



Institute for  
Policy Integrity  

---

new york university school of law

June 13, 2012

Administrative Conference of the United States  
comments@acus.gov

Subject: Comments for the ACUS 56<sup>th</sup> Plenary Session, on the Proposed Recommendations for Regulatory Analysis Requirements, Midnight Rules, and Improving Coordination

The Institute for Policy Integrity at NYU School of Law submits the following comments on the various proposed recommendations to be considered at the ACUS Plenary Session. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

In its final recommendations, ACUS should make the following changes. Specific language that ACUS could incorporate into its recommendations is included as an Appendix at the end of these comments.

- Changes to Recommendations for Regulatory Analysis Requirements
  - **Offer more concrete guidance on how to tailor requirements to reduce unnecessary burdens and improve efficiency.** The latest iteration of Recommendation 7 articulates the crucial goal of tailoring requirements, but offers little guidance.<sup>1</sup> At a minimum, ACUS should identify for OMB some topics that *Circular A-4* could better elaborate: the interpretation of “significant effect” under the executive order; proportionality; the role of breakeven analysis; the integration of employment effects into cost-benefit analysis; and the application of advanced analytical techniques.
  - **Explore missed opportunities to further rationalize the practice of regulatory analysis.** For example, the Committee could develop guidance (or recommend that OMB develop guidance) on how agencies can use ex-post, retrospective analysis to improve their ex-ante analytical estimates of costs and benefits. The Committee

---

<sup>1</sup> Policy Integrity previously commented on an earlier version of this proposal. See Comments from Policy Integrity to ACUS Committee on Regulation (May 2, 2012). The plain language of what was then numbered Recommendation 8, would have excluded from analytical requirements several types of rulemakings that can benefit enormously from careful cost-benefit assessments, such as deregulatory proposals, rules with significant benefits but limited or negative costs, and rules with significant but unquantified costs and benefits. The language of Recommendation 8 also seemed to ignore some of the mandates under Executive Order 12,866. The new version of the proposal, submitted to the Plenary Session now as Recommendation 7, corrects those problems, but the result is somewhat vague advice.

could also develop guidance (or recommend that OMB and/or the Small Business Administration develop guidance) on how agencies can focus their regulatory flexibility analysis (i.e., small business analysis) on achieving efficiency and distributional goals, as well as on the appropriate approach to distributional analysis more generally.

- Changes to Recommendations for Midnight Rules
  - **Address the problem of misclassifying significant/major rules as non-significant/non-major in order to avoid analytical or review requirements in the midnight period.** On occasion, agencies in previous presidential administrations may have treated regulatory proposals that meet the criteria for significance as “non-significant,” perhaps to avoid certain analytical requirements in the midnight period. Similarly, rules that arguably should have been economically significant and major have been classified as “otherwise significant” and “non-major,” perhaps to avoid certain executive and congressional review requirements. This practice should be guarded against.
  - **Clarify that agencies must complete all requisite analytical and disclosure requirements, even during the midnight period.** In addition to explaining the timing of midnight rules in their preambles, agencies should also explain if and how all requirements for analysis, disclosure, review, and the solicitation of public comments have been completed.
- Changes to Recommendations for Improving Coordination of Related Agency Responsibilities
  - **Call for public comments to identify areas of shared, overlapping, and related jurisdictions, as well as examples of conflicting or incoherent rules.** In addition to Recommendation 1(a)’s suggestion that federal agencies identify areas ripe for coordination, ACUS should advise either agencies or OMB to call for public comments on the topic. Additionally, OMB should solicit public comments on examples of conflicting or incoherent rules, so as to address the problem if it exists or to rule it out if it does not.
  - **Call for the development of inter-agency processes to standardize analytical methodologies.** To carry out Recommendation 1(b)’s goal of resolving differences in the application of analytical requirements, ACUS should advise OMB to coordinate inter-agency processes to harmonize calculations of the value of statistical life, approaches to distributional analysis, and policies on cancer risks. Such efforts would also advance Recommendation 2’s goals for the joint production of cost-benefit analyses.
  - **Call for the advancement of data interoperability.** Recommendation 4 encourages inter-agency teams to produce and analyze data together. To achieve this, OMB will need to promote data collection, interoperability, and sharing.

Additionally, ACUS should improve its own process for the solicitation of public comments.

## Expand the Recommendations for Regulatory Analysis Requirements

The proposed recommendations aim to improve the efficiency and transparency of regulatory analysis requirements<sup>2</sup>—an essential goal. Regulatory analysis can help promote rationality and accountability in agency decisionmaking, ensure that government actions are informed by relevant scientific and economic findings, and facilitate the maximization of net benefits for society.<sup>3</sup> Regulatory analysis can also be more than an internal decisionmaking tool; it is a tool for transparency, conveying information to the public and providing a forum for stakeholders to engage in the rulemaking process.<sup>4</sup>

The suggestions in the proposed recommendations are appropriate and relatively non-controversial. They focus on enhancing transparency, streamlining requirements to reduce analytical burdens on agencies, and defining the scope of requirements more consistently. The main shortcoming of the suggestions overall is that they offer little concrete guidance.

