

Reinforcing the Congressional Review Act (CRA):

To Facilitate Robust CRA Review by Congress, the Executive Branch Must Conduct Robust CRA Review First

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Executive Summary

- The Congressional Review Act (CRA) requires that new final rules indicate whether they will have \$100 million or more of annual economic effects. It also requires that rules so designated must have delayed effective dates and must provide Congress additional information to inform its CRA review.
- Determinations about whether rules will have those effects are made by the Office of Information and Regulatory Affairs (OIRA) within the White House.
- OIRA recently issued a wholesale rewrite of its decades-old approach to economic analysis as the direct result of a new executive order issued by President Biden. This change in economic analysis in the rulemaking process bends toward allowing a more partisan, ideological approach.
- Regardless of the new executive order, agencies must still adhere to the statutory requirements set out under the CRA for Congressional review purposes.
- New measures must ensure that OIRA is able to obtain, review, and turn over to Congress a rigorous and sound CRA analysis of the likely economic effects of new final agency rules.
- Congress should modernize OIRA's role in review, especially for independent agencies. Congress must also reinforce the CRA and assert its Article I authority by strengthening oversight of the regulatory process.

A Longstanding History of Regulatory Review

For decades, most important new regulations have been subjected to the cost-benefit analysis and centralized regulatory review requirements of the Office of Information and Regulatory Affairs (OIRA) within the U.S. Office of Management and Budget (OMB), which is part of the Executive Office of the President. The best-known of those requirements flow from executive orders and implementing guidance from OIRA, but there are also key statutory authorities that have too often been overlooked and underutilized, to the detriment of Congress and the public.

Recent changes to the executive branch’s longstanding practices concerning analysis and review—which previously aided OIRA’s efforts to fulfill its statutory mandates—have exacerbated the situation. Congress and the executive branch should undertake new efforts to ensure that OIRA is able to carry out its statutory responsibilities, including those of the Congressional Review Act (CRA).

In 1981, President Ronald Reagan issued Executive Order (EO) 12291, which among other measures required economic analysis and centralized review of most important new regulations.¹ With that order, President Reagan provided additional direction, granularity, and authority to prior presidential efforts to ground regulatory policy choices in analysis, and to ensure that key regulatory decisions were made in a centrally coordinated manner. In 1993, President Bill Clinton replaced EO 12291 with EO 12866, which for more than 30 years has provided the primary analytical and review architecture for new federal regulatory actions.² EO 12866 requires, among other provisions, federal agencies to subject significant regulatory actions to cost-benefit analysis and pre-promulgation review by OIRA. The analytical standards of EO 12866 were expounded upon more than 20 years ago in OMB Circular A-4.³

The standards of EO 12866 and OMB Circular A-4 have been supplemented over the years—such as when President George W. Bush made explicit OIRA’s authority to review guidance documents,⁴ and when President Donald Trump required new rules to comply with a regulatory budget⁵—but their core terms remained unchanged until the present Administration. A little more than one year ago, on April 6, 2023, President Joe Biden issued EO 14094, which materially changed key provisions of EO 12866 and directed a rewrite of OMB Circular A-4. Late last year, OIRA followed through with a dramatic

¹ Exec. Order No. 12291, 3 C.F.R. 127 (1981), <https://www.archives.gov/federal-register/codification/executive-order/12291.html> (accessed Apr. 2, 2024).

² Exec. Order No. 12866, 3 C.F.R. 638 (1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> (accessed Apr. 2, 2024).

³ Office of Management and Budget, “Circular A-4,” September 17, 2003, ObamaWhiteHouse.Archives.gov, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ (accessed April 3, 2024).

⁴ Exec. Order No. 13422, 72 Fed. Reg. 2763 (Jan. 18, 2007), <https://www.govinfo.gov/content/pkg/WCPD-2007-01-22/pdf/WCPD-2007-01-22-Pg48.pdf> (accessed Apr. 2, 2024).

⁵ Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017), <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs> (accessed Apr. 1, 2024).

overhaul of A-4.⁶ Now, though regulatory review is still conducted, the objective, quantitative emphasis of OMB Circular A-4, and thus of centralized review and the rules that emerge from it, has been meaningfully diminished.

After the sweeping changes to A-4 were proposed, some 15 former presidents of the Society for Benefit-Cost Analysis and editors of the *Journal of Benefit-Cost Analysis* cautioned against a more partisan turn and urged adherence to the core features of Circular A-4, noting that they “have proven durable across different presidential administrations because they are based on objective and nonpartisan principles.”⁷ The Administration declined to adopt the more moderate, mainstream approach advocated by those and other experts, and instead largely finalized the more ideological approach articulated in its proposal. That dramatic change to the longstanding foundation of regulatory policymaking in the executive branch compounds certain challenges that have long been a part of EO 12866, namely that its analytical and review standards have generally not been extended to tax rulemakings and independent-agency rulemakings.⁸

In this environment, the sound execution of regulatory policy requires the development and implementation of regulatory procedural standards beyond what may be found in EO 12866. This paper suggests that one such mechanism is the robust implementation of procedural authority granted to OIRA by the Congressional Review Act. That authority has long been overlooked because it was largely consonant with and thus incorporated into EO 12866 review. Given recent material changes to the standards associated with EO 12866 review, a reconsideration of OIRA’s statutory review obligation and authority is necessary.

