RESPONDING TO AGENCY AVOIDANCE OF OIRA

NINA A. MENDELSON AND JONATHAN B. WIENER*

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* Authors listed in alphabetical order by middle initial. Wiener is William R. & Thomas L. Perkins Professor of Law and Professor of Public Policy and Environmental Policy, Duke University; and University Fellow, Resources for the Future. Mendelson is Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School. For helpful conversations and comments on prior drafts, the authors are grateful to Matthew Adler, James Broughel, Gabriel Cohen, John Graham, Sally Katzen, Michael Livermore, Jennifer Nou, and participants at a workshop at Duke Law School. The authors also thank Eric Mattingly for helpful research assistance.

INTRODUCTION

For more than two centuries, Presidents of the United States have sought to oversee the regulatory state.[1] Since about 1980, presidential oversight has become centralized in the Office of Information and Regulatory Affairs (OIRA).[2] 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 to submit the resulting regulatory impact assessments to OIRA for review.

Although OIRA review has become a settled feature of the American regulatory state, concerns have recently been raised

1. *See generally* JERRY L. 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).

2. Pildes & Sunstein, *supra* note 1, at 3.

that regulatory agencies might be trying to avoid it.[3] Agencies may face incentives to avoid OIRA oversight if they find it burdensome or irksome. Avoidance 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 documents or forms of agency action that are not subject to OIRA review, or write impact assessassessments 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 state institutions, to act in place of federal agencies.[5] Finally, some entire agencies (dubbed "independent" agencies) have historically operated outside the OIRA review process.[6] Normative appraisals of agency avoidance vary; advocates of presidential oversight through OIRA see it as a problem, while critics of such oversight see it as a welcome development.

The concerns about agency avoidance have raised the question whether response measures are warranted 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 avoidance. 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 OIRA has completed a review. In general, advocates of OIRA review seem likely to fa-

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3. *See, e.g.*, *Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration: Hearing Before the Subcomm. on Courts, Communal & Admin. Law of the H. Comm. On the Judiciary*, 112th Cong. 29 (2012) (statement of John D. Graham, Dean, Ind. Univ. Sch. of Pub. & Envtl. Affairs) [hereinafter Graham Testimony]; Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1757–58 (2013); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 995 (2011). More generally, one observer reports "outrage" at agencies' use of nonlegislative rules to avoid review. *See* William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1028 (2004).

4. *See* Nou, *supra* note 3, 1782–98.

5. *See* Graham Testimony, *supra* note 3, at 27–28.

6. *See e.g.*, *Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration: Hearing Before the Subcomm. on Courts, Communal & Admin. Law of the H. Comm. On the Judiciary*, 112th Cong. 36–41 (2012) (statement of Sally Katzen, Visiting Professor of Law, N.Y. Univ. Sch. of Law) [hereinafter Katzen Testimony].

vor stronger responses; critics of OIRA review seem likely to prefer milder responses or none at all.

In this Article, we take no position on whether agency avoidance of OIRA is a crisis or a mirage (or something in between), or on which specific responses are warranted, if any. Rather, in Part III, we propose a path that seems to have been overlooked in the debate, yet should be prominent: response measures to address agency avoidance 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, which are discussed further in Part III. 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 avoidance—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 avoidance 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 avoidance? Although there may be salient examples of avoidance, a more comprehensive assessment of the extent of avoidance, 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 this question should include a range of alternative response options, including the option of no action.

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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 argues 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 avoidance.

- What are the benefits, costs, and other impacts of these alternative response options?

Some preliminary comments may be helpful regarding these key questions. First, it remains unclear whether avoidance of OIRA is actually widespread and serious. The answer to the first question above depends on the type of avoidance. Agencies may have good reasons and incentives to cooperate with OIRA review. Agencies' incentives to cooperate or avoid might differ when they are facing OIRA review as compared to judicial review, when they are weighing different types of avoidance tactics, and when they are anticipating different potential responses to avoidance. Further empirical analysis is needed to understand how often agencies actually avoid 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 avoidance may (by virtue of having been identified) also illustrate that avoidance 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 avoidance may be occur-

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

9. *E.g.*, *id.* at 1819–20 (recounting an episode in 1993 in which labeling requirements for meat and poultry were reported in the *Washington Post* 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*, 39 J. HEALTH POL., POL'Y & L. 443 (2014) (discussing the Department of Health and Human Services allowing states to define "essential health benefits").

10. *See* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 821 (2010) (finding that use of guidance documents to avoid notice-and-comment procedures has been "overstated" and "overgeneralize[d] from a few egregious examples"); Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produ ce a Chilling Effect and "OIRA Avoidance" in the Agencies?*, 44 PRESIDENTIAL STUD. Q. (forthcoming 2014) (on file with Princeton University) (finding no significant reduction in historical rates of economically significant rulemaking when subject to OIRA review). On the other hand, some research has found that agencies may try to avoid analytic requirements subject to judicial (as opposed to OIRA) review, at least where the risk of legal sanctions for such avoidance is low. *See* Connor Raso, Agency Avoidance of Rulemaking Procedures (2013)

ring in just a few—but 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.

Second, different types of avoidance may be more or less likely to occur than previous studies have suggested, once repeated interactions with OIRA over time are taken into account. To help identify the kinds of agency avoidance of OIRA review that deserve further empirical evidence, this Article offers a broader typology of the many types of agency avoidance of OIRA review that might occur. We need a more complete typology of avoidance 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 avoidance tactics appear to be more likely to circumvent OIRA oversight successfully. We move beyond prior literature by identifying not only a broader array of avoidance tactics, but also potential response options that could be used as countermoves to each avoidance tactic. Agency anticipation of detection, as well as the imposition of response measures, may deter initial agency avoidance. Drawing on game-theory analyses, we situate agency avoidance and response measures within a repeat-player relationship.

As a result, we suggest that the avoidance tactics on which there has been the most scholarly focus so far may turn out to be relatively less likely to escape OIRA review and response in practice, because OIRA and the agency have repeated interactions over time regarding these types of tactics. These tactics include the use of guidance documents instead of rules and attempts to understate the economic significance of rules or to split rules into smaller pieces so as to slip below the threshold

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(unpublished manuscript) (on file with author) (finding some agency avoidance of requirements under the Regulatory Flexibility Act and under the Unfunded Mandates Reform Act, and inferring that avoidance is more likely where the litigation risk of avoidance is low). Other analyses have debated whether judicial review induces delays in rulemaking. *Compare* 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, 1421 (2012), *with* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1494 (2012).

11. *E.g.*, Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. (forthcoming Aug. 2014) (arguing that the FDA frequently uses guidance documents to avoid review).

for review. At the same time, other tactics, such as the use of agency enforcement powers and litigation settlements that compel the agency to regulate, may turn out to be more likely to escape OIRA oversight because they are more difficult for OIRA to detect or address. These are our conjectures; more empirical study is needed to understand the frequency of each tactic, the likelihood of its use escaping oversight, the influence of responses and repeat playing, and the consequences of avoidance.

Third, even if agency avoidance of OIRA is significant, it remains an open question which remedies, if any, would be warranted in response. The proper remedy depends on the incentives of the actors, the type of avoidance and the consequences of each potential response option. As noted above, a good evaluation of response options to agency avoidance requires consideration of alternative response options (including no action) and their important impacts, both adverse and beneficial. Thus, in principle, responses to agency avoidance should be evaluated similarly in concept to the way that OIRA would evaluate agency regulations.

Further, the evaluation of response options needs to take account of the dynamic relationship between OIRA and the agencies. The very existence of agency avoidance implies that the agency is a strategic actor. OIRA is also a strategic actor. The agency may react to OIRA's oversight response measure by complying, or by shifting to a new avoidance tactic.[12] This dynamic relationship makes the evaluation of response options more complex. Repeat players in a multi-round game may cooperate more, or agencies may select avoidance 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 parts must be assessed as an interdependent

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 "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523 (2014) (arguing that greater OIRA review of agency nonlegislative rulemaking could drive agencies to adopt even more difficult-to-monitor policy-setting tools).

dynamic system. Review may elicit avoidance; likewise, a response to avoidance may elicit a countermove.[13]

This Article proceeds as follows: Part I provides a background of the system of presidential oversight of regulation through OIRA review. Part II analyzes: (1) the incentives for agencies to cooperate with or avoid OIRA, (2) a broad array of agency avoidance tactics, and (3) corresponding response options (especially in a repeat-player relationship). Part III argues that response options to agency avoidance should not be unquestioningly pursued or rejected. Instead, they should be evaluated using many of the same principles OIRA employs in reviewing agency regulation, including a systematic consideration of the benefits and costs of particular response actions and a comparison with alternatives.

I. PRESIDENTIAL OVERSIGHT OF AGENCY REGULATION THROUGH OIRA REVIEW

The presidential use of centralized regulatory review, through OIRA, for managing executive-branch agencies 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, President Nixon set up a "Quality of Life" review process in 1971, centered at the Office of Management and Budget (OMB), in which OMB circulated environmental, consumer protection, and occupational safety rules to other agencies for comment.[15]

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13. Nou, *supra* note 3, at 1814 (calling the selection of response options "the other half of the game"—the first half being agency avoidance). 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. *See 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. 37, 40–41 (2011).

15. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 956–57 (2006); Memorandum from George P. Shultz, Dir., Office of Mgmt. & Budget, to Heads of Dep'ts & Agencies (Oct. 5, 1971) [hereinafter Shultz 1971 Memorandum], *available at* http://www.thecre.com/ombpapers/QualityofLife1.htm, [http://perma.cc/0MVmX9tqSoY].

Presidents Ford and Carter expanded the overlay of requirements on agency rulemaking by requiring additional analyses. President Ford required analysis of impacts on inflation,[16] and President Carter issued Executive Order 12,044 requiring cost-benefit analyses (CBA) for rules with "major economic consequences."[17] These early oversight efforts anticipated two key objectives of current presidential review structures: improving the quality and rationality of agency analysis, and ensuring agency consistency with broader presidential priorities.

Congress created OIRA within OMB, with the support of the Carter administration, through the Paperwork Reduction Act of 1980.[18] The Carter administration previously had 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 OIRA—accompanied by regulatory impact assessments (RIAs)—before publication in the *Federal Register*, and they were ordered to refrain from publishing rules until OIRA concluded its review.[20]

Executive Order 12,291 institutionalized two other key elements of presidential review of rulemaking. First, it added a new set of analytical requirements on rulemaking to 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, assessing each rule's expected costs and benefits.[21] Second, it formalized the goal that executive agencies, in regulating, were to be explicitly guided not just by authorizing

16. *See* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974) (requiring preparation of inflation impact statements).

17. *See* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 24, 1978) (requiring detailed regulatory analysis of rules with "major economic consequences").

18. *See* Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3520 (2006)) (creating the Office of Information and Regulatory Affairs in new 44 U.S.C. § 3503).

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

20. *Id.* § 3(f).

21. *Id.* § 3(a), (d).

statutes but by overarching presidential priorities, notably to ensure that "benefits . . . outweigh . . . costs" and to "maximize the net benefits" to society.[22] Broadly understood, this might also encompass making sure that diverse regulatory agencies work 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 each President since Reagan. President Clinton's Executive Order 12,866[24] 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 continued to direct 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.[26] The Order also permitted OIRA to determine, over an agency's disagreement, that a particular regulation was indeed "significant" and thus subject to review.[27] Regulatory review was to be completed within 90 days, with narrow exceptions.[28] The Clinton Executive Order fortified centralized White

22. *E.g.*, *id.* § 2 ("In promulgating new regulations . . . all agencies, to the extent permitted by law, shall adhere to the following requirements: . . . Agencies shall set regulatory 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. Senate confirmation of the OIRA administrator was established by the 1986 Amendments to the Paperwork Reduction Act. Paperwork Reduction Reauthorization Act of 1986 § 813, 44 U.S.C. § 3503 (2006).

24. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

25. *See id.* § 4. 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 id.* § 3(e).

26. *Id.* § 3(f).

27. *Id.* § 6(a)(3)(A).

28. *Id.* § 6(b)(2).

House control by expressly providing that unresolved conflicts between the regulating agency and other agencies (including OMB) would ultimately be resolved by the President or Vice President.[29] 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 its costs"), and by including attention to qualitative impacts, distributional impacts, and impacts on health, safety, and the environment.[30] The maximization of net social benefits, however, remained as the objective.[31] The Order 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 administrations in favor of centralized regulatory oversight through OIRA.[32] President George W. Bush's OMB issued Circular A-4, providing highly detailed guidance to the agencies on the key elements of a "good regulatory analysis" under Executive Order 12,866, including a clear baseline for comparative purposes, specifically stated assumptions, an assessment of the sensitivity of the analytical results to changes in

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29. *Id.* § 7. *But see* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. (forthcoming 2014) (rather than funneling disputes between OIRA and an agency to the Vice President, the resolution of disputes during the Obama administration was "far messier and more ill-defined").

30. Exec. Order No. 12,866 58 Fed. Reg. at 51,733 § 1.

31. *Id.*

32. The bipartisan consensus is reflected in the decisions of every President, regardless of political party, since the 1970s (Nixon, Ford, Carter, Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama) to favor presidential oversight through centralized review (through OIRA since 1981). It is also reflected in the writings of eminent judges who also served in government and academia and were appointed by Presidents of both parties. *See, e.g.*, STEPHEN 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); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877 (2010) (Ginsburg served as OIRA Administrator and then was appointed by Reagan to the D.C. Circuit).

those assumptions, and attention to ancillary impacts.[33] Late in his second term, President George W. Bush also issued an Executive Order that, among other elements, called for OIRA to review agency guidance documents along with rules[34]—an indication of mounting concern about agency avoidance of OIRA.

President Obama has continued to emphasize that "centralized review is both legitimate and appropriate as a means of promoting regulatory goals."[35] He reaffirmed the importance of regulatory review as a device for a "dispassionate and analytical 'second opinion' on agency actions."[36] 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.[37]

Perhaps unsurprisingly, Presidents have consistently endorsed the idea that presidential priorities should guide and constrain agency rulemaking. Executive Order No. 12,866, though stating that it "reaffirm[s] the primacy of Federal agencies" in the rulemaking process,[38] 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.[39] President Obama similarly has emphasized that regulatory review

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33. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS (2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf, [http://perma.cc/08veaodUWNM]; Nou, *supra* note 3, at 1793–94.

34. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (later rescinded by President Obama in Jan. 2009).

35. Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (Feb. 3, 2009).

36. *Id.*; *see also* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

37. *See* Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 14, 2012) (reducing regulatory burdens); Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 4, 2012) (international regulatory cooperation); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011) (independent agencies); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (retrospective reviews).

38. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

39. *Id.* § 6(b).

should "ensure consistency with Presidential priorities."[40] Regulatory review has thus joined the appointment and removal powers as a means for the President to prompt agency responsiveness to presidential goals.[41]

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 significant guidance documents, as well as rules, for regulatory review.[42] Although President Obama formally revoked that executive order,[43] OMB and OIRA have continued to assert the authority to review significant policy and guidance documents.[44]

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. Although Executive Orders 12,291 and 12,866 expressly exclude "independent agencies" from centralized regulatory review,[45] commentators have criticized making such a distinction between executive-branch agencies and independent

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40. Regulatory Review, *supra* note 35. 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 Executive Order.

41. *See* Kagan, *supra* note 32, at 2282 (commenting on Clinton's use of OMB review to "convert[] administrative activity into an extension of his own policy and political agenda"); *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).

42. Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763–64 (Jan. 23, 2007).

43. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

44. *See* Guidance for Regulatory Review, Memorandum from Peter R. 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, [http://perma.cc/0v7MyocpEnX]; *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 Executive Order 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 free-standing 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).

45. Exec. Order No. 12,866, 58 Fed. Reg., 51,737 (Oct. 4, 1993); Exec. Order No. 12,291, 46 Fed. Reg., 13,193 (Feb. 19, 1981).

agencies.[46] President Obama's Executive Order 13,579, issued in July 2011, though not insisting on extending regulatory review obligations to independent agencies, did state that "independent regulatory agencies should comply" with regulatory requirements imposed by earlier executive orders, including requirements for public participation, science, regulatory analysis, and retrospective internal review of existing regulations.[47] A number of independent agencies appear to have at least done some retrospective review and cost-benefit analysis in response.[48] Full-blown regulatory review for independent agencies is on the

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46. For advocacy of greater inclusion of independent agencies under OIRA review, see Katzen Testimony, *supra* note 6, at 36–37. 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 presidential direction along with other executive agencies. *See generally* 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) (arguing that a President could remove an SEC Commissioner without cause and a reviewing court would uphold the removal). Finally, the official position of the American Bar Association is that regulatory review and cost-benefit requirements should extend to independent agencies**.** Letter from Thomas M. Susman, Dir. Am. Bar Ass'n Governmental Affairs Office, to Senators Thomas Carper and Tom Coburn (Sept. 16, 2013), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013Sept16_indregagencies_1.authcheckdam.pef, [http://perma.cc/NY-7WLG].

Military and foreign affairs rules are also exempted from review, *see* Exec. Order No. 12,866, although agencies (such as the State Department) are expected to consult with OIRA before making regulatory commitments in international agreements, *see* Publication, Coordination, and Reporting of International Agreements: Amendments, 71 Fed. Reg. 28,831 (proposed May 18, 2006) (codified at 22 C.F.R. pt. 181), 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.

47. Exec. Order No. 13,579, 76 Fed. Reg. 41,587, 41, 587 (July 14, 2011).

48. *See generally* CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES (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* Memorandum from RSFI and OGC to Staff of the Rulewriting Divisions and Offices (Mar. 16, 2012) (noting the stimuli of court decisions interpreting the SEC's authorizing legislation, congressional interest, and Executive Order 13,579); Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); Preliminary Plan for Retrospective Analysis of Existing Rules, 76 Fed. Reg. 81,462 (Dec. 28, 2011) (FCC plan in compliance with Executive Order 13,579).

horizon, though its arrival will depend on several factors, including legal reasoning, presidential elections, presidential relations with Congress, and the perceived burden of regulations issued by the independent agencies.[49]

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,[50] even though a rule with a $100 million impact in 2013 dollars would have had a significantly smaller impact in 1981 dollars.[51] 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 Professor 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.[52] 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.[53] On the other hand, these three

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49. *See infra* note 220 and accompanying text (discussing bill pending in Congress that would confirm the President's authority to review independent agency regulations).

50. *See Regulatory Impact Analysis: Frequently Asked Questions*, WHITE HOUSE, 2 (Feb. 7 2011), http://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf, [http://perma.cc/07vZNmW66N2].

51. 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. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm, [http://perma.cc/0FShbnaE6TM].

52. *See* Sunstein, *supra* note 44, at 1868 ("[M]ore than eighty percent 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."). Executive Order 12,866 authorizes OIRA review of rules on grounds other than economic significance. 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 also* Heinzerling, *supra* note 29, at 17–18 (suggesting that OIRA often reviews rules not clearly within the scope of the Executive Order's coverage).

53. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,737 (Oct. 4, 1993) (detailing analysis requirements).

expansions of OIRA's scope have occurred while OIRA's staff has declined—from over 80 in the 1980s to under 50 today.[54]

Recent statements regarding the functions and effect of OIRA review have conflicted, sometimes sharply.[55] 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.[56] Information regarding how OIRA review has specifically affected particular rules has rarely been disclosed either by OIRA or by the agencies whose rules are reviewed, notwithstanding the disclosure requirements in Executive Order 12,866.[57] When information related to OIRA review is disclosed, it is typically difficult to locate.[58] OIRA's posting of forty-two review and return letters in the George W. Bush administration, under OIRA Administrator John Graham, represents a notable exception.[59] 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 have been posted during the Obama administration,[60] and only one review letter has been posted since

54. *See* Katzen Testimony, *supra* note 6, at 41.

55. *Compare, e.g.*, Heinzerling, *supra* note 29 (arguing that OIRA does not systematically review economically significant rules, but rather rules "of special interest to OIRA staffers"), *with* Sunstein, *supra* note 44, at 1840 (portraying OIRA as an efficient center for "inter-agency coordination" and information aggregation).

56. For one attempt, see Robert W. Hahn, *An Evaluation of Government Efforts to Improve Regulatory Decision Making*, 3 INT'L REV. ENVTL. & RESOURCE ECON. 245 (2009).

57. Heinzerling, *supra* note 29 ("OIRA follows, and allows the agencies to follow, almost none of the disclosure requirements of EO 12,866."); *see also* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149–56 (2010).

58. 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 139–43 (2013), *available at* http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf, [http://perma.law.harvard.edu/0oGHL27ocDP].

59. Mendelson, *supra* note 57, at 1150.

60. *See Return Letters*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoReturnLetters, [http://perma.cc/0wtCsmJ2Xw1].

2008.[61] 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.[62]

Following his departure from government, former OIRA Administrator Professor Cass Sunstein has described OIRA's function as largely "an information aggregator," using regulatory review to focus on issues of quality of analysis, interagency coordination, and avoidance of "serious problem[s] or mistake[s]."[63] 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."[64]

II. AGENCY AVOIDANCE

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.[65]

In this Part, we offer a critical appraisal of the incentives of agencies to cooperate with or avoid OIRA review, and a broader typology than we have seen in prior literature of avoidance tactics. As mentioned above, a full typology of avoidance tactics is important to evaluate which response options would remedy which types of avoidance, to anticipate the potential shifts from

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61. *See Review Letters*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp, [http://perma.law.harvard.edu/0tPdjtMvT2w].

62. *See National Organic Program: Sunset Review for Nutrient Vitamins and Minerals*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=0581-AD17, [http://perma.law.harvard.edu/0zYTGuyjgUy] (stating only that withdrawal of rule would preserve status quo until a final rule could be issued).

63. Sunstein, *supra* note 44, at 1840, 1842. This mistake-avoidance rationale reflects Sunstein's view in *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

64. Sunstein, *supra* note 44, at 1846; *see also* Heinzerling, *supra* note 29 (suggesting that OIRA, rather than the agencies, "was calling the shots").

65. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007); Memorandum from Peter Orszag, *supra* note 44.

one avoidance tactic to another that strategic agencies might pursue in reaction to possible response measures, and to assess the likelihood of different avoidance tactics in a repeat-player setting. An assessment of a response measure will depend on both the avoidance tactic 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, however, remains incomplete. As we explain below, some potential avoidance 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. 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 to the agency of avoidance tactics. In such a repeat relationship, agencies can anticipate the prospect of OIRA monitoring, detection, and sanctions—recognizing that OIRA detection may vary across types of avoidance tactics—perhaps followed by agency countermoves and further response measures by OIRA or others. Similarly, the repeat relationship can influence OIRA's calculations and choices. The joint result may be to foster more cooperation, or it may shift agency avoidance efforts to other tactics.

