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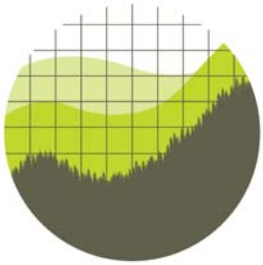

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June 13, 2012

Administrative Conference of the United States
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Subject: Comments for the ACUS 56th 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.[1] 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

[1] 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[2]—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.[3] Regulatory analysis can also be more than an internal decisiomaking tool; it is a tool for transparency, conveying information to the public and providing a forum for stakeholders to engage in the rulemaking process.[4]

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.[5] 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.

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[2] *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").

[3] *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).

[4] *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).

[5] *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.[6] 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.[7] 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.[8] 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.[9] 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.[10] 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

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[6] *See* Draft Recommendations for May 3, 2012 Meeting of the Committee on Regulation (Apr. 24, 2012).

[7] Exec. Order 12,866 § 3(f).

[8] *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).

[9] *Id.*

[10] *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.[11]

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.[12] 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.[13]

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.

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

[12] *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 (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.

[13] Policy Integrity, Comments to EPA on Retrospective Review (Mar. 18, 2011), *available at* 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.[14]

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,[15] and Executive Order 13,563 reiterated this point.[16] OMB also has emphasized the importance of considering distributional effects in several guidance documents, including *Circular A-4*,[17] "Updated Principles on Risk Analysis,"[18] and most recently with "Cumulative Effects of Regulations."[19]

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.[20] 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.[21] 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.[22] Therefore, better distributional information could be used to inform tax policy.[23] Some scholars even argue that distributional asymmetries could signal a failure in the regulatory process resulting in cost-benefit inefficiencies.[24] 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,[25] agencies rarely incorporate distributional considerations into their regulatory impact analyses. Simply asserting the importance of distributional analysis

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[14] *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.

[15] Exec. Order 12,866 §§ 1(a), (b)(5).

[16] Exec. Order 13,563 § 1(c).

[17] Circular A-4 at 14 (instructing agencies to "provide a separate description of distributional effects").

[18] *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).

[19] 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).

[20] *See* Cass Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2260 (2002).

[21] *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).

[22] *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).

[23] *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)).

[24] *See* Livermore & Rosenberg, *supra* note 21.

[25] 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.[26] 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.[27] 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. ENVT'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).

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

[27] *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.[28] 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.[29] 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.

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[28] 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).

[29] *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/CRRcommentstoHHSwithISRMemo.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."[30] 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.[31]

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.

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[30] 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).

[31] *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.[32]

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;[33]
- 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

[32] *Id.*

[33] 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.[34]

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

[34] *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.

why ACUS does not at least urge OMB to do a re-evaluation and report to Congress?

Page 6, recommendation 5: What about having Congress authorize OMB to do this without the need for Congress to approve each of those decisions?

Regulatory Analysis Requirements

Similar to my PRA comment, I think we should ask Congress (OMB) to do a cost-benefit analysis as to whether the cumulative impact of these analyses is worth it. I find the discussion of this topic on page 3 less than convincing, not because ACUS will not take a position, but because it does not urge Congress to do a full review of these requirements. Indeed, recommendation 3 on page 4, I would add to the final sentence "or eliminated" and would not object if someone with opposing views wanted to add "or expanded." Just so someone thinks about this beyond the issue of duplication. I do not think that recommendation 8 is strong enough or covers my concerns.

Thanks for looking into these. Alan

Regulatory Analysis Requirements

Comments on Proposed Recommendations

Carol Ann Siciliano
U.S. Environmental Protection Agency

5/29/12

Suggested Managers' Amendments:

Lines 65-66: Can this concept be expressed positively? Perhaps something like this:

OIRA should notify agencies . . . "and inform the agencies that they need only prepare one analysis to satisfy both requirements."

Line 65: [If the Managers decline the comment above] Replace "they" with "the agencies" (because I found "they" to be ambiguous in a sentence with two actors).

Line 85: insert hyphen in "crosscutting"

For Discussion at Plenary

Lines 78-83 (Recommendation 7): I recommend deleting Recommendation 7 in its entirety.

> Explanation: Recommendation #7 is unnecessary because Circular A-4, as written, already provides agencies with the flexibility to use different analyses based on the situation. OMB need not amend the Circular. Indeed, by making this recommendation, ACUS will imply that the current Circular is insufficiently limber to achieve our goal.
>
> OMB Circular A-4 provides guidance that allows agencies to identify "an appropriate analytical approach to use," particularly with regard to estimating costs and benefits. Agencies may tailor the method of regulatory analysis to the type of rule at issue without any change to OMB Circular A-4.
>
> Amending Circular A-4 to specify the type of regulatory analysis required for each type of rule may make regulatory analysis requirements more rigid and limit agency ability to choose among analytic approaches for particular rules.
>
> I am open to other solutions to this issue, including other ways to convey our point, as long as the new text does not involve amending Circular A-4 as currently presented.

