

Allen C. Basala

March 27, 2009

Via e-mail: oir_submission@omb.eop.gov

Attn: Mabel Echols
Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Room 10102, NEOB
725 Seventeenth Street, NW
Washington, D.C. 20503

RE: Federal Regulatory Review

Dear Ms. Echols:

Thank you for the opportunity to provide comments regarding a new Executive Order on Federal regulatory review. These are my comments and are not presented on behalf of other private or public sector entities.

Overview

Federal rule-writing and reviewing agencies (OMB-OIRA is not the only one) are motivated and shaped by their Congressional mandates, Congressional oversight, Judicially prescribed schedules, preferences of staff, Presidential directives (e.g. Executive Orders, policy memos, etc.), performance agreements, and public comments.

Regulatory review provides an opportunity to improve the quality and quantity of information requested by the Executive Orders as well as adhering to directives of Congress regarding regulation (e.g. Regulatory Flexibility Act, Unfunded Mandates Reform Act, Congressional Review Act, Paperwork Reduction Act, Regulatory Right to Know Act, Data Quality Act, etc.)

Regulatory review without a thorough examination of the RIA materials and related information misleads the President, the Congress, and the public. However, thorough regulatory review which produces flawed Regulatory Impact Analyses (RIAs) and unwarranted rule-making delays while creating animosities within and among the rule-writing and agencies is problematic.

In my experience, regulatory review as directed by Democratic and Republican Administrations from Presidents Carter through Bush II, were thorough and informative. The reviews took place in an atmosphere where key assumptions, data, tools, methodologies, and logic were questioned. The results were revisions to the rule-making package including the economic analysis component. These revisions and the review process had benefits. That is to say the logic was improved, important caveats were revealed, and additional context for findings (e.g. sensitivity analyses) were developed. But, there were also costs in terms of delays, grayed lines amongst physical science, economic analysis and policy, and elevated tensions amongst staffs within and among federal agencies.

Refinements to Executive Order 12866, and other suggested changes noted below can improve the effectiveness of regulatory review and concomitant regulations while fostering understanding of the consequences of regulation by the public and private sectors.

Background

The posted comments received by your office reflect perspectives of academicians, regulatory advocates, regulation resisters, regulation reviewers, and regulatory impact analysts. My perspective is unique. But, that doesn't mean my suggestions trump those offered by others. However, what you see in terms of problems and solutions sometimes depends on your vantage point.

I had several vantage points during my federal career. I served as a senior regulatory, policy, and legislation reviewer in the Legislative and Executive Branches of the federal government. I also conducted, designed, and/or reviewed many of economic and regulatory impact analyses for an Executive Branch rule-writing agency.

In January 2009, I retired after 38.5 years of federal service. I served as a Congressional Fellow assigned to Senator "Lauch" Faircloth (R-NC) in the 104th Congress and was a public-law appointee of President Clinton's second term Administration as National Policy Advisor and Senior Regulatory Economist for the Small Business Administration's Office of Advocacy. During the Administration of President George W. Bush, I served on an interagency economic assessment group regarding invasive species management strategies. However, the bulk of my federal government service was as an economist, supervisor, manager, and senior economist at the Environmental Protection Agency. There, I designed and/or supervised analytical tool development such as regional economic impact models, dynamic general equilibrium models, least cost control strategy models, as well as establishing a peer reviewed benefit analysis program, preparing economic analysis guidelines, assessing the role of economic incentives, establishing cost-effectiveness floors, and dozens of economic and regulatory impact analyses.

In the sections below, I address each of the 8 areas where suggestions were requested as well as a ninth area, the value of regulatory review.

1. Relationship between OIRA and the Agencies

Improving the working relationships within a rule-writing agency can go a long way toward improving the working relationships amongst the rule-writing agency, the OMB-OIRA, and the other federal agency reviewers. Rule-writing within an agency uses a different skill mix than those developing the Regulatory Impact Analysis (RIA). Moreover, the regulatory agency's program office views timely rule development as a key deliverable whereas that agency's policy office may view a credible RIA and its influence on policy makers as an important deliverable. The rule-writer is focused more on the Congressional mandate which authorizes the rule making and sometimes views the RIA as a pacing, check-box item.