Recommendation 7 provides a good example of this vagueness. It calls for the tailoring of analytical requirements to the type of rule under consideration. Indeed, agencies should not be burdened with analysis unlikely either to affect the ultimate rulemaking decisions or to meaningfully inform the public dialogue. Recommendation 7, however, offers no guidance on how to achieve this goal. At a minimum, ACUS could identify for OMB some topics that *Circular A-4* could better elaborate: the interpretation of “significant effect” under the executive order; proportionality; the role of breakeven analysis; the integration of employment effects into cost-benefit analysis; and the application of advanced analytical techniques.

Moreover, the proposed recommendations on the whole are overly focused on the goals of streamlining duplicative requirements and increasing transparency. While these are certainly valuable goals to pursue, they are not the exclusive goals of this project, as the Committee on Regulation’s own statements make clear.<sup>5</sup> ACUS therefore misses an excellent opportunity to provide guidance on how agencies can conduct regulatory analysis “in the most efficient manner possible” and can “otherwise rationalize” analytical practices.

### ***Offering Concrete Guidance on Tailoring Analytical Requirements***

Recommendation 7 states:

The Office of Management and Budget should consider amending Circular A-4 so as to tailor the type of regulatory analysis required to the type of rule at issue. For example, the type of analysis appropriate for understanding the effects of a rule that reduces exposure to environmental pollution will be different than the analysis needed to understand the effects of a rule that determines payments for medical services, or that establishes seasons for migratory bird hunting.

---

<sup>2</sup> See ACUS Comm. on Regulation, *Proposed Recommendations on Regulatory Analysis Requirements* at 2-3 (“to ensure that agencies fulfill the various regulatory analysis requirements in the most efficient manner possible, and to enhance the transparency of the process . . . [and] to consider streamlining the existing regulatory analysis requirements”); see also ACUS.gov, *Review of Regulatory Analysis Requirements* (last visited May 1, 2012) (“examine whether there is any duplication in the required analyses that could be eliminated . . . and whether or not the requirements could otherwise be rationalized or streamlined while continuing to serve their valuable goals”).

<sup>3</sup> See generally RICHARD REVESZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008); see also Jason Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings* (Policy Integrity Report 6, 2010).

<sup>4</sup> See Nathaniel O. Keohane, *The Technocratic and Democratic Functions of the CAIR Regulatory Analysis*, in *REFORMING REGULATORY IMPACT ANALYSIS* (Winston Harrington, Lisa Heinzerling & Richard Morgenstern eds., 2009).

<sup>5</sup> See citation and quotations *supra* note 2.

Instead of just posing this open-ended question to OMB, ACUS could identify some of the areas that provide the best opportunity for tailoring. By focusing the scope of the inquiry, ACUS can help OMB, scholars, and the public target their research and comments on the most pressing matters, making it easier for OMB to achieve progress on the goal of tailoring requirements.

For example, ACUS could suggest that OMB use its *Circular A-4* to clarify the interpretation of “significant effect,” a definition that largely determines which rules are subject to the more rigorous requirements for cost-benefit analysis and review. In previous work, the Committee on Regulation expressed concern about applying traditional cost-benefit analysis requirements to federal transfer payments and rules setting fee structures.<sup>6</sup> OMB could address this problem by defining what a significant adverse “effect” on the economy means under Executive Order 12,866. Transfer payments are usually thought not to affect efficiency, but rather to have mostly distributional consequences. By defining the term “effect” exclusively in terms of efficiency, excluding the purely distributional impacts of transfer payments, OMB would exclude such rules from the category of “economically significant” rules subject to the most rigorous analytical requirements. Instead, such rules would remain “otherwise significant,” a category that includes rules that materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs.<sup>7</sup> Agencies are only required to “assess” costs and benefits generally for such rules, and OMB could further clarify what types of analysis would satisfy that requirement.

More broadly, *Circular A-4*'s limited guidance on proportional analytical efforts could be expanded and explicitly tied to the underlying goals of analysis.<sup>8</sup> Agencies' efforts to identify, quantify, and monetize costs and benefits should be proportional to the likely impact of such efforts toward the goals of regulatory analysis: namely, to how much they inform the selection of policy alternatives that maximize net benefits, and to how much they inform the public dialogue on the rulemaking. For example, when agencies analyze rules that are deemed significant because they create inconsistencies or raise novel issues, OMB could clarify that the assessment of costs and benefits should be proportional to the extent analysis will impact the policy choices, help highlight or resolve the inconsistency, or enhance the public understanding of the novel issues.