Comments from Peter Strauss on Regulatory Analysis Recommendation
Submitted on May 21, 2012

Dear Reeve --

Hoping that this is what you mean by redline format, I'd suggest replacing the new Council text at lines 47-51,

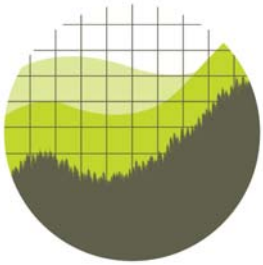
The Conference does not, however, take any position on the appropriate number of regulatory analysis requirements or on the appropriate 48 scope of their coverage. Rather, the Conference proposes a set of reforms designed to ensure that the existing requirements are applied in the most efficient and transparent manner possible.

as follows

In seeking to assure that existing analytic ~~The Conference does not, however, take any position on the appropriate number of regulatory analysis requirements or on the appropriate scope of their coverage. Rather, the Conference proposes a set of reforms designed to ensure that the existing~~ requirements are applied in the most efficient and transparent manner possible, the Conference does not address whether the number and nature of those requirements might not be reduced in light of their cumulative impact on agencies.

While I accept the neutrality of the recommendation on this question, the complete absence of even a suggestion that the current level of demand might be harmful is unfortunate. I hope that someone with the right to do so might offer this or a similar amendment at the plenary.

Peter



Institute *for*
Policy Integrity
new york university school of law

May 2, 2012

Committee on Regulation
Administrative Conference of the United States
Comments@acus.gov

Subject: Committee on Regulation—Comments on Proposed Recommendations for Review of Regulatory Analysis Requirements (posted April 24, 2012)

The Institute for Policy Integrity at NYU School of Law submits the following comments on the ACUS Committee on Regulation's proposed recommendations for review of regulatory analysis requirements. 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 on regulatory analysis requirements, the Committee on Regulation should make the following changes:

- **Revise the language of Recommendation Eight to better reflect the types of rules that should be subject to cost-benefit analysis**, as required by law and justified by best economic practices. In particular, deregulatory proposals, rules with significant benefits, and rules with significant but unquantified costs or benefits should be subject to traditional cost-benefit analysis, and the scope of Circular A-4 should not exclude any category of rule covered by Executive Order 12,866.
- **Explore additional opportunities to 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 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.

The proposed recommendations aim to improve the efficiency and transparency of regulatory analysis requirements[1]—an essential goal. Regulatory analysis can help promote rationality and

[1] *See* ACUS Comm. on Regulation, *Proposed Recommendations on Regulatory Analysis Requirements* at 2-3 (Apr. 24, 2012) [hereinafter Recommendations] ("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").

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.[2] Regulatory analysis can also be more than an internal decisiomaking tool; it is a tool for transparency, conveying information to the public and providing a forum for stakeholders to engage in the rulemaking process.[3]

The first seven suggestions in the proposed recommendations are both appropriate and relatively non-controversial. They focus on enhancing transparency,[4] streamlining requirements to reduce analytical burdens on agencies,[5] and defining the scope of requirements more consistently.[6]

Recommendation Eight, on the other hand, threatens to undermine the balanced and efficient application of analytical requirements. The implicit goal of Recommendation Eight (as revealed in the accompanying consultant report)[7] certainly has merits: analytical requirements should be tailored to the type of rule at issue, so agencies are not burdened with analysis unlikely either to affect the ultimate rulemaking decisions or to meaningfully inform the public dialogue. The plain language of the recommendation, however, would exclude from analysis 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 Eight also seems to ignore some of the mandates under Executive Order 12,866.

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's own statements make clear.[8] The Committee on Regulation 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.

Revising Recommendation Eight to Align with Legal and Economic Norms

Recommendation Eight states:

> The Office of Management and Budget should consider amending Circular A-4 so as to tailor the type of regulatory analysis to the type of rule at issue. Traditional cost-benefit analysis seems most appropriate for rules that would impose high annual compliance costs (at an identified level indexed to inflation) or that would result in major increases in costs or prices. Alternative types of analyses (more in the nature of accounting balance sheets) appear more appropriate for rules simply increasing or decreasing federal transfer payments (e.g., Medicare reimbursements or grants-in-aid) by the indexed amount or

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[2] *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).

[3] *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).

[4] Recommendations, *supra* note 1, at #1 (posting requirements online), #2 (ditto), and #5 (identifying applicable requirements in the rulemaking preamble).

[5] *Id.* at #3 (consolidating existing analyses) and #4 (consolidating future analyses).

[6] *Id.* at #6 (reevaluating agencies' discretion to determine the applicability of requirements) and #7 (adjusting the monetary threshold for inflation).

[7] *See* Curtis Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform* at 78-79 (Apr. 23, 2012) [hereinafter Consultant Report] (implying that analysis should only be done where likely to have an effect on the rulemaking outcome).

[8] *See* citation and quotations *supra* note 1.

setting fee structures (e.g., for nuclear power plant inspections) that are expected to produce at least the indexed amount in annual revenues. Rules that qualify as "major" or "economically significant" merely because they stimulate consumer spending (e.g., setting migratory bird hunting seasons) might not be subject to any special analysis requirement.

The limited scope suggested for application of "traditional cost-benefit analysis," the recommended tailoring for other types of rules, and the vague language all are problematic legally and economically.

