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## THE FUTURE OF REGULATORY OVERSIGHT AND ANALYSIS

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**E**VERY PRESIDENT SINCE Ronald Reagan has relied on the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget to coordinate regulatory policy and to ensure new regulations are accountable to the public and consistent with presidential priorities. Like those before him, President Obama recognizes the importance of this “dispassionate and analytical ‘second opinion’ on agency actions” and is moving to put his own stamp on this regulatory oversight function.<sup>1</sup>

As this administration advances its agenda for change, many of its most important actions will be implemented through regulations. Compared to programs financed directly through taxes, the effects of regulations—their benefits and costs—are less visible and less well-understood. Particularly in today’s economic climate, a careful and deliberate consideration of the effects of regulatory actions, facilitated by effective centralized review, is important to ensure that regulations best serve the American people.

While established principles and procedures have served the American public and past presidents well, experience over the last three decades suggests two improvements President Obama could make to the process. First, the president should adopt a formal “early review” process for particularly significant regulatory actions. Second, he should hold independent agencies to the same analytical and oversight standards as other agencies.

### CENTRALIZED REGULATORY REVIEW HAS WITHSTOOD THE TEST OF TIME

While regulatory agencies tend to shape their decisions to accommodate the interest groups that are most directly

affected by them,<sup>2</sup> OIRA's mandate is to advance the general public interest. OIRA currently operates under President Clinton's 1993 Executive Order (EO) 12866, which requires centralized, coordinated review of regulations, and states that agencies should "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

While benefit-cost analysis is not perfect, it is the best tool we have for understanding the effects of potential regulations and determining whether regulatory alternatives will do more good than harm.

#### BENEFIT-COST ANALYSIS—NOT PERFECT, BUT THE BEST WE'VE GOT

Presidents over the last three decades have recognized that while benefit-cost analysis (BCA) is not perfect, it is the best tool we have for understanding the effects of potential regulations and determining whether regulatory alternatives will do more good than harm. BCA provides an extremely useful framework for decision making by (1) identifying the underlying problem to be solved; (2) identifying and evaluating alternative regulatory (and non-regulatory) approaches; and (3) organizing this information in a consistent, coherent, and comprehensive way. Though it does not serve as the sole basis for regulatory decisions, it does help decision makers consider a wide range of possible effects. EO 12866 directs agencies to "select those approaches that maximize net benefits (*including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity*), unless a statute requires another regulatory approach" (emphasis added).

Analyzing and understanding distributive effects is a particularly important aspect of BCA because regulatory actions are sometimes regressive (i.e., the action imposes net costs on lower income groups or on other specific sub-groups of concern). Even in cases where it is not regressive, regulatory action generally represents a relatively ineffective way of addressing concerns about income distribution.

Alternatives to BCA analysis are bound to be less robust, less transparent, and result in decisions that are less well-informed. Some have suggested, for example, that cost-effectiveness analysis (CEA), which avoids putting dollar values on benefits, might be a substitute for BCA. While CEA can offer useful insights under some conditions, its narrower framework provides policymakers less information for comparing the relative merits of different types of policies. Sole reliance on CEA may lead to less careful inquiry about alternative approaches and their consequences. Also, because it limits the focus of analysis to one metric (e.g., cost per premature death avoided) it is less useful for evaluating regulatory approaches that have multiple outcomes of interest—for example, different types of health effects, mortality risks, and ecological effects.

Critics of BCA rightly point out that it will never be capable of quantifying all the different effects of regulation, nor will any level of analysis allow government decisions to improve upon those best left to individuals acting on their own behalf. However, BCA is still the best tool available for ensuring that, when government action is appropriate, it is designed to make the public better off. Moving away from BCA in favor of an alternative framework for analyzing rules would only make resulting policy judgments less transparent, less informed, and focused on a narrower inquiry that neglects key considerations.

#### RECOMMENDATIONS FOR THE REFORM OF EXECUTIVE ORDER 12866

While the analytical framework established in EO 12866 remains generally robust, two changes could make the review process more effective: (1) creating an explicit "early review" mechanism for major regulatory actions and (2) subjecting independent agencies to executive oversight.

OIRA's review comes after an agency has developed a proposed or final rule. At this point, regardless of the merits of arguments raised during interagency review, regulatory agencies are understandably dug in and reluctant to deviate from a specific approach. Furthermore, this end-stage review process has been susceptible to gamesmanship that undermines the purposes of the executive order. Though the executive order envisions up to 90 days for interagency review, reviews are often severely curtailed—sometimes they last only a few days—because of internal agency delays combined with either an internal administration deadline or a statutory or court-related deadline. In March, for example, EPA published a proposed rule with estimated costs of \$350 million per year and benefits of roughly \$1 billion or more after only one day of OIRA review. The short review was necessitated by the obligation to meet a deadline arising from a settlement agreement.

