Fixing Regulatory Review

Recommendations for the Next Administration

Institute *for* Policy Integrity
New York University School of Law

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Contents

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Executive Summary

This report contains a set of recommendations for the next administration to improve the process of regulatory review, including a set of ten principles that should inform regulatory review and cost-benefit analysis of regulation, and a detailed markup of the Executive Order signed by President William Jefferson Clinton that established the structure of review that is currently in place.

Our recommendations are divided into two categories: the role of OIRA, and methodological issues relating to cost-benefit analysis. After a brief introduction, the following two sections include ten primary recommendations, along with brief background information, and parts of the Executive Order that should be revised. The final section includes detailed revisions of the Clinton Executive Order, and is cross-referenced with the relevant recommendations.

Of the ten principles, four are dedicated to OIRA's role in overseeing agency regulation:

I. **Coordination**: OIRA should increase its commitment to improving agency coordination by reestablishing regular meetings of the Regulatory Working Group, and by creating standing subgroups in key areas where coordination is needed.

II. **Transparency**: To ensure that informal review by OIRA is not used to circumvent transparency requirements, agencies should be given the power to trigger the formal review process by submitting a proposed regulation to OIRA.

III. **Scope**: OIRA should subject regulations of all agencies to equally high levels of scrutiny, rather than focusing on the regulations of particular agencies.

IV. **Inaction**: OIRA should review petitions for rulemakings that have been denied by agencies as part of an annual planning process, to protect against agency inaction.

The next six principles are dedicated to reforms in the methodology of cost-benefit analysis:

V. **Net Benefits**: Agencies should focus on maximizing net benefits—including quantified and unquantified benefits—not on minimizing regulatory costs.

VI. **Ancillary Benefits**: When accounting for the indirect effects of regulation, agencies should pay equal attention to both the positive and negative indirect effects.

VII. **Future Generations**: The current practice of discounting benefits for future generations at a constant rate consistent with the return on traditional financial instruments should be abandoned in favor of a valuation mechanism that reflects the fundamental moral and ethical difficulties that arise with regulations that have intergenerational effects.

VIII. **Distribution**: Cost-benefit analysis should be accompanied by distributional analysis, conducted on a central and holistic level, to account for disadvantaged groups, including those that face disproportional environmental, health, and safety risks.

IX. **Costs**: Cost estimates should take account of possible production process changes and technological innovations in response to new regulation, and should not be based exclusively on end-of-the pipe or currently available technology.

X. **Deregulation**: Review of deregulation should be as stringent as review of new regulation.

Introduction

The regulatory review process has been a double-edged sword for the federal government. At its best, the practice offers the potential to improve regulations dramatically, by emphasizing broad administrative priorities, resolving inter-agency conflicts, harmonizing regulatory policies and procedures, and assessing distributive impacts. When executed faithfully and impartially, the review process has advanced properly-calibrated regulations that deliver key benefits to Americans with efficiency and fairness. Unfortunately, through much of its history, the review process has also been used to delay the passage of beneficial regulation and to inject bias and capriciousness into what should be evenhanded and reasoned decisionmaking.

Since 1981, presidential executive orders have shaped the federal administrative state by placing cost-benefit analysis at the center of regulatory review. While that system has at times helped develop many exemplary regulations, the current practice of federal regulatory review undeniably suffers from critical limitations and weaknesses. Using the last twenty-eight years of successes and failures as a guide, a revision of the current executive order can minimize potential pitfalls while enhancing the process's virtues.

Background

The process of federal regulatory review has evolved over the course of several presidential administrations. History shows both the dangers and the promises of a centralized system based on cost-benefit analysis.

Executive Order 12,291. Elected on a platform of deregulation, President Reagan quickly asserted an unprecedented level of control over the federal administrative apparatus upon taking office in 1981. Within a month of his inauguration, Reagan issued Executive Order 12,291, creating the essential architecture for the centralized review of agency action that still governs today.[1]

That Executive Order required agencies to prepare detailed cost-benefit analyses of any proposed regulation with a significant impact on the economy; and if a regulation's expected costs exceeded its expected benefits, it could not move forward. Reviewing those analyses and deciding regulations' fates were tasks assigned to the officials at the Office of Information and Regulatory Affairs (OIRA), which soon earned the nickname "the regulatory black hole."

Under Reagan, "cost-benefit analysis" became code for "deregulation." Influential back-channel communications from industry, combined with OIRA's tendency to focus more on potential costs than on potential benefits, precipitated the demise of many proposed regulations. Agencies received OIRA's demanding inputs and changes so late in the rulemaking process that it was nearly impossible to respond meaningfully. The size of OIRA's staff—tiny relative to the number of regulations it was meant to review—created costly and lengthy delays. Moreover, the entire review process was shrouded in secrecy, hidden from public scrutiny. Vice President, George H.W. Bush played a key role in developing Executive Order 12,291, and he largely continued Reagan's legacy during his presidency.

Executive Order 12,866. When President Clinton took office in 1993, he carefully weighed the pros and cons of centralized review. Under Reagan, regulatory review had been criticized heavily for stripping power from agency experts, reducing the transparency of the regulatory process, creating unnecessary delay, and giving OIRA undue influence over the regulatory process. However, there were also benefits of regulatory review including, quality-control over a growing and increasingly important regulatory state, a dispassionate second opinion concerning new regulation, and the introduction of a broader perspective into the sometimes parochial rulemaking process. Recognizing that regulatory review and cost-benefit analysis were not inherently biased or antiregulatory, Clinton chose to preserve Reagan's Executive Order, but with some key modifications.

Reissued as Executive Order 12,866, Clinton's directive maintained the basic existing structure, with OIRA reviewing cost-benefit analyses for significant regulatory actions.[2] However, Clinton changed the tone and substance of the Order. The review process followed firmer deadlines and more robust transparency requirements. Analysts were instructed to give due consideration to qualitative measures of costs and benefits, as well as to weigh the potential distributive impacts of regulations.

