

OIRA INSIGHT, REFORM, AND ACCOUNTABILITY ACT

FEBRUARY 27, 2017.—Ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1009]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1009) to amend title 44, United States Code, to require the Administrator of the Office of Information and Regulatory Affairs to review regulations, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 1009, the OIRA Insight, Reform, and Accountability Act, codifies current practices at the Office of Information and Regulatory Affairs (OIRA) for centralized review of regulations as required by Executive Order 12866. The bill also establishes new transparency measures for OIRA’s regulatory review, such as requiring increased disclosure when extending review time, explanations about regulations that are dropped from the Unified Agenda, and a redline of changes agencies make to a regulation while under OIRA review.

BACKGROUND AND NEED FOR LEGISLATION

Presidents of both parties have required a centralized review of regulations since the 1970s.¹ In 1980, the Paperwork Reduction Act (PRA) created OIRA within the Office of Management and Budget (OMB) to serve as a central review of all agencies’ information collection requests.² Shortly thereafter, President Reagan issued Executive Order (EO) 12291, which required OIRA to review all regulations and required agencies to conduct cost-benefit analyses. While not without controversy,³ every president since President Reagan has required a centralized review of regulations at OIRA, as well as agency cost-benefit analysis of regulatory actions.

In 1993, President Clinton replaced EO 12291 with EO 12866.⁴ In 2011, President Obama issued EO 13563, reaffirming the principles and requirements of EO 12866.⁵ Pursuant to President Clinton’s 1993 order, OIRA is designated as the “repository of expertise concerning regulatory issues.”⁶ President Obama described OIRA’s reviews as a “dispassionate and analytical ‘second opinion’ on agency actions.”⁷ EO 12866 limited OIRA’s review of regulations to only significant regulations. Significant regulations were generally defined as a rule that may “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”⁸ OIRA determines whether a rule is “significant,” even if the issuing agency does not initially deem it as such.⁹ The Office reviews “significant regulatory actions” and accompanying cost-benefit analyses from executive branch agencies at the proposed and final rulemaking stages.¹⁰

OIRA’s role has remained unchanged in the following 24 years. H.R. 1009 codifies practices that have been working, expands regu-

¹ MAEVE CAREY, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 5 (2011) [hereinafter *OIRA Federal Rulemaking* (2011)].

² Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2006).

³ See Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES, Nov. 7, 1981, <http://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html?pagewanted=all>.

⁴ Exec. Order No. 12,866, 58 Fed. Reg. 51,005 (Sept. 29, 1993).

⁵ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁶ Exec. Order No. 12,866.

⁷ Memorandum from Barack Obama to the Heads of Exec. Dep’ts & Agencies, *Regulatory Review* (Jan. 30, 2009).

⁸ Exec. Order No. 12,866.

⁹ Exec. Order No. 12,866.

¹⁰ *OIRA Federal Rulemaking* (2011) at 4.

latory review to previously excluded agencies, and establishes transparency requirements. Agencies do not consistently apply the principles of EO 12866 and other governing authorities, including those requiring state, local, and tribal consultation in the rule-making process.¹¹ Codification of these principles and extension of the regulatory review process to independent agencies is not simply a means to improve agency compliance with existing obligations, but necessary to ensure the promotion of a healthy regulatory state. As has been noted by some of the Committee’s minority members, OIRA’s regulatory review serves an important role in improving the quality of the life, health, and safety of Americans.¹²

OIRA’s role is increasingly important in the regulatory process as the number of regulations and associated costs increase. The cost and number of federal regulations grew to unprecedented levels under the Obama Administration.¹³ By the Administration’s own numbers, executive agencies imposed more than \$100 billion in annual regulatory costs from FY 2004 to FY 2014. The Obama Administration was responsible for nearly \$70 billion in annual regulatory costs from FY 2009 to FY 2014.

However, many analysts criticized the Obama Administration’s calculation of cumulative annual regulatory costs. The American Action Forum reports that totaling all available regulatory costs reported by executive agencies, the Obama Administration actually imposed more than \$600 billion in annual regulatory costs from 2009 to 2014.¹⁴ Another study, commissioned by the National Association of Manufacturers, found the total cost of federal regulations in 2012 was \$2.028 trillion, with an annual cost burden for the average U.S. firm of \$233,181, or 21 percent of average payroll.¹⁵ Further, 88 percent of those surveyed said that federal regulations are a top challenge for their firm.¹⁶ Other studies continue to show that regulation has a deleterious effect on the economy.¹⁷

OIRA Review Process

The review process at OIRA officially begins when an agency submits a regulatory review packet to OIRA. The packet consists of the draft rule, a reasonably detailed description of the need for the regulatory action, an explanation of how the regulatory action will meet that need, and an assessment of the potential costs and

¹¹ See e.g. H. COMM. ON OVERSIGHT & GOV’T REFORM, *POLITICIZATION OF THE WATERS OF THE UNITED STATES RULEMAKING* 41, 114th Cong. (2016) [hereinafter *WOTUS Report* (2016)]; *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Gov’t Operations of the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Mar. 15, 2016).

¹² *Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking: Hearing Before the Subcomm. on Gov’t Operations of the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 6 (Mar. 3, 2015) (statement of Rep. Matt Cartwright, stating “OIRA’s regulatory review functions aim to improve the daily lives of Americans across our Country in a multitude of ways.”), (statement of Rep. Gerald Connolly: “OIRA plays a key role in shaping hundreds of important rules, such as those that enhance the safety of our drinking water, protect food supply, guaranty buildings are accessible to the disabled, and protect the homeland, to name just a few important topics.”).

¹³ See, e.g., JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUNDATION, *RED TAPE RISING: FIVE YEARS OF REGULATORY EXPANSION* (May 11, 2015).

¹⁴ *Regulation Rodeo Database*, AMERICAN ACTION FORUM (accessed Mar. 13, 2016), <https://www.americanactionforum.org/regulation-rodeo-database/>.

¹⁵ W. MARK CRAIN & NICOLE V. CRAIN, NATIONAL ASSOCIATION OF MANUFACTURERS, *THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING, AND SMALL BUSINESS* (Sept. 10, 2014).

¹⁶ *Id.*

¹⁷ JOHN W. DAWSON & JOHN J. SEATER, AMERICAN ACTION FORUM, *FEDERAL REGULATION AND AGGREGATE ECONOMIC GROWTH* (Jan. 2013).

benefits of the rule.¹⁸ When OIRA completes its review, it either returns the draft rule to the agency for “reconsideration” or concludes that the rule is consistent with the requirements of EO 12866. In the latter case, the issuing agency may publish a notice of proposed rulemaking in the Federal Register for public comment. After the comment period closes, the agency may revise the draft rule to respond to the comments. The agency then sends the rule back to OIRA for a second review before publishing and promulgating the final rule in the Federal Register.

Little is known about what happens under the OIRA review process, but former OIRA Administrator Cass Sunstein described it as follows:

OIRA and agencies work together to ensure that when rules are proposed, important issues and alternatives are clearly and explicitly identified for public comment. OIRA and agencies also work closely together to ensure that public comments are adequately addressed in final rules, where appropriate by modifying relevant provisions in proposed rules.¹⁹

He continued:

Indeed, a central function of OIRA is to operate as a guardian of a well-functioning administrative process, to ensure not only respect for law but also compliance with procedural ideals, involving notice and an opportunity to be heard, that may not always be strictly compulsory but that might be loosely organized under the rubric of “good government.”²⁰

OIRA review is important to provide a double check on agencies rushing to promulgate rules. Review of the regulatory analysis generated by executive agencies shows that the quality is generally low.²¹ According to the George Mason University Mercatus Center (Mercatus), agencies usually satisfy around 60 percent or less of the requirements called for in EO 12866 for regulatory analysis.²² Mercatus claims that there is evidence that OIRA review improves the quality of regulatory analysis, but falls short of providing analysis adequate to support informed rulemaking.²³ For example, between 2000 and 2013, 98 percent of the Environmental Protection Agency’s (EPA’s) final rules contained no estimated compliance costs.²⁴ Additionally, EPA routinely justifies its regulatory activities by claiming benefits from matters unrelated to the underlying regulation.²⁵

¹⁸ Exec. Order No. 12,866.

