OMB's Guidance Memorandum to Independent Agencies

This short article is intended to stimulate discussion of the Office of Management and Budget's (the "**OMB**") April 11, 2019 Memorandum (the "**OMB Memo**") regarding the obligations of independent agencies.[1] The OMB Memo was issued to all federal agencies, including independent agencies, to establish a centralized review of agency rules by OMB's Office of Information and Regulatory Affairs ("**OIRA**").[2] The need for such review was based on OIRA's responsibility under the Congressional Review Act (the "**CRA**") to determine whether regulatory rules are "major."[3]

The OMB Memo raises important legal and policy questions. It could be read to require, for the first time, that independent financial regulatory agencies ("**IFRAs**")[4] conduct a cost-benefit analysis under OIRA methodology of all proposed rules, and that such analysis be reviewed by OIRA.[5] Additionally, if OIRA were to reject the adequacy of such cost-benefit analysis, OIRA might be able to prevent the rule from going into effect.[6] Whether such OIRA powers can be justified under the CRA is an important legal question. The OMB Memo raises further legal questions as to whether it is consistent with outstanding Presidential executive orders and is by its own terms binding on the IFRAs rather than being merely precatory. In the big picture, the question is whether the OMB Memo is consistent with the purpose of the CRA, which is to permit congressional (not executive) veto of proposed regulations, and whether it excessively infringes on the independence of the IFRAs.

This article proceeds in three parts. First, it explains the CRA and its relevant provisions. Second, it summarizes the OMB Memo and examines how it establishes centralized review by OIRA of IFRAs rules, including by establishing a cost-benefit analysis requirement. Third, it outlines other pertinent legal and policy questions raised by the OMB Memo.

The Congressional Review Act

The CRA, enacted in 1996, provides that Congress can veto or invalidate an agency's rule.[7] The CRA applies to all agencies, including independent agencies like IFRAs.[8] Subject to specific

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[1] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *Memorandum for the Heads of Executive Departments and Agencies* (Apr. 11, 2019) https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf [the "**OMB Memo**"].
[2] *Id.* at 1.
[3] *Id.* at 1–2.
[4] These include the Board of Governors of the Federal Reserve System (the "**Fed**"), Commodity Futures Trading Commission (the "**CFTC**"), Federal Deposit Insurance Corporation (the "**FDIC**"), Securities and Exchange Commission (the "**SEC**"), Consumer Financial Protection Bureau (the "**CFPB**"), and Office of the Comptroller of the Currency (the "**OCC**"). 44 U.S.C. § 3502(5).
[5] OMB Memo, supra note 1, at 4-6.
[6] Id. at 5 ("Insufficient or inadequate analysis may delay OIRA's determination and an agency's ability to publish a rule and to make the rule effective. To make the required finding, IRA may request additional information from the agency.").
[7] 5 U.S.C. §§ 801(b), 802.
[8] *Id.* § 804(1) (defining "Federal agency" by referencing the Administrative Procedure Act's definition of an "Agency" at 5 U.S.C. § 551(1), which broadly defines an agency such to it includes IFRAs).

limited exceptions, the CRA broadly defines the "rules" that Congress can override as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[9]

To ensure that Congress is informed about agencies' rules and has sufficient time to review rules that are categorized as "major" before they go into effect, the CRA imposes certain procedural requirements on OIRA and the Government Accountability Office[10] (the "**GAO**"). Under the CRA's provisions, a rule is classified as "major" if *OIRA determines* that that it will: (1) have an annual effect on the economy of $100 million or more; (2) result in a major increase in costs or prices, for consumers, particular industries, government agencies, or geographic regions; or (3) have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.[11]

Under the CRA, *before any rule can take effect*, the relevant agency must submit a report to Congress and the GAO that contains: (1) a copy of the rule; (2) a brief general statement about the rule, "including whether it is a major rule" *as determined by OIRA*; and (3) the proposed effective date of the rule.[12] If a rule is designated as "major", the rule cannot go into effect until at least 60 days after the report is provided to Congress. Notice-and-comment rules normally go into effect 30 days after they are published, and interpretative rules and general statements of policy usually go into effect immediately.[13] The "major" determination therefore provides Congress the opportunity to veto major rules before they ever go into effect.[14]

Although the CRA empowers OIRA to designate rules as "major rules," neither executive nor independent agencies are required by the CRA to submit rules to OIRA for such determination, and it appears that at least some agencies have submitted rules directly to Congress after making the determination unilaterally.[15] Cass Sunstein, a former OIRA administrator, previously observed that "[o]nce an agency has submitted a rule to Congress and the GAO under the CRA, OMB does not conduct retrospective reviews of their appropriate designation" as major or non-major rules.[16]

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[9] 5 U.S. Code § 804(3); 5 U.S.C. § 551(4).