Traditional Cost-Benefit Analysis Should Extend to Deregulation, Rules with Significant Benefits, and Rules with Unquantified but Significant Costs or Benefits

To repeat, Recommendation Eight advises that "traditional cost-benefit analysis" under OMB's Circular A-4 should apply only to "rules that would impose high annual compliance costs . . . or that would result in major increases in costs or prices"—implying that all other categories of rules should be subject to less rigorous or no analytical requirements. This approach is wrong from both legal and economic perspectives.

OMB has crafted the Circular A-4 to implement the executive orders on regulatory review. Executive Order 12,866 (incorporated by Executive Order 13,563) sets up two tiers of required economic analysis. For what are sometimes referred to as "economically significant rules," a rigorous cost-benefit analysis is required, including quantification where possible, disclosure of methodology, and assessment of feasible alternatives. For what are sometimes referred to as "otherwise significant rules," only a somewhat looser assessment of potential costs and benefits is strictly mandated.[9] Recommendation Eight's term "traditional cost-benefit analysis" is undefined, but likely it means the former, more rigorous standards for cost-benefit analysis.

Importantly, the category of "economically significant rules" subject to rigorous cost-benefit analysis, as defined by the Executive Order at § 3(f)(1), includes more than just rules that "impose high annual compliance costs . . . or that would result in major increases in costs or prices" (i.e., the two categories Recommendation Eight identifies for "traditional cost-benefit analysis"). In particular, the Executive Order requires rigorous cost-benefit analysis for any rule with an annual effect—positive or negative—on the economy of $100 million or more, as well as any rule that "adversely affect[s] in a material way the economy, a sector of the economy, productivity, competition, jobs, the *environment, public health or safety*, or State, local, or tribal governments or communities."[10] Unless the executive orders on regulatory review are changed, it would not be appropriate for OMB to revise the Circular A-4 to remove these additional categories of rules from the requirements of traditional cost-benefit analysis.

More to the point, such changes would be inadvisable: limiting the scope of cost-benefit analysis in this way would make the practice less balanced and less efficient, by removing several categories of rules that would benefit from economic scrutiny. For example, a deregulatory proposal in the environmental, health, or safety context would not cause either high annual compliance costs or major increases in prices. Instead, the costs would likely come in the form of adverse effects on the environment, public health, and safety. Deregulation has historically been subject to less frequent analysis,[11] but that is not a practice ACUS should recommend perpetuating. To the contrary, applying economic analysis to deregulatory proposals can be enlightening, both for disclosing information to the public and for helping agency analysts assess whether the deregulation is maximizing net social benefits.

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[9] *See* Exec. Order 12,866 § 6(a)(3)(B)-(C).

[10] *Id.* § 3(f)(1) (emphasis added).

[11] *See* REVESZ & LIVERMORE, RETAKING RATIONALITY, *supra* note 2, at 153.

For instance, EPA's greenhouse gas tailoring rule (included in the Congressional Research Service study that informed the ACUS's consultant report)[12] can be viewed as deregulatory in nature: it delivered nearly $200 billion worth of benefits in avoided regulatory compliance and administrative expenses, versus an unquantified amount of costs in foregone emissions reductions. This rule arguably would not have been covered by Recommendation Eight's scope, even though EPA's economic analysis of seven alternative policy options helped the agency both select the appropriate scope of the final regulation and justify its choice to the public.[13]

Similarly, Recommendation Eight's scope for traditional cost-benefit analysis does not seem to cover rules with significant benefits but non-major costs. Another rule cited by the CRS study is a Drug Enforcement Administration regulation on electronic prescriptions for controlled substances, which generated annual costs of $43 million (i.e., below the monetary threshold) compared to annual benefits of over $400 million.[14] Again, it is not clear if Recommendation Eight's scope would have covered this rule, even though DEA's analysis of three different policy alternatives helped the agency determine which regulatory option would maximize net benefits for society.[15]

Finally, EPA's recent new source performance standard for air pollution from the oil and natural gas sectors provides another good example of a rule that would not clearly be included in the scope of Recommendation Eight. This air pollution rule was estimated to have negative compliance costs (i.e., savings) of a few million dollars, and completely unquantified but significant benefits to public health and the environment. Nevertheless, EPA classified the rule as economically significant and submitted it to OMB for review under Executive Order 12,866, because the agency believed the costs and benefits—if they could be fully quantified—would likely exceed $100 million per year.[16] Importantly, under Executive Order 12,866, the standard for coverage is whether a rule is "likely" to have significant costs or benefits.[17] Even if the costs and benefits cannot be fully quantified and monetized, rules with significant but unquantifiable impacts should still be subject to analysis. Cost-benefit analysis creates a framework for assessing unquantified impacts in a rigorous and meaningful way—for example, through the application of breakeven analysis techniques.[18] Thus, such rules should not be excluded from the scope of "traditional cost-benefit analysis."