This is not a new problem and previous administrations have addressed it informally at the staff level through briefings and discussions of early drafts of regulations subject to tight time frames. This “informal review” has raised questions, however, so in keeping with this administration’s focus on transparency and its interest in increasing the integrity of the regulatory review process and the quality of analysis underlying its major regulatory initiatives, it should adopt a formal early-review process for key regulatory issues. This would cover the administration’s most significant rulemakings, including all major rules expected to have annual benefits or costs in excess of \$1 billion.

Under this early-review process, OIRA would formally designate key rulemakings, probably about 20 per year, after consultation with the affected agencies and other offices within the Executive Office of the President. After designation of a rulemaking for early review, OIRA and the agency would form an interagency review group to play an active role both in identifying issues and options and in developing the associated regulatory analysis needed to inform decisionmaking. This process would encourage a broader discussion of options and issues at an early stage in the development of these rulemakings and provide greater policy consensus within the administration on regulatory decisions. In doing so, it would help to address the “endgame” confrontations between OIRA and the agencies and the resulting delays that arise under the current executive order process.

The early review would also address the problem that regulatory analyses are often prepared after the agency has made key decisions on the draft rule. According to a recent Resources for the Future report, *Reforming Regulatory Impact Analysis*,<sup>3</sup> current EPA guidelines require that the draft regulatory analysis be circulated within the agency three weeks before final agency review—a schedule, the report notes, that often is not met. Even if it were, an analysis provided so late

in the regulatory development process cannot be expected to guide key decisions in a rulemaking. When agencies prepare a regulatory analysis after the policy decisions have been made, it becomes an exercise in supporting the rulemaking rather than something that informs regulatory decisions.

Finally, some of the most highly publicized regulatory problems today stem from so-called independent regulatory agencies, such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Communications Commission, and the Consumer Product Safety Commission. These agencies have never been subject to the analytical or procedural requirements of executive oversight.

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Because they adopt regulations of enormous consequence to the nation, President Obama should subject their regulatory decisions to executive order review to ensure they provide net benefits to the public and do not duplicate or conflict with actions of other parts of the government.

FIGURE 1: ECONOMICALLY SIGNIFICANT REGULATIONS AND THEIR OIRA REVIEW TIMES, BENEFITS, AND COSTS

YEAR	RULE	REVIEW DAYS	BENEFITS (IN BILLIONS)	COSTS (IN BILLIONS)
2004	NESHAP: Boilers	2	\$15	\$0.9
2004	NESHAP: Plywood	2	Not monetized	\$0.14
2004	Effluent Guidelines: Poultry and Meat Products	7	\$0.01	\$0.05
2004	Nonroad Diesel Engines	15	\$35	\$1.4
2005	Clean Air Mercury Rule for Electric Utility Units	11	\$0.003	\$0.9
2005	Clean Air Visibility Rule	1	\$2.2—14.3	\$0.3—2.9
2006	Review of NAAQS for PM	10	\$8—76	\$5.4
2007	Mobile Source Air Toxics Rule	7	\$2.3—3	\$0.3—0.35
2008	Petroleum Refineries-NSPS Subpart J	1	\$0.2—1.9	\$0.03
2008	Review of NAAQS for Lead	0	\$0.7—6.9	\$0.2—3.2

## CONCLUSION

As President Obama considers improvements to the regulatory analysis and oversight process established by President Clinton's EO 12866, he should recognize that (1) centralized oversight of regulatory development is essential for an accountable government and (2) though not perfect, a goal of maximizing net benefits using a BCA framework provides the most transparent and robust approach to ensuring regulatory proposals make Americans better off.

While executive oversight has served presidents and the American people well for almost three decades, President Obama could improve the process by adopting a formal early-review process for the most significant regulatory actions and holding independent agencies to the same analytical and oversight standards as other agencies.

## ENDNOTES

1. See President Obama's January 30, 2009 Memorandum for the Heads of Executive Departments and Agencies on Regulatory Review.
2. George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 3: 3–18.
3. Winston Harrington, Lisa Heinzerling, and Richard Morgenstern, eds, *Reforming Regulatory Impact Analysis* (Washington, DC: Resources for the Future, 2009), <http://www.rff.org/reforming-ria>.

The Mercatus Center at George Mason University is a research, education, and outreach organization that works with scholars, policy experts, and government officials to connect academic learning and real-world practice.

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