These were crucial improvements, and cost-benefit analysis under Clinton moved closer to becoming a neutral tool for rational decisionmaking. These reforms were important first steps, but the overall structure of regulatory review and many of the methodologies of cost-benefit analysis continued to include important flaws.

The Bush Reinterpretations. For the first six years of his presidency, George W. Bush maintained Clinton's Executive Order entirely intact. However, the actual practice of regulatory review changed significantly. While some aspects of transparency and timeliness improved during the Bush Administration, many others suffered. In particular, by augmenting the use of "informal" review, OIRA skirted around transparency requirements and formal review requirements. Agencies also felt that OIRA overstepped its role and interfered in their areas of expertise. Although Clinton's additions on qualitative measures and distributive impacts remained in effect, such instructions often went unheeded.

When President Bush did announce a revised Executive Order in January 2007, it tended to forge an even closer link between cost-benefit analysis and a larger deregulatory agenda. Executive Order 13,422 instituted the following key changes: it required agencies to identify a market failure before moving forward with proposed regulations; and it placed political appointees in agencies as Regulatory Policy Review Officers, further cementing presidential political influence over agency scientist and experts.[3]

Lessons from History. It is notable that Bush's 2007 revisions retained the essential structure of Clinton's Executive Order 12,866. History reveals the staying power of the fundamental architecture of regulatory review, though each administration finds new interpretations to advance its own agenda. The next presidential administration has an opportunity to re-imagine the structure of the federal administrative state. While it could simply reinterpret the existing Executive Order, it also has the chance to create more durable and lasting reforms that could preserve the neutrality and effectiveness of regulatory review far into the future.

Development of Recommendations

In this Report, we have distilled a set of recommendations from several sources, including our book *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (Oxford University Press 2008), a roundtable of experts convened at New York University School of Law on November 17, 2008, and other sets of recommendations on regulatory review issued during the transition process. The Institute for Policy Integrity hopes this collection of broad principles and specific recommendations for reform will assist the next presidential administration as it considers how to begin reshaping the federal regulatory state.

Retaking Rationality argues that cost-benefit analysis is a conceptually neutral tool to achieve a more rational system of regulation, but that this tool has often been used in the service of an ideological driven antiregulatory agenda. Due to this imbalance, groups that favor an active regulatory role for government—such as environmental groups, labor unions, and consumer organizations—have generally not participated in the debate over the methodology and uses of cost-benefit analysis. As a result, both substantive and institutional biases with antiregulatory effects have emerged in cost-benefit analysis. *Retaking Rationality* identifies eight of these biases, and proposes that by embarking on a campaign to improve cost-benefit analysis, rather than end its use, pro-regulatory groups can have more success in pursuing their agenda and promoting a more just and rational regulatory system.

Several other groups have recently released their own recommendations for reforms to the federal regulatory review process. In particular, OMB Watch,[4] the Center for Progressive Reform[5], and a collection of environmental groups[6] have issued recommendations on regulatory review. While there are areas of disagreement, most of these other publications substantially agree on several broad areas.[7]

To help inform our recommendations on how best to reform the process of regulatory review, the Institute for Policy Integrity hosted a roundtable discussion at New York University School of Law on November 17, 2008. The following individuals—all experts in the federal regulatory process—participated in that discussion and shared their own personal views:

- Rob Brenner, Director of EPA's Office of Policy Analysis and Review;
- Nancy Ketcham-Colwill, Counsel for EPA;
- Steven Croley, Professor of Law at the University of Michigan;

- Adam Finkel, Fellow and Executive Director, Penn Program on Regulation, University of Pennsylvania Law School; Professor of Environmental and Occupational Health at the University of Medicine and Dentistry of New Jersey School of Public Health; former Director of Health Standards Programs (1995-2000) and Regional Administrator for the Rocky Mountain states (2000-2003) at OSHA;

- Sally Katzen, Visiting Professor at University of Michigan Law School; former Administrator of OIRA (1993-1998); former Deputy Director for Management of the Office of Management and Budget (1999-2001);

- Michael A. Livermore, Executive Director, Institute for Policy Integrity;

- Rick Melberth, Director of Federal Regulatory Policy for OMB Watch;

- Richard D. Morgenstern, Senior Fellow at Resources for the Future;

- Vickie Patton, Deputy General Counsel for Environmental Defense Fund; Member, EPA's National Clean Air Act Advisory Committee; former attorney at EPA's Office of General Counsel;

- Kathleen Rest, Executive Director of the Union for Concerned Scientists; former Deputy Director for Programs at the National Institute for Occupational Safety and Health in the Centers for Disease Control;

- Richard L. Revesz, Dean of the New York University School of Law and Faculty Director of the Institute for Policy Integrity;

- Richard Stewart, University Professor and John Edward Sexton Professor of Law at New York University; former Assistant Attorney General, Environment and Natural Resource Division, U.S. Department of Justice (1989-1992);

- Katrina Wyman, Professor of Law at New York University.

The Institute for Policy Integrity has sole responsibility for the following recommendations, which do not necessarily reflect the views of any individual roundtable participant, nor of their affiliated organizations.

The Role of OIRA

The history of federal regulatory review has shown that OIRA's role easily shifts to reflect changing administrative ideologies: starting as a secretive and blunt instrument under President Reagan, changing to more of a facilitator under President Clinton, and reverting to a regulatory gatekeeper under President George W. Bush. The following four recommendations are geared towards making durable changes in OIRA's roles so that it can become a stabilizing force in regulatory review, rather than merely a mirror of the latest and mercurial administrative agenda.