Different Instructions Would Be More Appropriate for Transfer Rules, User Fee Rules, "Consumer Surplus" Rules, and Other Significant Rules

Recommendation Eight advises that "alternative types of analyses (more in the nature of accounting balance sheets) appear more appropriate for rules simply increasing or decreasing

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[12] Curtis Copeland & Maeve Carey, Cong. Res. Serv., *REINS Act: Number and Type of "Major" Rules in Calendar Year 2010*, at app. (Apr. 2011); *see also* Consultant Report, *supra* note 7, at 11 (citing to the CRS study).

[13] EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

[14] This rule could be considered, in part, to be deregulatory in nature, since it was moving from a written/oral requirement to an electronic option. Nevertheless, it is easy to imagine other rules in other years with significant benefits but non-major costs. For example, the CRS report also includes a Department of Energy rule establishing efficiency standards for certain commercial products, predicted to generate manufacturer losses of less than $10 million (net present value) but benefits up to $900 million (net present value). When annualized, it not clear that either these costs or benefits, or the combination of costs and benefits, would satisfy the monetary threshold set by Executive Order 12,866 (except perhaps in the high-growth, low discount rate scenarios). *See* Dept. of Energy, Energy Conservation Standards for Commercial Clothes Washers, 75 Fed. Reg. 1122 (Jan. 8, 2010). But future efficiency rules could have sufficiently high annual benefits, despite limited compliance costs.

[15] DEA, Electronic Prescriptions for Controlled Substances, 75 Fed. Reg. 16,236 (Mar. 31, 2010).

[16] EPA, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutant Reviews, *available at* http://www.epa.gov/airquality/oilandgas/pdfs/20120417finalrule.pdf.

[17] Exec. Order 12,866 § 3(f).

[18] OMB, Circular A-4 at 13 (2011).

federal transfer payments . . . or setting fee structures." First, what is envisioned by an "accounting balance sheet" is unclear. In particular, it is unclear whether this term means the simplified assessment of costs and benefits required by Executive Order 12,866 for "otherwise significant rules," or whether the standard is even less rigorous than that.

The Executive Order's definition of "significant" is a good place to start when determining the appropriate requirements for transfer rules and user fee rules. The category of "otherwise significant rules" includes: rules that create a serious inconsistency or otherwise interfere with the action of another agency; rules that materially alter the *budgetary impact of entitlements, grants, users fees, or loan programs or the rights and obligations of recipients* thereof; and rules that raise novel legal or policy issues.[19] For all these rules, the Executive Order still requires an assessment of potential costs and benefits, but the standards are less rigorous than for economically significant rules.

Most federal transfer payments and fee structure rules would clearly fall within the scope of the second, italicized category above. Transfer payments are usually thought not to affect efficiency, but rather to have mostly distributional consequences. If ACUS wishes to exclude transfer payments and fee structure rules from "traditional," rigorous cost-benefit analysis, its recommendations could advise OMB to interpret transfers and fees as not having a significant or adverse *effect* on the economy, by defining the term "effect" under the Executive Order. For example, "effect" could be defined exclusively in terms of efficiency, excluding the purely distributional impacts of transfer payments. Instead, such rules would remain "otherwise significant," and so be subject to the less rigorous requirements for cost-benefit assessments. Distributional analysis could be an appropriate part of the analytical requirements for these types of rules.

Recommendation Eight offers no opinion on if or how analytical requirements should be tailored for the other two categories of significant rules: those creating inconsistencies and those raising novel issues. One possible recommendation would be for OMB to clarify that the cost and benefit assessments required for these rules should be proportional to the extent analysis will impact the policy choices, will help highlight or resolve the inconsistency, or will enhance the public understanding of the novel issues.

The final sentence in Recommendation Eight advises that rules qualifying as significant "merely because they stimulate consumer spending (e.g., setting migratory bird hunting seasons) might not be subject to any special analysis requirement." The consultant report clarifies that, at least in calendar year 2010, this category of "consumer surplus rule" exclusively included migratory bird rules.[20] It very well may not make sense to subject migratory bird rules to full, annual cost-benefit analyses. However, the consultant report does note that the Department of the Interior already satisfies its analytical requirements for these rules by updating its analysis only every five years or when new data becomes available,[21] raising a question as to whether the burdens of analysis for these rules are really so onerous or disproportionate to the benefits of analysis. Regardless, eliminating analytical requirements for all consumer surplus rules in order to exempt migratory bird rules seems overly broad. Moreover, the scope of "consumer surplus rules" or "rules that stimulate consumer spending" is not clear—especially how this category might overlap with rules with significant cost savings, rules with significant benefits, or rules with major impacts on prices. The recommendations need to better define which types of rules it is trying to exempt from

[19] Exec. Order 12,866 § 3(f) (emphasis added).

[20] Consultant Report, *supra* note 7, at 42.

[21] *Id*.

analysis, explain the legal and economic justifications for such exemptions, and describe in detail how OMB should properly tailor such analytical requirements.

Cost-Benefit Analysis Could Be Tailored in Other Ways to Reduce Unnecessary Burdens and Improve Efficiency

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. Circular A-4's limited guidance on proportional analytical efforts could be expanded.[22] Circular A-4 should continue to recommend that important but unquantified costs or benefits be assessed using breakeven analysis.

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.[23] 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.

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.[24] 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 comments on retrospective review.[25]

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

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[22] *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).

