45.0 days during the comparable time period under Bush. The Obama administration has reviewed a greater number of rules than the Bush administration: 1,144 under Obama through Nov. 30, 2010, compared to 1,060 under Bush – an eight percent increase. For economically significant rules (those expected to generate annual costs and/or benefits of \$100 million or more), OIRA reviewed rules at faster pace through the same time period under Bush, 38.2 days on average, compared to OIRA under Obama, 49.0 days. Obama's OIRA reviewed a notably higher number of economically significant rules, 233, compared to Bush's OIRA, 164 – a 42 percent increase.

What numbers cannot show is the substance and quality of the rules reviewed. Generally speaking, rules proposed and finalized under the Obama administration, regardless of agency or issue area, have reflected a renewed desire to use regulation as a tool to protect the public. With respect to OIRA, the office appears to be playing a less interventionist role, leaving greater discretion to agencies. However, the overall process remains the same.²⁸

27 See *Public Employees for Environmental Responsibility v. Office of Science and Technology Policy*, U.S. District Court for the District of Columbia, Oct. 19, 2010, http://peer.org/docs/dc/10_19_10_OSTP_FOIA_Complaint_Final.pdf (accessed Dec. 14, 2010).

28 Matt Madia, *The Obama Approach to Public Protection: Rulemaking*, Washington, DC: OMB Watch, September 2010, <http://www.ombwatch.org/obamamidtermrulemakingreport> (accessed Dec. 14, 2010).

OIRA has at times interceded in agency business in ways that have raised concerns. OIRA has seemed particularly focused on the EPA. This is not surprising because EPA has been quite active in the regulatory arena. For example, OIRA's review of EPA's proposal to regulate coal ash has been its most controversial to date. After a review that lasted more than six months, documents showed that the published proposal was weaker than EPA's original submission and that industry comments may have influenced the decision making process.

The coal ash review lasted 200 days, far exceeding OIRA's self-imposed 120-day limit. During the review, OIRA and EPA met with outside stakeholders on at least 43 different occasions. Thirty of those meetings were with representatives of a variety of industries opposed to or fearful of coal ash regulation.

Although examples like coal ash may appear to contradict the claim that OIRA has played a less interventionist role under President Obama, it should be noted that there is no apparent pattern to OIRA's interference, as there had been during past administrations.

OIRA's willingness to play a less interventionist role is not the sole or even primary reason rulemaking agencies have succeeded in reviving moribund rulemakings and addressing new hazards: there is no replacement for qualified political appointees and their staffs with a commitment to public health and welfare. However, without OIRA's support, or at the very least its willingness to stand aside, certain regulatory successes may have been dulled or thwarted.

Cost-benefit Analysis

As noted in the previous section of this report, OIRA took the unprecedented step of requesting public comments on ways to reform the regulatory executive order, E.O. 12866. OMB Watch's analysis of the comments submitted on regulatory reform revealed strong differences between, for example, business groups and the public interest community.²⁹ One major area of disagreement was on the use of cost-benefit analysis, a decision tool often used to calculate the monetary costs and benefits of proposed actions. Although there was disagreement over the use of cost-benefit analysis, there was broad support for reassessing the way the tool is currently used (if it was to be retained in a new regulatory order). Several academic scholars and groups submitted comments, and those, too, called for modifications or supplements to cost-benefit analysis.

The recommendations from the regulatory experts in the *Advancing the Public Interest* report also called for changes in the way the administration applies cost-benefit analysis. Critics, including OMB Watch, have long fought against cost-benefit analysis because it is inherently unable to properly value some of the most critical benefits of regulations, such as environmental preservation, injuries and illnesses avoided, and even lives saved, and because it has often been used as a tool by anti-regulatory special interests to smear agency proposals.

A critical factor for OMB Watch is that cost-benefit analysis has increasingly become one of the most important considerations in determining whether to regulate, instead of just one tool to consider. Nonetheless, cost-benefit analysis can be appropriate if proper limits are placed on its use. For example, cost-benefit analysis should not be used as a determinative tool, it should be one of many sources of information, and it should include qualitative assessments of costs and benefits, not just monetized costs and benefits.

29 OMB Watch, "Comments on a New Regulatory Order Pour into OMB," April 21, 2009, <http://www.ombwatch.org/node/9913> (accessed Dec. 14, 2010).

OIRA Administrator Cass Sunstein is a long-time proponent of the use of cost-benefit analysis in regulatory decision making, and he has also advocated for reforming the way it is applied. In public remarks, Sunstein has asserted that the Obama administration does indeed view cost-benefit analysis differently than its predecessors. Sunstein has emphasized the application of “humanized” cost-benefit analysis that places a premium on distributional considerations and impacts on future generations, in addition to more traditional factors.³⁰ He has also emphasized the relationship between cost-benefit analysis and transparency, calling cost-benefit analysis “part and parcel of open government.”³¹



President Obama with OIRA Administrator Cass Sunstein

In a 2010 speech at American University’s Washington College of Law, Sunstein indicated agencies are beginning to implement his ideas for humanizing cost-benefit analysis. He described the Transportation Department Passenger Protection Rules that addressed trapping passengers on planes while waiting to take off. According to Sunstein, “There’s an effort to be disciplined about everything we’re gaining from that regulation, before we go forward with it, and it’s out there for the public to see.” In the airplane rule:

“The basic idea is if you’re flying domestically, and you can’t be kept on the tarmac for more than three hours, and you get food and water and medical care if you need it within two hours. That rule is accompanied by an extremely disciplined analysis of its cost and benefits. If we’re imposing financial burdens on airlines, we want to catalog them as best we can, and make sure the benefits justify the action.”

