

**Echols, Mabel E.**

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**From:** Rowell, Arden  
**Sent:** Tuesday, March 17, 2009 12:19 AM  
**To:** FN-OMB-OIRA-Submission  
**Subject:** comments on executive order governing regulatory review  
**Attachments:** Arden Rowell.doc

Attached please find my comments on OMB's effort to recommend a new EO governing Regulatory Review.

Regards,

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3/19/2009

## Comments on Executive Order Governing Regulatory Review

March 13, 2009

This memorandum is a response to OMB's invitation to provide comments on the principles and procedures governing regulatory review.

I agree with many of the recommendations made by previous commentators. I offer four additional suggestions. These address (1) the use of cost-benefit analysis, (2) updating regulations and the treatment of uncertainty, (3) decision-making where cost-benefit analysis is barred by statute, and (4) the impact of regulations on unrepresented and underrepresented groups.

### **(1) Retain cost-benefit analysis, but change the default assumption.**

Cost-benefit analysis remains a useful tool for guiding agencies in the allocation of limited resources. An important baseline question, however, is whether the burden of proof should lie on the cost or benefit side of the equation: must the benefits outweigh the costs to justify regulation, or must the costs outweigh the benefits to justify a lack of regulation?

Executive Order 12,866 erred on the side of non-regulation: it directed agencies to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."<sup>1</sup> This approach put the thumb on the wrong side of the scale because benefits are often non-monetary, and therefore more difficult to quantify than costs. A more balanced approach would be to allow cost-benefit analysis to delay regulations only where the costs are shown to outweigh the benefits.

Sample language: *Each agency shall assess the expected costs and expected benefits of proposed regulations. Where there is a reasoned determination that the costs outweigh the benefits, the agency shall delay the regulation until such time as new information changes the analysis.*

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<sup>1</sup> See Section 1(b)(4) of Executive Order 12,866.

**(2) Establish procedures to update existing regulations, particularly where initial regulations are made under conditions of uncertainty.**

It is appropriate to run cost-benefit analyses on proposed regulations, as well as on the “zero regulation” option for those regulations. But increasing information and changing preferences make the impacts of regulation vary significantly over time. For major regulations, this justifies the establishment of a reevaluation process. This process will be particularly important where initial regulatory decision-making must be made under situations of substantially limited information.

Sample language: *Where possible, agencies shall provide probability ranges for expected costs and benefits. Where no probability ranges can be assigned, agencies shall describe the attendant uncertainty, as well as the future information or circumstances that would substantially reduce this uncertainty. When the named circumstances develop, the regulation shall be reevaluated.*

**(3) Require tradeoff analyses where cost-benefit analysis is prohibited.**

As other commentators have noted, some statutory regimes explicitly prohibit the use of cost-benefit analysis. Where cost-benefit analysis is prohibited by statute, agencies should be required to use other methods (e.g. risk-risk analysis) designed to encourage the explicit analysis of tradeoffs.

Sample language: *Where cost-benefit analysis is prohibited by statute, agencies shall publish an explicit tradeoff analysis, detailing the risks faced under the proposed level(s) of regulation.*

**(4) Require agencies to describe the impact of proposed regulations on unrepresented and underrepresented groups.**

These groups cannot participate in the democratic system, so their preferences are not incorporated into regulatory policy. Their interests, however, may matter significantly to the public. Making

impacts transparent may help foster reflective deliberation about how their interests should be incorporated into policy.

Sample language: *Agencies shall describe the expected impact of regulation on unrepresented and underrepresented groups, including children, future persons, foreign persons, and animals.*

Thank you for the opportunity to comment.

Sincerely,

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