[23] *Id.* at 15.

[24] *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 (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.

[25] Policy Integrity, Comments to EPA on Retrospective Review (Mar. 18, 2011), *available at* http://policyintegrity.org/documents/Policy_Integrity_EPA_Retrospective_Review.pdf.

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.

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 comments on the regulatory flexibility act.[26]

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,[27] and Executive Order 13,563 reiterated this point.[28] OMB also has emphasized the importance of considering distributional effects in several guidance documents, including Circular A-4,[29] "Updated Principles on Risk Analysis,"[30] and most recently with "Cumulative Effects of Regulations."[31]

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.[32] 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.[33] 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

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[26] *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.

[27] Exec. Order 12,866 §§ 1(a), (b)(5).

[28] Exec. Order 13,563 § 1(c).

[29] CIRCULAR A-4 at 14 (instructing agencies to "provide a separate description of distributional effects").

[30] *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).

[31] 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).

[32] *See* Cass Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2260 (2002).

[33] *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).

biases.[34] Therefore, better distributional information could be used to inform tax policy.[35] Some scholars even argue that distributional asymmetries could signal a failure in the regulatory process resulting in cost-benefit inefficiencies.[36] 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,[37] agencies rarely incorporate distributional considerations into their regulatory impact analyses. Simply asserting the importance of distributional analysis 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.[38] 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

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[34] *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).

[35] *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)).

[36] *See* Livermore & Rosenberg, *supra* note 33.

[37] 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 Cost-Benefit Analysis?"* 1 REV. ENVT'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).

[38] Regulatory Flexibility Act, 5 U.S.C. §§ 601–612. *See* Policy Integrity Comments on the RFA, *supra* note 26.

be broken down by standardized deciles of the population based on income, wealth, race, or age.[39] 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.[40]

Sincerely,

Michael A. Livermore
Jason A Schwartz

Institute for Policy Integrity
New York University School of Law

[39] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Administrative State,* 106 COLUM. L. REV. 1260, 1328 (2006).

[40] For more details on these issues, see Policy Integrity, Comments to OIRA on Promoting Interagency Coordination (forthcoming).

May 1, 2012

H. Russell Frisby, Jr, Chair
Committee on Regulation
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Dear Mr. Frisby:

The Small Business Administration Office of Advocacy (Advocacy) would like to offer comments on the Administrative Conference of the United States (ACUS) Review of Regulatory Analysis Requirements and the April 24 draft Recommendations. We believe that this project presents an opportunity to make a stronger statement about the role of regulatory analysis in policymaking and the value of early public engagement.

Advocacy was created by statute in 1976 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed in this letter do not necessarily represent the views of SBA or the Administration.

Advocacy believes that the overall purpose of regulatory analysis is to inform and guide policy decisions. The ACUS report aptly focuses on the ways in which agencies communicate the current wide range of analytical requirements to the public. However, it does not emphasize the important role these tools also play in forming policy. Agencies should begin developing supporting analysis, including the identification and consideration of significant alternatives, in advance of identifying regulatory provisions, or even, if possible, choosing a regulatory strategy. Analysis that focuses only on informing the public misses an opportunity to improve the quality of regulatory decisions when they are being made. In the case of the Regulatory Flexibility Act, Advocacy advises agencies to develop economic analyses early in the process, so impacts on small entities can be presented to agency leaders before a preferred alternative is selected. Similarly, Executive Order (EO) compliance for issues such as energy supply and children's

health should be part of the supporting documents presented to policymakers rather than relegated to boilerplate in the preamble.

Advocacy therefore suggests that ACUS recommend agency best practices to incorporate analytical requirements into the earliest stages of policy development. This should include early consultation with the public, for example through Advance Notices of Proposed Rulemaking, Requests for Information, or Notices of Data Availability that inform the public of the analyses that the agency anticipates conducting and the data currently available to support those analyses. This approach is also consistent with OIRA Administrator Cass Sunstein's recent memorandum on Cumulative Effects of Regulations (March 20, 2012). Advocacy believes this approach offers the dual benefit of encouraging robust analysis in advance of policy formation while minimizing the burden of multiple analytic requirements. Early planning and consideration of all requirements is the most effective way to reduce the overall burden of the individual requirements without compromising their underlying purpose.

With respect to particular draft Recommendations, Advocacy offers the following thoughts:

- Draft Recommendation 5 may unfortunately encourage the idea that compliance with an EO dealing with particular policy priorities is in fact a 'checkbox' exercise, rather than a statement of the Administration's policy preference in decisionmaking. Advocacy believes that, even when the applicability of a particular EO appears obvious, the agency should explain to the public its reasoning. Assertions that the data indicate a particular outcome, as in the draft example, should be supported and available to the public for comment. Therefore, Advocacy suggest that a tabular format include cross-references to any analysis performed to support the requirement, whether it be a complete analysis or a screening analysis.
- In the context of draft Recommendation 6, Advocacy has recommendations for statutory revisions to the RFA. These legislative priorities are attached.
- Advocacy recommends that the last sentence of Recommendation 8 be deleted. Even regulations that stimulate consumer spending should be supported by an analysis of alternatives to demonstrate that the agency has maximized net benefits and that the distribution of those benefits do not disproportionately favor large businesses at the expense of small businesses.

