Evaluating Responses to Agency Evasion of OIRA

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I. Introduction

For more than two centuries, presidents of the United States have sought ways to oversee the regulatory state.[2] Since about 1980, presidential oversight has become centralized in the Office of Information and Regulatory Affairs (OIRA). Under a series of executive orders, presidents of both political parties have required federal regulatory agencies to assess the benefits and costs of important regulations and submit those regulatory impact assessments to OIRA for review.

But while OIRA review has become a settled feature of the American regulatory state, concerns have recently been raised that regulatory agencies might be trying to evade it.[3] Agencies may face incentives to evade OIRA oversight if they find it burdensome or irksome. Evasion of OIRA review might occur in several ways; for example, agencies might frame regulatory actions to slip below OIRA's thresholds for review, or shift substantive policy decisions into guidance documents or other forms of agency action that are not subject to OIRA review, or write impact assessments in ways that make review difficult, or run out the clock so that OIRA review is truncated by legal deadlines or the end of a presidential term.[4] Agencies also might enlist other regulators, such as states, to act in place of federal agencies.[5] Finally, some entire agencies (dubbed "independent" agencies) have historically operated outside the OIRA regulatory review process.[6] Normative appraisals of agency evasion may vary; for example, advocates of

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[2] JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

[3] *See, e.g.*, Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Testimony of John D. Graham before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, Hearings on "Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration," Serial 112-102, Mar. 21, 2012 (hereinafter "OIRA Under Obama"), at 27–36; Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011). More generally, one observer reports "outrage" at agencies' use of nonlegislative rules to evade review; *see* William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1028 (2004).

[4] *See* Nou, *supra* note 3.

[5] *See* Testimony of John Graham, "OIRA Under Obama," *supra* note 3.

presidential oversight through OIRA may see it as a problem, while critics of such oversight may see it as welcome.

The concerns about agency evasion have prompted suggestions for response measures to buttress OIRA review. For example, OIRA might broaden the scope of its review by lowering its thresholds, expanding the types of agency actions it reviews, or conducting spot checks to catch attempts at evasion. OIRA could also be given more funding and staff to carry out its reviews. Courts could encourage agencies to undergo OIRA review by adjusting judicial review to take account of whether or not a rule has passed OIRA review. In general, advocates of OIRA review seem likely to favor stronger responses; critics of OIRA review seem likely to prefer more mild responses or none at all.

In this paper, we take no position on whether agency evasion of OIRA is a crisis or a mirage (or something in between), nor on which specific response options are warranted (if any). Rather, in the final section (part IV), we propose a path that seems to have been overlooked in the debate, yet should be prominent: response measures to address agency evasion of OIRA should, in principle, be evaluated in a systematic fashion, similar in concept to the way OIRA evaluates agency regulations. This evaluation should consider alternative response options (including no action), and their important impacts (discussed further in part IV). Because response options and their enforcement may be costly, and OIRA's resources are limited,[7] the optimal level of enforcement of OIRA oversight is likely to tolerate some evasion—just as optimal regulation tolerates some acceptable risk rather than trying to eliminate all risk or ensure perfect enforcement.

Our proposal frames the problem of agency evasion and response measures as a problem of optimal regulation—not only optimal agency regulation of private activities, but also optimal OIRA regulation of agencies. Our proposal requires consideration of questions very similar to those now raised in OIRA review of agency regulations, notably,

- How serious is the problem of agency evasion? Although there may be salient examples of evasion, a more comprehensive assessment of the extent of evasion, its likelihood, and its consequences would be helpful for understanding the scope and severity of the issue for the regulatory system and society.
- What are the plausible alternative response options? The evaluation of responses to agency evasion should include a range of alternative response options, including the option of no action.
- What are the benefits, costs, and other impacts of these alternative response options?

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[6] *See* Testimony of Sally Katzen in "OIRA Under Obama," *supra* note 3, at 36–41.

[7] Nou, *supra* note 3, at 1814–15 (noting that the president may have good reasons not to "maximize control" of the agencies, because his "resources are constrained" and he must be "selective" in requiring review). Nou also notes that relaxed review might be a bargaining chip that the president could offer to an agency or a constituency favoring some regulation, *id.* at 1815. But she does not expressly advocate a thorough assessment of the benefits or costs of attempting to address agency evasion.

Some preliminary comments may be helpful regarding these key questions. First, as to the seriousness of the problem, it remains unclear whether evasion of OIRA is actually widespread and serious. This again depends on the type of evasion. Agencies may have good reasons and incentives to cooperate with OIRA review. Agencies' incentives to cooperate or evade might differ when they are facing OIRA review as compared to judicial review, when they are considering different types of evasion tactics, and when they are anticipating different potential responses to evasion. Further empirical analysis is needed to understand how often agencies evade OIRA review, in what ways, and with what consequences.[8] A few examples are insufficient; anecdotes could be atypical outliers—or the tip of a large iceberg. Some examples used to illustrate evasion may (by virtue of having been identified) also illustrate that evasion can be found out and remedied.[9] Some recent attempts at empirical analysis of larger data sets have found little evidence that agencies are significantly avoiding OIRA review.[10] Still, it remains possible that evasion may be occurring in just a few but very important cases, or at just a few agencies,[11] or that it is occurring more often but in ways that these studies have not captured.

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[8] Nou, supra note 3, at 1836 (agreeing that the question is "empirical"). Nou cites examples, but she does not present evidence that agency evasion ("self-insulation") is widespread, nor does she explore which type(s) may be more prevalent than others. *Id.*

[9] *E.g.*, Nou, *supra* note 3, at 1819–20 (recounting an episode in 1993 in which labeling requirements for meat and poultry were reported in the newspaper but had not been sent to OIRA for review, prompting the OIRA Administrator to call the Agency and insist on review or withdrawal, whereupon the Agency submitted the rule for OIRA review). This example is also cited in *OIRA Avoidance*, *supra* note 3, at 1005. A more recent example is discussed in Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process* (U. Mich. Pub. L. & Legal Theory Res. Paper Series, no. 302, 2013) (discussing HHS allowing states to define "essential health benefits").

[10] *See* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 821 (2010) (finding that use of guidance documents to evade notice & comment procedures has been "overstated" and "overgeneralized from a few egregious examples"); Alex Acs & Charles M. Cameron, Does White House Regulatory Review Produce a Chilling Effect and "OIRA Avoidance" in the Agencies? (2013) (unpublished manuscript, Princeton University) (finding no significant reduction in historical rates of rulemaking when subject to OIRA review). On the other hand, some research has found that agencies may try to evade analytic requirements subject to judicial (as opposed to OIRA) review, at least where the risk of legal sanctions for such evasion is low. *See* Connor Raso, Agency Avoidance of Rulemaking Procedures (2013) (unpublished manuscript) (finding some agency evasion of requirements under the Regulatory Flexibility Act and under the Unfunded Mandates Reform Act, and inferring that evasion is more likely where the litigation risk of evasion is low). Other analyses have debated whether judicial review induces delays in rulemaking, *see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012).

[11] *E.g.*, Lars Noah, Governance by the Backdoor: Administrative Law(lessness?) at the FDA (2013), __ Nebraska L. Rev. __ (forthcoming 2014) (arguing that FDA uses guidance documents to evade review more often than do other agencies).

Second, different types of evasion may be more or less likely than previous studies have suggested, once repeated interactions with OIRA over time are taken into account. In this paper, in order to help identify the kinds of agency evasion of OIRA review that deserve further empirical evidence, we offer a broader typology of the many types of agency evasion of OIRA review that might occur. (We need a more complete typology of evasion tactics, and the incentives driving agencies to choose among these types, in order to understand and estimate the significance of the issue.) In our typology, we also comment on which evasion tactics appear to be more likely to circumvent OIRA oversight. Going beyond prior literature, we identify not only a broader array of evasion tactics, but also potential response options that could be taken as countermoves to each evasion tactic. Agency anticipation of such response measures may deter initial agency evasion. Thus, drawing on game-theory analyses, we situate agency evasion and response measures within a repeat-player relationship.

As a result, we suggest that the evasion tactics on which there has been the most focus so far—such as the use of guidance documents instead of rules, and attempts to understate the economic significance of rules or to split rules into smaller pieces (to slip below the threshold for review)—may turn out to be less likely to escape OIRA review when OIRA and the agency have repeated interactions over time; meanwhile, other tactics, such as the use of enforcement efforts and litigation settlements that compel the agency to regulate, may turn out to be more likely to escape OIRA oversight. These are our conjectures; more empirical study is needed to understand the frequency of each tactic, the likelihood of escaping oversight, the influence of responses and repeat playing, and the consequences of evasion.

Third, even if agency evasion of OIRA is significant, it remains an open question which remedies, if any, would be warranted in response. This depends on the incentives of the actors, the type of evasion, the type of response, and the consequences of each. As noted above, a good evaluation of response options to agency evasion requires an assessment of alternative response options (including no action) and their important impacts. Thus, responses to agency avoidance should be evaluated, in principle, the way that OIRA would evaluate agency regulations, assessing important costs and benefits (including qualitative and ancillary impacts) and comparing across alternative response options.

Further, the evaluation of response options needs to take account of the dynamic relationship between OIRA and the agencies. Agency evasion itself implies that the agency is a strategic actor. So is OIRA. The agency may react to OIRA's oversight response measure by complying or by shifting to a new evasion tactic.[12] This dynamic relationship makes the evaluation of response options more complex. Repeat players in a multiround game may cooperate more, or agencies may select evasion tactics that are less likely to be detected by OIRA over time. The reality that the White House—and the agency—is a "they" and not an "it," multiplies the number of strategic players in this game. These multiple moving

[12] *See* Raso, *Strategic or Sincere?*, *supra* note 10, at 822 (arguing that greater OIRA review of agency guidance documents could drive agencies to rely more on adjudication); Stuart Shapiro, *Agency Oversight as Whack-a-Mole: The Challenge of Restricting Agency Use of Non-Legislative Rules*, HARV. J.L. & PUB. POL'Y (forthcoming) (arguing that greater OIRA review of agency nonlegislative rulemaking could drive agencies to even more difficult-to-monitor policy modes).

parts must be assessed as an interdependent dynamic system. Review may elicit evasion; likewise, a response to evasion may elicit a countermove.[13]

The paper proceeds as follows: Part II provides a background summary of the system of presidential oversight of regulation through OIRA review. Part III analyzes the incentives for agencies to cooperate with or evade OIRA, a broad array of agency evasion tactics, and corresponding response options (especially in a repeat-player relationship). Part IV argues that response options to agency evasion should not be unquestioningly pursued. Instead, they should be evaluated using many of the same principles OIRA employs in reviewing agency regulation, including a systematic assessment of the benefits and costs of particular response actions and a comparison with alternatives.

II. Presidential Oversight of Agency Regulation Through OIRA Review

The presidential use of centralized regulatory review as a tool for managing executive-branch agencies—through the Office of Information and Regulatory Affairs (OIRA)—is now well-established. As readers already familiar with OIRA review will know, the institutionalization of the systematic review process began with Presidents Nixon, Ford, and Carter, all of whom took steps to oversee agency action more closely.[14] For example, Nixon set up a "Quality of Life" review process in 1971, centered at the Office of Management and Budget, in which OMB circulated environmental, consumer protection, and occupational safety rules to other agencies for comment.[15] Presidents Ford and Carter expanded the overlay of requirements on agency rulemaking by requiring additional analyses. Ford required analysis of impacts on inflation,[16] while Carter issued an executive order requiring cost-benefit analyses (CBA) for rules with "major economic consequences."[17] These early oversight efforts anticipated two key

[13] Nou, *supra* note 3, at 1814 (calling the selection of response options "the other half of the game"—the first half being agency evasion). Nou cites several response options, but she does not evaluate response options in terms of the further countermoves they may trigger or their overall costs and benefits. *Id.*

[14] According to longtime OIRA official Jim Tozzi, the seeds of centralized regulatory review were actually sown in the Johnson administration, though not initiated in practice until the Nixon administration. *See* Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 39, 40–41 (2011) (special edition).

[15] John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URBAN L.J. 953, 956 (2006); Memorandum from George Shultz, OMB Director, to Heads of Departments and Agencies (Oct. 5, 1971), *available at* http:// www.thecre.com/ombpapers/QualityofLife1.htm [hereinafter Schultz 1971 Memorandum].

[16] *See* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 27, 1974) (requiring preparation of inflation impact statements).

[17] *See* Exec. Order 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978) (requiring detailed regulatory analysis of rules with "major economic consequences").

objectives of current presidential review structures: improving the quality and rationality of agency analysis, and ensuring agency consistency with broader presidential priorities.

OIRA was created within OMB, during and with the support of the Carter administration, by Congress in the Paperwork Reduction Act of 1980.[18] The Carter administration had previously reviewed agency CBAs through the Regulatory Analysis Review Group (RARG), a collection of experts from various offices, but not yet a centralized standing oversight body. In the first month after taking office in 1981, President Reagan issued Executive Order 12,291, formally centralizing White House review of agency rulemaking in OMB/OIRA.[19] Agencies were to submit proposed and final rules to OMB/OIRA (accompanied by regulatory impact assessments [RIAs]) before publication in the *Federal Register*, and they were ordered to refrain from publishing rules until OMB/OIRA concluded its review.[20]

Executive Order 12,291 institutionalized two other key elements that still characterize presidential review of rulemaking. One layered an additional set of analytical requirements on rulemaking on top of those already imposed by statute. In the regulatory review process for so-called "major" rules, agencies were to prepare, submit, and "to the extent permitted by law consider" the Regulatory Impact Analyses, particularly assessing each rule's expected costs and benefits.[21] The other was a formalizing of the goal that executive agencies, in regulating, were to be explicitly guided not just by authorizing statutes but by overarching presidential priorities, notably to ensure that "benefits outweigh costs" and to "maximize net benefits" to society.[22] Broadly understood, this also might encompass making sure that diverse regulatory agencies worked in a coordinated fashion, or at least not at cross-purposes. Regulatory review by OIRA, a White House office headed by an administrator appointed by the president (with Senate confirmation) would effectuate these goals.[23]

This regulatory review structure has been consistently maintained and reaffirmed—and from time to time extended—by all the presidents since Reagan. President Bill Clinton's Executive Order 12,866[24]

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[18] *See* Paperwork Reduction Act, § 2, Pub. L. No. 96-511, 94 Stat. 2812 (Dec. 7, 1980) (codified at 44 U.S.C. §§ 3501–3520 (1982)) (creating the Office of Information and Regulatory Affairs in new section 44 U.S.C. 3503).

[19] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[20] Exec. Order No. 12,291, § 3(f).

[21] Exec. Order No. 12,291, § 3(a), (d).

[22] *E.g.*, Exec. Order No. 12,291, § 2 ("In promulgating new regulations . . . all agencies, to the extent permitted by law, shall adhere to the following requirements . . . [A]gencies shall set priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future."

[23] Paperwork Reduction Act, § 2, Pub. L. No. 96–511, 94 Stat. 2812 (Dec. 7, 1980) (codified at 44 U.S.C. §§ 3501–3520 (1982)) (creating the Office of Information and Regulatory Affairs in new section 44 U.S.C. 3503). Senate confirmation of the OIRA administrator was initiated by the 1986 Amendments to the Paperwork Reduction Act.

[24] Exec. Order No. 12,286 (Sept. 30, 1993), published at 58 Fed. Reg. 51,735 (Oct. 4, 1993).

replaced Executive Order 12,291, while retaining and reinforcing each of these three key elements (centralized review, a set of analytical requirements, and an express focus on presidential priorities). The Clinton Executive Order, for example, continued to order executive agencies to refrain from publication of proposed or final rules until completion of OIRA review, though it limited regulatory review as well as regulatory-analysis requirements to "significant" rules.[25] These included rules with an economic impact of $100 million or more ("economically significant" rules) and those raising novel legal or policy issues, among others. The Order also permitted OIRA to determine, over an agency's disagreement, that a particular regulation was indeed "significant" and thus subject to review.[26] Regulatory review was to be completed within 90 days, with narrow exceptions.[27] The Clinton Executive Order fortified centralized White House control by expressly providing that unresolved conflicts between the regulating agency and other agencies (including OMB) would be finally resolved by the president or vice president.[28] Clinton's Order also somewhat enlarged the scope of CBA and the exercise of judgment in CBA by replacing the word "outweigh" with "justify" (i.e., "benefits justify the costs"), and by including attention to qualitative impacts, distributional impacts, and impacts on health, safety, and the environment (while maintaining the objective of maximizing social net benefits).[29] It also called for greater transparency in OIRA's activities and outside contacts, requiring disclosure of changes made during review and documents exchanged by OIRA and the agency.

