



The U.S. Practice of Regulatory Review

Shannon Joyce and Christine Kymn

White House Office of Information and Regulatory Affairs

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Any views expressed here are solely those of the presenters, and do not necessarily reflect the position of the Office of Management and Budget or the Executive Office of the President.

What is Regulation?

- From an economic perspective, regulation is viewed as a government or policy intervention in a market.
- In the typical regulatory scenario, market intervention would be justified when a market failure occurs and where the intervention would improve society's position (relative to a socially optimal reference point, such as perfect competition).



Economics in Regulatory Policy

- Economics provides behavioral tools to help predict how people will respond to changes in laws and policy.
- Economic tools such as consumer welfare, price and game theory, as well as the applied empirical analytics of econometrics help policymakers to analyze and anticipate behavior changes.
- Economics informs the policymaker beyond the what constitutes an “efficient” allocation of resources, it can also inform regarding distributive impacts.
- In the mid-1950s, economists formalized a definition of “public goods” (Samuelson 1954), followed by further scholarship in the 1960s and 70s on externalities (e.g. pollution) and property rights. In the 1980s, economics provided the technical foundation for deregulatory policy that restructured the airline, trucking, and railroad industries. In the 1980s and 1990s, cost benefit analysis became a standard tool in formulating US regulatory policy.



A Brief History of Benefit Cost Analysis in the U.S. Government

- Benefit-cost analysis early seeds in 1844 by French engineer Jules Dupuit, who also explored concepts which eventually came to be known as elasticity and consumer surplus.
- Benefit-cost analysis in the United States started in the 1930s with the U.S. Army Corps of Engineers. (1936 Flood Control Act)
- President Reagan formalized the use of benefit-cost analysis in Executive Order (EO) 12291 in 1981.
- President Clinton developed the format that regulations and analysis in EO 12866 in 1993.



In 1993, President William Clinton wrote in Executive Order 12866 that “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.”*



The Regulatory Policy of the Government of the United States

Federal agencies should promulgate only such regulations as are:

- required by law,
- necessary to interpret the law, or
- 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.



The Regulatory Policy of the Government of the United States

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.



The Regulatory Policy of the Government of the United States

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.



Regulatory Principles of the Government of the United States

These principles guide all regulatory programs in the United States – both new and old, regulatory and deregulatory.



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Principle 1 – Identify the Problem

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.



When and Why Is It Appropriate to Regulate?

- What is the need for regulation?
 - Market failure or some other compelling public interest
 - Should describe the failure both qualitatively and quantitatively, where feasible
- What is the market failure?
 - Externality, common property resource and public good
 - Market power
 - Inadequate or asymmetric information
 - Other social purposes
- Presumption against economic regulation



Examples of Market Failure

- Pollution from power plants that impacts the air quality of downwind property holders or the pig farmer that neighbors residential homes (negative externalities)
- Over-fishing in a body of water where ownership is unclear (common-pool resources)
- Financial sector bubbles and market collusion (asymmetric information)



Principle 2 – Consider Government Failure

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



Principle 3 – Assess Alternatives to ‘Command and Control’ Regulation

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.



Examples of Economic Incentives to Encourage Behavior

- These approaches include:
 - warnings,
 - appropriate default rules,
 - disclosure requirements, as well as
 - the provision of information to the public in a form that is clear and intelligible.



Principle 4 – Assess Risks

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.



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Uncertainty

- For economically significant rules
 - Characterize probabilities of the relevant outcomes
 - Qualitative discussion of main uncertainties
 - Sensitivity analysis
 - Assign economic value to the projected outcomes
- For all rules in excess of \$1 billion USD
 - Formal quantitative analysis of the relevant uncertainties
- Where level of scientific uncertainty is very high
 - If probabilistic approach is not possible, evaluate discrete alternative scenarios using a range of plausible scenarios
 - If uncertainty due to lack of data, evaluate additional research prior to rulemaking as an explicit regulatory alternative



Principle 5 – Cost-effectiveness

- 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.
- This is a useful principle when the agency has established an policy goal, has alternative avenues to achieve this goal, and has a finite set of resources with which to accomplish the goal.



