



DAVID VS. GODZILLA, OIRA AND THE FEDERAL AGENCIES

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Chairman Meadows, Ranking Member Connolly, and members of the committee, thank you for inviting me to testify on ways to improve transparency and accountability at the Office of Information and Regulatory Affairs (OIRA).

This small agency, established in 1980 by President Carter to “regulate the regulators” and to give “OMB final word on many of the regulations issued by our government,”¹ has largely failed to achieve either goal. The myth persists that OIRA is a “little-known but extraordinarily powerful” agency that has been a “bottleneck” for protective regulations.² The data, however, simply do not support this notion.

There are three main issues that I will cover in my testimony:

1. Other federal agencies, and their associated rulemaking, have grown manyfold in the last four decades, but OIRA staffing has shrunk in the same time period, rendering oversight by OIRA spotty, at best. OIRA cannot perform its duties effectively in this imbalanced state.
2. OIRA also lacks necessary expertise in one key area.
3. Recommendations for reform can help rebalance the relationship between OIRA, stakeholders, and federal agencies, while improving government accountability and transparency in rulemaking.

1. Jimmy Carter, “Paperwork Reduction Act of 1980 Remarks on Signing H.R. 6410 Into Law,” The American Presidency Project, December 11, 1980.

2. Rena Steinzor, “A Solution to Regulatory Delay: End Centralized White House Regulatory Review,” *Huffpost Green*, *Huffington Post*, October 10, 2013.

THE GROWING IMBALANCE BETWEEN OIRA AND OTHER FEDERAL AGENCIES

Employment in federal regulatory agencies almost doubled between 1980 and 2016, from 146,000 employees to 280,000.³ When it was established in 1981, OIRA had 77 staff members, but in 2013, it had only 38.⁴ Today, most federal regulations are promulgated without OIRA review. In the decade ending in 2014, regulatory agencies issued more than 37,000 regulations, yet 92 percent of them were not reviewed by OIRA.⁵ For the typically 8 percent of rulemakings OIRA reviews, its primary job is to evaluate the content and quality of regulatory impact analyses, in particular the estimates of benefits and costs of a proposed regulation. Of the roughly 3,000 major rules that OIRA reviewed between 2004 and 2014, however, only 116 included estimates of both benefits and costs.⁶ The absence of such important information makes OIRA's job difficult, to say the least.

Thus, there is little factual basis for the myth of OIRA as a David holding back a regulatory Godzilla.

LACK OF AREA EXPERTISE

While OIRA has a generally excellent staff of professionals, a key weakness is its lack of expertise in risk assessment. The vast majority of regulations, both by number and costs on the economy, are risk related. These include worker safety, food safety, environmental, and transportation rules. In order to calculate the potential benefits of any rule, it is first necessary to have an estimate of the risk that the agency is attempting to manage. Risk includes the probability of something going wrong and predicting the negative outcome, which might be injury, illness, or death. Next, the agency needs to evaluate different regulatory options that would reduce those risks.

For regulations focused on risk reduction, federal agencies employ risk assessors to estimate the size of the risk and the expected risk reduction for regulatory options. These analyses are often long and fairly complex but not necessarily accurate. Unfortunately, it is common for risk analyses to be heavily biased, showing much higher risks or much greater risk reduction than is actually achieved.⁷ For example, the journal *Risk Analysis* recently published an article suggesting that the benefits of reducing particulate matter (PM) may be negligible.⁸ Nevertheless, EPA continues to regulate PM to lower and lower levels.⁹ Alternatively, many of these analyses leave out increases in risk (i.e., risk/risk trade-offs) that are a natural result of some regulations. For example, lowering the tolerance for mercury in fish might reduce one tiny risk but also might cause some consumers to switch to meats that present other health risks.¹⁰

When agencies bias risk estimates upward, or risk mitigation estimates downward, the benefits that they estimate will be biased upward. This means both that the regulatory impact analysis is flawed and that OMB's annual *Report to Congress on the Benefits and Costs of Federal Regulations* is inaccurate. Without on-staff risk assessors, OIRA is not in a position to review risk assessments, meaning it is unable to ascertain the accuracy of benefits estimates.

3. Carter, "Paperwork Reduction Act of 1980 Remarks"; Susan Dudley and Melinda Warren, "Regulators' Budget Increases Consistent with Growth in Fiscal Budget" (St. Louis and Washington, DC: Weidenbaum Center at Washington University and Regulatory Studies Center at George Washington University, May 19, 2015).