Thank you for the Committee's attention to regulatory analysis requirements. If you have questions or require additional information, you may contact Assistant Chief Counsel David Rostker, at (202) 205-6966 or david.rostker@sba.gov, or Economist Christine Kymn, at (202) 205-6972 or christine.kymn@sba.gov. I am looking forward to the continuing dialogue on this important matter.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Christine Kymn
Economist

/s/

David J. Rostker
Assistant Chief Counsel

Attachment: Legislative Priorities for the 112th Congress, Office of Advocacy, U.S. Small Business Administration

SBA Office of Advocacy
www.sba.gov/advocacy

Legislative Priorities

Advocacy: the voice of small business in government

Legislative Priorities for the 112th Congress
Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy was established by Public Law 94-305 to represent the views of small businesses before federal agencies and the U.S. Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Office of Advocacy's top legislative priority is to give small businesses a voice in the regulatory process.

Advocacy's research shows that small firms generate 60-80 percent of all net new jobs, represent 99.7 percent of employers, and employ about half of all private sector employees. Small patenting firms produce about 16 times more innovations per employee than larger firms. Executive Order 13563 calls for regulations that protect public health, welfare, safety, and the environment, while promoting economic growth, innovation, competitiveness, and job creation.

Advocacy works to reduce the burden of regulation on small business through its role as the guardian of the Regulatory Flexibility Act (RFA). For more than 30 years, the RFA has required that agencies examine their proposed regulations for the effects on small entities and consider less burdensome approaches as appropriate.

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. The act required the CFPB to comply with the RFA section 609 small business advocacy review (SBAR) panel process, making it the third agency given this responsibility, along with the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). In September 2010, the Small Business Jobs Act gave Advocacy increased budgetary independence by creating a separate account for the office in the Treasury's General Fund. The law also requires agencies to provide more detailed analysis in response to comments from the Chief Counsel for Advocacy.

The federal government has saved small entities billions of dollars by following the RFA's direction and minimizing the impact of regulatory mandates on small business. History has shown that regulatory sensitivity toward small entities can be achieved without sacrificing the underlying purposes of environmental protection, workplace safety, border security, and other governmental priorities.

The 112th Congress has placed a strong emphasis on reducing barriers and promoting small business. The following amendments represent Chief Counsel for Advocacy Winslow Sargeant's legislative priorities.

1. Review of Existing Rules With the promulgation of new regulations each year, the cumulative impact can be extremely burdensome on small business. Evaluating existing regulations periodically helps minimize this impact. Advocacy believes there should be additional triggers for such reviews.

> **Amendment:** Strengthen section 610 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), that currently requires federal agencies to review regulations at the ten-year mark to assess their present-day impact. Section 610 should provide for public petitions for review and analysis of burdensome regulations without regard for how long the rules have been in place. Additionally, the list of scheduled section 610 reviews should be incorporated into the section 602 Regulatory Agenda.

2. Improve SBAR Panels. The SBAR panel process plays an important role in allowing for small business comment at EPA, OSHA, and CFPB. If small business panels are to work efficiently and to allow maximum input from small businesses, at least two months' notice of an impending panel is required. Over the years, disagreements have arisen about the amount and quality of information provided to the small entity representatives in the SBAR panels. Amending section 609 of the RFA would address these issues and help achieve better panels.

> **Amendment:** Modify section 609 of the RFA to require more detailed notification in advance of convening a panel and to specify information that must be provided to small entity representatives to the panel.

3. Narrowly Analyze Indirect Economic Impacts. Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

> **Amendment:** Amend section 601 of the RFA to define "impact" as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

Additional Improvements to the RFA or Other Legislation to Help Small Business

While this list represents Advocacy's top legislative priorities, Advocacy is prepared to work with Congress on other ideas for improving the RFA or on other legislation to support small business. The RFA has been an increasingly effective tool over the years, and Advocacy is wary of any changes that would potentially overwhelm its unique purpose or undermine its effectiveness. However, we do believe that a number of measured and technical changes could improve the RFA.

Comments from Professor Peter Strauss on Copeland Report and Draft Recommendation

Submitted on April 1, 2012 for Consideration of Committee on Regulation at its April 4, 2012 Meeting

Dear Reeve,

I've just finished a quick read of Curtis Copeland's report that you will be discussing Wednesday. I am so sorry that my teaching obligations will keep me away from any contact with the meeting, and that I will be out of the country May 3, and send these thoughts in the hope they will prove helpful.

Reflecting his many years at GAO and CRS, his intelligence and his DC contacts built up over the years, Curtis's report is as good as ACUS ever gets. What a treasure-trove of information and analysis!

I was stunned to read early on in the report (p. 6) that "The Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) declined to participate in the study." March 20, as I suppose you know, OIRA issued a two-page directive requiring agencies to engage in a new form of analysis, of the cumulative impact of their rules. http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf. This memo betrays no concern for the cumulative impact of analytic requirements, while asking agencies to take nine separate bullet-pointed steps in compliance with the new directive. "Cumulative burdens can create special challenges for small businesses and startups," the directive remarks; and also for agencies. ACUS has been reluctant to address itself to OIRA in the past; hopefully it will now, and OIRA will be willing to be engaged.

