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REFORMING REGULATORY ANALYSIS, REVIEW, AND OVERSIGHT
A Guide for the Perplexed

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Abstract

The number of regulations and their economic impact continue to grow. Yet the quality and use of economic analysis to inform regulatory decisions falls far short of the standards enunciated in executive orders governing regulatory analysis and review. Both the president and Congress have grappled in recent years with initiatives intended to reform the analytical requirements and oversight mechanisms that federal agencies must comply with when they propose and finalize regulations. Regulatory scholars have identified numerous additional provisions that could strengthen regulatory analysis, review, and oversight. This article summarizes proposals for change, explains their underlying rationales, and lists the pros and cons associated with each.

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Reforming Regulatory Analysis, Review, and Oversight:

A Guide for the Perplexed

Jerry Ellig and Richard Williams

I. Introduction

Since President Reagan's Executive Order 12291, all presidents have issued executive orders (EOs) requiring agencies to conduct comprehensive regulatory impact analyses (RIAs) for significant regulations to ensure that regulatory decisions solve social problems in a cost-beneficial manner.[1] President Clinton's Executive Order 12866, as amended by President Obama's Executive Order 13563, outlines the principal requirements that currently apply.[2] However, experience demonstrates that neither the executive orders nor the Office of Management and Budget (OMB) guidance[3] implementing those orders have been sufficient to ensure that regulation accomplishes important public goals without imposing unnecessary costs on the economy. Even when agencies conduct detailed RIAs, there are often significant gaps in the analyses.[4]

Both the president and Congress have grappled in recent years with initiatives intended to reform the analytical requirements and oversight mechanisms that federal agencies must comply with when they propose and finalize regulations. The incoming Obama administration sparked significant speculation when it appointed Cass Sunstein as the administrator of the Office of Information and Regulatory Affairs (OIRA), which reviews executive branch agencies' regulations and RIAs. In 2002, Sunstein coauthored a seminal article with Robert Hahn proposing a new executive order that would substantially expand RIA requirements and provide

[1] *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).
[2] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).
[3] U.S. 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.
[4] *See infra* Section II.

for judicial review of RIAs.[5] The new administration sought public comment on revisions to Executive Order 12866.[6] But instead of sweeping reform, the Obama administration produced marginal changes—reaffirming Executive Order 12866,[7] requiring executive branch agencies to undertake retrospective reviews of existing regulations,[8] and requesting that independent agencies abide by the principles of Executive Order 12866 and undertake their own retrospective review initiatives.[9]

Congress has not sat idly by in the debate over reforming regulatory impact analysis requirements. In 2011, the House of Representatives passed the Regulatory Accountability Act—the first major overhaul of the Administrative Procedure Act of 1946 (APA).[10] Among its many provisions, the Regulatory Accountability Act would write many of the analytical requirements in Executive Order 12866 into law; require regulatory agencies to conduct RIAs and seek comment on them in an advance notice of proposed rulemaking (NPRM) before proposing regulations with economic impacts exceeding $100 million annually; require agencies to hold formal rulemaking hearings for regulations with costs or other economic impacts of $1 billion or more annually; and permit judicial review of agencies' RIAs. This legislation passed the House again in 2013 but has not been acted upon in the Senate.

The number of regulations and their economic impact continue to grow. Yet the quality and use of economic analysis to inform regulatory decisions falls far short of the standards enunciated in executive orders governing regulatory analysis and review. Consider that in any

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[5] Robert Hahn & Cass Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).
[6] Federal Regulatory Review, 74 Fed. Reg. 8819 (Feb. 26, 2009).
[7] Exec. Order No. 13,563, *supra* note 2.
[8] *Id.* § 6.
[9] Regulation and Independent Regulatory Agencies, Exec. Order No. 13,579, 76 Fed. Reg. 41,685 (July 14, 2011).
[10] Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (2011).

given year, fewer than one-third of all major final rules[11] are accompanied by analysis of both monetized benefits and monetized costs.[12] This is a considerable failure, given that economically significant rules represent only about one percent of all rules. The need for more and better analysis, review, and oversight is even more urgent, given the new wave of regulations implementing the Dodd-Frank Act and the Affordable Care Act, both passed in 2010.

As we detail below, regulatory scholars have identified numerous additional provisions that could strengthen regulatory analysis, review, and oversight. These changes could be implemented either as amendments to the current executive order or, in some cases, as legislation. These two solutions, of course, are not equivalent. Executive orders are instructions from the president to the executive branch agencies about how he wants them to carry out the enforcement of laws, including promulgating regulations. Only presidents can enforce executive orders, and the problems that presidents have controlling the executive branch have been well documented.[13] Alternatively, unless specifically exempted, legislation can be enforced by the judicial branch where anyone with standing can bring suit to force agency compliance.

This article summarizes proposals for change, explains their underlying rationales, and lists the pros and cons associated with each. In some cases, we explicitly suggest executive orders or legislation, but in most cases, we simply suggest a solution, leaving it to others to determine the appropriate means of implementation. Section II of this article outlines the fundamental elements that a thorough RIA should include and discusses empirical research demonstrating that the quality and use of RIAs often fall short of the ideals envisioned in the executive orders. Section

[11] A "major" rule is a rule whose economic impact exceeds $100 million annually. Major rules include economically significant rules from executive branch agencies and rules with equivalent impact from independent agencies.
[12] Richard Williams, *Comparison of Final Rules with Monetized Benefits and Costs*, MERCATUS CTR. AT GEORGE MASON UNIV. (Apr. 23, 2012), http://mercatus.org/publication/comparison-final-rules-monetized-benefits-and-costs.
[13] For an excellent discussion of these problems, *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–73 (2001).

III outlines major problems with the quality of RIAs and suggests reforms. Section IV discusses reforms that could promote greater use of RIAs in agency decision-making. Section V discusses proposals for improved enforcement mechanisms to promote both higher-quality analysis and more extensive use in decision-making. Section VI concludes.

II. Analysis, Review, and Oversight Fall Short

For almost four decades, presidents have required executive branch regulatory agencies to conduct economic analysis to inform their decisions about regulations.[14] Under President Reagan's Executive Order 12291, OIRA reviewed all executive branch regulations. Under President Clinton's Executive Order 12866, OIRA reviewed only "significant" regulations—generally, regulations that have an effect on the economy exceeding $100 million annually; have other material adverse effects; conflict with other agencies' actions; affect federal spending or loan programs materially, or raise novel legal or policy issues.[15] Regulations with economic effects exceeding $100 million annually or other material adverse effects listed in the executive order are often referred to as "economically significant," although that term of art appears nowhere in the executive order.

The most extensive RIA requirements apply to economically significant regulations. A thorough RIA should do four things:

1. Assess the nature and significance of the problem the agency is trying to solve, so the agency knows whether there is a problem that could be solved through regulation and, if so, the agency can tailor a solution that will effectively solve the problem.[16]

[14] *See* Jerry Ellig & Jerry Brito, *Toward a More Perfect Union: Regulatory Analysis and Performance Management*, 8 FLA. ST. U. BUS. L. REV. 1, 21–31 (2009).
[15] Exec. Order No. 12,866, *supra* note 2, § 3(f).
[16] *Id.* §§ 1(b)(1) & 6(a)(3)(B)(i).

2. Identify a wide variety of alternative solutions.[17]
3. Define the benefits the agency seeks to achieve in terms of ultimate outcomes that affect citizens' quality of life, and assess each alternative's ability to achieve those outcomes.[18]
4. Identify the good things that regulated entities, consumers, and other stakeholders must sacrifice in order to achieve the desired outcomes under each alternative.[19] In economics jargon, these sacrifices are known as "costs," but just like benefits, costs may involve far more than monetary expenditures.[20]

Without all this information, regulatory choices are based on intuition (which may be faulty) or simply on faith that the regulation will produce a positive outcome. Given the enormous influence regulation has on our day-to-day lives, decision makers have a responsibility to act based on knowledge of regulation's likely effects.

Some evidence shows that the requirements in the executive orders, coupled with review by OIRA, have induced agencies to engage in more thorough analysis than they otherwise would have undertaken. For example, "prescriptive" regulations that contain mandates or prohibitions receive more intensive OIRA review than regulations that implement budget programs; prescriptive regulations also tend to have more thorough RIAs.[21] Agencies produce higher-quality RIAs when OIRA reviews the regulation for a longer period of time.[22] Case studies document instances in which regulatory analysis helped improve regulatory decisions by

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[17] *Id.* § 6(a)(3)(C)(iii).
[18] *Id.* §§ 6(a)(3)(C)(i) & 6(a)(3)(C)(iii).
[19] *Id.* §§ 6(a)(3)(C)(ii) & 6(a)(3)(C)(iii).
[20] *See id. See also* U.S. OFFICE OF MGMT. & BUDGET, *supra* note 3.
[21] *See* Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. (SPECIAL EDITION) 179 (2011).
[22] *See* Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* (Mercatus Ctr. at George Mason Univ., Working Paper No. 13-13, July 2013); Stuart Shapiro & John F. Morrall III, *Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?*, 20 ADMIN & SOC'Y 1 (2013).

providing additional options regulators could consider or by unearthing new information about benefits or costs of particular modifications to the regulation.[23] For example, in his case study of a 2004 Environmental Protection Agency regulation requiring power plants to design cooling water intake structures that minimize harm to marine organisms, Scott Farrow concluded, "EPA clearly chose an approach that imposed a considerably lighter burden on society. . . . The record provides substantial evidence that the agency considered a lower-cost alternative to meeting a standard with the potential to save approximately $3 billion in annualized dollars or approximately $40 billion in present value."[24]