4. Curtis W. Copeland, "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," Congressional Research Service, June 9, 2009; Richard Williams and James Broughel, "OIRA Quality Control Is Missing for Most Regulations," Mercatus Center at George Mason University, October 1, 2014, <http://mercatus.org/publication/oira-quality-control-missing-most-regulations>.

5. Williams and Broughel, "OIRA Quality Control Is Missing for Most Regulations."

6. Ibid.

7. Office of Management and Budget, "Current Regulatory Issues in Risk Assessment and Risk Management," Regulatory Program of the United States, April 1, 1990–March 31, 1991, 13–26.

8. Louis Anthony Cox, "Miscommunicating Risk, Uncertainty, and Causation: Fine Particulate Air Pollution and Mortality Risk as an Example," *Risk Analysis* 32, no. 5 (2012): 765–67. For another example of a critique of benefit estimates, see Anne Smith, *Summary and Critique of the Benefits Estimates in the RIA for the Ozone NAAQS Reconsideration* (Washington, DC, NERA Economic Consulting, July 22, 2011).

9. Environmental Protection Agency, "Particulate Matter: Regulatory Actions," accessed March 10, 2016.

10. Richard Williams and Kimberly Thompson, "Integrated Analysis: Combining Risk and economic Assessments While Preserving the Separation of Powers," *Risk Analysis* 24, no. 6 (2004).

PROPOSED REMEDIES

Several reforms can help rebalance the relationship between OIRA and federal agencies to improve regulatory policy.

First, create incentives that make the content and quality of regulatory impact analyses important to the agencies. The *Unified Agenda of Regulatory and Deregulatory Actions*, which currently includes only a title and a brief description of what the agency intends to do, should be reformed to be more transparent and include the type of information for proposed rules that agencies currently provide for final rules. For example, just one final rule the EPA published in the *Unified Agenda* had sections on statement of need, summary of legal basis, alternatives, anticipated benefits and costs, and risks.¹¹ Yet proposed rules only get a title and a short abstract.¹² This is precisely the kind of information that should be in the *Unified Agenda* for proposed rules. This material would provide clearer information to the public on what the agency knows and the types of information it needs to refine its understanding of the problem, potential outcomes, and options.

A stronger incentive would be to require agencies to publish preliminary regulatory impact analyses for public comment before a proposed rule is published for notice and comment. Research from the Mercatus Center at George Mason University indicates that going a step further and establishing a statutory mandate for conducting regulatory impact analyses could significantly improve regulatory impact analyses and their use.¹³ Any of these options can contribute to a better-informed agency, a better-informed OIRA, and a better-informed public.

Second, Congress should consider changes in OIRA's logistical authority. With the volume of regulations on the books and in process at federal agencies, there is a great need for better information on which rulemakings will affect which industries and when. Currently, there is no government service providing the public with a means to easily match rulemakings with regulated parties. OIRA could create online calendars by industry that would track compliance dates for individual rules, along with links to the small business compliance guides. This would begin to show where agencies have compliance dates for specific industries "bunched up," much as midnight regulations bunch up at the end of presidential administrations.¹⁴ Transparency and accountability could be improved if all information associated with regulations, including the *Unified Agenda*, notices, proposed rules, and final rules, were searchable by industry and accessible through timely updates to RSS feeds.

Finally, OIRA could operate as "flow control" for industries by coordinating amongst all federal regulatory agencies to ensure that compliance dates are evenly spread out by industry.

CONCLUSION

OIRA is no longer any match for the huge number of agencies and regulations that they issue. Restoring OIRA to its original strength, adding risk assessment professionals, and tasking it with ensuring that multiple agency rules do not bog down compliance when agencies bunch up rules can help to ensure that the federal government only issues rules informed by sound analysis and that no industries face compliance dates that are overwhelming.

Thank you, and I welcome your questions.

11. Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, 40 C.F.R. § 770 (2013).

12. Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, 40 C.F.R. § 721 (2015).

13. Jerry Ellig and Rosemarie Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2013).

14. See articles on midnight regulations at "Midnight Regulations," Mercatus Center at George Mason University, <http://mercatus.org/research/midnight-regulations>.

APPENDIX: POTENTIAL QUESTIONS ABOUT FEDERAL REGULATIONS FROM REGULATED PARTIES

IMPROVING THE IMBALANCE BETWEEN OIRA AND OTHER FEDERAL AGENCIES

One area that has been a consistent concern of Congress has been the effect of regulations on small businesses. That concern led to the Regulatory Flexibility Act of 1980 and its expansion, the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA). Small businesses and start-ups form a large part of the creative engine of the economy and are major employers (55 percent of all jobs), yet they are the least engaged in the regulatory process.¹⁵ This is largely due to necessity as they cannot afford expensive lawyers to monitor the *Federal Register* or meet with agencies to express concerns. Some of the questions an owner of a small business may consider are addressed in the appendix. Enhancing OIRA will help with some of these issues.

