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

The Cost-Benefit Compass

Navigating the Perfect Storm of Economic, Environmental, and Energy Challenges

Michael A. Livermore

Policy Brief No. 1
October 2008

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Executive Summary

America is facing challenging times. The collapse and bailout of cornerstone Wall Street firms is just the latest in a string of bad economic news. The United States continues to fall behind the rest of the developed world in addressing climate change and must play catch-up at the same time that energy prices reach historic highs.

This policy brief recommends the greater use of cost-benefit analysis—properly reformed—to help the next presidential administration address these compounded threats. Cost-benefit analysis recognizes the need for regulation to account for failures of the marketplace, but also seeks to achieve the greatest results at the lowest cost. It is the right tool for an administration facing several expensive threats in lean economic times.

Over the past thirty years, cost-benefit analysis has generally been associated with broad antiregulatory efforts. This results more from history than from any conceptual basis. However, in part because of this history, there are several biases in the methodologies and uses of cost-benefit analysis that must be eliminated before it can truly become a neutral tool of policy analysis.

Both to signal a commitment to cost-benefit analysis and to engage in appropriate reforms of the technique, the next administration should issue an Executive Order within the first 100 days of office, reauthorizing and reforming the regulatory review process. This policy brief closes with a markup of the Clinton-era Executive Order to provide direction for those reforms.

Acknowledgments

This policy brief is based, in part, on *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, by Richard L. Revesz and Michael A. Livermore (Oxford University Press, 2008). Thanks are due to all of those who contributed to that project.

Facing the Storm

Three Fronts Collide

The bad economic news has been well documented. The recent financial bailout of Wall Street is only the latest example of an unbalanced economy.

A variety of key economic indictors that track growth in production, GNP, and jobs have lagged for well over a year. Financial markets have suffered serious losses. The home foreclosure crisis has threatened the most valuable asset that many American families hold. The primary debates between economists turn on how bad the situation is and how bad it will get before things turn around.

The next administration will inherit a country facing three severe crises.

The recent economic crisis comes on the heels of an economic expansion whose gains were largely concentrated among the wealthiest Americans. While there had been robust economic growth by many indicators in the recent expansion, the average take-home wages of middle- and working-class Americans have remained stagnant. Inflation in key areas, including health care, education, gasoline, and food, has added to the "crunch" felt by the American middle class.

Internationally, the value of the U.S. dollar has declined in the face of long periods of high trade deficits and growing national debt.

The war and occupation in Iraq will continue to impose costs on the national security budget for years to come. Outdated infrastructure, inadequate access to health care, and the need to reinvest in education to maintain a competitive workforce in the global economy are all pressing budgetary demands on government.

At the same time that domestic and global economic concerns have become paramount, the United States must address the next generation of environmental, health, and safety threats. Many of the key statutes and regulations in areas like pollution control, workplace safety, and natural resource management are outdated. New threats are not addressed, and old threats are addressed in outmoded ways.

Climate change and clean energy pose great challenges for policymakers. Reducing emissions of greenhouse gases—while maintaining quality of life for all Americans—will require sweeping changes in many sectors of the economy. Housing, transportation, manufacturing, agriculture—all will be seriously affected by climate change action.

Ignoring climate change is not a legitimate policy option.

These changes will not be easy, but the consequences of not acting are even more severe. The threats from climate change have been well explained, and the consensus of the international scientific community has only grown as the evidence of human impacts on climate continues to mount. Rising sea levels, the potential for more severe weather, effects on agriculture, the spread of tropical diseases, increased instability in the developing world, and the creation of "climate refugees": these are all very real threats. Giving up on greenhouse gas controls and simply allowing the potentially catastrophic effects of climate change is not a legitimate option.

As the long-term threats of climate change have become clearer, the short-term consequences of energy insecurity have risen to the top of the nation's agenda. For decades, the United States has pursued short-sighted policies that have left Americans exposed to turbulent markets for fossil fuels, at a time when growth in the developing world and a tightening of supply have produced historically high oil prices.

In order to address climate change and energy security, a major rethinking of our energy infrastructure is necessary, especially over the long term. The twin goals of energy security and reduction in carbon emissions can be mutually reinforcing, if wise policy options are chosen. The challenge for the next administration is to find policies that produce simultaneous economic, environmental, and energy benefits, rather than force these policy goals to fight each other in a lose-lose battle.

Rebuilding the Ship

Reinvigorating the regulatory state will be central to facing the current crises.