[10] The CRA references the Comptroller General, who is the head of the GAO. For simplicity, this statement refers to the office he oversees, the GAO. The GAO "is an independent, nonpartisan agency that works for Congress." It "examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently." The GAO works "at the request of congressional committees or subcommittees or is statutorily required by public laws or committee reports …" *About GAO – Overview*, GAO, https://www.gao.gov/about/ (last accessed May 1, 2019); *About GAO – What GAO Does*, GAO, https://www.gao.gov/about/what-gao-does/ (last accessed May 1, 2019).

[11] 5 U.S.C. § 804(2).

[12] 5 U.S.C. §§ 801(a)(1)(A), 804(2).

[13] 5 U.S.C. § 553(d).

[14] 5 U.S.C. §§ 801(a)(1)(B), 801(2)(A).

[15] Maeve P. Carey, Alissa M. Dolan and Christopher M. Davis, *The Congressional Review Act: Frequently Asked Questions* 9-10, CONGRESSIONAL RESEARCH SERVICE (Nov. 17, 2016) https://fas.org/sgp/crs/misc/R43992.pdf.

[16] Letter from Cass R. Sunstein, Administrator, OIRA, to the Honorable Charles E. Grassley, Ranking Member, Committee on Finance, United States Senate, April 28, 2010.

Further, OIRA historically deferred to IFRAs' own determinations about whether a rule was major or not. For example, a 1999 OMB memo addressing OIRA's rule in the "major" designation process under the CRA instructed IFRAs to involve OIRA in accordance with the IFRAs' established practices,[17] and a study by former government officials that surveyed 15 rules adopted by IFRAs found that there was no evidence that OMB or OIRA played any role in determining whether a rule was major or not.[18] According to more recent findings of the Congressional Research Services, "at least some of the independent regulatory agencies no longer appear to be acknowledging a role for OIRA in the determination of rules as major."[19]

Finally, Section 805 of the CRA provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[20] As a result, several U.S. Court of Appeals decisions have held that agencies' failures to comply with the CRA are not reviewable,[21] and so there may be no recourse for OIRA or the Administration in the event an agency fails to comply with the CRA's terms.

The OMB Memo

The OMB Memo requires that "[f]ederal agencies *must* coordinate with OIRA regarding a major determination for all final, interim final, and direct final rules."[22] The OMB Memo says coordination is necessary because "[a]t present, OIRA does not consistently receive from agencies the information necessary to determine whether a rule is major."[23] The OMB Memo applies to IFRA rulemaking and therefore creates, for the first time,[24] central OIRA oversight over IFRA rulemaking.

Unlike the prior 1999 memo,[25] the OMB Memo asserts that the definition of "rule" "encompasses a wide range of other regulatory actions, including, *inter alia*, guidance documents,

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[17] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF DEPARTMENTS, AGENCIES, AND INDEPENDENT ESTABLISHMENTS (Mar. 30, 1999).

[18] Joe Aldy, Art Fraas, & Randall Lutter, IDENTIFYING MAJOR RULES BY INDEPENDENT REGULATORY AGENCIES – COMMENT TO THE OFFICE OF MANAGEMENT AND BUDGET 2 (July 24, 2013), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2013_cb/comments/aldy_fraas_lutter_comments_on_2013_draft_omb_report.pdf.

[19] Maeve P. Carey, Alissa M. Dolan and Christopher M. Davis, *The Congressional Review Act: Frequently Asked Questions* 9-10, CONGRESSIONAL RESEARCH SERVICE (Nov. 17, 2016) https://fas.org/sgp/crs/misc/R43992.pdf.

[20] 5 U.S.C. § 805.

[21] *See, e.g.*, Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., No. 17-5110, 2018 U.S. App. LEXIS 15472, at *26 (D.C. Cir. June 8, 2018) (declining to consider whether agency rule "took effect" in violation of CRA because of the judicial review preclusion provision); Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C Cir. 2009) (declining to adjudicate claim that agency "failed to satisfy the reporting requirement" of the CRA); Via Christi Reg'l Med. Ctr. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms.").

[22] OMB Memo, *supra* note 4, at 3 (emphasis added).

[23] *Id.* at 4.