Quantifying and monetizing some costs and benefits may be impossible, or may require tremendous agency resources. *Circular A-4* already provides some guidance on hard-to-quantify effects, including a discussion of the role of breakeven analysis.<sup>9</sup> But OMB could provide additional guidance on how much effort agencies should exert attempting to monetize effects before resorting to breakeven analysis, and how breakeven analysis should be structured so it is rigorous and transparent.

Finally, some more advanced practices in cost-benefit analysis may only be suited for a subset of those rules that satisfy the basic threshold for significance. For example, *Circular A-4* requires formal, quantitative uncertainty analysis for rules with an annual impact over one billion dollars.<sup>10</sup> OMB could develop similar thresholds and guidance on which rules should be subject to other types of sensitivity or uncertainty analysis, to peer review, and to rigorous distributional analysis. In particular, the possible effects of rule on employment increasingly monopolize the political debate over regulations. OMB could provide guidance on what types of rules would most benefit from

---

<sup>6</sup> See Draft Recommendations for May 3, 2012 Meeting of the Committee on Regulation (Apr. 24, 2012).

<sup>7</sup> Exec. Order 12,866 § 3(f).

<sup>8</sup> See *Circular A-4* at 13 (noting that “when the unquantified benefits or costs affect a policy choice, the agency should provide a clear explanation of the rationale behind the choice,” implying that costs and benefits deserve analysis if they will affect a policy choice).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 15.

analysis of employment effects, if and how such effects should be incorporated into the broader cost-benefit analysis, and how rigorous the analysis should be (e.g., whether to include sensitivity analysis). For more details, see Policy Integrity's attached report on the role of job impact analyses in policy debates.<sup>11</sup>

### ***Exploring Additional Opportunities to Rationalize Regulatory Analysis***

The proposed recommendations largely focus on streamlining duplicative requirements and increasing transparency. Pursuit of these admirable goals should not prevent ACUS from simultaneously exploring other ways to rationalize regulatory analysis.

#### *Recommend Using Ex-Post Analysis to Improve Estimates of Future Costs and Benefits*

The estimates of costs and benefits in regulatory analyses are necessarily based on models, predictions, and guesswork. Academic reviews of existing regulations have discovered both overestimates and underestimates in federal agencies' prospective regulatory impact analyses, as compared to the actual costs and benefits that result from the rule's implementation.<sup>12</sup> Retrospective reviews—now mandated by Executive Order 13,563—provide an opportunity for agencies to compare the actual consequences of regulation with their ex-ante projections: in essence, they allow agencies to check their work. As agencies conduct more retrospective reviews they will improve their predictive methodologies. This in turn will improve their ability to anticipate the effects of new rules.

ACUS should explore possible recommendations to OMB on improving its guidance to agencies on retrospective review and the use of ex-post checks to improve their future estimates of costs and benefits. For more details on this issue, see Policy Integrity's attached comments to EPA on retrospective review.<sup>13</sup>

#### *Refocus Regulatory Flexibility Analysis on the Relevant Efficiency and Distributional Goals*

The Regulatory Flexibility Act (RFA), its subsequent amendments, and Executive Order 13,272 require agencies to consider regulatory alternatives for rules having a "significant economic impact on a substantial number of small entities." The RFA has several important objectives and can play a meaningful role in the regulatory process, but the process should be refined. First, and most importantly, agencies should use the RFA process to maximize the net social benefits of regulation wherever possible. Where a regulation causes small entities to have higher marginal compliance costs than large entities, the regulation adversely affects small entities and is also socially inefficient. In such cases, agencies should ease regulatory requirements for small entities, increase regulatory stringency for larger entities, or do both, based on the social benefits of the regulation. Second, the RFA process should consider the distributional effects of regulation on small entities when regulatory burdens will make small entities less competitive. The objective of ensuring small entity competitiveness can come into conflict with the goal of economic efficiency. Therefore, when mitigating the burdens of regulation on small entities, agencies should make sure that any improvements in small entity competitiveness are sufficiently compelling despite potential losses in economic efficiency.

---

<sup>11</sup> *The Regulatory Red Herring: The Role of Job Impact Analysis in Environmental Policy Debates* (Policy Integrity Report 8, 2012).

<sup>12</sup> See Jonathan B. Wiener, *Better Regulation in Europe* at 513 (Duke Law Faculty Scholarship, Paper 1586, 2006), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/1586](http://scholarship.law.duke.edu/faculty_scholarship/1586) (noting that both OMB and academic reviews have observed inaccurate estimates); see also Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1531.