Major Rule Determinations

The CRA requires federal agencies to provide Congress with an opportunity to review and disapprove new regulations. For rules that are deemed to be “major,” the effective date of the rule must be delayed by at least 60 days, and Congress must be provided with additional analytical information to inform its review and decision-making on whether the rule ought to be allowed to take effect. The CRA defines a “major rule” in the following manner:

The term “major rule” means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect

⁶ WhiteHouse.gov, “Circular No. A-4,” November 9, 2023, <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf> (accessed April 1, 2024).

⁷ Arnold Harberger et al., letter to OIRA Administrator Richard Revesz, August 28, 2023, https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-08/sbca_former_president_letter_administrator_revesz_a4_8-28-23.pdf (accessed April 2, 2024).

⁸ The requirements of regulatory analysis and review were extended to tax rules in 2018, but those standards were rolled back last year. See, for example, Kristin Hickman, “Exempting Tax Rules from White House Review Is a Step Backward,” Bloomberg Tax, July 6, 2023, <https://news.bloombergtax.com/tax-insights-and-commentary/exempting-tax-rules-from-white-house-review-is-a-step-backward> (accessed April 1, 2024).

on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.⁹

That is, a rule is “major” if OIRA determines that it is likely to have certain effects on the economy. There are three key points to make about this definition and framework.

1. **The CRA requires OIRA to conduct a “major” rule review.**

First, the determination of whether a rule is “major” rests with OIRA, not with the drafting agency. That means that an agency cannot simply self-designate a rule as major or not major, and thereby possibly deprive Congress of its statutory right to the time and information necessary to consider the rule. Regulatory actions must be submitted to OIRA for review and a determination prior to promulgation and effectiveness. There are limited exceptions provided in the statute, such as for rules concerning monetary policy, but those narrow, explicit exemptions help to confirm that all other rules must comport with the requirements of the CRA, including the requirement to submit rules to OIRA for major rule review prior to promulgation and effectiveness.

Typically, when reference is made to “OIRA review,” what is meant is the “significant rule” reviews conducted pursuant to EO 12866. In that past, that review has largely subsumed the “major rule” review required by the CRA. The point here is that regardless of what might be required by executive order, there is a clear and independent statutory requirement for OIRA to evaluate and make determinations about whether rules have certain economic effects. That statutory requirement gives OIRA the power and responsibility to conduct regulatory reviews across the executive branch.

2. **Agencies must comply with the CRA’s dollar threshold.**

Second, the definition provides a specific dollar threshold and several other important thresholds for “major” rules. That test largely reflects the longstanding requirements of “economically significant” rules under EO 12866, as well as the prior standard from President Reagan’s EO 12291. However, as a creature of executive branch policy rather than law, the EO 12866 standard was recently amended by EO 14094, which set the dollar threshold for OIRA’s ordinary EO 12866 review at \$200 million of annual economic effects rather than \$100 million.¹⁰ And, as already discussed, the analytical methods used to calculate those effects were completely

⁹ 5 U.S. Code § 804(2).

¹⁰ Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf> (accessed Apr. 1, 2024).

overhauled in the recent revision to OMB Circular A-4, which is used to help to implement EO 12866.

Regardless of how the executive branch might analyze rules for purposes of EO 12866 and EO 14094, however, it must still evaluate rules pursuant to the \$100 million test for purposes of the CRA. While seemingly obvious, this point is important to underscore because this is the first time in decades when those two economic thresholds have been different. That change requires a careful assessment of what must be done to continue to satisfy the statutory obligations of the CRA. Economic analysis for other purposes does not necessarily satisfy the executive branch’s CRA requirements.

3. “Independent” does not mean “exempt” from CRA review.

Third, OIRA’s responsibility to determine whether rules are “major” extends not only to rules from departments and agencies that routinely report to the President, but also to the regulatory actions of agencies that for other purposes may historically have been regarded as independent or otherwise exempt from centralized regulatory review.¹¹ Even though significant rule reviews conducted pursuant to EO 12866 have historically not extended to such agencies, major rule reviews conducted pursuant to the CRA *must* extend to those agencies. The statutory reach is greater than the executive order reach, so thought must be given to whether the procedural standards of the greater authority ought to predominate or at least be distinguished.

Recommendations to Strengthen CRA Major Rule Review

First, OIRA should make clear to all federal departments and agencies that they must comply with the requirements of the CRA, including the requirement to allow OIRA to make “major” rule determinations. This step has previously been taken through OMB memoranda, but Congress and OIRA should further emphasize and enforce it.¹²

Second, Congress and OIRA should make clear that OIRA’s statutory “major” rule determination authority is no rubber stamp. Its role is not to approve whatever determination is suggested by the agency, but to review and scrutinize those suggestions, along with an accompanying written economic analysis in support of any suggestions. To render the proper designation, OIRA must require the provision of such

¹¹ Section 804(1) of the CRA defines “agency” by incorporating the definition found at 5 U.S. Code § 551(1) (“each authority of the Government of the United States”), which includes the historically independent agencies.