Principle 6 – Assess *both* Costs and Benefits

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.



Principle 7 – Base Regulations in Quality Information

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.



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Principle 8 – Preference for Performance-Based Standards

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.



Example of Performance Standards

- U.S. Department of Homeland Security's Chemical Facilities Antiterrorism Standards (CFATS)
 - Requires industrial facilities using dangerous chemicals to protect the chemicals from terrorists
 - Sets a standard, but not a path for getting there
 - Facilities submit their own proposed compliance method



Principle 9 – Minimize Regulatory Conflict with State and Local Government

- 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.



Principle 10 – Avoid Regulatory Conflict with Other Federal Regulation

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



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Avoid Regulatory Conflict with Other Federal Regulation

- The Environmental Protection Agency's *Risk Management Plan (RMP)* for industrial facilities using hazardous chemicals
- The Department of Homeland Security's *Chemical Facilities Antiterrorism Standards (CFATS)* program for industrial facilities using chemicals at risk of exploitation by terrorists.
- Two programs, same facilities, same chemicals, different goals
- The two agencies must coordinate



Principle 11 – Minimize Cumulative Burden on Society

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.



Principle 12 – Use Clear Language

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.



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These principles guide both:

- the agencies that promulgate regulations;
- the review of those regulations by the White House Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB)



Interagency Coordination of Rulemaking: Presidential Oversight

1970s

- **President Ford:** Required, for the first time, regulatory impact analysis (RIA) requirement for major regulations (over \$100 million in impact).
- **President Carter:** Established the Regulatory Analysis Review Group.

1980s

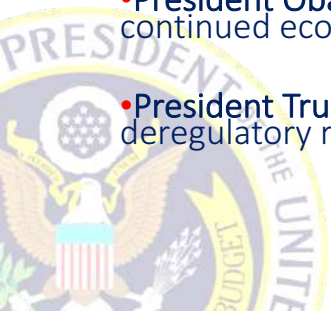
- **President Reagan:** Solidified regulatory oversight authority within the White House, issuing Executive Order 12291, which required OMB review and approval of rules.
- **President George H.W. Bush:** Continued the Reagan Executive Order.