<sup>13</sup> Policy Integrity, *Comments to EPA on Retrospective Review* (Mar. 18, 2011), available at [http://policyintegrity.org/documents/Policy\\_Integrity\\_EPA\\_Retrospective\\_Review.pdf](http://policyintegrity.org/documents/Policy_Integrity_EPA_Retrospective_Review.pdf).

ACUS should explore possible recommendations to OMB and/or the Small Business Administration on improving guidance to agencies on the implementation of the regulatory flexibility act. For more details on this issue, see the Policy Integrity's attached comments to SBA on the regulatory flexibility act.<sup>14</sup>

### *Harmonizing General Requirements for Distributional Analysis*

Regulations that maximize social welfare may impose disproportionate costs on a particular subpopulation, resulting in both equity and efficiency problems. Recognizing this, Executive Order 12,866 permits agencies to consider “distributive impacts” and “equity” in promulgating rules,<sup>15</sup> and Executive Order 13,563 reiterated this point.<sup>16</sup> OMB also has emphasized the importance of considering distributional effects in several guidance documents, including *Circular A-4*,<sup>17</sup> “Updated Principles on Risk Analysis,”<sup>18</sup> and most recently with “Cumulative Effects of Regulations.”<sup>19</sup>

Academics have identified several benefits of performing distributional analysis. For example, distributional concerns could act as “tiebreakers” between regulatory alternatives with the same aggregate net benefits.<sup>20</sup> Distributional analysis also produces important information on the effects of the regulation. The information generated by distributional analysis is especially useful when aggregated because it can show the total effects of the regulatory system on different populations.<sup>21</sup> Even if each individual rule creates an efficient balance of costs and benefits, certain groups may bear a disproportionate share of the costs of the regulatory system on the whole due to systematic biases.<sup>22</sup> Therefore, better distributional information could be used to inform tax policy.<sup>23</sup> Some scholars even argue that distributional asymmetries could signal a failure in the regulatory process resulting in cost-benefit inefficiencies.<sup>24</sup> While there may be disagreement on the most important uses of this information, there is wide agreement that having the information would be valuable.

However, as OMB recently recognized,<sup>25</sup> agencies rarely incorporate distributional considerations into their regulatory impact analyses. Simply asserting the importance of distributional analysis

---

<sup>14</sup> See Policy Integrity, Comments to SBA on Regulatory Flexibility Act (Feb. 24, 2012), available at [http://policyintegrity.org/documents/Policy\\_Integrity\\_Letter\\_to\\_SBA\\_on\\_RFA.pdf](http://policyintegrity.org/documents/Policy_Integrity_Letter_to_SBA_on_RFA.pdf).

<sup>15</sup> Exec. Order 12,866 §§ 1(a), (b)(5).

<sup>16</sup> Exec. Order 13,563 § 1(c).

<sup>17</sup> Circular A-4 at 14 (instructing agencies to “provide a separate description of distributional effects”).

<sup>18</sup> See MEMORANDUM FROM OFFICE OF INFORMATION AND REGULATORY AFFAIRS ADMINISTRATOR SUSAN DUDLEY FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES ON UPDATED PRINCIPLES FOR RISK ANALYSIS 10 (Sept. 19, 2007) (stating that agencies should consider both “the magnitude and the distribution of benefits and costs” when considering risk management alternatives).

<sup>19</sup> MEMORANDUM FROM OFFICE OF INFORMATION AND REGULATORY AFFAIRS ADMINISTRATOR CASS SUNSTEIN FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES ON CUMULATIVE EFFECTS OF REGULATIONS (March 20, 2012) (although this memorandum does not state that distributional effects are a rationale for considering cumulative regulatory effects, the concern that certain entities may face disproportionate burdens may be understood as a distributional concern).

<sup>20</sup> See Cass Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2260 (2002).

<sup>21</sup> See Michael A. Livermore & Jennifer S. Rosenberg, *The Shape of Distributional Analysis: Toward Efficient and Equitable Redistribution in the Developing World*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL DECISIONMAKING IN DEVELOPING AND EMERGING COUNTRIES (Richard L. Revesz and Michael A. Livermore, eds.) (Oxford 2012) (forthcoming).

<sup>22</sup> See, e.g. David Schlosberg, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* (2007) (arguing that environmental policies ignore the disproportionate pollution exposure of urban, minority, and poor communities).

<sup>23</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1325–28 (2006); see also *id.* at 1313 (noting the widespread belief that “tax-and-transfer policy can minimize any distributional problems in light of the cumulative impact of regulatory policy” (emphasis added)).

<sup>24</sup> See Livermore & Rosenberg, *supra* note 21.