Presidents George W. Bush and Barack Obama retained the Clinton Executive Order, further cementing the bipartisan consensus across presidencies in favor of centralized regulatory oversight through OIRA.[30] President George W. Bush's OMB/OIRA issued Circular A-4, providing highly detailed

[25] Executive Order No. 12,866 also requires review of other agency actions expected to lead to the issuance of a final rule, including notices of inquiry and advance notices of proposed rulemaking. *See* § 3(e).

[26] Exec. Order No. 12,866, § 6(a)(3)(A).

[27] Exec. Order No. 12,866, § 6(b)(2).

[28] Exec. Order No. 12,866, § 7, 58 Fed. Reg. 51,735 (Oct. 4, 1993). *But see* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, __ PACE ENVT. L. REV. (forthcoming, __) (manuscript at 14)s (rather than funneling OIRA/agency disputes to the vice president, the resolution of disputes [during the Obama administration] was "far messier and more ill-defined").

[29] Exec. Order No. 12,866, § 1 and § 6(b).

[30] The bipartisan consensus is reflected in the decisions by all the presidents of both political parties since the 1970s to favor presidential oversight through centralized OIRA review (Nixon, Ford, Carter, Reagan, Bush-41, Clinton, Bush-43, and Obama). It is also reflected among eminent judges (who also served in government and academia) appointed by presidents of both parties, notably STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (former counsel at the Senate Judiciary Committee, appointed to the First Circuit by President Carter and later appointed to the Supreme Court by President Clinton); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (former White House official in the Clinton administration and later appointed to the Supreme Court by President Obama); and Douglas Ginsburg (former OIRA Administrator in the Reagan administration and then appointed by President Reagan to the D.C. Circuit).

guidance to the agencies on the key elements of a "good regulatory analysis" under Executive Order 12,866, including the need for a baseline, specifically stated assumptions, an assessment of the sensitivity of the analytical results to changes in those assumptions, and attention to ancillary impacts.[31] Late in his second term, President Bush also issued an Executive Order that, among other elements, called for agency guidance documents to be reviewed by OIRA along with rules[32]—an indication of mounting concern about agency evasion of OIRA.

President Obama continued to emphasize that "centralized review is both legitimate and appropriate as a means of promoting regulatory goals."[33] He reaffirmed the importance of regulatory review as a device for a "dispassionate and analytical 'second opinion' on agency actions."[34] He retained the Clinton Executive Order, and strengthened it with additional orders directing agencies to undertake retrospective review of existing rules to reduce regulatory burdens; strongly encouraging the so-called "independent regulatory agencies" to participate in that retrospective review; and directing agencies to promote international regulatory cooperation.[35]

Perhaps unsurprisingly, presidents have consistently endorsed the idea that presidential priorities should guide and constrain agency rulemaking. The Clinton Executive Order, while stating that it "reaffirm[s] the primacy of Federal agencies" in the rulemaking process,[36] asks agencies to explain how proposed actions will be consistent with the president's priorities and expressly tasks OIRA with reviewing each proposed rule to ensure consistency with those priorities.[37] President Obama has similarly emphasized that regulatory review should "ensure consistency with Presidential priorities."[38]

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[31] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (Sep. 17, 2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf; Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1793–94 (2013).

[32] Exec. Order No. 13,422 (Jan. 18, 2007) (later rescinded by President Obama in Jan. 2009).

[33] "Regulatory Review," Memorandum of Jan. 30, 2009, 74 Fed. Reg. 5977 (Feb. 3, 2009).

[34] Memorandum of Jan. 30, 2009, 74 Fed. Reg. *See also* Exec. Order No. 13,579, Exec. Order No. 13,563.

[35] *See* Exec. Order No. 13,563 (Jan. 18, 2011) (retrospective reviews), Exec. Order No. 13,579 (July 11, 2011) (independent agencies), Exec. Order No. 13,609 (May 1, 2012) (international regulatory cooperation), Exec. Order No. 13,610 (May 10, 2012) (reducing regulatory burdens).

[36] Exec. Order No. 12,866 (preamble)..

[37] Exec. Order No. 12,866, § 6(b).

[38] Memorandum of Jan. 30, 2009, "Regulatory Review," 74 Fed. Reg. 5977 (Feb. 3, 2009). We note that OIRA can and does also give input to presidential decisions on major policy issues through other White House deliberative avenues that are separate from OIRA's role in reviewing agency rules and RIAs under the EO.

Regulatory review thus has joined the appointment and removal powers in the president's collection of authorities to prompt agency responsiveness to presidential goals.[39]

The scope of regulatory review has also grown over time in a number of respects. First, some agency actions that are not officially labeled "rules" may nonetheless be subject to OIRA review if they have large impacts. In Executive Order 13,422, President George W. Bush ordered agencies to submit for regulatory review significant guidance documents as well as rules.[40] Although President Obama formally revoked that executive order,[41] OMB and OIRA have continued to assert the authority to review significant policy and guidance documents,[42] and public documents confirm that OIRA reviews, at a minimum, several such economically significant guidance documents each year.[43] Second, the set of agencies subject to OIRA review may be growing. Specific agencies have been created, or their rulemaking functions enlarged, such as the Department of Homeland Security (after 9/11). While Executive Orders 12,291 and 12,866 expressly exclude "independent agencies" from centralized regulatory review,[44] commentators have criticized this division between executive-branch agencies and independent agencies.[45] President Obama's Executive Order 13,579, from July 2011, while not insisting

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[39] *See* Kagan, *supra* note 30, at 2282 (observing Clinton's use of OMB review to "convert[] administrative activity into an extension of his own policy and political agenda"). *Cf.* Free Enterprise Fund v. Public Company Accounting Oversight Board, __ U.S. __, 130 S. Ct. 3138 (2010) (striking down double layered removal restrictions as violating "Article II's vesting of the executive power in the President," even as the officers "exercised power in the people's name"); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008). *Cf.* Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10433 (2005) (highlighting the challenge in melding two potentially different objectives—"maximizing net benefits" and advancing the president's policy priorities—in the same regulatory oversight process).

[40] Exec. Order No. 13,422, § 3 (Jan. 18, 2007).

[41] Exec. Order No. 13,497 (Jan. 30, 2009).

[42] *See* Guidance for Regulatory Review, Memorandum from Peter Orszag to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf. *See also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1853–54 (2013) (stating that under E.O. 12,866 OIRA has "unambiguous" authority to review guidance documents that lead to rules, and also has a long understanding, reaffirmed in the Memorandum from Peter Orszag of Mar. 4, 2009, that freestanding guidance documents may be reviewed by OIRA if they are "significant" and even if they would be exempt from public notice and comment under the APA).

[43] *See* REGINFO.GOV (last visited Oct. 22, 2013), www.reginfo.gov.

[44] Exec. Order No. 12,291, § 1(d); Exec. Order No. 12,866, § 3(b).

[45] For advocacy of greater inclusion of independent agencies under OIRA review, *see* Katzen testimony, in "OIRA Under Obama," *supra* note 3. Meanwhile, scholars continue to debate whether the agencies with restrictions on presidential removal of their heads are truly "independent" or instead should also be considered subject to

on extending regulatory review obligations to independent agencies, did state that for regulatory requirements imposed by earlier executive orders, including requirements for public participation, science, regulatory analysis, and retrospective review of existing regulations, "independent regulatory agencies should comply."[46] A number of independent agencies appear to have at least done some retrospective review and cost-benefit analysis in response.[47] Full-blown regulatory review for independent agencies is on the horizon, though its arrival will depend on several factors, including not only legal reasoning but also presidential elections, presidential relations with Congress, and the perceived burden of regulations issued by the independent agencies.[48] Third, inflation, combined with inertia, has also caused the coverage of regulatory review to grow. President Reagan's Executive Order 12,291 defined "major rules" subject to regulatory impact analysis requirements to include rules with over $100 million of impact on the economy. That definition of what is now termed an "economically significant" rule under the Clinton Executive Order has not been updated,[49] even though a rule with a $100 million impact in 2013 dollars would have had a significantly smaller impact in 1981 dollars.[50]

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presidential direction along with other executive agencies. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (arguing for an end to the distinction and for all agencies to be subject to presidential oversight); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013). Finally, the official position of the American Bar Association is that regulatory review and cost-benefit requirements should extend to independent agencies**.**

Military and foreign affairs rules are also exempted from review, *see* Exec. Order No. 12,866, § 3(d)(2), although agencies (such as the State Department) are expected to consult with OIRA before making regulatory commitments in international agreements, *see* 71 Fed. Reg. 28,831 (May 18, 2006), as they also must before making budget commitments, *see* 22 C.F.R. § 181.4(e). (It remains unclear to what degree regulatory commitments in international agreements are actually submitted to OIRA for ex ante review.)

[46] Exec. Order No. 13,579, § 1(c), 2 (July 11, 2011), 76 Fed. Reg. 13,579 (2011).

[47] *See* Curtis Copeland, *Economic Analysis and Independent Regulatory Agencies*, draft report to ACUS (Apr. 30, 2013) (surveying cross-cutting and agency-specific analytical requirements that apply to independent regulatory agencies). For example, the Consumer Product Safety Commission is required to prepare a CBA for some rules, while the Federal Communications Commission is not. The Securities and Exchange Commission has developed its own guidelines on economic analysis of rulemaking. *See* SEC Memorandum, "Current Guidance on Economic Analysis in SEC Rulemakings," Mar. 16, 2012 (noting the stimuli of court decisions interpreting the SEC's authorizing legislation, congressional interest, and E.O. 13,579); Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. July 22, 2011). *E.g.*, Federal Communications Commission, Preliminary Plan for Retrospective Analysis of Existing Rules, 76 Fed. Reg. 81,462 (Dec. 28, 2011) (FCC plan in compliance with E.O. 13,579).

[48] *See infra* note __ and accompanying text (discussing S. 3468).

[49] *See* OIRA's FAQs on Circular A-4 at 2, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf.

[50] According to the Bureau of Labor Statistics, a rule with a $100 million impact in 2013 would only have had an impact of $39 million in 1981, thus not subjecting it to regulatory review. BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR (last visited __), http://www.bls.gov/data/inflation_calculator.htm.

Perhaps that reflects a tacit but conscious decision to review even smaller rules as inflation shrinks the impact threshold over time. Moreover, the definition of economic significance probably is not very limiting anyway. As Cass Sunstein has reported, over 80% of OIRA-reviewed rules are reviewed for reasons other than economic significance, further broadening the scope of rules subject to review.[51] (It remains true, however, that economically significant rules are subjected to more extensive OIRA review, and agencies are obligated to prepare more extensive analyses for these rules.[52]) On the other hand, these three expansions to OIRA's scope have occurred while OIRA's staff has declined—from over 80 in the 1980s to under 50 today.[53]

Recent statements regarding the functions and effect of OIRA review have conflicted, sometimes sharply.[54] Public information is incomplete regarding the influence of centralized regulatory review on key outcomes, such as consistency with presidential priorities, quality of analysis, and net benefits.[55] Information regarding how OIRA review has specifically affected particular rules has been only rarely disclosed either by OIRA or the agency, notwithstanding disclosure requirements in Executive Order 12866.[56] When this information is disclosed, it is typically difficult to locate.[57] OIRA's posting of 42 return letters and 15 review letters (as well as some prompt letters) in the George W. Bush administration,

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[51] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1868 (2013) ("more than 80% of rules reviewed by OIRA are not economically significant, in the sense that they do not have an annual economic impact of at least $100 million"). Sunstein notes that "rules that are not economically significant need not have a Regulatory Impact Analysis, which is the most formal and detailed assessment of both costs and benefits." *Id.* at 1868. *See* REGINFO.GOV, *supra* note 43 (historical reports of executive reviews). *See also* Heinzerling, *supra* note 28, at 17–18 (suggesting that OIRA often reviews rules not clearly within the scope of the Executive Order's coverage).

[52] *See* Exec. Order No. 12,866, § 6(a)(3)(C) (detailing analysis requirements).

[53] *See* Katzen Testimony, *supra* note 3, at 37 and 41.

[54] *Compare, e.g.*, Heinzerling, *supra* note 28, *with* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).

[55] For one attempt, *see* Robert W. Hahn, *An Evaluation of Government Efforts to Improve Regulatory Decision Making*, 3 INT'L REV. OF ENVTL. AND RES. ECON. 245 (2010).

[56] Heinzerling, *supra* note 28 (manuscript at 29) ("OIRA follows, and permits agencies to follow, almost none of the disclosure requirements" of E.O. 12,866). *See* Nina Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149–56 (2010).

[57] Professor Wendy Wagner has reported on the difficulty of locating information on regulations.gov regarding changes made to rules undergoing regulatory review. After extensive searching on regulations.gov, she was able to locate a number of "redline" versions of rules, but could not distinguish which redlined changes were added by OIRA and which by the agency. Wendy Wagner, *Science in Regulation: A Study of Agency Decisionmaking Approaches*, Consultant's Report to Admin. Conf. (Feb. 18, 2013), at 139–43, *available at* http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf .

under Administrator John Graham, represents a notable exception.[58] With the exception of the return of the Environmental Protection Agency's (EPA's) new national ambient air quality standard for ozone in the fall of 2011 (a return that Administrator Cass Sunstein stated was directed by the president himself), no other return letters were posted during the Obama administration,[59] and only one review letter has been posted since 2008.[60] For example, the recent withdrawal of an Agriculture Department rule limiting the use of synthetic additives in foods labeled "organic" was unaccompanied by any public explanation on the OIRA website or on the website of the federal government's regulatory database, www.regulations.gov.[61]

Following his departure from government, former OIRA Administrator Professor Cass Sunstein has written at length describing OIRA's function largely as "an information-aggregator," implying that the main focus of regulatory review is on issues of quality of analysis and interagency coordination, and avoiding a "serious problem or mistake."[62] But Sunstein also has championed the function of regulatory review in implementing presidential priorities, remarking that Obama's Executive Order 13,563 serves as a "kind of mini-constitution for the regulatory state."[63]

III. Agency Evasion

In recent years, some observers have suggested that agencies may use a variety of tactics to avoid OIRA review. By formally stating that OIRA would also review (or was already reviewing) guidance documents, for example, executive branch officials have implicitly confirmed some of these concerns.[64]

In this section, we offer a critical appraisal of the incentives of agencies to cooperate with or evade OIRA review, and a broader typology than we have seen in prior literature of evasion tactics. As mentioned above, a full typology of evasion tactics is important in order to evaluate which response

[58] Mendelson, *supra* note 56, at 1151.

[59] *See* OIRA Return Letters, http://www.reginfo.gov/public/do/eoReturnLetters (last visited June 10, 2013) (posting multiple review letters).

[60] *See* OIRA Review Letters, http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp (last visited June 10, 2013).

[61] *See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=0581-AD17 (stating only that withdrawal of rule would preserve status quo until a final rule could be issued).

[62] Sunstein, *supra* note 42, at 1842. This mistake-avoidance rationale reflects Sunstein's view in *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

[63] Sunstein, *supra* note 42, at 1846. *See* Heinzerling, *supra* note 28, at 16 (suggesting that OIRA, rather than other agencies, "was calling the shots").

[64] *See* Exec. Order No. 13,422, *supra* note 32; Memorandum of Peter Orszag, *supra* note 42.

options would remedy which types of evasion, to anticipate the potential shifts from one evasion tactic to another that strategic agencies might pursue in reaction to possible response measures, and to assess the likelihood of different evasion tactics in a repeat-player setting. An impact assessment of a response measure will depend on both the evasion tactic that is sought to be regulated and the alternative tactics that the response measure might then induce.

A. Prior Literature

The prior literature in this area has made important strides in identifying a range of methods agencies might use to avoid OIRA review and in assessing the motivations that might prompt agencies to avoid (or agree to) regulatory review. The literature remains incomplete, however. As we explain below, some potential evasion methods, such as litigation settlements, deserve more in-depth consideration. Moreover, the literature does not yet fully attend to an important feature of OIRA-agency interactions—the dynamic strategic relationship between OIRA and the agencies. The fact that OIRA and the agencies interact again and again, year after year, in a "repeat game" can change agency calculations regarding the costs and benefits of evasion methods. Agencies can anticipate the future prospect of OIRA monitoring, detection, and sanctions (perhaps followed by agency countermoves, and further response measures by OIRA or others).

The most important entry in the recent literature on evasion may be from Professor Jennifer Nou, who argues in an extensive 2013 article that an agency might "self-insulate" against OIRA review if the review is costly or irksome to the agency and/or if the agency's preferences diverge from those of OIRA (or, implicitly, the president).[65] "Self-insulation," she further argues, would depend on the agency's resource constraints and the likelihood of what she calls "reversal" at the hands of OIRA. OIRA's potential responses in regulatory review clearly extend not only to reversal (including a issuing a return letter or requesting an agency to withdraw a rule altogether) but also to modifications that change the focus, scope, approach, policy instrument, or stringency of an agency rule.

