Regulatory Planning and Review in the U.S.: An Overview

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• Served 5 Presidents in the Executive Office of the President (EOP)
  -- COWPS, 1977-1981
  – OIRA/OMB, 1981-2008

• Economist and researcher
  – Federal Reserve Board of Governors, 1969-1973
  – U.S. Naval Academy, 1973-1976
  – Anti-Trust and Monopoly Subcommittee, U.S. Senate, 1976
How to Achieve Government Policy Goals?

• **Spend** (make federal Budget request, seek Congressional appropriations)

• **Tax** (include in federal Budget, requires Congressional action)

• **Regulatory Mandate** (may require Congressional action, or if there is already existing statutory authority, may entail issuance of *new regulation*).
Attractions of the Regulatory Mandate Approach

• “Off-budget”
  – Effects (both costs and benefits) are less transparent.
• If authorizing legislation already exists, a regulation is within President’s authority.
• More appropriate for complicated science-based risk-related issues that are pervasive in modern life, e.g.,
  – food and drug safety,
  – labeling,
  – air pollution.
The Rulemaking Process

• The Administrative Procedure Act requires agencies to go through a notice and comment process open to all members of the affected public (both U.S. and foreign).

• Before agencies can issue a final rule, they must respond to public comments, make sure that the rule is a logical out-growth of the proposal and the public record, and is not arbitrary and capricious.

• The public record is used by the courts in settling any challenge to the regulations brought by the affected public.
Regulatory Planning and Review Policy and Practice

• Problem (control and authority)
• Process of Regulatory Planning and Review
  • Who?
  • How?
  • What?
• Role of Economic Analysis
• Regulatory Transparency and Accountability
• Strengths and weaknesses
The Problem

• Who makes what regulatory decisions, according to what criteria, and with what level of oversight?

• Regulatory review is important because it is a key process for establishing the President’s control over Executive Branch agencies.
  – Accountability is required because special interests are especially powerful in regulatory matters.
  – Presidents for decades have established control through a process of review within the EOP of draft regulatory decisions.
Federal Register Pages: 1940-2008
The President’s Process: E.O. 12866

– Signed by President Clinton, October 1993,
  • Replaced E.O. signed by President Reagan.
  • Used by President Bush and so far by President Obama.
– “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.”
E.O. 12866 Has Twelve “Good Government” Principles, e.g.,

(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 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.
E.O. 12866 Has 12 Principles, e.g.,

(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.
Process under E.O.12866

- Agencies submit draft “significant” regulations (both proposed and final) for OIRA review before publishing them in the Federal Register.
- OIRA reviews 400-700 rules per year (out of 2200 rules issued); about 60-100 rules are economically significant (over $100 million per year in benefits or costs).
- OIRA reviews both the draft rule and the RIA, and makes suggestions for improvement. OIRA review also seeks to make sure that the rule is consistent with the Executive Order and the President’s priorities.
- If OIRA and the agency cannot agree on the need to revise the rule, OIRA can return the rule for reconsideration.
Other Steps

• After OIRA completes review, the agency publishes the rule in the Federal Register.
• Congress may review it under the Congressional Review Act.
• After a rule goes into effect, affected parties can bring suit against the agency issuing the rule. The Federal courts may reverse the rule (or require changes) because the agency violated the APA process requirements, the statute serving as the basis for the rule, or the U.S. Constitution.
• The Regulatory Right-to-Know Act requires OMB to issue a report to Congress each year providing estimates of the benefits and cost of rules in the aggregate, by agency, and by regulation.
Role of Economic Analysis (RIAs)

• Best available comprehensive, systematic, prospective projections of positive and negative consequences of regulatory actions.

• A-4: “Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to receive. . . .”