[24] Exec. Order No. 12,866, § 3(b), 3 C.F.R. 638 (1993) (excluding independent agencies from the order's definition of "agency").

[25] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF DEPARTMENTS, AGENCIES, AND INDEPENDENT ESTABLISHMENTS, 3-5 (Mar. 30, 1999) (quoting the CRA and APA definitions of "rule" and observing that agencies can look to judicial precedent to determine which agency actions constitute "rules").

general statements of policy, and interpretive rules."[26] It then affirms that the "limited and explicit [statutory] exemptions [to the definition of "rule" for CRA purposes] underscore that all other rules must follow the requirements of the CRA."[27] Historically, the overwhelming majority of agency guidance has been issued without being submitted to the GAO and Congress as required by the CRA.[28] By explicitly affirming that guidance documents are "rules" subject to the CRA, the OMB Memo for the first time circumscribes agencies' ability to issue guidance outside CRA process.

The OMB memo elaborates as to how oversight is to be achieved. It provides that the agency "*should*" provide OIRA an analysis sufficient "to allow OIRA to determine whether the rule is major."[29] This may mean that an agency could not stipulate a rule was major, however obvious this might be, since the OMB Memo, following the provision of CRA, requires that OIRA make this determination.[30]

The OMB Memo also describes the analytical approach agencies *should* employ in conducting their own analysis of whether their rule is major within the meaning of the CRA.[31] This effectively requires IFRAs to engage in a cost-benefit analysis, using OIRA methodology subject to OIRA review.[32] The OMB Memo states that "[i]nsufficient or inadequate analysis may delay OIRA's determination and an agency's ability to publish a rule and to make the rule effective."[33] "[A]fter the designation…[agencies] may send the CRA report to Congress and…may then publish the rule in the Federal Register."[34]

The OMB memo could therefore result in significant delays in the adoption of a rule because OIRA could withhold a "major" classification decision until it obtains what it regards as adequate cost-benefit analysis.

If the OMB Memo is indeed mandating (see the precatory issue discussed below) IFRA cost-benefit analysis subject to OIRA review, the OMB Memo would mark an important change from past practice. First, while the CFTC and SEC are legally mandated to conduct cost-benefit analyses,[35] the banking regulators, namely the Fed, FDIC and OCC, are subject only to narrowly

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[26] OMB Memo *supra* note 4, at 2–3.
[27] OMB Memo *supra* note 4, at 3.
[28] U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, *Shining Light on Regulatory Dark Matter*, 4 (Mar. 2018) https://permanent.fdlp.gov/gpo110748/Guidance-Report-for-Issuance1.pdf ("Of the
more than 13,000 guidance documents identified for the Committee, only 189 were submitted to Congress and the Government Accountability Office (GAO) in accordance with the CRA.").
[29] OMB Memo, *supra* note 4, at 5.
[30] *Id.*
[31] OMB Memo, *supra* note 4, at 6–7.
[32] *Id.* at 6 (referring agencies to "the analytical approach set forth in OMB Circular A-4," which addresses how a number of cost-benefit methodological issues should be dealt with "for draft proposed rules that are formally submitted to OIRA after December 31, 2003 ….").
[33] *Id.* at 5.
[34] *Id.* (emphasis added).
[35] *See* National Securities Market Improvement Act of 1996, PUB. L. 104-290, 110 STAT. 3416 (codified as amended in scattered sections of 15 U.S.C.) (requiring the SEC to consider the protection of investors whether the action will promote efficient, competition and capital formation). That law has been interpreted by the D.C. Circuit as requiring cost-benefit analysis in SEC rulemaking. See generally, SEC. & EXCH. COMM'N, *SEC Staff Memo: Current Guidance on Economic Analysis in SEC Rulemakings* (Mar. 16, 2012)

targeted paperwork and small entity burden analyses.[36] Second, IFRAs have never before been required to involve OMB or OIRA in their rulemaking processes.[37] When President Reagan in 1981 issued the first executive order directing agencies to conduct cost-benefit analyses subject to OIRA review for major rules, the order excluded independent agencies, including IFRAs, from its coverage.[38] Likewise when President Clinton issued Executive Order 12,866 in 1993 that largely reaffirmed the Reagan order, it continued to exclude the independent agencies.[39] Finally, even when the Obama administration in 2011 suggested that independent agencies "should" conduct cost-benefit analysis, it did not subject them to any kind of White House review.[40] In conducting cost-benefit analyses, the Obama administration directed covered agencies to assess "both quantitative and qualitative" costs and benefits, including "the costs of cumulative regulations," and "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[41]

Legal and Policy Issues Raised by the OMB Memo

The OMB Memo raises numerous important legal and policy questions.