Steps taken by the leaders of rule-writing agencies can improve intra-agency working relationships, bolster the value added by the RIA, and relax some of the regulation development time constraints. Here are suggestions designed to do just that.

- This suggestion applies to rule-writing agencies where benefit-cost and/or economic impact considerations are precluded as inputs to rule-writing decisions. After the Secretary or Administrator has made their decision on the final rule, direct them to identify how that decision would change if benefit-cost analysis including distributional considerations were allowed as inputs to the rule-making decision.
- Direct rule-writing agencies to make provision for conducting properly sequenced RIAs as the rule-writing agencies negotiate schedules with litigants or in presenting schedule requirements in judicial proceedings. If the rule-writers provide no time for RIA development and review in negotiating tight schedules, they are helping to perpetuate the conflict within their agency and with other agencies regarding regulations, RIAs, and review.¹
- The Administration should champion objective, transparent, and timely analysis within the rule-writing agencies while offering strong support for objective, thorough, and timely RIA reviews. RIAs are there to inform and findings may not necessarily comport to the *ex ante* hunches of RIA developers, RIA reviewers as well as senior management and/or political appointees. The Administration should explicitly acknowledge that the RIA may not necessarily confirm some of these *ex ante* hunches.
- Because of sunset provisions, major regulatory and policy/guidance actions are often revisited. For a subset of such actions, direct OMB-OIRA, the rule-writing agency, and 2 or 3 other federal reviewing agencies, to issue a joint report within 12 months of the promulgated rule-making. The joint report would take into account public comments on the RIA and identify ways to improve the next RIA. This joint report would serve as the foundation for a targeted research agenda and analytical blueprint for the next RIA.
- To the extent practical, federal rule-writing agencies should use the same set(s) of socio-demographic and economic projections for the temporal timeframe reflected in the RIA. Allowing each rule-writing agency to use its own set(s) of projections can result in inconsistent projections across the rule-writing agencies. These inconsistencies inhibit meaningful comparisons of rules across federal agencies. Realize that some rules or bundles of rules may show changes relative to the common set of socio-demographic and economic projections. But, those changes reflect the consequences of the rule and/or other considered alternatives.

2. Guidance on Disclosure and Transparency

The reason there is so much ink on the issue of regulatory review is the lack of trust. Lack of trust within and between federal agencies makes the present review process painful for those conducting the analysis as well as reviewers within the rule-writing and other federal agencies. However, the big losers are the regulation advocates, the regulated entities and more importantly the public and the Congress.

RIAs are often complicated. The supporting analyses are often opaque with implications on key elements and strategic choices such as snap-shot year versus multi-year timeframes, baseline(s), technological progress rates, retrofit cost elements, and benefit functions known only known to the RIA developers.

Distrust results in incentives to conceal. For example, RIA developers may fear that if they identify all the strengths and weakness of the analysis, the reviewers will only seize on the admitted weaknesses to the exclusion of more pertinent strengths.

¹ V. Kerry Smith provided a related comment regarding sufficient time for coordination and economic analysis.

But, disclosure and transparency can reveal deficiencies, ameliorate concerns, and improve trust and communications within the federal government and between the federal government and the public. However, there has to be a time for intense discussion amongst the RIA developers and reviewers with no fear of reprisal in these brain storming discussions which may be part of the foundation for the analytical blueprint development process noted earlier and below. Here are some suggestions.