¹⁹ Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 38 A.B.A. ADMIN. & REGULATORY LAW NEWS 8 (2013).

²⁰ *Id.*

²¹ JERRY ELLIG & JOHN MORRALL, MERCATUS CENTER, ASSESSING THE QUALITY OF REGULATORY ANALYSIS: A NEW EVALUATION AND DATA SET FOR POLICY RESEARCH (2010).

²² *Id.* *Toward a 21st-Century Regulatory System: Hearing Before the S. Comm. of Homeland Sec. & Gov’t Affairs*, 114th Cong. (2015) (statement of Jerry Ellig, Senior Research Fellow, Mercatus Center).

²³ *Id.*

²⁴ WILLIAM KOVACS, U.S. CHAMBER OF COMMERCE, THESE 9 CHARTS PUT FEDERAL REGULATIONS IN A DIFFERENT LIGHT (2014).

²⁵ *Id.*

Despite its value added, there are repeated claims that the OIRA review process lacks transparency.²⁶ Lisa Heinzerling, former Associate Administrator of EPA's Office of Policy, expressed concerns about transparency and accountability at OIRA, saying, "The process is utterly opaque."²⁷ The Government Accountability Office issued multiple recommendations for increasing transparency, most of which remain unimplemented.²⁸

Despite transparency measures embedded in EO 12866, the Committee's most significant insight into OIRA's review process came through the Committee's Waters of the United States (WOTUS) investigation. Through documents and transcribed interviews, the Committee learned what OIRA was doing when a rule was under review. Inter-agency coordination was an important, although rushed, process.²⁹ Review of the rule development process was attempted, but also very limited.³⁰

H.R. 1009 codifies the requirement for OIRA to conduct a review of significant regulations to ensure the regulations are consistent with applicable law and the principles set forth in EO 12866. The bill requires that OIRA conduct a review to determine if the agency complied with the regulatory principles and applicable law and requires OIRA review the quality of the compliance. H.R. 1009 authorizes OIRA to issue best practice guides to agencies based on the experience and expertise of what quality regulatory analysis and development entails. H.R. 1009 establishes transparency of the review by requiring that OIRA provide written analysis of what principles and legal requirements were reviewed, as well as the results of that review.

One key difference between EO 12866 and H.R. 1009 is the OIRA review of the President's priorities. H.R. 1009 does not include the requirements for OIRA to review regulations for consistency with the President's priorities, as that is best directed to the agencies through the EO. The EO will allow the President to determine the extent to which presidential priorities will be directed to agencies through the OIRA review process and the extent to which presidential priorities will be included in the review of independent agency regulations.

Coordination

A central part of the OIRA review process is coordination with other agencies in the Federal Government. Former OIRA Administrator Cass Sunstein described the interagency review process as a primary mission for OIRA,

OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside of the federal government.

* * *

²⁶ See, e.g., *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2016).

²⁷ Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014).

²⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-505T, FEDERAL RULEMAKING: OPPORTUNITIES REMAIN FOR OMB TO IMPROVE THE TRANSPARENCY OF RULEMAKING PROCESSES (2016).

²⁹ *WOTUS Report* (2016).

³⁰ *Id.*

For example, the Department of Agriculture will know a great deal about how rules affect farmers, and the Department of Transportation will know a great deal about how rules affect the transportation sector, and the Department of Energy will know a great deal about implications for the energy sector; the OIRA process enables their perspectives to be brought to bear on rules issued by other agencies. Part of OIRA's defining mission is to ensure that rule-making agencies are able to receive the specialized information held by diverse people (usually career officials) within the executive branch.³¹

The Committee learned from the WOTUS investigation that the OIRA interagency review process can fall short of the ideal that Sunstein described.³² Agencies consulted on the WOTUS rule-making complained about insufficient time and shifting deadlines.³³ When a rulemaking is set on a political schedule, as was the case for WOTUS, the interagency review process is short-changed. The OIRA staffer responsible for the process wrote:

The real challenge here was working on a very tight schedule which required me to provide short deadlines. To the extent that Agencies were able to provide me comments . . . I did all that I could to address them with EPA and the Corps . . . but even then there was only so much that I could do.³⁴

H.R. 1009 codifies the requirement for interagency review to elevate the importance of the process. Coordinating and consulting with regulatory experts across the government will improve the overall quality of regulations.

Retrospective Review

Agencies have been under an obligation to review their regulations since the Carter Administration.³⁵ EO 12866 requires agencies to report in their regulatory plans what types of retrospective review the agency has conducted. In 2011, President Obama issued EO 13563 directing agencies to implement plans to retrospectively review their regulations, with a focus on rules that were “outmoded, ineffective, insufficient, or excessively burdensome.”³⁶

Retrospective regulatory review in the Obama Administration has actually cost more than it has saved.³⁷ Net costs increased by more than \$14 billion, and only two agencies actually reduced costs. Agencies also increased the paperwork burden by 13.4 mil-

³¹ Sunstein, *supra* note 19 (“When a proposed or final rule is delayed, and when the OIRA review process proves time-consuming, it is usually because significant interagency concerns have yet to be addressed. Frequently, there will be general agreement that a rule is a good idea, and the delay will be a product not of any sense that it should not go forward but a judgment that important aspects require continuing substantive discussion.”).

³² *WOTUS Report* (2016) at 10.

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. GOVT'S ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS, (July 2007). President Carter's E.O. 12,044 was the first to require agencies to periodically review existing rules, and every President since has issued similar direction to agencies. *Id.*

³⁶ E.O. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011), *reprinted in* 3 C.F.R. 215 (2012).

³⁷ Sam Batkins, *Administration's July 2015 "Regulatory Review" Adds \$14.7 Billion in Costs*, AMERICAN ACTION FORUM (Aug. 25, 2015), <https://www.americanactionforum.org/insight/administrations-july-2015-regulatory-review-adds-14-7-billion-in-costs/>.

lion hours. However, most agencies still have yet to institutionalize retrospective regulatory review procedures.³⁸

In testimony before Congress, Michael Mandel of the Progressive Policy Institute (PPI) explained that President Obama’s attempts at promoting retrospective review fell short of expectations.³⁹ Quoting several studies about the effectiveness of retrospective review, Mandel pointed out that of all major rules issued by agencies in 2014, none of the rules included a plan for future retrospective review and only two were identified as products of retrospective review under EO 13563. Mandel also argued that President Obama’s retrospective review did not work for various reasons—notably, that agencies have a vested interest in justifying their original decisions, and even if costs and benefits of individual regulations are justified, in the aggregate, “the total accumulation of regulation can create a heavy burden on innovation.”⁴⁰

H.R. 1009 codifies the requirements in EO 12866 to require agencies to publish the retrospective review work that they undertake or plan to undertake in a given year. The bill requires agencies to submit a list of regulations identified as unjustified, unnecessary, duplicative, or otherwise recommended for repeal, including any regulations identified as such by recommendations from the public. H.R. 1009 also requires OIRA to work with stakeholders including state, local, and tribal governments to identify regulations for repeal.