Bold programs will fail unless properly implemented. In our complex and interdependent world, action at the congressional and presidential levels is important, but the everyday work of federal agencies is where a great deal of government power is exercised. Without intelligent regulation, policy developed in Congress and the White House will not be effective.

Administrative agencies write and enforce the rules that implement a President's vision.

In addition, many current regulatory regimes impose unnecessary costs or fail to maximize environmental or public health benefits. Outdated regulations do not take into account technological development, changes in market conditions, or new scientific knowledge. In times of economic crisis, it is important to recognize that regulations impose economic costs and must be designed to generate the highest possible rate of return.

In part because economic development and strong regulation have been seen as competing priorities, underregulation and outdated regulatory approaches have become common. Known environmental and public health threats are not addressed. Energy infrastructure has developed without sufficient incentives for conservation and investment in alternative sources. Inadequate enforcement resources

plague many agencies, reducing incentives for firms to comply with regulations.

As we have seen with recent high-profile events in the financial sector, however, strong regulation can be essential to economic development. There are many other areas in which the benefits of regulation are less obvious, but no less important. Without regulation, uncontrolled pollution imposes public health costs on third parties, poor quality products undermine consumer confidence, and workers cannot count on safe workplace conditions.

A strong system of regulation is a basic part of a functioning modern economy. The costs of a system that is too lax, or that has become outmoded and archaic, are grave. To address the current crises and to prevent both future catastrophes and the "silent killers" that quietly damage public health or sap economic potential, the next administration will have to rebuild a stronger, smarter regulatory system.

Pulling Together

Efforts to act decisively in the face of the current crisis will be severely undermined if a political coalition in support of a newly active role for the federal government cannot be built. However, building that coalition will not be easy.

Business interests and civil society groups must put aside past fights over the regulatory system.

Entrenched interests often oppose innovation within federal agencies. Budgets for enforcement are an easy target during times of budgetary cutbacks. Many Americans have lost faith in the ability of the government to deliver public health and environmental benefits without imposing unnecessary costs on the economy.

At the same time, groups that have traditionally advocated for greater regulation have grown skeptical of attempts made by past administrations to control how agencies regulate. Most importantly, the process of regulatory review, which has been in place since the early years of

the Reagan administration, has been broadly opposed by many environmental, labor, and consumer organizations.

To build the political coalition necessary to face the perfect storm of economic, environmental, and energy challenges, the next administration will have to convince skeptics on both sides of the political spectrum. Unless some consensus can be developed to rebuild a regulatory system that is capable of addressing these threats, there will be little that a new administration can do.

Smarter Regulation

Advantages of Cost-Benefit Analysis

By studying and estimating the consequences of regulation, and identifying the policy options that maximize net benefits, cost-benefit analysis holds out great promise as a rational point of agreement among diverse interests.

Cost-benefit analysis is used to identify and quantify the impacts of regulation.

Cost-benefit analysis is a systematic tool for evaluating public policy. Before a regulation is adopted, the positive and negative impacts are anticipated and monetized so they can be compared. Regulations pass a cost-benefit test if they maximize net benefits.

When used properly, cost-benefit analysis can cut down on the influence of ideology and special-interest politics. America deserves an administration that is focused on sound analysis, evidence-based decisionmaking, and a pragmatic and pluralistic approach to public policy. By recognizing that trade-offs are an inherent part of making choices, while at the same time refusing to allow those trade-offs to paralyze decisionmaking, the next administration can demonstrate its willingness to make hard choices that lead to genuine solutions for the problems affecting average Americans. Cost-benefit analysis can help achieve those results.

Because of its focus on ensuring that net benefits are maximized, cost-benefit analysis is even more important during a time of economic crisis. While it is not accounted for in the budgetary process, new regulatory programs also "spend" money by imposing compliance costs, and cost-benefit analysis can be used to ensure that this money is spent wisely. Cost-benefit analysis can also be used to improve overall well-being by identifying new regulations that can extract net benefits by correcting unaddressed market failures.

Finally, cost-benefit analysis can help build and maintain political support for strong regulatory programs. The public will not support programs it perceives as captured by narrowly focused or ideologically driven interests. However, Americans are willing to support regulation that solves significant failures of the marketplace, and cost-benefit analysis can show where new or strengthened regulations are justified on economic terms.

Cutting Across Regulatory Areas

Rather than a substantive policy, cost-benefit analysis is an approach to policymaking.

Cost-benefit analysis cuts across all regulatory areas to find efficient mechanisms to achieve social goals at the lowest cost. Unlike specific programs designed to achieve environmental and economic goals—like "green jobs" or subsidies to alternative energy sources—cost-benefit analysis places the entire federal regulatory apparatus in the service of maximizing net benefits.