Nevertheless, the quality and use of regulatory impact analysis falls far short of the ideals enunciated in Executive Order 12866:

- Government Accountability Office studies and scholarly research reveal that in many cases, regulatory impact analyses are not sufficiently complete to serve as a guide to agency decisions. The quality of analysis varies widely, and even the most elaborate analyses still have problems.[25]

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[23] REFORMING REGULATORY IMPACT ANALYSIS (Winston Harrington et al. eds., 2009); RICHARD D. MORGENSTERN, ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT (1997); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).
[24] Scott Farrow, *Improving the CWIS Rule Regulatory Analysis: What Does an Economist Want?*, *in* REFORMING REGULATORY IMPACT ANALYSIS 176, 182 (Winston Harrington et al. eds., 2009).
[25] *See* Art Fraas & Randall Lutter, *The Challenge of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4* (Resources for the Future, Discussion Paper 10-54, 2010); Jamie Belcore & Jerry Ellig, *Homeland Security and Regulatory Analysis: Are We Safe Yet?*, 40 RUTGERS L.J. 1 (2009); Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader & Petrea Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2001); Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost–Benefit Analysis?*, REV. ENVTL. ECON. & POL'Y 192 (2007); Robert W. Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 JOURNAL INT'L ECON. L. 473 (2005); Robert W. Hahn, Randall W. Lutter & W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (AEI-Brookings Joint Ct. for Reg. Studies, 2000); U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY REFORM: AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC ANALYSES (1998), *available at* http://www.gao.gov/products/RCED-98-142; U.S. GOV'T ACCOUNTABILITY OFFICE, AIR POLLUTION: INFORMATION CONTAINED IN EPA'S REGULATORY IMPACT ANALYSES CAN BE MADE CLEARER (1997), *available at* http://www.gao.gov/products/RCED-97-38.

- The Regulatory Report Card—published by the Mercatus Center at George Mason University—assesses the quality and use of RIAs for economically significant regulations, awarding scores that range from 0 to 60 points.[26] For the period 2008 to 2012, the average Report Card score for "prescriptive" regulations that contain mandates or prohibitions was 31.2 out of 60 possible points.[27] That's equivalent to an "F." The highest-scoring regulation ever evaluated received 48 points, equivalent to a B-minus.[28]
- In any given year, fewer than one-third of all major rules are accompanied by information about monetized benefits and costs. Further, the number of regulations accompanied by information on monetized benefits and costs is only a tiny fraction of the overall number of final rules.[29] For example, between fiscal years 2003 and 2012, there were 37,786 final rules, of which only 536, or about 1.4 percent, were major rules.[30] That means that less than one-half of one percent of final rules have monetized benefits and costs.
- Surveying the scholarly evidence on regulatory analysis, Robert Hahn and Paul Tetlock conclude that economic analysis has not had much impact, and the general quality of regulatory analysis is low.[31]

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[26] The Report Card consists of 12 criteria based on requirements in Executive Order 12866. Trained evaluators award the RIA a score of 0–5 points on each criterion. The scoring methodology has been published in a peer-reviewed journal, and statistical analysis finds that the evaluator training results in consistent scoring across evaluators. *See* Jerry Ellig & Patrick A. McLaughlin, *The Quality and Use of Regulatory Analysis in 2008*, 32 RISK ANALYSIS 255 (2012).
[27] *Reducing Unnecessary and Costly Red Tape through Smarter Regulation: Hearing Before the Joint Econ. Comm.*, 113th Cong. (2013) (testimony of Jerry Ellig, Senior Research Fellow, Mercatus Ctr. at George Mason Univ., Improving Regulatory Impact Analysis through Process Reform, 4), *available at* http://www.jec.senate.gov/public //index.cfm?a=Files.Serve&File_id=4ab151c8-c772-4da7-93b2-048a848ec613.
[28] Jerry Ellig, Patrick A. McLaughlin & John F. Morrall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 REG. & GOVERNANCE 153, 161 (2013).
[29] Williams, *supra* note 12.
[30] U.S. OFFICE OF MGMT. & BUDGET, DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 10 (2013).
[31] Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. ECON. PERSP. 67 (2008). Most of the scholarly research focuses on effects of the Regulatory Impact Analysis, which is often written after major decisions are made. This may not account for economists' behind-the-scenes influence as the regulation is being developed.

- While executive branch oversight by OIRA has helped, one former OIRA administrator described OIRA oversight as producing "marginal results."[32]
- For two-thirds of the regulations evaluated in the Regulatory Report Card between 2008 and 2012, agencies provided no explanation for how they used the RIA to inform their decisions.[33]

Myriad causes contribute to these shortcomings in the quality and use of regulatory analysis. Some, such as the enforcement problem inherent in any administration reviewing its own regulations, cannot be solved with revisions to the executive order. The optimal blend of regulatory reforms would likely include revisions to the executive order, revisions to OMB guidance, other executive branch actions, and legislation. Below, we focus primarily on the substance of the reforms rather than the implementation vehicle.

The recommendations we put forth in this paper are directed toward federal regulation. In a recent book, Stuart Shapiro and Debra Borie-Holtz examine regulatory reforms at the state level and find that not many reforms accomplish what they believe is the primary purpose of regulatory reform: reducing the number of regulations.[34] The two things the authors find that seem to reduce the number of regulations are having Republicans in charge and giving agencies strict deadlines.[35] Since Shapiro and Borie-Holtz's research addresses state rather than federal regulation, it is not clear that the same results would occur at the national level. We believe that many of the reforms we discuss could at least modestly improve federal regulation. More importantly, we focus on a different goal. Our goal is not to reduce the number of regulations,

[32] Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101, 104 (2011).
[33] Ellig, *supra* note 27, at 5.
[34] STUART SHAPIRO & DEBRA BORIE-HOLTZ, THE POLITICS OF REGULATORY REFORM (2013).
[35] *Id.*

but rather to ensure that regulations address serious, systemic problems, solve a substantial portion of the problem, and do so at an acceptable cost.

III. Improving the Quality of Regulatory Impact Analysis

Problem: Agencies Rarely Define Success at the Outset

Agencies often fail to adequately assess the nature and significance of the problems they are trying to solve with regulations, despite specific language in Executive Order 12866 directing them to do so.[36] As a result, they often fail to indicate clearly what counts as a successful outcome of a proposed regulation. Consequently, it is hard to identify the point at which the regulation will no longer be necessary or the point at which the problem will largely be solved and no additional regulation will be necessary. This deficiency likely leads to regulations that are less effective and more costly than necessary because objectives are not clear at the outset. In addition, the absence of clear agency goals and measures hampers retrospective review after the regulation is adopted because it is not always clear what analysts or decision makers should observe that would tell them whether the regulation is accomplishing its goals or, if it is, at what cost.

Since 2008, the Mercatus Center has evaluated the quality and use of proposed regulatory impact analyses for economically significant rules. In these evaluations, the two criteria with the lowest scores are the one that assesses whether the agency has articulated goals and measures to gauge the results of a regulation and the one that indicates what data the agency will use to evaluate the regulation's results after it is adopted.[37] The criterion with the next lowest score is analysis of the systemic problem the regulation seeks to solve—another critical piece of

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[36] Exec. Order No. 12,866, *supra* note 2, § 1(b)(1).
[37] Ellig & McLaughlin, *supra* note 26; Ellig, *supra* note 27, at 4.

information needed to define what counts as success.[38] The Government Accountability Office and independent scholars have found that few agencies engage in genuine retrospective review of regulations—that is, evaluations to ascertain the actual benefits and costs of regulations after they are implemented.[39] Scholars and policymakers repeatedly call for greater focus on such a retrospective analysis.[40]

President Carter's Executive Order 12044 provided that an agency head could not approve a regulation before determining that the agency had developed a plan to evaluate the regulation after it was implemented.[41] Subsequent executive orders all had provisions requiring agencies to develop plans for retrospective review of existing regulations, and they empowered either the OMB director or the vice president to designate regulations that should be reviewed.[42] None, however, continued the Carter approach of requiring the agency to develop a retrospective review plan before the regulation could be issued. An empirical study finds that regulations resulting from a legislative requirement that the agency review a previous rule are accompanied by higher-quality regulatory analysis.[43] The analysis accompanying such regulations is also more likely to include provisions that would facilitate retrospective analysis after the regulations are implemented.[44]

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[38] Ellig, *supra* note 27, at 4; Ellig & McLaughlin, *supra* note 26.
[39] U.S. GOV'T ACCOUNTABILITY OFFICE, RE-EXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007); Randall Lutter, *The Role of Retrospective Analysis and Review in Regulatory Policy* (Mercatus Ctr. at George Mason Univ., Working Paper No. 12-14, 2012).
[40] In 2002, Robert Hahn and Cass Sunstein recommended that agencies be required to generate retrospective analysis of their major regulations with help from OIRA in identifying which regulations qualify as major and are thus worthy of retrospective analysis. *See* Hahn & Sunstein, *supra* note 5, at 1527. In 2006, former OIRA administrator Sally Katzen recommended that agencies focus less on cost-benefit analysis methodology, and instead focus on retrospective review, believing that society would get more rational regulations if an agency's limited resources were spent examining previous regulations and institutions. Sally Katzen, *Cost-Benefit Analysis: Where Should We Go from Here?*, 33 FORDHAM URB. L.J. 101 (2005).
[41] Exec. Order No. 12,044, 43 Fed. Reg. 12,661, § 2(d)(8) (Mar. 24, 1978).
[42] *Id.* § 4; Exec. Order No. 12,291, *supra* note 1, § 3(i); Exec. Order No. 12,866, *supra* note 2, § 5; Exec. Order No. 13,258, 67 Fed. Reg. 9385, § 10 (Feb. 28, 2002); Exec. Order No. 13,563, *supra* note 2, at § 1.
[43] Ellig & Fike, *supra* note 22.
[44] *Id.*

The GPRA Modernization Act of 2010 created a new opportunity for an administration to integrate retrospective evaluation of regulations with performance reporting and budget decisions. The legislation requires agencies to identify high-priority goals and identify every program, tax expenditure, and regulation that contributes to those goals. Budget recommendations based on assessments of regulation's actual effects are the president's primary tool under GPRA to focus public discussion on retrospective analysis in a way that could affect decisions.