¹² Shalanda D. Young, “Guidance on Compliance with the Congressional Review Act,” *Memorandum for the Heads of Executive Departments and Agencies*, Executive Office of the President, February 16, 2024, <https://www.whitehouse.gov/wp-content/uploads/2024/02/M-24-09-Guidance-on-Compliance-with-the-Congressional-Review-Act.pdf> (accessed April 2, 2024), and Russell T. Vought, “Guidance on Compliance with the Congressional Review Act,” *Memorandum for the Heads of Executive Departments and Agencies*, Executive Office of the President, April 11, 2029, <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (accessed April 2, 2024).

analysis as may be necessary to determine whether a rule satisfies the relevant economic threshold. How can it otherwise satisfy the statute’s instruction to tell Congress whether the rule has annual effects of \$100 million or more?

Further, OIRA should insist that such information be included in the published text of rules, otherwise how can Congress and the public evaluate whether that determination was properly made? To facilitate its CRA major rule review, OIRA should require agencies to provide some form of regulatory impact analysis, preferably in a manner consistent with what was articulated in the version of OMB Circular A-4 that endured for more than 20 years across Administrations of very different political philosophies.

The CRA memorandum issued by OMB in 2019 took that step, directing, “To determine a rule’s economic effect for all three criteria of Section 804(2), agencies should follow the analytical approach set forth in OMB Circular A-4.”¹³ That instruction was removed from the recently released version of the CRA guidance, thus leaving undefined key terms and analytical concepts that are essential to CRA major rule determinations.¹⁴ To know whether CRA analyses and determinations are being conducted in a manner consistent with longstanding principles of objective analysis, additional and more granular information ought to be provided to agencies, Congress, and the public.

Third, to facilitate agency compliance with the CRA, OIRA should modernize its electronic regulatory management platform to include CRA “major” rule reviews. The hard, mechanical controls associated with the management of that platform will help to ensure that OIRA is able to satisfy its statutory obligation under the CRA. Similar controls already exist to help to ensure compliance with EO 12866, the Paperwork Reduction Act (PRA), and the Regulatory Flexibility Act (RFA), and in the case of the statutory controls of the PRA and RFA, they already extend to the historically independent agencies. Adding a new technical control mechanism to facilitate CRA major rule review and compliance would be a natural and effective enhancement of that platform.

Specifically, OIRA should require all covered rules to be uploaded for pre-promulgation review into OIRA’s regulatory management platform, a public-facing version of which is viewable on its website.¹⁵ Next, OIRA should preliminarily evaluate whether a rule includes sufficient analysis to render a proper designation. If further analysis is needed, OIRA should request that information, ensure that it is included in the rule, and then conduct a careful review, iterating with the agency and interagency stakeholders as appropriate. Once a determination is made, noted, and supported in the text of the rule, and any other overlapping requirements have been satisfied, major rule review may be concluded, and the rule may be released for publication.

These platform enhancements would clearly need to be integrated with existing controls, such as those necessitated by EO 12866. For example, where appropriate, the

¹³Vought, “Guidance on Compliance with the Congressional Review Act.”

¹⁴Young, “Guidance on Compliance with the Congressional Review Act.”

¹⁵ Office of Information and Regulatory Affairs, Reginfo.gov, <https://www.reginfo.gov/public/> (accessed April 1, 2024).

pulling of one lever may by platform design immediately pull the other lever. Historically, CRA reviews have largely been subordinate to EO 12866 review and have thus not been broken out separately in the regulatory management platform. However, because the CRA naturally has a much broader reach than EO 12866—and because the quantitative analysis of EO 12866 reviews has been materially altered by the recent departure from the longstanding analytical standards of EO 12866 and OMB Circular A-4, it may be appropriate to add a “major rule” category of review to OIRA’s regulatory management database, website, and daily workflow.

Conclusion

The most common discussion of the CRA concerns whether specific rules will be overturned by a congressional resolution of disapproval, which is signed by the President. As the core function of the CRA, that emphasis is appropriate. At the same time, a necessary precondition of proper congressional review is the provision of accurate and timely information from the executive branch to Congress.

The longstanding requirements of OIRA’s EO 12866 regulatory reviews once facilitated compliance with the CRA given the high degree of overlap between the statutory and executive order standards. Given the recent and dramatic analytical changes to EO 12866 review, as well as the need for greater compliance architecture for agencies covered by the CRA but not covered by the executive order, it is worth carefully assessing whether further procedural enhancements are necessary to facilitate the executive branch’s compliance with the CRA. Both Congress and a future Administration would be well served by modernizing and strengthening OIRA’s role in CRA review.

Federal departments and agencies issue regulations with the constitutional lawmaking power delegated to them by Congress. It is therefore highly appropriate that Congress oversee the exercise of that constitutional power. The CRA provides a meaningful mechanism for that supervision, but it is diminished if agencies do not assiduously comply with its requirements. Reinforcing the Congressional Review Act is of the utmost importance to preserve Congress’s Article I authority and to ensure proper oversight of regulatory decision-making on behalf of the American public.