If this “humanizing” approach is being implemented now, clarity about what the methods entail is needed. Yet OIRA has not issued to agencies any publicly available guidance detailing Sunstein’s views on cost-benefit analysis or expectations for changes in the analyses agencies submit to OIRA for review. There have been no publicly available policies instructing agencies to consider equity factors or transparency, although it appears OIRA has begun to assert these values in individual rulemakings. Agencies are still operating under the cost-benefit guidelines in OMB Circular A-4 written by John Graham.

30 Cass Sunstein discussed cost-benefit analysis at American University’s Washington College of Law on Feb. 16, 2010. An audio recording of his remarks is available at <http://www.federalnewsradio.com/?nid=35&sid=1890426> (accessed Dec. 14, 2010).

31 Cass Sunstein discussed open government at the Brookings Institution on March 10, 2010. A transcript of his remarks is available at http://www.brookings.edu/events/2010/0310_open_government.aspx (accessed Dec. 14, 2010).

Paperwork Reduction Act

On Oct. 27, 2009, OIRA published a notice in the *Federal Register* asking for public comment on ways it could improve implementation of the Paperwork Reduction Act, the law that gives OIRA the authority to review agency information collection requests as well as the responsibility for managing federal information policy more broadly, including information dissemination, information resource management, and statistics policy.³² The document emphasized OIRA's desire to reduce the "burden" associated with the completion of government forms and paperwork.

The information collection request review process carries significant implications for issues affecting the public. For example, the U.S. Election Assistance Commission (EAC), which oversees election administration and conducts audits on the use of funds distributed under the Help America Vote Act, among other activities, cannot easily conduct surveys to identify potential problems immediately after elections because it must first receive clearance from OIRA for its information collection activities. If the EAC wants election information from different states, it may need to use a different survey for each state, adding to the clearance hurdles.

Under the PRA, OIRA has the authority to exempt certain classes of information collections from review. It should utilize this authority to streamline agencies' information collection efforts. OIRA has taken small steps in that direction. On April 7, 2010, Sunstein issued a memo to agencies that relaxes agency obligations to seek White House approval for certain web-based technologies.³³ The memo says that voluntary social media and other web-based forums – for example, blogs, wikis, or message boards – will not be considered information collections under the PRA. The memo is intended to stem concern that agencies need to comply with the PRA before including comment sections on their websites or using online services like Facebook and Twitter.

Sunstein issued another memo on May 28, 2010, reminding agencies that they may seek "generic clearances" from OIRA.³⁴ The use of generic clearances may expedite the clearance process for information collections that are voluntary, uncontroversial, or easy to produce.

Disclosure and Simplification

On June 18, 2010, Sunstein issued a memo to agencies titled, "Disclosure and Simplification as Regulatory Tools" reflecting some of his perspectives on rulemaking.³⁵ The memo does not appear to impose any concrete requirements on agencies. Like other Sunstein memos, including those on the PRA, it appears to leave agencies with an appropriate amount of flexibility.

32 Cass R. Sunstein, "Improving Implementation of the Paperwork Reduction Act," Office of Information and Regulatory Affairs, Office of Management and Budget, Oct. 27, 2009, 74 FR 55269, <http://edocket.access.gpo.gov/2009/pdf/E9-25757.pdf> (accessed Dec. 14, 2010).

33 Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act," Office of Management and Budget, Executive Office of the President, April 7, 2010, http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf (accessed Dec. 14, 2010).

34 Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Paperwork Reduction Act – Generic Clearances," Office of Management and Budget, Executive Office of the President, May 28, 2010, http://www.whitehouse.gov/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf (accessed Dec. 14, 2010).

35 Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies: Disclosure and Simplification as Regulatory Tools," Office of Management and Budget, Executive Office of the President, June 18, 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf (accessed Dec. 14, 2010).

The first part of the memo encourages agencies to consider rules that use disclosure mechanisms as a complement to or replacement for more traditional regulatory options. By addressing market failures related to information access, disclosure can induce better decision making among the public, the memo says. The memo provides examples of existing and salutary disclosure policies, including nutrition labels and cigarette warnings.

The second part of the memo, regarding simplification, encourages agencies to consider “default” rules, where affected citizens or sectors are opted into a regulatory option predetermined to be most advantageous. Where default rules are inappropriate, the memo asks agencies to consider “active choosing” where the government does not set a default but does require consumers or other end users to make an explicit choice or state a preference among options.