I. Coordination

Recommendation: OIRA should increase its commitment to improving agency coordination by reestablishing regular meetings of the Regulatory Working Group, and by creating standing subgroups in key areas where coordination is needed.

Background: Under the current and past executive orders, part of OIRA's stated role has been to facilitate coordination between agencies. However, in practice, OIRA has dedicated the bulk of its resources to the regulatory review function, with relatively little done to enhance communication, harmonization, and coordination between agencies.

Coordinating federal agencies is crucial. Many risks are not easily cordoned off along bureaucratic lines, and agencies can, and sometimes do, engage in turf battles, work at cross-purposes, enact redundant regulation, or shuffle off difficult problems. These failures of coordination waste resources and reducte the effectiveness of agencies.

The are a large number of substantive overlaps and competing jurisdictions in the federal bureaucracy, which require coordinatation to achieve smart policy. Perhaps the most clear is example is energy policy, which touches on issues as far flung as environmental emissions standards and procurement processes for lighting in federal buildings. Another clear examples is air toxins exposure, which requires coordination between OSHA and EPA.

Often, when confronted with cross-agency issues, OIRA's job has been to help mediate conflict on an *ad hoc* case-by-case basis. However, OIRA should take on an expanded role

that moves beyond a zero-sum framework and proactively looks for areas where coordination can achieve greater regulatory efficiency.

Under the Clinton Administration, a Regulatory Working Group met monthly to discuss issues, agendas, and regulatory gaps. Though originally productive, the practice died when the Bush Administration came to power. Reviving the meetings as a useful tool will require commitments from top-level agency officials to attend and keep an open mind.

OIRA is already resource-constrained, and augmenting its role as a coordinator will require more staff and a bigger budget. While there is likely to be some concern about increasing OIRA's size and power, the importance of coordinating policy across agencies, and the distinction between the coordinating and review functions, counsel for expansions within OIRA in this area.

Revisions: Section 4(d) describes the Regulatory Working Group and its functions. Revisions should be made to establish standing subgroups, and increase the number of meetings.

II. Transparency

Recommendation: To ensure that informal review by OIRA is not used to circumvent transparency requirements, agencies should be given the power to trigger the formal review process by submitting a proposed regulation to OIRA.

Background: Transparency of process and disclosure of information to the public are necessary for government accountability. During the adoption of the Clinton Executive Order, and in the early years of the Bush Administration, many important transparency reforms were adopted to open the process of OIRA review to public scrutiny. These reforms have led to a more public and accountable process, and have helped dispel some concerns directed at OIRA review.

However, in recent years, OIRA has increasingly used an "informal" review process to inject its comments earlier into the rulemaking process. Though OIRA claims this practice is motivated by concerns about scarce resources and quick deadlines, many experts feel informal review is neither a response to nor a solution for the timeliness problem, but has instead been an opportunity for OIRA to influence rulemaking off-the-record, before most transparency requirements kick in. OIRA skirts other transparency requirements by issuing most of its informal comments orally—such communications rarely are transcribed or released publicly. In other words, a great deal of transparency is lost during OIRA's informal reviews, reducing the accountability of both OIRA and agencies.

For example, in late 2007 and early 2008, EPA was prepared to propose new regulations of greenhouse gas emissions. Instead, OIRA and White House officials—outside of any formal or public review process—collected criticisms from other government agencies and industry and pressured EPA to withdraw its regulations before they could even be proposed.[8]

While the importance of transparency is clear, absolute transparency also presents some downsides. Candid conversations can be vital to the rulemaking process, but agency staff may feel the need to censor themselves and their ideas if every communication becomes part of the public record. Moreover, neither OIRA nor agencies have the resources to achieve full transparency: though the cost of disclosing a single communication may seem small, the cumulative effort required to draft or transcribe, edit, and post every individual communication and document would demand substantial resources. Where to draw the line between sufficient disclosure and too much disclosure is a thorny question.

Early review, however, can serve a very useful purpose. During the Clinton Administration, agencies often approached OIRA in the pre-rule stage, asking for guidance on how to proceed. These informal consultations helped agencies choose the most efficient and effective rulemaking tactics. In limiting OIRA's ability to exploit informal reviews, we should not create disincentives for agency initiation of early or informal reviews that could increase the quality of rulemakings.

However, OIRA-initiated informal reviews are dangerous when used early in the rulemaking process to forbid certain regulatory options before the agency even has a chance to study them. They are equally dangerous when used late in the rulemaking process as a substitute to a more transparent formal review.

Revisions: Section 6(b) contains transparency requirements for formal OIRA review. In order to ensure that informal review is not abused, a new definition should be created making it clear that agencies have the power to initiate the formal review process by submitting a proposed rule to OIRA.

III. Scope

Recommendations: OIRA should subject regulations of all agencies to equally high levels of scrutiny, rather than focusing on the regulations of particular agencies.

Background: The outcome of regulatory review is often defined by OIRA's relationship with other government agencies. Giving OIRA centralized and supervisory powers over agency action serves an important regulatory function: it ensures quality-control and offers both a dispassionate second opinion and a broader perspective of the regulatory landscape. However, this function must be balanced against the need to express deference to and respect for agencies as the primary source of information and expertise. Finding the right equilibrium will allow OIRA and agencies to work collaboratively, rather than combatively.

During different administrations OIRA has acted as a "gatekeeper"—a restrictive hurdle agencies must surmount before they can regulate—and at other times has played the role of a "facilitator"—helping to improve rules and shepherd regulations through the review process. A 2003 study by the U.S. General Accounting Office (now called the Government Accountability Office) found that, over the last eight years, OIRA has acted more as a gatekeeper—aggressively imposing its will at the expense of reasoned analysis and science—whereas during the Clinton Administration it played the role of a facilitator.[9] This

abrupt change left many agencies feeling frustrated, leading to low morale and attrition among staff.

