

Become a Rulemaking Ninja: Exploring the OIRA Web Portal

by Robert R.M. Verchick

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Environmental lawyers are a clever breed, but these days the Regulatory State leaves even many of us in the dark. But not everyone. Ever wonder how Prof. Tom McGarity knows about all those delays in regulatory review?¹ Or how Prof. Lisa Heinzerling sniffed out the food safety regulations² the White House appears to be burying?

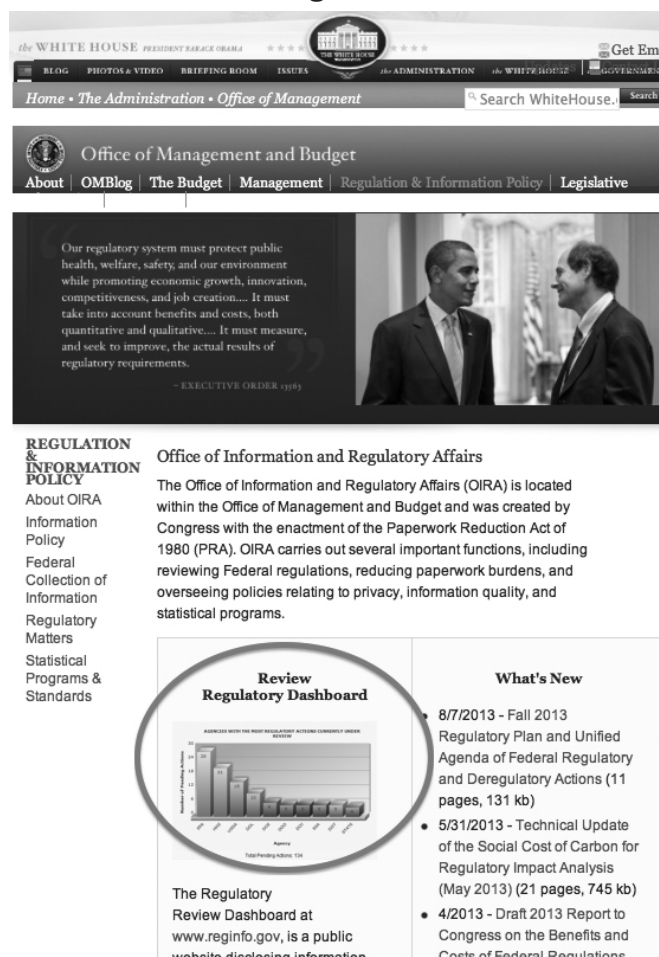
Well, now you too can be a *Rulemaking Ninja*. In the first term of the Obama Administration, the White House Office of Information and Regulatory Affairs (OIRA) introduced an interactive web portal designed to give you better information about the president's centralized system of regulatory review. (I have sometimes referred to OIRA as "the ganglia of the president's rulemaking brain,"³ which creeps out some readers, but I'm sticking with it.)