Nou examines a particular set of tactics for evading OIRA review, including using guidance documents and policy memoranda, using adjudication, splitting rules into smaller pieces, making review difficult by presenting a poorly-explained CBA, waiting to submit a rule to OIRA until just before a statutory or judicial deadline, and building coalitions among other agencies and offices.[66] We offer a more complete typology below, adding other tactics not discussed by Nou, such as enforcement actions, litigation settlements, and delegation or deference to standards developed by other governmental entities and institutions (e.g., states).

Nou mentions steps Congress could take to increase or decrease agency insulation. She also suggests that judges might attempt to detect agency efforts to insulate their actions from OIRA review,

[65] Nou, *supra* note 3.

[66] *Id.* at 1782–802.

though she acknowledges the difficulty in discerning precisely what such self-insulation might signify.[67] But Nou does not recommend specific response options, nor does she recommend (as we do) a systematic assessment of benefits and costs across a range of alternative response options.

Nou looks at the agencies, OIRA, and other entities as strategic actors, guided by their preferences and the expected benefits (or costs) of their actions, and subject to resource constraints.[68] We extend her analysis to more fully consider the likelihood and implications of repeat games among the affected institutions. She acknowledges that repeat games are a possibility,[69] stating that repeat play may prompt agencies only to self-insulate "when most valuable to them," but her analysis does not consider how the possibility (or lack thereof) of repeat play might affect an agency's tendency to use particular evasion methods. For example, as we discuss below, the possibility of repeat play with OIRA is likely to deter an agency from the so-called "splitting" of economically significant rules or the use of nonrule guidance or policy statements (each of which could be detected by OIRA over time); but this possibility may have less deterrent effect in other settings where repeat play with OIRA is atypical, such as an agency's modification of enforcement approaches or its entry into a consent decree.[70]

Systematic empirical evidence on the frequency and patterns of evasion is limited. Alex Acs and Charles Cameron have attempted to assess whether OIRA review has reduced the historical rate of rulemakings at key agencies by assessing the rate of publication of Notices of Proposed Rulemaking (NPRMs). Examining data on 25 federal agencies, they found no reduction in the rate of NPRM production for economically significant rules even for agencies with high rates of "audit" by OIRA, suggesting that the increased cost or ossification of rulemaking from OIRA review is not a great concern for agencies, and that evasion of OIRA is not widespread.[71] Among these same agencies, they also found no data to suggest that agencies "split" economically significant rules (exceeding the $100 million impact threshold) into smaller parts, each below that threshold, to avoid OIRA review. They found no significant change in the production of economically significant rules when OIRA audit rates increased, though they did, oddly, still find an increase in the production of rules that did not reach the level of economic significance. As Acs and Cameron themselves recognize, however, such data are at best a "coarse metric," and a far more nuanced assessment is truly necessary to evaluate agency use of avoidance tactics and the incentives for agencies resulting from OIRA review. For example, for lack of data, Acs and

[67] *Id.* at 1823–30.

[68] *E.g.*, *id.* at 1756 (seeing involved entities as "strategic actors"); *id.* at 1814–15 (resource constraints).

[69] *Id.* at 1770 (stating that agencies are "repeat players").

[70] *See infra* text accompanying notes __–__.

[71] Acs & Cameron, *supra* note 10, at 8–9.

Cameron do not assess whether agencies might try to strategically evade review of *particular* rules,[72] including when the agency expects OIRA disagreement on the merits.[73]

Similarly, Connor Raso has found little evidence that guidance documents are used by agencies to evade notice-and-comment rulemaking procedures; he concludes that the use of guidance documents has been "overstated" and "overgeneralized from a few egregious examples."[74] Meanwhile, Raso has also found that agencies may try to evade statutory analytic requirements subject to judicial (as opposed to OIRA) review, at least where the risk of detection and sanctions for such evasion is low (e.g., because the statute allows the agency to opt out of the analysis for a wide range of reasons), as under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[75]

Other information on agency evasion tactics is fairly limited and impressionistic. Professor Michael Livermore has argued in an unpublished paper, using the example of EPA, that agencies with greater expertise in CBA methodologies are more able to influence the cost-benefit methodology used by OIRA, presumably in the direction the agency favors.[76] Livermore argues that this has permitted EPA to obtain more lenient regulatory review at OIRA's hands. His examples, however, could be understood just as

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[72] *Id.*

[73] Before the Acs and Cameron paper, a student note in the *Harvard Law Review* attempted to empirically assess one potential evasion method—whether agencies might understate the estimated costs of rules in an effort to avoid a designation of "economically significant," which would trigger an enhanced level of review at OIRA and an agency obligation to prepare a cost-benefit analysis. *OIRA Avoidance*, *supra* note 3. The author looked only at whether economically significant rules subjected to OIRA review had been initially designated as such in the first Unified Agenda of Regulatory and Deregulatory Actions in which the rule was "published," most likely sometime earlier than the issuance of the Notice of Proposed Rulemaking. *Id.* at 1008. Using this method, the author did locate some rules (ranging from 18% to 30% at three agencies) that were initially designated as not economically significant in a Unified Agenda, but that were ultimately deemed by OIRA to be economically significant. But this method may overstate the estimate of evasion, because the Unified Agenda is known to be a preliminary document, including regulatory proposals that are not yet projected to result in a Notice of Proposed Rule in any particular timeframe. *See, e.g.*, 73 Fed. Reg. 71,417 (listing, under timetable for rule to prescribe flight crewmember duty limitation and rest requirements, "Next Action Undetermined," but still identifying rule as "significant"); *see also* Katzen testimony, in "OIRA Under Obama," *supra* note 3, at 6 (Unified Agenda is more of a "paper exercise than an analytical tool"). And indeed, the author also located some rules (albeit a lower percentage) that were initially designated by the agency as economically significant but that later turned out to be deemed not economically significant in OIRA review. *Id.* at 1010. Likely for lack of data, the author did not look at whether the agency asserted economic insignificance *at the time the rule was submitted to OIRA*, which would be the key question for purposes of assessing potential evasion. The use of first mention of a rule in the Unified Agenda seems a weak proxy for this strategy.

[74] Raso, *Strategic or Sincere?*, *supra* note 10, at 821.

[75] Raso, Agency Avoidance, *supra* note 10.

[76] Michael Livermore, *Cost-Benefit Analysis and Agency Independence*, __ U. CHI. L. REV. (forthcoming 2014).

well to reveal a useful ongoing dialogue between OIRA and the agencies as they jointly develop best practices for cost-benefit analysis. Livermore also argues, more persuasively, that agencies might use CBAs to help persuade outsiders that a rule is worth issuing, thus helping to insulate it from "political winds."[77]

B. Incentives and Strategic Behavior by Agencies and OIRA

We now turn to an effort to more thoroughly analyze the options for agency evasion of OIRA.[78] We begin by analyzing the incentives that would motivate an agency to evade—or to cooperate with—OIRA, and then we turn to developing a more complete typology of evasion tactics.

1. Presidential and OIRA incentives to require review of agency action

A president with a policy agenda, not surprisingly, will be interested in controlling the regulatory apparatus of the executive branch. This is because regulatory action—quasi-legislative action—is broadly applicable, legally binding, and long-lasting. It is thus a highly effective mechanism for distributing the benefits and burdens of government. And presidents tend to be held politically accountable for the costs and benefits of regulation (even if that regulation is driven by legislation enacted by Congress). High regulatory costs, low regulatory benefits, or skewed distributions of either (i.e., costs or benefits perceived as unfairly distributed) may undermine the president's political support. Agencies that fail to carry out the president's policy agenda, or that adopt other policies that conflict with the president's agenda, may likewise undermine the president's political support. These problems may also tarnish the president's longer-term legacy of accomplishment. Thus, every president of both parties for at least the last four decades has sought systematic and centralized oversight of the regulatory state.

On occasion, however, a president may wish to publicly distance him- or herself from a particular agency action, and hence may acquiesce in agency evasion of review.[79] Or the White House may want to offer relaxed review as a bargaining chip with an agency to secure a deal on other issues.[80]

As discussed above, OIRA regulatory review is now a well-established device among the president's authorities over executive-branch agencies—one of several tools that the president can use to increase the chances that agency choices will conform to presidential preferences.[81] So, as with any process that

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[77] *See also* Nou, *supra* note 3 (agencies may try to recruit allies).

[78] We do not discuss here possible agency evasion of APA notice-and-comment requirements or judicial review. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (Dec. 2012). Also, we do not address here SBREFA and SBA review, nor the Congressional Review Act.

[79] *See* Mendelson, *supra* note 56.

[80] Nou, *supra* note 3, at 1815.

[81] Presidential appointment of the agency head may be another such tool, but it may be ineffective on specific policies if the agency head, once confirmed in office, has incentives to diverge from presidential preferences in

provides for the review and approval of an agent's actions or that asks the agent for a reasoned explanation of its decisions, OIRA's review of executive agency regulations might be understood as a means of increasing the chances that the actions of the agent—the agency—hew more closely to the preferences of the principal—the president, in this scenario. And those preferences, of course, might extend both to the general processes of regulatory decision-making—the sorts of information agencies consider and prioritize and the quality of their analysis—and to particular policies.[82]

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order to serve other constituencies, and the president faces either legal or political obstacles to removing the agency head. Another tool of presidential oversight is the agency's budget; it is unclear how often the budget side of OMB acts to assist the regulatory side of OMB/OIRA.

[82] Some have criticized OIRA review on the grounds that the "principal" whose interest may be furthered by OIRA review, in practice, may actually be civil servants in OIRA, or a political official outside the regulatory agency, or industry, rather than the president or Congress or the people. To the extent these others' policy preferences displace the preferences of the Senate-confirmed presidential appointees who have the delegation from Congress to administer particular programs, the process can appear to be less democratically responsive and undermining the intent of Congress (or even the president, if OIRA's preferences do not match the president's). *E.g.*, Nicholas Bagley & Richard Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Heinzerling, *supra* note 28.

Indeed, some have argued that congressional delegations to a particular executive-branch-agency official should be understood to mean that the rulemaking agency—not even the president—alone is to make key decisions in implementing the statutory program. The requirement of OIRA "clearance" for regulatory review would seem to be in some tension with this notion. Others argue that all congressional delegations to agencies should be understood to mean delegations to the president. *E.g.*, Kagan, *supra* note 30. Nonetheless, the longstanding existence and potential usefulness of both OIRA review and interagency coordination on regulatory matters, together with consensus across presidencies regarding the value of such review (and the fact that the OIRA administrator is also a presidential appointee with Senate confirmation), tend to support the idea that agencies should participate in such review or at least are not precluded from taking account of views from many quarters in their exercise of delegated rulemaking authority.

Even though agencies would seem to be able to consider presidential views and perhaps even treat them as dispositive, there is debate over whether the agency's "true" principal is the president, or alternatively the Congress, or both, as representatives of the people. A rulemaking agency's authority is, of course, defined by statutes enacted by Congress and presented to the president for signature (unless enacted overriding a president's veto). The agency's true principals accordingly might be understood to encompass both the current president, as chief executive, and the Congress (and president) who enacted the original statutory delegation. And all these institutions might be understood as agents of the people, also represented by their current elected officials in Congress. (Consider that judicial review might be understood as a mechanism to ensure the agency acts as a faithful agent of its authorizing statute and indirectly the bodies that enacted it; congressional oversight and budgetary control, meanwhile, as well as Senate confirmation decisions, can prompt agency responsiveness to the current Congress's preferences.)

To that extent, regulatory review performed by OIRA might be understood not purely as increasing the agency's responsiveness to the president, but as increasing the agency's relative responsiveness to the president as compared to its responsiveness to other principals. Such presidential oversight through OIRA may in turn accord

2. Incentives for agencies to cooperate with OIRA review

An agency might favor OIRA review, at the narrow level of the particular rule undergoing review, because of the prospect that the review, through technical expertise and the interagency process, could contribute useful information and improve the quality of agency analyses. Relatedly, agencies might view OIRA review as contributing useful input on public values because of OIRA's proximity to the president.[83] OIRA review might also increase the likelihood of successful promulgation of the rule, as where the CBA convinces OIRA to become an ally of the rule, or where the review convinces other parties, whether inside or outside the government, to become allies of it.[84] RIA using CBA might even strengthen the targets and policy instruments in the rule.[85] In addition, OIRA review could improve the likelihood that the rule will survive judicial review, because it represents a presidential imprimatur or because it represents approval by technical experts, which certifies the agency's analysis to be of higher quality. (Nou suggests that, as one way to increase compliance with OIRA, courts could take a harder look at rules that evade OIRA;[86] we discuss judicial-review responses below.)

Broader institutional considerations, beyond the specific rule at issue, might also encourage agencies to cooperate with OIRA review. These might include the ongoing relationship of the agency to OIRA over time and the relationships of individual agency officials to the president. Agencies may also simply respect the institutional value of oversight by the elected chief executive.

3. Incentives for agencies to evade OIRA

On the other hand, an agency may resist the notion of OIRA review for a particular rule for a number of reasons. Agencies may be irked by oversight intruding into their decision processes. Agencies may also have concerns about cost and delay due to OIRA review, about the considerations that OIRA review

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with increasing the agency's responsiveness to the people as a whole (to "maximize net benefits to society"); the president is constitutionally charged with executing the laws, and the president is elected nationally, whereas members of Congress serve local districts.

[83] *But see* Bagley & Revesz, *supra* note 82 ("OIRA is not the President").

[84] Examples include the decisions to phase down lead in gasoline, and to phase out CFCs that deplete stratospheric ozone, during the Reagan administration, based in part on CBAs. Nou, *supra* note 3, at 1818 (citing an example from the Clinton administration, in which OIRA review helped FDA design a better policy instrument for seafood safety).

[85] *See* Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. __ (2014) (reporting that, perhaps surprisingly, RIAs using CBA, as part of EPA's submission of rules to OIRA review, warranted even more stringent ambient-air-quality standards for several major air pollutants than EPA had set under Clean Air Act section 109 without using CBA).

[86] Nou, *supra* note 3, at 1823–34.

may incorporate, and about the substantive elements that OIRA may seek to put in the rule.[87] Senior officials at agencies (appointed by the president and confirmed by the Senate, and exercising authority delegated by Congress) may dislike having their policy initiatives reviewed by career civil servants at OIRA (although the OIRA Administrator is also appointed by the president and confirmed by the Senate).

The review process itself demands time and resources. OIRA review could result in significant delays before a rule is issued;[88] it also sometimes results in the rule's outright withdrawal, rather than the agency's presumably preferred outcome of issuance. Further, rules are often changed during OIRA review; an agency might resist OIRA review if it perceives that these anticipated modifications are not likely to improve the rule. Modifications, delays, or withdrawal might generally make the rule worse, in the agency's view, if the agency believes its understanding and treatment of the technical or analytical issues is superior to what OIRA can contribute. An agency might also see modifications as making the rule worse if the agency views its rule as best implementing the policy commitments of the underlying statute, or embodying better insights into current public views, perhaps through the public-comment process, than OIRA is likely to possess.[89]

a. Dislike of perceived institutional intrusion on agency policymaking

At a broad level, agencies might view statutes as theirs to implement, both by virtue of statutory delegation and by virtue of the institutional expertise developed around the program. They might resist OIRA review if they view their technical and institutional expertise and tradition with a program as, in general, superior to that of OIRA. They might worry that OIRA review will import the views of opponents of the rule (such as regulated industries) who will have OIRA's ear. Or an agency might see the statute as a vehicle to deliver rents to the agency's own constituency (e.g., industries or advocacy groups), a role that OIRA review could impede by using broad measures of social well-being in CBA.[90]

Agency views on the president's legal authority and the legitimacy of OIRA review both may be relevant to whether the agency seeks to avoid that review. As the chief executive, the president can both appoint and remove senior agency officials; this may inspire a certain degree of loyalty, at least among the president's own appointees to that agency (though "capture" of an appointee by his or her agency is widely lamented in Washington, DC). The president's threat of removal might be moderated somewhat, however, by the agency official's recognition that he or she possesses some leverage vis–à–

[87] Observing an agency choosing to employ a nonrulemaking policy form (e.g., a guidance document or adjudication) does not necessarily mean that OIRA review induced that choice. If the prospect of judicial review had already induced the agency to evade via nonrulemaking policy forms, then OIRA review may also be evaded even if the agency would have welcomed OIRA review. Each type of review (executive and judicial) may be a confounding variable for studies of the effect of the other kind of review on agency evasion.

[88] *E.g.*, Editorial, *Stuck in Purgatory*, N.Y. TIMES, July 1, 2013, at A22.

[89] *Cf.* Katharine Q. Seelye, *Flooded with Comments, Officials Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, at C4.