- Certification of objectivity by RIA reviewers and RIA development team.
- Independent peer review of key models including data inputs along with sufficient information to provide context for the review. To wit: peer reviewers are provided information on how the data inputs and modeling outputs are to be used.
- Follow-up accountability studies in an attempt to foster verification, plausibility checks, and/or validation of RIA predictions.
- Assess the balance and adequacy of RIA related research portfolios. What percent of rule-writing agency projects and their costs are directed toward providing (1) improved data to reduce uncertainty in a policy neutral fashion, (2) a basis for more stringent regulation, (3) updated and expanded coverage for benefit models, (4) assessment of confounding (multiple causes) in workplace, home, epidemiological, ecological, and environmental models, (5) missing elements of cost models, and (5) adverse consequences assessments due to federal regulation. Similar information should be required for reviewing agencies.
- Develop the joint (e.g. OMB-OIRA, rule-writing agency, 2 or 3 other reviewing agencies as appropriate) report mentioned earlier. The joint report cannot be developed for all RIAs. However, by focusing on the top 20 or 40 rule making actions, with provisions to have it apply to more than 1 or 2 rule-writing agencies, the burden on federal agency rule developers and reviewers becomes manageable.

3. Encourage Public Participation in Agency Regulatory Processes

At present, the Administrative Procedures, Equal Access to Justice, and Federal Advisory Committee Acts together with Congressional oversight provide transparency and foster public involvement and participation. The e-dockets and other innovations amplify this.

These Acts may stay the same but the behavior and philosophy of the federal agencies and their personnel may reveal openness or perceptions of an entrenched bias. Is it true, that rule-writing agencies curry favor or have a more welcoming environment for regulatory advocates while reviewing agencies have a more welcoming environment for regulation resisters? Do federal rule-writers and rule reviewers listen with an open and objective ear to both regulatory advocates and regulation resisters?

Also, speech may be free. But, speech is not necessarily costless, nor is all speech equally effective. For example, many times comments amplify preferences of the commenter regarding a policy position to the exclusion of facts under girding that position.

Here are some suggestions to encourage public participation.

- Direct rule development and rule reviewing agencies political appointees, senior managers and staff to be as open with those who support rulemaking as they are with those who do not support or question a rule-making. Federal agencies are there to serve all, not just their favored constituencies.
- Monitor the effectiveness of <http://www.reginfo.gov> and other related portals making warranted improvements.
- In the preamble to proposed and final regulations and guidance, identify clearly where public comment can be most helpful and what information is needed to better understand those comments.
- Require regulatory review for independent agencies that are currently excluded from Executive Order 12866 and Regulatory Flexibility Act requirements.

4. Offer Suggestions on the Role of Benefit Cost Analysis (BCA).

BCA is an information tool. BCA provides a tested and proven framework for revealing tradeoffs, while identifying lower cost solutions, averting unintended consequences, and maintaining underlying distributional information.² BCA can also be used to distinguish between transfers and net changes in society's well-being.

BCA is not a substitute for decision-making or decision makers. Moreover, analytical uncertainties and data deficiencies may mean that one cannot identify significant differences in net benefits amongst the presented policy options. Furthermore, Congressional Mandates and court directives may preclude adopting alternatives which are preferred on economic efficiency grounds.

Here are some suggestions.

- Maintain neo-classical welfare economics based BCA as the center of regulatory review in the revised Executive Order.
- Require completeness in identifying the strengths and weakness of the BCA
- Distinguish amongst alternatives where there are significant differences in net benefits and distributional consequences amongst alternatives
- Require the use of cost-effective analysis to map out dominant as opposed to inferior regulatory options. Most RIAs do not take this step. Hence, \$10s of millions of dollars are spent assessing and reviewing the benefits and costs of options that cost more than necessary to achieve the desired objective. Instead of RIA reviewers unknowingly looking for the best apples in a crate of rotten apples, they should be looking for the best apples in a crate of good ones.

5. Address the Role of Distributional Considerations, Fairness, and Concern for Future Generations

At present, some rule-writing agencies conduct benefit analyses presuming lower income households have the same wealth and income endowment as mean or median income households. The result is that the benefit estimates are amplified for those groups. The bias in this analytical assumption is compounded in future time period assessments as the income elasticity of demand for the "public good" is presumed to be normal or superior. At first blush, such actions seem consistent with compassion regarding lower income and minority populations now and in the future given the bias toward producing more of the "public good."

However, regulatory agencies are generally remiss in that they do not reveal information on the incidence of cost for lower income and minority populations. In essence, the benefits in current RIAs are often "adjusted" upward in what may appear to be acts of fairness and concern for current and future low income and minority populations. But, the fact of the matter is that regulatory costs are often regressive meaning greater burden for these populations. Without information on the distribution of cost, analysts with compassion for lower income and minority populations may have facilitated decisions making these population segments worse off!