1. Does the OMB Memo actually establish obligations on IFRAs? While the OMB Memo states that IFRAs "must" coordinate with OIRA, the rest of the OMB Memo consistently uses the word "should." Indeed, "must" only appears once in the OMB Memo and "should" appears twenty times. Does the use of the word "should" mean that the directives about conducting a cost-benefit analysis and delaying submission of a rule to Congress are merely precatory rather than mandatory?

2. If the OMB Memo's directives are meant to be mandatory, are they actually binding on IFRAs? As previously mentioned, the CRA provides that no actions, omissions, determinations, or findings under the CRA are reviewable. Could an IFRA therefore just ignore the OMB Memo? Could it avoid OIRA review by simply stipulating to Congress, as had been past practice,[42] that a rule is "major"?

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https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. *See also* 7 U.S.C. § 19(a)(2) (requiring the CFTC to consider the costs and benefits of its rules).

[36] Those are the Paperwork Reduction Act, 44 U.S.C. § 2501 et seq., and the Regulatory Flexibility Act, 5 U.S.C. §§ 601–12. *See* Office of Inspector Gen., Bd. Of Governors of the Fed. Reserve Sys., *Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings* 6 (2011), *available at* http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf; Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. Leg. Studs. 351 (2014).

[37] Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (mandating cost-benefit analyses for agency actions and submission of those analyses for "major" rules to the Director of the OMB and excluding independent agencies); Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (requiring OIRA review of significant regulatory actions and excluding independent agencies); Exec. Order No. 13,579, 76 FED. REG. 41587 (2011) (exhorting independent agencies to promote cost-benefit objectives but imposing no mandate nor any review of independent agency actions).

[38] Exec. Order No. 12,291 § 1(d), 3 C.F.R. 127 (1981) (excluding from the definition of an "agency" the agencies listed in 44 U.S.C. § 3502 as independent regulatory agencies).

[39] Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638 (1993).

[40] *See generally*, Exec. Order 13,563, 76 FED. REG. 3821 (Jan. 18, 2011);Exec. Order 13,579, 76 FED. REG. 41585 (July 14, 2011).

[41] Exec. Order 13,563, 76 FED. REG. 3821 (Jan. 18, 2011).

[42] Maeve P. Carey, Alissa M. Dolan and Christopher M. Davis, *The Congressional Review Act: Frequently Asked Questions* 9-10, CONGRESSIONAL RESEARCH SERVICE (Nov. 17, 2016) https://fas.org/sgp/crs/misc/R43992.pdf.

3. Is the OMB Memo lawful under Executive Order 12,866 issued by President Clinton? That executive order expressly excluded IFRAs from cost-benefit obligations and OIRA review of them. Does the OMB memo, based on the CRA, legally override this executive order or permissibly extend its reach?

4. Does the President have the constitutional authority to require an IFRA to conduct cost-benefit analyses supervised by the executive office of the President in the absence of a statutory requirement for IFRA's to do so? If so, in the absence of an executive order, does the OMB itself have the authority to require IFRA's to conduct a supervised cost-benefit analysis?

5. Did Congress really intend for the CRA, a statute created to give Congress veto power of agency rules, to be used by the Executive branch to potentially override IFRA rules? If not, would its use to do this be reviewable by the courts?

6. Does the CRA justify the OMB Memo's requirement that agencies, including IFRAs, provide a cost-*benefit* analysis to OIRA to make a "major" determination, given the fact that the definition of "major" only points to costs not benefits?

7. As a matter of policy, even if it is a good idea for IFRAs' to do cost-benefit analysis, should review by OIRA of such analysis be binding? Or should it simply be made available to Congress and the public? In 2013, the Committee on Capital Markets Regulation, which I direct, recommended that Congress should subject all IFRAs to consistent cost-benefit standards for the most economically significant rulemakings.[43] The Committee noted that IFRAs could be encouraged to outsource such analyses to independent nonpartisan experts, where appropriate.[44] The Committee further recommended that OIRA approval or disapproval of agency cost-benefit analysis be taken into account in court review.[45]

[43] COMMITTEE ON CAPITAL MARKETS REGULATION, *A Balanced Approach to Cost-Benefit Analysis Reform* 1 (Oct. 2013) https://www.capmktsreg.org/2013/10/01/a-balanced-approach-to-cost-benefit-analysis-reform/.
[44] *Id.*
[45] *Id.*