<sup>25</sup> 2011 REPORT FROM THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS TO CONGRESS 11 (June 2011) (“[S]o far as we are aware, there is only limited analysis of the distributional effects of regulation in general or in significant domains; such analysis could prove illuminating.”), see also Robert W. Hahn and Patrick M. Dudley, *How Well Does the Government Do*

has not spurred widespread use. Where appropriate, OIRA should require that agencies conduct distributional analyses in a common format determined by an interagency working group. It should then aggregate that information in its annual report to Congress.

Agencies have not been undertaking thorough distributional analyses for a number of reasons. They have limited resources and additional analysis is costly and time consuming. Therefore, any new analytical requirement should seek to limit the additional burdens placed on agencies. Furthermore, agencies have not been instructed to seek distributional goals and have not been required to conduct comprehensive distributional analysis, so they may see little reason to do so. In other words, for an agency seeking to promulgate a particular rule, distributional analysis may seem both burdensome and unnecessary.

Agencies might be further incentivized to perform distributional analysis if they had a greater appreciation for the broader importance of distributional analysis and it was less costly to do so. Convening an interagency group to develop a set of best practices for distributional analysis would accomplish both of these goals.

Once a set of best practices are established, it will become less costly for an agency to do a distributional analysis in each rulemaking because the agency can refer back to established practice, rather than developing a new methodology each time. The interagency group should carefully consider the existing requirements for distributional analysis, and seek to establish a single methodology that would satisfy all of them. For example, the new distributional analysis should encompass the Regulatory Flexibility Act's requirement to consider distributional effects on small businesses.<sup>26</sup> It should also consider the Congressional information requests that agencies must respond to and seek to create a methodology that will satisfy such inquiries.

Furthermore, participation in the interagency group will promote a shared understanding that distributional analysis is important for broader policy reasons, even if it does not change the outcome of individual rules. If agencies believe in the value of the aggregate information provided by OIRA, they should be more willing to spend time to enable that information.

Compiling useful information about which groups face disproportionate burdens requires a coordinated approach. Therefore, OMB should create a common methodology for agencies' distributional analyses, including a common set of subgroups on which to focus. Subgroups could be broken down by categories based on income, wealth, race, or age.<sup>27</sup> Using a common methodology will make the distributional analyses interoperable, so that OMB will be able to aggregate that information in its annual report to Congress.

Once the interagency group makes its report, OMB should incorporate it into the regulatory review process by accepting it as standard practice and insisting that agencies follow its recommendations unless they have a particularized reason not to. After agencies begin employing more regular distributional analysis of their rules, it will become possible for OMB to aggregate those analyses for inclusion in its annual report to Congress.

ACUS should encourage OMB to pursue such initiatives. These recommendations are also relevant to the ACUS proposals on improving agency coordination. For more details on these issues, see Policy Integrity's attached comments to OIRA on promoting interagency coordination.

---

*Cost-Benefit Analysis?* 1 REV. ENV'T'L ECON. & POL'Y 192 (2007); Cass Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2260 (2002) (calling for a stronger requirement that agencies conduct distributional analysis).

<sup>26</sup> Regulatory Flexibility Act, 5 U.S.C. §§ 601–612. See Policy Integrity Comments on the RFA, *supra* note 14.

<sup>27</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Administrative State*, 106 COLUM. L. REV. 1260, 1328 (2006).

## **Ensuring Proper Regulatory Analysis During the Midnight Period**

The proposed recommendations on midnight rule would enshrine some good government practices and smooth the transition between presidential administrations. ACUS should also make recommendations that will counteract the tendency of agencies to try to avoid requirements for regulatory analysis and review during the midnight period.

### ***Guarding Against the Misclassification of Rules***

If a rule that meets the Executive Order's criteria for "significance" is classified as non-significant, it will avoid crucial analytical and review requirements. Similarly, a rule that meets the criteria for "major" and "economically significant" (i.e., a \$100 million impact on the economy) but is misclassified as "otherwise significant" would avoid the most rigorous analytical requirements and be subject to different provisions under the Congressional Review Act. Though such misclassifications can happen at any time in a presidential administration, there may be a stronger motivation for agencies to engage in such gamesmanship in the midnight period, in order to speed rules through the analytical and review requirements.

For example, on December 19, 2008, the Department of Health and Human Services finalized a rule to expand protections for medical professionals who refuse to provide health care services on moral grounds. The final rule was classified as otherwise significant but not as major and not as economically significant; the rule's effective date was set for thirty days later, January 20, 2009.<sup>28</sup> In making these determinations, however, the agency only considered the paperwork and administrative costs of the rule, ignoring the possibly large health care costs, such as restricted access to contraception.<sup>29</sup> This rule certainly could have had a significant adverse effect on public health, and possibly could have had a \$100 million impact on the economy, in the form of health care costs. In short, the rule should have been classified as "significant" under Executive Order 12,866 § 3(f)(1) and as "major" under the Congressional Review Act. Instead of the somewhat limited assessment of costs and benefits the agency performed and the thirty-day period for congressional review before the rule took effect, the rule should have been subject to a more rigorous assessment of the possible health care costs, and the effective date should have been set for sixty days after final publication.