- Revise Executive Orders 12298 and 12866 to require assessments of the distributional aspects of both benefits and costs.
- Do not "artificially" adjust the benefit estimates to "pretend" that the median and/or mean household income economic agents reflect the preferences of all households. This is disingenuous to those populations. Maintain the principle of consumer sovereignty in conducting the RIA
- Present distributional benefit and cost information of all population segments.
- I do believe in considering future generations in a cost and benefit sense.

² The form of BCA described here is based on tenets of consumer sovereignty including the Hicks-Kaldor compensation principle—neoclassical welfare economics.

- However, I also believe in mapping out the path to that future “bliss” point. For example, rule-writing agencies developing new source rules may identify a future snapshot year when the existing capital stock is turned over. That is the year when benefits and costs are at a maximum. However, these rule-writing agencies are generally silent about the up tick in pollution with the new source regulations as existing sources keep the dirtier capital for longer periods of time by better maintenance of existing facilities. This up tick results from a decrease in the dirty capital scrappage rates. The result is greater near term pollution levels than if the pre-regulation scrappage rates were maintained.
- Also, pertinent in the future generation considerations is the identification of the stakeholders along with plausibility checks to determine if scarcity considerations are violated (e.g. with zero or negative discount rates are there any future generation projects that are not preferred?).
- Future generational considerations seem to focus on the benefits exclusively. However, for completeness, there will be costs that future generations incur because of the bundle of future benefits we gave them. These costs should be considered in the RIA.

6. Identify Methods for Ensuring that Regulatory Review Does Not Produce Undue Delay

Not all delay is the same. Regulatory review takes place in the Executive as well as the Legislative and Judicial branches of the federal government. Avoiding what is considered undue delay for Executive Branch review, may result in inferior rule-makings that end up being remanded to the regulatory agency by the Congress or the Courts.

However, undue delays may also be those which provide little value added in terms of the regulation and the quality of the RIA. Here are a few suggested improvements which may reduce the time for regulatory review while maintaining the quality of the rules and associated analyses.

- Reduce the number of actions by bundling rules and/or RIAs where there is overlap (or jointness) on the cost and/or benefit sides. EPA did this with PM and O₃ NAAQS during President Clinton’s Administration. They also bundled review of the secondary NAAQS for oxides of sulfur and nitrogen during President George W. Bush’s Administration.
- If major or economically significant rules are continually changing, the administrative burden on regulated entities and state and local governments is markedly increased. There is also a burden on the staffs of the federal rule-writing and reviewing agencies. Can you imagine a 5 year review cycle for major or economically significant rules some of which have 5 year attainment dates? Well, that is the case with the Clean Air Act’s Title I National Ambient Air Quality Standards provisions. The EPA and OMB-OIRA staffs are almost in states of perpetual circular motion. Securing rifle shot amendments to the Clean Air Act to provide for a 10 year review cycle will not impair public health as the Clean Air Act has significant harm provisions yielding additional protection. Providing for a 10 year review cycle will reduce administrative burdens for regulated entities, state and local governments, and federal rule-writing and rule reviewing agencies. Such legislative changes may also be appropriate in other instances where such short cycle regulatory review required.
- Don’t create bottlenecks, avoid them. Rule-writing agencies sometimes perpetuate longer review processes by addressing easy to handle regulatory review issues up front, and attempt to handle the more difficult regulatory review issues at the 11th hour thus creating an artificially short fuse for completion of an approved RIA.
- Encourage development and maintenance of adequate analytical tools and data to improve credibility of the cost analysis, enhance coverage of benefits, and reduced time and cost for RIA production. These tools and data may be used for multiple federal rules. In addition, the tools and data may also be useful to state and local governments in their regulatory analysis and review programs.

7. Clarify the role of behavioral sciences in formulating regulatory policy.

I presume the clarification request applies to disciplines which currently produce RIAs and related analyses and the role of the RIA and related analyses in formulating regulatory policy.³

Here are some suggested principles regarding the role of behavioral sciences in formulating regulatory policy.