Solutions: Agencies should be required to group related regulations into regulatory programs and evaluate the effectiveness of these programs in accomplishing their strategic goals under GPRA. Since the majority of regulatory costs do not appear in the federal budget, agencies should also be required to assess the costs of their regulatory programs so that these costs can be compared with the benefits.[45] When agencies propose regulations, they should be required to identify goals and measures—derived from the agency's strategic goals—that can be used to evaluate the regulation's actual effects after it is implemented. Finally, an OMB budget review should include an assessment of the agency's success in achieving strategic goals via regulation at minimum costs. In some cases, regulatory programs should be discontinued if they cannot achieve goals or if their goal has been achieved.[46]

Pros: The change would leverage GPRA's reporting requirements to prompt agencies to develop an ongoing program of retrospective analysis of regulations. Assessing regulatory performance

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[45] JERRY ELLIG, MAURICE MCTIGUE & HENRY WRAY, GOVERNMENT PERFORMANCE AND RESULTS: AN EVALUATION OF GPRA'S FIRST DECADE 154–55 (2012).
[46] *See* Patrick McLaughlin & Richard Williams, *The Consequences of Regulatory Accumulation and a Proposed Solution* (Mercatus Ctr. at George Mason Univ., Working Paper No. 14-03, Feb. 2014).

as part of the agency's budget review would strengthen the agency's incentive to take retrospective analysis and reporting seriously.

Cons: Any deficiencies in the benefit or cost measures developed for the RIA will likely carry over into goals and measures developed for the regulation. Directing OMB to consider the results of retrospective analysis in its annual budget review may not provide a sufficiently strong incentive to motivate ongoing retrospective analysis across all agencies. After all, Congress has expressed scant interest in using GPRA performance information to make budget decisions, thus causing a major roadblock to GPRA producing results.[47] Also, agencies are not motivated to do objective analysis of their programs.

Problem: Agencies Rarely Consider Innovative Regulatory Alternatives

Agencies lack strong incentives to consider innovative regulatory alternatives. The executive orders on regulatory analysis have told agencies to consider meaningful alternatives, minimize costs, reduce burdens, and consider net benefits. But even when a statute gives the agency substantial discretion (such as acting "in the public interest"), agencies have little incentive to consider innovative approaches and strong incentive to keep regulating the way they always have. After all, if the courts have not overturned a particular approach, agencies will see it as a safe alternative that will not need defending after it is adopted. As a result, agencies often employ tried-and-true approaches as their default option, and the RIA becomes an exercise in defending this alternative against other ideas. As one agency economist noted when interviewed by a coauthor of this paper, "We do what we always do, just trotting out the same old thing.

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[47] *See* Ellig et al., *supra* note 45, at 203–19.

That's why we don't come up with better regulations; we just come up with the same regulations in different areas."[48]

Solution: Require agencies to consider a wide range of alternatives, order them from least to most restrictive, and consider a more restrictive alternative only if the agency can demonstrate through analysis that the less restrictive alternative would not significantly address the regulatory goal.[49]

Pros: This change would help prompt agencies to consider a full range of alternatives and find the least restrictive or burdensome alternative.

Cons: Agencies would likely object that this change would force them to spend time analyzing alternatives that they feel, a priori, will not be effective.

Problem: Agencies Rarely Consider Alternatives Outside the Scope of Their Current Authority

Agencies are often reluctant to analyze alternatives that are not within their current statutory authority. They see little point in doing so, since they cannot select these alternatives, and such analysis may be viewed as usurping congressional prerogatives. Congress, however, does not conduct regulatory impact analysis before enacting legislation that authorizes regulations. Expert agencies are uniquely positioned to identify both the most effective and the most cost-effective options.

[48] *See* Richard Williams, *The Influence of Regulatory Economists in Federal Health and Safety Agencies* 6 (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-15, 2008).
[49] *See* Bruce Yandle, *Rethinking Protection of Competition and Competitors*, *in* 21ST CENTURY REGULATION: DISCOVERING BETTER SOLUTIONS FOR ENDURING PROBLEMS 55, 57 (2009).

Analysis of alternatives outside the scope of current legislation could help the president develop legislative priorities and help Congress assess whether the regulation should be disapproved under the Congressional Review Act (1996). In fact, OMB Circular A-4, the detailed guidance document that explains how agencies should prepare RIAs, explicitly urges agencies to consider alternatives outside the scope of their current authority: "If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost."[50]

It appears that only President Reagan's Executive Order 12291 explicitly required agencies to assess alternatives outside the scope of existing law.[51] This EO required agencies to describe the potential benefits, costs, and net benefits of both the rule and any lower-cost alternatives, and provide an explanation of the legal reasons the lower-cost alternatives could not be adopted. Executive Order 12866, which replaced Executive Order 12291, does not explicitly direct agencies to assess alternatives outside the scope of current law; instead, it contains ambiguous language directing agencies to assess "available" alternatives or "reasonably feasible" alternatives.[52] Agencies may interpret this to mean they are responsible only for considering alternatives they currently have authority to implement, rather than using their expertise to discover the best possible approach. For example, the NPRM for a Department of Transportation regulation restricting truckers' work hours considered three alternatives that were all variations on the same basic approach: limit driver work time and require a break. DOT noted, "This rule is targeted at preventing driver fatigue, and the Agency is unaware of any alternative to restricting

[50] U.S. OFFICE OF MGMT. & BUDGET, *supra* note 3, at 17.
[51] Exec. Order No. 12,291, *supra* note 1, § 3(d).
[52] Exec. Order No. 12,866, *supra* note 2, §§ 1(b)(3) & 6(a)(3)(C)(iii).

driver work *that the Agency has authority to implement* that would address driver fatigue" (emphasis added).[53]

Solution: Require agencies to analyze lower-cost or more effective alternatives even if they are outside the scope of existing law.

Pros: Since no entity conducts RIAs before Congress passes a law, this change helps ensure that the president and Congress receive the full benefit of agency expertise in cases where expert assessment would have revealed a more socially beneficial solution. It also strengthens the president's hand in suggesting changes to existing law and provides information that members of Congress may find useful if they consider a resolution of disapproval under the Congressional Review Act.

Cons: Unless an administration finds ways to prevent agencies from making decisions (with regulation always being the most preferred option) before conducting and using analysis, the analysis of alternatives outside existing law is unlikely to be objective. Agencies will continue to justify the same types of regulations, rather than find a solution that might require further legislative action before they can implement it.

Problem: Agencies Often Provide Inadequate Analysis of Uncertainty

Agencies often ignore significant uncertainties about the existence or size of the problem the regulation seeks to address, the size of potential benefits, or the size of potential costs. For

[53] U.S. Dep't of Transp., Fed. Motor Carrier Safety Admin., Hours of Service of Drivers, 75 Fed. Reg. 82,169, 82,195 (2010).

example, the Mercatus Regulatory Report Card includes three questions that assess how well an RIA analyzed uncertainty about the problem, the benefits, and the costs. Average scores for the 2008–12 period indicate that all three types of uncertainty analysis are typically incomplete:

- The average score for assessing uncertainty about the *systemic problem* was 1.3 points (out of a maximum possible 5), which means RIAs typically mentioned uncertainty about the problem but included no actual analysis of this uncertainty.
- The average score for assessing uncertainty about *benefits* was 2.7 points, which means RIAs typically offered some analysis of uncertainty but it was far from complete.
- The average score for assessing uncertainty about *costs* was 2.3 points, which means RIAs typically acknowledged and presented a small amount of information about uncertainties, but the analysis was rarely complete.[54]

When estimates in an RIA are presented without showing the extent of uncertainty (e.g., using too narrow a range of values or using exact numbers such as "4,807 deaths prevented"), the RIA misinforms decision makers about what is really known.[55] In some cases, agencies may put their "thumb on the scale" by deliberately erring on one side or another. For example, the EPA notes in its guidance that defaults will be chosen so that risk is "not *knowingly* underestimated or *grossly* overestimated" (emphasis added).[56] In some cases, when there is uncertainty in either costs or benefits (or in both measures), the ranges may overlap (e.g., upper bound costs exceed lower bound benefits), and that may affect the decision about which policy to adopt. In other

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[54] Authors' calculations using data downloaded from the Mercatus Center's Regulatory Report Card. *Regulatory Report Card*, MERCATUS CTR. AT GEORGE MASON UNIV., www.mercatus.org/reportcards.
[55] *See* Richard Belzer, *Risk Assessment, Safety Assessment, and the Estimation of Regulatory Benefits* (Mercatus Ctr. at George Mason Univ., Mercatus Research, Oct. 2012), *available at* http://mercatus.org/sites/default/files/Risk Assessment_Belzer_v1-0_2.pdf.
[56] U.S. ENVTL. PROT. AGENCY, OFFICE OF THE SCI. ADVISOR, STAFF PAPER: RISK ASSESSMENT PRINCIPLES & PRACTICES 13 (2004).

cases, as uncertainty is theoretically reducible by obtaining more information, the decision may be to gather more information. This would preclude making a policy decision until the information is obtained.