This difference in emphasis is seen in the types of rules that are subjected to OIRA scrutiny. Most importantly, there has been generally greater scrutiny of rules emanating from environmental, health, and safety agencies—like EPA and OIRA—and less scrutiny of regulations from other agencies—such as the Department of Homeland Security. This imbalance is not justified on economic grounds—counter-terrorism rules can generate as large economic consequences as environmental rules.

It is especially important that the regulatory review process recognizes the expansion of homeland securities regulations in the post-9/11 world. The recently created Department of Homeland Security has issued a large number of new regulations that have broad consequences across the economy. While many of these regulations many be justified, they should be subjected to the same scrutiny as the regulations of other agencies.

Revisions: The preamble of the executive order should be revised to remove its emphasis on removing "unacceptable or unreasonable costs on society," and instead focus on facilitating well-designed regulation. Because regulations affecting homeland security have generally been subject to less scrutiny than environmental, health and safety rules, an d an interagency group should be convened to develop appropriate review of homeland security regulation.

IV. Inaction

Recommendation: OIRA should review petitions for rulemakings that have been denied by agencies as part of an annual planning process, to protect against agency inaction.

Background: Agency inaction is currently not subject to the same scrutiny as agency action, leading to a fundamental antiregulatory bias in how cost-benefit analysis is used.

OIRA can play a more affirmative role in tackling agency inaction when agencies do not engage in needed, efficient, and beneficial rulemaking. OIRA has at times used "prompt letters" to attempt to prod agencies to take action on under-regulated issues. However, the practice occurs inconsistently and infrequently, and it an *ad hoc* mechanism that is not enshrined in the Executive Order. Unfortunately, given the potentially unlimited universe of possible agency inaction, requiring OIRA to study every regulatory gap and make recommendations would place unbearable burdens on an already resource-strapped agency.

Other than the OIRA prompt letters, the only other institutional check on agency inaction is for outside groups to petition agencies for rulemakings. These petitions are generally denied, and judicial review of denials of petitions for rulemakings is very deferential to agencies.

OIRA should review petitions for rulemakings that have been denied as part of its yearly agency agenda setting process. Where a petition is denied or if an agency otherwise

formally decides not to take regulatory action, OIRA could require agencies to justify their decisions with some level of economic analysis. A substantial burden of proof would have to fall on the original petitioner so that agencies and OIRA are not over-burdened. This review process should happen on an annual basis and should take place in the context of agency agenda setting, so that ideas for new rulemakings can be evaluated in light of overall agency priorities.

Revisions: Section 4(a) discusses an annual planning meeting to be carried out by OIRA and agency heads. That meeting should be used as a forum to review denials of petitions for rulemaking and to give the public an opportunity to have input into the agenda setting process.

Cost-Benefit Methodology

Cost-benefit analysis is conceptually a neutral tool, but it is also malleable. Over much of the last twenty-eight years—and especially during the last eight—cost-benefit analysis has often been wielded by antiregulatory forces and its methodology has developed an antiregulatory bias. The next administration has the opportunity to reshape cost-benefit analysis as a neutral tool for the pursuit of effective, welfare-maximizing policies. Proper reforms now can help OIRA and agencies build good methodological habits, which could endure far into the future.

V. Net Benefits

Recommendation: Agencies should focus on maximizing net benefits—including both quantified and unquantified benefits—not minimizing regulatory costs.

Background: The goal of cost-benefit analysis is to help agencies identify regulatory options that will maximize net benefits. It should not be to act as a one-way ratchet to reduce regulatory stringency. The current Executive Order, with its emphasis on reducing costs rather than maximizing net benefits, should be revised to embrace the more rational goal of identifying efficient regulations.

While no analysis is ever perfect or complete, agencies should endeavor to capture the relevant consequences of proposed regulations and proceed on the basis of sound information. Of particular concern are qualitative costs and benefits. Some costs and benefits are impossible or too difficult to quantify and can only be measured in some qualitative fashion. But many of these qualitative costs and benefits can in fact be quantified—with additional research. The state of research now is limited. For example, willingness-to-pay studies are outdated; existence values remain highly contentious and poorly understood; and the complex nature of time preferences, particularly the concept of dread, need further exploration and incorporation into discounting tactics. Agencies should implement research agendas to expand the quantification possibilities in these areas.

It is also important to recognize that while maximizing net benefits is generally the goal of regulation—and regulatory review—there are exceptions. Where Congress has legislated

with other goals in mind—such as morality or distributional goals—these other priorities must be respected, as is currently provided for in the Executive Order.

Revisions: In the statement of regulatory philosophy in Section 1(a) the definition of net benefits should emphasize equal treatment of quantified and unquantified benefits. The regulatory principles in Section 1(b) should more clearly emphasize the maximization of net benefits. Section 1(b) should also be revised to charge agencies with implementing a research agenda to better inform regulatory decisions.

VI. Ancillary Benefits

Recommendation: When accounting for the indirect effects of regulation, agencies should pay equal attention to the both positive and negative indirect effects.

Background: As cost-benefit analysis has become more sophisticated, more of the collateral consequences of regulations have been taken into account. However, often, only the negative side effects of regulation are analyzed, while positive side effects are ignored. This practice creates a bias against regulations by systematically underestimated their potential benefits.

There is no good reason to believe that ancillary benefits are more rare than countervailing risks. Just as a regulation can have negative side effects, there are many potential pathways for regulations to have unintended positive consequences. There are many examples of ancillary benefits, such as the water filtration potential of wetlands, and the prevention of accidental death and suicide from carbon monoxide regulations targeted at clean outdoor air.