Independent Agencies

While the President has always had the authority to extend OIRA review to independent agencies, Presidents have repeatedly chosen to defer to Congress.⁴¹ President Reagan excluded independent agencies from EO 12291 out of a concern of an adverse reaction from Congress.⁴² This tradition of deference highlights the need for Congress to codify this role. Excluding independent agencies from the OIRA process means that numerous controversial and extremely costly regulations are issued without the second look by regulatory experts that OIRA review provides. In testimony before the House Committee on the Judiciary, American Action Forum President Douglas Holtz-Eakin said, “In 2012 and 2013 alone, independent agencies published eight rulemakings with at least \$100 million in annual costs, for a total burden of more than \$4 billion annually.”⁴³

Presidents have long encouraged independent agencies to undergo review, but independent agencies have not voluntarily submitted

³⁸ Sofie Miller, *Pitching Retrospective Review as a Cure for Regulatory Accumulation*, G.W. REGULATORY STUDIES CENTER (March 8, 2016), <https://regulatorystudies.columbian.gwu.edu/pitching-retrospective-review-cure-regulatory-accumulation>.

³⁹ *Toward a 21st-Century Regulatory System: Hearing Before the S. Comm. of Homeland Sec. & Gov’t Affairs*, 114th Cong. (2015) (statement of Michael Mandel, Chief Economic Strategist, Progressive Policy Institute).

⁴⁰ *Id.*

⁴¹ *The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sally Katzen, Senior Advisor, Podesta Group).

⁴² Robert Hahn & Cass Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

⁴³ *Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Douglas Holtz-Eakin, President, American Action Forum).

their regulations to OIRA.⁴⁴ In 2011, President Obama issued EO 13579, “Regulation and Independent Regulatory Agencies,” specifically calling independent agencies to adopt the “principles, structures, and definitions governing contemporary regulatory review” established in Executive Order 12866.⁴⁵ The Order requires that regulations “be adopted through a process that involves public participation,” and “consistent with EO 12866 . . . shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”⁴⁶ The Order further provides that independent agencies shall base their rules on “the open exchange of information and perspectives among State, local, and tribal officials” and other affected stakeholders.

The argument for including independent agencies in OIRA’s regulatory review is well documented. Indeed, even former OIRA Administrators have encouraged the review of independent agency rules.⁴⁷ Sally Katzen, former OIRA Administrator under the Clinton Administration, has frequently advocated for the extension of OIRA review to independent agencies.⁴⁸ Former Administrator under the Obama Administration, Cass Sunstein, argued for coverage of independent regulatory agencies, stating: “[i]n view of the substantial costs now imposed by [independent] agencies on the private sector, Congress itself should require more discipline from them. A required accounting of both costs and benefits would help to prevent excessive regulatory burdens,” noting specifically the regulatory burdens imposed on small businesses under the Dodd Frank law.⁴⁹

Numerous regulatory experts have recommended that OIRA’s review extend to independent agencies, since even before President Clinton issued EO 12866. The Administrative Conference of the United States (ACUS) issued a recommendation in 1988 to extend OIRA review to independent agencies “as a matter of principle.”⁵⁰ The American Bar Association (ABA) first recommended including independent agencies in 1986, then again in 1990.⁵¹ In a 2015 letter to the Senate Committee on Homeland Security and Government Affairs, the ABA said, “From the standpoint of sound policy in the federal rulemaking process, we believe that there is no meaningful difference between the ‘independent’ agencies and those

⁴⁴ Hahn & Sunstein, *supra* note 44, at 1506.

⁴⁵ Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (2011) (“Executive Order 13563 . . . directed to executive agencies, was meant to produce a regulatory system that protects “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Independent regulatory agencies, no less than executive agencies, should promote that goal”).

⁴⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51005 (Sep. 29, 1993).

⁴⁷ INSTITUTE FOR POLICY INTEGRITY, STRENGTHENING REGULATORY REVIEW: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION FROM FORMER OIRA LEADERS 1 (2016).

⁴⁸ See *The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Sally Katzen, Senior Advisor, Podesta Group); Sally Katzen, *Expand Centralized Regulatory Review to Independent Agencies*, REGBLOG.ORG (Aug. 9, 2011), <http://www.regblog.org/2011/08/09/expand-centralized-regulatory-review-to-independent-agencies/>.

⁴⁹ Cass R. Sunstein, *5 Smart Ways to Cut Red Tape*, BLOOMBERG (Jan. 20, 2016), <https://www.bloomberg.com/view/articles/2016-01-20/5-smart-ways-to-cut-red-tape>.

⁵⁰ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 88–9, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING (1988).

⁵¹ Letter from Thomas M. Susman, Director, A.B.A. Governmental Affairs Office, to Ron Johnson, Chairman, and Thomas R. Carper, Ranking Member, S. Comm. on Homeland Sec. & Gov’t Affairs (July 23, 2015).

agencies to which the current executive order (EO 12866) applies.”⁵²

H.R. 1009 expands OIRA’s review to independent agencies, currently excluded under EO 12866. Legislation is needed to close this loophole in centralized executive branch regulatory review. Unlike EO 12866, H.R. 1009 does not include a special exception for independent agencies—H.R. 1009 applies the OIRA review to independent agencies as well. H.R. 1009 amends the PRA, which defines both agencies and independent agencies. Independent agencies are included in the PRA’s requirements for OIRA to approve information collection requests and in EO 12866’s requirements for the Unified Agenda, Regulatory Plans, Working Group, and stakeholder consultations. By codifying OIRA’s regulatory review role in the PRA, H.R. 1009 eliminates the independent agency loophole found in EO 12866.

Review Timing

EO 12866 states that OIRA shall complete its review within 90 calendar days.⁵³ EO 12866 also provides that OIRA review may be extended “(1) once by no more than 30 calendar days upon the written approval of the [OMB] Director and (2) at the request of the agency head.”⁵⁴ OIRA interprets the second clause of this provision exclusive from the first, allowing an indefinite time for extension if the agency initiates the request.⁵⁵ Consequently, extensions under (1) rarely occur.

Instead, OIRA has adopted a practice of asking the agency to request an extension under (2),⁵⁶ effectively circumventing the time limit in (1), and giving itself an undefined time to hold onto the rule.⁵⁷ A senior EPA official once characterized such requests in that “[i]t is clear, in such a phone call [from OIRA], that the agency is not to decline to ask for such an extension.”⁵⁸ This practice has led to extensive delays in regulations without any notice to the public.⁵⁹

Senior agency officials reported political influence as a reason for delays, specifically citing concerns by the White House about issuing costly or controversial rules during an election year.⁶⁰ Leading up to the 2012 Presidential election, evidence showed that the White House instructed OIRA not to complete reviews and finalize rules before the New Year: in 2012, OIRA review averaged 80 days, but jumped to an incredible 140 days in the first half of 2013—almost three times the average from 1994 to 2011.⁶¹ In January 2013, an impressive 83 rules had been sitting at OIRA for at

⁵² *Id.*

⁵³ Exec. Order No. 12,866.

⁵⁴ *Id.*

⁵⁵ CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 19–21 (2013) (report prepared for the Administrative Conference of the United States) (citing the “Frequently Asked Questions” page on the OIRA website: “the review period may be extended indefinitely by the head of the rulemaking agency”) [hereinafter Copeland ACUS Report (2013)].

⁵⁶ *Id.* at 20–21 (“Previous reports suggest that at least some agency requests for extensions may actually originate with OIRA, not with the agency submitting the request.”)

⁵⁷ *Id.*

⁵⁸ Heinzerling, *supra* note 27.

⁵⁹ Copeland ACUS Report (2013) at 12.

⁶⁰ Copeland ACUS Report (2013) at 4. See also John M. Broder, *Regulatory Nominee Vows to Speed Up Energy Reviews*, N.Y. TIMES (June 12, 2013) (finding election-year politics as a reason for slowdown of regulatory delays).