The key point to all this is that managing (i.e., making decisions in the presence of) uncertainty is an exercise in value judgment. That is, it is not science; it is policy. Failure to reveal the full extent of uncertainty usurps the policymaker's role. None of the executive orders on regulatory analysis have explicitly addressed these kinds of uncertainties (although they are addressed in OMB Circular A-4).

Solution: Require agencies to acknowledge the full range of uncertainties inherent in their analyses (both risk assessments and regulatory impact analyses), explain how the analysis accounted for them, and explain how decision makers managed uncertainties associated with regulatory decisions.[57]

Pros: If implemented and followed consistently, this change would make regulatory analysis more objective and help ensure that regulations are adopted based on the most likely estimates of consequences.

Cons: Understanding and interpreting uncertainty analysis can be difficult for individuals not trained in the natural or social sciences, so it is possible that decision makers may draw the

[57] George M. Gray and Joshua T. Cohen recommend that the EPA replace risk values built on science-policy assumptions with risk estimates that acknowledge uncertainties. *See* George M. Gray & Joshua T. Cohen, *Policy: Rethink Chemical Risk Assessments*, 489 NATURE 27 (2012).

wrong implications even from a sound uncertainty analysis.[58] In addition, risk-averse decision makers may still insist that analysts give them "a number," because they are uncomfortable shouldering responsibility for low-probability negative consequences.

Problem: Agencies Often Provide Inaccurate Risk Estimates

It has been widely known for more than 25 years that agencies tend to produce "conservative" estimates of risk.[59] OMB acknowledged as much in 1990: "Unfortunately, risk assessment practices continue to rely on conservative models and assumptions."[60] This practice continues.[61] Too frequently, rather than reporting the full range of possible risks, health and safety agencies only report upper bound risk estimates. The use of upper bound risk estimates inflates benefit estimates by overstating the extent of the risk the regulation seeks to reduce. When only conservative risk estimates are reported, the range of uncertainty reported is artificially attenuated.

A memorandum to agencies from the Bush administration in 2007 provided some guidance on this issue, but it was a watered-down version of a draft prepared under OIRA Administrator John Graham and ultimately rejected by the National Academy of Sciences.[62] OMB Circular A-4 offers the following guidance (which is often ignored):

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[58] One of the authors saw this firsthand when a manager in the Department of Health and Human Services, confronted with a quantitative analysis of uncertainty, suggested that the economist should go back and do more work if he was so uncertain.

[59] *See, e.g.*, Albert L. Nichols & Richard J. Zeckhauser, *The Perils of Prudence: How Conservative Risk Assessments Distort Regulation*, 8 REGULATORY TOXICOLOGY & PHARMACOLOGY 61 (1988).

[60] U.S. OFFICE OF MGMT. & BUDGET, CURRENT REGULATORY ISSUES IN RISK ASSESSMENT AND RISK MANAGEMENT, REGULATORY PROGRAM OF THE UNITED STATES, APRIL 1, 1990–MARCH 31, 1991 13–26 (1990).

[61] *See, e.g.*, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT IRIS ASSESSMENT OF FORMALDEHYDE (2011).

[62] Memorandum from Susan E. Dudley, Adm'r, Office of Info. & Reg. Affairs & Sharon L. Hays, Assoc. Dir. & Dep. Dir. for Sci., Office of Sci. & Tech. Pol'y, for Heads of Exec. Dep'ts & Agencies (Sept. 19, 2007) (the 2007 memorandum to agencies), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-24.pdf; U.S. OFFICE OF MGMT. & BUDGET, PROPOSED RISK ASSESSMENT BULLETIN (2006) (the original, draft memorandum), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf.

> Worst-case or conservative analyses are not usually adequate because they do not convey the complete probability distribution of outcomes, and they do not permit calculation of an expected value of net benefits. In many health and safety rules, economists conducting benefit-cost analyses must rely on formal risk assessments that address a variety of risk management questions such as the baseline risk for the affected population, the safe level of exposure, or the amount of risk to be reduced by various interventions. Because the answers to some of these questions are directly used in benefits analyses, the risk assessment methodology must allow for the determination of expected benefits in order to be comparable to expected costs. This means that conservative assumptions and defaults (whether motivated by science policy or by precautionary instincts), will be incompatible with benefit analyses as they will result in benefit estimates that exceed the expected value. Whenever it is possible to characterize quantitatively the probability distributions, some estimates of expected value (e.g., mean and median) must be provided in addition to ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.[63]

Solution: Instruct agencies to employ objective, unbiased risk assessments when the assessment is to accompany a regulatory impact analysis. Risk assessments should be based on the most likely, rather than the worst-case or most conservative, scenarios. If a risk affects different subpopulations differently, the analysis should indicate the upper bound, lower bound, and most likely assessments for each subpopulation.[64] Significant risk assessments should be peer reviewed and not under the control of the agency whose analyses are being reviewed, with the objectivity of the risk assessment a primary criterion.

Pros: Decision makers and the public deserve to have an accurate understanding of what is known, what is not known, and the likelihood of various consequences of regulation. Objective risk assessments give decision makers and the public a better understanding of reality. They also

[63] U.S. OFFICE OF MGMT. & BUDGET, *supra* note 3, at 40–41.
[64] Gray and Cohen recommend reporting a range of risks from different models. *See* Gray & Cohen, *supra* note 57.

help decision makers assess whether in fact public health will be improved when there are risk-risk trade-offs (which should also be analyzed).[65]

Cons: The production and use of objective risk assessments can carry a political cost because they can make analysts, agencies, or the administration appear insensitive to the plight of small numbers of people who *might* suffer significant harm. In addition, it may be more expensive to more completely investigate the underlying science so as to be able to depart from a conservative default. Most "risk assessments" done now for noncarcinogens are, in reality, safety assessments that do not estimate risk but rather establish a "safe" level of exposure that conservatively protects exposed individuals.[66] Producing actual risk estimates is much more difficult and expensive and usually involves a lot of uncertainty.

IV. Improving the Use of Analysis to Inform Decisions

Problem: Decision-Makers Often Ignore Economic Criteria

The regulatory analysis executive orders address "agencies," but it is not always obvious that they are the president's instructions to decision makers in agencies. For example, Section 1(a) of EO 12866 lists decision-making criteria, telling agencies that they should promulgate only regulations that are necessary and should seek to maximize net benefits unless a statute requires

[65] Robert Hahn and Cass Sunstein warned in 2002 that agencies should pay special attention to "substitute risks," i.e., risks that are borne due to government regulations intended to reduce risk. They recommended that all regulatory agencies should analyze the existence and extent of potential risks both qualitatively and quantitatively. *See* Hahn & Sunstein, *supra* note 5, at 1524–25 & 1543.

[66] EPA's guidance for noncarcinogens states that the reference concentration (or "RfC") "is an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. It can be derived from a NOAEL [no-observed-adverse-effect level], LOAEL [lowest-observed-adverse-effect level], or benchmark concentration, with uncertainty factors generally applied to reflect limitations of the data used." *Risk Assessment for Noncancer Effects*, ENVTL. PROT. AGENCY, http://www.epa.gov/ttn/atw/toxsource/noncarcinogens.html.

another approach. Section 1(b) then provides a mixture of decision-making criteria (e.g., regulations shall be designed in the most cost-effective manner to achieve the statutory objective, a regulation should be adopted only upon reasoned determination that benefits justify the costs) and topics that should be covered in an RIA (e.g., identify and assess the significance of the problem, identify and examine alternative solutions, assess benefits and costs). Perhaps because the executive order does not explicitly say that "decision makers" should use these criteria when making regulatory decisions, agencies may have assumed that these instructions are only intended to guide the preparation of economic analysis. Indeed, this seems to be the case, given that agencies often do not claim to have used the analysis to guide their decisions.[67]

Solution: Clarify by executive order or law that the requirement to use economic analysis to help fashion regulations is an instruction to decision makers, and that Office of Management and Budget guidance (currently in Circular A-4) is written for analysts in agencies who conduct regulatory impact analysis.

Pros: This change would make it crystal clear that economic decision-making criteria in the executive order or law are elected officials' instructions to political appointees and the career civil servants who serve under them. Decision makers could not slough off these requirements on the grounds that they are just instructions to the agency's economists or a mere paperwork requirement to clear regulations through OMB. It may also prevent the political appointees from being "captured" by their agencies. Thus, managers could be held accountable (by, for example,

[67] *See* Ellig, *supra* note 27.

specific provisions in Senior Executive Service contracts) if they fail to use economic analysis to inform their decisions.

Cons: The scholarly research cited above amply demonstrates that agencies often fall far short of the expectations in the existing executive order to use regulatory analysis to inform decisions. Putting something in the executive order does not mean it will happen, as the only enforcement mechanism is from the president. Like all the content of the executive order, this change will affect agency behavior only if an administration is willing and able to enforce it by returning regulations that are not based on economic analysis, by making compliance a major component of selection and retention of personnel, and by appropriately rewarding or sanctioning individuals and agencies based on their demonstrated commitment to implementing the executive order. For this reason, a law specifying how decision makers are to use economic analysis would likely be more effective.