[90] Bagley & Revesz, *supra* note 82.

vis the president—because of potential negative news-media coverage and the general public perception that presidential removal of a recalcitrant agency official over a rulemaking issue may be an "alarm signal to the public that the president . . . may not be acting in the best interests of the country."[91]

In addition, there is an ongoing debate on the scope of both the president's constitutional authority and the official's statutory authority (when the statute delegates rulemaking power to the agency official) to specifically direct particular agency actions.[92] Proponents of the unitary-executive theory might argue, for example, that because the president serves as the chief executive in the Constitution, Congress is prohibited from insulating executive institutions from presidential control, including the authority to direct particular actions. But this view has not yet found full favor in the courts, which have sustained at least some restrictions on presidential control over agencies.[93] On the statutory question, commentators have debated whether Congress's assignment of rulemaking authority to a "Secretary" or "Administrator" rather than to the president might be understood to limit the president's authority to direct a particular rulemaking result.[94] (On the other hand, perhaps it refers only to Congress's intent that the president, rather than Congress, assign the responsible agency to perform a particular rulemaking task, especially since such statutes are enacted against the backdrop of presidential removal authority and, more recently, regulatory review procedures.[95]) In theory, an agency official who believes that he or she, rather than the president, possesses the statutory authority to make the final decision, might seek to avoid OIRA review as a means of avoiding conflict over that decision or that authority.[96]

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[91] Robert Percival, *Presidential Management of the Administrative State: The Not So Unitary Executive*, 51 DUKE L.J. 963, 93 (2007).

[92] That debate is beyond the scope of this essay. Regarding the unitary-executive argument under the Constitution, *see generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994).

[93] *E.g.*, Free Enterprise Fund v. PCAOB, 561 U.S. __, 130 S. Ct. 3138 (2010) decision (vacating one, but not both, layers of for-cause removal restrictions because of undue encroachment on presidential control); *In re* Humphrey's Executor, 295 U.S. 602 (1935).

[94] *See* Peter L. Strauss, Foreword: *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–3 (2007); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 293–96 (2006); Percival, *supra* note 92; *see also* Heinzerling, *supra* note 28 (noting that the OLC memo accompanying E.O. 12,291 concluded that the president could advise, but not determine, the content of an agency action); Curtis Copeland, *Economic Analysis and the Independent Regulatory Agencies*, Consultant's Report to the Administrative Conference of the United States (April 30, 2013).

[95] *E.g.,* Kagan, *supra* note 30, at 2327–28; Nina Mendelson, *Another Word on Presidential Directive Authority*, 79 FORDHAM L. REV. 2455 (2011).

[96] Commentators have also suggested that the agency official might have more backbone in OIRA review. *See* Strauss, *supra* note 95; Percival, *supra* note 92.

Moreover, an agency, as noted, may view the OIRA process as (mainly) career civil servants in OIRA overseeing the work of Senate-confirmed senior agency officials; even if the president is understood to possess strong supervisory or directive authority (given that the OIRA administrator is a presidential appointee with Senate confirmation), this attitude may reduce the perceived legitimacy of OIRA review and prompt greater resistance.[97]

Thus, agencies may prefer autonomy to implement their own policies and priorities, and may resist being guided by OIRA and the president as an institutional matter (irrespective of disagreement or agreement on policy objectives and outcomes). Over 90% of rules classified as economically significant, and over 70% of all rules, are changed sometime during OIRA review. These numbers have been fairly stable since the early 2000s.[98] While it is impossible to tell definitively without greater disclosure than we now have, it appears that rule changes are typically introduced by the OIRA process itself, rather than by some other factor, such as a change initiated by the rulemaking agency.[99] The numbers may understate changes prompted by OIRA, since they do not include changes made or options developed when agencies share early drafts of rules with OIRA before entering the formal review process.[100]

b. Dislike of changes or delays in regulatory outcomes

Agencies may fear that OIRA review will change outcomes in ways the agency dislikes, such as by preventing or delaying protections of public health, safety, security, well-being, and the environment. An agency might view OIRA's preferences as diverging significantly from the agency's policy preferences. For example, an agency and OIRA might be at odds regarding how a statute should best be implemented to serve public needs. Or the agency may believe it has a better handle on values or "political" issues in the rule than OIRA does. An agency and OIRA also might be at odds regarding whether a particular narrow interest should be protected in statutory implementation, or how aggressively to pursue a statute's goal at the expense of other legitimate considerations.[101] OIRA review accordingly might

[97] *E.g.,* Heinzerling, *supra* note 28, at 33 (OIRA review conveys the views of "OIRA career staff and other agencies' career staff and other cabinet officials, etc.—not "the President."); Lisa Heinzerling, *Who Is Running OIRA?*, REGBLOG, Apr. 29, 2013, *available at* https://www.law.upenn.edu/blogs/regblog/2013/04/29-heinzerling-oira-review.html.

[98] Mendelson, *supra* note 56.

[99] Sunstein, *supra* note 54, at 1847 ("[T]he vast majority of rules . . . are generally changed (and improved) as a result.").

[100] Heinzerling, *supra* note 28, at 8–9 (describing early review practices); Wagner, *supra* note 57 (noting that OIRA interprets disclosure provisions not to apply to prereview changes or to changes prompted by staff rather than branch chiefs at OIRA). *See also* John D. Graham, *The Evolving Regulatory Role of the US OMB*, 1 REV. ENVTL. ECON. & POLICY 171 (2007) (reporting several cases of proactive early involvement by OIRA with agencies, such as helping to prompt and shape rules that required trans-fat content in food labels, reduced diesel-engine pollution, and increased automobile-fuel efficiency).

[101] *See generally* Bagley & Revesz, Centralized Oversight of the Regulatory State, supra note 82.

restrict an agency's slack to pursue goals that diverge from the preferences of the White House or OIRA. And if OIRA review comes only at the end of an agency's multiyear policy-development effort, then negative reviews by OIRA seemingly at the last minute may feel especially jarring to the agency and to regulatory beneficiaries.

For example, Lisa Heinzerling, formerly a senior policy official at EPA during the Obama administration, has argued that OIRA review has effectively blocked important rules without adequate substantive justification, resulting in significant lost regulatory benefits and a waste of agency resources.[102] Heinzerling also recently criticized OIRA review as opaque, lacking in accountability for its results, and requiring changes in rules that are largely driven by OIRA itself, rather than the results of an interagency process.[103] The concern that OIRA review may be exceeding its 90-day schedule and thereby delaying needed agency regulations was highlighted as President Obama began his second term and appointed a new OIRA administrator.[104]

By contrast, former OIRA administrators have praised OIRA review for improving regulatory outcomes. Cass Sunstein states that rules are generally "changed (and improved) as a result" of OIRA regulatory review.[105] John Graham and Sally Katzen also report favorably on OIRA's role in not only reducing regulatory costs but also increasing regulatory benefits (such as protection of public health, safety, and the environment).[106]

To explore agencies' incentives to evade review, we need empirical studies to assess the effects of regulatory review on regulatory outcomes (both in fact and as perceived by agencies). The key challenges here are to estimate and evaluate those regulatory outcomes, and to compare them to a counterfactual baseline—what would have happened absent regulatory review.[107] Jennifer Nou has suggested that the regulatory review process generally prompts agencies to perform more careful

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[102] Heinzerling, *supra* note 28; *see also* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVT. & ADMIN. L. 209 (2012).

[103] Heinzerling, *supra* note 28, at 1, 16.

[104] *See, e.g.*, Editorial, *Stuck in Purgatory*, N.Y. TIMES, July 1, 2013, at A22; John Broder, *Regulatory Nominee Vows to Speed Up Energy Reviews*, N.Y. TIMES, June 13, 2013, at A19. *See also* James Goodwin, Transparency Withdrawn: A New Tactic for Shielding OIRA's Regulatory Review Activities? CPRblog, Sep. 18, 2013, *available at* www.progressivereform.org (last visited Oct. 22, 2013) (suggesting that OIRA is asking agencies to withdraw long-pending rules, possibly to improve statistics on delay of review).

[105] Sunstein, *supra* note 54, at 1847.

[106] *See* Graham, *supra* note 101; John D. Graham, *Saving Lives through Administrative Law and Economics*, 157 PENN. L. REV. 395–540 (2008); Katzen testimony, *supra* note 3.

[107] *See* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 UNIV. ILLINOIS L. REV. 1111; Derek Gill, *Applying the Logic of Regulatory Management to Regulatory Management in New Zealand*, *in* RECALIBRATING BEHAVIOUR: SMARTER REGULATION IN A GLOBAL WORLD (Susy Frankel & Deborah Ryder eds., LexisNexis, 2013).

analyses.[108] Steven Croley has argued that OIRA review can have a discernible and beneficial influence on agency rules.[109] Alex Acs and Charles Cameron studied 25 agencies over the period 1995–2010 and found no evidence that OIRA review had chilled the baseline rate of agency rulemaking activity.[110]

4. Agency-oversight relations as a repeated game

Agency evasion and oversight response is not limited to the question of initial incentives, because the parties interact with each other repeatedly over time and across issues. Scholars have modeled agency behavior in the face of review as a strategic game.[111] For example, Tiller and Spiller suggest that if the agency has a choice among policymaking instruments (e.g., inaction, rulemaking, or adjudication), with different costs and payoffs, the agency will choose the instrument that maximizes its own net benefits. Judicial review can change the agency's strategy, because it poses the risk of reversing the agency's policy. The costs to the reviewer, and hence the likelihood of reversing the agency, also vary across the different instruments. Thus in some cases the agency may choose an instrument that would have offered lower net benefits (to the agency) in the absence of review, if that option poses higher costs to the reviewer and hence reduces the risk of reversal sufficiently to raise the agency's net expected benefit for that instrument above other instruments in the presence of review. Tiller and

[108] Nou, *supra* note 3.

[109] Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) (finding relatively little bias in OIRA review).

[110] Acs & Cameron, *supra* note 10.

[111] Several papers have examined agency strategy facing judicial review. *See* Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. LAW, ECON. & ORG. 349–77 (1999); James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures*, 57 LAW & CONTEMP. PROBS. 111–60 (1994); David Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. REG. 407 (1997); Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCIENCE REV. 605–20 (2007). *See also* Acs & Cameron, *supra* note 10 (arguing that models of judicial review are similarly applicable to presidential review through OIRA); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 238–54 (1994) (applying game theory to presidential oversight of agency rulemaking, focusing on the influence of interest groups on OMB oversight and calling for greater transparency); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (arguing that in a dynamic game, CBA can lead to increased regulation and decreased influence by interest groups); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343 (2002) (arguing that requiring CBA can lead to decreased regulation when firms can lobby and litigate in ways that raise the costs to agencies of regulating); Matthew D. Adler, *The Positive Political Economy of Cost-Benefit Analysis: A Comment on Johnston*, 150 U. PENN. L. REV. 1429 (2002) (discussing and critiquing Johnston's model).

Spiller use this reasoning to argue that agencies may shift from rulemaking to adjudication if courts find it more costly to review a series of adjudications than to review a rule(s) of comparable scope.[112]

Similarly, agencies that would have preferred rulemaking (absent OIRA review) may, when subject to OIRA review on such rulemaking, shift to alternative approaches—evading OIRA—if the costs to OIRA of reviewing the alternative are sufficiently high, so that evasion would reduce the likelihood of OIRA reversing the agency's decision. This kind of analysis, however, should be extended to consider OIRA's next move in a repeat-player extended game. Given OIRA's well-established long-term relationship with the regulatory agencies, the prospect of countermoves by OIRA is likely to be more significant than in the judicial-review settings analyzed by Tiller and Spiller.[113]

OIRA would choose the oversight approach that maximizes its net benefits, which in turn depends on the costs to OIRA and the costs to the agency. If it can expand its oversight scope to encompass the evasion strategy, or impose costs on the agency for its evasion, OIRA may do so where such moves increase its net benefits given agency evasion. Where OIRA and the agency already regularly interact, OIRA may be able to identify the evasion strategy and impose costs on the agency for it with a comparatively low expenditure of its own resources. Moreover, the agency may anticipate OIRA's response, factoring it into the agency's initial decision whether to try to evade; thus, repeat playing may enhance cooperation.[114]

If the agency anticipates that OIRA will have a difficult time discovering and responding to a particular kind of evasion, that will lower the agency's expected cost of evasion and hence encourage it. However, where the agency anticipates repeat play with OIRA, the prospect of OIRA's detection of evasion, and the advent of low-cost opportunities for OIRA to act to deter evasion, may reduce the agency's incentive to attempt it.

For example, when an agency regularly engages with OIRA on rulemaking, it could expect that OIRA will easily be able to impose costs for agency evasion via guidance documents, subregulatory statements, or rules that the agency characterizes as not economically significant. OIRA might, for example, examine retrospective impact assessments of these guidance documents. OIRA also might demand more detailed information submissions in future regulatory reviews of other rules from that

[112] Tiller & Spiller, *supra* note 112.

[113] A possible exception is judicial review in the D.C. Circuit, because that court has such extensive jurisdiction over regulatory-agency decisions that an agency may repeatedly encounter, not only the same court, but the same judges.

[114] *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); COLIN CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS ON STRATEGIC INTERACTION (2003).

agency, or request memoranda from the agency itemizing planned guidance documents or even subregulatory statements.[115]

Such game-theoretic models of regulatory review are informative, but they are also simplified and hence incomplete (as their authors recognize). They help identify hypotheses for some of the incentives facing agencies and reviewers, but they do not reflect all the features of real-world decisions.

C. A Broader Typology of Potential Evasion Tactics

Agencies might seek to structure rules to avoid the coverage of Executive Order 12,866 or use other policymaking devices, ranging from agency adjudication to litigation settlements, none of which is subject to regulatory review.[116] The agency might also shape the information it submits to OIRA in regulatory review to reduce the likelihood that OIRA can make meaningful changes in a rule.[117] The prospect of evasion has prompted frustration from some quarters, including from those interested in ensuring that agency policy is rational and meets cost-benefit standards,[118] regulated entities regarding regulation through the "back door" or "under the radar," and from presidents and their immediate staff regarding the difficulty in managing bureaucratic actions.[119]

Here we examine several possible evasion tactics. Some of these tactics seek to avoid review altogether, by escaping its boundaries—falling below the thresholds that trigger review (e.g., understating impacts, or splitting rules into smaller pieces), or by falling outside the scope of the types of agency action that trigger review (e.g., shifting from rulemaking to "subregulatory" statements, including guidance and individual letters; adjudication, enforcement actions, litigation and settlement; or deference or delegation to other actors such as states, private standards, or international standards). Other tactics assume that the policy falls inside the boundaries and review is triggered, but seek to raise the costs or shorten the time for review (e.g., by obfuscating analysis; combining rules into larger, more complex packages or submitting just before deadlines; or building coalitions favoring the regulation).

As we discuss below, several of the tactics that have raised the most concern seem to us to be less likely to be used, whereas several other tactics that have raised less concern (so far) may be more likely to be used and to evade oversight—even in repeat-player relationships.

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[115] *E.g.*, Heinzerling, *supra* note 28, at 19 ("in my experience, OIRA personnel keep an eagle eye on EPA—on its public announcements, website, etc.—to make sure EPA does not sneak something past it").

[116] Other factors, such as the cost of notice-and-comment rulemaking and the cost and uncertainties accompanying judicial review, may also influence agency choices, but those issues are beyond the scope of this essay. *See generally* Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

[117] *E.g.*, Nou, *supra* note 3; Livermore*, supra* note 76.

[118] "*OIRA Under* Obama," *supra* note 3. *See also* Funk, *supra* note 3 (reporting "outrage").

[119] *E.g.*, Kagan, *supra* note 30.

1. Understating impact or splitting an "economically significant" rule into smaller rules

At first glance, an agency could avoid review by attempting to aim a rule below the threshold for OIRA review of "economically significant" rules, set in Executive Order 12,866 at an economic impact of less than $100 million. This could be accomplished by understating the rule's impact or by "splitting" a larger rule into smaller pieces. These tactics would reduce the agency's obligation to prepare the detailed analyses of costs and benefits required for "economically significant" rules. If the rule was not "significant" for other reasons, the agency could, in theory, avoid review altogether. While this has been a focus of OIRA attention, and stories of this sort of action have been reported,[120] this strategy may not be so prevalent overall.[121] As noted above, the vast majority of rules currently undergoing regulatory review are not reviewed because they are "economically significant," but for other reasons, so understating or "splitting" may be a strategy with limited utility.[122] Moreover, as noted above, the $100 million threshold has become smaller over time due to inflation, so the challenge of understating or splitting to fall below that threshold has become greater. The Executive Order also vests OIRA with the authority to make the final determination as to whether a particular rule is a significant regulatory action,[123] further deterring understating or splitting, particularly if an agency submits the different pieces of the rule around the same time.

In addition, splitting a rule into smaller pieces to fall below OIRA's "significance" threshold may be costly to agencies. Preparing multiple rule proposals will add cost, time, and staff resources, particularly for some standards that may be less susceptible to division (consider, for example, a national ambient-air-quality standard). And splitting a large rule into pieces may undermine political package deals. Each individual piece of the rule may be more vulnerable to focused special-interest opposition.