⁶¹ Copeland ACUS Report (2013) at 4.

least six months. In contrast, between 1994 and 2011, the average length of OIRA review was 50 days, with 62 being the highest average in any year.⁶² The spike in 2013 highlights the large number of rules OIRA held onto to avoid publishing before the 2012 election.

Not all lengthy delays are related to concerns about political timing. According to former OIRA Administrator Cass Sunstein:

When a proposed or final rule is delayed, and when the OIRA review process proves time-consuming, it is usually because significant interagency concerns have yet to be addressed. Frequently, there will be general agreement that a rule is a good idea, and the delay will be a product not of any sense that it should not go forward but a judgment that important aspects require continuing substantive discussion.⁶³

Sunstein also found that technical concerns required more time:

When rules are delayed, it is often because technical specialists are working through the technical questions. Much of the time, the problem is not that OIRA, or anyone else, has a fundamental objection to the rule and the agency's approach. It is that the technical questions need good answers.⁶⁴

As such, H.R. 1009 does not create an arbitrary time limit on OIRA's review. H.R. 1009 resolves the ongoing concerns by requiring more transparency into the extensions process. Rather than continuing a process wherein OIRA must request that the agency request an extension, H.R. 1009 allows either the issuing agency or OIRA to request the extension, which must be made in writing and made publically available. To encourage a timely review, H.R. 1009 requires OIRA and the issuing agency to revisit the extension every 30 days to issue a new request, until OIRA has completed its review or the agency withdraws the rule.

Unified Agenda

The Unified Agenda is a list of all regulatory actions at all executive branch agencies that are under development or review. Issued twice a year, the Unified Agenda is intended to be the primary regulatory transparency tool to allow the public to understand what regulations are being considered by agencies. Under the Obama Administration, OIRA made a practice of issuing the Unified Agenda right before holidays.⁶⁵ Additionally, OIRA did not post any Unified Agenda in spring 2012.⁶⁶ The Committee questioned OIRA about the failure to issue the 2012 Spring Unified Agenda, but received an incomplete response.⁶⁷

According to ACUS, "it is critical to ensure that the information in the Unified Agenda is as accurate as possible to allow regulators

⁶² Copeland ACUS Report (2013) at 4.

⁶³ Sunstein, *supra* note 19, at 9.

⁶⁴ *Id.*

⁶⁵ See Veronique De Rugy, *The Obama Administration Is Hiding the Scale of Its Regulatory Agenda. Why Might That Be?*, NATIONAL REVIEW (Nov. 25, 2014).

⁶⁶ Letter from Lamar Smith, Chairman, H. Comm. on the Judiciary, and Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs (Oct. 25, 2012).

⁶⁷ *Id.*

and stakeholders to plan accordingly.”⁶⁸ In a 2015 recommendation, ACUS identified some ongoing concerns with the quality of the Unified Agenda:

The Unified Agenda functions reasonably well as a predictor of some agency actions, but is less accurate in other areas. For example, estimated action dates may prove incorrect, the significance of a regulation may be misclassified, and jointly issued rules may inappropriately be characterized differently by different agencies. Additionally, some rules are classified as long-term actions when regulatory activity is imminent, while others remain listed as long-term actions after work on them has ceased. Occasionally, entries are removed from the Unified Agenda without explanation. Finally, a number of regulatory actions have recently been placed in a “pending” category that is not included in the published Unified Agenda.⁶⁹

While OIRA claims to review the data, the data is frequently inaccurate, incomplete, and lacks standardization.⁷⁰ Because agencies are obligated to submit their data several months prior to the publication date, often information is out of date and no longer accurate.⁷¹ As an example, in the past 15 editions of the Unified Agenda, the Federal Communications Commission (FCC) has only listed regulations as either “long term” or “completed,” despite issuing an average of 250 proposed or final rules each year.⁷² According to an FCC staff, as reported in an ACUS report, “the FCC uses the Unified Agenda primarily to document the publication of regulatory actions, not to inform the public about forthcoming actions.”⁷³ OIRA has never suggested a change to the FCC reporting.⁷⁴

In 2011, the Obama Administration created a new hidden category on the Unified Agenda named “pending.”⁷⁵ The Obama Administration decided that the Unified Agenda should only reflect rules that were actually being considered and requested agencies exclude entries that were informally considered “old and cold.”⁷⁶ Agencies opposed removing some less active entries because they wanted to maintain the regulatory identification numbers.⁷⁷ To remove older, less active entries, OIRA created a category called “pending,” which is hidden from the public and allows agencies to continue to report regulations that have been under consideration at the agency and have not been officially cancelled by the agency.⁷⁸

ACUS made several recommendations to address the identified concerns: (1) OIRA should help agencies identify best practices, (2)

⁶⁸ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2015–1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA 1 (2015).

⁶⁹ *Id.* At 3–4.

⁷⁰ CURTIS W. COPELAND, THE UNIFIED AGENDA: PROPOSALS FOR REFORM (2015) (prepared for the Administrative Conference of the United States) hereinafter *Copeland Unified Agenda Proposals* (2015).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

information in the Unified Agenda should link to other regulatory data systems, (3) OIRA should help agencies define and designate the status of regulations, (4) agencies should explain why actions have been removed from the Unified Agenda, and (5) OIRA should better define data elements in the Unified Agenda.⁷⁹

H.R. 1009 codifies the requirements of the Unified Agenda and includes several reforms to address the concerns and recommendations identified. H.R. 1009 requires OIRA to issue guidance on complying with Unified Agenda requirements, including defining key terms such as stages of regulatory development, and generally permits OIRA to issue best practice guides for regulatory development. Under H.R. 1009, agencies will be required to provide a written explanation as to why a rule is no longer on the Unified Agenda. Further, H.R. 1009 establishes specific dates by which the Unified Agenda will be required to be published.

LEGISLATIVE HISTORY

Representative Paul Mitchell (R-MI), Mark Meadows (R-NC), and Gary Palmer (R-AL) introduced H.R. 1009 on February 13, 2017 and the bill was referred to the Committee on Oversight and Government Reform with an additional referral to the Committee on the Judiciary. On February 14, 2017, the Committee on Oversight and Government Reform ordered H.R. 1009 favorably reported, without amendment with a vote of 23 to 16.

SECTION-BY-SECTION

Section 1. Short title

The short title of the bill is the “OIRA Insight, Reform, and Accountability Act.”

Section 2. Office of Information and Regulatory Affairs

Section (a) amends subchapter I of chapter 35 of title 44 of the United States Code by adding the following three new code sections:

§ 3522. Office of Information and Regulatory Affairs Regulatory Working Group; regulatory plan; Unified Agenda

Subsection (a) of section 3522 establishes the Regulatory Working Group to serve as a forum for agencies to identify and analyze regulatory issues.

Subsection (b) of section 3522 requires agencies to submit a regulatory plan to OIRA, each of which is required to be included in the fall issuance of the Unified Agenda, which compiles information about each significant regulatory action the agency expects to issue in the following fiscal year. Agencies are also required to report on efforts to review outdated regulations and provide a list of any such regulations in the regulatory plan. OIRA is required to circulate agency regulatory plans to affected agencies to assist in identifying duplicative or conflicting regulatory actions.

Subsection (c) of section 3522 requires agencies to submit a list of regulations under development to OIRA. OIRA is required to

⁷⁹ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA 1 (2015).

compile all of the regulations under development in the Unified Agenda and to publish the list online.

Subsection (d) of section 3522 requires OIRA to meet with state, local, and tribal governments no less than quarterly to identify regulations that may uniquely or significantly affect government entities and to periodically convene conferences with representatives of the public to discuss regulatory issues of common concern.

