

March 31, 2009

Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Attn: Ms. Mabel Echols
Room 10102, New Executive Office Building
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Washington, DC 20503

To Whom It May Concern:

I am writing these comments in response to the February 26, 2009 request for comment by the Office of Management and Budget (OMB) on recommendations to the President on means to improve the Executive order and procedures for interagency regulatory review. I writing to give my personal perspective as someone who worked for the Office of Information and Regulatory Affairs (OIRA) for over four years. In my capacity as President of Policy Navigation Group, our firm has had the privilege of drafting economic analysis of economically significant rulemakings for Federal agencies. Thus, I have experience on reviewing and trying to satisfy the criteria for economic analysis of regulation. However, these views are solely my own and not those of Policy Navigation Group, its clients, or any third party.

There has been ample criticism of OIRA staff, Executive branch regulatory review, benefit-cost analysis, and other analytic frameworks from Executive Order 12291's inception. Much of this criticism stems from the differences between economic, legal, and political science theory and the practical reality of administering the government. OIRA and the agencies must balance analytic rigor, other policy and political considerations, and the role of the Executive branch in relation to Congress and the courts. Policy creation, regulatory review, and analysis occur among individuals with personalities, time constraints, competing interests.

In this way, much of the debate over OIRA's role is as artificial as the debate between the relative merits of engineering and science. You cannot wire a building without understanding the electromagnetic theory; you cannot perform scientific experiments unless your building is wired for electricity. Each depends on each other. In the same way, OIRA's regulatory review draws its principles from legal, economic, scientific, and political knowledge. At the same time, however, OIRA's activities ensure policy officials and the public have practical information to inform the policy decisions made on April 1, 1981, April 2, 1981, ... April 1, 2009 and beyond.

As the Administration considers revisions to the regulatory review process, I urge that any revised Executive order draw from clear principles:

- Document the social resource allocation consequence of policy decisions;

- Provide the public the best available measures of social benefits and social costs of policy decisions;
- Provide a marginal analysis of policy decisions and major alternatives;
- Ensure the social benefits and social costs are presented in consistent units in time, space, and value;
- Ensure the analysis is transparent and reproducible; and,
- Contain explicit comparison criteria.

Role of Benefit-Cost Analysis

To achieve these principles, economists and policy officials have turned to benefit-cost analysis. Benefit-cost analysis uniquely combines social benefits and costs into a consistent and comprehensive framework that allows policy alternatives to be compared. It has proven a useful tool.

However, many critics suggest that benefit-cost analysis has inherent biases and thus should not be used. This reasoning confuses the tool for the result. We do not use a hammer because of the inherent truth and beauty of a hammer; we use a hammer a lot because we find ourselves frequently joining wood with nails. Policy official must allocate scarce social resources and reasonably want to have consistent and comprehensive information to inform their choices. If they use benefit-cost analysis instead of a distributional analysis to answer questions of equity, they are engaging in the policy equivalent of hammering in a screw. It is not a limitation of the hammer, but of the user.

In a fully equipped workshop I might have many specialized tools to use in very specific circumstances. However, if I am pressed for time and money, I - and most people -- will choose limit my toolkit to a hammer, screwdriver, measuring tape, and other very common and useful tools. As policy engineers, OIRA and agency staff are pressed for resources. It is appropriate that they allocate their limited resources on the analytic frameworks that can inform the most common policy questions. While other analytic frameworks may be optimal for a narrow range of policy choices, benefit-cost analysis has proven over many decades to be a very cost-effective way to allocate scarce social resources. In that way, it should be the principal tool in the policy toolbox.

Further, the Administration has signaled that it will increase performance metrics for Federal programs. This analytic effort to ensure the best use of taxpayer resources is commendable. Similar care and analysis should be applied to Federal allocation of social resources through regulation. For Federal spending, Congress has passed several laws starting with the Government Performance and Results Act to require agencies to measure and analyze program effectiveness. Recent Administrations have added to these statutory requirements. OMB has been directing agencies to measure performance, to choose performance metrics for services citizens value, and to document their findings. OMB is also using this information to identify programs that add little value. In summary, the management and budget functions of OMB are incorporating cost-effectiveness and benefit-cost analysis explicitly into Federal spending. It would seem counterproductive to reduce the use of these tools in OMB's regulatory functions.

Scope of OIRA's Review

Guidance Documents. The Executive orders are ambiguous as to what policy documents beside regulation are subject to interagency and OIRA review. I recommend that any revised

Executive order on regulatory review include guidance documents that are economically significant or have novel policies.