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

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

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

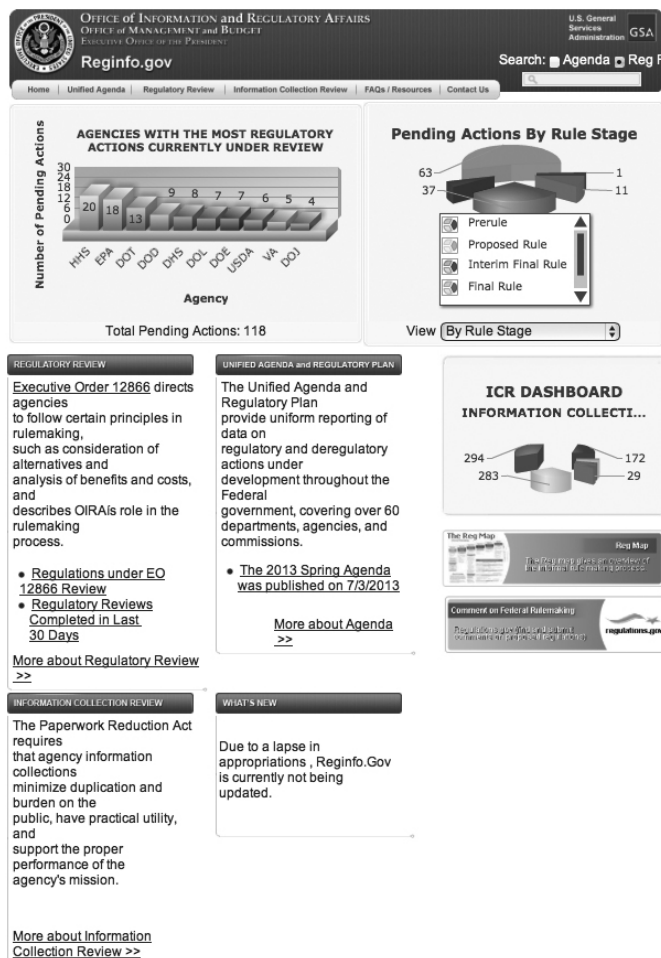
Figure 1



1. Thomas McGarity, *A Long History of Analysis and Intervention*, CPRBlog (Oct. 2, 2013), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=79901C5B-DE50-DC45-15673BAA2AED10FE> (last visited Oct. 14, 2013).
2. Lisa Heinzerling, *Who Is Running OIRA?*, REGBlog (Apr. 29, 2013), <https://www.law.upenn.edu/blogs/regblog/2013/04/29-heinzerling-oira-review.html> (last visited Oct. 14, 2013).
3. Robert R.M. Verchick, *Politics and Progress: Will the White House Stall Its Own Climate Change Plans?*, THE HILL'S CONGRESS BLOG (July 25, 2013), <http://thehill.com/blogs/congress-blog/energy-a-environment/313513-politics-and-progress-will-the-white-house-stall-its-own-climate-change-plans%23more-blogs> (last visited Oct. 14, 2013).

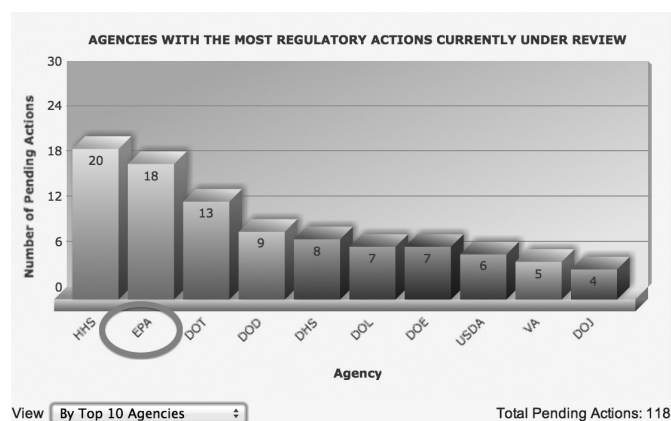
Click the link (see Figure 2) and you'll find yourself in a candy shop of circle graphs and column charts—just like Wolf Blitzer on CNN!

Figure 2



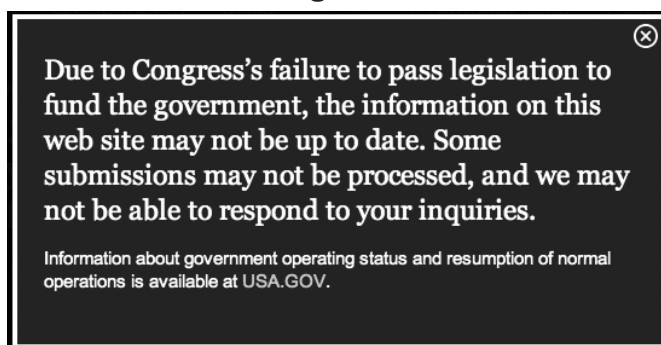
This is where you can find out about what rules are currently under consideration at OIRA and how long they have been there. By adjusting the filters below the charts, you can format the data to your particular interests. For instance, last month I wanted to see a breakdown of rules under review by the top 10 agencies. After a click or two, I got this (the circles are mine):

Figure 3



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

Figure 4



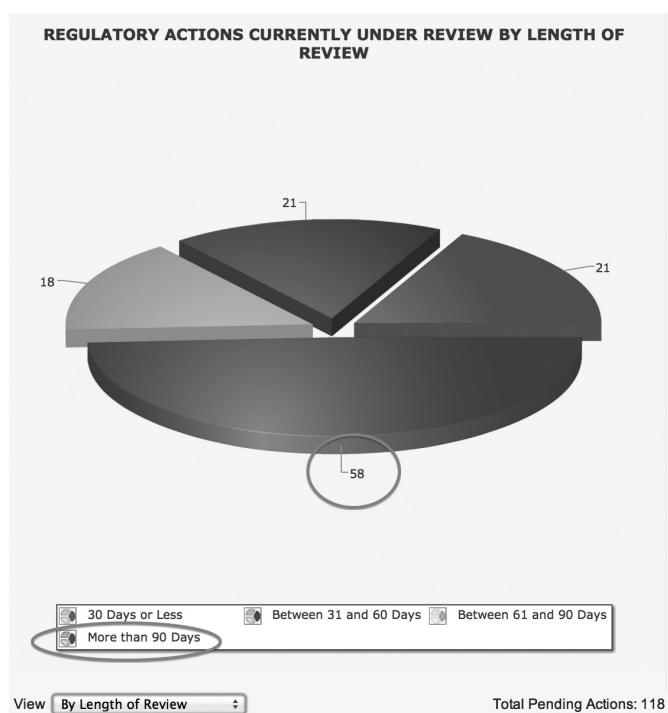
All this White House scrutinizing takes time. And as White House critics have pointed out, OIRA is *frequently* in violation of the 90-day deadline for processing agency submissions (see Figure 5). The backlog, in fact, is *unprecedented*. Nobody will say exactly why delays have become such a problem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