Subsection (e) of section 3522 authorizes OIRA to issue best practice guidelines for agencies to use in developing new regulations.

§ 3523. OIRA coordinated review of significant regulatory actions

Subsection (a) of section 3523 requires agencies to submit significant regulatory actions to OIRA for review prior to issuing a significant regulatory action.

Subsection (b) of section 3523 permits agencies to consult with OIRA prior to submitting their significant regulatory action for review.

Subsection (c) of section 3523 sets requirements for agencies to submit certain information to OIRA when a significant regulatory action is submitted for review.

Subsection (d) of section 3523 establishes deadlines for OIRA to complete its review of a submitted significant regulatory action.

Subsection (e) of section 3523 requires OIRA to review a submitted significant regulatory action for compliance with legal requirements and long-standing regulatory principles established in Executive Order 12866.

Subsection (f) of section 3523 requires OIRA to conduct a review of the quality of the significant regulatory action to determine whether the analysis was meaningful and complete.

Subsection (g) of section 3523 requires OIRA to conduct an inter-agency review of the submitted regulatory action and to allow potentially affected agencies time to review the regulatory action.

Subsection (h) of section 3523 requires OIRA to invite the issuing agency to meetings with the public and to share written comments with the issuing agency and online.

Subsection (i) of section 3523 requires OIRA to provide the results of the review in writing to the issuing agency and requires the issuing agency to provide OIRA with a redline of any changes that were made during the review period.

§ 3524. Public disclosure of regulatory review

Subsection (a) of section 3524 requires OIRA to publish certain information pertaining to the review of the regulations online within three days of completing the review of a significant regulatory action.

Subsection (b) of section 3524 requires, to the extent practicable, information provided to the public is in plain language.

Section (b) makes technical and conforming amendments.

Section (c) adds definitions to section 3502 of title 44 United States Code.

Section (d) requires OIRA to issue required guidance within 180 days of enactment.

EXPLANATION OF AMENDMENTS

No member offered an amendment to H.R. 1009 during the Committee's consideration of the bill.

COMMITTEE CONSIDERATION

On February 14, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 1009, by recorded vote of 23 to 16, a quorum being present.

ROLL CALL VOTES

There was one recorded vote during consideration of H.R. 1009:

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
 115TH CONGRESS
 RATHO 24-18
 ROLL CALL

Vote on: H.R. 1009 – Report to House Favorably

Date: 2-14-17

Vote #: 7

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) <i>(Chairman)</i>	X			MR. CUMMINGS (MD) <i>(Ranking)</i>		X	
MR. DUNCAN (TN)	X			MRS. MALONEY (NY)		X	
MR. ISSA (CA)	X			MS. NORTON (DC)		X	
MR. JORDAN (OH)	X			MR. CLAY (MO)		X	
MR. SANFORD (SC)	X			MR. LYNCH (MA)		X	
MR. AMASH (MI)	X			MR. COOPER (TN)			
MR. GOSAR (AZ)	X			MR. CONNOLLY (VA)		X	
MR. DesJARLAIS (TN)	X			MS. KELLY (IL)		X	
MR. GOWDY (SC)				MS. LAWRENCE (MI)		X	
MR. FARENTHOLD (TX)	X			MS. WATSON-COLEMAN (NJ)		X	
MS. FOXX (NC)	X			MS. PLASKETT (VI)		X	
MR. MASSIE (KY)	X			MS. DEMINGS (FL)		X	
MR. MEADOWS (NC)	X			MR. KRISHNAMOORTHY (IL)		X	
MR. DeSANTIS (FL)	X			MR. RASKIN (MD)		X	
MR. ROSS (FL)	X			MR. WELCH		X	
MR. WALKER (NC)	X			MR. CARTWRIGHT		X	
MR. BLUM (IA)	X			MR. DeSAULNIER		X	
MR. HICE (GA)	X			<i>(Vacancy)</i>			
MR. RUSSELL (OK)	X						
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						
MR. COMER (KY)	X						
MR. MITCHELL (MI)	X						

Roll Call Totals: Ayes: 23 Noes: 16 Present:

Passed: X Failed:

CORRESPONDENCE

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FIFTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (205) 225-5074
MINORITY (202) 225-5051
<http://oversight.house.gov>

February 16, 2017

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

On February 14, 2017, the Committee on Oversight and Government Reform ordered reported without amendment H.R. 1009, the "OIRA Insight, Reform, and Accountability Act" by a vote of 23 to 16. The bill was referred primarily to the Committee on Oversight and Government Reform, with an additional referral to the Committee on the Judiciary.

I ask that you allow the Committee on the Judiciary to be discharged from further consideration of the bill so that it may be scheduled by the Majority Leader. This discharge in no way affects your jurisdiction over the subject matter of the bill, and it will not serve as precedent for future referrals. In addition, should a conference on the bill be necessary, I would support your request to have the Committee on the Judiciary represented on the conference committee. Finally, I would be pleased to include this letter and any response in the bill report filed by the Committee on Oversight and Government Reform, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Thank you for your consideration of my request.

Sincerely,



Jason Chaffetz
Chairman

cc: The Honorable Paul D. Ryan, Speaker
The Honorable Elijah E. Cummings
The Honorable Thomas J. Wickham, Parliamentarian

BOB GOODLATTE, Virginia
CHAIRMAN

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
STEVE KING, Iowa
TREVY FRANKS, Arizona
LOUIE GOMMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREV GOWDY, South Carolina
RUIZ B. LARRAZO, Idaho
BLAKE FARENTHOLD, Texas
DOLU COLLINS, Georgia
RON DESANTIS, Florida
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
MKE BISHOP, Michigan
MARTHA ROBY, Alabama
MATT GAETZ, Florida
MIKE JOHNSON, Louisiana
ANDY BIGGS, Arizona

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951
<http://www.house.gov/judiciary>

February 23, 2017

JOHN CONYERS, JR., Michigan
RANKING MEMBER

JERROLD NADLER, New York
ZOE LOFGREN, California
SHERA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
JUDY CHU, California
TED DEUTCH, Florida
LUSY V. GUTIERREZ, Illinois
KAREN BASS, California
CEPRIC J. RICHMOND, Louisiana
HAKHEEM S. JEFFRIES, New York
DAVID CICILLINE, Rhode Island
ERIC SWALWELL, California
TED LEEU, California
JAMIE RASKIN, Maryland
PRAMILA JAYAPAL, Washington

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Chaffetz,

I write with respect to H.R. 1009, the "OIRA Insight, Reform, and Accountability Act." As a result of your having consulted with us on provisions within H.R. 1009 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I forego any further consideration of this bill so that it may proceed expeditiously to the House floor for consideration.

The Judiciary Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 1009 at this time, we do not waive any jurisdiction over subject matter contained in this or similar legislation and that our committee will be appropriately consulted and involved as this bill or similar legislation moves forward so that we may address any remaining issues in our jurisdiction. Our committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H.R. 998 and would ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during floor consideration of H.R. 1009.

Sincerely,



Bob Goodlatte
Chairman

cc: The Honorable John Conyers, Jr.
The Honorable Elijah Cummings
The Honorable Paul Ryan, Speaker
The Honorable Thomas Wickham, Jr., Parliamentarian

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill codifies President Clinton’s executive order 12866, which establishes the Unified Agenda, requires annual regulatory plans, establishes requirements for centralized regulatory review, and mandates stakeholder consultation with the public and state, local, and tribal governments. As such, this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee’s performance goal or objective of this bill is to require the Administrator of the Office of Information and Regulatory Affairs to review regulations, and for other purposes.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 2(c)(5) of rule XIII, no provision of this bill establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. The Committee has requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office. The Committee believes that enactment of this bill would result in no net effect on direct spending over the 2018–2022 period. Assuming the appropriation of authorized amounts, the Committee estimates that the legislation would also have a discretionary cost of less than \$5 million over the 2018–2022 period.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office. The Committee believes that this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 44, UNITED STATES CODE

* * * * *

CHAPTER 35—COORDINATION OF FEDERAL INFORMATION POLICY

SUBCHAPTER I—FEDERAL INFORMATION POLICY

Sec.
3501. Purposes.