The memo is Sunstein’s most significant to date. It applies to all agencies, and, though it does not impose requirements, OIRA will likely check draft rules to ensure agencies are taking the memo under advisement. In this way, the memo marks the first change, albeit a subtle one, in the way OIRA reviews regulations during the Obama administration.

Conclusions: Reforming the Regulatory Process

President Obama created expectations that there would be what he called a “fundamental transformation” of the regulatory process. Clearly, the administration set a tone far different from that of the Bush administration by appointing talented professionals to head many of the regulatory agencies, restoring badly needed resources to agencies, revoking E.O. 13422, which centralized more power in OIRA, and calling for a new regulatory executive order.

OIRA spends too much time and energy wading deep into the technical and scientific waters of agency drafts.

Unfortunately, the administration failed to produce a new executive order to replace E.O. 12866, which is a major disappointment. OMB Watch had hoped that Obama’s order would mark the beginning of a new era for the regulatory process. OIRA has for too long been a lightning rod for criticism and controversy and needs to be reoriented. The Obama administration should work to restore the primacy of the agencies that possess the technical and scientific expertise needed to develop the complex rules Congress mandates.

OMB Watch has long believed that OIRA should end rule-by-rule, transactional review of regulations. Instead, OIRA should play a coordinating role in helping agencies with their regulatory work, including sharing comments from other agencies and raising questions for agencies to consider. But the OIRA yes-or-no authority on each rule should end.

Even for those who do believe OIRA should continue transactional review, there should be no doubt that OIRA has become too transactional. The office spends too much time and energy wading deep into the technical and scientific waters of agency drafts. Instead, OIRA should provide vision on major regulatory issues and guidance for agencies looking to improve their rulemaking practices. OIRA could also highlight unregulated risks that agencies may wish to prioritize.

While transforming the regulatory process is a daunting challenge, its implications for public health and welfare and economic stability make it a challenge worth addressing. In the *Advancing the Public Interest* report, the authors advocated for several significant changes, many of which could be reflected in a new executive order. Although a new order could still be issued, all signs indicate the administration has abandoned attempts to reform the regulatory process by producing a new executive order framework.

OIRA has been less interventionist than in recent years. There have still been times that the office has intervened in agency rulemakings that raise serious concerns, but there does not appear to be a pattern of interference in rulemaking as agencies experienced during the Bush administration.

“Agencies are disclosing more information, improving data quality, and experimenting with new ways to include the public in decision making.”

The Obama administration has clearly adopted an expansive vision for open government unmatched by previous administrations. Throughout the White House and executive agencies, there have been numerous efforts to increase government accountability, including a FOIA policy that favors disclosure and an Open Government Directive that is a long-term effort to address transparency, participation, and collaboration in the agencies. There seems to be genuine support for the principles issued in the early days of the administration. Agencies are disclosing more information, improving data quality, and experimenting with new ways to include the public in decision making. Although many of these agency actions will have impacts on regulatory decision making in the future, the transparency changes have come more slowly to regulatory issues.

The public comments submitted in expectation of a new regulatory executive order indicated broad support for increasing transparency in the regulatory process. Many industry and public interest groups, individuals, and academics called for more openness within OIRA. Of primary concern was the need for greater transparency of communications among OIRA, agencies, and outside interests, as well as for including all relevant rulemaking information, such as scientific and technical studies and data, in rulemaking dockets.

The office has not pushed for significant or transformational changes that could help streamline the regulatory process. For example, while OMB Watch urges OIRA to look at the PRA beyond simply the information collection review process, including its potential as a dissemination vehicle, OIRA can and should immediately reduce the number of information collection requests it requires agencies to submit for review. Under the PRA, OIRA has the authority to exempt certain classes of information collections from review and/or allow decisions about information to be made at the agencies. It should utilize this authority to streamline agencies' information collection efforts.

In terms of both process and regulation, much work remains to be done. The White House needs to reform the regulatory process and firmly establish its vision for the role of regulation. Despite the administration's progress, there are countless more hazards in need of agency attention.

AGENCY REGULATORY EFFORTS

Agency activity provides a different lens through which to view the Obama administration's regulatory record. An examination of agency rules and enforcement actions not only fleshes out the administration's agenda, it illuminates the real world implications regulatory activity has for consumers, workers, businesses, and the environment.

In stark contrast to the George W. Bush administration, the Obama administration has taken its role of protecting the public seriously and has been far more active in pursuing its regulatory responsibilities. Obama's philosophy regarding the role of government is very different from the Bush philosophy, with many agencies aiming to prevent harm and trying to more aggressively find and police known bad actors.

The Obama administration philosophy has translated into regulatory activity at the agency level in different ways. The other two reports in this series, one on rulemaking and one on regulatory enforcement, divided issues and agencies into three categories: environment, worker health and safety, and consumer health and safety. Taken together, several key findings emerge from the research presented in those reports:

- The Obama administration's environmental agenda has thus far been driven primarily by climate and energy issues. Agencies have finalized rules and set standards in a variety of areas that together clearly signal a broad and concerted effort to fight climate change through regulation.
- Air pollution controls, toxics regulation, clean water enforcement, and environmental justice are also clear priorities in the environmental agenda, specifically at the U.S. Environmental Protection Agency (EPA).
- The Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) have increased their enforcement activity at high-risk workplaces and workplaces with historically poor safety and health records.
- The administration made food safety a regulatory priority early on, but progress slowed as the Food and Drug Administration (FDA) awaited legislative reform.
- Several agencies are attempting to empower consumers by providing better information about products and by more forcefully policing bad or misleading information.