Cost-benefit analysis can have important payoffs in improving the rationality of the regulatory state and generating economic opportunity. Programs that address traditional environmental threats can be updated to deliver greater benefits at lower costs. New programs can be designed to spur innovation and generate economic development. Smart regulation can generate synergistic economic, environmental, and energy gains.

By focusing on cost-benefit analysis and economic efficiency as a cross-cutting issue, the next administration can show its commitment both to good decisionmaking and to pursuing effective government action that improves the lives of all Americans.

The Current System

Of course, cost-benefit analysis is not a new idea. Cost-benefit analysis has been required for major federal regulations under Executive Orders that have been in place since the early days of the Reagan administration. Both Democratic and Republican administrations have recognized the value of central review based on rigorous analysis of the economic costs and benefits of regulation.

Under the current Executive Order, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) is charged with reviewing the cost-benefit analyses produced by agencies and ensuring that net benefits are maximized. OIRA has a large degree of power to stop regulations from moving forward, and has been sharply criticized for slowing down the regulatory process without improving the quality of regulations.

The system, while imperfect, has likely contributed to more rational regulation in many ways. Administrations favorable to economic interests have been convinced to undertake environmental programs that are supported by solid cost-benefit analysis. Administrations that are more focused on environmental and public health issues have pursued those goals in more cost-effective ways. Over the years, the back and forth between agencies and OIRA has helped build a more sophisticated apparatus within agencies to analyze the implications of their decisions.

However, the full potential for cost-benefit analysis has not been realized because of important biases in its methodology and uses. For the next administration to capitalize on the ability of cost-benefit analysis to drive an effective regulatory agenda, these biases must be addressed.

Fixing Biases in Review

While cost-benefit analysis has been a useful tool to pursue economic efficiency and wealth-maximizing regulation, distorting biases have been incorporated into both the methodology of the technique and how it is used. These biases have contributed to suboptimal levels of regulation and inaction on a host of pressing environmental, public health, and energy issues.

To be legitimate, cost-benefit analysis must be a neutral tool.

Traditionally, cost-benefit analysis tends to be used as a mechanism to check agency action, but it has rarely been used to guard against agency inaction. For this reason, regulatory review has come under legitimate criticism as promoting regulatory ossification and paralysis. Also, deregulatory decisions have, at times, been subjected to less strict review than regulatory decisions. This is problematic because inefficient deregulation can be just as costly, in terms of social well-being, as inefficient regulation.

In addition to institutional biases, there are many substantive biases in the methodology of cost-benefit analysis that tend to have anti-regulatory results. For example, much attention has been paid to the "countervailing risks" of regulation—where the secondary effects of a regulation impose social costs—but less attention has been paid to the "ancillary benefits" of regulation. The distributional effects of regulation are inadequately examined, raising the possibility that certain groups are systematically under served or over burdened by regulation. There are many similar substantive biases that should be

addressed in order to build support for expanded use of cost-benefit analysis.

For the thirty years of its use, cost-benefit analysis has been opposed by many of the groups that represent interests protected by regulation—including environmental and labor groups. The opposition of these groups to cost-benefit analysis has historical, rather than conceptual, origins. Because cost-benefit analysis has traditionally been closely linked with deregulatory and antiregulatory efforts, groups that promote regulation have not seen the technique as serving their interests.

The U.S. Court of Appeals for the Ninth Circuit recently overturned light truck regulations for inadequate consideration of ancillary benefits.

Fair cost-benefit analysis, however, will often support strong regulation. Consideration of ancillary benefits, for example, will tend to increase regulatory stringency. Removing other antiregulatory biases—such as discounting benefits to future generations at constant rates found in financial markets—will improve the efficiency of regulations, but also help reassure groups that have tended to oppose the use of cost-benefit analysis and regulatory review.

The following principles should guide efforts by the next administration to reform cost-benefit analysis and regulatory review:

Review should look not only for overregulation, but also underregulation and poorly structured regulation. While overregulation imposes unnecessary costs, and should be avoided, a lack of regulation or overly lax standards can also have significant negative consequences in the form of reduced social welfare.

Distributional analysis is needed to avoid unjust regulatory impacts. Cost-benefit analysis generally excludes concerns over how regulatory costs and benefits are distributed. Distributional analysis, conducted on a central and holistic level, rather than on an

ad hoc or case-by-case basis, should ensure a fairer and more reasonable regulatory system.