Finally, in a repeat-player relationship, the agency should anticipate that OIRA could detect evasion and impose sanctions. Any regulated entity disgruntled by such a "split" rule could well alert OIRA, and OIRA could well view the combined pieces as "economically significant" rules, giving OIRA a ready opportunity to impose sanctions. Indeed, on one report, OIRA reached an agreement with an agency to review the agency's rules with economic impacts of over just $25 million, in part to deter splitting, suggesting that OIRA, at least, believed there to be a reasonable risk of such conduct (but also illustrating OIRA's capacity to prevent such evasion).[124] Such an agreement, which effectively expands

[120] *See* Nou, *supra* note 3, at 1792 n.205 (citing sources suggesting that agencies have tried splitting rules); *OIRA Avoidance*, *supra* note 3 (focusing on agencies understating impacts).

[121] Acs & Cameron, *supra* note 10, find little evidence of this strategy over 1995–2010 across 25 agencies. *See supra* text accompanying notes __.

[122] *See* Sunstein, *supra* note 54, at 1868.

[123] Exec. Order No. 12,866, at § 6.

[124] Nou, *supra* note 3, at 1814 n.328 (reporting that for a time, EPA agreed to submit rules with an economic impact of over $25 million).

the scope of OIRA's review beyond what is stated in the Executive Order, certainly sanctions the agency in question and would be likely to deter other agencies from trying the same thing.

Among potential strategies for evading OIRA review, then, "splitting" seems easy to detect, insufficient to escape other criteria for review, costly to the agency to undertake, and, in the context of repeated agency-OIRA interactions on regulatory review, subject to sanctions at relatively low cost to OIRA. (The primary cost would be the staff resources required to engage in additional reviews.) Understating impacts might be more difficult for OIRA to monitor than splitting, because it requires examining the details of the policy's impacts, but it too can be noticed by OIRA and overcome by OIRA designating the rule for review, or requiring retrospective reviews, especially if OIRA observes the agency repeatedly issuing unreviewed rules that later look significant.[125] Thus, a game-theoretic analysis might indicate that agencies would not favor these "under the threshold" tactics. And as noted, Acs and Cameron have found little evidence of "splitting" over the years 1995–2010.

2. Guidance documents

Another tactic might be the agency use of so-called "guidance documents" to make policy in lieu of issuing a notice-and-comment rule. Generally, an agency's issuance of a rule is subject to notice-and-comment requirements under the Administrative Procedures Act (APA); the agency must publish a proposed rule, accept public comments, and consider them prior to finalizing the rule. Guidance documents, however, encompass two classes of agency actions that are exempt from these requirements—interpretive rules and general policy statements.[126] As described elsewhere, the resources and time demanded by notice-and-comment rulemaking likely have significantly contributed to an increased use of such guidance documents by agencies.[127] Agencies using guidance documents need not comply with the Administrative Procedure Act requirements to reply to public comments, for example. In some instances In which a rule would be subject to judicial review, agencies may be able to

[125] *See OIRA Avoidance*, *supra* note 3 (reporting that OIRA has changed the designation of numerous rules from nonsignificant to significant, and a few vice-versa).

[126] *See* Administrative Procedures Act, 5 U.S.C. 553(b)(3)(A).

[127] *E.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1316 (1992) ("It is manifest that the nonobservance of APA rulemaking requirements is widespread."); Erica Seiguer & John Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances*, 60 FOOD & DRUG L.J. 17, 25 (2005) (FDA issues on average twice as many guidances as rules). *See generally* David Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011); *See* Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policy Making*, 92 CORNELL L. REV. 398 (2007).. *But see* Raso, *Strategic or Sincere?*, *supra* note 10 (finding little increase in guidance documents).

delay judicial review if they embody their policies in guidance documents.[128] Moderating the attractiveness of this strategy for agencies, however, is the fact that guidance documents are also inferior to rules in certain ways. These include the lack of legally binding effect of policy statements and reduced judicial deference to agency legal interpretations contained in interpretive rules.[129]

It is important to distinguish an agency's incentives to minimize APA requirements and judicial review from any incentives to avoid OIRA review, however. With respect to OIRA review, although using guidances instead of rules may have been a permitted strategy to avoid review for a time, it clearly is not now. President Bush's issuance of Executive Order 13,422, in January 2007, specifically directed agencies to submit "significant" guidance documents to OIRA review.[130] That this instruction was expressly stated implies that such documents may not have been reviewed on a regular basis previously. This appears to be one of the few agency evasion tactics that has risen to the level of triggering a new EO in response. In that Order, "significant" guidance documents were defined as those having the same characteristics, roughly, as "significant" rules, including an anticipated annual effect of $100 million or more or raising novel or legal policy issues.[131] The order did not require preparation of regulatory impact analyses, but only a "brief explanation of the need for the guidance document and how it will meet that need."[132] Despite Obama rescinding that Executive Order, OIRA has continued to assert the right to review significant guidance documents,[133] stating that even before Executive Order 13,422, OIRA had long reviewed significant policy and guidance documents.[134]

It remains unclear, however, how frequently and extensively OIRA reviews guidance documents. OIRA's "historical records" of reviews for the last 15 years (1998 through May 2013) list, at most, only a handful of guidance documents reviewed annually, compared with hundreds of rulemaking documents.[135] However, guidance-document reviews may not be systematically reported; for example,

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[128] *See* Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policy Making*, 92 CORNELL L. REV. 398, 411 (2007) (guidance documents may not be "ripe" for judicial review in circumstances in which notice and comment rules would be).

[129] *E.g.*, Christensen v. Harris County, 529 U.S. 576 (2000) (interpretations contained in guidances and other agency documents lacking the force of law would receive reduced judicial deference).

[130] Exec. Order No. 13,422, § 9, 72 Fed. Reg. 2763 (Jan. 23, 2007).

[131] Exec. Order No. 13,422, § 3.

[132] Exec. Order No. 13,422, § 7. Unlike OIRA review of regulations, the order sets no deadline for OIRA review of guidance documents. *Id.*

[133] *See* Memorandum of Peter Orszag, *supra* note 42.

[134] *Id.* (suggesting that such review had taken place from 1993 to 2007).

[135] *See* REGINFO.GOV, *supra* note 43. This database reports a peak of eight documents entitled "Guidance" reviewed by OIRA in 2010; in each other year, between zero and four documents entitled "Guidance" were reported as undergoing OIRA review. However, other document titles might be considered "guidance," so that these numbers

no information regarding the substance of guidance-document reviews appears to be publicly available either on OIRA's website or through www.regulations.gov.[136] And many guidance documents, including those that restate or summarize regulatory requirements for the lay reader or for agency staff, may simply not meet Executive Order criteria for significance. However, it seems clear that guidance documents, once reviewed, may be subject to change or reversal in the OIRA process, just as rules are.[137] Most of those listed as having been reviewed are also listed as having been changed during the OIRA review process—or even withdrawn.

Could agency use of guidance documents—given OIRA's claim to review them—still represent a serious device for evasion of OIRA review? It seems unlikely that agencies could evade review of policies altogether through the use of guidance documents. OIRA has been attending more specifically to guidance documents through, for example, OMB's Bulletin for Agency Good Guidance Practices, which instructs agencies to obtain public feedback for all significant guidances, and to conduct a notice-and-comment process for economically significant guidances and submit them for OIRA review.[138] Moreover, interest groups affected by guidance documents are likely to bring issues of any importance to OIRA's attention, much as they do for rules undergoing regulatory review. And agencies are likely to anticipate countermoves or sanctions from OIRA, since they deal with OIRA repeatedly on both guidances and rules. Those repeat interactions and the prospect of countermoves are likely to prompt agencies to make OIRA aware of significant guidance documents before they are issued.[139] Once OIRA detects evasion, for example, OIRA could simply demand more detailed information on future guidance documents or review them more closely. Thus, in issuing its 2011 guidance document on which medical services would count as "essential health benefits" under the Affordable Care Act, the Department of Health and Human Services provided advance public notice, received significant public input, and shared the document with OIRA, which cleared it.[140]

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underestimate the number of guidances OIRA has reported reviewing. *See also* Nou, *supra* note 3, at 1785 (compared with the review of rules, guidance-document review is "more limited and unsystematic in practice").

[136] For example, the *New York Times* reported in mid-2012 that a significant EPA guidance was held up in OIRA review, but that guidance document does not appear in OIRA's current or historical records. *See* Editorial, *Where Are the Clean Water Rules*, N.Y. TIMES, June 20, 2012, *available at* http://www.nytimes.com/2012/06/21/opinion/where-are-the-clean-water-act-rules.html.

[137] *See* REGINFO.GOV, *supra* note 43 (reporting changes to reviewed guidance documents).

[138] Memorandum from Rob Portman to Heads of Executive Departments and Agencies (Jan. 18, 2007), *available at* http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.

[139] Nou, *supra* note 3, at 1786.

[140] *See* REGINFO.GOV, *supra* note 43 (reporting approval, "Consistent with Change," of "Essential Health Benefits Bulletin," RIN 0938-ZB06). *See generally* Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process* (Univ. Mich. Pub. L. & Legal Theory Res. Paper Series, no. 302, 2013).

Nou has argued that guidance documents may be "more difficult to reverse" in OIRA review because these documents are not legally binding, and so the review's "effects are unclear."[141] This may not be correct with respect to OIRA's review authority, however. While a guidance document will not have the same legal force as a rule, it still—by design—will represent an agency's policy announcement. OIRA would thus have an ability equivalent to that in regulatory review to suggest, for example, that the agency consider alternatives or language revisions. The impacts of the guidance could be estimated by assessing it as if it were a binding rule, and then reflecting its nonbinding character by adjusting downward the probability of both benefits and costs. Some guidance documents may be nearly as effective as binding rules, or perhaps even more effective in some settings, as the literatures on "soft law" and "social norms" indicate. In short, compared with some other evasion techniques, guidance documents seem less likely to escape OIRA attention altogether.

The more significant question, in our view, is whether the use of guidance documents might allow agencies to avoid disciplining requirements that would otherwise have applied through the regulatory review process. For example, an agency must prepare a detailed cost-benefit analysis, including alternatives, for an economically significant rule undergoing OIRA review, but may not have to prepare such an analysis for an economically significant guidance.[142] The use by the Department of Health and Human Services of a guidance to define "essential health benefits" was criticized as permitting the agency to avoid the cost-benefit analysis that the Executive Order would otherwise have required.[143] Lars Noah has similarly criticized FDA's use of guidance documents.[144]

3. Other subregulatory statements

We have already focused on the major form of subregulatory statement, namely guidance documents. Agencies can also issue even less formal statements of policy position. For example, an agency may write a letter answering a regulated entity's question, perhaps setting forth an interpretation or promising a safe harbor. Such a statement could be posted on an agency website, putting all regulated entities on notice.[145] An agency may draft an internal memorandum that then becomes public, or an agency official may give a speech that has the effect of publicly stating a new or

[141] Nou, *supra* note 3, at 1777.

[142] E.O. 12,866 does not speak specifically to guidance documents, and the Orszag memo does not make clear precisely which regulatory review requirements apply to which guidance documents.

[143] Letter from Michael B. Enzi et al., U.S. Senators and Representatives, to Kathleen Sebelius, Secretary, U.S. Dep't Health & Human Services (Jan. 13, 2012), *available at* http://edworkforce.house.gov/uploadedfiles/1-13-12_letter_to_sebelius.pdf.

[144] Noah, *supra* note 11.

[145] *E.g.*, Mike Dorning, *OSHA Backs Down on Home Work Rules*, CHI. TRIB., Jan. 28, 2000 (discussing "storm" provoked by 2000 OSHA "interpretation letter," later withdrawn, saying that an office-ergonomics rule would apply to employees working from home).

changed agency policy. In this issue, John Graham and Cory Liu give a vivid example of "rule-like" statements by the Environmental Protection Agency and other agencies, including a press release and an interagency agreement, that had the effect of restricting so-called "mountain top mining."[146] These could be understood as evasion methods, since they are not subject to OIRA review or the other disciplining mechanisms, including cost-benefit analysis for economically significant rules, contained in Executive Order 12,866.

As with all the evasion methods we discuss, it is an empirical question how often agencies elect to make policy using such methods, and whether the desire to avoid presidential supervision plays a significant role. For example, in the mountaintop mining example described above, there are some indications that the White House was involved in the decision—EPA's press release described the policy being announced as that of the "Obama Administration."[147] It may be, however, that the decision was not subjected to disciplining measures such as cost-benefit analysis because it was not formally reviewed by OIRA.

Nonetheless, subregulatory statements may be among agencies' tools of evasion. Besides potentially avoiding OIRA review, an agency also may be able to minimize its APA obligations to publish, collect public comment, and respond to that comment. Meanwhile, the statement may still prompt changes in behavior among those the agency regulates, making it at least a somewhat effective policy-declaring device from the agency's perspective. An agency also may be able to avoid judicial review, since these statements typically would be considered neither final nor ripe. These tools have their shortcomings, however—unlike a rule, they have no legally binding effect, and it may be more difficult to apprise regulated entities of their existence.

An agency considering making such statements as a means of avoiding OIRA review would also likely consider possible countermoves. For example, OIRA may well be made aware of such statements by other interested agencies or interest groups, so it may be relatively easy for OIRA to detect evasion effort.[148] And there may be countermoves with respect to potential future statements: OIRA or another White House office might contact the agency and request review of any significant subregulatory statements, such as speeches, before they are given. The prospect of such countermoves may well deter the use of these statements as a means of evading review.

4. "Bunching" or combining rules

Another strategy could be for an agency to attempt to overwhelm OIRA by sending numerous proposed or final rules at once or combining several rules into a larger and more complex package, in the hope of raising the costs of review and obtaining less rigorous review of each individual rule. Again,

[146] *See* John Graham & Cory Liu, Backdoor Rulemaking, at __ (this symposium).

[147] *Id.*

[148] *See supra* note 146 (ergonomics-rule "interpretation letter" triggered storm and was withdrawn within 48 hours).

in a game-theoretic framework, one must consider the likelihood of an evasion strategy by assessing, not only expected benefits and risks to the agency, but also the agency's anticipation of detection, sanctions, or potential countermoves from OIRA. Because "bunching" involves agency rules submitted to OIRA in the context of regular agency/OIRA interactions, OIRA would obviously be aware that it is being swamped. OIRA could respond by delaying review of relevant rules or asking the agency to prioritize and resubmit some of the rules at a later time. Although the Executive Order calls for a 90-day limit to review, that limit is often not followed, and an agency has little recourse when it is not, except possibly to try to draw the attention of public or congressional monitors.[149]

In theory, an agency might also attempt to overwhelm OIRA by submitting its rule when deadlines are looming, whether statutory or court-ordered, or at the end of a presidential administration term.[150] Others have suggested, however, that agencies may seek to insulate less at the end of a presidential term, on the theory that at that time, OIRA's and the President's preferences, like the agency's, will also be for increased rulemaking.[151]

With respect to submitting a rule for regulatory review close to a statutory or judicially imposed deadline, the immediate benefit to an agency in terms of minimizing review may be greater, because OIRA review is not a justification for noncompliance with a required deadline [152] But the agency presumably would also assess the prospect of repeat play with OIRA and the likelihood of countermoves by OIRA in response to this sort of evasion. Again, because this tactic takes place in the very context of regulatory review, an agency could anticipate that OIRA would have the opportunity to countermove. At the beginning of new presidencies, White House chiefs of staff commonly declare a moratorium on the outgoing administration's "midnight" regulations. Anticipating rules arriving with short deadlines, OIRA could reach out earlier to those agencies, or require advance notice (through the Unified Agenda or otherwise), or perhaps link approval of the agency's other pending rules (not facing deadlines) to the agency's timeliness in submitting a rule facing a deadline.

5. Obfuscation and other means of exploiting information asymmetry

In theory, an agency might also seek to turn its better control over more specific information into an attempt to raise the costs of review to OIRA. As mentioned above, the simplest example might be an agency's efforts to characterize a rule as not economically significant when it actually is economically significant.[153] Such an effort seems unlikely to succeed, given OIRA's expertise in understanding regulatory costs and the possibility of OIRA countermoves in repeat interactions with the agency. For

[149] *E.g.*, Editorial, *Stuck in Purgatory*, N.Y. TIMES, July 1, 2013, at A22.

[150] *See, e.g.*, Acs & Cameron, *supra* note 10, at 8–9.

[151] *See* Nou, *supra* note 3, at 1805.

[152] Nou, *supra* note 3, at 1798.