* * * * *

3522. *Office of Information and Regulatory Affairs Regulatory Working Group; regulatory plan; Unified Agenda.*

3523. *OIRA coordinated review of significant regulatory actions.*

3524. *Public disclosure of regulatory review.*

* * * * *

SUBCHAPTER I—FEDERAL INFORMATION POLICY

* * * * *

§ 3502. Definitions

As used in this subchapter—

(1) the term “agency” means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include—

(A) the Government Accountability Office;

(B) Federal Election Commission;

(C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or

(D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities;

(2) the term “burden” means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including the resources expended for—

(A) reviewing instructions;

(B) acquiring, installing, and utilizing technology and systems;

(C) adjusting the existing ways to comply with any previously applicable instructions and requirements;

(D) searching data sources;

(E) completing and reviewing the collection of information; and

(F) transmitting, or otherwise disclosing the information;

(3) the term “collection of information”—

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1);

(4) the term “Director” means the Director of the Office of Management and Budget;

(5) the term “independent regulatory agency” means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;

(6) the term “information resources” means information and related resources, such as personnel, equipment, funds, and information technology;

(7) the term “information resources management” means the process of managing information resources to accomplish agency missions and to improve agency performance, including through the reduction of information collection burdens on the public;

(8) the term “information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information;

(9) the term “information technology” has the meaning given that term in section 11101 of title 40 but does not include national security systems as defined in section 11103 of title 40;

(10) the term “person” means an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision;

(11) the term “practical utility” means the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion;

(12) the term “public information” means any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public;

(13) the term “recordkeeping requirement” means a requirement imposed by or for an agency on persons to maintain specified records, including a requirement to—

(A) retain such records;

(B) notify third parties, the Federal Government, or the public of the existence of such records;

(C) disclose such records to third parties, the Federal Government, or the public; or

(D) report to third parties, the Federal Government, or the public regarding such records[; and];

(14) the term “penalty” includes the imposition by an agency or court of a fine or other punishment; a judgment for mone-

tary damages or equitable relief; or the revocation, suspension, reduction, or denial of a license, privilege, right, grant, or benefit[.];

(15) the term “Administrator” means, unless otherwise indicated, the Administrator of the Office of Information and Regulatory Affairs;

(16) the term “economically significant regulatory action” means any regulatory action described under subparagraph (A) or (B) of paragraph (21);

(17) the term “OIRA” means the Office of Information and Regulatory Affairs;

(18) the term “regulation”—

(A) means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency; and

(B) does not include such a statement if—

(i) issued in accordance with the formal rulemaking provisions of sections 556 and 557 of title 5;

(ii) the statement pertains to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of nondefense articles and services;

(iii) the statement is limited to an agency organization, management, or personnel matters; or

(iv) the statement is exempted as a regulation by the Administrator;

(19) the term “regulation identifier number” means a unique identification code for regulations, which is designed to assist tracking regulations through the course of development;

(20) the term “regulatory action” means any substantive action by an agency normally published in the Federal Register that promulgates or is expected to lead to the promulgation of a final regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking;

(21) the term “significant regulatory action” means any regulatory action that is likely to result in a regulation that may—

(A) have an annual effect on the economy of \$100,000,000 or more;

(B) adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(C) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(D) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients therein; or

(E) raise novel legal or policy issues arising out of legal mandates;

(22) the term “small business” has the meaning given the term “small-business concern” in section 3 of the Small Business Act (15 U.S.C. 632); and

(23) the term “State” means each of the several States, the District of Columbia, each territory or possession of the United States, and each federally recognized Indian tribe.

* * * * *

§ 3522. Office of Information and Regulatory Affairs Regulatory Working Group; regulatory plan; Unified Agenda

(a) REGULATORY WORKING GROUP.—

(1) ESTABLISHMENT; MEMBERS.—The Administrator of the Office of Information and Regulatory Affairs shall convene a working group to be known as the Regulatory Working Group, whose members shall consist of the following:

(A) The Administrator.

(B) Representatives selected by the head of each agency that the Administrator determines to have significant domestic regulatory responsibility.

(C) Other executive branch officials as designated by the Administrator.

(2) CHAIR.—The Chair of the Regulatory Working Group shall be the Administrator, who shall periodically advise Congress on the activities of the Regulatory Working Group.

(3) PURPOSE.—The Regulatory Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues, including, at a minimum—

(A) the development of innovative regulatory techniques;

(B) the methods, efficacy, and utility of comparative risk assessment in regulatory decisionmaking; and

(C) the development of streamlined regulatory approaches for small businesses and other entities.

(4) MEETINGS.—The Regulatory Working Group shall meet not less than quarterly and may meet as a whole or in subgroups of members with an interest in particular issues or subject areas.

(5) ANALYTICAL STUDIES.—To inform the discussion of the Regulatory Working Group, the Regulatory Working Group may request analytical studies and reports by the Office of Information and Regulatory Affairs, the Administrative Conference of the United States, or any other agency.

(b) REGULATORY PLAN.—

(1) IN GENERAL.—

(A) DEADLINE FOR AND DESCRIPTION OF REGULATORY PLAN.—Not later than June 1 of each year, the head of each agency shall approve and submit to the Administrator a regulatory plan that includes each significant regulatory action that the agency reasonably expects to issue in proposed or final form in the following fiscal year or thereafter and the retrospective review described in paragraph (2). The regulatory plan shall also contain, at a minimum, the following:

(i) A statement of the regulatory objectives and priorities of the agency.

(ii) A summary of each planned significant regulatory action including, to the extent possible, alter-

natives to be considered and preliminary estimates of the anticipated costs and benefits of such action.

(iii) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order.

(iv) A statement of the need for each such action and, if applicable, how the action will reduce risk to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to any other risk within the jurisdiction of the agency.

(v) The schedule for each such action, including a statement of any applicable statutory or judicial deadline.

(vi) The name, email address, and telephone number of a knowledgeable agency employee the public may contact for additional information about each such action.

(B) CIRCULATION OF REGULATORY PLAN.—Not later than 10 days after receiving the regulatory plan under subparagraph (A), the Administrator shall circulate the regulatory plan to any other agency the Administrator determines may be affected by the plan.

(C) AGENCY NOTIFICATION TO OIRA OF CONFLICTING SIGNIFICANT REGULATORY ACTIONS.—The head of an agency shall promptly notify the Administrator in writing if any planned significant regulatory action in the regulatory plan of another agency may conflict with the policy or action taken or planned by that agency. The Administrator shall forward any notification received under this subparagraph to the other agency involved.

(D) NOTIFICATION OF CONFLICTING SIGNIFICANT REGULATORY ACTIONS.—The Administrator shall notify the head of an agency in writing if any planned significant regulatory action conflicts with any policy or action taken or planned by another agency.

(E) REQUIREMENT TO PUBLISH IN UNIFIED AGENDA.—Each regulatory plan submitted by the head of an agency under subparagraph (A) shall be included in the October publication of the Unified Agenda described under subsection (c).

