Become a Rulemaking Ninja: Exploring the OIRA Web Portal

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by Robert R.M. Verchick

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Environmental lawyers are a clever breed, but these days the Regulatory State leaves even many of us in the dark. But not everyone. Ever wonder how Prof. Tom McGarity knows about all those delays in regulatory review? Or how Prof. Lisa Heinzerling sniffed out the food safety regulations the White House appears to be burying?

Well, now you too can be a Rulemaking Ninja. In the first term of the Obama Administration, the White House Office of Information and Regulatory Affairs (OIRA) introduced an interactive web portal designed to give you better information about the president’s centralized system of regulatory review. (I have sometimes referred to OIRA as “the ganglia of the president’s rule-making brain,” which creeps out some readers, but I’m sticking with it.)

On entering the portal, there are only two things to keep in mind. First, don’t be afraid to zoom around: sometimes the most useful stuff is found three or four levels down. Second, don’t fall in love. OIRA’s slick website is a fresh breeze for advocates of government transparency. But there’s still a lot missing. Remember the line about statistics and swimsuits: what they reveal is interesting, but what they conceal is vital.

Let’s start with OIRA’s homepage (Figure 1), the one with the photo of President Obama and then-regulatory czar Cass Sunstein gazing admiringly into each other’s eyes. (Find it at: http://www.whitehouse.gov/omb/infereg_

default.) Just below the photo is a link to the “Regulatory Dashboard,” your entrée into the president’s regulatory control room.

Figure 1

Click the link (see Figure 2) and you’ll find yourself in a candy shop of circle graphs and column charts—just like Wolf Blitzer on CNN!

As you can see in Figure 4, on the day I accessed this screen (10/14/2013), OIRA had 118 rules under review. Eighteen of those were environmental rules, ranking the U.S. Environmental Protection Agency (EPA) as OIRA’s second most scrutinized agency. As it turns out, that’s pretty typical. OIRA boasts that its information is very current, but the day I logged in, things appeared to be running slowly for reasons you might recall.

All this White House scrutinizing takes time. And as White House critics have pointed out, OIRA is frequently in violation of the 90-day deadline for processing agency submissions (see Figure 5). The backlog, in fact, is unprecedented. Nobody will say exactly why delays have become such a problem (remember the swimsuits). OIRA’s economic analysis does take time, as does the process of interagency review. But many observers believe politics is a big factor. Some of these rules, after all, are political dynamite (coal ash? toxic chemicals?) and difficult to handle safely in a public forum. You might wonder why delay is such a big deal. But health and environmental regulations can prevent illness, death, and ecosystem collapse. Every month that those regulations stay in the box is another month when more bad things can happen.

And as you can see in Figure 6 (after a few more clicks on the Dashboard), some agencies are delayed a lot more than others, like Health and Human Services, the Department of Transportation, and EPA—three agencies that emphasize health and safety.

Why does OIRA review so many agency rules anyway? The common assumption is that agency rules are often very “expensive,” by which Beltway insiders mean the rules, while promising sometimes vast public benefits, are nonetheless costly for industry to comply with. Indeed, Executive Order (EO) 12866 requires agencies to submit for review any rule that is “economically significant,” which is defined as having “an annual effect on the economy of $100 million.” So, how many of those 118

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rules stacked up at OIRA are “economically significant”? The Dashboard has the answer (see Figure 7).

You read that right: only 18 of 118 (or about 15%) are rules deemed by OIRA to be “economically significant.” The rest fit into other categories, including a catch-all category for rules that OIRA may take an interest in that (to quote EO 12866), “[r]aise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” Read that again: “[r]aise novel . . . policy issues arising out of . . . the President’s priorities.”

This is the language that leads some observers to speculate that many rules under review are there because they pack political dynamite. Look, for instance, at the number of non-economically significant environmental rules under review as compared to the number of economically significant ones. That’s a lot of regulatory novelty.

After scrolling down and doing a little fishing, you can pull up examples of the kind of non-economically significant rules OIRA is preoccupied with, like this on nanoscale materials. Ever wonder about the health effects of nano-particles in your sunscreen or paint products? Ever think it might be a good idea for the government to collect data on stuff like this from the people who make and sell it? According to the White House’s website, EPA sent over a proposed rule to address this issue nearly three years ago. But
it’s still under review at OIRA. Why is that? The website, unfortunately, doesn’t say. (Swimsuits, again.)

If you had information like this (and now you do), what could you do with it? One obvious answer is to inform other people so that the goal of government transparency is made more real. But you could also take your case to the White House. If you are a member of a company or citizens’ group, you could even set up a meeting to discuss your views at a meeting in person with OIRA staff members. In the past, OIRA has expressed its willingness to meet with virtually any organization that has a serious case to make.

That’s honorable. But unfortunately, only those who know about OIRA, and who have the resources to travel, end up setting up the meetings. Want to know who goes to these meetings? Again, the information is available on the website. Go back to the photo of our smiling leaders and examine the subheadings under “Regulatory Matters.”

Soon you will find gateways into the meeting records that OIRA keeps on rules advanced by all agencies. Look at this list involving air regulations:

As you can see, there is a lot of interest in EPA’s recently announced proposal to regulate greenhouse gases from new gas- and coal-fired electric plants. The Sierra Club made a showing in one of those meetings, but most were held for the usual industry-based suspects.
But it could be different. If more people outside of industry knew about what OIRA does, how its data is made available, and how it’s staff can be contacted and communicated with, White House review might look less like a meeting at the Wharton Club and more like democracy. Not only can you begin the discussion on the White House portal, you can even send gifts! (But perhaps in a separate mailing.)

So, grab your laptop and get going. White House staffers are standing by.