[153] *E.g.*, Harvard Note, *supra* note 73. *But see* note 73 (criticizing empirical conclusions Note reached).

example, OIRA could simply seek to review rules on other criteria than economic impact (as provided in Executive Order 12,866 and as currently characterizes the great majority of reviews), or to review rules not clearly covered in the Executive Order.[154]

A number of commentators have noted some variant of this issue in the context of cost-benefit analysis. For example, Jennifer Nou has suggested that agencies may submit "poorly translated" cost-benefit analyses to OIRA that are deliberately written in a way that is difficult to understand.[155] Such obfuscation could raise the costs to OIRA of reviewing the rule, nudging OIRA to shift its scrutiny more to other rules. Michael Livermore has argued that an agency can carefully select alternatives to shape the outcome of cost-benefit analysis.[156] He has also argued that an agency can influence CBA methodology in a way that could benefit the agency in OIRA review, though as noted, it is hard to exclude the possibility that CBA methodology may simply be improved as a result of OIRA/agency dialogue over it.

With respect to CBA, we note here that such strategies can have pitfalls for the agency. OIRA might interpret a poorly written CBA to signify a poorly conducted CBA, and be inclined in the context of the particular review to assess the agency's proposal even more closely. Further, a poor CBA can undermine an agency's efforts to gain outside allies for its regulatory proposal. Finally, in the context of ongoing repeat-play interactions over regulatory review, the agency could anticipate that OIRA will make countermoves as it becomes increasingly aware of the agency's strategy. For example, OIRA could ask other agencies to scrutinize the obfuscating agency's CBAs, or it could adopt a presumptive adjustment to the obfuscating agency's estimates of benefits (down) and costs (up) that reflects OIRA's greater uncertainty about their true values and gives the agency an incentive to clarify its estimates.

In general, the CBA-obfuscation problem is a variant of the classic principal-agent asymmetric-information problem, in which the expert agent may have more information than the principal, and may choose modes of operating that raise the information costs to the reviewer. We note two other particular areas of asymmetric information. First, an agency is likely to have greater expertise in scientific issues specific to its field of regulation, such as biological and ecological information in the regulation of threats to endangered species, or toxicology, pharmacology and epidemiology in the regulation of food, drugs and toxic substances. Second, an agency (or in some cases the Department of Justice) is likely to have longer experience than OIRA with the agency's own legal issues, notably the courts' interpretation of the agency's statutes, such as the extent to which a particular regulatory approach is circumscribed by a particular statute, or the extent to which that approach may increase the agency's litigation risk if aggrieved parties seek judicial review.

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[154] According to Lisa Heinzerling, OIRA already regularly engages in such practices. Heinzerling, *supra* note 28, at 17–18.

[155] Nou, *supra* note 3, at 1793.

[156] Livermore, *supra* note 76.

Again, however, this sort of evasion strategy operates in the field of repeat play, so an agency considering exploiting asymmetric information is likely to anticipate OIRA countermoves, both short- and long-term. In the short term, OIRA is a far more expert principal than, say, the typical patient who is seeking medical treatment from a physician. Moreover, OIRA may have other ready sources of information to supplement what it receives from the agency, including submissions from outside groups with a stake in the particular rule. OIRA may also be able to develop greater expertise in an area over the long term, by devoting increased resources to that area. And OIRA could adopt presumptions that adjust an agency's unclear CBA estimates until the agency shows a better CBA.

6. Incorporation by reference of private or international standards

Another possible technique for evasion of OIRA review may be agency use of already-written private or international standards in lieu of so-called "government-unique" standards. Private standards may be written by so-called "standards development organizations," ranging from the American Society for Testing and Materials to the American Petroleum Institute. Indeed, OIRA policy favors the use of such standards. Circular A-119 incorporates a preference for use of voluntary consensus standards over government-unique standards,[157] as does the National Technology Transfer and Advancement Act of 1995.[158] Executive Order 12,866 does not expressly exclude these standards from regulatory review, but Circular A-119 states that if an agency incorporates a voluntary consensus standard by reference, the "agency must comply with the 'Principles of Regulation' (enumerated in Section 1(b)) and with the other analytical requirements of Executive Order 12,866, 'Regulatory Planning and Review,'" perhaps implying that agencies need not formally submit their proposals to OIRA for review. In any event, the policy embodied by Circular A-119 might conceivably prompt OIRA to review these standards more leniently, since the goal is to build on a private process in which a wide array of viewpoints have already been considered and in which the standards already may be met by many regulated entities.[159] Digital searching in the Code of Federal Regulations for private standards that have been adopted by agencies but then modified in some way seems to bear this out; it shows only 17 agency rules, out of thousands utilizing private standards, in which an agency both incorporated a private standard and modified it to some degree.[160] While this is not conclusive, it is suggestive that OIRA policy may favor the wholesale

[157] *See* Memorandum for Heads of Executive Departments and Agencies, Circular No. A-119, Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Feb. 10, 1998.

[158] U.S. Pub. L. 104-113 (1996), § 12(d) (1995) (unless inconsistent with applicable law or impractical, all federal agencies were to use "technical standards that are developed or adopted by voluntary consensus standards bodies . . . to carry out [the agency's] policy objectives or activities").

[159] Circular A-119.

[160] *See* Nina Mendelson, *Private Control over Access to Public Law: the Puzzling Regulatory Use of Private Standards*, 112 MICH. L. REV. (forthcoming 2014), at note 226 & accompanying text (describing electronic searching method and conclusions).

incorporation of private standards, rather than modification either by the agency in adoption or through OIRA review.

Thus, to the extent that an agency can identify a private standard that accords with the agency's own goals for implementation of the statute, the agency may be able to avoid close OIRA review in the regulatory review setting. From an agency's perspective, however, the use of this strategy depends on locating agreeable private standards. In the short term, it is unclear how much use agencies may be making of this strategy. In addition, again, the agency would need to anticipate OIRA countermoves, such as an effort to expand the scope of review at an earlier stage of regulatory development.

Agency use of international standards raises similar issues. In some cases, the effective use of the standards essentially requires using them in their entirety if they are to be used at all. Deference to international standards, whether incorporated in treaties adopted by states, or in codes adopted by transnational private groups (such as the International Standards Organization), might be favored because these international standards reflect widespread agreement and help avoid trade conflicts. We note, however, that OIRA has not given up all supervision in this area: the State Department and the agencies are supposed to consult with OIRA before making regulatory commitments in international agreements.[161]

7. Deferring or delegating to state-level standards

Rather than regulating directly, federal agencies may also implement policy by incorporating or relying on state-level policy. Federal agencies may decline to regulate in a particular area in view of existing state actions, adopt state standards, or authorize state regulation. For example, the FDA has not fully exercised its authority to set standards for bottled water, in part in view of some state actions.[162] But agency inaction has not been subject to OIRA review or any of the disciplining mechanisms in Executive Order 12,866.[163] In their contribution to this issue, Graham and Liu discuss EPA's grant of a Clean Air Act "waiver" from mobile-source standards to the State of California's zero-emissions-vehicle program.[164] Although it is the Clean Air Act statute that authorizes California to regulate after receiving

[161] *See* 71 Fed. Reg. 28,831 (May 18, 2006). This matches the agency's obligation to consult on the budget side, 22 C.F.R. § 181.4(e).

[162] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, BOTTLED WATER: FDA SAFETY AND CONSUMER PROTECTIONS ARE OFTEN LESS STRINGENT THAN COMPARABLE EPA PROTECTIONS FOR TAP WATER, REPT. 09-610 (June 2009).

[163] *See generally* Michael Livermore & Richard Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013) (proposing OIRA review of agency denials of rulemaking petitions).

[164] *See* Graham & Liu, *supra* note 147, at 6. OIRA does not presently review Clean Air Act waivers under E.O. 12,866, since they are not considered rules. *E.g.*, 78 Fed. Reg. 58,090, 58,121 (Sep. 13, 2013) ("As with past authorization and waiver decisions, this action is not a rule . . . . [I]t is exempt from review by the Office of Management and Budget as required for rules and regulations."). OIRA may nonetheless be involved less formally. *See generally* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics*, 12 U.

an EPA waiver, such waiver decisions may not be subjected to the same sort of OIRA oversight and cost-benefit analysis as if EPA had regulated directly. An interesting case may arise when EPA issues regulations (due in June 2014) to limit greenhouse gas emissions from existing power plants under Clean Air Act section 111(d), which calls for the states to implement these standards: will OIRA's review of the EPA rule include the expected state implementation plans? To take another example, the Department of Health and Human Services, tasked with defining "essential health benefits" under the Affordable Care Act, decided, in a guidance document, to defer that definitional problem to the individual states. Although that decision was subjected to OIRA review, as discussed above, it may have permitted HHS to bypass cost-benefit analysis requirements that would have applied had HHS made the decision directly.

Even though these strategies may permit agencies to avoid or minimize regulatory review requirements that would otherwise apply, there are undoubtedly trade-offs from the agency's perspective. The major difficulty, of course, is that in deferring to states, the agency cannot assure as directly that the policies made are the ones the agency believes are needed to implement the federal statute.

Further, to the extent these choices are made to avoid OIRA review, an agency should be anticipating OIRA countermoves. OIRA is likely to be well aware of decisions such as the EPA waiver for California or the HHS deferral to state definitions of "essential benefits." Indeed, in the HHS example, OIRA was involved in reviewing the HHS guidance and may have requested to do so either because it was a "significant" guidance or because OIRA took an expansive view of its review authority.

The problem of evasion may be more troubling when an agency simply decides not to act. OIRA may not readily learn of the issue, particularly when those disadvantaged by agency deferral to state regulation are diffusely spread and poorly organized, as with bottled-water drinkers or other product consumers. States may have suboptimal incentives to regulate, especially regarding interstate externalities. (Agency inaction could also occur unrelated to action by the states.) Nonetheless, there are countermoves that could be considered. For example, OIRA Administrator John Graham set up a system of "prompt letters," not only to encourage agencies to consider removal of poorly functioning regulations, but also to issue regulations to address key problems where action was warranted (examples of rules he "prompted" include FDA requirements for trans-fat content labels on food, and OSHA rules on automatic defibrillators in the workplace). Citizens and outside entities were permitted to submit suggestions to OIRA for the letters.[165] It remains to be seen whether prompt letters will become

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PENN. J. CONST. L. 637, 643 (2010) (noting that EPA's 2007 denial of California's waiver request for automotive greenhouse gas standards was "after interactions with OIRA").

[165] *E.g.*, testimony of Administrator John Graham 2, U.S. House Committee on Energy & Commerce, Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Mar. 12, 2002, at 2, *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/graham_house031202.pdf

a regular part of OIRA's work. Livermore and Revesz have also suggested that OIRA review agency inaction by expanding its review to include agency denials of petitions for rulemaking.[166]

8. Litigation and settlements

A tactic which we think deserves attention is the agency use of judgments and consent decrees in defensive litigation to constrain regulatory decision making. Such a tactic may effectively insulate the agency's decision from OIRA review, an issue we have not seen discussed in other scholarship on OIRA evasion. For example, an agency may be sued by a citizens' group seeking to implement a statutory rulemaking requirement or seeking review of a rule. The judgment—if the agency loses or settles—might specify the outlines of a rule that the agency is required to issue to resolve the litigation. Such consent decrees may be quite specific and even exclude alternatives or approaches that OIRA might favor. Former OIRA Administrator John Graham has given one example—an EPA consent decree committing to regulate power-plant emissions.[167] Once the consent decree is entered, it is legally binding, effectively limiting OIRA's later involvement in the policy decisions at stake. Owing to the White House policy of refraining, without specific preclearance from the White House Counsel's office, from involvement in adjudication and agency enforcement—and from any contact with the Justice Department—there is currently little prospect of OIRA oversight of such settlements before judgment.[168]

However, there are important limitations on the use of this tactic. First, the opportunity to use the device depends on a lawsuit. The agency is unlikely to have control over the filing of such a lawsuit, though at least one scholar has recently suggested that dissatisfied agency officials have been known to invite filing.[169] Further, the contents of the judgment are highly unlikely to be defined by the agency alone—instead, in a litigated judgment, the agency is dependent on the judge's decision; in a settlement, the agency must persuade their adversaries to sign on as well.

Although these interactions involve some potential repeat play with OIRA—after all, they involve regulations, the subject of OIRA review—an agency might expect that, compared with the "splitting" or "bunching" scenario, OIRA will have fewer countermoves. Litigation settlements may be less frequent

[166] *See* Livermore & Revesz, *Regulatory Review*, at 1382–85.

[167] Testimony of John Graham, in "OIRA Under Obama," *supra* note 3, at 9 (discussing rule aimed at reducing mercury emissions). *See* testimony of David Schoenbrod, Hearing on Federal Consent Decree Fairness Act, U.S. House Committee on the Judiciary, Feb. 3, 2012, at 8 (giving example of NRDC v. Train, 6 ELR 20588 (D.D.C. 1976), *available in* Ser. No. 112-83; testimony of Roger Martella in Hearing on Federal Consent Decree Fairness Act, House Committee on the Judiciary, Feb. 3, 2012, Ser. No. 112-83,at 5–6 (giving examples, including EPA's 2010 agreement via consent decree to issue greenhouse-gas performance standards for utilities and refineries).

[168] *E.g.*, Memorandum of Charles Ruff, Counsel to the President (Nov. 24, 1998) (stating firm policy of no White House contact regarding pending agency adjudications), cited in Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. REV. __, __ (forthcoming 2013) , at 1072 n.191.

[169] *See* Daniel Walters, *Litigation-Fostered Bureaucratic Autonomy*, 28 J. L. & POLITICS 129 (2013).

occurrences than an agency's typical submission of rules for review.[170] Further, although this is defensive litigation, rather than agency enforcement, OIRA may be circumspect about direct involvement as a countermove because of general concerns about the perception of political interference in agency litigation and adjudication.[171] Therefore, it is worth being alert to possible increases in the use of this tactic.

9. Enforcement litigation

Enforcement proceedings, like litigation settlements and adjudications, are moves away from rulemaking toward other forms of agency action that may evade OIRA oversight. An agency could anticipate fewer opportunities for OIRA monitoring and responses to these nonrulemaking modes. On the other hand, other characteristics of these procedures may limit their appeal to agencies.

Agency decisions to enforce (or not enforce) a statute may provide an avenue for evading OIRA review because, like rulemaking, these decisions can represent an exercise of the agency's policy discretion. For example, an agency may argue, in the context of an enforcement action, that a statute or regulation should be interpreted more broadly, perhaps to cover a new species of action, or that particular conduct violates a general statutory prescription against, say, "unreasonable" risks or injury to the environment. (Conversely, an agency may decline to pursue cases in which a statute or regulation appears to be violated, or announce a safe harbor from enforcement.) As Morriss, Yandle, and Dorchak describe, for example, EPA "sued every heavy-duty diesel-engine manufacturer and obtained major substantive regulatory concessions from the industry in settlements of lawsuits."[172] Jerry Mashaw and David Harfst have famously discussed the case of the National Highway Traffic Safety Administration, which, in order to avoid the unfavorable judicial review that had been accorded their vehicle-safety rules, ended up shifting to a strategy of recalls, a strategy that Mashaw and Harfst significantly criticize.[173] Finally, as Tim Wu has recently discussed, an agency may use the threat of an enforcement action to convey possible future policy choices and evoke changes in behavior.[174] (In this symposium issue, Jerry Brito responds to Wu by arguing that such tactics are overly coercive and that an agency that uses them is not necessarily serving the public interest.)[175]

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[170] *See* testimony of John Cruden in Hearing on Federal Consent Decree Fairness Act, *supra* note 168, Ser. No. 112-83, at 66 ("consent decrees are actually hard to obtain").

[171] *See infra* text accompanying notes __ (discussing White House policy of refraining from involvement in agency enforcement and adjudication).

[172] *See* ANDREW MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION 9 (2004).

[173] JERRY MASHAW & DAVID HARFST, THE STRUGGLE FOR AUTO SAFETY 192–93 (1990); *id.* at 111 ("a reorientation of auto safety regulation, from science and planning to crime and punishment").

[174] Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011).

[175] *See* Jerry Brito, *An Offer You Can't Refuse: "Agency Threats" and the Rule of Law* (in this symposium issue).

Meanwhile, White House offices are likely to wish to avoid interference—or any perception of interference—with individual agency enforcement decisions or adjudication, because of the association with the "crassest forms of partisan politics."[176] As a result, "internal White House rules . . . prohibit contact with agencies regarding specific enforcement actions [or agency adjudications] without preclearance from the White House Counsel's Office."[177] Thus, an agency might anticipate few, if any, OIRA countermoves compared with other evasion tactics.[178]

Although an agency selecting this tactic faces a reduced prospect of OIRA countermoves, compared with, say, "splitting" a rule, policymaking through enforcement has other difficulties that may deter agencies from using it. For example, this approach provides less advance notice to regulated entities compared with a rule or rule-like document, and thus may evoke fewer immediate changes in behavior. Regulated entities may have to "read between the lines" to discern whether an agency's individual enforcement decision represents a meaningful policy decision that will apply to others. By comparison, an agency's use of a rule or even a nonbinding guidance would provide more notice and perhaps induce broader changes in behavior.