- Objective and appropriately *caveated* transparent science and analysis inform the regulatory policy decisions.⁴
- Policy decisions are made by congressionally confirmed political appointees.
- RIA producers, rule-writers, and regulation/RIA reviewers are not the policy makers.
- If you are not the congressionally confirmed appointee but are delivering the policy decision, say so. Some critics within and outside government complain that RIA producers, rule-writers, and rule-reviewers make policy when in fact they are merely delivering the policy decisions made by the appointees. If the critics are correct, the appointees are not doing their jobs and should be directed to do so.
- RIA producers, rule-writers, and rule/RIA reviewers should offer recommendations to policy makers when asked to do.
- Policy makers should encourage RIA producers, rule-writers, and rule/RIA reviewers to speak up should they be in key decisional meetings. If the policy maker is about to make a bad decision, a muzzled staff is not much help.

8. Identify the best tools for achieving public policy goals through the regulatory process.

I presume what is asked for here is identification of tools associated with production of rules, RIAs, and related analyses which undergo OMB-OIRA and other agency review.

Here are some “tools” (more like techniques) that may be appropriate for addressing some public policy goals in the context of regulation/RIA development and review.

- Cross checking within OMB-OIRA to avoid unintended spillovers. Within OMB-OIRA, the OSHA and MSHA rules are handled by one branch while EPA rules are handled by another. A solution to worker health problems in the form of sending indoor and underground pollution to the ambient air may pose concerns for other federal regulatory and public health agencies. Early cross checking within OMB-OIRA and amongst other federal agencies can avert some of these unintended spillovers where one rule-writing agency’s solution is another rule-writing agency’s concern.
- Use the semi-annual regulatory agenda and priors of agency experts to identify potential complementarities and conflicts amongst planned rule-writing actions of federal agencies to avert regulatory failures, ward off conflicts in federal policy, and lower the cost of federal regulation. A first step might be to identify all forthcoming regulations initially incident upon a particular sector or a particular substance. In some instances, coordinated regulation development and one RIA by the federal rule-writing agencies may be warranted. For example, through a coordinated effort, OMB-

³ Public good, negative externality, monopoly power, and information asymmetry or merit want are sometimes set forth as arguments for government interference in the marketplace. If the problem is information asymmetry, government may choose to intervene with appropriate regulatory review to provide the information. However, in some instances, public good or negative externality arguments are addressed by presuming omniscience on the part of rule-writers or other “experts” and using their preferences in an “altered form” form of BCA in lieu of the stated and/or revealed preferences of sovereign consumers. I do not recommend this “altered form” in formulating regulatory policy.

⁴ The neoclassical BCA can and does use other analytical constructs in a prescribed manner. For example, V. Kerry Smith set forth the pre-requisites for consistent integration of risk assessment and exposure analysis in a BCA framework.

OIRA and the rule-writing agencies may identify an even lower cost bundle of regulatory solutions to the regulatory objective(s).

- Consider the use of expert elicitation to address significant gaps regarding known control technology and/or potential physical and biological attributes of un-quantified benefits. Use of expert elicitation is not a perfect substitute for empirical data on control technology or physical or biological attributes. However, expert elicitation may be preferred to disparate visceral intuitions of rule-writers, RIA authors, and RIA rule reviewers.
- Enhance risk and exposure analyses to address potential biases. Risk assessment and exposure analyses often presume that human activity patterns are autonomous with respect to weather. In the extreme, certain at risk populations are presumed to sit on their porches for 70 years! Research undertaken at Georgia Tech and at RTI has begun to assess the effectiveness of informational cues on behaviors of at risk populations. These research efforts together with additional research on meteorological variability can enhance the credibility of risk and exposure assessments as well as concomitant benefit analyses serving as inputs to the public policy process. Informed members of populations at risk may be making exposure choices at odds with or confirm that current benefit analyses are appropriate. Such research and resulting models may be used to improve and/or confirm current benefit assessments by DOI, DOL-OSHA, DOT, EPA, USDA and other regulatory agencies.
- Use multi-year analyses where appropriate. At present, a single set of meteorological conditions for parts of a year are often used as a basis for extrapolating environmental and/or workplace conditions for an entire year. But, meteorological variability is such that in some years it is relatively easy to meet environmental and/or workplace standards where as in other years it is much more difficult. Hence, the “snap-shot” year RIAs may reflect a “typical” year. But, in reality control levels and costs reflected in the RIA may achieve much lower benefits in the good years and fall short of the mandated environmental and workplace standards in other years.