Perhaps the most egregious recent example of ancillary benefits that were ignored occurred in the case of a National Highway Traffic Safety Administration (NHTSA) rule on fuel-efficiency for light trucks. When promulgating that rule, NHTSA failed to place any value on the benefits that would be derived from greenhouse gas reductions associated with a higher standard. The omission was so egregious that the U.S. Court of Appeals for the Ninth Circuit struck down the rule, and instructed NHTSA to place a value on greenhouse gas benefits or provide better justification for its failure to do so.[10]

To correct these tendencies, the emphasis on ancillary benefits must be strengthened, and the practice of identifying and measuring secondary costs and benefits must be standardized. There is widespread agreement that, where ancillary benefits exist, they should be given parity with countervailing risks. The most recent guidelines from OIRA on conducting cost-benefit analysis also mention that ancillary benefits may be important. However, the actual practice of cost-benefit analysis continues to be biased in favor of finding countervailing risks and against finding ancillary benefits.

Revisions: Section 6(a) should be revised to clarify that indirect benefits will be given parity with indirect costs of regulation.

VII. Future Generations

Recommendation: The current practice of discounting benefits for future generations at a constant rate consistent with the return on traditional financial instruments should be abandoned in favor of a valuation mechanism that reflects the fundamental moral and ethical difficulties that arise with regulations that have intergenerational effects.

Background: The constant discount rate used in financial markets is based, in part, on the preference of individuals to enjoy benefits sooner rather than later. In keeping with the general practice of cost-benefit analysis to respect individuals' preferences, there is nothing wrong with discounting the benefits of certain types of regulations when the costs occur before the benefits and the regulatory beneficiaries fall within the current generation. For these types of regulations—which are commonly used to target long-latency threats—discounting can be justified.

However, in the intergenerational context—where regulatory costs occur now but the benefits will not be incurred for decades, by a different population—discounting is often inappropriate. Most troubling is the use of a rate of pure time preference, which is based on intrapersonal preferences and does not reflect a social decisions about the distribution of benefits and burdens between individuals.

Discounting on the basis of rates of pure time preferences is not sensible for intergenerational benefits. In a economy without productive capacity, with a fixed amount of resources and a fixed population—one that inhabits the economy at an early date than the other—there is no reason why more resources should be allocated to the early population. This moral intuition indicates that a pure time preference that favors the present is not justified.

Other frameworks for determining obligations to future generations, including sustainable development, utilitarianism, corrective justice, and the opportunity costs of regulation, should be used. Any mechanism that treats benefits that accrue to future generations differently than benefits for the current generation must be based on a full reckoning with the difficult moral and ethical questions inherent in such distributional decisions.

Revision: Section 4(d) should be modified to create a subgroup of the Regulatory Working Group tasked with developing consistent treatment for future generations.

VIII. Distribution

Recommendation: Cost-benefit analysis should be augmented with distributional analysis, conducted on a central and holistic level, to account for disadvantaged groups, including those that face disproportional environmental, health, and safety risks.

Background: Since 1993, the Executive Order has directed agencies to consider the distributional consequences of regulation—that is, to assess whether and how a regulation affects certain subpopulations of society. However, that Order treats distributional consequences as a potential "cost" of regulation, which is not analytically sensible, and does not integrate distributional analysis into the system of regulatory review.

Because cost-benefit analysis selects regulations that maximize net benefits across the entire population, subpopulations could be saddled with regulatory costs while other groups might enjoy the bulk of the benefits. Over the course of many regulations, some of these effects might cancel out, as the beneficiaries of one regulation could be burdened by another regulation. But if the regulatory system as a whole is burdening some groups significantly more than others—or unfairly benefiting certain subpopulations—then there is a clear concern about equity and fairness.

There are many ways that the distribution of regulatory costs and benefits may be unfair. For example, a particular subpopulation may be shut out from receiving the same regulatory benefits that many others enjoy. The distribution of regulatory costs could fall disproportionately on one subpopulation. Some groups may be subject to disproportionate risks, or regulatory costs could fall on those least able to bear them. In addition, a regulation may effectuate an undesirable transfer of wealth from poorer to richer.

In general, economic analysis tends to disregard distributional impacts, focusing on whether regulations are wealth-maximizing in the aggregate. Economists generally do not favor adjusting regulation on a case-by-case basis to achieve distributional ends—there are other more efficient mechanism to achieve distributional goals, such as the tax and transfer system. However, for those mechanisms to work, there must be information about the overall distributional consequences of the regulatory system, because current measures of inequity—which focus on income—fail to account for the welfare consequences of environmental, public health, and safety risks.

Revisions: Revisions are needed throughout the order to institutionalize the process of distributional analysis. Most important, Section 6(a) should be revised to explicitly direct agencies to conduct distributional analysis, apart from cost-benefit analysis, of major rules, and Section 6(b) should be revised to require OIRA to make an annual report on the distribution of costs and benefits of rules adopted in the prior year.

IX. Costs

Recommendation: Cost estimates must take account of production process changes and technological innovation in response to new regulation, and should not be based exclusively on currently available technology.

Background: Estimates of compliance costs are too frequently based on the price of end-of-pipe equipment, ignoring the possibility of technological advancements and production process improvements. Both end-of-pipe methods and production process changes have the potential to reduce emissions of harmful pollutants.

End-of-pipe methods attempt to capture some of the emissions before they escape the plant and are released into the atmosphere or water. Paradigmatic examples of end-of-pipe technologies are catalytic converters on cars and scrubbers on power plants. A simple screen that prevents debris from escaping is a low-tech version of the end-of-pipe method.

Production process changes seek to reduce the amount of harmful pollution that is created in the first place. Changes in production processes are often much cheaper per unit of pollution reduction than end-of-pipe technologies. For example, switching from high-sulfur coal to low-sulfur coal reduces the amount of pollution that is produced by coal-fired power plants. Switching from coal to natural gas reduces pollution to an even greater extent. In the manufacture of goods, toxic solvents can be replaced by nontoxic alternatives.