In addition, relying on enforcement reduces an agency's control over policymaking opportunities compared with rulemaking. To bring such an action, the agency must have an appropriate target. And making policy through case-by-case incrementalism can require protracted effort over time.

Finally, an adjudicator—either a judge or an agency adjudicator (more on this below)—may have to be persuaded of the correctness of the agency's position. This is true whether the agency elects to litigate its enforcement action or whether the regulated entity resists a "threat." Meanwhile, the decisionmaker likely will defer less to the agency's position (embodied in a brief) on the meaning of a statute than if it were embodied in a notice-and-comment rule. An agency brief would receive little, if any, deference, while so-called strong *Chevron* deference would be accorded an agency interpretation in a rule.[179]

Nonetheless, anyone concerned with OIRA-evasion tactics should consider whether this choice of policymaking form, like litigation settlements, might be increasing.

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[176] *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. __, __ (forthcoming 2013) (citing Kagan, *supra* note 30, at 2357–58, and giving an example of Nixon administration involvement in tax audits).

[177] *See* Andrias, *supra* note 178, text accompanying note 19 (citing internal White House memoranda).

[178] Andrias, however, has argued that the president should more thoroughly oversee and coordinate agency enforcement decisions writ large, in part because those decisions do encode policy choices. Andrias, *supra* note 178.

[179] Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 214 (1998) (refusing to defer to agency interpretation expressed for the first time in a brief); *see generally* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that courts shuold defer to an agency's reasonable interpretation of ambiguous language in its authorizing statute).

10. Agency adjudication

Another evasion tool might be for agencies to resolve issues by adjudication rather than rulemaking. Long-settled doctrine permits an agency, in its discretion, to resolve policy issues through either method.[180] With both adjudication and litigation, in contrast to rulemaking, the agency may seek to use the vehicle of an individual case to try to make policy, either by declaring policy itself in adjudicating a matter, or by persuading a court or other adjudicator to adopt its view of the law. Thus far, OIRA has no history of reviewing agency adjudication prior to decision, and, indeed, the ex parte contact rules applicable to formal adjudication as well as the strong custom of limits on ex parte contacts from White House officials regarding other agency adjudications would be obstacles to such review.[181]

This option may not be available to all agencies in all situations. Policymaking by more formal adjudication methods has been typical primarily of multimember independent commissions such as the Securities and Exchange Commission, Federal Communications Commission, National Labor Relations Board, and Federal Trade Commission. As "independent" agencies, these agencies already are currently exempt from OIRA review of their rules. Meanwhile, Congress may specifically require some agencies to use rulemaking, rather than adjudication, in certain contexts.[182] Adjudication in other agencies may be conducted primarily by independent administrative law judges, [183] with agency heads only very rarely involved. But in some instances, an executive-branch agency may have the option to shift policy decision making from rulemaking or guidance to adjudication.[184] The Department of Health and Human Services, for example, possesses the authority to resolve cost-reimbursement issues under Medicare either through regulations or through adjudication.[185] And as then-Professor, now-Dean Elizabeth Magill has described, the Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Service) used so-called "precedent" decisions of the Board of Immigration Appeals to resolve visa-

[180] Securities & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 202–3 (1947).

[181] *See* Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1545–46. (9th Cir. 1993) (APA's ex parte communications ban extends to White House staff and the president). 5 U.S.C. 557(d), the source of this prohibition, applies only to formal adjudications. Nonetheless, the White House retains a policy of avoiding contact with respect to any adjudication. *E.g.*, Memorandum of Charles Ruff, Counsel to the President (Nov. 24, 1998) (stating firm policy of no White House contact regarding pending agency adjudications), cited in Andrias, *supra* note 178, at __ n.191.

[182] Magill, *supra* note 117, at 1389.

[183] *See generally* 5 U.S.C. 556 (describing functions of ALJ in formal adjudication); 5 U.S.C. 557 (prohibiting ex parte contacts); 5 U.S.C. 3105 (prohibiting an agency from assigning ALJ duties inconsistent with judicial functions); 5 U.S.C. 554(d)(2) (prohibiting ALJ from being supervised by someone from the investigative part of the agency).

[184] *See* Raso, *Strategic or Sincere?*, *supra* note 10, at 822 (suggesting that OIRA efforts to review guidance documents may drive agencies to shift to adjudication).

[185] *E.g.*, Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 96 (1995) (upholding Secretary's use of adjudication to resolve particular questions in "specific applications of a rule").

standards requirements, rather than using new rulemaking.[186] Further, as Dean John Graham and Cory Liu describe in this symposium issue, EPA effectively set policy on mountaintop mining in part through permitting decisions (or denials) on 175 mine sites.[187]

Although adjudication may be a way to avoid OIRA review of policy decisions, it has other pitfalls that may deter an agency from using it. An agency may receive less deference for an interpretation rendered in an informal adjudication, compared with one issued in a rule.[188] An agency interpretation rendered in a formal adjudication—or an adjudication that is conducted with significant procedural formalities—will still be eligible for *Chevron* deference, however.[189] Further, as with enforcement actions, adjudication requires an appropriate target to come along, reducing an agency's ability to use it proactively. The agency may need to receive an application for a permit that provides it with an opportunity to act, for example. On the other hand, if an appropriate target does come along, an agency may have more flexibility to rapidly advance a new approach to statutory implementation.[190]

11. Coalition building

Agencies may try to assemble coalitions of allies favoring a rule, in order to raise the costs to OIRA of changing or returning that rule.[191] Such coalitions may include advocacy groups, other federal agencies, state agencies, and industry subgroups benefited by the rule.

As part of such a tactic, the agency could disclose OIRA's comments on the rule in order to bring political pressure to bear on OIRA. Executive Order 12,866 provides for public disclosure of changes made through the OIRA regulatory review process, though it does not apply to all OIRA/agency interactions,[192] and the disclosed documents are often incomplete or difficult to locate.[193] To be sure, notice-and-comment rulemaking is intrinsically a public process, and disclosure of documents exchanged by OIRA and the agency during review is already required, so it may be difficult to characterize disclosure as "evasion."

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[186] Magill, *supra* note 117, at 1403.

[187] *See* Graham & Liu, *supra* note 147, at __.

[188] *E.g.*, United States v. Mead, 553 U.S. 218 (2001) (refusing *Chevron* deference for informal Customs Service adjudications).

[189] *E.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

[190] *Cf.* Wu, *supra* note 176 (defending threats as a flexible policymaking device).

[191] Nou, *supra* note 3, at 1799–800.

[192] Exec. Order No. 12,866, § 6. For example, changes the agency makes in a proposal through informal consultation with OIRA before the formal initiation of the regulatory review process are not subject to disclosure. *See supra* note 82 and sources cited therein (Heinzerling, Wagner, Graham).

[193] *See* Mendelson, *supra* note 56.

To the extent OIRA perceives coalition-building and/or disclosure of OIRA comments as a form of evasion (by raising the costs of review), or a way to tie OIRA's hands, the agency that uses it is operating in a field of repeat interactions with OIRA. Therefore, the agency must anticipate countermoves from OIRA, whether those are competing disclosures, more challenging review of the particular regulatory proposal, linkage to review of other rules, or, over the longer term, changes in the disclosure rules.[194]

12. Being or becoming an "independent" agency.

We include this status as a tactic in the interest of making our typology as complete as possible, because rules proposed by independent regulatory agencies are not currently subject to OIRA regulatory review requirements.[195] As our discussion of this issue above in part II suggests, however, presidential executive orders may be gradually attempting to extend control over the independent agencies.[196] And at least one bill is now pending in Congress to expressly confirm the president's authority to order independent agencies to submit to the OIRA regulatory review process.[197]

Is this truly an agency evasion tactic? Typically, the agency does not have a choice—instead, it is made independent by Congress (and the president) in the agency's authorizing statute, sometimes as confirmed by a court.[198] Yet officials leading an agency (or its constituency interest groups) may be able, over the long term, to influence the agency's formal independence from the president. An agency can apparently persuade the courts that it is independent, even if it lacks express statutory limits on the president's power to remove the agency's head.[199] Or, an agency could persuade Congress to confer independent status on it by statute. For example, consider the Consumer Financial Protection Bureau, created in the Dodd-Frank legislation and placed on the list of independent agencies under the Paperwork Reduction Act (hence outside OIRA review).[200] Besides assuming some new functions, the Bureau also took over functions previously located in other agencies, including executive-branch

[194] *See* Heinzerling, *supra* note 28, at 18 ("If OIRA wanted to review something, OIRA reviewed it," even if draft rules were not particularly novel or economically significant.).

[195] *See* Exec. Order No. 12,866.

[196] Exec. Order No. 13,579 (2011). *See* Katzen testimony in "OIRA Under Obama," *supra* note 3; Datla & Revesz, *supra* note 45.

[197] The Independent Agency Regulatory Analysis Act, S. 3468 (113th Cong. 2013).

[198] *E.g.*, Free Enterprise Fund v. PCAOB, 561 U.S. __, 130 S. Ct. 3138 (2010) (holding that SEC was an independent agency, subject to presidential removal only for cause, despite lack of express "for cause" discharge provisions).

[199] As in Free Enterprise Fund v. PCAOB, 561 U.S. __ , 130 S. Ct. 3138 (2010). More generally, *see* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013); Datla & Revesz, *supra* note 45.

[200] *See* Nou, *supra* note 3, at 1835 (discussing Congress expressly amending the PRA to list the new CFPB as an independent agency, and suggesting that Congress could do so for other agencies as well).

agencies such as the Department of Housing and Urban Development and the Treasury Department.[201] One could imagine, therefore, a long-term strategy to persuade Congress to transfer particular regulatory functions from an executive agency to an independent one. Needless to say, this is not a strategy with guaranteed success, since it depends on congressional cooperation both in the creation of the entity and in the confirmation of like-minded agency officials to run it.

Whether agencies' independence from presidential oversight waxes or wanes in the future, in the meantime, the current existence of some independent agency regulation offers a sort of natural experiment for analysts to observe the impact of avoiding OIRA. Acs & Cameron use independent agencies as controls in their empirical work.[202] Former OIRA Administrator Sally Katzen has commented that independent regulatory agencies far less often engage in disciplined analysis of costs and benefits.[203] However, this distinction may become blurred over time as independent agencies bow to Executive Order 13,579, or to court decisions interpreting their regulatory statutes,[204] by starting to conduct their own RIAs using CBA.[205]

IV. Evaluating Response Measures to Reduce Evasion

A. Evasion and response in a repeated game

Observing the possibility of agency evasion does not by itself predict its frequency or severity, nor does it indicate which countermeasures should be taken in response. As we have discussed in detail above, agencies have some incentives to cooperate with OIRA review, and even if an agency seeks to evade OIRA review, it would anticipate countermoves -- from OIRA, other White House officials, other agencies, courts, interest groups, and other parties -- that might induce the agency nonetheless to comply. We have emphasized that an agency required to submit rules to OIRA for review can expect to deal with OIRA in a continuing repeat-play relationship, so that no tactic or response can be viewed in isolation.[206] Agencies might well expect repercussions, or at least distrust, to result from evasive tactics. To the extent that an agency builds a reputation for evasiveness, OIRA might more aggressively review all the agency's rule submissions to ensure compliance with regulatory review requirements. This could

[201] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 111 Pub. L. 203 (2009), § 1061 (transferring existing agency consumer-protection functions to CFPB).

[202] Acs & Cameron, *supra* note 10.

[203] Katzen testimony, in "OIRA Under Obama," *supra* note 3, at 4 ("IRCs do not typically engage in the analysis that has come to be expected for Executive Branch agencies").

[204] *E.g.*, Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[205] *See, e.g.*, SEC Memorandum, "Current Guidance on Economic Analysis in SEC Rulemakings," March 16, 2012.

[206] *See* Tiller & Spiller, *supra* note 112; Bueno de Mesquita & Stephenson, *supra* note 112.

increase overall delays and resource demands on the agency. Relatedly, OIRA might move to develop more in-house expertise to enable more extensive regulatory review of that agency or that field of expertise.[207] (And OIRA might offer more favorable treatment to agencies that cooperate earlier and more fully in regulatory review, such as faster processing of submissions, more assistance in shaping proposals, or credit for issuing regulations that deliver net benefits.[208]) Conceivably, OMB might threaten to cut an evasive agency's budget. Presidents might appoint "tougher" agency heads, less sympathetic to the agency's mission, who will ride herd more sternly on agency action.[209] Congressional committees might undertake investigations that are costly to the agency and distract it from its mission, and Congress might enact new legislation adding review burdens. Courts might review the agency's rulemakings more stringently (and might grant greater deference to agency actions that have successfully undergone OIRA review).

An agency's anticipation of such response moves might deter it from the initial evasion. Or the agency might foresee further openings: For example, if an agency tries to evade OIRA by splitting large rules into more numerous smaller rules, the agency could anticipate that OIRA would respond by expanding its review to cover smaller rules. But that could stretch OIRA's staff resources even more thinly, raising the costs to OIRA of reviewing other (important) rules, and thus giving agencies more latitude on those other rules. Anticipating such a scenario, OIRA could seek more staff resources from the president and Congress; in turn, Congress might be lobbied by the agencies or by interest groups favoring agency action, as well as by interest groups favoring OIRA review. Meanwhile, the agency might shift to modes of action that are more difficult for OIRA to monitor, such as adjudication, enforcement, and litigation settlements. These in turn might elicit further responses.

Each actor may try to foresee several choice points on a large decision tree, and may try to estimate the costs to itself and to its counterpart of each choice set. One implication is that agencies may already anticipate response measures in considering evasion, so concerns that evasion could be widespread may be overstated (although evasion in specific instances may still be important). Or concerns about types of evasion tactics that are easy for OIRA to monitor may be overstated, and the more serious issue may be other types of tactics that are more difficult to monitor. For analysts of regulatory systems, it is not enough to observe the possibility of agency evasion through one tactic or another; analysts must

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[207] *E.g.*, Sunstein, *supra* note 42 ("in recent years [OIRA] has generally had two scientists on its staff").

[208] For the idea that OIRA could give agencies the incentive of credit for issuing regulations that deliver net benefits (credit that can be used by the agency to cover other regulations that do not yield net benefits, so long as the agency's total account stays positive), *see* Eric A. Posner, "Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment" (Regulatory Policy Program Working Paper RPP-2002-01, Cambridge, MA, Center for Business and Government, John F. Kennedy School of Government, Harvard University, 2002).

[209] Acs & Cameron, supra note 10, find some evidence that the administration of President George W. Bush achieved some reduction in rulemaking through the appointment of agency heads (as opposed to via OIRA review). *Cf.* Exec. Order No. 13,422 (requiring each regulation to be approved by a high-level officer in each agency) (later rescinded).

consider multiple evasion tactics, multiple response options, multiple actors, and scenarios of repeated interactions conditioning these choices.

B. Evaluating each response option

How serious is evasion of OIRA, and what should be done about it? The question mirrors the evaluation of agency regulation (How serious are market dysfunctions and particular social concerns, and what should be done about them?) and the evaluation of OIRA oversight (How serious are regulatory dysfunctions, and what should be done about them?). It calls for an evaluative framework for OIRA evasion that mirrors the evaluative framework that OIRA asks of agencies: consider the impacts, including both benefits and costs, of response options. Just as the presence of market failure offers a prima facie case but an insufficient basis for regulating (because we must also consider the costs and benefits of regulatory policy options), so the presence of agencies evading OIRA offers a prima facie case but an insufficient basis for OIRA responses (because we must also consider the costs and benefits of the response options).

This question depends in part on how one views OIRA oversight. Some may see agency evasion as an alarm signal regarding overbearing presidential control. Others may see agency evasion as a violation of electoral accountability and sensible regulatory oversight.

Without reproducing here the full debate over the merits of OIRA oversight,[210] one can see the merit in applying OIRA's own evaluative framework to its choices among response options to agency evasion. Evidence of evasion may warrant some response, but one should assess the pros and cons of a variety of responses. Thus, we propose that *response measures to address agency evasion of OIRA should, in principle, be evaluated with a focus similar to OIRA's evaluation of agency regulations*: thorough assessment of benefits and costs (broadly understood), and comparison to alternatives, including a no-action alternative.