ACUS should include a recommendation that would guard against such misclassifications during the midnight period. In particular, the recommendation should guard against the misclassification of rules where the significant costs come in the form of environmental and public health risks (such as deregulatory proposals), as well as rules with significant but hard-to-quantify costs and benefits.

### ***Requiring a Statement on the Completion of All Analytical and Review Requirements***

Recommendation 3 instructs that when a rule is proposed or finalized during the midnight period, the agency should explain in the preamble by the timing of the rule. This recommendation should be supplemented, so agencies are also required to explain in the preamble how all required analytical, disclosure, review, and comment solicitation requirements were completed. The risk that rules will be sped through their analytical and review requirements is one of the chief concerns surrounding the issue of midnight regulations, and prominently including a list of how and when such requirements were satisfied will put to rest some of the possible concerns about a rule finalized in the midnight period.

---

<sup>28</sup> Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008).

<sup>29</sup> See Memorandum on the Rule's Cost-Benefit Analysis (Policy Integrity was formerly known as the Institute for the Study of Regulation), attached to Comments from Ctr. for Repro. Rights et al. to HHS, Sept. 25, 2008, *available at* <http://policyintegrity.org/documents/CRRcommentsstoHHSwithISRMemo.pdf>.

## **Improving Inter-Agency Coordination on Conflicts, Analysis, and Data**

Though the proposed recommendations on agency coordination focus largely on joint rulemakings, memoranda of understanding, and consultation practices, the aim of the ACUS project is broader: “to identify . . . best practices for collaboration and coordination among regulatory agencies.”<sup>30</sup> As such, ACUS should call for public comments on regulatory conflict and incoherence, for the development of inter-agency processes to standardize analytical methodologies, and for improved data collection and interoperability.

### ***Addressing Claims of Regulatory Conflict and Incoherence***

In addition to Recommendation 1(a)’s suggestion that federal agencies identify areas ripe for coordination, ACUS should advise either agencies or OMB to call for public comments on the topic. Moreover, OMB should solicit public comments on examples of conflicting or incoherent rules, so as to address the problem if it exists or to rule it out if it does not. For a deeper discussion of these issues, see the attached letter to OMB on agency coordination.<sup>31</sup>

Many academic scholars have warned about regulatory conflict and incoherence. Some scholars argue that the problem is so prevalent that the government should be reformed to avoid conflicting regulations. Others have argued that the fear of inconsistent regulations has already influenced the shape of government by leading to more centralized review. Political actors have also frequently criticized the regulatory system for producing conflicting or incoherent rules.

This criticism of the regulatory system appears to be based on the number of rules and regulators. It is well known that government programs sometimes overlap and that administrative agencies have overlapping delegations of regulatory authority. Moreover, there are some examples of directly conflicting rules—two rules that were impossible to comply with simultaneously—but they are often decades old. For example, in the early 1980s, certain chocolate manufacturers faced a situation in which OSHA rules required the use of porous insulation that could not be kept clean enough to meet FDA standards. However, when academics and political actors assert that such conflicts persist, they either lack ready examples or only give examples of burdensome regulations or programmatic issues. Therefore, this problem may be overstated. Critics may be correct that regulations create significant burdens and that agency jurisdictions often overlap, but may be wrong that these overlaps actually create burdens through conflict or incoherence.

To uncover the severity of the problem of conflicting and incoherent regulations, OMB should survey academic literature, consult with agencies, and solicit and analyze comments from the public. Regulated entities are interested in reducing their regulatory burdens. Therefore, they are likely to participate in a comment process that would eliminate rules that are impossible to comply with.

ACUS should advise OMB to call for public comments on areas of shared, overlapping, and related jurisdictions, as well as examples of conflicting or incoherent rules. If few genuine examples of conflicts are submitted and the alleged problem appears to be overstated, then regulators and regulated entities can work together on more substantial concerns about regulation, such as cost-effectiveness. If conflicting rules are still a problem, then soliciting comments would be a low-cost way to find existing conflicts, which is the only way to resolve them.

---

<sup>30</sup> ACUS.gov, *Improving Agency Coordination in Shared Regulatory Space*, <http://www.acus.gov/research/the-conference-current-projects/joint-rulemaking/> (last visited May 7, 2012).

<sup>31</sup> See Letter from Policy Integrity to OIRA on Interagency Coordination (May 10, 2012).