The most important entry in the recent literature on avoidance 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 or if the agency's preferences diverge from those of OIRA (or, implicitly, the President).[66] "Self-insulation," she further argues, would depend on the agency's resource constraints and the likelihood of what she calls "reversal" at the

66. *E.g.*, Nou, *supra* note 3, at 1761 ("The incentive to engage in strategic behavior . . . increases the more an agency expects the President to disagree with [it.]").

hands of OIRA.[67] OIRA's potential responses in regulatory review clearly extend not only to reversal—including 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 avoiding 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.[68] We offer a more complete typology below, adding tactics Nou does not discuss, such as enforcement actions, litigation settlements, and delegation or deference to standards developed by other governmental entities and institutions—for example, states or private standards organizations.

Nou details steps Congress could take to increase or decrease agency insulation. She also suggests that courts might attempt to detect an agency's efforts to insulate its actions from OIRA review, though she acknowledges the difficulty courts may face in discerning precisely what such self-insulation might signify.[69] But Nou does not recommend specific response options, nor does she recommend (as we do) that OIRA and other actors undertake a systematic comparative assessment of 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.[70] She acknowledges that repeat games are a possibility,[71] stating that repeat play may prompt agencies only to self-insulate when doing so is "most valuable to them," but her analysis does not consider how the possibility (or absence) of repeat play might affect an agency's tendency to use particular avoidance methods. Here, we consider more fully the likeli-

67. *Id.* at 1803.

68. *Id.* at 1782–1802.

69. *Id.* at 1823–30.

70. *See, e.g.*, *id.* at 1756–57 (conceptualizing involved entities as strategic actors); *id.* at 1814–15 (referring to resource constraints).

71. *Id.* at 1771 (stating that agencies are "repeat players").

hood and implications of repeat games among the affected institutions, highlighting differences in the ease of detecting avoidance tactics. 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 non-rule guidance or policy statements (each of which may be relatively easy for OIRA to detect over time);[72] but this possibility may have less deterrent effect in other settings where repeat play with OIRA is atypical (and OIRA's cost of detection and countermoves may be higher), such as an agency's modification of enforcement approaches or its entry into a consent decree.

Systematic empirical evidence on the frequency and patterns of avoidance 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).[73] Examining data on twenty-five 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 there is a lack of clear-cut evidence of avoidance of OIRA.[74] 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.[75] 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,"[76] and a far more nuanced assessment is necessary to truly evaluate agency use of avoidance tactics and agency incentives when facing OIRA review. For

72. *See id.* at 1792.
73. Acs & Cameron, *supra* note 10, at 23–24.
74. *Id.*
75. *Id.*
76. *Id.*

example, because of the lack of data, Acs and Cameron do not assess whether agencies might try strategically to avoid review of *particular* rules, [77] including when the agency expects OIRA disagreement on the merits.[78]

Similarly, Connor Raso has found little evidence that guidance documents are used by agencies to avoid notice-and-comment rulemaking procedures; he concludes that the concern over agency avoidance using guidance documents has been "overstated," and amounts to an "overgeneralization from a few egregious examples."[79] Meanwhile, Raso has also found that agencies may try to avoid statutory analytic requirements subject to *judicial* review, at least where the risk of detection and sanctions for such avoidance is low (for example, because the statute allows the agency to opt out of the analysis

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77. *Id.*

78. Before the Acs and Cameron paper, a student note in the *Harvard Law Review* attempted to assess empirically one potential avoidance 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 1007–08. 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. *Id.* at 1009–11. But this method may overstate the estimate of avoidance, 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.*, Flight Crewmember Duty Limitations and Rest Requirements 73 Fed. Reg. 71,417 (Nov. 24, 2008) (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, *supra* note 6, at 40 (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 were deemed not economically significant in OIRA review. *OIRA Avoidance*, *supra* note 3, 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 avoidance. The use of first mention of a rule in the Unified Agenda seems a weak proxy for this strategy.

79. Raso, *Strategic or Sincere?*, *supra* note 10, at 821.

for a wide range of reasons), as under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[80]

An interesting hypothesis (yet to be tested with empirical data) is offered by Professor Michael Livermore, who argues that White House regulatory review using CBA, rather than constraining agencies' policy autonomy, may enhance agencies' autonomy from the White House, because agencies themselves help develop the CBA methodology, and thus agencies with greater expertise in CBA methodologies (such as EPA) are more able to influence the terms of methodological discourse or debates with OIRA in the direction the agency favors.[81] His examples could also be understood, though, to reveal a useful ongoing dialogue between OIRA and the agencies as they jointly develop better practices for cost-benefit analysis; each learns from the other. Livermore also argues that agencies might use CBAs to help persuade outsiders that a rule is worth issuing, thus helping to insulate the rule from external political winds, at the same time that outsiders (such as academic economists) can also shape the agency-OIRA discourse over CBA methodologies.[82]

B. Incentives and Strategic Behavior by Agencies and OIRA

We now turn to an effort to analyze more thoroughly agencies' methods of avoiding OIRA review.[83] We begin by analyzing the incentives that would motivate an agency to avoid or cooperate with OIRA, and then we develop a more complete typology of avoidance tactics.

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80. Raso, Agency Avoidance, *supra* note 10.

81. Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. (forthcoming 2014) (manuscript at 2–3), *available at* http://policyintegrity.org/publications/detail/cost-benefit-analysis-and-agency-independence/.

82. *Id.*; *see also* Nou, *supra* note 3, at 1802 (agencies may try to recruit allies to raise OIRA's costs of review).

83. We do not discuss here possible agency avoidance of APA notice-and-comment requirements or judicial review. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012). Also, we do not address here review under the Small Business Regulatory Enforcement Fairness Act or the Small Business Administration review, nor do we address the Congressional Review Act.

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. Regulatory action—quasi-legislative action—can be broadly applicable, legally binding, and long-lasting. Presidential control over the regulatory state is thus a potentially highly effective mechanism for achieving presidential priorities and 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 perceptions that those costs or benefits are unfairly distributed may undermine the President's political support. Agencies' failure to carry out the President's policy agenda, or agency adoption of 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 publicly to distance himself from a particular agency action and hence may acquiesce in agency avoidance of review.[84] Alternatively, the White House may sometimes want to offer relaxed review to an agency on one issue, as a bargaining chip to secure a deal with that agency on other issues.[85]

As discussed above, OIRA regulatory review is now a well-established device for Presidential authority 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.[86] So, as with any process that provides

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84. *See* Mendelson, *supra* note 57, at 1161–62.

85. Nou, *supra* note 3, at 1815.

86. *See* Kagan, *supra* note 32 (discussing regulatory review and other mechanisms for Presidential supervision of regulatory agencies). In addition, Presidential appointment of the agency head may be another such supervisory tool, but it may be ineffective with respect to specific policies if the agency head, once confirmed in office, has incentives to diverge from presidential preferences in order to serve other constituencies, and the President faces either legal or political obstacles to guiding or

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 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. And those preferences, of course, might extend both to the general processes of regulatory decisionmaking—the sorts of information agencies consider and prioritize and the quality of their analysis—and to particular policies.[87]

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removing the agency head. Another tool of presidential oversight is control over the agency's budget; it is unclear how often the budget side of OMB acts to assist the regulatory side of OMB and OIRA.

87. Some have criticized OIRA review on the grounds that the "principal" whose interest may be furthered by OIRA review may, in practice, actually be civil servants in OIRA, or a political official outside the regulatory agency, or industry (rather than the President, Congress, or the people). To the extent that these others' policy preferences are displacing or superseding the preferences of the President, Congress, and the Senate-confirmed presidential appointees who have the authority delegated by Congress to administer particular programs, the oversight process can appear to be less democratically responsive, undermining the intent of Congress (or even that of the President, if the preferences communicated through OIRA review do not match the President's). *See, e.g.*, Nicholas Bagley & Richard Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1303 (2006); Heinzerling, *supra* note 29.

Indeed, some have argued that congressional delegations to a particular executive branch agency official should be understood to mean that the rulemaking agency alone—without interference by even the President—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 executive agencies should be understood to mean delegations to the President. *E.g.*, Kagan, *supra* note 32, at 2288–90. 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 – including OIRA – in their exercise of delegated rulemaking authority.

Even though agencies would seem to be able to consider presidential views and perhaps even to 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 over a President's veto). The agency's 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 as principal, who are represented by their current elected officials in Congress and in the Presidency.

2. Incentives for Agencies to Cooperate with OIRA Review

An agency might favor undergoing OIRA review, in general or at least with regard to a particular rule, because of the prospect that the review, through technical expertise and the interagency process, could contribute useful information and improve the quality of the agency's analyses and policy outcomes. Relatedly, agencies might view OIRA review as contributing useful input on presidential and public values, because of OIRA's proximity to the President (and the OIRA Administrator having been appointed by the President).[88] OIRA review might also increase the likelihood of the agency's successfully promulgating a particular rule, as where the review 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 the rule.[89] Regulatory Impact Analyses (RIAs) using CBA might even strengthen the targets and policy instruments in the rule.[90] In addition, OIRA review could improve the likelihood that the rule will survive judicial review, possibly because it represents a presidential imprimatur or because it represents approval by technical experts that the agency's analysis and reasoning are of higher quality and arguably non-arbitrary. Nou suggests that, as one way to increase compliance with OIRA,

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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 with increasing the agency's responsiveness to the people as a whole – to "maximize net benefits to society," and moreover because the President is constitutionally charged with executing the laws, and the President is elected nationally, whereas members of Congress are elected in local districts.

88. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation,* 108 MICH. L. REV. 877, 904 (2010). *But see* Bagley & Revesz, *supra* note 87, at 1307 ("OIRA is not the President").

89. Examples include the decisions to phase down lead in gasoline and to phase out CFCs that deplete stratospheric ozone during the Reagan administration, both based in part on CBAs. *See also* 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).

90. *See* Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. (forthcoming 2014) (on file with the New York University Law Review) (reporting that EPA's RIAs using CBA turned out to warrant even more stringent ambient air quality standards for several major air pollutants than EPA had set under Clean Air Act section 109 absent CBA).

courts could take a harder look at rules that avoid OIRA;[91] we discuss judicial review responses below in Part III.

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 Avoid OIRA

On the other hand, an agency may resist OIRA review, in general or for a particular rule, for a number of reasons. Agencies may be irked by oversight that they perceive as intruding into their decision processes. Agencies may also have concerns about cost and delay due to OIRA review, about the considerations that OIRA review may incorporate, and about the substantive elements that OIRA may seek to put in the rule.[92] 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;[93] 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 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 be-

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91. Nou, *supra* note 3, at 1824.

92. Observing an agency choosing to employ a nonrulemaking policy form (for example, a guidance document or adjudication) does not necessarily mean that a desire to avoid OIRA review induced that choice. For example, if the prospect of judicial review had already induced the agency to shift to nonrulemaking policy forms, then OIRA review may thereby also be avoided even if the agency would have welcomed OIRA review. In short, 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 avoidance.

93. *See, e.g.*, Editorial, *Stuck in Purgatory*, N.Y. TIMES, July 1, 2013, at A22.

lieves 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 gained through the public comment process, than OIRA is likely to possess.[94]

4. Dislike of Perceived Institutional Intrusion on Agency Policymaking

At a broad level, agencies might view their responsibility to implement statutes as primary, by virtue of both statutory delegation to the agency and institutional expertise developed in the agency. They might resist OIRA review if they view their authority and technical expertise as 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 and its implementing policies as a vehicle to deliver rents to the agency's constituencies, such as industries or advocacy groups. If so, the agency might resist review to the extent that OIRA review would impede the agency's delivery of rents to special interests by insisting that the agency pursue broader measures of social well-being (e.g., to "maximize social net benefits").[95]

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 authority in general, and the specific fear of removal, may inspire a degree of loyalty, at least among the President's own appointees (though "capture" of an appointee by his or her

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94. *Cf.* Katharine Q. Seelye, *Ideas & Trends; Flooded with Comments, Officials Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, at C4.