Regulatory successes are due, in part, to two important developments: increased agency funding and committed agency leadership. As discussed above, the Obama administration began to reverse the trend of underfunding regulatory agencies by requesting significant budget increases in FY 2010, most notably at the EPA, OSHA, and FDA. Obama also succeeded in nominating qualified and dedicated individuals to key regulatory positions.

For more information on agency budget and leadership, as well as greater detail about the rules and statistics discussed below, see the first two reports in this series, available at www.ombwatch.org/obamamidtermrulemakingreport and www.ombwatch.org/obamamidtermenforcementreport.

Environment

When the Obama administration took office, it was not yet the position of the United States government that climate-altering greenhouse gas emissions were a problem. EPA moved quickly to address that issue by proposing and finalizing a so-called endangerment finding, a document that says manmade greenhouse gases pose a threat to health, welfare, and the environment.³⁶ Environmental and public health advocates hailed the finding as a long-overdue first step in the battle against climate change.

Meanwhile, the Obama administration was developing regulations to curb greenhouse gas emissions from passenger vehicles and stationary sources – regulations predicated upon the endangerment finding. EPA and the Department of Transportation jointly proposed and finalized new fuel efficiency standards for vehicles manufactured from model year 2012 to model year 2016.³⁷ EPA's next major step was to set standards for major industrial sources, such as oil refineries and power plants.³⁸ Those regulations are scheduled to take effect in 2011.

“When the Obama administration took office, it was not yet the position of the United States government that greenhouse gas emissions were a problem.”

The Department of Energy has also been a player in the administration's climate change agenda. The department's Energy Efficiency and Renewable Energy Office has set a series of energy standards for consumer products, including dishwashers, microwaves, ranges and ovens, and pool and water heaters. The office has proposed and finalized a significantly greater number of standards during the first 18 months of the Obama administration than during comparable periods in the Bush administration.

EPA has also taken strides to improve air quality through rulemaking. EPA's Office of Air and Radiation, the same office responsible for the greenhouse gas regulations discussed above, has significantly outpaced the Bush administration in number of rules proposed and finalized during the first 18 months of the Obama administration. The office has finalized or is in the process of developing several clean air rules it believes will lead to healthier communities and fewer pollution-related illnesses and deaths.

EPA has emphasized regulatory enforcement as a means to fulfill its obligations to clean water. EPA has shown signs that it is employing different strategies for clean water enforcement under the Obama administration. Several of those strategies are outlined in the agency's Clean Water Act Action Plan

36 Lisa P. Jackson, “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule,” Environmental Protection Agency, 74 FR 66496, Dec. 15, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-29537.pdf> (accessed Sept. 2, 2010).

37 Ray LaHood and Lisa P. Jackson, “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,” Environmental Protection Agency [and] Department of Transportation, National Highway Traffic Safety Administration, 75 FR 25324, May 7, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-8159.pdf> (accessed Sept. 2, 2010).

38 Lisa P. Jackson, “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule,” Environmental Protection Agency, 75 FR 31513, June 3, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-11974.pdf> (accessed Sept. 2, 2010).

released in October 2009.³⁹ In the plan, EPA pledged to focus on major threats to clean water and to target major violators, improve enforcement activity in states with EPA-approved clean water plans, and require electronic reporting and other transparency measures that allow the agency to more easily link incoming data to enforcement needs.

EPA has also taken on the emerging issue of toxics regulation. EPA's new strategy for managing hazardous chemicals and other substances of concern represents a shift toward a deliberative, science-based approach to evaluating chemical safety. In most cases, decisions on regulatory controls appear distant, though there have been indications that the agency will exercise seldom-used regulatory authority.

EPA Administrator Lisa Jackson announced in September 2009 that the agency was overhauling its chemicals management program, and EPA has supported reform to the Toxic Substances Control Act – the 34-year-old law that has proven ineffective in giving EPA the regulatory tools needed to keep dangerous substances from entering commerce.⁴⁰

EPA has also taken steps to improve the efficiency of its Integrated Risk Information System (IRIS), the agency's premiere collection of data on chemical substances and their health effects. In May 2009, Jackson announced new procedures for IRIS, with the goal of shortening to 23 months the time taken to complete an assessment.⁴¹ Jackson also reasserted EPA's control over the assessment process. Under the Bush administration, OIRA played an increasingly significant role in reviewing assessments, often thwarting EPA.

However, IRIS remains a work in progress. EPA completed only nine assessments in 2009, and the backlog of chemicals in need of attention is significant.⁴² Under the 2009 procedures, EPA still provides OIRA (and the other agencies with which it shares assessments) an opportunity for review, potentially lengthening the assessment process.