Because the difference in compliance costs between end-of-pipe technology and production process changes is often significant, it is vital that cost estimators look to both. Basing cost estimates on known pollution-control technology will tend to overestimate costs.

Because end-of-the-pipe technology is often used as the basis for cost-estimates, there may be important overstatements of regulatory costs. There have been many examples where early estimates of the costs of regulation were extremely high, and where technological change significantly reduced compliance costs. In order to accurate account for regulatory costs, the dynamic power of the marketplace and innovation to reduce compliance costs must be taken into account.

Revisions: Section 1(b) should be revised to create a new principle of regulation, requiring agencies to take account of the effects of regulation on innovation and technological change.

X. Deregulation

Recommendation: Review of deregulation should be conducted as stringently as review of new regulation.

Background: Under the current Executive Order, deregulation is often subjected to less stringent review than new regulations. There is no justification for this bias, because inefficient deregulation can be as costly, in terms of social welfare, as inefficient regulation.

Efficient regulations deliver large benefits and counteract important failures of the unregulated market. Just as regulations impose some cost on the economy, the lack of regulation, when regulation is needed, also imposes negative consequences in the form of reduced social welfare. Economic analysis can be just as valuable for cases of deregulation, non-regulatory approaches, and agency inaction as it is for examining new regulations.

There are many examples where deregulation has been subjected to a lower level of scrutiny. Perhaps the most egregious recent example was large scale changes made to the New Source Review Program under the Clean Air Act that extended grandfathering provision that protect old dirty power plants.

The National Association of Public Administration, the EPA's own Office of Inspector General, the American Lung Association, and a host of environmental groups have stated

that the new rule will result in increased levels of air pollution. Given the well-documented effects of air pollution on health, the economic impact generated from increases in health risks alone likely justified a cost-benefit analysis and OIRA review. The argument that the new rule will have little economic impact is further undermined by the scope of the New Source Review provision, which covers all "stationary sources," meaning any facility "which emits or may emit any air pollutant"—a very large number of facilities including power plants, factories, and oil refineries. Even small changes in the New Source Review rules will deeply affect these important economic actors, with ripple effects throughout the economy.

Revisions: Section 3(d) is revised to make clear that deregulation is subject to the same scrutiny as new regulations.

Markup of Executive Order 12866

Regulatory Planning and Review

Principles

The American people deserve a regulatory system that works~~. for them, not against them: a regulatory system that~~ Well-designed regulation protects and improves ~~their~~ public health, safety, and the environment, ~~and well-being~~ and improves the performance of the economy, thereby promoting widespread opportunity and well-being for the American public. Poorly-designed regulation, or the failure to regulate significant risks, ~~without~~ imposes ~~ing~~ unacceptable and ~~or~~ unreasonable costs on society, ~~regulatory policies that recognize that the private sector and~~ hampers private markets, and stalls ~~are the best engine for~~ economic growth. To be effective, regulatory approaches must ~~that~~ respect the role of State, local, and tribal governments; utilize the best scientific and economic information; and be ~~and regulations that are effective,~~ flexible, consistent, sensible, and understandable. ~~We do not have such a regulatory system today.~~

Net Benefits

With this Executive Order, the Federal Government ~~begins~~ strengthens the ~~a~~ program to reform and make more efficient the regulatory process. The objectives of this Executive Order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.* (a) *The Regulatory Philosophy*. Federal agencies should promulgate ~~only such~~ regulations ~~as~~ that are required by law, that are necessary to interpret the law, or ~~are made necessary by compelling public need, such as material~~ that advance the public good by: correcting failures of private markets; ~~to~~ protecting or improving the health and safety of the public, or the environment; promoting economic growth; or otherwise enhancing the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits ~~that are difficult to quantify, but nevertheless essential to consider~~. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits ~~(including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity),~~ unless a statute requires another regulatory approach. Net benefits include both unquantifed and quantified economic, employment, environmental, public health and safety, and overall welfare effects. When choosing between regulatory alternatives, agencies should take due account of distributive impacts, including impacts on future generations, and equity. The American public should be given ample opportunity to comment on regulatory alternatives, and the regulatory process should be conducted expediently, without unnecessary delay, and with sufficient coordination between federal agencies and with State, local, and tribal governments.

Net Benefits

Net Benefits

Transparency

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of

private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine ~~whether~~ existing regulations (or other law) ~~have created, or contributed to, the problem that a new regulation is intended to correct~~ and determine whether those regulations (or other law) should be modified to help ~~achieve the intended goal of~~ the new regulation address the identified problem more completely or effectively.

Net Benefits

(3) Each agency shall identify and assess all feasible regulatory ~~available~~ alternatives, ~~to direct regulation, including providing~~ especially the use of economic incentives to encourage the desired behavior, such as user fees or marketable permits, or the provision ~~providing~~ information ~~upon which~~ to help the public make more informed choices ~~can be made by the public~~.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) Each agency ~~When an agency determines that a regulation is the best available method of achieving the regulatory objective, it~~ shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider ~~incentives for innovation,~~ consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), and flexibility~~, distributive impacts, and equity~~.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and~~, recognizing that some costs and benefits are difficult to quantify,~~ shall propose or adopt a regulation only upon a reasoned determination that the intended regulation maximizes net

benefits. ~~of the intended regulation justify its costs.~~ In making this determination, the agency shall consider both quantified and unquantified costs and benefits. The agency shall also give due regard to the distributive impacts of the intended regulation and shall take appropriate steps to mitigate negative distributive effects.

Net Benefits

(7) Each agency shall take account of the effect of regulation on technical change and innovation, and shall ensure that estimates of compliance costs reflect the ability of market actors to adapt to new regulation.

