

*Executive Regulatory Review:
Disconnects Between Theory and Practice,
and How to Repair Them*

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Theory

- “Agencies are out of control.”
- “Only the White House can control them.”
- “Put review authority in OMB and make the agencies run its gauntlet.”
 - Paperwork Reduction Act of 1980 (PRA) established OIRA, founded April 1, 1981
 - “Put regulatory review in OIRA.”
- “Enforce with an iron fist.”

Practice

- Agencies are out of control only rarely.
- White House has weak incentives to control them.
 - Is the need to control evidence of a personnel error?
 - When is the White House an enabler?
- At OMB, the budget rules *über alles*.
 - OIRA's internal stature is weak.
 - An marriage of convenience, not intelligent design
- When iron fists meet tempered steel, bet on steel.

Common Implementation Problems

- Limited and progressively smaller review staff
- Transaction-driven, and hence reactive
- End of the process after decisions have been made
- Asymmetrical rules of engagement
- Limited enforcement tools
- Enforcement has limited utility
- Presidential initiatives are exempt
- Congressional sensitivities abound
- Statutory/judicial deadlines trump OIRA review
- OIRA has limited political and public support

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Many Remedies Have Been Tried

- Negotiate and persuade
- Secure OIRA participation in agency work groups
- Issue RIA Guidance/”Best Practices” documents
- Return to sender
- Suspend review

Negotiate and Persuade

Best of Intentions...

- We're on the same team
- Settle issues at lowest possible level
- Elevate most important issues
- Persuade rather than confront
- No public display of dirty laundry

...Gone Awry

- Objectives usually conflict
- Asymmetric incentives to settle
- Too much is elevated to OIRA Admin
- Let's Make a Deal Syndrome
- Deal-making undermines morale

OIRA Participation in Agency Work Groups

Best of Intentions...

- Educate agency staff on methods, principles
- OIRA involvement before decisionmaking
- Prevent conflicts during regulatory review

...Gone Awry

- A little education is a dangerous thing
- Participation exhausts staff time
- Agencies can develop dual work groups, one that excludes OIRA

RIA Guidance/"Best Practices" Documents

Best of Intentions...

- Sets government-wide standards
- Prevent avoidable BCA 101 conflicts
- Reduce conflicts to significant technical and policy issues

...Gone Awry

- Guidance can set a floor or a ceiling
- Invites BCA 201 conflicts (and beyond)
- BCA 201 conflicts can be harder to resolve than BCA 101 conflicts

Return to Sender

Best of Intentions...

- Public and transparent
- Enforce stated regulatory principles
- Staff can move on to the next transaction

...Gone Awry

- Public embarrassment
- Stated and actual principles conflict
- Returns don't make issues go away
- Agencies shift to OIRA responsibility for hard decisions

Suspension of Review

Best of Intentions...

- Turn off OIRA's review clock if agency is dilatory
- Motivate agency to comply with stated analytic requirements
- Enforce stated analytic requirements
- Staff can move on to the next transaction

...Gone Awry

- Recreate Black Hole, Lone Desk Officer myths
- Little evidence that suspension instills much motivation
- Stated and actual analytic requirements may conflict
- Suspension doesn't make issues go away

New Ideas

- Regulatory budget
- Regulatory accounting
- “Prompt” letters
- Published technical reviews of RIAs
- RIA Blueprints
- Integrate paperwork and regulatory reviews

Regulatory Budget

Best of Intentions...

- Agencies set priorities based on declining cost-effectiveness
- Regulation stops when budget caps reached
- Set the budget and go

...Gone Awry

- Who says cost-effectiveness is the agency's objective?
- Caps aren't binding (*cf.* budget caps)
- Strategic behavior within and outside budget caps

Regulatory Accounting

Best of Intentions...

- Treat regulation like public spending
- Public education about regulation
- Count everything government does once
- Inform policy- and decision-making

...Gone Awry

- Spending caps proven ineffective
- Education requires reliable information
- Much government remains uncounted
- Aggregates are misleading

“Prompt” Letters

Intended Effects

- Prove commitment to cost-effective, not necessarily less, regulation
- Overcome the in-box
- Achieve earlier OIRA involvement

Potential Risks

- Confer premature endorsement based on preliminary analysis
- Invites scientific and analytical stasis if new information could weaken case

Publish Technical Reviews of Agency RIAs

Intended Effects

- Increase transparency of review process
- Create a less extreme enforcement tool
- Praise agencies for superior work
- Provide a logical basis for regulatory accounting reports to Congress

Potential Risks

- OIRA could be wrong
- May lead to greater risk aversion
- Praise may be taken out of context
 - Problem analogous to “prompt” letters
 - Other government peer review examples

RIA Blueprints

- RIAs are prepared after decisions are made
 - Policy choices are embedded and often hidden
 - Errors are difficult to fix at this stage
- OIRA often seeks additional analysis
- Agencies call these requests “late hits”
- Blueprints ensure analysis precedes decisionmaking and no “late hits” allowed

RIA Blueprints: Contents

- Identify alternatives to be analyzed
- Specify data, models, default assumptions
- Specify procedures for:
 - Supplanting default assumptions
 - Using new data or models
 - altering the Blueprint
- Milestones for completion and publication of RIA components

RIA Blueprints: Procedures

- Pre-rule stage
- Joint leadership of OIRA and agency
- Public participation, but:
 - Decisions made deliberatively
 - Stakeholder consensus not required
 - OIRA and agency responsible for content
- Publish MOU in *Federal Register*
- Limit OIRA review of analysis to agency compliance with RIA Blueprint
 - Return to sender for material noncompliance with Blueprint
 - Burden of proof shifted to OIRA

RIA Blueprints

Intended Effects

- Early OIRA & sister agency involvement
- Public participation
- Transparency
- Identify and fill data gaps early
- Consensus on analysis before decisionmaking

Potential Risks

- Time-consuming
- Divert OIRA staff from regular tasks
- More technical staff may be needed
- Susceptible to end-stage politics

Integrate Regulatory and Paperwork Reviews (1)

- With bad data, good decisions require dumb luck
- Obtaining good data requires early anticipation of future data requirements
- Paperwork review process is the best available opportunity to anticipate future data needs
 - Identify data gaps and fill them
 - Identify weak data collections and improve or terminate them
- Document compliance with ICR supporting statements and research protocols when data are used or disseminated

Integrate Regulatory and Paperwork Reviews (2)

- Revitalize public participation in PRA process
 - Public participation is required by law under PRA...
 - ..but severely restricted under EO 12866 and 12291 (“Wendy Gramm Procedures”)
- Rules governing public participation are a longstanding source of confusion and uncertainty
- Protect legitimate confidentiality of EO review by maximizing the transparency of information collection activities

Integrate Regulatory and Paperwork Reviews (3)

Intended Effects

- Better achievement of PRA, data quality, data access, and EO objectives
- Increased transparency of OIRA processes
- Stronger role for high quality science and economic analysis

Potential Risks

- More (and more specialized) staff probably required
- Transparency makes politics more visible
- If science and economics matter, they will become political battlegrounds

Conclusions

- Executive review works, but clearly could work better
- The Law of Unintended Consequences applies to all reform proposals
- Procedural changes that make OIRA more transparent, and enhance early and sustained OIRA and public participation, have the greatest potential for success