(2) RETROSPECTIVE REVIEW.—

(A) LIST OF OUTDATED REGULATIONS.—The head of each agency shall include in the regulatory plan submitted under paragraph (1)(A) a list of regulations that have been identified by the agency (including any comments submitted to the agency) as unjustified, unnecessary, duplicative of other regulations or laws, inappropriately burdensome, or otherwise recommended for removal.

(B) DESCRIPTION OF RETROSPECTIVE REVIEW.—The head of each agency shall include in the regulatory plan submitted under paragraph (1)(A) a description of any program or other effort to review existing regulations to determine whether any such regulations should be modified or eliminated in order to increase the effectiveness in achieving the regulatory objectives of the agency or to reduce the

burden of regulations. The agency shall include any statutory requirements that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(C) *OIRA COORDINATED REVIEW.*—The Administrator shall work with interested entities and agencies, including through the processes established under subsection (d), to review the list of regulations identified under subparagraph (A) and such entities may assist OIRA and the agencies with identifying regulations or groups of regulations that—

- (i) impose significant or unique burdens on governmental entities and that are no longer justified; or
- (ii) affect a particular group, industry, or sector of the economy.

(c) *UNIFIED AGENDA.*—

(1) *SUBMISSION OF REGULATIONS UNDER DEVELOPMENT OR REVIEW.*—Not later than April 1 and October 1 of each year, the head of each agency shall submit to the Administrator an agenda of each regulation under development or review in accordance with any guidance issued under this section. Each agenda shall include, to the extent practicable, the following:

(A) For each regulation—

- (i) a regulation identifier number;
- (ii) a brief summary of the regulation;
- (iii) a citation to the legal authority to issue the regulation;
- (iv) any legal deadline for the issuance of the regulation;
- (v) the name and phone number for a knowledgeable agency employee; and
- (vi) the stage of review for issuing the regulation.

(B) For each regulation expected to be promulgated within the following 18 months—

- (i) a determination of whether the regulation is expected to be a significant regulatory action or an economically significant regulatory action; and
- (ii) any available analysis or quantification of the expected costs or benefits.

(C) For any regulation included in the immediately previous agenda, an explanation of why the regulation is no longer included.

(2) *PUBLICATION OF UNIFIED AGENDA REQUIRED.*—Not later than April 15 and October 15 of each year, the Administrator shall compile and publish online each agenda received under paragraph (1) (to be known as the Unified Agenda).

(3) *GUIDANCE.*—

(A) *IN GENERAL.*—The Administrator shall issue guidance for agencies on the manner of submission under this subsection and on meeting the requirements of this subsection, including a standard definition for each stage of review and any other definition that would assist the public in understanding the different terms used by agencies to submit the agenda required under paragraph (1).

(B) *UPDATES.*—The Administrator shall periodically review compliance with this section and issue guidance or recommendations to assist agencies in complying with this section.

(d) *COORDINATION WITH STATE, LOCAL, AND TRIBAL GOVERNMENTS AND THE PUBLIC.*—

(1) *STATE, LOCAL, AND TRIBAL GOVERNMENTS.*—The Administrator shall meet not less than quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those government entities.

(2) *PUBLIC.*—The Administrator shall periodically convene conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

(e) *BEST PRACTICES.*—The Administrator shall, in consultation with the Regulatory Working Group and the entities described in subsection (d), periodically develop advice and guidance for agencies on best practices of the development of regulations.

§ 3523. OIRA coordinated review of significant regulatory actions

(a) *OIRA REVIEW.*—

(1) *IN GENERAL.*—The Administrator shall conduct a Governmentwide coordinated review of significant regulatory actions to ensure that such regulations are consistent with applicable law and that a regulatory action by one agency does not conflict with a policy or action taken or planned by another agency.

(2) *PERIODIC AGENCY SUBMISSION OF PLANNED REGULATORY ACTIONS.*—The head of each agency shall provide to the Administrator, at such time and in such a manner as determined by the Administrator, a list of each planned regulatory action with an identification of whether each such regulatory action is a significant regulatory action.

(3) *REVIEW OF SIGNIFICANT REGULATORY ACTION REQUIRED.*—

(A) *IN GENERAL.*—The Administrator shall make a determination of whether any planned regulatory action submitted under this section is a significant regulatory action and shall review each such significant regulatory action in accordance with this section.

(B) *NOT SUBJECT TO REVIEW.*—Any planned regulatory action determined by the Administrator not to be a significant regulatory action is not subject to review under this section.

(C) *NOTIFICATION REQUIRED.*—Not later than 10 days after a planned regulatory action has been determined to be a significant regulatory action, the Administrator shall notify the head of the relevant agency of such determination.

(4) *WAIVER OF REVIEW FOR SIGNIFICANT REGULATORY ACTION.*—The Administrator—

(A) may waive review of any planned regulatory action designated as a significant regulatory action; and

(B) shall publish online a detailed written explanation of any such waiver.

(b) *AGENCY CONSULTATION WITH OIRA.*—

(1) *IN GENERAL.*—An agency may consult with OIRA at any time on any regulatory action.

(2) *REGULATION IDENTIFIER NUMBER.*—The head of an agency shall make every effort to obtain a regulation identifier number for the regulatory action that is the subject of the consultation before consulting with OIRA.

(3) *CONSULTATION INFORMATION REQUIRED.*—If the head of an agency is unable to obtain the regulation identifier number as described in paragraph (2), the head of the agency shall provide the regulation identifier number to OIRA as soon as the number is obtained with a list of any previous interactions with OIRA relating to the regulatory action that is the subject of the consultation.

(c) *AGENCY SUBMISSION OF SIGNIFICANT REGULATORY ACTION FOR REVIEW.*—Before issuing a significant regulatory action, the head of an agency shall submit the significant regulatory action to the Administrator for review and shall include the following:

(1) The text of the significant regulatory action.

(2) A detailed description of the need for the significant regulatory action.

(3) An explanation of how the significant regulatory action will meet the identified need.

(4) An assessment of potential costs and benefits of the significant regulatory action.

(5) An explanation of the manner in which the significant regulatory action is consistent with a statutory mandate and avoids undue interference with State, local, and tribal government functions.

(6) For an economically significant regulatory action, if any of the following was developed during the decisionmaking process of the agency:

(A) An assessment of and quantification of costs and benefits of the significant regulatory action.

(B) An assessment of and quantification of costs and benefits of potentially effective and feasible alternatives, including any underlying analysis.

(C) An explanation of why the planned significant regulatory action is preferable to any identified potential alternatives.

(d) *DEADLINES FOR REVIEW.*—

(1) *REVIEW COORDINATION.*—To the extent practicable, the head of each agency shall work with the Administrator to establish a mutually agreeable date on which to submit a significant regulatory action for review.

(2) *EXPEDITED REVIEW.*—When an agency is obligated by law to issue a significant regulatory action before complying with the provisions of this section, the head of the agency shall notify the Administrator as soon as possible. To the extent practicable, OIRA and the agency shall comply with the provisions of this section.

(3) *10-DAY REVIEW.*—In the case of a significant regulatory action that is a notice of inquiry, advance notice of proposed rulemaking, or other preliminary regulatory action prior to a notice of proposed rulemaking, within 10 business days after the date

of submission of the such action to the Administrator, OIRA shall complete the review.

(4) 90-DAY REVIEW.—

(A) *IN GENERAL.*—Except as provided in subparagraph (B), for any other significant regulatory action not described in paragraph (3), within 90 days after the date of submission of the action, OIRA shall complete the review.

(B) *EXCEPTION 45-DAY REVIEW.*—If OIRA has previously reviewed the significant regulatory action described in subparagraph (A) and, since that review, there has been no material change in the facts and circumstances upon which the significant regulatory action is based, OIRA shall complete the review within 45 days after submission of the action.