That said, I thought the brief preamble to the recommendation failed to reflect the richness of Curtis's study -- in particular, its recognition that that the principal analytic requirements do not map so well on one another.

For the recommendations themselves,

1) In my judgment, the first recommendation should not ask OIRA merely to list -- what Curtis has done so well -- but also to work with agencies to rationalize and consolidate them to the extent that can be done. This can be done by consolidation with 5 & 6, below.

2) I was a little surprised not to find "major" in Curtis's second recommendation (p. 76). Some such qualification belongs between "each" and "substantive" in the first line of the second recommendation, to avoid seeming to require this boilerplate for ALL rulemaking, no matter how trivial.

3) I suggest rewording the last words of p. 3 and first of p. 4 to something on the order of "requirements that, although broadly stated, in practice have proved rarely to be applicable." The following sentence, about inflation indexing, deserves statement in its own, separate recommendation.

4) Consistent with the recommendation for inflation indexing, recommendation 4 should not recite specific dollar amounts. So, "... impose high annual compliance costs, at an identified level indexed to inflation ... federal transfer payments by the indexed amount ... produce at least the indexed amount in annual revenues."

5 and 6) could be consolidated with 1, and urge OIRA to coordinate a study of this rationalization/consolidation. Better to address OIRA than the President, in my judgment, and "consider reviewing" ought to be, simply and directly, "review."

Peter

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****

REGULATORY CHECKBOOK

November 9, 2011

Comments on

"Regulatory Analysis Requirements Draft Outline,"
by Curtis W. Copeland[1]

Richard B. Belzer

COMMENTS ON "SPECIFIC RESEARCH QUESTIONS"

1. Types of analysis required. The taxonomy of regulatory analyses is straightforward. However, it appears to exclude regulatory analysis requirements established by agencies themselves, pursuant to the agency head's own authority; by Congress the Administrative Procedure Act, as a requirement for reasoned decision making; or by Congress to implement statutory directives.
    a. The exclusion of these other regulatory analysis requirements implicitly presumes that agencies would conduct no regulatory analysis before deciding whether to take action or what action to take.
    b. Though Environmental Impact Statements are mentioned in passing, the outline does not seem to go anywhere with this. It would be useful to know how the various regulatory analysis requirements compare with NEPA's EIS requirement on each of the margins below, as the EIS provides an especially useful baseline insofar as regulations are treated as exempt from the definition of "major federal action" in 40 C.F.R. § 1508.18 and related requirements.

[1] Curtis W. Copeland, "Regulatory Analysis Requirements Draft Outline," http://www.acus.gov/wp-content/uploads/downloads/2011/11/Review-of-Regulatory-Analysis-Outline.pdf (posted by ACUS November 2, 2011).

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c. What is the value-added of this task? Mr. Copeland expects to show only what is already known—that agencies face multiple analytic requirements.

2. Overlapping/duplicative analytical requirements.

   a. Genuine duplication may not be as common as usually believed. Care must be taken to distinguish between genuine duplication (i.e., the imposition of identical analytic requirements multiple times or places) with superficial duplication (e.g., the imposition of analytic requirements that seem to be identical but which are different when examined carefully).

   b. Superficial duplication often masks major differences. For example, EO 12866 and RFA both require "cost" estimates, but the definition of cost in the latter ("direct cost to small entities") is very different, and a subset of, the definition in the former ("social opportunity cost").

   c. Thus, it is insufficient to look just at analytic terms and assume that they have the same meaning. Genuine overlap/duplication may be less pronounced than inconsistency.

   d. Inconsistency sometimes appears to have been intended. A clue can be observed when the definition of a crucial term *does not* rely on a cross-reference, but easily could have.

   e. What is the value-added of this proposed task? Mr. Copeland expects to show what is already known—that agencies attempt to combine analyses whenever possible.

3. Costs and benefits of regulatory analysis. Mr. Copeland likely will not be able to obtain reliable estimates or accurately interpret the figures he obtains.

   a. Unless they contract out for the entire work product, agencies are unlikely to maintain records with sufficiently

fine granularity to estimate expenditures on individual analyses.

b. Even if they have such records, *expenditure* is not *cost*.

c. Analytical costs borne by private parties will be missed. These include:

   i. The cost of performing analyses to verify agency estimates.

   ii. The cost of performing analyses agencies decline to perform correctly or at all.

d. How would the "benefits" of regulatory analysis be defined? Benefits to the agency? To the public? A clear and reasonable definition is essential before proceeding further.

a. What is the value-added of this task? Mr. Copeland intends to rely on agency documentation, an approach that can be predicted to yield information of little value.