• RIAs are valuable if done well.
Estimates of Costs and Benefits
Table A-1: Summary of Agency Estimates for Final Rules  
October 1, 2007 - September 30, 2008 (As of Date of Completion of OMB Review)

<table>
<thead>
<tr>
<th>Rule [FR Cite]</th>
<th>Agency</th>
<th>Benefits</th>
<th>Costs</th>
<th>Other Information</th>
</tr>
</thead>
</table>
| Right Whale   | DOC/NOAA         | Not estimated     | $105 million per year| Benefits: Reduction of right whale mortality which reduces the likelihood of extinction of this endangered species.  
Costs: Total costs include both direct and secondary economic effects.  
The RIA is available online at: http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/feis_economic_analysis.pdf |
| Ship Strike   |                   |                   |                      |                                                                                                                                                  |
| Reduction    |                   |                   |                      |                                                                                                                                                  |
| [73 FR 60173]|                  |                   |                      |                                                                                                                                                  |
| Energy        | DOE/EERE         | $120 - 182 million per year | $33 - 38 million per year | Energy savings of 0.011 quadrillion BTUs of energy from 2015 to 2038.  
The RIA is available online at: http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/fb_frsd/ria.pdf |
| Efficiency    |                   |                   |                      |                                                                                                                                                  |
| Standards for |                   |                   |                      |                                                                                                                                                  |
| Residential   |                   |                   |                      |                                                                                                                                                  |
| Furnaces and  |                   |                   |                      |                                                                                                                                                  |
| Boilers       |                   |                   |                      |                                                                                                                                                  |
| [72 FR 65136]|                  |                   |                      |                                                                                                                                                  |
| Group Health  | HHS/CMS, DOL/EBSA and IRS | Not estimated | $119 - 238 million per year | Benefits: Increase in access to health plan coverage for postpartum care and monitoring of mothers and their newborns should reduce the risk of adverse health outcomes.  
Costs: Because the statute does not require a 48 or 96-hour stay, but instead gives the decision-making authority to the attending physician in consultation with the mother, it is expected that not all these births will result in additional hospital time.  
The RIA is available online at: http://www.regulations.gov/Edmspublic/component/main?main=DocumentDetail&o=090000648076a419 |
| Plans and Health |                   |                   |                      |                                                                                                                                                  |
| Insurance Issues |               |                   |                      |                                                                                                                                                  |
| Under the    |                   |                   |                      |                                                                                                                                                  |
| Newborns and  |                   |                   |                      |                                                                                                                                                  |
| Mothers Health Protection Act | |                   |                      |                                                                                                                                                  |
| [73 FR 62409]|                  |                   |                      |                                                                                                                                                  |
Summary of FY 2008 Rules

• 42 economically significant final rules in 12 month interval.

• 21 of these implement Federal budgetary programs, which primarily facilitate “income transfer” from taxpayers to program beneficiaries.

• For the 21 with social benefits and costs, some do not provide (quantitative) estimates of
  – Costs (1 rule: Migratory Bird Hunting Regulations)
  – Benefits (6 rules: e.g., Right Whale Ship Strike Reduction)
  – Cost or benefits (1 rule: Default Investment Alternatives for Participant Directed Individual Account Plans)
The Process

• OIRA professional analysts evaluate draft agency analyses to see whether
  – Draft regulations comport with the principles in EO 12866
  – Supporting analyses follow methods outlined in OMB circulars, regarding both process (e.g., peer-review) and substance (e.g., discount rates).

• OMB accepts requests from outside parties to meet to hear concerns with pending draft regulations, but these meetings are
  – in presence of representatives of regulatory agencies
  – disclosed officially to the public.
  – held without disclosing the content of the draft rule to outsiders

• Agency and OMB officials discuss (negotiate) over text of regulation.
Three Roles for Economic Analysis

• To comply with statutory requirements.
• To inform government policy makers about efficiency implications and other effects.
• To provide information to Congress and the public.
Example: Benefit/Cost Analysis

• Government Support for a Sports Stadium
  – Reasons for Government Intervention
  – Alternatives
  – Benefits of a Sports Franchise
    • Economic growth, jobs, etc.
    • Community Well-being/spirit
  – Costs of a Sports Franchise
  – Evidence from the Economics of Sports Literature
RIAs: Complying with Statutory Requirements

• Agencies take seriously legal requirements for economic analysis under SBREFA or UMRA, or even under CWA BAT program, for example.
• Successful challenge of rules for inadequate economic analysis is rare.
• But statutorily mandated economic analysis of rules is rarely directly related to efficiency.
RIAs: Informing Government Policy Makers About Efficiency Implications

• RIAs are well suited. If the people in charge care about getting better RIAs they can ask agencies to conduct further analysis.