From OMB's perspective, Federal spending and regulatory spending both should have a comprehensive accounting and review. It would make little sense if OMB's budget side did not have the ability to review a significant portion of Federal spending; the on-going debacle with the off-budget liabilities of Fannie Mae and other government-supported enterprises provides ample proof of the dangers of having limited OMB control. Similarly, if agency policy decisions direct and divert significant social resources, they should undergo the same interagency and analytic review as regulation.

It is clear that agency guidance documents do have significant effect on social resources. For example, EPA publishes carcinogen and noncarcinogen risk factors through risk assessments posed to its Integrated Risk Information System (IRIS). Due to the often decade-long lag between draft and final risk assessments, EPA Regions and states increasingly use ORD's draft values for cleanup decisions and policy decisions. These draft values - without the benefit of full peer review or public comment - can act as *de facto* regulatory standards and impose substantial costs on public and private entities.

OIRA has been criticized for reviewing these EPA and other seemingly technical documents. Critics suggest that by reviewing these documents OIRA steps beyond its expertise into questions of science. As a practical matter, these criticisms are unfounded and do not recognize that important guidance documents and regulation mix science, science policy, and policy components. The distinctions between science, science policy, and policy issues are well established in the public policy literature. Briefly, in policy questions, officials must weigh the trade-off between worthy and competing public policy goals. Scientific questions can be posed and feasibly answered using the scientific method and peer review. Science policy questions are questions that can be posed in scientific terms but can never be answered by the scientific method either due to ethical or practical constraints (e.g., testing potential adverse medical treatments on infants or controlled testing of low doses of potential carcinogens on thousands of animals or people). Scientific findings can narrow the uncertainty or suggest options, but can not give transparent and reproducible answers to science policy questions. In a democratic process, there is no reason why the policy views of scientists on science policy questions outweigh the views of other policy officials.

As a practical matter, guidance documents mix an agency's scientific findings, its science policy choices, and its explicit policy choices. To execute policies, clean up sites, issue grants, and administer programs, agency managers need specific direction and explicit choices. Yet, just as in a regulation, one agency's science policy and policy choices can affect the budget and mission of another agency, state or locality, or other segment of our population. OIRA, as an agency of the Executive Office of the President, must oversee and referee these potential policy conflicts in the Executive branch. In sum, it is not that OIRA seeks to meddle in scientific documents; for OIRA staff to do their job, they must go to where the science policy and policy decisions are - often within these risk assessments, directives, and other guidance.

The Administration has expressed its intent to enhance the scientific transparency of its decisions. I recommend that OIRA can play an important role by helping agencies separate questions of science, science policy, and policy in their draft policy documents. OIRA, OMB and the Office of Science and Technology Policy can then craft different procedures to

resolve scientific disagreements and uncertainty from science policy and policy questions. Further delineation would provide policy officials with the best available scientific information as well as defined policy options. The public would also benefit from more transparent discussions of the three issues.

Statutory Constructs that Preclude Cost Considerations. Critics suggest that OIRA and agencies should not perform benefit-cost or cost-effectiveness analysis in cases where court decisions or the law explicitly prohibits Executive branch agencies for using the analytic results. They argue that analysis in these situations is either wasteful or undemocratic because it second-guesses the most representative branch of government.

I disagree with this recommendation as a matter of principle and practice. First, to fulfill OIRA's role to ensure agencies provide the public with unbiased information on its decisions, all decisions must be included. If there is no information on a whole set of decisions, the public is denied the information needed to compare alternatives, to petition its representatives, or to evaluate candidates' positions. Rather than promoting a democratic ideal, it is a step toward tyranny when elected officials are unwilling to have their decisions open to public review.

Further, as a practical matter, agencies and OIRA should provide this information since Congress changes the law. During my tenure at OIRA, a court decision concerning the Resource Conservation and Recovery Act (RCRA) would have required EPA to impose hundreds of millions of dollars in hazardous waste treatment costs for *de minimis* benefit. Although the court left EPA little discretion, it performed an economic analysis that laid bare the staggering inefficiency of this court decision. This analysis persuaded the Clinton Administration and the Congress to pass with bipartisan support a narrow law to overturn the court decision. If EPA had not performed this analysis, policy officials would not have this information. Similarly, Congress amended the Safe Drinking Water Act to allow EPA to use benefit-cost analysis to set priorities among all the potential drinking water contaminants. These bipartisan amendments arose from EPA and Congressional unhappiness with the Act's previous priority-setting construct. Therefore, OIRA and the agencies should not omit informative analysis simply due to current law; good analysis can improve both regulation and law.

I appreciate the opportunity to comment on this very important subject. If you have any questions concerning these comments, please do not hesitate to contact me.

Sincerely,

Jonathan Gledhill