

To: Jessica Hertz, OMB
From: Heather L. Ross, Roger M. Cooke, Joel Darmstadter, Shalini Vajjhala, RFF
Subject: Request for Comments: Federal Regulatory Review
Date: March 16, 2009

Federal regulatory review can be thought of as oversight of general principles implemented through common guidance applied to particular actions. While the principles are timeless truths, the guidance to give them operational effect will change over time, reflecting scientific learning and evolving values. In the long run, OIRA's best contribution will not be checking the application to particular rulemakings at the back end of the process, but championing and advancing the function at the front end - pushing the envelope of good guidance and acting as de facto leader of a virtual regulatory service across government.

A. Regulatory Principles

The philosophy and principles of E.O. 12866 are fundamentally sound. All regulations must meet a common-sense standard - is it worth it? This is a question people ask and answer every day in their own lives by judging whether an action they are considering will on balance make them better off - that is, by weighing costs and benefits. Major federal regulations require particularly careful consideration, but the same standard. Applying the standard will almost always require judgment - informed and unbiased representation of values beyond those that can be quantified or monetized. Such judgment is recognized in E.O. 12866 language directing agencies to "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

Justification by reasoned determination is not the same as "do the math." A reasoned answer to the question "Is it worth it?" will be challenging, but that is not an argument for changing the question. It will be hard enough to arrive at a good answer if the question is posed properly, impossible if it is not.

B. Guidance

Good guidance on how to implement the principles is the meat of good rulemaking. This requires a separate document outside the E.O. setting forth best practices and standard parameters as they are currently understood. The presumption should be uniformity in key elements - e.g., discount rates, valuations of loss of life or health - with exceptions for significant cause.

The E.O. itself should mention major topics contained in the guidance. Two guidance areas where E.O. 12866 language could be updated are uncertainty and distributive impacts and equity.

1. Uncertainty. The importance of recognizing uncertainty in effects and their valuation, and broad reference to appropriate occasions for and types of analysis

and appropriate parameters for reported results would be useful, including attention to low risk high damage outcomes through commission or omission.

2. Distributive impacts and equity. Strengthening the brief mention in the current E.O. would be useful, particularly drawing broadly on later documents such as E.O. 12898 on environmental justice and Circular A-4 addressing distributional effects and intergenerational discounting.

C. Organization, Planning and Review

The organizational and procedural arrangements of E.O. 12866 are fundamentally sound. Meeting the standard for regulatory action requires that all benefits and costs be comprehensively considered. There is an argument that mission-focused agencies are too narrow in their remits to perform an even-handed consideration of all relevant factors. The Executive Order is meant to instruct and guide agencies to avoid any such tendency, and the combination of agency mission-based expertise and OIRA big-picture oversight can provide a good overall arrangement for regulatory success. The proper relationship between OIRA and the agencies is thus one of collegial interaction and complementary joint service to the public interest – where the public interest is an abiding concept that does not shift sharply with a change of Administration. The President will have final say on executive branch regulatory action, and while that authority may be exercised for good or ill, the remedy for misuse will generally be judicial or electoral, not distorting the regulatory review process to over-empower agencies.

While the arrangements in E.O. 12866 are generally good ones, a few areas could be improved:

1. Relations with Congress. Congress is easily the single greatest source of excess costs in the regulatory system. Consider providing for enhanced cooperation between OIRA and Congress to remedy situations where Federal regulatory review standards cannot be met due to faulty law, including a reporting mechanism and cooperative staff contact with a companion entity such as the Congressional Budget Office or the Government Accountability Office. The multiple passes in E.O. 12866 (“unless prohibited by law” etc.) should not themselves be given a pass in this review.
2. Positive leadership. In the spirit of agency-OIRA complementarity, consider value beyond the oversight of individual rules that OIRA can add (increased function stature and resources; good strategy, planning, coordination and prompting; skilled technical assistance; electronic rulemaking leadership; repositories of data, approved uniform procedures, shared best practices, look-back assessments....) While support functions often face a respect deficit, career staff are the backbone of good government and formidable performers when well-deployed. To make room for these OIRA leadership endeavors, raise the threshold of “significant regulatory action” appreciably. Catching the big outliers will do 90% of the job.

3. Principal advisor and coordinator. This is a key role within the Executive Order, and if the President does not intend the Vice President to undertake it, he should consider designating another official of appropriate stature and purview, for example, the Director of OMB, but not someone of narrower scope, for example any of the individual policy "czars."

Thank you for the opportunity to comment.



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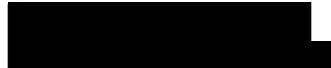
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FEDERAL REGULATORY REVIEW

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