Think about the questions an owner of a small business might ask when first encountering the idea that the business must comply with federal regulations.

1. What regulations are already on the books that I have to comply with?

If you start reading the *Code of Federal Regulations* today, March 15, 2016, you should be finished about the same time in 2019 (an estimated 5,727 hours of reading over 100 million words).¹⁶ The regulations are found in 226 books.¹⁷

2. How will I know what regulations are coming up that are final or, if I do have the time, can comment on?

On average, you will have to read 70,000–80,000 pages of often dense legalize in the *Federal Register* each year.

3. If I do find something that will affect my business, how long will I have to read a proposed rule and prepare a comment on it?

Agencies take years to prepare regulations that can run to thousands of pages in length, but you will have only 30 to 60 days to get your comment in.¹⁸ Regulations may contain complex risk assessments and regulatory impact analyses, as well as lots of supporting documentation that you may need to understand in order to comment effectively. The federal government itself suggests that you write a “constructive, information rich comment that clearly communicates and supports its claims.”¹⁹ You should, of course, understand the laws and Executive Orders that the agency is operating under, including the authorizing statute, Executive Order 12866, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement and Fairness Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, and any special acts that are applicable to the agency.²⁰

4. Does commenting make a difference?

It will, particularly if you agree with the agency. If you don’t agree, perhaps not so much. Shapiro concluded that agencies are “happy to clear up confusion in their proposals but less willing to make

15. “Small Business Trends,” Small Business Administration, accessed March 10, 2016.

16. Patrick McLaughlin, “The Code of Federal Regulations, the Ultimate Longread,” Mercatus Center at George Mason University, April 1, 2015, <http://mercatus.org/publication/code-federal-regulations-ultimate-longread-game-thrones-hunger-games>.

17. Office of the Federal Register, “Federal Register Facts,” July 15, 2010.

18. Office of the Federal Register, “A Guide to the Rulemaking Process,” 2011.

19. “Tips for Submitting Effective Comments,” *Regulations.gov*, accessed March 10, 2016.

20. See Jerry Ellig, *A Guide to Writing Public Interest Comments Using Economic Analysis* (Arlington, VA: Mercatus Center at George Mason University, 2014).

substantive changes to their rules.”²¹ Another author noted, “as a general matter, the changes that agencies make to proposed rules in response to comments tend to be small and painful, and they are often subtractive rather than innovative or additive.”²² Finally, to describe it from the agency’s point of view, “by the time the NPRM is issued, the agency has made a very substantial commitment to the draft rule it is proposing, and will be understandably reluctant to modify it very substantially afterwards.”²³

5. When the rule is made final, how will I know about it and know when I have to be in compliance?

Just like finding the proposed rule, you will have to read the *Federal Register* and read the final rules pretty thoroughly. SBREFA does require that agencies publish compliance guides for any rules that have a significant small business impact—that may be helpful to you.²⁴ You will have to ascertain from the final rule or the guide when you must be in compliance. It could be anywhere from immediately to years from publication. What may be more of a problem for you, however, is that you may have to comply with multiple regulations from multiple agencies at the same time. For example, if you were in the waste management industry in 2014, there were 4,600 regulatory requirements (where the agencies said you “must” or “shall” do something).²⁵ These came from 17 different regulations from three different agencies—and 7 of those regulations had compliance dates in just two out of the 12 months in 2014. No one in the federal government coordinates the requirements to space them out. This is a problem for small businesses as compliance with virtually all regulations has been financed out of retained earnings.

6. What happens if I don’t comply?

You must comply with every single regulation and every one is equally important. If you don’t comply you can be fined, your products can be seized, you can have your license or permit revoked, or, in some cases, you can be sent to jail.

21. Stuart Shapiro, “When Will They Listen? Public Comment and Highly Salient Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2013), 14.

22. William F. West, “Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis,” *Public Administration Review* 64, no. 1 (2004): 67.

23. Richard Parker and Alberto Alemanno, “Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems” (Report, European Commission, May 13 2014), 47.