Our proposal frames the problem of agency evasion and response measures as a problem of optimal regulation—not only optimal agency regulation of private activities, but also optimal OIRA regulation of

[210] OMB/OIRA's own annual reports tout the net benefits of the agency rules that were issued under its review. But it is unclear how much to attribute those results to OIRA review. And those reports rely on the agencies' own ex ante RIAs, rather than on OIRA's independent analysis. *See* Testimony of Richard Williams, in House Hearings, "OIRA Under Obama," *supra* note 3. For a study attempting to estimate the net benefits of the U.S. system of OIRA review, *see* Robert W. Hahn, *An Evaluation of Government Efforts to Improve Regulatory Decision Making*, 3 INT'L REV. OF ENVTL. AND RES. ECON. 245 (2010) (finding overall impacts plausibly net positive, but difficult to measure). For a study comparing RIA systems across OECD member countries, *see* Peter Carroll, *Does Regulatory Impact Assessment Lead to Better Policy?* 29 (2) POL'Y & SOC'Y 113 (May 2010) (finding weak results in many countries, and attributing this to weak oversight institutions in those countries).

As more countries adopt regulatory-oversight systems, comparing across countries could be a promising way to study this question. *See* Jonathan B. Wiener, *The Diffusion of Regulatory Oversight*, *in* THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY (Michael A. Livermore & Richard L. Revesz eds., 2013).

agencies. It avoids the hard-line positions of either OIRA maximalists (seeking complete oversight and zero evasion) or OIRA minimalists (seeking to eliminate all OIRA review); for each of those extremes, the answer to agency evasion seems preordained. We submit that a truly careful analyst of regulatory policy would favor neither extreme and would seek to evaluate the pros and cons of each option. (Those concerned about agency evasion of OIRA should not resist our proposal—or, if they do, it should cause them to reconsider why they favor OIRA review to begin with.) Our proposal focuses inquiry on the optimal regulation of agency compliance with regulatory review. In so doing, it promotes a meta-level of analysis: impact assessment of impact assessment, and CBA of CBA (though we do not necessarily recommend a formal CBA of each response option). In particular, it promotes thorough, balanced evaluation of benefits and costs of the incremental additional steps to enforce regulatory review, including consideration of alternatives.

Our proposal therefore requires consideration of core issues that are similar to those now raised in OIRA review of agency regulations, notably

1. How serious is the problem of agency evasion? Just as OIRA regulatory review requires the agency to assess the extent of market failure or other problems, and to prepare a risk assessment of the likelihood and consequences of pollution or other externalities, so the evaluation of responses to agency evasion should include at least a basic assessment of the extent of the evasion problem, its likelihood, and its consequences for the regulatory system and society. These characteristics may of course depend on the type of evasion that is occurring and the potential response options. Our analysis above, in part III of the typology of evasion tactics (and response options in a repeated game), helps frame this inquiry. At the same time, gathering information has both value and costs. Empirical study or other assessment of the seriousness of evasion may be costly in effort and especially in time, so gathering such information will be most valuable where it would significantly improve the choice among response measures. An implication is that high-cost response measures may warrant more empirical inquiry, while low-cost response measures may be desirable based on less than a comprehensive empirical assessment.

2. What are the plausible alternative response options? Just as OIRA regulatory review requires agencies to identify and evaluate several alternative regulatory options—including the option of no action—so the evaluation of responses to agency evasion should include a range or set of alternative response options, including the option of no action. We sketch a typology below.

3. What are the benefits and costs of these alternative response options? Which options would have benefits that justify their costs? While we recognize that a formal cost-benefit analysis may not be appropriate (due to its own costs, and the difficulty of quantifying the impacts of procedural changes), the evaluation of response options to agency evasion should nonetheless be thoughtful and systematic. It should apply the same principle to assess response options that OIRA requires for evaluation of agency

> regulation: the evaluation of benefits and costs across a range of alternatives. In proportion to the costs and benefits of the analysis for improving the decision about response options, the analysis should include all important impacts -- both quantitative and qualitative, both direct and ancillary (both ancillary harms and ancillary benefits) -- and it should pay attention to both overall social well-being and distributional equity.[211]

Additionally, evaluation of evasion and response options could benefit from comparing oversight systems across the U.S., the European Union, and other countries.[212]

As to the seriousness of the problem, it remains unclear whether evasion of OIRA is actually widespread and serious. This again depends on the type of evasion. Agencies may have good reasons and incentives to cooperate with OIRA review, especially in a repeat-playing relationship. Agencies' incentives to cooperate or evade might differ when facing OIRA review as compared to judicial review, and when considering different types of evasion tactics as well as different responses to evasion. Further empirical analysis is needed to understand how often agencies evade OIRA review, in what ways, and with what consequences.[213] Still, it remains possible that evasion may be occurring in just a few but very important cases, or at just a few agencies[214]; or that it is occurring more often but in ways that previous studies have not captured. OIRA needs a risk assessment of agency evasion, going beyond initial examples of evasive tactics to assess their likelihood and severity in the context of repeat playing. As we have emphasized above, the evasion tactics on which there has been most focus—such as the use of guidance documents instead of rules, and attempts to understate the economic significance of rules or split rules into smaller pieces (to slip below the threshold for review)—may turn out to be less likely to escape OIRA review when OIRA and the agency have repeated interactions over time. Meanwhile, other tactics, such as the use of enforcement efforts and litigation settlements binding the agency to regulate, may turn out to be more likely to escape OIRA oversight, but may also be deterred by these tactics' reduced effectiveness as policy-making methods. These are our conjectures; more empirical study is needed (subject to its own costs and value) to understand the frequency of each tactic, the likelihood of escaping oversight, and the consequences of evasion.

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[211] *See* Jonathan B. Wiener, *Better Regulation in Europe*, 59 CURRENT LEGAL PROBS. 447–518 (2006) (discussing "warm analysis" and "proportionate analysis" as intermediate analytic methods that seek to ensure that all important impacts are considered by the decision maker [rather than limiting analysis to precisely quantified impacts or intended impacts], to the extent warranted by the expected improvement in the decision from further analysis compared to the costs of further analysis).

[212] *See* Carroll, *supra* note 212; Wiener, "Diffusion…," *supra* note 212; Jonathan B. Wiener & Alberto Alemanno, *Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs (OIRA) in the US and the Impact Assessment Board (IAB) in the EU*, in COMPARATIVE ADMINISTRATIVE LAW 309–335 (Susan Rose-Ackerman & Peter Lindseth eds., Edward Elgar, 2010).

[213] Nou, *supra* note 3, at 1836, agrees that the question is "empirical." *See* Acs & Cameron, *supra* note 10; Raso, *Strategic or Sincere?*, *supra* note 10; Raso, Agency Avoidance, *supra* note 10.

[214] *E.g.*, Noah, *supra* note 11.

Even if agency evasion of OIRA is significant, it remains an open question which remedies, if any, would be warranted in response. This depends on the incentives of the actors, the type of evasion, the type of response, and the consequences of each. As noted above, a good evaluation of response options to agency evasion requires an assessment of alternative response options (including no action) and their full impacts. Some response options may be desirable, but others may be worse than not acting. Response options may be costly to OIRA—in direct expenses, in the opportunity costs of diverting OIRA resources from other more valuable tasks, and in the costs of delaying agency actions that would offer net benefits to the president and to society. Given these costs, and OIRA's constrained resources (in budget, staff, and time),[215] the optimal level of enforcement of OIRA oversight is unlikely to be 100%, which is to say that the optimal level of agency evasion is likely to exceed zero. The optimal (net-benefits maximizing) strategy for OIRA would consciously tolerate some agency avoidance (where the benefits of prevention do not justify the costs of prevention). This is akin to the similar point that optimal agency regulations should not seek 100% compliance or 100% elimination of the regulated private activity (zero risk), because there are rising costs to regulating and enforcing too stringently.[216] Even some unintended "regulatory slippage" can be tolerable when the costs of preventing it are considered.[217] The analysis of response options could also examine institutional considerations, such as regard for agencies' statutory responsibilities and for effective presidential oversight.

Based on our discussion above in part III of potential responses to agency evasion, we sketch the following incomplete and nonexhaustive set of response options. Many of these may already be in use by OIRA or others; some may not. We do not necessarily advocate (or reject) any of these; our point is that multiple alternative response options need to be evaluated for their costs and benefits. We have already noted some of these costs and benefits in part III above (e.g., constraints on White House involvement in agency adjudications or enforcement proceedings).

A more complete analysis would match each response option with the type of evasion tactic to which it responds (as indicated briefly in each tactic's subsection of part III). One can imagine a table listing three columns: oversight requirements, agency evasion tactics, and corresponding oversight responses. But that immediately points out that several different response options (or more than one) could be used in response to each evasion tactic. If so, each cell in the column of response options could

[215] Nou, *supra* note 3, at 1814–15, notes that the president may have good reasons not to "maximize control" of the agencies, because his "resources are constrained" and he must be "selective" in requiring review. (She also notes that relaxed review might be a bargaining chip that the president could offer to an agency or a constituency favoring some regulation, *id.* at 1815.) But she does not expressly advocate a systematic analysis of the benefits and costs of responding to purported agency evasion.

[216] *See* BARUCH FISCHHOFF ET AL., ACCEPTABLE RISK (1984); WILLIAM BAUMOL & WALLACE OATES, THE THEORY OF ENVIRONMENTAL POLICY (1988).

[217] *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999).

grow to resemble the full list. Selection among them would depend on their costs and benefits in the specific case. And then the table would need another column for the agency's countermoves, and so on.

1. Earlier engagement
    a. Earlier notice of upcoming agency actions (e.g., via the Regulatory Agenda)
    b. Earlier collaboration between OIRA and agencies on initial development, framing, and analysis of regulatory options and alternatives
    c. Early approval, "pre-clearance" or "fast track" of selected agency actions
    d. "Prompt" letters to encourage agency action on policies with promising net benefits
    e. Credit for net benefits, or other steps to encourage desirable agency action
2. Later monitoring of actions that may have evaded review
    a. Spot checks
    b. Communications from affected parties
    c. A petition process, in which parties can formally seek OIRA review of
        i. policies that agencies have pursued, without OIRA review (via any evasion tactic), despite potentially negative net benefits
        ii. agency decisions not to pursue policies, despite potentially positive net benefits (e.g., an agency denial of a petition for rulemaking, or deregulation, or agency inaction)
    d. Retrospective reviews of existing regulations (including reviews of policies that did go through ex ante review, and reviews of some that did not)
    e. Empirical analysis of trends in agency actions
3. Broader scope of review of rule-like actions, such as:
    a. Smaller (lower impact) rules
    b. Guidance documents
    c. Policy statements, letters, websites, FAQs, etc.
4. Broader scope of review of litigation affecting regulation, such as:
    a. Litigation settlements that bind agency's regulatory choices
    b. Agency adjudications
    c. Agency enforcement actions
5. Broader scope of review of regulation by or with other actors, such as:
    a. Regulation by states in concert with federal agencies—e.g., when federal agencies authorize, shape, delegate, adopt, or defer to states' policies.
    b. Regulation by international treaties, agreements, or organizations—e.g., when federal agencies negotiate, delegate, adopt, or defer to such policies
    c. Regulation by private groups—e.g., when federal agencies authorize, shape, delegate, adopt, or defer to such standards, codes, or norms
6. Broader scope of agencies subject to oversight
    a. Asking "independent" agencies to review their existing regulations
    b. Asking "independent" agencies to prepare RIAs using CBA on their proposals for new regulation

    c. Requiring "independent" agencies to be subject to presidential oversight, including OIRA review
    d. Blurring or ending the distinction between executive and "independent" agencies, at least with regard to regulatory oversight (whether eliminating or retaining differences in the power to remove the agency head)
7. Greater resources for OIRA
    a. More funding and staff
    b. Staff in broader fields of expertise
    c. Capacity to conduct some of its own impact assessments of selected agency policies, both ex ante and ex post (retrospective), rather than relying only on the agencies' analyses
8. Calibration of oversight
    a. Using OIRA's authority to review rules on multiple criteria (not only economic impact)
    b. Creating tiers of thresholds for review—e.g., different levels of scrutiny and depth of analysis for different levels of impact or importance of policies
    c. Proportionate analysis—adjusting the degree of analysis required in proportion to the importance of the decision (e.g., the policy's likely impact, or, more accurately, the likely improvement in social well-being that the added analysis of that policy could offer, compared to the costs of that added analysis of that policy (in time and other factors))
9. Coalition building
    a. Enlisting other White House offices, and other agencies, to assist in review
    b. Creating an outside advisory body for OIRA (perhaps at the National Academy of Sciences, or as a counterpart to agencies' science-advisory boards)
10. Presidential appointment (or removal) of agency heads
11. Executive orders and other presidential initiatives to adopt policies
12. Congressional responses
    a. Holding oversight hearings
    b. Modifying the agency's budget
    c. Using the Congressional Review Act to rescind a regulation
    d. Enacting legislation to rescind (or impose) a regulation
    e. Codifying in statute various aspects of regulatory review, RIA, CBA, and OIRA powers (e.g., enacting a statutory version of Executive Order 12,866)
    f. Mandating agencies to employ RIA and CBA notwithstanding prior statutory limitations; or authorizing (without mandating) agencies in their discretion to employ RIA and CBA notwithstanding prior statutory limitations; or retaining prior statutory limits on RIA and CBA
    g. Creating an office of regulatory review in Congress, for RIA on major pending legislation (legislative impact assessment)
    h. Designating agencies as "independent" (or not) in their own statutes, and under the Paperwork Reduction Act

13. Judicial responses
    a. Applying relevant provisions of the APA, and/or agencies' authorizing statutes, to require RIA and CBA.
    b. Interpreting statutory silence to imply agency discretion to employ RIA and CBA. (Requiring Congress to speak clearly if it seeks to prohibit agency use of RIA and CBA in rulemaking.)
    c. Subjecting agency action to a "harder look" where OIRA has not reviewed it
    d. Subjecting agency action to a "harder look" where OIRA review was negative but the agency then evaded OIRA to adopt the policy another way
    e. Deferring to OIRA review where OIRA has favorably reviewed the agency action (e.g., holding that a favorable OIRA review provides a presumption that the agency action is not "arbitrary" under the APA).
    f. Remanding the case to the agency (or to OIRA), or certifying questions to OIRA, for review of technical analytic questions.

Just to repeat: no doubt there are other options; this is a nonexhaustive list. And we do not necessarily advocate (or reject) these options; our point is that they require analysis of their costs and benefits.

Further, the evaluation of response options needs to take account of the dynamic relationship between OIRA and the agencies. One cannot evaluate a response measure to reduce agency evasion as if it would be implemented in a static world on a catatonic agency. The problem of agency evasion makes it obvious that the agency is a strategic actor that considers the costs and benefits of its own options. The agency may respond to the oversight response measure by complying or by shifting to a new evasion tactic.[218] Such shifts by agencies reacting to OIRA oversight are akin to the familiar phenomenon of shifts by private firms reacting to agency regulation.[219] This dynamic relationship makes the evaluation of response options more complex. (At the same time, as noted above, the reality that OIRA and the agencies are "repeat players" in a multiround game may lead them to cooperate more, or may lead the agencies to select evasion tactics that are less likely to be detected by OIRA over time.)

The evasion-response strategic relationship is but one subunit of the larger dynamic system: private activities may yield external harms, which agencies then regulate; private actors may try to evade the agency regulation, to which the agency may respond; at the same time, the agency regulation is subject to OIRA oversight, which the agency may undergo or try to evade, and evasion may in turn elicit an oversight response. Each response may trigger further moves by these and other actors. Markets, regulation, review, evasion, response, and further steps are all moves and countermoves in a strategic

[218] *See* Raso, *Strategic or Sincere?*, *supra* note 10, at 822 (arguing that greater OIRA review of agency guidance documents could drive agencies to rely more on adjudication); Shapiro, *supra* note 12 (arguing that greater OIRA review of agency nonlegislative rulemaking could drive agencies to even more difficult-to-monitor policy modes).

[219] *See* RISK VS. RISK: TRADE-OFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan B. Wiener eds., 1995).

game among multiple players. The reality that the White House—and each agency—is a "they" and not an "it" multiplies the number of strategic players in this game. These multiple moving parts must be assessed as an interdependent, dynamic system. Review may elicit evasion; a response to evasion may elicit a countermove, and more beyond that.[220]

V. Conclusions

Concerns about agency evasion of OIRA may be serious, but the evidence is preliminary, and more empirical assessment is needed. Our analysis of a broader typology of evasion tactics and potential response options, situated in a continuing repeat-player relationship, suggests that concerns about some types of evasion may be overstated, while other types deserve closer investigation. Further, observing evasion does not by itself justify a response. There are many response options; they may be costly; and in a dynamic setting, they may induce cooperation or countermoves by agencies, some of which may be worse than the initial evasion. Hence, we propose that the evaluation of response options to agency evasion of OIRA oversight – akin to OIRA evaluation of proposed agency regulations – should assess the seriousness of the problem (risk assessment), the range of alternative responses (including no action), and the costs and benefits of those alternative responses (including potential dynmic countermoves).

[220] Nou, *supra* note 3, at 1814, calls the selection of response options "the other half of the game" (the first half being agency evasion). She identifies several response options, but she does not evaluate response options in terms of the further countermoves they may trigger, or their overall costs and benefits.