95. *See* Bagley & Revesz, *supra* note 87, at 1284–85. Similarly, Joseph Stiglitz has praised such analysis because it vindicates the "national interest" over special interest politics, through "quantitative assessment of the impacts on various groups, a process that often results in outcomes different from the aggregation of political interests that emerges from the policy process." Joseph Stiglitz, *Looking Out for the National Interest: The Principles of the Council of Economic Advisers*, 87 AM. ECON. REV. PAPERS & PROCEEDINGS 109, 111 (May 1997).

agency is regularly lamented in Washington). The President's threat of removal might be moderated somewhat, however, if an agency official anticipates that he or she possesses some leverage vis-à-vis the President—to the extent that there would be negative news media coverage and a general perception that presidential removal of an agency official over a rulemaking issue may be an "alarm signal to the public that the president may not be acting . . . in the best interest of the country."[96]

In addition, there is an ongoing debate on the scope of the President's constitutional and statutory authority—when the statute delegates rulemaking power to the agency official—to direct particular agency actions.[97] Proponents of the unitary executive theory might argue, for example, that because the President serves as the chief executive by virtue of 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.[98] 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.[99] On the other hand, perhaps a delegation to the President refers only to Congress's intent that the President, rather than Congress, assign the responsible agency to perform a particular rulemaking

96. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1004 (2001).

97. That debate is beyond the scope of this Article. 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).

98. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (vacating one, but not both, layers of for-cause removal restrictions because of undue encroachment on presidential control); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

99. *See* COPELAND, *supra* note 48, at 20; Percival, *supra* note 96, at 1008; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 293–96 (2006); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–03 (2007); Heinzerling, *supra* note 29, at 328 (noting that the OLC memo accompanying Executive Order 12,291 concluded that the President could advise, but not determine, the content of an agency action).

task, especially because such statutes are enacted against the backdrop of presidential removal authority and, more recently, regulatory review procedures.[100] 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.[101] Moreover, agency officials, 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 whom the Senate confirmed), this attitude may reduce the perceived legitimacy of OIRA review and prompt greater resistance.[102]

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.[103] These numbers have been fairly stable since the early 2000s.[104] Although 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.[105] The numbers may understate changes prompted by OIRA, as they do not include changes made or

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100. *See* Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2458 (2011); Kagan, *supra* note 32, at 2327–28.

101. Commentators have also suggested that the agency official might have more backbone in OIRA review. *See* Percival, *supra* note 96, at 1009; Strauss, *supra* note 99.

102. *See* Heinzerling, *supra* note 29, 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), https://www.law.upenn.edu/blogs/regblog/2013/04/29-heinzerling-oira-review.html, [http://perma.law.harvard.edu/0gRFyz5TkLj].

103. Mendelson, *supra* note 57, at 1151 n.125.

104. Mendelson, *supra* note 57, at 1151.

105. Sunstein, *supra* note 44, at 1847 ("The vast majority of rules . . . are generally changed (and improved) as a result [of the OIRA review process].").

options developed when agencies share early drafts of rules with OIRA before entering the formal review process.[106]

5. Dislike of Changes or Delays in Regulatory Outcomes

An agency may fear that OIRA review will change outcomes in ways the agency dislikes, such as by preventing or delaying regulations that would protect the public health, safety, security, well-being, or the environment. An agency might view OIRA's preferences as diverging significantly from the agency's policy preferences as to goals or means. For example, an agency and OIRA might be at odds regarding how a statute should best be implemented, even if they generally agree on the goal to be attained. Moreover, the agency may believe it has a better understanding of technical questions, public values, or political issues than OIRA does. An agency and OIRA also might be at odds regarding whether a particular interest should be protected in statutory implementation, or how aggressively to pursue a statute's goal at the expense of other important considerations.[107] OIRA review might restrict an agency's slack to pursue goals that diverge from the preferences of the White House or OIRA. 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, Professor Lisa Heinzerling, formerly a senior policy official at the 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 wasted agency resources.[108] Heinzerling also recently criticized OIRA review as

106. Wagner, *supra* note 58, at 82–83 (noting that OIRA interprets disclosure provisions not to apply to pre-review changes or to changes prompted by staff rather than branch chiefs at OIRA); Heinzerling, *supra* note 29 (describing early review practices); *see also* John D. Graham, *The Evolving Regulatory Role of the U.S. Office of Management and Budget*, 1 REV. ENVTL. ECON. & POL'Y 171, 186 (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).

107. *See generally* Bagley & Revesz, *supra* note 87.

108. Heinzerling, *supra* note 29; *see also* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 214–15 (2012).

opaque, lacking in accountability for its results, and requiring changes in rules that are largely driven by OIRA itself, rather than by the results of interagency processes.[109] The concern that OIRA review may be exceeding its ninety-day schedule and thereby delaying needed agency regulations was highlighted as President Obama began his second term and appointed a new OIRA administrator.[110]

In 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 review.[111] 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.[112]

To explore agencies' incentives to avoid 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.[113] Jennifer Nou has suggested that the regulatory review process generally prompts agencies to perform higher-quality analyses and permits them to obtain "greater information and expertise from other executive branch entities."[114] Steven Croley has argued that OIRA review can have a discernible

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109. Heinzerling, *supra* note 29.

110. *See, e.g.*, John M. Broder, *Pollution Rules Delayed As White House Slows The Process of Reviews*, N.Y. TIMES, June 13, 2013, at A19; Editorial, *Stuck in Purgatory*, *supra* note 93, at A22; *see also* James Goodwin, *Transparency Withdrawn: A New Tactic for Shielding OIRA's Regulatory Review Activities*, CPRBLOG (Sept. 18, 2013), www.progressivereform.org, [http://perma.law.harvard.edu/0Azg4g7uwvt] (suggesting that OIRA is asking agencies to withdraw long-pending rules, possibly to improve statistics on delay of review).

111. Sunstein, *supra* note 44, at 1847.

112. *See* Katzen Testimony, *supra* note 6, at 36–38; John D. Graham, *Saving Lives through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 461–62 (2008); Graham, *supra* note 106, at 172.

113. *See* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1113; Derek Gill, *Applying the Logic of Regulatory Management to Regulatory Management in New Zealand*, *in* RECALIBRATING BEHAVIOUR: SMARTER REGULATION IN A GLOBAL WORLD 559, 577–78 (Susy Frankel & Deborah Ryder eds., 2013).

114. Nou, *supra* note 3, at 1811.

and beneficial influence on agency rules.[115] Alex Acs and Charles Cameron studied twenty-five agencies over the 1995–2010 period and found no evidence that OIRA review had chilled the baseline rate of agency rulemaking activity.[116] Even so, agency perceptions of OIRA review might motivate avoidance of review in specific cases.

6. Agency-Oversight Relations as a Repeated Game

An evaluation of agency avoidance and oversight response cannot be 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.[117] For example, Tiller and Spiller suggest that if the agency has a choice among policymaking instruments—for example, inaction, rulemaking, or adjudication—with different costs and payoffs, the agency will choose the instrument that maximizes its own net benefits.[118] They observe

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115. 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).

116. Acs & Cameron, *supra* note 10, at 3–4.

117. Several papers have examined agency strategy. *See* Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605, 607 (2007); James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111, 112 (1994); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 407 (1997); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. L. ECON. & ORG. 349, 350 (1999); *see also* Acs & Cameron, *supra* note 10, at 4-5 (arguing that models of judicial review are similarly applicable to presidential review through OIRA); Matthew D. Adler, *The Positive Political Theory of Cost-Benefit Analysis: A Comment on Johnston*, 150 U. PA. L. REV. 1429, 1431 (2002) (discussing and critiquing Johnston's model); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1354 (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); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 238 (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, 1143 (2001) (arguing that in a dynamic game, CBA can lead to increased regulation and decreased influence by interest groups).

118. Tiller & Spiller, *supra* note 117, at 352.

that judicial review can change the agency's strategy, because it poses a risk of reversing the agency's policy.[119] The costs to the reviewer, and hence the likelihood of reversing the agency, also vary across the different instruments.[120] 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 those of other instruments.[121] Tiller and 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 of comparable scope.[122]

Similarly, agencies that would have preferred rulemaking, absent OIRA review, may, when subject to OIRA review of such rulemaking, shift to alternative approaches if the costs to OIRA of reviewing that alternative approach are sufficiently high, so that the switch would reduce the likelihood of OIRA reversing the agency's decision.[123]

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 that Tiller and Spiller analyzed.[124]

Meanwhile, we might assume that 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 agency's avoidance tactic, or impose costs on the agency for its avoidance, OIRA may do so where such moves increase its net benefits. Where OIRA and the agency already regularly interact, OIRA

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119. *Id*. at 354.

120. *See id*. at 355.

121. *Id*. at 356.

122. *See id*. at 361.

123. Acs & Cameron, *supra* note 10, at 6–8.

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

may be able to detect the avoidance tactic 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 avoid; thus, repeat playing may enhance cooperation.[125]

If the agency anticipates that OIRA will have a difficult time detecting and responding to a particular kind of avoidance, that will lower the agency's expected cost of avoidance and hence encourage the avoidance tactic. However, where the agency anticipates repeat play with OIRA, the prospect of OIRA's detection of avoidance and the advent of low-cost opportunities for OIRA to act to deter avoidance 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 detect and impose costs for agency avoidance via guidance documents, subregulatory statements, or rules that the agency characterizes as not economically significant. OIRA might begin to require retrospective impact assessments of these guidance documents, statements and rules; demand more detailed information submissions in future regulatory reviews of other rules and policies from that agency; or request memoranda from the agency itemizing planned guidance documents or subregulatory statements.[126]

Such game-theoretic models of regulatory review are informative, but they are also simplified and hence incomplete (as their authors recognize).[127] They help identify hypotheses for some of the incentives facing agencies and reviewers, although they do not reflect all the features of real-world decisions. One important complication is that the government institutions comprise multiple actors, each of whom may have different incentives. Each institution is a "they," not an "it." For example, the goals of and incentives for longtime career offi-

125. *Cf.* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 125 (1984); COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION 336–37 (2003).

126. *E.g.*, Heinzerling, *supra* note 29 ("[I]n 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.").

127. *E.g.*, Tiller & Spiller, *supra* note 117, at 370.

cials, whether in OIRA or in an agency, may differ from those of shorter-term political appointees. Agency official commitments may also vary based on disciplinary training or the official's age cohort. While we do not attempt to assess these complications in detail, we note in passing that differences between career and political appointees in an agency may moderate an incentive to avoid review, to the extent that a political appointee's preferences are relatively more likely to track those of the President and her staff at OIRA. And to the extent that the career officials in both the agencies and OIRA expect a long tenure in government and decades of working together across multiple political administrations, the repeat play feature of the relationship may encourage both the agency's and OIRA's career staffs to cooperate with each other. Still, both career and political officials at an agency may wish to avoid the resource and time demands of OIRA review.

A game-theoretic framework for analyzing agency-OIRA interactions also does not fully address potential sources of uncertainty in the game, such as changes in personnel, incomplete information, or policy stickiness, that could affect OIRA's ability to predict agency avoidance or an agency's anticipation of response. That said, we think the framework helps conceptualize avoidance and assess its extent, notably by highlighting the role that repeat relationships may have in fostering better monitoring and increased cooperation; and it helps with evaluation of potential responses to agency avoidance.