Across all policy areas, EPA has increasingly emphasized environmental justice, a concept in which environmental risks are evaluated with greater respect to disadvantaged and disproportionately represented communities and demographic groups. In March 2010, Jackson called environmental justice “a defining issue” for the agency.⁴³ EPA officials have regularly discussed the importance of environmental justice in public forums, pledged to consider environmental justice earlier in the

39 “Clean Water Act Action Plan,” U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Oct. 15, 2009, <http://www.epa.gov/oecaerth/resources/policies/civil/cwa/actionplan101409.pdf> (accessed Oct. 28, 2010).

40 Lisa P. Jackson, “Administrator Lisa P. Jackson, Remarks to the Commonwealth Club of San Francisco, As Prepared,” United States Environmental Protection Agency, Sept. 29, 2009, <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/fc4e2a8c05343b3285257640007081c5!OpenDocument> (accessed Sept. 2, 2010).

41 “EPA Announces New IRIS Assessment Development Process,” United States Environmental Protection Agency, May 21, 2009, <http://yosemite.epa.gov/opa/admpress.nsf/48f0fa7dd51f9e9885257359003f5342/065e2c61afea0917852575bd0064c9db!OpenDocument> (accessed Dec. 6, 2010).

42 Rena Steinzor, et al., “Corrective Lenses for IRIS: Additional Reforms to Improve EPA's Integrated Risk Information System,” Center for Progressive Reform, October 2010, http://www.progressivereform.org/articles/IRIS_1009.pdf (accessed Dec. 6, 2010).

43 Lisa P. Jackson, “Administrator Lisa P. Jackson, Remarks at the Symposium to Strengthen Research and Policy on Environmental Justice, As Prepared,” United States Environmental Protection Agency, March 17, 2010, <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/2300cadb345f14be852576f0005594e9!OpenDocument> (accessed Dec. 6, 2010).

rulemaking process, hired a senior official in EPA's enforcement division to oversee justice issues, and emphasized justice in the agency's five-year plan. However, EPA is still in the process of developing environmental justice policies and finding ways to systematically incorporate justice criteria into its decision making.

EPA has also been an exemplar in the administration's effort to increase government transparency. In April 2009, Jackson reinstated EPA's transparency policy, in which the agency is to operate as if in a "fishbowl."⁴⁴ The fishbowl policy dates back to the 1980s but had gone dormant during the Bush administration. Jackson directed her agency to adopt the Obama administration's presumption of openness.



EPA Administrator Lisa Jackson with citizens of New Orleans

Since then, the agency has taken significant steps to make its decision making more transparent and to release more information to the public. EPA has released pollution information under its Toxics Release Inventory earlier than ever before and, in August 2010, proposed a rule that would require manufacturers to provide more information, including production and use data, to the EPA (and in turn, to the public) and to provide the information more frequently (every four years instead of every five years).⁴⁵ The agency also launched the Health Environment Research Online, or HERO, database in March 2010 to expand public access to research the agency uses in its decision making.

Worker health and safety

The story at OSHA is one of enforcement. The agency has taken several steps to strengthen oversight of high risk workplaces and employers with historically poor health and safety records, including the creation of its Severe Violator Enforcement Program.⁴⁶ The efforts reflect an increasing seriousness in policing workplaces and an awareness of the need to prioritize its enforcement activity.

44 Lisa P. Jackson, "Memo to EPA Employees: Transparency in EPA's Operations," United States Environmental Protection Agency, April 23, 2009, <http://www.epa.gov/Administrator/operationsmemo.html> (accessed Dec. 6, 2010).

45 Stephen A. Owens, "TSCA Inventory Update Reporting Modifications; Proposed Rule," Environmental Protection Agency, 75 FR 49656, Aug. 13, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-19830.pdf> (accessed Sept. 2, 2010).

46 "US Department of Labor's OSHA takes action to protect America's workers with severe violator program and increased penalties," U.S. Department of Labor, Occupational Safety and Health Administration, April 22, 2010, http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17544 (accessed Oct. 14, 2010).

Data on OSHA enforcement bear out the agency's tougher posture towards unsafe workplaces. While OSHA is not conducting a significantly greater number of inspections, it is citing workplaces with health and safety violations to a much greater degree. For example, from Jan. 20, 2009, through Jan. 19, 2010, Obama's first full year in office, federal and state OSHA programs handed out more than 68,000 violations – a 167 percent increase from the previous year – and have already exceeded that total in 2010.

Of note, that data is now more easily accessible via the Department of Labor's Enforcement Data website, a flagship initiative under the Open Government Directive. Though limited in its functionality, the database combines enforcement statistics for five Labor agencies (OSHA, MSHA, the Wage and Hour Division, the Employment Benefit Standards Administration, and the Office of Federal Contract Compliance Programs) painting a more complete picture of the Department's regulatory presence across the country.

Rulemaking advances at OSHA have been slower to progress. OSHA transitioned from the Bush to Obama administration burdened with a rulemaking agenda that had grown long and cumbersome. Health standards for crystalline silica and beryllium have been in the queue since the late 1990s. Meanwhile, new hazards continue to warrant attention. For the most part, OSHA's rulemaking agenda has remained untouched 22 months into the Obama administration.