Costs

(8) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation. Each agency shall pursue an agenda of research and training to ensure that its staff gathers necessary background data and builds a sufficient knowledge base to make accurate regulatory decisions. Special focus shall be given to the accurate estimation of regulatory benefits—including mortality and morbidity risks—and to the effects of regulation on technological change.

Net Benefits

~~(8)~~ (9) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

~~(9)~~ (10) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives.

In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

~~(10)~~ (11) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

~~(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.~~

~~(12)~~ (12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. *Organization.* An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and

Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive Order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President~~, the Vice President,~~ and ~~other~~ regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive Order.

(c) *Assistance.* ~~*The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order.~~ In fulfilling the~~ir~~ responsibilities under this Executive Order, the President ~~and the Vice President~~ shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President ~~and the Vice President~~ may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive Order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President ~~and Vice President~~ may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the ~~Assistant to the President for~~ Director of the Office of Science and Technology Policy (7) the Deputy Assistant to the President and Director for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the ~~Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12)~~ Chairman of the Council on Environmental Quality and Director of the Office on Environmental Quality; (12) the

the Administrator of OIRA, who also shall coordinate communications relating to this Executive Order among the agencies, OMB, the other Advisors, and the Director ~~Office of the Vice President~~.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It includes the amendment, suspension, or repeal of existing regulations or rules. It does not, however, include:

Deregulation

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the *Federal Register*) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy or social welfare of $100 million or more;

(2) ~~or a~~ Adversely affect 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;

~~(2)~~ (3) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

~~(3)~~ (4) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

~~(4)~~ (5) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Deregulation

Significant regulatory actions include actions that impose additional compliance costs or stricter regulatory standards, and those that relax protections or reduce compliance costs. Annual effect on the economy should be calculated on an aggregate (rather than net) basis and should include all quantifable and non-quantifiable effects, including all welfare effects such as effects on public health, safety, or the environment.

Sec. 4. *Planning Mechanism.* In order to ~~have an effective regulatory program,~~ identify efficient new regulatory proposals, to update and revise regulations on a timely basis, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this

Executive Order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the ~~Vice President~~ Director shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year. (1) Prior to that meeting, the head of each agency shall:

(A) Compile a list of all petitions for rulemaking that have been received over the course of the previous year, along with descriptions of the proposed rules and any substantive comments submitted in support of the petitions; and

Inaction

(B) Invite parties that have submitted petitions for rulemakings in the past year to offer additional comments in the form of cost-benefit analyses in support of new regulations to be considered at the Agencies' Policy Meeting.

(2) A portion of the Agencies' Policy Meeting will be open to the public to accept oral comment on petitions for rulemakings under consideration.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered

to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5). (1) As part of the Unified Regulatory Agenda, ~~beginning in 1994,~~ each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Director ~~Vice President~~.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Director ~~Vice President~~.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive Order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors~~, and the Vice President~~.

(6) The Director ~~Vice President~~, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive Order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic

regulatory responsibility, and the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Director Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least monthly quarterly. The Working Group shall establish standing and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas including, at a minimum, subgroups on energy policy, and workplace air quality. The Working Group shall also convene subgroups devoted to the long-term harmonization of risk-assessment, especially the identification and characterization of cancer risks, to developing a consistent mechanism for valuing costs and benefits of regulations for future generations, and to subjecting homeland security policy to appropriate review. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA or any other agency, and may request advice from outside experts.

Coordination

Future Generations

Scope

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. *Existing Regulations.* In order to determine the cumulative distribution of reduce the regulatory benefits and burdens; to ensure the balanced treatment of on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether

regulations promulgated by the executive branch of the Federal Government should be modified ~~have become unjustified or unnecessary~~ as a result of changed circumstances; to confirm that regulations are ~~both~~ compatible with each other ~~and not duplicative or inappropriately burdensome in the aggregate~~; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive Order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 180 ~~90~~ days of the date of this Executive Order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations. This review will assess the accuracy of original estimates regarding the costs and benefits of existing regulations and will determine the distributional impacts of current regulations; the review will also take account of changed technological, scientific, and economic circumstances to determine whether ~~to determine whether any such~~ regulations should be modified or eliminated, or if new regulations are needed to achieve agency objectives. ~~or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.~~

Net Benefits

Distribution

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that should be modified and of areas where new regulations are needed. ~~that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.~~

Inaction

~~(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.~~

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive Order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive Order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each

agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive Order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive Order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; ~~and~~

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal govern-

ments in the exercise of their governmental functions; and

(iii) An assessment of the distribution of the costs and benefits of the proposed rule, with special focus on disadvantaged groups or groups subject to multiple environmental, public health, or safety burdens.

Distribution

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action. Such benefits include, ~~as,~~ but are not limited to, direct benefits for ~~the promotion of the efficient functioning of~~ the economy and private markets, ~~the enhancement of~~ health and safety, ~~the protection of~~ the natural environment, and the elimination or reduction of discrimination or bias and indirect economic, environmental, health and safety, or other benefits. ~~together with,~~ To the extent feasible, the assessment will include a quantification of those benefits. Where it is difficult or impossible to quantify benefits, the assessment will include a qualitative analysis of such benefits;

Ancillary Benefits

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action. Such costs include, ~~as,~~ but are not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the

economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment. ~~together with,~~ To the extent feasible, the assessment will include a quantification of those costs. Where it is difficult or impossible to quantify costs, the assessment will include a qualitative analysis of such costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of ~~potentially effective and reasonable~~ feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the *Federal Register* or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between

the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended ~~(1)~~ once by no more than 30 calendar days upon the written approval of the Director. ~~and (2) at the request of the agency head.~~

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive Order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Each year, beginning in 2010, the Administrator of OIRA shall prepare a report on regulatory activity that summarizes significant regulations that have been adopted, the costs and benefits of such regulations, the distributions of those costs and benefits, and a summary of the agency Regulatory Plans for the coming year. This report shall be submitted to the President no later than February 1, shall be made available to the public, and shall be posted on the OIRA website.