9.0 Value of Regulatory Review

The OMB-OIRA Report on the Costs and Benefits of Federal Regulation provides a bottom line in terms of the regulatory accounting statement on benefits and costs. However, if this is where federal policy ended up, how does it compare with where federal policy would be in the absence of regulatory review in general and a the regulatory review Executive Order in particular?

Does regulatory review foster higher net benefit rules, rules which provide greater net gains for a greater number of people, rules which are less likely to be remanded by the courts, and/or something else?

Some regulatory review agencies issue annual reports on the “value of regulatory review”. The most recent Small Business Administration’s Office of Advocacy Annual Report on the Implementation of the Regulatory Flexibility Act, Executive Order 13272, and Advocacy’s Regulatory Review and Reform Initiative is for fiscal year 2008. The SBA-OA identified one-time and on-going cost savings totaling \$10.7 billion dollars for actions in FY 2008. To arrive at some of these figures, SBA-OA compared the differences in costs between proposed and final rulemaking. If these differences in costs between proposal and promulgation identified by SBA-OA did not change the benefits, then one could consider the regulatory cost savings between proposal and promulgation as a measure of the value of their regulatory review (focuses on small entities).

But, recognize that the scope of SBA-OA regulatory review is generally small entities and specifically rules which may have a significant adverse impact on a substantial number of small entities. In addition, SBA-OA is quick to point out that this is regulatory savings due to the review process as a whole.

The President or Congress may want to direct OMB-OIRA to review the SBA-OA analytical framework to see if it can be refined and applied to the regulatory review for economically significant rule-makings. For

example, OMB-OIRA may choose to examine the benefit as well as the cost changes. Moreover, OMB-OIRA may extend the analysis to assess the changes in net benefits amongst the pre-proposal, proposal, final rule, and even the implementation stages of the rule.

However, the attribution question remains. For example, if there are positive net benefits and/or fewer remands of federal rules is that due to the Administration's Executive Order on Regulatory Review, the rule-writers, the quality and timeliness of the RIA, the Congressional Review Act, the Regulatory Right to Know Act, the Unfunded Mandates Reform Act, public comments, or some combination of these factors?

Finally, Paul Portney, former head of Resources for the Future and currently at the University of Arizona, once did a benefit cost analysis of benefit cost analysis related to Executive Order 12291. In essence, assessment was more like an implicit valuation analysis concluding that incremental benefits of regulatory review would not have to be very large to equal the incremental costs of conducting regulatory review. The cost of RIA development pales in comparison to the cost of the regulations and other parts of the rule-making package.

Conclusions

In my view, the neoclassical benefit cost analysis framework (which includes Hicks-Kaldor) should remain as the central template for RIAs.

The federal RIA development and review processes provide positive net benefits. However, the RIA production and review processes can be improved while not diminishing the net benefits of those programs.

In these 9 pages, I made some suggestions to improve RIAs and regulatory review. However, any refinement of the Executive Order and federal regulatory review process will also take commitment from the management and staffs of the reviewing and rule-writing agencies.

The net effect of the suggested refinements if adopted will include more trust, better understanding, and on point RIAs (i.e. avoid many person years and millions of dollars analyzing a bunch of inferior-bad apple regulatory options). Bad information as we all know can lead to poor public policy decisions. Strengthening data inputs and tools while enhancing objectivity and transparency should foster improved regulatory decisions.

Thank you again for the opportunity to comment. If you wish to talk with me regarding any of my comments, please do not hesitate to call

Sincerely,

Allen C. Basala