OSHA did score a major victory in July 2010 when it announced a new safety standard for crane and derrick workers.⁴⁷ The final rule is the culmination of almost a decade of work: OSHA first announced its intention to write new crane and derrick standards in 2002. OSHA estimates the new standards will save 22 lives and prevent 175 injuries every year.

OSHA continues to fall down on the job when it comes to whistleblowers. OSHA is responsible for whistleblower protections under 18 laws, but its program has long been criticized as inadequate. Those criticisms have continued under the Obama administration as both the Government Accountability Office and the Department of Labor Inspector General released reports in 2010 faulting OSHA and recommending substantial reforms.^{48,49}

Perhaps more than any other agency, the Mine Safety and Health Administration's agenda has been co-opted by tragedy. The April 2010 explosion at the Upper Big Branch mine in West Virginia, which killed 29 miners, has dominated mine safety policy during the Obama administration. The tragedy exposed flaws in the mine safety regulatory apparatus, including a major loophole wherein mine operators are allowed to appeal violations to avoid added scrutiny. The appeals are handled by the Federal Mine Safety and Health Review Commission, which had a backlog of 18,000 cases as of October 2010.⁵⁰

47 David Michaels, "Cranes and Derricks in Construction; Final Rule," Department of Labor, Occupational Safety and Health Administration, 75 FR 47905, Aug. 9, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-17818.pdf> (accessed Sept. 2, 2010).

48 George A. Scott, "Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weaknesses," United States Government Accountability Office, GAO-10-722, Aug. 17, 2010, <http://www.gao.gov/new.items/d10722.pdf> (accessed Oct. 26, 2010).

49 Elliot P. Lewis, "Complainants Did Not Always Receive Appropriate Investigations Under The Whistleblower Protection Program," U.S. Department of Labor, Office of Inspector General, Office of Audit, Sept. 30, 2010, <http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf> (accessed Oct. 26, 2010).

50 "Federal Mine Safety and Health Review Commission Activity: Review Commission Decisions and Orders," *Mine Safety and Health News*, Oct. 15, 2010, Vol. 17, No. 19, 479.

To its credit, MSHA has taken steps to right some of the wrongs exposed by the disaster. In April 2010, at Obama's urging, MSHA began a four-month-long inspection blitz focused on mines with questionable safety records.⁵¹ MSHA chose to conduct "impact assessments," as the agency is calling them, at high-risk mines. The agency has uncovered significant violations at many mines as a result of the effort.

“Perhaps more than any other agency, the Mine Safety and Health Administration’s agenda has been co-opted by tragedy.”

MSHA has also taken steps to address black lung disease. In December 2009, the agency announced the End Black Lung – Act Now! initiative.⁵² In October 2010, MSHA proposed a rule that would cut in half the exposure limit for coal dust, the cause of black lung disease.⁵³ MSHA estimates the new standard will prevent thousands of illnesses and hundreds of deaths over the lifetimes of miners.

Consumer health and safety

Obama signaled a commitment to food safety early in his administration, announcing the creation of a Food Safety Working Group in March 2009.⁵⁴ The working group made progress initially: the Food and Drug Administration (FDA) announced guidance for leafy greens, melons, and tomatoes and set long-awaited standards for eggs intended to prevent salmonella contamination. (The standards were not yet in effect when a salmonella outbreak led to the recall of 550 million eggs and sickened more than 1,800 people in 2010.) However, action has since slowed. The FDA spent months awaiting enhanced regulatory authority under the FDA Food Safety Modernization Act. The House approved the bill in July 2009, but it stalled in the Senate in 2010. A version of the bill finally passed both chambers in December 2010 during Congress's lame-duck session.

The Food Safety and Inspection Service (FSIS), the regulator of meat and poultry products, was limited by a leadership vacancy for the first 19 months of the administration. Obama did not announce his nominee for USDA undersecretary for food safety, Elisabeth Hagen, until January 2010. The Senate Agriculture Committee did not approve the nomination until June 30. The full Senate did not take up the nomination before leaving for its 2010 summer recess. Finally, Obama installed Hagen through a recess appointment on Aug. 19.⁵⁵

51 "MSHA announces results of 5 months of impact inspections," U.S. Department of Labor, Mine Safety and Health Administration, Sept. 20, 2010, <http://www.msha.gov/MEDIA/PRESS/2010/NR100920.asp> (accessed Oct. 14, 2010).

52 "MSHA launches comprehensive action plan to tackle black lung," U.S. Department of Labor, Mine Safety and Health Administration, Dec. 3, 2009, <http://www.msha.gov/MEDIA/PRESS/2009/NR091203.asp> (accessed Sept. 2, 2010).

53 Joseph A. Main, "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors; Proposed Rule," Department of Labor, Mine Safety and Health Administration, 75 FR 64412, Oct. 19, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-25249.pdf> (accessed Dec. 6, 2010).