• But improving economic analysis as a management aid has an effect on efficiency only to the extent that decision-makers are committed to efficiency as an important objective.

• Evidence here is mixed.
RIAs: Informing Congress and the Public

• Benefit-cost analysis when well done yields perhaps the best available summary of the effects of a regulation on national welfare.
• But how to judge “quality” of RIAs?
• There are two approaches:
  – review the results,
  – review the process.
RIAs: Informing Congress and the Public

• 1) Review results
  – Low hurdles of general applicability
    • assess different regulatory options (or alternatives),
    • discount benefits that occur later than the associated costs, and
    • use the same baseline to assess costs and benefits.
RIAs: Informing Congress and the Public

• 1) Review results
  – Medium hurdles
    • Did the analysis assess an adequate set of alternatives?
    • Did the analysis use an economically defensible discount rate or set of discount rates?
    • Did the analysis use an appropriate baseline to describe the world that would occur in the absence of the regulation?
    • Did the analysis assess all significant categories of benefits and costs?
    • Did it provide quantitative estimates of benefits and costs for all such categories?
    • Did it take risk and uncertainty into account in an appropriate way? For example, did it present best or most likely estimates of outcomes as well as other points on the distribution of outcomes?
RIAs: Informing Congress and the Public

• 1) Review results
  – High hurdles of general applicability.
    • Does reanalysis of the same data with the same techniques give the same results?
    • Would other closely related estimation techniques provide similar results?
    • Does third party review confirm the analysis?
RIAs: Informing Congress and the Public

• 2) Review process: Are there incentives for quality and good procedures for quality control?
  • Public comment
  • External independent qualified peer-review
  • Competition among institutions
  • Independence from political pressure
Information Quality

• Under the Information Quality Law, OMB has issued guidelines to enhance the quality of information that agencies use and disseminate
  – Agencies must establish minimum quality standards for information that they disseminate to the public.
  – “Influential” data—such as data used to support rules—must be reproducible by qualified third parties.
  – Any affected member of the public may challenge agency information and request a technical correction.
Regulatory Transparency And Accountability

• Disclosure of Information on E.O 12866 Review
  – [www.reginfo.gov](http://www.reginfo.gov) posts a list of draft rules under review (and those for which OIRA has concluded review).
  – [www.whitehouse.gov/omb/oira](http://www.whitehouse.gov/omb/oira) posts a list of meetings with outside groups on rules under review.
  – All written information from outside parties for a rule under review is provided to the agency.
  – Return letters and other letters concerning a draft rule under review are posted at [www.reginfo.gov](http://www.reginfo.gov)
Strengths and Weaknesses

• Strengths:
  – Institutionalized commitment to economic analysis of regulations through transparent process open to public comment and according to established rules.
  – Acceptance within the Executive Branch and the policy community
  – Frequently good, credible analysis
Strengths and Weaknesses

• Weaknesses
  – Weak incentives or controls to ensure quality analysis and plenty of examples of quality inadequate for public accountability.
Suggestions / Recommendations

• The quality of economic analysis is likely to be higher if there are competing estimates.
• Insulation of analysts from political pressures is important.
• Some administrative arrangements may promote good analysis.
  – Public commitments to abide by best practices for RIAs.
  – Public commitments to complete analysis before decision-making.
• Some analysis, or some oversight of analysis, could be delegated to independent agencies.
Questions?

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Selected References