4. Agency compliance with analytic requirements.

   a. OMB reviews all RIAs but does not publicly opine about agency compliance. Its annual Reports to Congress incorrectly imply that noncompliance isn't a problem. OMB treats all agency estimates equally valid and reliable, without bias, error, excess precision, or uncertainty).

   b. SBA-Advocacy *may* do the same for IRFAs, but it also does not opine systematically about agency compliance.

   c. GAO makes no meaningful effort to evaluate compliance.

   d. Various nongovernmental attempts have been made over the past 15+ years to measure or monitor agency compliance. These efforts are bounded by Belzer (1999)[2]

[2] Richard B. Belzer, 1999. *CSAB Project on Regulatory Oversight: Study Protocol 1,*" Center for the Study of American Business, Washington University in St. Louis (evaluative criteria in Appendices A-G).

and Ellig and Morrall (2010).[3] Each has had a fatal defect (e.g., CSAB's was too comprehensive to be implementable at reasonable cost; Mercatus' is too superficial).

e. How will compliance be measured in this study?

5. Accuracy of ex ante estimates.

   a. Accuracy is collinear with, and hard to distinguish from, compliance except in extreme cases (e.g., the absence of analysis).

   b. Accuracy must be distinguished from precision.

   c. False precision must be distinguished from true precision.

   d. What is the value-added of this task? Mr. Copeland expects to show that "regulated entities/others disagree with agencies' estimates of costs and/or benefits," a fact that is well known.

6. Ossification resulting from regulatory analysis.

   a. Ossification is a conclusion famously reached by McGarrity (who opposes most analytic requirements) based on anecdote and rumor. An attempt to test this hypothesis might be useful, but it would be a heroic task almost certainly beyond what Mr. Copeland can do.

      i. Multiple confounders must be managed to tease out the effects of analytic requirements.

      ii. Delay (a sensitive but not selective proxy for ossification) must be balanced by the benefit of better regulation (if any).

      iii. Among these benefits is an increased likelihood of successful legal defense (i.e., reduced delay).

   b. No benefits could be obtained from analysis if agencies did not implement previous ACUS Recommendations (e.g.,

[3] Jerry Ellig and John Morrall, 2010. *Assessing the Quality of Regulatory Analysis*, Mercatus Center, George Mason University.

85-2.1: "Regulatory analysis can be most useful to agency decisionmakers in identifying regulatory options if the regulatory analysis function is an integral part of the agency decisionmaking process," emphasis added).

i. Deciding to ignore analysis in decision making is not chargeable as a cost to the analytic requirement.

ii. Benefit should be estimated as what could have ben obtained had the decision maker chosen to utilize it.

c. Is this hypothesis testable? How? If not, is it worth performing research?

7. Results used in decision making.

a. Benefits of analysis cannot be estimated without first taking this into account.

b. Mr. Copeland should reverse the order of questions 6 and 7 and attempt to answer this question conditional on whether the agency used analysis to inform decision making.

i. Where analysis was not used, what was the potential increase in net benefit?

ii. Where analysis was used, what was the estimated increase in net benefit?

c. Is this task researchable? Mr. Copeland expects to "examine rules and related analyses to determine whether there is evidence that the agencies used the results in decision making." Where in these documents will such evidence be located?

d. Timing. Mr. Copeland proposes to "determine at what point in the rulemaking process agencies conducted the analysis."

i. The key question is whether analysis was performed first (and thus could have informed decision making)

or second (and thus was intended to justify decisions already made).

ii. Answers to this question would be extremely valuable, for they speak specifically to the question whether process reform should seek to expedite the analytic stage much earlier in the regulatory development process.

iii. Mr. Copeland's methodology here is sketchy.

COMMENTS ON "OVERALL METHODOLOGY"

1. Interviews are a problematic research strategy.
    a. They are useful for generating hypotheses and possible fact-checking, but Mr. Copeland appears intent on using them for inferential purposes (see bullets 1 and 3).
    b. Mr. Copeland proposes a sample of persons/organizations to interview that reflects built-in selection bias, gives equal weight irrespective of expertise (e.g., of the 4 organizations listed, only Mercatus has relevant expertise; the others have policy interests that are variously affected by regulatory analysis and thus varying interest in quality).
    c. Accuracy of responses cannot be verified; strategic behavior is highly likely.
    d. Interviews are likely to yield predictable answers.
2. Mr. Copeland's sample is likely to suffer selection biases that make it impossible to generalize.
    a. 2010 only. Is it representative? Of what?
    b. "Selected agencies" only. (Ditto.)
    c. "At least 2 rules from" each selected agency only. (Ditto.)
    d. This sample is missing dogs that don't bark, e.g.:

i. Major rules without analyses.

ii. Rules that were major but misclassified, plausibly to avoid analytic requirements.

SUGGESTED ALTERNATIVES

1. Limit the project to tasks that are:
    a. Researchable;
    b. Can plausibly test interesting hypotheses; and
    c. Reveal something we do not already know.
2. Broadly compare agency performance today with performance in the pre-analytic era (1970s). (This better utilizes Mr. Copeland's decades of experience.)
3. Identify top (say) three procedural barriers to improved quality. Some possibilities come to mind:
    a. Timing. If regulatory analyses are not performed before decisions are made, then they cannot improve decision making.
    b. Independence. Do agency analysts have sufficient independence from agency program officials to perform analysis without bias?
    c. Accountability.
        i. Are there any rewards for quality? Are there penalties?
        ii. Are there any penalties for error? Are there rewards?