Net Benefits

Transparency

~~(4)~~ (5) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive

branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates, subject matters, and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a ~~publicly available~~ log, publically available and posted on the OIRA website, that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates, subject matters, and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel

and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the *Federal Register* or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public, and post on the OIRA website, all documents exchanged between OIRA and the agency during the review by OIRA under this section.

~~(5)~~ (6) An agency action is "under review" for purposes of (b)(5)(B) of this section whenever a proposed regulation is submitted to the OIRA Administrator by an agency.

Transparency

(7) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. *Resolution of Conflicts.* To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, ~~or by the Vice President acting at the request of the President,~~ with the relevant agency head (and, as appropriate, other interested government officials). ~~Vice Presidential and~~ Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

~~Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.~~

During the ~~Vice Presidential and~~ Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs ~~or to the staff of the Vice President~~ shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. *Publication.* Except to the extent required by law, an agency shall not publish in the *Federal Register* or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive Order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Director ~~Vice President~~, as provided under section 7 of this order. Upon receipt of this request, the Director ~~Vice President~~ shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. *Agency Authority*. Nothing in this Order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. *Judicial Review*. Nothing in this Executive Order shall affect any otherwise available judicial review of agency action. This Executive Order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. *Revocations*. Executive Orders Nos. ~~12291 and 12498~~ 12866, 13258, and 13422; all amendments to those Executive Orders; all guidelines issued under those Orders; and any exemptions from those Orders heretofore granted for any category of rule are revoked.

Notes

[1] Exec. Order No. 12,291 , 46 Fed. Reg. 13193 (1981).

[2] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

[3] Exec. Order No. 13,422, 72 Fed. Reg. 2763 (2007).

[4] GARY D. BASS ET AL., OMB WATCH, ADVANCING THE PUBLIC INTEREST THROUGH REGULATORY REFORM (2008), *available at* http://www.ombwatch.org/regulatoryreformrecs.pdf. OMB Watch developed its recommendations with advice from individuals from—but not necessarily representing—the following groups: United Automobile Workers, National Conference of State Legislatures, Center for Science in the Public Interest, Center for American Progress, Union of Concerned Scientists, Natural Resources Defense Council, various universities, and other organizations.

[5] REBECCA M. BRATSPIES ET AL., CTR. FOR PROGRESSIVE REFORM, WHITE PAPER NO. 806, PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT BY THE STROKE OF A PRESIDENTIAL PEN (2008) *available at* http://www.progressivereform.org/CPR_ExecOrders_Stroke_of_a_Pen.pdf.

[6] AMERICAN RIVERS ET AL., TRANSITION TO GREEN 2-12 to 2-17(2008), *available at* http://www.greencollarblog.org/documents/transition-to-green.pdf. The collection of groups signing off on those recommendations include: American Rivers, Center for International Environmental Law, Clean Water Action, Defenders of Wildlife, Earthjustice, Environment America, Environmental Defense Fund, Friends of the Earth, Greenpeace, Izaak Walton League, League of Conservation Voters, National Audubon Society, National Parks Conservation Association, National Tribal Environmental Council, National Wildlife Federation, Native American Rights Fund, Natural Resources Defense Council, Oceana, Ocean Conservancy, Pew Environment Group, Physicians for Social Responsibility, Population Connection, Population Action International, Rails-to-Trails Conservancy, Sierra Club, Wilderness Society, Trust for Public Land, Union of Concerned Scientists, and World Wildlife Fund.

[7] Among these publications, there is widespread agreement that:

> (1) On his first day in office, President Obama should impose a moratorium on finalizing any pending regulations and should review all of Bush's recently finalized (i.e., "midnight") regulations.
>
> (2) President Bush's Executive Order 13422 should be rescinded. It over-emphasizes market failures as the principal justification for government action and inappropriately empowers political appointees over agency staff.
>
> (3) Executive Order 12,866 may provide a foundation for a new, more effective administrative state, but is itself insufficient and should at least be modified.

(4) Transparency is essential for accountability. The federal government should move toward a presumption of openness through all stages of the regulatory process. Disclosure requirements should apply early in the rulemaking process—as soon as possible after documents, communications (including oral communications and communications with private entities), or other types of information are available.

(5) Transparency is essential for repeatability. Information and assumptions used in cost-benefit analysis should be disclosed, including statements of uncertainty about the assumptions.

(6) Cost-benefit analysis must accurately measure all costs and benefits. Qualitative measurements should be used when needed and should be given equal weight in decision-making as quantitative measurements. Ancillary benefits must not be ignored.

(7) Cost-benefit analysis should be accompanied by a rigorous and meaningful distributive analysis of how regulations impact sensitive subpopulations.

(8) OIRA must give greater deference to agency expertise. OIRA and White House officials should not manipulate the cost-benefit analyses performed by agencies.

(9) Regulatory decisions should be timely: OIRA's review should neither rush nor significantly delay regulatory action.

(10) OIRA should play a greater coordinating role, assisting with identifying regulatory gaps, resolving inter-agency conflicts, and harmonizing policies and practices.

[8] *See* SELECT COMMITTEE ON ENERGY INDEP. & GLOBAL WARMING MAJORITY STAFF, 110TH CONG., INVESTIGATION OF THE BUSH ADMINISTRATION'S RESPONSE TO *MASSACHUSETTS V. EPA* 2 (2008).

[9] U.S. GENERAL ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEW OF AGENCIES' DRAFT RULES AND TRANSPARENCY OF THOSE REVIEWS 38-44 (2003), *available at* http://www.gao.gov/new.items/d03929.pdf.

[10] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007).