Regulation is just as likely to generate ancillary benefits as countervailing risks. To ensure an accurate and complete analysis of regulation, agencies must take a broad view of benefits as well as costs and must not ignore benefits that seem intangible or difficult to monetize.

Estimates of compliance costs should recognize that industry can and will adapt to regulatory changes. 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. Accurate accounting of regulatory costs, based on neutral, peer-reviewed data and a dynamic view of the marketplace, is needed to ensure efficient levels of regulatory stringency.

Intergenerational discounting is inappropriate. The constant discount rate used in financial markets is based, in part, on the preference of individuals to enjoy benefits sooner rather than later. These discount rates are inappropriate in the intergenerational context because distribution between individuals is the relevant question. Other frameworks for determining obligations to future generations, including sustainable development, utilitarianism, corrective justice, and the opportunity costs of regulation, should be used.

Regulatory analysis should value mortality risks, not risks to incremental years or quality units. Measuring benefits in terms of life-years or quality-adjusted life-years (QALYs) is inconsistent with existing empirical evidence of how people value risk, and tends to devalue risk reductions for senior citizens and other vulnerable populations.

Transparency and public participation are essential. Too often, executive review has been conducted in secrecy, with inadequate opportunity for public comment. Actions taken by central reviewers should be disclosed to the public. Both the structure of executive review and the methodologies used to evaluate agency decisions should be subject to public comment.

Delayed or overly burdensome review must be avoided. The analytic burdens imposed by central review on agencies should be proportionate to the nature of the agency action under review. The office of executive review must be appropriately staffed to ensure timely responses to agencies and avoid unnecessarily slowing the regulatory process.

Improving the Compass

A new Executive Order authorizing review of agencies by OIRA is needed to signal the next administration's commitment to balanced cost-benefit analysis and smart, effective regulation.

The new order should follow the principles described above, and should also require that agencies adhere to basic methodological standards, which can be provided on a general level in the order, and can be described in greater detail by OIRA. While radical changes to the structure of review are not needed, many small changes to the focus of cost-benefit analysis, as well as the methodologies, are needed to ensure balance of review.

An Executive Order revising the process of central review within the first 100 days of a new administration will send a powerful message of commitment to cost-benefit principles.

What follows is a mark-up of Executive Order 12866, adopted by President Clinton in 1993. EO 12866 updated somewhat the Executive Order adopted by President Reagan in 1981, and was used by President George W. Bush for the first six years of his term. The Bush reforms in 2006 did not substantially change the structure of review, and are not addressed here.

Federal Register
Vol. 58, No. 190
Monday, October 4, 1993

Presidential Documents

Title 3—

The President

Executive Order 12866 of September 30, 1993

Regulatory Planning and Review

The preamble is overly focused on regulatory costs.

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins 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.

There should be greater emphasis on the benefits of regulation and the costs of failing to regulate.

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 are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether 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.

The statement of philosophy is also too negative. Regulation is only endorsed where "necessary to interpret the law," in cases of "compelling public need," or "material failures of private markets."

(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

Regulation can be justified beyond these narrow circumstances. The philosophy should be simply stated as "maximizing net benefits," with costs and benefits understood broadly. Transparency, avoiding delay, coordination, and distributional analysis should all be stated as goals of regulatory review.

is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which 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) 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), 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, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) 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.

(8) 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) 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) 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) 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.

Agencies should be encouraged to develop methods for accurately estimating the value of regulatory benefits, including existence value and mortality risk reduction.

Agencies should develop techniques to estimate regulatory costs that take into account production process changes and innovation.

In general, the current principles are overly focused on the negative impacts of regulation, and do not give adequate attention to ancillary benefits.

Distributional analysis of regulation, undertaken at the central level with data collected by agencies, is also essential to a fair regulatory system. The principles should place distributional concerns at the center of the regulatory review system.

(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 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. [illegible] than one agency, this Executive order, [illegible]cies. 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.

The review function should be maintained in OIRA, given the substantial institutional knowledge that has been developed by that office. In order to avoid costly delay, it is essential that OIRA have adequate staff to perform its review functions in a timely and competent fashion.

(c) *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 their 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 Science and Technology; (7) the Assistant to the President 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) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the 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(10).

(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 does not, however, include:

(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.

OIRA should be tasked with implementing a mechanism to review agency inaction.

"Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected

Because this move would expand its mandate, OIRA would need increases in the size of its staff so that these additional responsibilities do not cause delays in the regulatory process.

(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 of $100 million or more or 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) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

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

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, 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 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.