Problem: Agencies Often Engage in Ready-Fire-Aim Rulemaking

Agency managers often make decisions about regulation before the regulatory analysis is completed, sometimes before it is even conducted. Economists and other analysts are then expected to craft an analysis that supports the decision, instead of performing an objective analysis to help managers make a better decision.[68] This ready-fire-aim approach to rulemaking puts agencies in the position of selecting a regulatory option before they know whether there is a

[68] *See* Williams, *supra* note 48; *Raising the Agencies' Grades: Protecting the Economy, Assuring Regulatory Quality, and Improving Assessments of Regulatory Need: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of Jerry Ellig, Senior Research Fellow, Mercatus Ctr. at George Mason Univ., Look Before You Leap: Improving Pre-Proposal Regulatory Analysis, 7), *available at* http://judiciary.house.gov/_files/hearings/pdf/Ellig%2003292011.pdf; Wendy E. Wagner, *The CAIR RIA: Advocacy Dressed Up as Policy Analysis*, *in* REFORMING REGULATORY IMPACT ANALYSIS 56, 57 (Winston Harrington et al. eds., 2009).

problem that regulation could solve, what caused the problem, or which solution might be most effective and efficient. If the agency does not understand the problem and does not examine alternative solutions, the resulting regulations are likely to be less effective than they could be, excessively costly, or perhaps not needed at all.

Past executive orders have included a succession of ever-stronger requirements that agencies make available to the public RIAs, comments and changes from OIRA, and underlying scientific and technical information.[69] Such transparency has been required only when rules are proposed or finalized—not earlier in the process when public critique and comment could improve the analysis that is supposed to inform rule writing.[70] Thus, decisions are made before there is an understanding of what might constitute the best regulatory option from a benefit-cost perspective, and regulatory decisions are "put in cement" before the public has a chance to comment.[71]

A recent empirical study finds that several types of agency efforts that give stakeholders greater opportunity to comment on the agency's analysis and furnish information before regulations are proposed are associated with higher-quality RIAs and greater claimed use of analysis in decision-making. These include a prior notice of proposed rulemaking in the same regulatory proceeding, a public request for information by the agency, and consultation with state, tribal, or local governments.[72]

Solutions: Two complementary changes would allow the public to comment on the agency's understanding of the problem and prompt the agency to conduct more objective analysis before

[69] Exec. Order No. 12,044, *supra* note 41, § 3(b); Exec. Order No. 12,291, *supra* note 1, § 3(g); Exec. Order No. 12,866, *supra* note 2, § 6(a)(3)(E), Exec. Order No. 13,563, *supra* note 2, § 2(c).
[70] *See supra* note 69 (listing executive orders pertaining to this limited requirement).
[71] For a discussion of this, *see* Williams, *supra* note 48.
[72] *See* Ellig & Fike, *supra* note 22.

the regulation is written: (1) Before agencies write the most significant regulations, require them to publish for public comment an analysis of the existence and nature of the problem the regulation might solve, a list of alternative regulatory and nonregulatory solutions, and a preliminary assessment of the benefits and costs of each alternative, along with all underlying data.[73] (2) Free economists and other analysts to conduct objective analysis by requiring agencies to locate them in a separate unit from the program offices that write regulations. Have analysts report to and be managed by other analysts, with clear incentives for career advancement based on the quality and objectivity of their analysis, not on their skill in crafting analysis to support decisions that have already been made.[74]

Since the second part of the solution involves organizational and personnel matters, it would probably be most appropriately dealt with in another executive order or through instructions to the cabinet.

Pros: This addition puts first things first by requiring an agency to assess whether there is a problem, understand the nature of the problem, specify alternative solutions, and receive public

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[73] In 2011, the President's Jobs Council recommended expanded use of advance notices of proposed rulemaking without making it a requirement. *See* PRESIDENT'S COUNCIL ON JOBS & COMPETITIVENESS, ROAD MAP TO RENEWAL 43 (2011). In 2009, coauthors of a Resources for the Future monograph recommended that "a preliminary RIA be prepared at least six months in advance of final agency review of proposed and final regulations. Understandably, a preliminary RIA may be incomplete and subject to greater uncertainties than the full study. At the same time, this preliminary RIA would characterize the full set of options being analyzed and would provide at least rough estimates of the benefits and costs of each option." *See* Winston Harrington, Lisa Heinzerling & Richard D. Morgenstern, *What We Learned*, *in* REFORMING REGULATORY IMPACT ANALYSIS 215, 224–25 (Winston Harrington et al. eds., 2009). Elsewhere, we have proposed making advanced notices of proposed rulemaking mandatory for major regulations. *See* Ellig, *supra* note 68, at 10; *Raising the Agencies' Grades: Protecting the Economy, Assuring Regulatory Quality, and Improving Assessments of Regulatory Need: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of Richard Williams, Improving the Regulatory Process, 6), *available at* http://judiciary.house.gov/_files/hearings/pdf/Williams03292011.pdf.

[74] The President's Jobs Council suggested in 2011, "Another way to promote objective analysis to separate agency economists from the program offices that propose regulations," and "the work of agency economists should be evaluated by other economists, with compensation and career advancement tied to the quality of their analysis, not on whether the analysis supports decisions already made." *See* PRESIDENT'S COUNCIL ON JOBS & COMPETITIVENESS, *supra* note 73, at 45.

comments on this analysis before the agency decides whether or how to regulate. It has the potential to save significant agency resources by terminating some rulemaking initiatives before the agency writes a proposed rule. When the agency concludes regulation is appropriate, it is more likely to select the most efficient solution because it has a better understanding of the problem. If done properly, this solution should lead to fewer court challenges and reversals. It also satisfies the goal of more public involvement in rulemaking by ensuring that all voices are heard early in the process, as opposed to only those who have "wired" access.[75]

Cons: The specific requirements that agencies respond to comments on their analysis of a systemic problem and potential solutions, while commonsensical and implicit in Sec. 1(b)(1) of EO 12866, will require more resources for analysis and may lengthen some rulemaking proceedings (although it may save some court challenges at the end).[76] Whether the time and resources saved via early termination of some proceedings are sufficient to balance the additional time and resources required to assess the systemic problem is ultimately an empirical question. However, if additional time is needed to create more regulations, that cost should be compared to the cost of creating regulations that are ineffective or inefficient due to insufficient up-front analysis.

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[75] Wired access means political access that gives one private party's requests higher priority than requests from the general public.

[76] The cost of doing regulatory impact analysis is discussed in a study by the Congressional Research Service. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS, NO. 7-5700 38 n.129 (2011) (stating that "A 1997 study by the Congressional Budget Office concluded that the median cost of 85 analyses conducted between 1990 and 1996 was $270,000, but some of the analyses cost more than $1 million." For the 1997 study Copeland cites, *see* CONG. BUDGET OFFICE, REGULATORY IMPACT ANALYSIS: COSTS AT SELECTED AGENCIES AND IMPLICATIONS FOR THE LEGISLATIVE PROCESS (1997). *See also* U.S. GEN. ACCOUNTING OFFICE, EPA'S COSTS OF PREPARING REGULATORY IMPACT ANALYSES, GAO/RCED-97-15R 3 (1996) (reporting that 27 EPA analyses cost about $13 million, or an average of about $480,000 each. The cost of the individual studies ranged from $46,000 to $3.8 million).

Problem: Agencies Often Ignore Their Own Analysis Without Explaining Why

The current standard in the executive order for adopting regulations contains significant loopholes that allow agencies to ignore the findings of their own analysts. Executive Order 12866 instructs agencies to propose or adopt a regulation "only upon a reasoned determination that the benefits of the intended regulation justify its costs."[77] This is much more vague than the language used in the Reagan executive order: "Regulatory action should not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[78] In addition, the current executive orders allow agencies to consider nonquantified benefits, nonquantified costs, and factors that are neither benefits nor costs (such as distributive impacts and equity) while containing no requirements that these factors be analyzed rigorously.

As a result, a decision maker's mere assertion that one regulatory alternative produces the fairest result can trump the findings of any analysis. This occurred in the first round of regulations implementing the Affordable Care Act, where the RIA sections of the NPRMs characterized various results of the regulations as improvements in "equity" without ever defining equity or explaining how the regulation improved it.[79]

Admittedly, the authors of Executive Order 12866 and Executive Order 13563 were grappling with a genuine problem. Some benefits and costs are difficult or impossible to quantify. And some regulatory decisions are driven by legitimate social concerns other than economic efficiency. For these reasons, one cannot simply presume that a comparison of quantified costs with quantified benefits can automate regulatory decisions—nor would we want

[77] Exec. Order No. 12,866, *supra* note 2, § 1(b)(6).
[78] Exec. Order No. 12,291, *supra* note 1, § 2(b).
[79] Christopher J. Conover & Jerry Ellig, *Beware the Rush to Presumption, Part A: Material Omissions in Regulatory Analyses for the Affordable Care Act's Interim Final Rules* 21–25 (Mercatus Ctr. at George Mason Univ., Working Paper No. 12-01, 2012), *available at* http://mercatus.org/sites/default/files/publication/Beware_the_Rush_to _Presumption_PartA_ConoverEllig.pdf.

it to, as that would turn the analysts into de facto decision makers. But the language in the current executive orders is much broader than necessary to accommodate qualitative values.