54 Barack Obama, "Weekly Address: President Barack Obama Announces Key FDA Appointments and Tougher Food Safety Measures," The White House, March 14, 2009, http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F/ (accessed Sept. 2, 2010).

55 Hagen has since been confirmed by the Senate, rendering the recess appointment moot.

The vacancy likely contributed to a stunting of FSIS's rulemaking record. The agency scored an early victory in March 2009 when it tightened regulations preventing downer cows from being slaughtered and entering the food supply.⁵⁶ However, since then, the agency has struggled, proposing four significant rules and finalizing none.

The FDA has been another of the Obama administration's transparency leaders. The agency has taken several steps to improve the transparency of its regulatory decision making. FDA formed a transparency task force in June 2009 and asked for public comment on ways to make the agency more transparent.⁵⁷ The agency and the task force have enacted specific initiatives – including FDA Track, an online performance management system that makes public dozens of metrics that indicate levels of agency activity – and continue to engage the public in their efforts.⁵⁸

Expanding information for consumers and cracking down on misleading information have been key drivers of the administration's consumer product agenda. For example, in March 2010, the FDA announced it had sent warning letters to 17 companies telling them that they were in violation of federal law by making misleading or false claims on product labels that could lead consumers to believe the foods were healthier than they are.⁵⁹

Expanding information for consumers and cracking down on misleading information have been key drivers of the administration's consumer product agenda.

The National Highway Traffic Safety Administration (NHTSA) has also been a player in the Obama administration's consumer information agenda. The agency finalized a rule in March 2010 that will require tire manufacturers to better inform consumers about how new tires affect vehicle fuel efficiency.⁶⁰ In a similar vein, NHTSA, along with EPA, proposed in September 2010 a redesign to the fuel economy stickers affixed to new car windows, with the goal of presenting information to consumers more clearly.⁶¹

56 Alfred Almanza, "Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection," Department of Agriculture, Food Safety and Inspection Service, 74 FR 11463, March 18, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-5987.pdf> (accessed Sept. 2, 2010).

57 Jeffrey Shuren, "Food and Drug Administration Transparency Task Force; Public Meeting," Department of Health and Human Services, Food and Drug Administration, 74 FR 26712, June 3, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-12902.pdf> (accessed Dec. 6, 2010).

58 FDA Track is located at <http://www.fda.gov/AboutFDA/Transparency/track/default.htm> (accessed Dec. 6, 2010).

59 Lyndsey Layton, "FDA Warns 17 Food Companies of Misleading Claims on Labels," *The Washington Post*, March 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030303119.html> (accessed Oct. 28, 2010).

60 David L. Strickland, "Tire Fuel Efficiency Consumer Information Program; Final Rule," Department of Transportation, National Highway Traffic Safety Administration, 75 FR 15893, March 30, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-6907.pdf> (accessed Sept. 2, 2010).

61 Ray LaHood and Lisa P. Jackson, "Revisions and Additions to Motor Vehicle Fuel Economy Label; Proposed Rule," Environmental Protection Agency [and] Department of Transportation, National Highway Traffic Safety Administration, 75 FR 58078, Sept. 23, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-22321.pdf> (accessed Dec. 6, 2010).

However, much of NHTSA's regulatory activity has centered on the recalls of millions of Toyota vehicles for sudden, unintended acceleration problems. Toyota recalled millions of vehicles in late 2009 and early 2010 because accelerator pedals were becoming trapped under floor mats and because of an internal malfunction that could cause accelerator pedals to stick. In the wake of the recalls, NHTSA came under scrutiny. The agency had, since 2003, investigated at least six complaints about unintended acceleration in Toyota vehicles but did not come to firm conclusions or take action. On Feb. 16, 2010, NHTSA announced it was investigating whether Toyota knew of the vehicles' defects well before announcing the recalls but failed to alert regulators, a violation of federal law.⁶²

The product safety agenda continues to be driven by the Consumer Product Safety Improvement Act (CPSIA),⁶³ the landmark 2008 law that overhauled product safety, particularly children's product safety, and was studded with deadlines for rulemakings and the creation of a product defect database, among others. CPSC has been largely successful in meeting the CPSIA's deadlines while conceding to complaints about its workability. Standards for lead, phthalates, and cribs, among others, are expected to protect children and families from dangerous products. The agency is beginning to exercise the increased authority granted to it under the law.

Outside of the CPSIA, the agency has been forced to deal with the fallout over contaminated drywall manufactured in China that was used in the construction of U.S. homes. The drywall has caused damage in homes, corroding metal and damaging ventilation systems, and has been linked to skin irritation and respiratory illnesses. "To date, this has been the largest compliance investigation in agency history," according to CPSC.⁶⁴ In response to the drywall incident, and other contaminated products made in China that have been recalled in recent years, the agency has stepped up its oversight of imported products and has set up an office in Beijing.

Conclusions: Agency Regulatory Efforts

The philosophical shift – from anti-regulatory, market-based solutions – that occurred when the Obama administration took control of the regulatory apparatus is bearing itself out at the agency level.