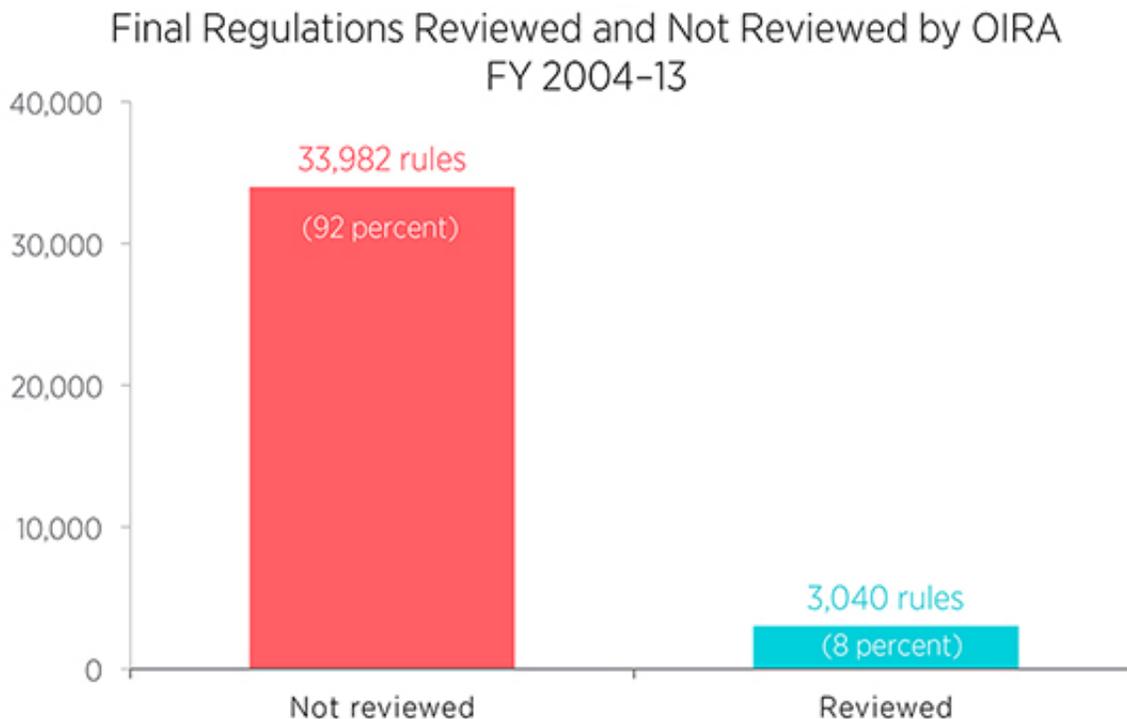
24. “Summary of SBREFA,” Small Business Administration, accessed March 10, 2016.

25. “Ask RegData a Question about US Federal Regulation,” RegData, regdata.mercatus.org.

OIRA Quality Control Is Missing for Most Regulations

Richard Williams ^[1], James Broughel ^[2] | Oct 01, 2014

Over the last decade, federal regulatory agencies finalized more than 37,000 regulations, yet 92 percent of rules escaped review by the Office of Information and Regulatory Affairs (OIRA), a small office tasked with reviewing significant regulatory actions promulgated by such agencies. Of the roughly 3,000 rules OIRA did review, only 116 have estimates of both benefits and costs appearing in OIRA's annual report. Relative to the cost of many of these regulations, expecting agencies to analyze benefits and costs before issuing a rule is a fairly low bar to set.



Source: Office of Management and Budget, "2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities" (July 2014).
Produced by James Broughel, Richard Williams, and Rizqi Rachmat, Mercatus Center at George Mason University, October 2, 2014.

[3]

The numbers suggest that the analysis of rules reviewed by OIRA is severely lacking in most cases. Of roughly 3,600 rules finalized last fiscal year, only seven had estimates of both benefits and costs appearing in OIRA's report.

By confirming that agency actions are consistent with executive orders ^[4] that set standards for regulatory analysis, OIRA is charged with ensuring that analysis meets minimal levels of quality and that agency rules are informed by those analyses. Each year OIRA puts out a report ^[5] with details on the costs and benefits of the US regulatory system, but the report provides little insight

because so many regulations escape review by OIRA. These missing rules also lack OIRA's critical quality control check.

Most rules that avoid OIRA review are not deemed "significant," meaning they aren't expected to have large economic impacts, raise novel legal issues, or meet certain other criteria signifying the importance of a regulation. Yet, even if any of these rules by themselves might be small, cumulatively their effects can be large. Even worse, the rules that have estimates of both benefits and costs in OIRA's report are not necessarily the ones that are most important to the American public. Of fiscal year 2013 rules, OIRA reports benefits and costs for a rule [6] that defined "gluten-free" for the purposes of labeling foods that are gluten-free, but four major regulations emanating from the Affordable Care Act do not have any benefit or cost information, and none of the regulations implementing the Dodd-Frank Act have estimates of both benefits and costs. This last point is not surprising, as independent agencies (including most financial regulators) do not have to comply with executive orders setting regulatory analysis standards. Still, these examples suggest the true costs to the public are simply not captured in OIRA's report.