The fact that a value, or the implications of a theory of justice, are not quantified does not mean that they cannot be discussed substantively and thoughtfully, with citations to relevant research. Regulations motivated by "equity" in particular would benefit from a more transparent discussion of what the agency means by equity and the political philosophy or theory of justice on which the definition is based. That way OIRA, other agencies, and the president could more readily determine whether they agree or disagree with the agency's underlying ethical suppositions. For example, the Affordable Care Act regulation requiring insurance companies to let parents keep adult children on their health insurance until age 26 simply asserted that this change increased equity because it expanded insurance coverage. But such an approach has underlying assumptions with ambiguous implications for equity. For example, some of the wealth transfers created by the regulation could reduce equity by forcing those who are less well-off but childless to subsidize those with higher incomes who have children. The burden should be on regulators to explain exactly how and why these kinds of transfers are justified by the approach they have chosen.

Solutions: Require every preamble to a proposed or final rule to include a separate section that discusses how an agency used the results of the Regulatory Impact Analysis to decide on the proposed or final option. In addition, define more carefully how decision makers are to compare benefits with costs, and establish standards to guide analysis of unquantified factors and factors that are neither benefits nor costs. If there are important unquantified benefits or costs, the RIA should present evidence that these benefits or costs are real and significant. If factors other than benefits and costs, such as distributive impacts, equity, human dignity, or individual liberty, motivated a regulatory decision that deviates from the one that maximizes net benefits to society, the agency should present a clear explanation that identifies the additional factors(s) that affected the decision and presents evidence that the chosen alternative is likely to improve the factor(s) in a noticeable way.[80] In addition, if the approach chosen has net costs (costs that exceed benefits), the agency should explain this trade-off. Finally, if a statute requires a regulatory approach that does not maximize net benefits, the agency should explain this.

Pros: This change promotes more objective consideration of unquantified factors or values by ensuring that agencies define these factors clearly and provide some evidence that they really exist and that they are significant enough to override quantitative benefit-cost considerations. It also forces decision makers to be explicit (in other words, transparent) about why qualitative considerations drove their decision or why they ignored the findings of the RIA.

Cons: The evidence agencies present that could satisfy these requirements may still be relatively weak. Enforcing truly substantive requirements will require an administration to back OIRA strongly in disputes over agency arguments that have typically been used to trump OIRA's objections to an RIA or a regulation.

[80] Robert Hahn and Cass Sunstein make a similar argument. They suggest that agencies should be allowed to consider distributive effects but have to provide a rigorous analysis of their approach. When the costs grossly outweigh the benefits, then there should be "a strong presumption against regulation, rebuttable only in cases where the distributive argument is compelling." *See* Hahn & Sunstein, *supra* note 5, at 1527. John Graham proposed that lifesaving regulations should be required to pass a "soft" benefit-cost test and also a distributional test: the regulation cannot make the poor worse off. John Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 519–24 (2008). Both of these approaches, while commendably adding rigor to the analysis of fairness, nevertheless narrowly focus on distribution rather than other definitions of fairness.

V. Improving Enforcement Mechanisms

Problem: OIRA Staff Has Shrunk

Regulatory review by OIRA is the president's principal institutional tool for managing the development of regulations. Different administrations may have different approaches and emphasis,[81] but it is clear that presidents of both political parties value centralized regulatory review.[82]

Unfortunately, since 1981, OIRA's regulatory review responsibilities have waxed and waned with the volume of regulations subject to review. Over that same time period, the office acquired major new responsibilities, such as production of the annual report to Congress on the benefits and costs of federal regulations. Yet OIRA's staff has steadily shrunk, from ninety people in 1981 to about forty-five today, while the number of regulators in agencies has grown by fifty-one percent. Regulatory staff outnumbers OIRA's staff by almost 5,000 to 1.[83]

Nevertheless, empirical research finds that OIRA review is associated with higher-quality RIAs and better explanations of how an agency used the RIA to inform its decisions. The quality and use of regulatory analysis is positively correlated with the length of OIRA review time.[84] OIRA's influence in the administration (measured by whether the administrator is a political

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[81] *See* Katzen, *supra* note 40.
[82] *See id.*; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986). *See also* Eric Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (arguing that presidents, regardless of ideology, can use analytical requirements and centralized regulatory review to mitigate the principal-agent problems inherent in managing regulatory agencies).
[83] For figures used to calculate regulatory agency staff growth, *see* Susan Dudley & Melinda Warren, *Sequester's Impact on Regulatory Agencies Modest* (George Washington Univ. Reg. Studies Ctr. & Weidenbaum Ctr. On the Econ. Gov't, and Pub. Pol'y, Regulators' Budget Report 35, July 2013), *available at* http://wc.wustl.edu/files/wc/imce/2014_regulators_budget.pdf. The calculation excludes the Transportation Security Administration, which hired tens of thousands of airport inspectors when the federal government took over airport security screening after 9/11. The OIRA staff figure for 1981 is from Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 184 (2009). The current OIRA staff figure was supplied by Susan Dudley in an e-mail. E-mail from Susan Dudley, Dir., Reg. Studies Ctr., George Washington Univ., to authors (Aug. 5, 2013) (on file with authors).
[84] Ellig & Fike, *supra* note 22; Shapiro & Morrall, *supra* note 22.

appointee or acting administrator) is positively correlated with claimed use of regulatory analysis.[85] Prescriptive regulations, whose RIAs receive more intensive OIRA review, tend to have higher-quality RIAs.[86] Thus, there is evidence that effective OIRA review can make a difference.

Solution: Increase OIRA staff to restore balance with regulatory agencies. OIRA's staff should be increased significantly, both so it can adequately conduct its regulatory review responsibilities and so it has the resources to serve as a source of expertise on ways to improve regulatory impact analysis.[87] Extending the EO to apply to independent agencies will increase OIRA's workload further, and OIRA may need to hire additional expertise on financial regulation due to the large number of impending financial regulations from independent agencies. New hires at OIRA should include risk assessors so that there is oversight for both risk assessments and challenges by the public to those risk assessments.

Pros: Increased staff and additional expertise will allow OIRA to review regulations and their accompanying analysis more thoroughly and effectively, and perhaps more quickly.

Cons: Additional staff will cost money. However, given the significant expansion of staff in regulatory agencies over the past three decades, relatively small attrition in agency regulatory staff could free up resources to hire the needed OIRA staff.

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[85] Ellig & Fike, *supra* note 22.
[86] McLaughlin & Ellig, *supra* note 21.
[87] PRESIDENT'S COUNCIL ON JOBS & COMPETITIVENESS, *supra* note 73, at 45; Hahn & Sunstein, *supra* note 5, at 1527; Richard Revesz & Michael Livermore, *Fixing Regulatory Review Recommendations for the Next Administration* 7–8 (Inst. for Pol'y Integrity, Report No. 2, Dec. 2008); Gabriel Cohen, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1015 (2011).

Problem: The Executive Order Lacks Adequate Enforcement Mechanisms

Agency RIAs often make some effort at compliance with the executive order on regulatory analysis, but they still fall short of the standards envisioned in the executive order. In these cases, OIRA's threat to return a regulation to the agency for further consideration may not be credible. OIRA has no recourse if agencies fail to conduct objective retrospective analyses of existing regulations.

Solutions: There are several possible solutions to this problem:

1. Propose budget reductions for agencies whose RIAs or regulations chronically ignore the principles of the executive order on regulatory analysis. Tying regulatory agency budgets (the budgets the president submits to Congress) to compliance with the executive order is a tool that could underscore the administration's commitment to sound regulatory analysis. If the president declines to adopt this strategy, Congress could do so.
2. Make Regulatory Impact Analysis a legal requirement[88] (as opposed to an executive order).[89] There are already some laws that have required economic analysis, including those that govern the Securities and Exchange Commission, the Environmental Protection Agency (water and pesticide rules), and the Consumer Product Safety Commission. In addition, there have been proposals to make RIAs mandatory for all regulations in the past. It appears that the judicial review stemming from such laws can

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[88] This idea goes back to at least 1995. *See* Risk Assessment and Cost-Benefit Act of 1995, H.R. 1022, 104th Cong. (1995).

[89] Robert Hahn and Cass Sunstein propose that if agencies' cost-benefit analysis is weak and if the benefits of the regulation issued do not justify the costs, then courts should be permitted to consider these facts on judicial review. Hahn & Sunstein, *supra* note 5, at 1537–38. Susan Dudley suggests making the requirements in either EO 12866 or EO 13563 judicially reviewable. *See* Susan Dudley, *Prospects for Regulatory Reform in 2011*, 11 ENGAGE 1, 12 (2011).

be useful, as the SEC, having lost several court cases based on poor analysis, has pledged to improve its economic analysis capability.[90]

3. Re-establish and fund the Congressional Office of Regulatory Analysis. Although established by law in the late 1990s, this office was never actually funded. The agency was supposed to both ensure compliance with the benefit-cost requirement of the executive order and conduct its own analyses for major rules.[91]
4. Use crowdsourcing for RIAs. Use the same mechanism as Wikipedia to produce estimates of benefits and costs. Where there are disagreements, the differing estimates will not be eliminated but captured as uncertainty. OMB should retain final review authority over crowdsourced RIAs to help prevent private parties from dominating the process.