Climate change has been the most dominant environmental issue during the Obama administration, but across the board, EPA has been an agency active in the development of new protections and more robust enforcement.

Department of Labor agencies are attempting to more aggressively find and police high-risk workplaces and employers known to put their employees at unacceptable risk. This strategy has led not only to a more focused enforcement regime, but also to an increasing number of violations cited by agencies like OSHA.

The consumer protection agenda has included an emphasis on prevention of harm, particularly with regard to food safety, and increased disclosure and quality of information for consumers. Many agencies, including the FDA, CPSC, and NHTSA, have been integral to setting and enforcing new protections.

62 "NHTSA Launches Probe into Timeliness of Three Toyota Recalls," National Highway Traffic Safety Administration, Feb. 16, 2010, <http://www.nhtsa.gov/PR/DOT-29-10> (accessed Oct. 28, 2010).

63 P.L. 110-314. Hereinafter, CPSIA.

64 "Investigation of Imported Drywall: Status Update, September 2010," U.S. Consumer Product Safety Commission, September 2010, <http://cpsc.gov/info/drywall/sep2010status.pdf> (accessed Oct. 28, 2010).

CONCLUSION

From a regulatory perspective, the Obama administration took office in 2009 confronted by problems that resulted from a decades-long dismantling of public protections. The regulatory process was mired in procedural muck intended to halt or slow the development of health, safety, and environmental regulations in particular. Agencies were suffering from the loss of both human and financial resources as a result of the dominant governing view that public protections were burdens, not benefits, and therefore, that agencies had to be constrained and limited. The strong anti-regulatory views that dominated the George W. Bush administration were the culmination of this long battle over the role of government in protecting the public.

The Obama administration acted quickly to undo some of the damage from the previous governing approach. The White House and executive agencies worked to undo or minimize the impact of last-minute deregulatory actions from the Bush administration. The president appointed highly competent and qualified people to lead regulatory agencies and began to restore badly needed resources so agencies could better meet their legal responsibilities.



Within the first two months of the Obama administration, the president signaled two principles intended to drive his administration, increased transparency and scientific integrity. On the transparency front, the Obama administration has clearly adopted an expansive vision for government openness unmatched by previous administrations. There appears to be genuine interest and enthusiasm within agencies for this transparency agenda.

This enthusiasm has not resulted in significantly greater transparency in the rulemaking process, however. OIRA has lagged behind other federal offices in adopting transparency as part of its operating principles. For example, OIRA's communications with agencies, and communications from other agencies, about rules in development remain nearly as opaque as ever.

The administration's focus on scientific integrity, though slow in developing, was born out when OSTP Director Holdren issued a memo to agencies in December 2010. His memo focuses on several issues that have stirred controversy in the past, including conflicts of interest, and contains an unequivocal statement that politics should not trump science.

A major disappointment has been the administration's failure to produce a new or revised regulatory executive order after Obama called for a "fundamental transformation" in the regulatory process. After criticizing the current executive order, E.O. 12866, and calling for public and agency comments on changes that could be reflected in a new order, the administration has apparently abandoned the effort to produce a new regulatory framework. This failure means that the regulatory process has not been significantly streamlined or amended in ways that make rulemaking more efficient, effective, and timely.

OIRA continues to operate as it has for three decades, spending most of its time reviewing individual agency rules and information collection requests instead of playing a larger regulatory coordination role, focusing on helping agencies manage their information resource needs, and making institutional changes to improve the regulatory process.

OIRA continues to operate as it has for three decades ... At the agency level, the Obama administration has been more focused on protecting the public than the previous administration.

OIRA has enacted small, positive steps to help agencies improve some rulemaking practices. OIRA acts more as a counselor to agencies during the rulemaking process and is less interventionist than in the past. Agencies have greater discretion over their regulatory activities and greater freedom to set their own agendas.

OIRA appears to have urged agencies to conduct cost-benefit analysis in a more humanistic way than agencies were allowed previously, yet the prescriptive, detailed, one-size-fits-all OMB circular that governs how agencies prepare cost-benefit analyses remains in place. The more humanistic approach is apparently conducted on a rule-by-rule basis; there has been no public indication that OIRA has issued to agencies a set of principles to implement the revised approach. These types of institutional reforms have the potential to make the regulatory process more efficient and responsive.

At the agency level, the Obama administration has been more focused on protecting the public than the previous administration. Many agencies have started to rebuild their regulatory capabilities thanks to increased funding and new leadership. Others have more actively pursued their regulatory agendas to meet their congressionally mandated responsibilities and have stepped up enforcement.

The philosophical shift from an anti-regulatory perspective to a balanced view of the positive role of government that characterizes the Obama administration is most strongly reflected at the agency level. The crises this administration has faced – from near-economic collapse to disastrous oil spills and coal mine explosions – illustrate the costs of not having a vigorous regulatory presence. The Obama administration seems to have grasped the importance of this badly needed role for government. At this point in the administration, the change in approach is clear, but there is much that needs to be addressed. It remains to be seen if the administration can stand up to the many forces allied against it, forces that have a vastly different view of public protections and the intrinsic value of the health and safety of all Americans.



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