### ***Standardizing Methodological Practices***

To carry out Recommendation 1(b)'s goal of resolving differences in the application of analytical requirements, ACUS should advise OMB to coordinate inter-agency processes to harmonize calculations of the value of statistical life, approaches to distributional analysis, and policies on cancer risks. Such efforts would also advance Recommendation 2's goals for the joint production of cost-benefit analyses. For a deeper discussion of these issues, see the attached letter to OMB on agency coordination.<sup>32</sup>

Rule development frequently requires multiple agencies to confront a similar set of methodological issues. If agencies do not coordinate on common issues, they will be unable to use the accumulated knowledge of other agencies, and systematic inefficiencies will result. Methodological standardization makes it easier to compare the effects of regulations across agencies, and it equalizes the marginal costs of regulation, leading to a more efficient regulatory system.

For complex issues, particularly where agencies have important subject matter expertise that will help shape a more accurate result, interagency groups may be the most appropriate vehicle to achieve harmonization. Interagency groups may also be superior where agencies are hesitant to change their established practices—agencies may comply with the result more readily where they had a role in its creation. The Social Cost of Carbon (SCC) working group succeeded in altering the way agencies do regulatory impact analysis, in part because it came about through an interagency process.

OMB should continue to standardize aspects of agency rulemaking through interagency working groups. While there are many areas where standardization would be highly beneficial, OMB and the regulatory agencies do not have the resources to approach all important issues at once. ACUS should prioritize the following high-impact issues for OMB to explore first:

- harmonizing the Value of a Statistical Life;
- requiring and establishing best practices for distributional analysis;<sup>33</sup>
- establishing best practices for labeling rules; and
- standardizing agency cancer risk assessment practices.

For instance, the monetized value of incremental mortality risk reduction, often referred to as the Value of a Statistical Life (VSL), is one of the most important numbers in cost-benefit analysis: an increase or decrease in the VSL will often determine whether a regulation is cost justified or how stringently a regulatory standard should be set.

Agencies use disparate VSLs. For example, in rules published last year, the Federal Motor Carrier Safety Administration (FMSCA) set the VSL at \$6 million, the Food and Drug Administration (FDA) at \$7.9 million, and the Environmental Protection Agency (EPA) at \$8.7 million. While this range is smaller than it once was, it still represents an unexplained 45% variance—large enough to have significant practical implications.

Any significant disparity in agencies' VSLs without a unifying rationale suggests that agencies may be approving or rejecting regulatory alternatives when another agency's methodological assumptions would result in the opposite outcome. This methodological divergence also makes it difficult to compare the value of life-saving regulations across agencies. Dissonant agency VSLs may account in part for the dramatic variation in the cost effectiveness of final rules and may contribute

---

<sup>32</sup> *Id.*

<sup>33</sup> See the discussion above on the recommendation for regulatory analysis for more details on coordinating distributional analysis.

to a regulatory system that, on the whole, devotes too many resources to regulations that have small net benefits and too little to highly cost-effective rules.

An interagency working group could be especially useful in harmonizing the VSL. The simplest approach would be to establish a single federal VSL. This is possible given that each agency that has approached the issue has established a single VSL across all of their rules. Alternatively, the working group might find it desirable to allow for multiple VSLs, in which case the group could either create a set of acceptable values based on willingness to pay variations or it could create a guidance document for determining the VSL. Any of these approaches would facilitate more accurate comparison of rules across agencies and would equalize the marginal costs of regulation, resulting in a more harmonious regulatory system.

### ***Promoting Data Interoperability***

Recommendation 4 encourages inter-agency teams to produce and analyze data together. To achieve this, OMB will need to promote data collection, interoperability, and sharing. For a deeper discussion of these issues, see the attached letter on data interoperability.<sup>34</sup>

Different regulatory programs, overseen by different agencies, often perform similar functions or have similar goals. For instance, many social services programs distribute financial assistance to reduce poverty or homelessness, or administer services aimed at enhancing access to health care or education. These social services programs also often serve or interface with overlapping populations. The efficacy and cost-effectiveness of these programs is hard to assess for a number of reasons, including that multiple programs contribute to the same output (for instance, better health or educational outcomes). However, one of the main reasons that evaluations and comparisons are difficult is because of insufficient or incompatible data. Data from one program may not be compatible with data from another, or a program may not collect information that evaluators of that program or other programs would find useful. Improving data collection and interoperability would enhance the government's ability to evaluate the success of these programs, both individually and comparatively. These evaluations, in turn, can inform funding allocations and regulatory decisions to help better ensure policies will return the greatest net benefits.

Data interoperability is defined as the compatibility between different data sets, often from different organizations. Data that is not collected to maximize sharing and data that is unable to be shared for nontechnical reasons are deemed "not fully interoperable." Given the difficulty in assessing the ongoing effectiveness of regulatory programs, OMB (e.g., OIRA and other actors, like the Office of E-Government) should develop and implement a new data interoperability plan, with the twin goals of improving interagency data collection and data sharing practices.

