



# Analysis of the Trump Administration's Memo on CRA Compliance

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The Office of Management and Budget (OMB) issued a [memorandum](#) on April 11 that set out a process for reviewing rules that, in part, expands the reach of the Congress to override both nontraditional rules and the rules of independent agencies. According to the memo, new rules, including those of independent agencies, should be provided to the Office of Information and Regulatory Affairs (OIRA) for the purposes of determining whether a rule is “major” under the Congressional Review Act (CRA) in advance of being made public.

The memo, scheduled to take effect in 30 days, raised eyebrows in regulatory circles, as experts contemplated what it will mean for independent agencies and how it will affect nontraditional rules, such as guidance documents. This Insight explains the memo and explores its implications on these issues and others.

## MEMORANDUM DETAILS

The purpose of the memo is to establish a process, uniform across all agencies, that will allow OIRA to determine whether rules are major under the CRA. Major rules under the CRA are subject to an expedited procedure by which Congress may overturn regulatory actions, albeit with the consent of the president (or enough votes to override a veto). The CRA defines major rules as those that OIRA has determined to have met certain criteria.

OMB argues in the memo that in order to complete this statutory requirement adequately, all agencies need to provide the type of information that it gets from executive agencies under the centralized regulatory review process, established in its current form by [Executive Order \(EO\) 12,866](#). As part of the EO 12,866 process, agencies must submit draft proposed and final rules, along with accompanying economic impact analyses, to OIRA for approval and to ensure analyses are satisfactory. Independent agencies have been exempt from this requirement, but the memo asserts that independent agencies should be sending analyses typical of executive agencies under EO 12,866 to OIRA so it can make a determination under the CRA. It does not, however, assert any authority for OIRA to return or revise a rule submitted by an independent agency as part of the CRA process.

The memo also clarifies the breadth of the definition of “rule” under the CRA. The purpose of this clarification is to remind agencies that other regulatory actions – those perhaps not immediately considered as rules such as “guidance documents, general statements of policy, or interpretive rules” – can be considered as rules under the CRA.

The memo reminds agencies that they cannot publish a final rule, per the CRA, unless OIRA has decided if it is major or not. The implication is clear: Provide OIRA the information it wants, or publication of a rule could be held up.

## EFFECT ON INDEPENDENT AGENCIES

For decades, OIRA has had responsibility for conducting centralized regulatory review under EO 12,866. Since the beginning of the Trump Administration, expectations of broadening its scope to include independent agencies have grown, particularly when former OIRA Administrator Neomi Rao publicly stated her support of the idea in April 2018. It appeared this new memo could be one way of achieving such a reform, giving the administration the ability to influence the work of independent agencies.

That is not the case, however. The regulatory review provision under EO 12,866 is separate from OIRA's responsibilities under the CRA. The regulatory review provision allows OIRA to review executive agency rules to ensure they are consistent with the president's priorities and do not conflict with the responsibilities of another agency. The CRA, on the other hand, utilizes OIRA's expertise as a frequent reviewer of regulations to determine if a rule – issued by any agency, independent or not – is major.

There may also be implications for independent agencies beyond a CRA determination. A main result of the memo will be to compel independent agencies to analyze their rules for economic impacts. Many independent agencies do not regularly conduct economic impact analysis of their rules, with one example being the Surface Transportation Board's Reciprocal Switching proposed rule that the American Action Forum has [discussed previously](#). The memo will require, ostensibly, independent agencies to provide some type of analysis consistent with the principles of EO 12,866 to OIRA in order to receive a determination for CRA purposes. An independent agency's failure to provide adequate information to OIRA could result in a delay of the effective date of the rule in question, even if OIRA could not alter the rule itself.

## EFFECT ON OTHER REGULATORY ACTIONS

The effect of the memo on other regulatory actions is, at once, both minimal and substantial. On one hand, the effect is minimal because major guidance documents and interpretive rules that do not go through the typical notice-and-comment rulemaking process have always been covered by the CRA. On the other hand, the effect is substantial operationally because these types of actions have often gone unnoticed for CRA purposes. A good example is an auto lending guidance issued by the Consumer Financial Protection Bureau in 2013, which Congress overturned in 2018. The guidance sat dormant – from a CRA perspective – for five years because no one initially considered it a rule. Once Senator Pat Toomey inquired about the document, however, the Government Accountability Office determined it to meet the definition of a rule under the CRA.

The OMB memo will help prevent the issue from occurring again by clarifying for all agencies that other regulatory actions not called rules in the traditional sense count as rules under the CRA, and therefore need an OIRA status determination. Agencies will need to provide documentation regarding the impact of a guidance, for example, to help OIRA make that determination. Executive agencies have been expected to provide such documentation as part of OIRA review, but now independent agencies have been told they need to supply this information for CRA purposes as well.

## CONCLUSION

The new OMB memo is important because it helps clarify the existing obligations of all agencies under the CRA. Regulatory agencies under the direction of the administration must submit all regulatory documents to OIRA for review, even if not traditionally considered rules. And independent agencies must submit their rules for analysis by OIRA, as well. It also improves transparency by nudging independent agencies to develop economic impact analyses of their rules and other regulatory actions. It does not, however, grant OIRA new

authority over the substance of independent agency rules and, accordingly, it is not the expansion of centralized regulatory review that some expected the Trump Administration to pursue.