(5) *EXTENSION.*—Any review described under this subsection may be extended for any number of additional 30-day periods upon written request by the Administrator or the head of the agency. Such request shall be granted unless the nonrequesting party denies the request in writing within 5 days after receipt of the request for extension.

(6) *RETURN.*—If the Administrator determines OIRA is unable to complete a review within the time period described under this subsection, the Administrator may return the draft of the significant regulatory action to the agency with a written explanation of why OIRA was unable to complete the review and what additional information, resources, or time OIRA would need to complete the review.

(7) *WITHDRAWAL.*—An agency may withdraw the regulatory action from OIRA review at any time prior to the completion of the review.

(e) *COMPLIANCE REVIEW.*—The Administrator shall review any significant regulatory action submitted under subsection (c) to determine the extent to which the agency—

(1) identified the problem that the significant regulatory action is designed to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action);

(2) assessed the significance of the problem the regulatory action is designed to address;

(3) examined whether existing regulations or laws have created or contributed to the problem that the regulatory action is designed to correct and whether those regulations or laws should be modified to achieve the intended goal more effectively;

(4) identified and assessed available alternatives to direct regulation, including providing economic incentives to encourage desired behaviors, such as user fees or marketable permits, or providing information upon which choices can be made by the public;

(5) considered, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within the jurisdiction of the agency;

(6) designed the regulatory action to be the most cost-effective manner to achieve the regulatory objective;

(7) considered incentives for innovation, consistency, predictability, flexibility, distributive impacts, equity, and the costs of

enforcement and compliance by the Government, regulated entities, and the public;

(8) assessed costs and benefits of the regulatory action and made a reasoned determination that the benefits justify the costs;

(9) used the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the regulatory action;

(10) identified and assessed alternative forms of regulation and, to the extent feasible, specified performance objectives rather than behavior or manner of compliance;

(11) sought comments and suggestions from appropriate State, local, and tribal officials on any aspect of the regulatory action that might significantly or uniquely affect those governmental entities;

(12) assessed the effects of the regulatory action on State, local, and tribal governments, including specifically the availability of resources to carry out the regulatory action, and minimized the burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives;

(13) harmonized the regulatory action with the regulatory and other functions of State, local, and tribal governments;

(14) avoided conflicts with or duplication of other existing regulations;

(15) tailored the regulatory action to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, and taking into account, among other things and to the extent practicable, the costs of cumulative regulations;

(16) drafted the regulatory action to be simple and easy to understand, and minimized the potential for uncertainty and litigation arising from such uncertainty;

(17) met all applicable Executive order requirements;

(18) met all applicable statutory requirements; and

(19) complied with all applicable guidance.

(f) QUALITY REVIEW.—For any significant regulatory action submitted under subsection (c), OIRA shall assess the extent to which the agency conducted a meaningful and complete analysis of each of the factors described in subsection (e), considering best practices, methods observed through reviewing other agencies, comments from stakeholders, and other resources that may improve the quality of the process.

(g) INTERAGENCY CONSULTATION.—The Administrator shall identify each agency potentially affected, interested, or otherwise likely to provide valuable feedback on a significant regulatory action submitted under subsection (c) and facilitate a meaningful interagency consultation process. The Administrator shall—

(1) provide each identified agency with a copy of the draft regulatory action;

(2) allow each identified agency to review the draft regulatory action for a sufficient period of time, not less than 10 business days;

- (3) solicit written comments from such agency and provide those written comments to the submitting agency; and
- (4) as appropriate, facilitate conversations between agencies.
- (h) **STAKEHOLDER CONSULTATION.**—For all substantive communications between OIRA and individuals not employed by the executive branch regarding a regulatory action submitted to the Administrator for review under this section, the Administrator shall—
 - (1) invite the issuing agency to any meeting between OIRA personnel and individuals not employed by the executive branch;
 - (2) not later than 10 business days after receipt of any written communication submitted by any individual not employed by the executive branch, make such communications available to the public online; and
 - (3) make available to the public online a log, which shall be updated daily, of the following information:
 - (A) The status of each regulatory action.
 - (B) A copy of any written communication submitted by any person not employed by the executive branch.
 - (C) The dates and names of persons involved in any substantive oral communication and the subject matter discussed during such communication.

(i) **CONCLUSION OF REVIEW.**—

- (1) **PROVISION TO AGENCY.**—Upon completion of the review, the Administrator shall provide the head of an agency with the results of the OIRA review in writing, including a list of every standard, Executive order, guidance document, and law reviewed for compliance and the results for each.
- (2) **CHANGES DURING REVIEW PERIOD.**—Within 24 hours after the conclusion of the OIRA review under this section, the head of the submitting agency shall provide the Administrator with a redline of any changes the agency made to the regulatory action during the review period. To the extent practicable, the agency shall identify any change made at the suggestion or recommendation of any other agency, member of the public, or other source. To the extent practicable, the agency should identify the source of any such change.

§ 3524. Public disclosure of regulatory review

(a) **IN GENERAL.**—On the earlier of 3 days after OIRA completes the review of any agency significant regulatory action under section 3523, the date on which such agency publishes the regulatory action in the Federal Register, or the date on which the agency announces a decision not to publish the regulatory action, the Administrator shall make available to the public online—

- (1) all information submitted by an agency under section 3523;
- (2) the results of the review provided to the agency under section 3523;
- (3) the redline of any changes made by the agency during the course of the review provided under section 3523(i)(2); and
- (4) all documents exchanged between OIRA and the agency during the review.

(b) PLAIN LANGUAGE REQUIREMENT.—All information provided to the public shall, to the extent practicable, be in plain, understandable language.

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MINORITY VIEWS

H.R. 1009, THE OIRA INSIGHT, REFORM, AND ACCOUNTABILITY ACT

Committee Democrats strongly oppose H.R. 1009. H.R. 1009 would codify the role of the Office of Information and Regulatory Affairs (OIRA) in reviewing significant agency rulemakings. The bill includes many of the provisions of E.O. 12866, which was issued by President Clinton in 1993. However, the bill also includes significant differences from E.O. 12866.

Independent agencies are not currently required to comply with E.O. 12866, but the bill would subject such agencies to review by OIRA. A primary concern with subjecting independent agencies to OIRA review of rulemakings is that those agencies are designed to be independent and therefore not subject to political review of their regulatory actions by the White House.

E.O. 12866 requires agencies to provide information to OIRA “unless prohibited by law,” including estimates of the proposed costs and benefits of a rule. The bill does not include this limitation. There are many environmental, worker safety, and public health statutes that do not permit the use of cost-benefit analysis when setting public health standards. The majority has not explained how this bill would or would not impact those laws.

The bill would enhance the stature of OIRA in the rulemaking process in a manner that undercuts the role of agencies. Congress delegates the authority to promulgate rules to regulatory agencies, not to OIRA.

H.R. 1009 would provide OIRA with the exclusive authority to determine whether rulemakings are “significant” and therefore subject to OIRA review. Under E.O. 12866, agencies decide whether a regulatory action is significant. If an agency determines a rulemaking is not significant, OIRA has ten days to disagree with that determination or the rule is not subject to OIRA review.

Under E.O. 12866, OIRA is required to conduct its review of agency rulemakings within 90 days, and that period can be extended once for 30 days. This bill would allow OIRA 90 days to review rules and would allow OIRA to extend its review of rulemakings for any number of additional 30-day periods upon written request by the Administrator or the head of the agency. The bill also would provide that [s]uch request shall be granted unless the nonrequesting party denies the request in writing within 5 days after receipt of the request for extension. Allowing OIRA an

unlimited number of extensions could lead to political interference through delays in rulemakings.

ELIJAH E. CUMMINGS,
Ranking Member.