C. A Broader Typology of Potential Avoidance Tactics

The likelihood and consequences of agency avoidance of OIRA review thus depend on the benefits and costs to each actor—in a repeat relationship—of review, avoidance, monitoring, countermoves, and cooperation. These prospects may vary across different types of avoidance tactics. Here we examine a broader typology than in prior literature of avoidance tactics to assess their potential prevalence, especially in repeat relationships between agencies and OIRA.

Agencies might seek to structure rules to avoid the coverage of Executive Order 12,866, or to use other policymaking devices, ranging from agency adjudication to litigation settlements,

which are not subject to regulatory review.[128] The agency might also shape the information it submits to OIRA to reduce the likelihood that OIRA can make meaningful changes in a rule.[129] The prospect of avoidance has prompted frustration from some quarters, including from those interested in ensuring that agency policy is rational and meets cost-benefit standards,[130] from regulated entities that resent regulation through the "back door" or "under the radar,"[131] and from Presidents and their immediate staff who find it difficult to manage bureaucratic actions.[132]

Here, we examine several possible avoidance tactics. Some of these tactics seek to avoid review altogether, by escaping its boundaries. Agencies can accomplish this by ensuring that actions fall below the thresholds that trigger review—understating impacts, or splitting rules into smaller pieces. Or agencies could try to act outside the scope of the types of agency action that trigger review, such as by shifting from rulemaking to "subregulatory" guidance or policy statements; adjudication, enforcement actions, litigation and settlement; deference or delegation to other actors such as states, private standards, or international standards; or having the entire agency designated as outside OIRA review. Other avoidance 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. Such tactics include obfuscating analysis; combining rules into larger, more complex packages; submitting just before deadlines; or building coalitions favoring the regulation.

As we discuss below, when reconsidered in a repeat relationship, several of the tactics that have raised the most concern in the literature (so far) may be less likely to be used, whereas several other tactics that have raised less concern (so far) may

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128. 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 Article. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1385 (2004).

129. *E.g.*, Livermore, *supra* note 81 (arguing that agency expertise on CBA methodologies may give the agency advantages in shaping its interactions with OIRA); Nou, *supra* note 3, at 1831–32 (arguing that agency obfuscation of CBA may raise the costs of review to OIRA).

130. Graham Testimony, *supra* note 3, at 27.

131. Funk, *supra* note 3, at 1028 (reporting "outrage").

132. *E.g.*, Kagan, *supra* note 32, at 2272.

be more likely to be used and to avoid oversight—even in a repeat-player relationship.

1. *Understating Impact or Splitting an "Economically Significant" Rule into Smaller Rules*

At first glance, it seems that 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.[133] 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 were also not "significant" for other reasons,[134] the agency could, in theory, avoid review altogether. Although this has been a focus of OIRA attention, and stories of this sort of action have been reported,[135] it is unclear to what extent this actually occurs.[136] As noted above, the vast majority of rules currently undergoing regulatory review are not reviewed because they are "economically significant," but for other reasons. [137] Therefore understating or "splitting" may be a strategy with limited utility. Moreover, as noted above, the $100 million threshold has become smaller over time due to inflation,[138] 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,[139] further deterring understating or

133. Exec. Order No. 12,866, § 3(f)(1), 58 Fed. Reg. 51,738 (Oct. 4, 1993).

134. *Id*. (listing other reasons that an action can be significant, such as interfering with the plans of another agency, altering the impacts on grant or loan recipients, and raising novel legal issues).

135. *See* Nou, *supra* note 3, at 1792 n.205 (citing sources suggesting that agencies have tried splitting rules); *OIRA Avoidance*, *supra* note 3, at 999–1000 (focusing on agencies understating impacts).

136. Acs and Cameron, *supra* note 10, at 23, find no "clear-cut" evidence of this, but they note that the number of agency regulations that qualify as significant does change depending on how much the agency is audited.

137. *See* Sunstein, *supra* note 44, at 1868.

138. *See supra* note 50.

139. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993).

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 require additional cost, time, and staff resources, particularly for some standards that may be less susceptible to division—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 avoidance 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 was a reasonable risk of such conduct, but also illustrating OIRA's capacity to prevent such avoidance.[140] Such an agreement, which effectively expands the scope of OIRA's review beyond what is stated in the Executive Order, certainly sanctions the agency in question and would likely deter other agencies from trying the same thing.

Among potential strategies for avoiding 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, beyond the likely low cost of detection, 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

140. 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).

agency repeatedly issuing unreviewed rules that later look significant.[141] 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.[142]

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 Procedure Act (APA); the agency must publish a proposed rule, accept public comments, and consider them prior to finalizing the rule.[143] Guidance documents, however, encompass two classes of agency actions that are exempt from these requirements—interpretive rules and general policy statements.[144] The resources and time demanded by notice-and-comment rulemaking likely have significantly contributed to an increased use of such guidance documents by agencies.[145] 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 delay judicial review if they embody their policies in guidance

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141. *See OIRA Avoidance*, *supra* note 3, at 1010 (reporting that OIRA has changed the designation of numerous rules from nonsignificant to significant, and has done the reverse to a few rules).

142. *See supra* note 136.

143. Administrative Procedure Act, 5 U.S.C. § 553 (2012).

144. *See id.* § 553(b)(3)(A).

145. *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) ("[I]t is manifest that nonobservance of APA rulemaking requirements is widespread."); Erica Seiguer & John J. 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) (noting that FDA issues on average more than twice as many guidances as rules); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 295 (2010); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policy Making*, 92 CORNELL L. REV. 397 (2007) (discussing heavier use of guidance documents compared to legislative rules). *But see* Raso, *supra* note 10, at 821 (finding that major decisions typically are not made via guidance document).

documents.[146] 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 and reduced judicial deference to agency legal interpretations contained in interpretive rules.[147]

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, that is clearly not the case now. President Bush's issuance of Executive Order 13,422 in January 2007 specifically directed agencies to submit "significant" guidance documents for OIRA review.[148] This instruction implies that such documents may not have been reviewed on a regular basis previously. The use of guidance documents appears to be one of the few agency avoidance tactics that has risen to the level of triggering a new Executive Order in response. In that Order, "significant" guidance documents were defined as those having the same characteristics, roughly, as "significant" rules, including those having an anticipated annual effect of $100 million or more or those raising novel or legal policy issues.[149] 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."[150] Although President Obama has rescinded that Executive Order, OIRA has continued to assert the right to review significant guidance documents,[151] stating that even before Executive Order 13,422, OIRA had long reviewed significant policy and guidance documents.[152]

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146. *See* Mendelson, *supra* note 145, at 411 (guidance documents may not be "ripe" for judicial review in circumstances in which notice and comment rules would be).

147. *E.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 577 (2000) (interpretations contained in guidances and other agency documents lacking the force of law would receive reduced judicial deference).

148. Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2765 (Jan. 23, 2007).

149. *Id.* at 2763–64.

150. *Id.* at 2764–65. Unlike OIRA review of regulations, the Order sets no deadline for OIRA review of guidance documents.

151. *See* Memorandum from Peter Orszag, *supra* note 44.

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

It remains unclear, however, how frequently and how extensively that review is conducted. OIRA's "historical records" of reviews for the last fifteen years (1998 through May 2013) list, at most, only a handful of guidance documents reviewed annually, compared with hundreds of rulemaking documents.[153] Guidance document reviews, however, may not be systematically reported; for example, no information regarding the substance of guidance document reviews appears to be publicly available either on OIRA's website or through www.regulations.gov.[154] 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.[155] Most of those listed as having been reviewed are also listed as having been changed during the OIRA review process—or even withdrawn.[156]

Could agency use of guidance documents, given OIRA's claim to be able to review them, still represent a serious device for avoidance of OIRA review? It seems unlikely that agencies could avoid review of policies altogether through the use of

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153. 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. Other document titles, however, might be considered "guidance," so that these numbers underestimate the number of guidances OIRA has reported reviewing. *See Executive Order Reviews Completed between January 1, 2010 to December 31, 2010*, REGINFO, http:www.reginfo.gov (follow "Regulatory Review," then "Historical Reports." In the first search bar click on "all" and in the second search bar, choose the year "2010;" in the next page, do a control-f search for "guidance," 8 documents with the word "Guidance" appear); *see also* Nou, *supra* note 3, at 1785 (finding that, compared with the review of rules, guidance document review is "much more limited and unsystematic in practice").

154. 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, including OIRA's report of its pending regulatory reviews. *See* www.reginfo.gov/public. To see the list of pending reviews, select "Regulations under EO 12866 Review." *Compare* Editorial, *Where Are the Clean Water Rules?*, N.Y. TIMES, June 21, 2012, at A26, *with* REGINFO, http://www.reginfo.gov (follow "Regulations under EO 12866 Review.").

155. *See supra* note 153 (reporting changes to reviewed guidance documents).

156. *Id*.

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.[157] 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. Further, agencies are likely to anticipate countermoves or sanctions from OIRA, as 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.[158] Once OIRA detects avoidance it 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.[159]

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 document's "effects are unclear."[160] This may not be correct with respect to OIRA's review authority, however. Although a guidance document will not have the same legal force as a rule, it will still—by design—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 lan-

157. Memorandum from Rob Portman to the Heads of Executive Departments and Agencies (Jan. 18, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf, [http://perma.cc/Q7PD-NSLF].

158. *See also* Nou, *supra* note 3, at 1786 (noting that agencies will be "hesitant" to issue important documents unseen by senior officials).

159. *See OIRA Conclusion of EO 12866 Regulatory Review*, REGINFO, http://www.reginfo.gov/public/do/eoDetails?rrid=121365 (reporting approval, "Consistent with Change," of "Essential Health Benefits Bulletin," RIN 0938-ZB06); Bagley & Levy, *supra* note 9.

160. Nou, *supra* note 3, at 1777.

guage 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 the probability of both benefits and costs. Guidance documents may generally be less effective than binding rules, but sometimes possibly more effective, where "soft law" and "social norms" are more persuasive and yield less backlash than hard law. In short, compared with some other avoidance techniques, guidance documents seem less likely to escape OIRA attention altogether.

The more significant question 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.[161] The Department of Health and Human Services's use of a guidance document to define "essential health benefits" was criticized as permitting the agency to avoid preparing the cost-benefit analysis otherwise required by the Executive Order.[162] Lars Noah has similarly criticized FDA's use of guidance documents.[163]

3. Other Subregulatory Statements

We have already focused on the major form of subregulatory statement—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.[164] An agency may draft an inter-

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161. Executive Order 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. *See* Memorandum from Peter Orszag, *supra* note 44.

162. Letter from Senator Michael B. Enzi et al. to Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Services (Jan. 13, 2012).

163. Noah, *supra* note 11, at 8–9.

164. *E.g.*, Mike Dorning, *OSHA Backs Down on Home Work Rules*, CHI. TRIB. Jan. 28, 2000, http://articles.chicagotribune.com/2000-01-28/news/0001280152_1_osha-ergonomic-home-offices, [http://perma.cc/0msff1wWDtV] (discussing "storm" pro-

nal memorandum that then becomes public, or an agency official may give a speech that has the effect of publicly stating a new or changed agency policy. In this area, 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."[165] These could be understood as avoidance methods, as 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 avoidance methods we discuss, how often agencies elect to make policy using such methods, and whether the desire to avoid presidential supervision plays a significant role in that decision, are empirical questions. For instance, in the mountaintop mining example described above, the White House was apparently involved in the decision—EPA's press release described the policy being announced as that of the "Obama Administration."[166] 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 avoidance. Besides potentially avoiding OIRA review, an agency may also be able to minimize its APA obligations to publish, collect public comments, and respond to those comments. Meanwhile, the statement may still prompt changes in behavior among those the agency regulates, making it at least a somewhat effective device from the agency's perspective. An agency may also be able to avoid judicial review, as these statements typically would be considered neither final nor ripe.[167] These tools, however, do have their shortcomings. Unlike a rule, subregulatory statements are not legally binding, and it may be more difficult to apprise regulated entities of their existence.