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

Why does OIRA review so many agency rules anyway? The common assumption is that agency rules are often very "expensive," by which Beltway insiders mean the rules, while promising sometimes vast public benefits, are nonetheless costly for industry to comply with. Indeed, Executive Order (EO) 12866 requires agencies to submit for review any rule that is "economically significant," which is defined as having "an annual effect on the economy of \$100 million."⁴ So, how many of those 118

4. Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (1993).

Figure 5



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

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

Figure 7

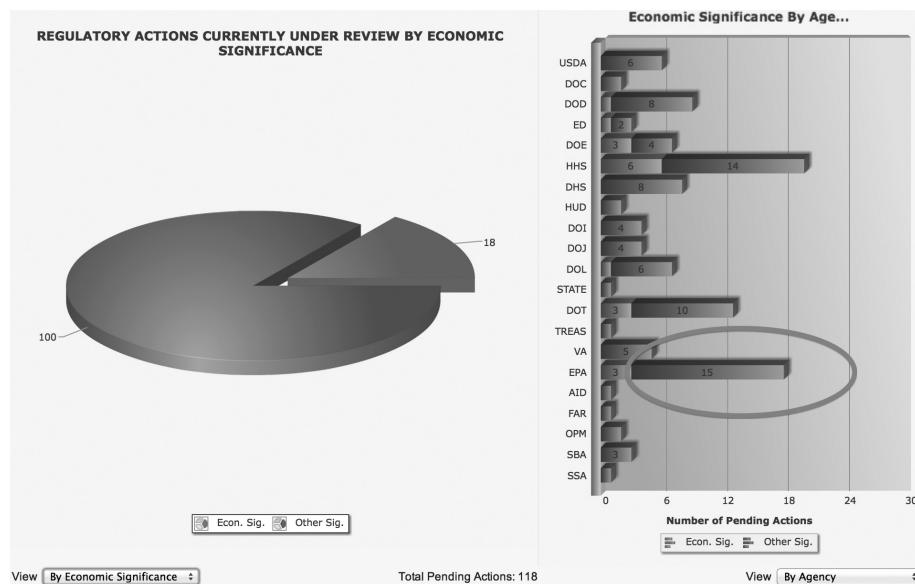
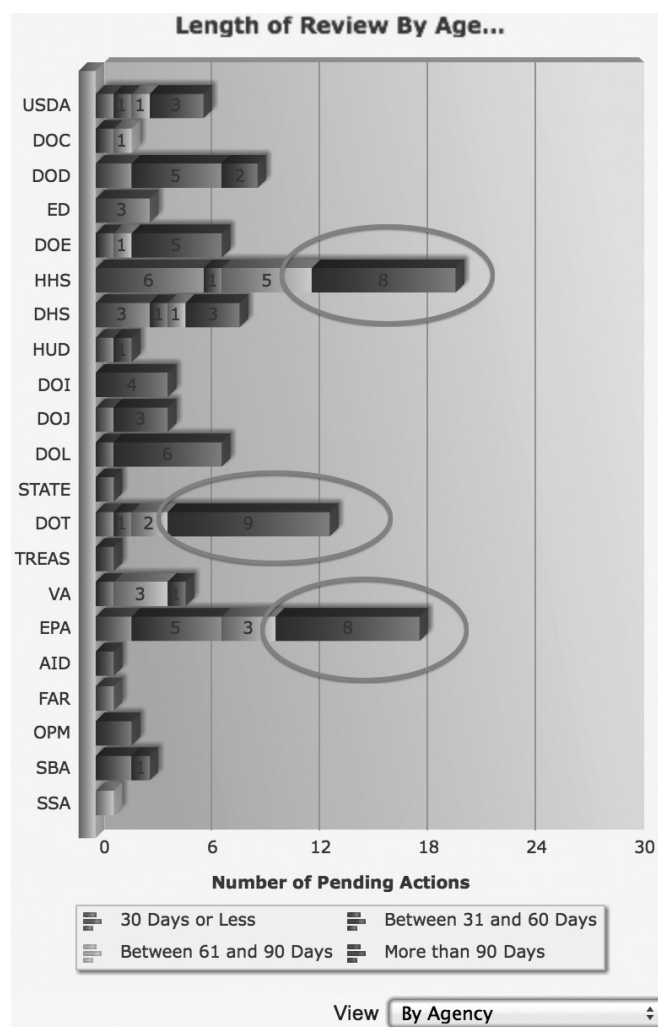


Figure 6



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

After scrolling down and doing a little fishing, you can pull up examples of the kind of non-economically significant rules OIRA is preoccupied with, like this on nanoscale materials. Ever wonder about the health effects of nano-particles in your sunscreen or paint products? Ever think it might be a good idea for the government to collect data on stuff like this from the people who make and sell it? According to the White House’s website, EPA sent over a proposed rule to address this issue nearly three years ago. But

it's still under review at OIRA. Why is that? The website, unfortunately, doesn't say. (Swimsuits, again.)