Pros: Each of these solutions has its own set of pros. For the first solution, direct budgetary consequences would create a powerful incentive for agencies to improve the quality and use of RIAs. They would also provide an unequivocal signal that the administration and/or Congress believe regulators should understand the consequences of their actions before making decisions. The other three solutions remove the monopoly that executive branch agencies currently enjoy on analyzing their own decisions. In the first case, direct budgetary consequences would create a powerful incentive for agencies to improve the quality and use of RIAs. They would also provide

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[90] *See* Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009); Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005). In March 2012, the SEC issued extensive new guidelines for economic analysis of its regulations that explicitly acknowledge and draw upon the principles in Executive Order 12866. See Memorandum from Div. of Risk, Strategy & Fin. Innovation, Sec. & Exch. Comm'n & Office of Gen. Counsel, Sec. & Exch. Comm'n, for the Staff of the Rulemaking Divs. and Offices (Mar. 16, 2012), *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

[91] Susan Dudley recommends that Congress create its own regulatory oversight body to provide an independent review of agencies' RIAs. The Truth in Regulating Act of 2000 already required the GAO to take on the responsibility of the aforementioned task contingent on Congress appropriating $5,200,000 annually. However, these funds were never appropriated. *See* Dudley, *supra* note 89, at 12.

an unequivocal signal that the administration and/or Congress believe regulators should understand the consequences of their actions before making decisions.

Cons: An administration or Congress that ties agency performance to budgets will be accused of undermining regulatory agencies' protective missions by critics who do not believe regulators should understand the full consequences of their actions before making decisions. The latter three reform ideas have not been fully tested. Such requirements may cause agencies to seek to regulate outside of the Administrative Procedure Act, through such means as using the courts (regulation by litigation), sending warning letters, etc., to avoid having a well-done RIA expose poor regulatory decisions.

Problem: Regulators Are Often Rewarded for Activity Rather Than Results

Regulatory agencies often regard the production of regulations, rather than the production of benefits for the public, as their primary output. This creates a bias in favor of adopting more regulations, since a steady stream of new regulations indicates that the agency is hard at work solving problems. As one agency economist noted, "Success is putting out 10 regulations a year and bigger regulations are bigger successes. They don't say, 'We examined 10 regulations and we decided that 8 did not warrant regulation, which would be better.'"[92] Pay, bonuses, career advancement, and recognition go to staff who successfully complete regulatory proceedings.[93]

Agencies and their managers should be evaluated and rewarded based on the demonstrated benefits they produce for the public, regardless of whether those benefits stem from new regulatory actions or decisions not to regulate.

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[92] Williams, *supra* note 48, at 7.
[93] *Id.*

Solutions: (1) Reward decision makers for the actual net benefits (benefits minus costs) their decisions produce for the public. They should not reward managers or staff based on regulatory output. (2) Raise agencies' and the public's awareness that the decision *not* to regulate, when appropriate, can produce as much or more benefit to the public as a decision to regulate. Require agencies to report annually on the major instances in which they considered regulating but concluded that federal regulation would not be appropriate because the problem was or would soon become insignificant, because alternatives to federal regulation could better accomplish the regulatory objective, or because the prospective costs exceeded the prospective benefits.

Pros: This requirement helps correct current incentives that prompt agencies to produce regulations in order to show they are productive. If accompanied by solid, objective analysis, the list in the second solution above would help build the case for refraining from regulating when the evidence suggests this is warranted.

Cons: Results are harder to measure than activity. Agency lists of decisions not to regulate would provide fodder for advocacy groups who want to accuse an administration of inaction. On the other hand, if agencies perceive positive benefits from producing a significant list, they may pad the list with initiatives they never seriously considered.

Problem: Stakeholders Lack Adequate Opportunities for Dialogue and Challenge

Stakeholders affected by regulation—businesses; state, local, and tribal governments; and individual citizens—have little ability to question or challenge an agency's data or analysis and see an evidence-based response in the course of the notice-and-comment process. If an agency disagrees with commenters, it can often dismiss the issue by saying that it is not persuaded or the commenters provided insufficient information.[94]

Agencies do sometimes commit to holding public hearings on regulatory proposals. Empirical research finds that when they commit to public hearings, agencies do a better job of explaining how the RIA assisted their decisions.[95]

Solution: Require agencies to conduct formal rulemakings for regulations whose economic impact exceeds $500 million.[96] Formal rulemaking allows affected entities to challenge and cross-examine the agency's experts in a hearing before an administrative law judge. In such a setting, agencies cannot ignore contradictory evidence but must respond to it with counter-evidence. All agencies now have the legal right to use formal rulemaking, but, as a matter of general practice, they tend to use informal rulemaking.

Pros: This change would require the use of the Administrative Procedure Act's strongest challenge procedures during the rulemaking process, just for the largest economically significant

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[94] See for example, the discussion of USLegal.com. *Response to Comment*, USLEGAL, INC., http://administrativelaw.uslegal.com/administrative-agency-rulemaking/response-to-comment/. Although the agency must respond, there is no legal requirement to respond substantively.

[95] Ellig & Fike, *supra* note 22.

[96] Jeffrey Rosen recommends that Congress amend the APA to make formal hearings a requirement for major rules. *See The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of Jeffrey A. Rosen, 38–39), *available at* http://judiciary.house.gov/_files/hearings/pdf/Rosen02282011.pdf. Susan Dudley recommends legislative changes to the APA to expand the use of formal rulemaking and/or apply a substantive evidence test to informal rulemakings. *See* Dudley, *supra* note 89, at 11–12; *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of Susan Dudley, 17–18), *available at* http://judiciary.house.gov/_files/hearings/pdf/Dudley02282011.pdf.

regulations. Agencies would have to offer substantive responses to interested parties' objections to their data or analysis, rather than simply stating that the commenters were not persuasive. *Cons:* Formal rulemaking would likely add time and expense to rulemakings, which is the reason agencies claim that they do not use this mechanism even though it is available to them now. If a regulation produces benefits or costs that would be widely dispersed among the general public, there may be no organized group participating in the hearing that represents the interests of these recipients with respect to benefits and costs. That is, with concentrated benefits and dispersed costs, only those who stand to gain (or lose a lot) from regulation may actually show up for hearings. Also, if the regulation would produce net benefits, formal rulemaking would delay these benefits. In addition, the effectiveness of this provision would likely depend on how much deference the courts grant agencies. If relatively weak substantive responses satisfy courts, then this provision may have only marginal effects.

Problem: Agencies Can Avoid RIA Requirements by Issuing Guidance

Agencies can avoid the economic analysis requirements of the executive order by issuing guidance instead of regulations. While the guidance may not technically be binding, regulated entities know that the safest course of action is to follow the guidance. Therefore, guidance can impose significant costs on the economy, but neither costs nor benefits have to be assessed rigorously or publicly. This is a major reduction in transparency.

President Carter's EO 12044 (Sec. 6a) simply defined "regulation" to include "both rules and regulations" without addressing the issue of guidance. President Reagan's EO 12291 (Sec. 1a) defined "regulation" as "an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency . . . ."[97] This appears to include guidance, since guidance involves interpretation of law or policy. President Clinton's EO 12866 (Sec. 3d), however, includes a loophole that exempts guidance; it inserted the phrase, "which the agency intends to have the force and effect of law" between "future effect" and "designed to implement."

President George W. Bush's EO 13422 extended RIA requirements to significant guidance documents, but President Obama's EO 13497 revoked these changes. A memo from OMB Director Peter Orszag on March 4, 2009, stated that OIRA would continue to review shrink significant regulations, policy documents, and guidance documents as it had between 1993 and 2007.[98] Although OIRA continues to informally review guidance, it is not clear whether OIRA reviews all significant guidance, whether agencies produce RIAs for guidance documents, and whether OIRA can "return" guidance in the same manner as it can for regulations.

Solution: Restore the changes relevant to guidance documents that were introduced in EO 13422. Agencies would conduct RIAs for significant guidance documents, submit the guidance and RIA to OMB for review, and obtain OMB approval before guidance documents are sent to Congress under the Congressional Review Act or published in the Federal Register.[99]

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[97] This is similar to the Administrative Procedure Act definition, except that the APA definition includes statements "of general or particular applicability . . . ." Administrative Procedure Act, 5 U.S.C. § 551(4) (2012). The Congressional Review Act cites the APA definition. Congressional Review Act, 5 U.S.C. § 804(3) (2012).

[98] Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, for the Heads and Acting Heads of Exec. Dep'ts & Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets /memoranda_fy2009/m09-13.pdf.

[99] In testimony before the House Judiciary Committee, John Graham recommended that Congress expand the cost-benefit requirements to significant guidance documents. He defines significant documents as those that have "the same practical effect on regulated parties as a regulation." *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of John D. Graham, 7), *available at* http://judiciary.house.gov/_files/hearings/pdf/Graham05042011.pdf.

Pros: This change addresses one very obvious way agencies might seek to avoid the executive order's economic analysis requirements. Making it a formal requirement in the executive order ensures that all significant guidance is reviewed and can be returned.

Cons: Rather than increasing transparency by prompting agencies to conduct RIAs for guidance documents, the requirement may encourage some agencies to substitute even less transparent methods of influencing regulated entities' behavior. Potentially less transparent methods include warning letters to individual companies or discretionary enforcement. Agencies will also claim that a requirement to produce RIAs for guidance just delays something that is not binding.

Problem: The Information Quality Act Lacks an Adequate Enforcement Mechanism

Entities affected by regulation currently lack an effective remedy to challenge the quality of agencies' data or analysis under the Information Quality Act (IQA).[100] Appeals concerning information quality go to agencies, and agencies can delay action on the appeals for years.[101] OMB is currently the final arbiter of IQA disputes, but OMB is not viewed as a "science" agency, so its involvement is viewed as political interference with the agencies' scientific expertise.