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voked by 2000 OSHA "interpretation letter," later withdrawn, saying that an office-ergonomics rule would apply to employees working from home).

165. *See* John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review*, 37 HARV. J.L. & PUB. POL'Y 425. 426–30 (2014).

166. *Id*.

167. *See* Mendelson, *supra* note 145, at 411–12 (discussing judicial refusal to review guidance documents as not final or unripe).

An agency considering making such statements as a means of avoiding OIRA review would likely consider possible countermoves. For example, other interested agencies or interest groups may bring such statements to OIRA's attention, so it may be relatively easy for OIRA to detect avoidance efforts.[168] 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 avoiding 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, in a game-theoretic framework, one must consider the likelihood of an avoidance 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,[169] and an agency has little recourse when the time frame is exceeded, except possibly to try to draw the attention of public or congressional monitors.

In theory, an agency could 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.[170] Others have suggested, however, that agencies may seek

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168. *See* Dorning, *supra* note 164 (ergonomics rule "interpretation letter" triggered storm and was withdrawn within 48 hours).

169. *E.g.*, *Stuck in Purgatory*, *supra* note 93.

170. *See, e.g.*, Acs & Cameron, *supra* note 10, at 448.

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.[171]

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.[172] But, 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 require special reviews of the outgoing administration's "midnight" regulations. Anticipating rules arriving with short deadlines, OIRA could reach out earlier to those agencies, require advance notice (through the Unified Agenda or otherwise), or 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 use its better control over information 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, in reality, it is economically significant.[173] But 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 example, OIRA could simply seek to review rules based on criteria other than economic impact, as provided in Executive Order 12,866 and as currently happens in the great majority of reviews, or to review rules not clearly covered in the Executive Order.[174]

A number of commentators have noted some variant of this tactic in the context of cost-benefit analysis. For example, Jen-

171. *See* Nou, *supra* note 3, at 1805.

172. *See* Nou, *supra* note 3, at 1798.

173. *E.g.*, *OIRA Avoidance*, *supra* note 3, at 1010.

174. According to Lisa Heinzerling, OIRA already regularly engages in such practices. Heinzerling, *supra* note 29.

nifer 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.[175] Such obfuscation could raise the costs to OIRA of reviewing the rule,[176] nudging OIRA to focus its scrutiny on other rules. Michael Livermore, while not arguing that agencies submit low-quality CBAs to frustrate review, has pointed out that an agency can carefully select alternatives to shape the outcome of cost-benefit analysis.[177] Livermore has argued more generally that the requirement to conduct CBA, wholly apart from any efforts to obfuscate or manipulate it, may favor the agency because the agency may have greater expertise than OIRA on the methodology of CBA, which could then benefit the agency during OIRA review.[178] The interaction between the agency and OIRA over the methodology of CBA may work not to obfuscate review or avoid OIRA, but rather to highlight the agency's expertise, to shape the terms of debates where the agency and OIRA disagree, and to advance the development of CBA methodology in ways that both the agency and OIRA may welcome.

Strategies to obfuscate or manipulate CBA can have pitfalls for the agency, moreover. OIRA might interpret a poorly written CBA to signify a poorly conducted CBA, and as a result might be inclined 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, including, for example, staff from the Council of Economic Advisers, to scrutinize the obfuscating agency's CBAs, or it could adopt a presumptive downward adjustment of the agency's stated benefits and upward adjustment of the agency's stated costs that reflects OIRA's greater uncertainty about their true values and gives the agency an incentive to clarify its estimates.

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175. Nou, *supra* note 3, at 1793.

176. *See id*. at 1795.

177. Livermore, *supra* note 81, at 19–20.

178. *Id*. at 2–3.

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 legally circumscribed or may increase the agency's litigation risk if aggrieved parties seek judicial review.

Again, however, this sort of avoidance strategy operates in the field of repeat play. 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 information from other agencies, White House offices, and 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 avoidance of OIRA review may be agency use of standards previously drafted by private or international groups, in lieu of "government-unique" standards. Private standards may be written by "standards development organizations," such as the American Society for Testing and Materials, industry trade associations, or the International Standards Organization. Indeed, OIRA policy favors the use of such standards. Circular A-119 incorporates a

preference for voluntary consensus standards over government-unique standards,[179] as does the National Technology Transfer and Advancement Act of 1995.[180] 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,'"[181] 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, as the goal is to build on a private process in which a wide array of viewpoints have already been considered and in which many regulated entities may already be meeting the standards.[182] A digital search 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 eighteen agency rules, out of thousands utilizing private standards, in which an agency both incorporated a private standard and modified it to some degree.[183] Although these data are not conclusive, they suggest that OIRA policy may favor the incorporation without change of private standards, rather than modification by the agency 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

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179. Memorandum Concerning Circular No. A-119 from Franklin D. Raines, Dir., Office of Mgmt. & Budget, For Heads of Executive Departments and Agencies (Feb. 10, 1998), *available at* http://www.whitehouse.gov/omb/circulars_a119, [http://perma.cc/0FTg1U1ExpH] [hereinafter Circular A-119 Memorandum].

180. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d) 110 Stat. 775, 783 (codified at 15 U.S.C. § 272) (1996)) (requesting, unless inconsistent with applicable law or impractical, that all federal agencies use "technical standards that are developed or adopted by voluntary consensus standards bodies . . . to carry out [the agency's] policy objectives or activities").

181. Circular A-119 Memorandum, *supra note* 179, § 6(f).

182. *See id.* § 2.

183. *See* Nina A. Mendelson, *Private Control Over Access to the Law: the Perplexing Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 782 & n. 259 (2014) (describing electronic searching method and conclusions).

OIRA review. From an agency's perspective, however, the use of this strategy depends on locating suitable private standards. Currently, 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 efforts to review private standards more closely or 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, or the International Accounting Standards Board 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 other agencies are supposed to consult with OIRA before making regulatory commitments in international agreements, including not only transnational private standards, but regulatory commitments in public international law as well.[184]

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 otherwise-preempted state regulation. For example, the FDA has not fully exercised its authority to set standards for bottled water, in part because of state actions.[185] But agency inaction is not currently subject to OIRA review or any of the disciplining mechanisms in Executive Order 12,866.[186] In their

184. *See* 22 C.F.R. § 181.4(e)(2) (2013). This matches the agency's obligation to consult on the budget side. *See* 22 C.F.R. § 181.4(e)(1) (2013).

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

186. *But see* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1382–83 (2013) (proposing OIRA review of

contribution to this issue, Graham and Liu discuss EPA's grant of a Clean Air Act "waiver" from mobile-source standards to California's zero-emissions-vehicle program.[187] Although it is the Clean Air Act that authorizes California to regulate after receiving 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 such standards: will OIRA's review of the EPA rule include review of the expected state implementation plans? To take another example, the Department of Health and Human Services (HHS), which is 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, 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 an agency 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 be assured that the policies made are the ones the agency believes are needed to implement the federal statute.

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agency denials of rulemaking petitions). Although agency inaction (such as doing nothing, or denying a petition for rulemaking) may not currently be subject to OIRA review, agency deregulation—promulgating a new rule that rescinds or relaxes a prior rule—could be subject to OIRA review.

187. *See* Graham & Liu, *supra* note 165, at 431–39. OIRA does not currently review Clean Air Act waivers under Executive Order 12,866, because they are not considered rules. *E.g.*, California State Nonroad Engine Pollution Control Standards; Off-Road Compression Ignition Engines—In-Use Fleets; Notice of Decision, 78 Fed. Reg. 58,090, 58,121 (Sept. 20, 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. PA. J. CONST. L. 637, 643 (2010) (noting that EPA's 2007 denial of California's waiver request for automotive greenhouse gas standards was "[a]fter interactions with OIRA").

Further, to the extent these choices are made to avoid OIRA review, an agency should be anticipating OIRA countermoves. OIRA is likely 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 avoidance 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 consumers. States may have suboptimal incentives to regulate, especially regarding interstate externalities. Nonetheless, there are countermoves that OIRA could take. For example, OIRA Administrator John Graham started to issue "prompt letters," not only to encourage agencies to consider removal of poorly functioning regulations, but also to encourage agencies 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 invited to submit suggestions for prompts to OIRA.[188] It remains to be seen whether prompt letters will become 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.[189]

8. Litigation and Settlements

Another tactic that deserves attention is agency use of judgments and consent decrees in defensive litigation to constrain regulatory decisionmaking. Such a tactic may effectively insu-

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188. *E.g.*, *Office of Information and Regulatory Affairs: Oversight Hearing Before the Subcomm. On Energy Policy, Natural Resources & Regulatory Affairs of the H. Comm. On Oversight and Government Reform*, 107th Cong. 2 (2002) (statement of John D. Graham Administrator, Office of Information and Regulatory Affairs), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/graham_house031202.pdf, [http://perma.law.harvard.edu/0ns2p7pgpBj].

189. *See* Livermore & Revesz, *supra* note 186, at 1382–85.

late the agency's decision from OIRA review, an issue we have not seen discussed in other scholarship on OIRA avoidance. 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. John Graham has given one example: an EPA consent decree committing EPA to regulate power-plant emissions.[190] 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.[191]

There are, however, 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, although at least one scholar has recently suggested that dissatisfied agency officials have been known to invite filing.[192] 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 deci-

190. Graham Testimony, *supra* note 3, at 34 (discussing rule aimed at reducing mercury emissions); *see also Federal Consent Decree Fairness Act, and the Sunshine for Regulating Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. On Courts, Commercial & Admin. Law of the H. Comm. On the Judiciary*, 112th Cong. 41 (2012) (statement of David Schoenbrod, Trustee Professor of Law, New York Law School) (citing Natural Res. Def. Council v. Train, 510 F.2d 692 (D.D.C. 1976)); *id.* at 28–29 (statement of Roger R. Martella, Jr., Sidley Austin LLP) (listing several examples, including EPA's 2010 agreement via consent decree to issue greenhouse gas performance standards for utilities and refineries).

191. *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1072 n.191 (2013) (citation omitted) (describing White House's firm policy of no contact regarding pending agency adjudications (citing Memorandum from Charles F.C. Ruff, Counsel to the President and Daniel Marous, Senior Counsel (Nov. 24, 1988))).

192. *See* Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 181 (2013).

sion. In a settlement, the agency must persuade its 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 occurrences than an agency's typical submission of rules for review.[193] 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.[194] 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 avoid OIRA oversight. An agency could anticipate fewer opportunities for OIRA monitoring and responses to these nonrulemaking modes. On the other hand, certain characteristics of these procedures may limit their appeal to agencies.

Agency decisions to enforce (or not enforce) a statute may provide an avenue for avoiding OIRA review because, like rulemaking, these decisions can represent an exercise of the agency's policy discretion. An agency may argue, in the context of an enforcement action, that a statute or regulation should be interpreted more broadly to cover a new species of action, or that particular conduct violates a general statutory prescription against "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 may announce a safe

193. *See Federal Consent Decree Fairness Act, and the Sunshine for Regulating Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. On Courts, Commercial & Admin. Law of the H. Comm. On the Judiciary*, 112th Cong. 66 (2012) (statement of John C. Cruden, President, Environmental Law Institute) ("[C]onsent decrees are actually hard to obtain.").