1990s

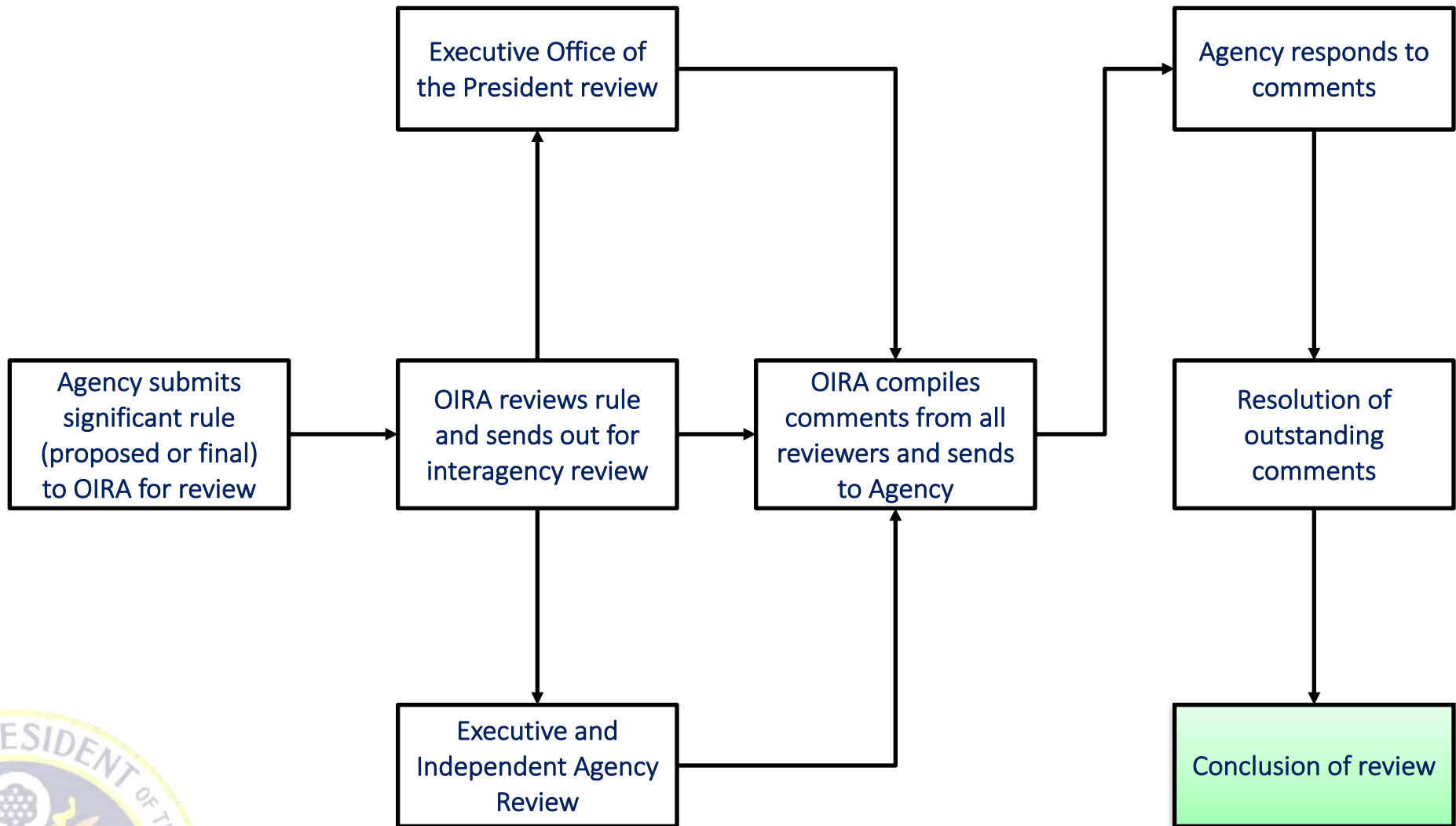
- **President Clinton:** Issued Executive Order 12866, which focused OMB oversight on “significant” rules and increased the disclosure of contacts with outside parties.

2000s

- **President George W. Bush:** Maintained the Clinton Executive Order that requires the agencies to do RIAs and send significant regulations to OMB for review.
- **President Obama:** Issued Executive Order 13563, which affirms EO 12866 and outlines his regulatory strategy to support continued economic growth and job creation.
- **President Trump:** Issued Executive Order 13371 which outlines a regulatory budget and a requirement for identifying deregulatory rules before issuing regulatory rules, as allowed by law.



OIRA Centralized Regulatory Review Process



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Possible Actions at the End of OIRA Review

Allow the agency to issue the rule.

- A rule is usually sent directly to the *Federal Register* at the conclusion of review.

Agency withdrawal of the rule.

- If we are unable to resolve issues during the review process, or the agency needs more time to make changes, the agency can withdraw the rule.

“Return Letter”

- OIRA may return a regulation for agency reconsideration to address OIRA concerns.
- Very public and very rare.



Regulatory Transparency and Participation

Disclosure of Information Under Executive Order 12866:

- The public can consult OMB's online "Regulatory Review Dashboard" to learn each day which rules are under formal review at OMB.
- Meetings with outside parties – OIRA and the issuing agency will meet with external stakeholders regarding rules under review. OMB's website notes which outside groups have met with OIRA, including the participants, and docket written materials provided to OIRA during the meeting.
- All written information given to us while a rule is under review is sent to the agency, placed in OIRA's docket, and posted online.
- Return letters sent to the agencies outlining our concerns with rules we send back are posted on our website.