Figure 8

AGENCY: EPA-OCSP	RIN: 2070-AJ54
TITLE: Nanoscale Materials; Reporting Under TSCA Section 8(a)	
STAGE: Proposed Rule	ECONOMICALLY SIGNIFICANT: No
RECEIVED DATE: 11/22/2010	LEGAL DEADLINE: None

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

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

Figure 9

THE WHITE HOUSE PRESIDENT BARACK OBAMA

REGULATION & INFORMATION POLICY

Office of Management and Budget

Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.... It must take into account benefits and costs, both quantitative and qualitative.... It must measure, and seek to improve, the actual results of regulatory requirements.

EXECUTIVE ORDER 13563

REGULATION & INFORMATION POLICY

About OIRA

Information Policy

Federal Collection of Information

Regulatory Matters

Statistical Programs & Standards

Office of Information and Regulatory Affairs

The Office of Information and Regulatory Affairs (OIRA) is located within the Office of Management and Budget and was created by Congress with the enactment of the Paperwork Reduction Act of 1980 (PRA). OIRA carries out several important functions, including reviewing Federal regulations, reducing paperwork burdens, and overseeing policies relating to privacy, information quality, and statistical programs.

Review Regulatory Dashboard

What's New

8/7/2013 - Fall 2013 Regulatory Plan

Soon you will find gateways into the meeting records that OIRA keeps on rules advanced by all agencies.

Look at this list involving air regulations:

Figure 10

OMBLog The Budget Management Regulation & Information Policy Legislative Information Join OMB

REGULATION & INFORMATION POLICY

Meeting Records

Selected agency: Air and Radiation

Mon Sep 16 2013. Topic: Standards of Performance for new Residential Wood Heaters, New residential Hydronic heaters and Forced-Air Furnaces, and new Residential masonry Heaters.

Fri Sep 13 2013. Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Fri Sep 13 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Thu Sep 12 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Wed Sep 11 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Mon Sep 9 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Wed Sep 4 2013. Topic: NSPS for Power Plants.

Thu Aug 29 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Wed Aug 28 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Tue Aug 27 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Thu Aug 22 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Wed Aug 21 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Tue Aug 20 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Tue Aug 13 2013. Topic: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units.

Mon Aug 5 2013. Topic: Standards of Performance for new Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters.

Fri Aug 2 2013. Topic: Greenhouse Gas Reporting Program: Amendments to Address Input to Emission Equation Issues.

As you can see, there is *a lot* of interest in EPA's recently announced proposal to regulate greenhouse gases from new gas- and coal-fired electric plants. The Sierra Club made a showing in one of those meetings, but most were held for the usual industry-based suspects.

Figure 11

REGULATION & INFORMATION POLICY

Meeting Record

Meeting Record Regarding: Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generation Units

Date: 8 / 27 / 2013

Name	Affiliation	Client (if applicable)
Bob Wayland	EPA	
Nick Hudson	EPA	
Christian Fellner	EPA	
Jim Laity	OMB/OIRA	
Maureen Gannon	PNM	
Skiles Boyd	DTE Energy	
John McManus	AEP	
Carli Boyce	Duke Energy	
Michele Somerday	First Energy	
Brian Toth	Southern Company	
Ray Butts	Next Era Energy	
Steve Plevniak	Xcel Energy	
Melissa Larinson	PG + E	
Caroline Choi	SCE	
Ann Loomis	Dominion	
Cathy Woolums	MidAmerican Energy	Holdings Company
Emily Fisher	Edison Electric Institute	
Karen Obenshain	Edison Electric Institute	
Susana Hildebrand	Edison Electric Institute	
Geraldine Smith	PSEG	
Bruce Rodan	OSTP	
Nathan Frey	OMB/OIRA	
Anne Finken	CEQ	
Drew McConville	CEQ	
Nicole Comisky	OMB	
Rebecca Higgin	OMB (Detaillee)	

But it could be different. If more people outside of industry knew about what OIRA does, how its data is made available, and how its staff can be contacted and communicated with, White House review might look less like a meeting at the Wharton Club and more like democracy. Not only can you begin the discussion on the White House portal, you can even send gifts! (But perhaps in a separate mailing.)

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

Figure 12