(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(10). 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 and 41 U.S.C. 402 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(10). (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;

In the past, deregulatory decisions have been subjected to significantly lower levels of review than regulations that impose new restrictions or increase levels of stringency. However, deregulation can be just as costly, in terms of welfare, as new regulation.

The new Executive Order should make clear that even if a regulation tends to reduce compliance costs, cost-benefit analysis is necessary if the regulation results in losses to public health, the environment, or any other good that impacts welfare. The definition should be drawn as expansively as possible so that deregulatory and regulatory decisions are subjected to the same level of scrutiny.

(c) *The Regulatory Plan.* ...edule 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 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 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 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, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the 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 quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(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 reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regula-

Both the Regulatory Plan and Regulatory Working Group sections contain many useful measures.

However, additional steps can be taken to improve coordiantion and harmonization between executive agencies.

OIRA should be specifically tasked with taking on a greater harmonization and coordination role. This will include the addition of staff members with relevant professional backgrounds responsible for facilitating interagency dialogue and identifying areas where conflicts or synergies are possible.

Sec. 5. *Existing Regulations.* In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applic (a) Within 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 to determine whether any such regulations should be modified 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.

(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 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.

(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.* 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

Review of current regulations should always be accompanied by review of underregulated areas where net benefits could be increased with stronger government action. Backward-looking review should also focus on distributional consequences of the set of existing regulations, especially normatively problematic transfers of wealth from less well-off groups or individuals.

In addition to performing cost-benefit analysis, agencies should be required to identify the distributional effects of a proposed regulation. The central review office can then compile and analyze this data to draw more general conclusions about the distributional impacts of regulation.

The current Executive Order, by requiring agencies to assess both "direct costs" and other "adverse effects," including increases in non-target risks, explicity anticipates the analysis of countervailing risks. This is good practice, in as much as it adds information to the regulatory process.

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 governments in the exercise of their governmental functions.

(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 as, but not limited to, 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) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but 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, a quantification of those costs; and

However, there is no equal requirement that ancillary benefits be measured. This is likely to result in an anti-regultory bias.

benefits of potentially effective and reasonably 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);

To avoid this bias, language should be inserted into this section urging agencies to focus on potential ancillary benefits of regulation. Ancillary benefits can be economic, including investment in new areas and the creation of jobs and consumption opportunities. Ancillary benefits can also take the form of reduced public health or environmental risks. While all ancillary benefits and countervailing risks cannot be accounted for, there should be parity between how the two effects are treated.

(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

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) 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 and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did

Firm deadlines are essential for avoiding unnecessary delay in the regulatory process.

Transparency is important so that all relevant views are considered, and to maintain legitimacy for regulatory review.

Additional transparency measures should be considered. In general, the actions of OIRA are less subject to the normal requirements of notice-and-comment rulemaking, and the broad opportunity such rulemakings provide for comment. However, for certain actions that are quasi-regulatory in nature, such as the setting of general cost-benefit guidelines, OIRA should follow procedures similar to those used by the regulating agencies.

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 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 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 all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) 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

A new section should clearly lay out OIRA's role in establishing guidelines for the agencies to conduct cost-benefit and distributional analysis of proposed regulations. The new section should also describe OIRA's role in reviewing regulatory inaction.

One mechanism would allow groups or individuals that have been denied petitions for rulemaking before an agency to seek review before OIRA.

OIRA would establish a procedure for such review, and would also publish clear guidelines, grounded in cost-benefit principles, on which review would be based.

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 Vice President, as provided under section 7 of this order. Upon receipt of this request, the 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.

ments 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.

William J. Clinton

THE WHITE HOUSE,
September 30, 1993.

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Editorial note: For the President's remarks on signing this Executive order, see issue 39 of the *Weekly Compilation of Presidential Documents.*

In general, the actions of OIRA should not be subject to judicial review. Only quasi-regulatory actions, such as the creation of published guidelines that are binding on agencies, should be considered for judicial review.

While the Executive Order may not create a direct right to subject agencies to additional judicial oversight, properly structured, the order can facilitate more effective and useful judicial review. Most importantly, by enforcing the requirement that agencies perform cost-benefit analysis, the order allows courts greater opportunity to evaluate the quality of agency decisionmaking. Where clear costs and benefits have been ignored, courts should strike down regulations in the course of ordinary "arbitrary and capricious" review under the Administrative Procedure Act.

OIRA review of inaction can also facilitate judicial review of denials for petition for rulemaking by creating an additional record that courts can use in the course of review.

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