References

- Executive Order 12866, Regulatory Planning and Review (September 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>
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- Regulatory Impact analysis: A Primer, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf
- Regulatory Impact Analysis, Frequently Asked Questions (FAQs) (February 11, 2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (January 30, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf>
- Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs”, M-17-21 (April 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>
- Executive Order 13777, Enforcing the Regulatory Reform Agenda (February 24, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf>



Questions?

Thank you!

Contact information:

Shannon Joyce: sjoyce@omb.eop.gov

Christine Kymn: ckymn@omb.eop.gov



Possible Q&A



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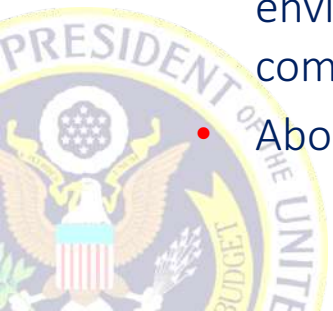
What regulations must OIRA review?

“Significant” Rules (Proposed and Final Rules)

- Create a serious inconsistency or otherwise interfere with another agency’s actions.
- Materially alter the budgetary impact of Federal programs.
- Raise novel legal or policy issues.
- OIRA reviews 500-700 proposed and final regulations per year—those we determine to be significant—out of about 6,500 that are published in the *Federal Register* (national gazette).

“Economically Significant” Rules (Proposed and Final Rules)

- Subset of “significant” rules.
- 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.
- About 70-100 of the regulations reviewed are “economically significant.”



Distributional Effects

- Regulatory actions generate varied impacts across the population and economy
- Those who bear the costs of a regulation often differ from those who bear the benefits
- Circular A-4 strongly encourages a separate description of distributional effects (such as population subgroups)
- Where distributional effects are important, alternatives should, to the extent possible, quantitatively address the magnitude, likelihood and severity of distributional impacts



Executive Order 13771:

“Reducing Regulation and Controlling Regulatory Costs”

- **EO 13771 Regulatory Action (M-17-21, Q2)**

“(i) A significant regulatory action as defined in Section 3(f) of EO 12866 that has been finalized and that imposes total costs greater than zero; or

(ii) A significant guidance document (e.g., significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and imposes total costs greater than zero.”

- **EO 13771 Deregulatory Action (M-17-21, Q4)**

“... an action that has been finalized and has total costs less than zero. An EO 13771 deregulatory action qualifies as both: (1) of the actions used to satisfy the provision to repeal or revise at least two existing regulations for each regulation issued, and (2) a cost savings for the purposes of the total incremental cost allowance.”



What doesn't require offsets under EO 13771?

- See Guidance M-17-21, Q 13, 33 (April 05,2017)
- Regulations issued with respect to the military, national security, and foreign affairs
- Rules with *de minimis* costs
- Transfer rules, unless they have more than *de minimis* costs
- ANPRMs
- Information collections
- Emergency actions and statutorily or judicially required actions can delay offsets



What factors might agencies find helpful in determining which costs/cost savings to monetize under EO 13771?

- A-4 business practices
 - Monetize
 - Quantify
 - Qualitative
- Economically Significant?
- Previous (recent) final action (NPRM, FR)?
- EO 13771 worksheet options
- Other analyses such as RFA analysis



If an agency doesn't have established accounting conventions, do you have any guidance or "rules of thumb" regarding which impacts (costs/benefits) belong on which side of the ledger under EO 13771?

- See Guidance M-17-21, Q21 (April 05, 2017)
- Consider treating effects on the regulated party as being "costs." Consider treating effects that are related to the aim or goal of the regulation as "benefits."
- Guidance says that fuel savings due to energy efficiency regulations are to be counted as benefits rather cost savings.