194. *See infra* text accompanying notes 199–201 (discussing White House policy of refraining from involvement in agency enforcement and adjudication).

harbor from enforcement. As Andrew Morriss, Bruce Yandle, and Andrew 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."[195] 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 its vehicle-safety rules, ended up shifting to a strategy of recalls—a strategy that Mashaw and Harfst strongly criticize.[196] 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.[197] In this 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.[198]

Meanwhile, White House offices likely wish to avoid interference—or any perception of interference—with individual agency enforcement decisions or adjudications, out of fear of being associated with the "crassest forms of partisan politics."[199] As a result, "internal White House rules . . . prohibit White House staffers from contacting agencies about specific enforcement actions [or agency adjudications] without preclearance from the White House Counsel's Office."[200] Thus, an agency might anticipate few, if any, OIRA countermoves against agency enforcement measures, compared with other avoidance tactics.[201]

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

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195. ANDREW P. MORRISS, BRUCE YANDLE, & ANDREW DORCHAK, REGULATION BY LITIGATION 1 (2009).

196. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 111 (1990) ("The shift in emphasis from rules to recalls seemed to signal a reorientation of auto safety regulation, from science and planning to crime and punishment.").

197. Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1843–44 (2011).

198. *See* Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 HARV. J.L. & PUB. POL'Y 553 (2014).

199. *See* Andrias, *supra* note 191, at 1072 (citing Kagan, *supra* note 32, at 2357–58) (giving an example of Nixon Administration involvement in tax audits).

200. *Id.* at 1072 & n.190 (citing internal White House memoranda).

201. 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. *See generally* Andrias, *supra* note 191.

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 document 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 increincrementalism 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 will likely 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, though *Chevron* deference would be accorded an agency interpretation in a rule.[202] Nonetheless, anyone concerned with OIRA avoidance tactics should consider whether the use of this policymaking form, like litigation settlements, might be increasing.

10. Agency Adjudication

Agencies' ability to resolve issues by adjudication rather than rulemaking might serve as another avoidance tool. Long-settled doctrine permits an agency, in its discretion, to resolve policy issues through either method.[203] With both adjudication and liti-

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202. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (refusing to defer to agency interpretation expressed for first time in a brief). *See generally* Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) (holding that courts should defer to an agency's reasonable interpretation of ambiguous language in its authorizing statute).

203. *See* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

gation, 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 agency adjudications would be obstacles to such review.[204]

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 specifically requires some agencies to use rulemaking, rather than adjudication, in certain contexts.[205] Adjudication in other agencies may be conducted primarily by independent administrative law judges, with agency heads only very rarely involved.[206] But in some instances, an executive-branch agency may have the option to shift policy decisionmaking from rulemaking or guidance to adjudication.[207] The Department of Health and Human Services, for example, possesses the authority to resolve cost-reimbursement issues under Medicare either through regula-

204. *See* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1545–46 (9th Cir. 1993) (extending APA's ex parte communications ban to White House staff and the President). The source of this prohibition, 5 U.S.C. § 557(d), applies only to formal agency proceedings. Nonetheless, the White House retains a policy of avoiding contact with respect to any adjudication. *See, e.g.*, Andrias, *supra* note 191, at 1072 n.191 (citation omitted).

205. Magill, *supra* note 128, at 1389.

206. *See* 5 U.S.C. § 554(d)(2) (2012) (prohibiting ALJ from being supervised by someone from investigative part of agency); *id.* § 556 (describing functions of ALJ in formal adjudication); *id.* § 557 (prohibiting ex parte contacts); *id.* § 3105 (prohibiting agency from assigning ALJ duties inconsistent with judicial functions).

207. *See* Raso, *supra* note 10, at 822 (suggesting that OIRA efforts to review guidance documents may drive agencies to shift to adjudication).

tions or through adjudication.[208] 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-standards requirements, rather than using new rulemaking.[209] Further, as Dean John Graham and Cory Liu describe in this Issue, EPA effectively set policy on mountaintop mining in part through permitting decisions (or denials) on 175 mine sites.[210]

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.[211] 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.[212] 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 rapidly to advance a new approach to statutory implementation.[213]

11. Coalition Building

Agencies may try to assemble coalitions of allies favoring a rule in an attempt to raise the costs to OIRA of changing or returning that rule.[214] Such coalitions may include advocacy

208. *E.g.*, Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995) (upholding agency's use of adjudication to resolve particular questions in "specific applications of a rule").

209. Magill, *supra* note 128, at 1403.

210. *See* Graham & Liu, *supra* note 165, at 426–30.

211. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 221 (2001) (refusing *Chevron* deference for informal Customs Service adjudications). *But see* City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

212. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

213. *Cf.* Wu, *supra* note 197, at 1842 (defending regulatory threats as a flexible policymaking device).

214. Nou, *supra* note 3, at 1798–99.

groups, other federal agencies, state agencies, and industry subgroups that benefit from 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, although it does not apply to all OIRA-agency interactions,[215] and the disclosed documents are often incomplete or difficult to locate.[216] 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 "avoidance."

To the extent OIRA perceives coalition-building or disclosure of OIRA comments as a form of avoidance or a way to tie OIRA's hands, the agency that uses coalition-building operates in a field of repeat interactions with OIRA. Therefore, the agency may 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.[217]

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.[218] As our discussion of this issue in Part I suggests, however, presidential executive orders may be attempting gradually to extend control over the independent agencies.[219] And at least one bill is now pending in Congress to

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215. Exec. Order No. 12,866, 58 Fed. Reg. 51, 735, 51, 740–42 (Oct. 4, 1993). 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.

216. *See* Mendelson, *supra* note 57, at 1149.

217. *See* Heinzerling, *supra* note 29 (arguing that "[i]f OIRA wanted to review something, OIRA reviewed it," even if draft rules were not particularly novel or economically significant).

218. *See* Exec. Order No. 12,866, 58 Fed. Reg. at 51,737.

219. *See* Exec. Order No. 13,579, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011); *see also* Katzen Testimony, *supra* note 6, at 38.

expressly confirm the President's authority to order independent agencies to submit to the OIRA regulatory review process.[220]

Is agency independence truly an avoidance 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.[221] 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 its authorizing statute lacks express statutory limits on the President's power to remove the agency's head.[222] Or, an agency could persuade Congress to confer independent status on it by statute. For example, consider the Consumer Financial Protection Bureau (CFPB), created in the Dodd-Frank legislation and placed on the list of independent agencies under the Paperwork Reduction Act.[223] Besides assuming some new functions, the Bureau also took over functions previously located in other agencies, including executive branch agencies such as the Department of Housing and Urban Development and the Treasury Department.[224] 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, as it depends on congressional cooperation both in the creation of the entity and in the confirmation of like-minded agency officials to run it.

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220. Independent Agency Regulatory Analysis Act of 2013, S. 1173, 113th Cong. (2013).

221. *E.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148–49 (2010) (deciding case on the "understanding" that SEC was an independent agency, subject to presidential removal only for cause, despite lack of express "for cause" discharge provisions).

222. *See id. See generally* Datla & Revesz, *supra* note 46; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

223. *See* Nou, *supra* note 3, at 1835 (discussing Congress's expressly amending the Paperwork Reduction Act to list the new CFPB as an independent agency, and suggesting that Congress could do so for other agencies as well).

224. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 312, 124 Stat. 1376, 1521–23 (2010) (transferring existing agency consumer-protection functions to CFPB).

Whether agencies' independence from presidential oversight waxes or wanes in the future, the current existence of some independent agency regulation offers a sort of observational experiment for analysts to observe the impact of avoiding OIRA. Acs and Cameron use independent agencies as controls in their empirical work.[225] Former OIRA Administrator Sally Katzen has commented that independent regulatory agencies far less often engage in disciplined analyses of costs and benefits.[226] This distinction, however, may become blurred over time as independent agencies bow to Executive Order 13,579 or to court decisions interpreting their regulatory statutes[227] by starting to conduct their own RIAs using CBA.[228]

III. EVALUATING RESPONSE MEASURES TO REDUCE AVOIDANCE

A. Avoidance and Response in a Repeated Game

Observing the possibility of agency avoidance 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 avoid 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.[229]

Agencies might well expect some repercussions, or at least distrust, to result from avoidance tactics. To the extent that an agency builds a reputation for avoidance, OIRA might review

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225. Acs & Cameron, *supra* note 10, at 4.

226. Katzen Testimony, *supra* note 6, at 39 ("[Independent regulatory commissions] do not typically engage in the analysis that has come to be expected for Executive Branch agencies.").

227. *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

228. *See, e.g.*, Memorandum from Div. of Risk, Strategy & Fin. Innovation and Office of Gen. Counsel to Staff of the Rulewriting Divs. & Offices, US Securities and Exchange Commission (SEC) (Mar. 16, 2012).

229. *See generally* Bueno de Mesquita & Stephenson, *supra* note 117; Tiller & Spiller, *supra* note 117.

more aggressively all the agency's rule submissions to ensure compliance with regulatory review requirements. This could 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.[230] 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.[231] Conceivably, OMB might threaten to cut an uncooperative agency's budget. Presidents might appoint "tougher" agency heads, less sympathetic to the agency's mission, who will more sternly manage agency action.[232] 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 prompt it to be more selective in seeking to avoid review. Or the agency might foresee further openings; for example, if an agency tries to avoid 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 thinner, 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

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230. *See, e.g.*, Sunstein, *supra* note 44, at 1871 ("[I]n recent years [OIRA] has generally had two scientists on its staff . . . .").

231. For the idea that OIRA could give agencies incentives to cooperate by giving them 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 credit account stays positive), *see* Eric Posner, *Using Net Benefit Accounts to Discipline Agencies: A Thought Experiment* (John F. Kennedy Sch. of Gov't, Ctr. For Bus. & Gov't, Working Paper RPP-2002-01, 2002).

232. *See* Acs & Cameron, *supra* note 10, at 24 (finding 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, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007) (requiring each regulation to be approved by high-level officer in each agency) (later rescinded).

from the President and Congress; in turn, the agencies, interest groups favoring agency action or interest groups favoring OIRA review might also lobby Congress. 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 institutional actor[233] 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 avoidance, so concerns that avoidance could be widespread may be overstated (although avoidance in specific instances may still be important). Or concerns about types of avoidance tactics that are easy for OIRA to monitor may be overstated, and the more serious issue may be other avoidance tactics that are more difficult to monitor. When evaluating agency avoidance and potential responses, it is not enough to observe the possibility of agency avoidance through one tactic or another; analysts must consider multiple avoidance tactics, multiple response options, multiple actors, scenarios of repeated interactions of moves and countermoves, and the pros and cons of each path.

B. Evaluating Each Response Option

How serious is agency avoidance of OIRA, and what should be done about it? The question mirrors the evaluation of agency regulation (how serious are market dysfunctions and social problems, and what should be done about them?) and the evaluation of OIRA oversight (how serious are government dysfunctions and regulatory problems, and what should be done about them?).

We note that taking a game-theoretic approach to these issues, as we do here—and hence suggesting that OIRA and the agencies may already be trying to anticipate each others' potential future strategic moves—does not necessarily imply that there is already an efficient cooperative equilibrium that obviates the need to evaluate the desirability of response measures to agency

233. As discussed above, the motivations of the multiple individual actors within a single agency conceivably can vary, further complicating this analysis.

avoidance. Even if the agencies and OIRA are already anticipating future moves and have achieved some stable equilibrium, that equilibrium may not be fully socially optimal if it reflects the particular strategic interests of these actors rather than full societal interests. Moreover, a stable equilibrium may be elusive because information costs, uncertainties, new policy frontiers, new arrays of agencies and interest groups, new avoidance tactics and responses, and other factors may keep relations evolving. Thus there is a continuing need to evaluate the normative desirability of responses to agency avoidance.

