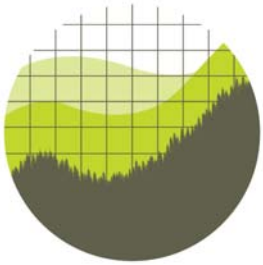

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May 2, 2012

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,

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[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).