OIRA performs an important role, but its staff is too small (38 at the end of 2013) relative to the hundreds of thousands of employees working in regulatory agencies to provide effective oversight. This means that there is no effective check on the vast majority of regulations, where there is often a total absence of analysis, analysis is ignored in the decision-making, or analysis is made to conform with a predetermined decision.

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[4] <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>

[5] http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf

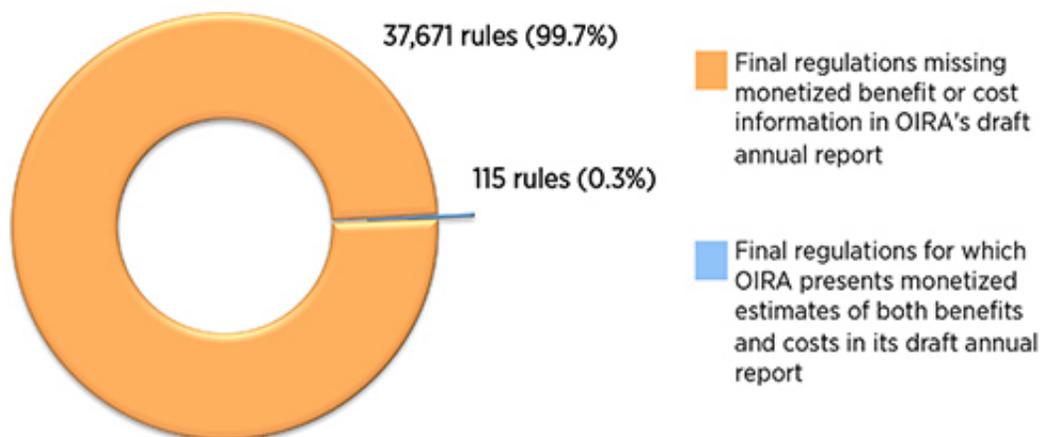
[6] <https://www.federalregister.gov/articles/2013/08/05/2013-18813/food-labeling-gluten-free-labeling-of-foods>

Government Report on Benefits and Costs of Federal Regulations Fails to Capture Full Impact of Rules

Richard Williams ^[1], James Broughel ^[2] | Dec 02, 2013

Each year, the Office of Information and Regulatory Affairs (OIRA) produces a report on the benefits and costs of federal regulations, using Regulatory Impact Analyses (RIAs) created by federal agencies. The OIRA report and the underlying agency RIAs together provide an estimate of the effects regulations are likely to have on the economy upon implementation.

Government Report on Benefits and Costs of Federal Regulations Fails to Capture Full Impact of Rules



Data note: chart represents fiscal years 2003–2012.
Produced by James Broughel and Richard Williams, Mercatus Center at George Mason University.
Source: Office of Management and Budget, "2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act" (April 2013).

[3]

OIRA's most recent [draft report](#) ^[4] for fiscal year 2003 through 2012 estimated that the major regulations the agencies evaluated would produce benefits ranging from \$192.7 to \$799.7 billion (2001\$), at a cost of \$56.6 to \$83.7 billion (2001\$).

While at first glance it might appear the regulatory system is working well for the American public, these numbers are misleading. As required by presidential executive order, agencies must present an assessment of the potential benefits and costs for all regulations that are deemed to be significant by the Administrator of OIRA. There were 3,203 significant rules reviewed by OIRA in FY2003–FY2012. Within this group, OIRA presents dollar estimates of benefits and costs for only a small fraction of the total regulations the agency reviewed. Of 37,786 rules finalized in FY2003–FY2012, only 115 rules had estimates of monetized benefits and costs in OIRA's draft report. This is less than one-third of one percent of all final regulations, an abysmal record. Even worse, there are no rules in the report from independent regulatory agencies that have dollar estimates for both benefits and costs.

Furthermore, even though many of the regulations promulgated by agencies are not “significant” in nature (i.e., their impact on the economy is less than \$100 million in any given year), the aggregate effects of thousands of these “nonsignificant” regulations being implemented year after year can be substantial, and agencies should make an effort to measure these effects.

A snapshot of a very small number of regulations may imply the US regulatory system is better than it is. Until we have estimates of benefits and costs for all regulations produced on an annual basis, however, OIRA’s benefit and cost figures produce little meaningful information for the public.

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