

OMB Issues New CRA Guidance, Potentially Changing Relationship with Independent Agencies

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On April 11, 2019, the acting director of the Office of Management and Budget (OMB) issued a [memorandum to agencies](#) on implementation of the [Congressional Review Act](#) (CRA). The memorandum discussed the types of agency actions covered by the CRA and, for some agencies, established a new process for determining whether rules are “major” under the CRA.

The most noteworthy effects of the memorandum are its apparent changes to rulemaking procedures for statutorily designated [independent regulatory agencies](#), sometimes also referred to as independent regulatory commissions (IRCs). Depending on how the memorandum is implemented, those changes could be significant for two main reasons. First, the requirement for IRCs to submit rules to OMB before publication could alter the relationship between the President (through OMB) and those agencies, which were statutorily designed by Congress to be at least partially independent from presidential control. Second, the memorandum could be interpreted as a new requirement for some of those agencies to engage in cost-benefit analysis.

Presidential Control of IRC Rulemaking

In 1981, President Ronald Reagan issued [Executive Order \(EO\) 12291](#), which established centralized regulatory review in the [newly created](#) Office of Information and Regulatory Affairs (OIRA), located within OMB. Under the order, most federal agencies were required to (1) submit their proposed and final rules to OIRA for review to ensure consistency with the President’s policy priorities and (2) conduct a cost-benefit analysis for “major” rules. These requirements applied to executive agencies (such as Cabinet departments) but not agencies designated under [Title 44, Section 3502\(5\) of the United States Code](#) as “independent regulatory agencies.” President Reagan’s decision not to extend OIRA review to those

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agencies is widely understood to have been out of respect for Congress's decision to make those agencies independent. When President Clinton replaced EO 12291 with [EO 12866](#) in 1993, he also chose to exempt IRCs from its requirements for OIRA review and cost-benefit analysis, reportedly for the same reasons. As such, the IRCs' development of rules has generally occurred without direct involvement of OIRA.

Potential Changes Under April Memorandum

Although the relationship between OIRA and agencies in rulemaking is governed primarily by executive order and not by statute, under the CRA, Congress [assigned OIRA](#) the task of determining what rules are "major" for *all* agencies, including IRCs. (Under the CRA, if a rule is "major," its effective date must be delayed at least 60 days, and the Government Accountability Office must write a report to Congress on the rule. Rules are subject to the CRA regardless of whether they are major.) Until the new memorandum, OIRA [appears to have](#) deferred to IRCs' determinations of whether their rules were major. Under the terms of the new memorandum, however, OIRA will apparently no longer be deferring to those agencies and will be making the determination itself.

The nature of the new OIRA review is not yet clear, but it could potentially be a significant change, as [some observers have suggested](#). [Previously](#), the arrangement between OIRA and IRCs for determining which rules are "major" under the CRA largely mirrored their relationship as established over decades under prior executive orders. Simply stated, OIRA and IRCs remained at arm's length from one another. Arguably, the new policy could give OIRA, and by extension the OMB Director and the President, greater influence over the content and timing of IRC rulemaking by establishing a new process in which presidential policy preferences could potentially play a role. The extent to which a President's policy preferences might influence OIRA's review, however, remains to be seen. If policy preferences do play a role in OIRA's review—for example, if OIRA does not allow an agency to move forward with a rule because it is not in alignment with the President's policy preferences—it could affect the independence of IRCs, which are statutorily designed by Congress to have their policymaking insulated from partisan politics and overt presidential influence (see [CRS Report R43391](#) for further discussion). [Some observers and policymakers](#), however, see such influence as desirable, potentially leading to better regulatory outcomes.

Cost-Benefit Analysis Requirements in Rulemaking

Currently, the primary analytical requirement in rulemaking is in EO 12866 and does not apply to IRCs. Specifically, the order requires covered agencies to conduct initial assessments of the anticipated costs and benefits of rules and to complete a cost-benefit analysis consistent with [OMB Circular A-4](#) for rules that are economically significant. IRCs are not subject to any comparable general requirement to conduct cost-benefit analysis, although [some](#) IRCs [conduct](#) cost-benefit analysis [voluntarily](#) or pursuant to an agency-specific [statutory requirement](#).

Potential Changes Under April Memorandum

Agencies subject to EO 12866 have generally used their analyses under the order to determine whether rules were "major" under the CRA and will likely continue to do so. Under the OMB memorandum, however, IRCs will now be required to conduct an analysis that is "consistent with the principles enunciated in Circular A-4 and Part IV of this Memorandum" and to submit the analysis to OIRA along with each rule for review.

For IRCs that already conduct cost-benefit analysis, the new analytical requirement may not be as significant. Nevertheless, OIRA review of the analysis and the requirement to follow Circular A-4 will be required of all IRCs. For IRCs that are not currently required to conduct cost-benefit analysis and do not

do so voluntarily, this could arguably be a rather significant change. The desirability of mandatory cost-benefit analysis for IRCs has been a topic of discussion in Congress and among [some](#) outside [observers](#) in recent years (see [CRS Report R44813](#)).

Although this Insight does not further address the issue, contrary to some media reports, the memorandum did not alter the *scope* of the CRA. For a discussion of what types of agency actions are covered by the CRA, see [CRS In Focus IF11096](#) and [CRS Report R45248](#).

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