Most of the executive orders concerning regulatory analysis since President Reagan's have contained general language stating that agencies shall use the best reasonably available information and/or ensure the objectivity of that information.[102] The Reagan order even empowered the OMB director to require agencies to obtain and evaluate additional data from any

[100] Pub. Law No. 106-554, § 515 (2000).
[101] The best source of information for this is the Regulatory Checkbook, http://regcheck.blogspot.com/2005/04/welcome-to-regulatory-checkbook.html.
[102] *See* Exec. Order No. 12,866, *supra* note 2, § 1(b)(7); Exec. Order No. 13,563, *supra* note 2, § 5.

source.[103] But the executive orders issued since the passage of the Information Quality Act have contained no specific language instructing agencies how to handle appeals. A better process would open up challenges to scientific data through crowdsourcing and encourage more and more effective challenges to conservative risk assessments and to poorly crafted benefits assessments.[104] Agencies are not necessarily the best or final repository of scientific credibility; there is a vast scientific public that can and should fill that role.

Solution: Require agencies to provide substantive, evidence-based responses to Information Quality Act appeals under a clear deadline and, where they fail to do so, make that failure judicially challengeable.[105]

Pros: This change would prompt agencies to respond to IQA appeals in a timely fashion, and it would involve OIRA, which is likely to be less prone to assuming reflexively that agencies never make mistakes. It also removes the decision about data quality from the agency that is being challenged. Thus, it will promote timely and objective resolutions of IQA appeals. Knowing that poor data quality can lead to challenges, and ultimately to judicial reversal, agencies would be more likely to produce objective data in the first place.

Cons: There is some question whether courts are in the best position to arbitrate data quality. Further, in practice, OIRA can have only as much influence on the resolution of IQA appeals as

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[103] Exec. Order No. 12,291, *supra* note 1, § 6(a)(3).
[104] One commentator noted, "Peer review should be tightened—or perhaps dispensed with altogether, in favour of post-publication evaluation in the form of appended comments. That system has worked well in recent years in physics and mathematics." *How Science Goes Wrong*, THE ECONOMIST, Oct. 19, 2013, http://www.economist.com/news/leaders/21588069-scientific-research-has-changed-world-now-it-needs-change-itself-how-science-goes-wrong.
[105] *See* Dudley, *supra* note 89, at 12.

the administration is willing to allow. Just as OIRA has been told to back down when reviewing regulations that implement significant administration priorities,[106] so OIRA may be told to avoid embarrassing an agency that seeks to implement an administration priority that appears justified only because of shoddy data or analysis.

Problem: Independent Agencies Escape RIA Requirements and OIRA Review

Independent regulatory agencies are not subject to most provisions in the executive orders on regulatory analysis. Unless a particular agency is legislatively required to conduct regulatory analysis, there is no guarantee that the independent agencies will consider economic analysis when they regulate. Yet even the independent agency that arguably has the strongest legislative requirements—the Securities and Exchange Commission—has lost multiple court cases due to shoddy economic analysis, and its analysis is less thorough than the RIAs produced by executive branch agencies.[107] Scholars at Resources for the Future have found that other independent agencies rarely present information about the benefits and costs of their regulations.[108] Therefore, we have little confidence that the independent agencies are conducting high-quality economic analysis to inform their regulatory decisions.

Apparently no president has wanted to litigate whether the president has authority to compel agencies to produce RIAs and review agency regulations. Sally Katzen, the OIRA administrator who drafted Executive Order 12866, notes that legal advisors to authors of the

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[106] Williams, *supra* note 48, at 10.
[107] Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009); Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005). On the quality of SEC economic analysis compared to that of executive branch agencies, *see* Jerry Ellig & Hester Pierce, *SEC Regulatory Analysis: A Long Way to Go, and a Short Time to Get There*, 8 BROOKLYN J. CORP., FIN. & COM. L. 361 (2014).
[108] Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, 63 ADMIN. L. REV. (SPECIAL EDITION) 213 (2011).

executive orders on regulatory analysis in both the Reagan and Clinton administrations "concluded that the president had authority to review the rules of the [independent regulatory agencies], and the decision not to do so was essentially for political reasons—namely, deference to Congress, which traditionally views the [independent regulatory commissions] as 'its' agencies, not the president's."[109] President Obama's Executive Order 13579 requested that independent agencies perform RIAs and retrospective analysis of existing regulations, but it included no enforcement mechanism and no provisions requiring OIRA reviews of independent agency regulations or regulatory analysis. Executive Order 12866 requires independent agencies to prepare regulatory plans for inclusion in the Unified Regulatory Agenda, so there is precedent for requiring agencies to submit regulatory materials to OMB.[110]

Solution: Require independent agencies to conduct regulatory impact analysis and submit regulations and RIAs to OIRA.[111] The strongest possible version of this requirement would simply apply all provisions of the executive order to independent agencies, which raises the

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[109] Katzen, *supra* note 40, at 109.
[110] Exec. Order No. 12,866, *supra* note 2, §§ 4(b) & 4(c).
[111] Numerous experts have recommended this. The President's Jobs Council recommended that independent agencies be required to conduct regulatory impact analysis, coupled with review by OIRA or some other independent entity. *See* PRESIDENT'S COUNCIL ON JOBS & COMPETITIVENESS, *supra* note 73, at 45. Peter L. Strauss recommends that Congress bring the independent agencies under the regulatory review process to help streamline and standardize the process and because the agencies "can be nothing else than departments of the executive branch" and should be subject to the same requirements. *See The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?: Hearing Before the H. Subcomm. on the Courts, Commercial & Administrative Law*, 112th Cong. (2011) (testimony of Peter L. Strauss, 47–48), *available at* http://judiciary.house .gov/_files/hearings/pdf/Strauss02282011.pdf. C. Boyden Gray recommends that Congress bring the independent agencies under the same cost-benefit requirements that apply to executive branch agencies. He also provides examples of where such a requirement would be useful. *See Hearing on: H.R. 3010, the "Regulatory Accountability Act of 2011": Hearing, H. Judiciary Comm.*, 112th Cong. (2011) (testimony of C. Boyden Gray, 44–49), *available at* http://judiciary.house.gov/_files/hearings/pdf/Gray%2010252011.pdf. Susan Dudley recommends that Congress codify decision-making requirements based on regulatory impact analysis and extend the requirements to the independent agencies. Additionally, this would make meeting such requirements judicially reviewable. Dudley, *supra* note 96, at 20.

question of whether OIRA can return regulations to independent agencies.[112] A more modest version would require independent agencies to submit regulations and RIAs to OIRA, but would not include independent agencies in the administration's appeals process laid out in Section 7 of Executive Order 12866. Instead, OIRA's comments would become part of the public record in the regulatory proceeding, thus exposing independent agencies to embarrassment if they fail to heed OIRA's advice.[113]

Pros: The change would increase the likelihood that independent agencies adopt regulations whose benefits exceed their costs by improving the economic analysis that informs their decisions.

Cons: Executive branch agencies fall far short of the standards enunciated in EO 12866. At best, independent agencies might achieve the same performance. This would represent an improvement, but it would hardly be ideal.

VI. Conclusion

Citizens expect federal regulation to accomplish a lot of important things, such as protecting us from financial fraudsters, preventing workplace injuries, preserving clean air, and deterring

[112] Robert Hahn and Cass Sunstein suggest that the president does indeed have the ability to require regulatory impact analysis from independent agencies and subject their regulations to OIRA review. Since there is not an exact definition of independent agencies, the authors define independent agencies as those whose officials can be deposed by the president *only* for corruption, malfeasance, negligence, and inefficiency, i.e., for non-policy-related disagreements. Requiring such agencies to produce cost-benefit analyses and to refrain from issuing regulations for which the benefits do not justify the costs would seem to promote efficiency. While Hahn and Sunstein prefer a unified oversight standard across all agencies (i.e., all agencies must submit RIAs to OIRA, and they can only issue regulations upon OIRA's review and approval), they do also agree that a weaker oversight standard for independent agencies is possible (i.e., requiring them to submit RIAs to OIRA but acknowledging that they maintain the right to issue regulations over OIRA's objection). *See* Hahn & Sunstein, *supra* note 5, at 1531–37.
[113] Sally Katzen recommends that the independent regulatory commissions have some sort of centralized review. One variation she suggests is that OIRA could provide its objections in writing to the independent agency, but the commissioners could vote to issue the regulation over OIRA's objections in a public meeting. *See* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. (SPECIAL EDITION) 103, 109–10 (2011).

terrorist attacks. And regulation also requires sacrifices. Depending on the regulation, consumers may pay more, workers may receive less, our retirement savings may grow more slowly due to reduced corporate profits, and we may have less personal freedom. Regulatory impact analysis is the key ingredient that makes these trade-offs more transparent to decision makers and to the public. So understanding the effects of regulation has to start with sound regulatory impact analysis.

For more than three decades, executive orders have instructed federal agencies to conduct regulatory impact analyses and consider the results of those analyses when making decisions. Unfortunately, the quality of the analysis and its use in decisions is often not commensurate with the significance of regulation's impact on our lives, liberty, and prosperity. This is an institutional problem that transcends presidential administrations, and so the solutions need to be institutional solutions. While every potential solution has drawbacks, we believe that the solutions we have outlined above have the greatest chance of improving the quality of regulatory impact analysis and its use in agency decisions.