In our view, the question of what should be done about agency avoidance calls for an evaluative framework for response options 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 avoiding 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 avoidance as an alarm signal regarding overbearing presidential control. Others may see agency avoidance as a violation of electoral accountability and sensible regulatory oversight. Without reproducing here the full debate over the merits of OIRA oversight,[234] one can see the

234. OMB and 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 one should 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 Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration: Hearing Before the Subcomm, on Courts, Communal & Admin. Law of the H. Comm. On the Judiciary*, 112th Cong. 51 (2012) (statement of Richard A. Williams, Director of Policy Research, Mercatus Center, George Mason University). 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. ENVTL. & RESOURCE ECON. 245, 247 (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 POL'Y & SOC'Y 113 (2010) (finding poor RIA performance in many countries, and attributing this to weak

merit in applying OIRA's own evaluative framework for agency regulation to the choices among response options to agency avoidance. Evidence of avoidance 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 avoidance of OIRA should, in principle, be evaluated similarly 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 avoidance and response measures as a problem of optimal regulation—not only optimal agency regulation of private activities, but also optimal OIRA regulation of agencies. We use the term "optimal" here in the broad sense of social well-being (recognizing that there are varied approaches to assessing social well-being). This approach avoids the hard line positions of either OIRA maximalists (seeking complete oversight and zero avoidance) or OIRA minimalists (seeking to eliminate all OIRA review); for each of those extremes, the answer to agency avoidance 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. We contend that those concerned about agency avoidance of OIRA should not resist our proposal—or, if they do, it should cause them to reconsider why they favor OIRA review (which applies a similar framework) 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: in a rough sense, this would be impact assessment of impact assessment, applying CBA to CBA, although we recognize that a formal quantitative CBA of each response option may not be appropriate, and that there are varied approaches to CBA. The broader need is really for *impact assessment of oversight* (which may include RIA and CBA as well as other elements). Our point is that choosing how best to respond to agency avoidance of OIRA oversight ought to involve a balanced evaluation of the benefits and

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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 123 (Michael A. Livermore & Richard L. Revesz eds., 2013).

costs of the 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 the following:

1. How serious is the problem of agency avoidance? 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 avoidance should include at least a basic assessment of the extent of the avoidance problem, its likelihood, and its consequences for the regulatory system and society. These characteristics may, of course, depend on the type of avoidance that is occurring and the potential response options. Our analysis above, in Part II, of the typology of avoidance tactics (and response options in a repeated game), helps frame this inquiry. At the same time, gathering information has cost as well as value. Empirical study or other assessment of the seriousness of avoidance may be costly in effort and especially in time. And gathering such information will be most valuable where it would significantly improve the choice among response measures. An implication of this cost-of-information/value-of-information approach is that high-cost response measures may warrant more empirical inquiry (because the value of reducing those response costs is greater), while low-cost response measures may be worth undertaking even on a less-than-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 avoidance should include a range or set of alternative response options, including the option of no response. We sketch a typology of response options below.

3. What are the benefits and costs of these alternative response options? Which options would have benefits that justify their costs? Although 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 avoidance 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 intended and ancillary (including both ancillary harms and ancillary benefits)—and it should pay attention to both overall social well-being and distributional equity.[235]

Additionally, evaluation of avoidance and response options could benefit from comparing oversight systems across the United States, the European Union, and other countries.[236]

As to the seriousness of the problem, it remains unclear whether avoidance of OIRA is actually widespread and serious. This again depends on the type of avoidance. Agencies may have good reasons and incentives to cooperate with OIRA review, especially in a repeat-player relationship. Agencies' incentives to cooperate or avoid might differ when facing OIRA review as compared to judicial review, and when considering different types of avoidance tactics as well as different re-

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235. *See generally* Jonathan B. Wiener, *Better Regulation in Europe*, 59 CURRENT LEGAL PROBS. 447 (2006) (discussing "warm analysis" and "proportionate analysis" as intermediate analytic methods that ensure that all important impacts are considered by the decisionmaker, rather than limiting analysis only to precisely quantified impacts or only to intended impacts, by expanding the analysis to include qualitative, ancillary (both harm and benefit), and distributional impacts, and by scaling the degree of analysis to the improvement expected in the decision from this analysis compared to the costs of such analysis).

236. *See generally* Carroll, *supra* note 234; Wiener, *supra* note 234; Jonathan B. Wiener & Alberto Alemanno, *Comparing regulatory oversight bodies across the Atlantic: the Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU, in* COMPARATIVE ADMINISTRATIVE LAW 309, 309–35 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

sponses to avoidance. Further empirical analysis is needed to understand how often agencies avoid OIRA review, in what ways, and with what consequences.[237] Still, it remains possible that avoidance may be occurring in just a few, but very important, cases, or at just a few agencies;[238] or that it is occurring more often but in ways that previous studies have not captured. OIRA needs a risk assessment of agency avoidance, going beyond initial examples of avoidance tactics, to assess their likelihood and severity in the context of repeat playing. As we have emphasized above, the avoidance tactics on which there has been the most focus—such as the use of guidance documents instead of rules and attempts to understate the economic significance of rules or to split them into smaller pieces—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 policymaking 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 avoidance.

Even if agency avoidance 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 avoidance, the type of response, and the consequences of each. As noted above, a good evaluation of response options to agency avoidance 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—in direct expenses, in the opportunity costs of diverting oversight 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 con-

237. Jennifer Nou agrees that the question is empirical. Nou, *supra* note 3, at 1836; *see also* Acs & Cameron, *supra* note 10, at 1; Raso, *Strategic or Sincere?*, *supra* note 10, at 782; Raso, Agency Avoidance, *supra* note 10, at 3.

238. *See, e.g.*, Noah, *supra* note 11, at 5–7.

strained resources (in budget, staff, and time),[239] the optimal level of enforcement of OIRA oversight is unlikely to be 100%, which is to say that the optimal level of agency avoidance is likely to exceed zero. The optimal (net-benefit 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.[240] Even some unintended "regulatory slippage" can be tolerable when the costs of preventing it are considered.[241] 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 in Part II of potential responses to several types of agency avoidance, here we sketch the following incomplete and non-exhaustive 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 the accompanying costs and benefits in Parts II and III.A above (for example, potential agency countermoves, and constraints on White House involvement in agency adjudications or enforcement proceedings).

A more complete analysis would match each response option with the type of avoidance tactic to which it responds (as indicated briefly in each tactic's subsection of Part II above). One can imagine a table listing three columns: oversight require-

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239. 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. Nou, however, does not expressly advocate a systematic analysis of the benefits and costs of responding to purported agency avoidance.

240. *See generally* WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY (2d ed. 1988); BARUCH FISCHHOFF ET AL., ACCEPTABLE RISK (1981).

241. *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 298–300 (1999).

ments, agency avoidance tactics, and corresponding oversight responses. But that sketch immediately points out that several different response options (or more than one) could be used in response to each avoidance tactic. If so, each cell in the column of response options could 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.

Possible response measures (by OIRA, the President, the courts, Congress, or other actors) include:

1. Earlier engagement, such as:
    a. Earlier notice of upcoming agency actions (for example, 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 avoided review, such as:
    a. Spot checks
    b. Communications from affected parties
    c. A petition process, in which parties can formally seek OIRA review of policies that agencies have pursued without OIRA review (via any avoidance tactic)
    d. Review of agency decisions not to pursue policies, despite potentially positive net benefits (for example, an agency denial of a petition for rulemaking, or deregulation, or agency inaction)
    e. Retrospective reviews of existing regulations (including reviews of policies that underwent ex ante review and reviews of some that did not or that should have but avoided review)
    f. 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 agencies 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—for example when federal agencies authorize, shape, delegate, adopt, or defer to states' policies
   b. Regulation by international treaties, agreements, or organizations—for example when federal agencies negotiate, delegate, adopt, or defer to such policies
   c. Regulation by private groups—for example when federal agencies authorize, shape, delegate, adopt, or defer to such standards, codes, or norms
6. Broader scope of oversight over "independent" agencies, such as:
   a. Asking "independent" agencies to review the impacts of their existing regulations and policies
   b. Asking "independent" agencies to prepare RIAs using CBA on their proposals for new regulations and policies
   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, such as:
   a. More funding and staff

   b. Staff from more diverse fields of expertise
   c. Capacity to conduct some of its own impact assessments of selected agency policies, both ex ante and ex post, rather than relying only on the agencies' analyses
8. Calibration of oversight, such as:
   a. Using OIRA's authority to trigger review of rules based on multiple criteria (not only economic impact)
   b. Creating tiers of thresholds for review—for example, 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—for example, 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 (including delay) of that added analysis of that policy
9. Coalition building, such as:
   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 similar 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, such as:
   a. Holding oversight hearings
   b. Modifying the agency's budget
   c. Using the Congressional Review Act to review a regulation
   d. Enacting legislation to rescind (or impose) a regulation
   e. Codifying in statute various aspects of regulatory review, such as RIA, CBA, and OIRA

oversight powers (perhaps enacting a statutory version of Executive Order 12,866)

f. Mandating agencies to employ RIA and CBA notwithstanding prior statutory limitations
g. Authorizing (without mandating) agencies in their discretion to employ RIA and CBA notwithstanding prior statutory limitations
h. Creating an office of regulatory review in Congress, to conduct or arrange for RIAs on major pending legislation (legislative impact assessments)
i. Designating agencies as "independent" (or not) in their own statutes and under the Paperwork Reduction Act

13. Judicial responses, such as:
    a. Applying relevant provisions of the APA or agencies' authorizing statutes to require RIA and CBA
    b. Interpreting statutory silence to imply agency discretion to employ RIA and CBA (or, closely related, requiring Congress to use a clear statement in a statute to prohibit agency use of RIA and CBA)
    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 avoided OIRA to adopt the policy another way
    e. Deferring to OIRA review where OIRA has favorably reviewed the agency action (for example, 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: This is a non-exhaustive list. There are no doubt other options. And we do not necessarily advocate (or reject) these options; our point is that a good evaluation of re-

sponses to agency avoidance requires analysis of the costs and benefits of selected relevant response options.

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 avoidance as if it would be implemented in a static world. The problem of agency avoidance 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 avoidance tactic.[242] Such shifts by agencies reacting to OIRA oversight are akin to the familiar phenomenon of shifts by private firms reacting to agency regulation.[243] 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 avoidance tactics that are less likely to be detected by OIRA in the long run.

The avoidance-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 avoid 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 avoid, and avoidance may in turn elicit an oversight response. Each response may trigger further moves by these and other actors. Markets, regulation, review, avoidance, response, and further steps are all moves and countermoves in a strategic 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, dy-

242. *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 adopt even more difficult-to-monitor policy modes).

243. *See* John D. Graham & Jonathan B. Wiener, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1 (John D. Graham & Jonathan B. Wiener eds., 1995).

namic system. Review may elicit avoidance; a response to avoidance may elicit a countermove, and more beyond that.[244]

IV. CONCLUSIONS

Concerns about agency avoidance of OIRA may be serious, but the evidence is preliminary, and more empirical assessment is needed. Our analysis of a broader typology of avoidance tactics and potential response options, situated in a continuing repeat-player relationship, suggests that concerns about some types of avoidance may be overstated, while other types deserve closer investigation. Further, observing avoidance 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 avoidance. Hence, we propose that the evaluation of response options to agency avoidance of OIRA oversight should take an approach—akin to OIRA evaluation of proposed agency regulations—that assesses 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 dynamic countermoves).

244. *See* Nou, *supra* note 3, at 1814. Nou calls the selection of response options "the other half of the game" (with the first half being agency avoidance). *Id.* 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.