### **Improving ACUS's Own Public Comment Process**

ACUS has not made it easy for the public to comment on its proposals. Notices of committee meetings and plenary sessions do not contain the text of the proposals themselves. Proposed recommendations and draft committee reports are not always available online when the meeting notice is first announced; sometimes the proposed recommendations are only posted online days before the actual date of the meeting. Recommendations are not always posted in the most obvious place: for example, the final recommendations on midnight rules only quite recently appeared on the Midnight Rule Project Page; interested parties were expected to find the proposals on the Plenary Session Event Page (which itself was not featured prominently on the website and not easy to find). Finally, it is not always clear what stage in the process any given proposal is at or when

---

<sup>34</sup> See Letter from Policy Integrity to OMB on Data Interoperability (June 11, 2012).

exactly the public should submit its comments. ACUS needs to improve its own disclosure and solicitation practices if it wants to benefit the most from public comments.

Sincerely,

Michael A. Livermore

Jason A Schwartz

Institute for Policy Integrity

New York University School of Law

## Appendix: Redlined Changes to Proposed Recommendations

### *Redlined Changes to Recommendations on Regulatory Analysis Requirements*

Recommendation 7: The Office of Management and Budget should consider amending Circular A-4 so as to tailor the type of regulatory analysis required to the type of rule at issue. For example, the type of analysis appropriate for understanding the effects of a rule that reduces exposure to environmental pollution will be different than the analysis needed to understand the effects of a rule that determines payments for medical services, or that establishes seasons for migratory bird hunting. OMB should prioritize the clarification or expansion of the Circular A-4's discussion of the following issues: the interpretation of "significant effect" under the executive order; the proportional balancing of analytical effort against the benefits of analysis; the role of breakeven analysis; the integration of employment effects into cost-benefit analysis; and the application of advanced analytical techniques, such as sensitivity and uncertainty analyses, peer review, and rigorous distributional analysis.

.....

Recommendation 9: OIRA should develop additional guidance on how agencies can use ex-post, retrospective analysis to improve their ex-ante analytical estimates of costs and benefits.

Recommendation 10: OIRA and the Small Business Administration should together develop guidance on how agencies can focus their regulatory flexibility analysis on achieving efficiency and distributional goals, and how such analysis can be combined with broader distributional analysis.

### *Redlined Changes to the Recommendations on Midnight Rules*

Recommendation 3: When incumbent administrations issue a significant "midnight" rule—meaning one issues in the last 90 days of a presidential term—they should explain the timing of the rule in the preamble of the final rule (and, if feasible, in the preamble of the proposed rule). Similarly, agencies should use the preambles of midnight rules to explain if and how all requirements for analysis, disclosure, review, and the solicitation of public comments have been completed (or, if feasible for proposed rules, how they will be completed in time).

Recommendation 3(a): Incumbent administrations should refrain from misclassifying significant/major rules as non-significant/non-major in order to avoid analytical or review requirements in the midnight period. OIRA should develop guidance to agencies on how to guard against such misclassifications. Using rule preambles to emphasize the completion of all requisite analytical, disclosure, review, and comment procedures may assist in these efforts.

### *Redlined Changes to the Recommendations for Improving Coordination*

Recommendation 1(a): Federal agencies should identify any areas of shared, overlapping or closely related jurisdiction or operation that might require, or benefit from, interagency coordination; agencies should further identify any instances of conflicting or incoherent rules. OIRA should oversee a call for public comments to identify such areas of shared, overlapping, or related jurisdictions, as well as examples of conflicting or incoherent rules. Federal agencies that share overlapping or closely related responsibilities should adopt policies and procedures for facilitating coordination with other agencies. If any examples of conflicting or incoherent rules are identified by agencies or the public, the relevant agencies should work together to resolve them.

Recommendation 1(b): Concurrently, the Executive Office of the President (EOP) should work with the agencies to develop a policy to promote coordination where agencies share overlapping or

closely related responsibilities. The policy, while maintaining the need for flexibility, should address how agencies will, among other things: . . . (v) identify and resolve differences over the application of analytical requirements imposed by statute or executive order, and resolve differences in analytical methodologies (such as calculating the value of statistical life and conducting distributional analysis); . . . .

.....

Recommendation 4(a): The EOP should encourage agencies to conduct interagency consultations early in a decisionmaking process, before initial positions are locked in, and to conduct such consultations in a continuing and integrated, rather than periodic and reactive, way. To this end, when appropriate, the EOP should encourage coordinating agencies to establish an interagency team to produce and analyze data together over the course of the decisionmaking process, and ensure such teams have adequate funding and support. OMB should develop policies and guidance to promote such data collection, interoperability, and sharing more broadly.