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PERFORMANCE-BASED REGULATIONS

By Henry Wray

MERCATUS CENTER

GEORGE MASON UNIVERSITY

The ideas presented in this research are the author's and do not represent official positions
of the Mercatus Center at George Mason University.

Introduction

Regulation plays a vital role in the way the federal government carries out its functions. Federal rules are a key tool for implementing many important governmental policies that directly affect the lives of all our citizens in such areas as public health and safety, environmental quality, and the sound functioning of financial institutions and markets. At the same time, federal rules impose heavy costs and burdens on business and other organizations, state and local governments, individual citizens, and the economy as a whole. It is essential that rules be effective. Regulators also must adhere to their statutory mandates and avoid “mission creep” by exceeding their authority in response to the myriad pressures they face, externally and internally.

Given the importance of regulation, federal policymakers and the public need to understand whether federal rules are in compliance with with statutory intent and how well they are performing in order to assess whether they should be continued or modified, or whether alternative approaches should be considered. Specifically, the following core performance assessment questions must be answered:

- What outcomes does the rule seek to achieve that produce concrete benefits for the public?
- How does the rule comport with and advance the statutory mission and strategic goals of the agency that issued it?
- How does the agency measure the rule’s success in achieving its intended outcomes?
- Once implemented, how well does it perform against its goals and measures?

Current regulatory reform statutes and executive orders do not provide a comprehensive and consistent means to answer these questions. Therefore, a systematic, outcome-oriented assessment framework is needed. This paper (1) examines several statutory and executive order provisions enacted to improve the regulatory process, (2) offers a

proposal for a new assessment framework, (3) articulates how this proposal will improve the process, and (4) makes recommendations for its implementation.

I. Statement of the Problem

The existing statutory and executive order provisions for regulatory oversight are plentiful but not well-suited to provide for the systematic, outcome-oriented assessment of regulatory effectiveness. Indeed, they were developed in a piecemeal way and probably were not designed with this overall purpose in mind. Considering the pervasive importance and impact of federal rules, there is a critical need to assess a rule's effectiveness and hold the issuing agency accountable for how well it achieves its intended purpose.

Leading federal agencies affirm the need for such assessments. The Office of Management and Budget (OMB) has observed that federal rules, like other tools of government policy, carry great potential for both good and harm. A well-designed rule can advance important public benefits; a poorly designed rule can produce excessive compliance costs and burdens, harm the economy, and divert attention from potentially better solutions to the problem it seeks to address.¹ The Government Accountability Office (GAO) asserts that a thorough review of the regulatory process is particularly timely now because of the long-term fiscal imbalance facing the United States, along with our many other fundamental national challenges. GAO regards a broad reexamination of federal regulation as a first step in the long-term effort to transform what the federal government does and how it does it.²

The enormous economic impact of federal rules re-enforces the need for effectiveness assessments. One estimate places the aggregate cost to comply with federal rules at \$1.1

¹ Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress on the Costs and Benefits of Federal Regulations* (Sept. 30, 1997), at 10. The report can be found at: <http://www.whitehouse.gov/omb/inforeg/rcongress.html> (last visited June 26, 2008).

² U.S. Government Accountability Office, *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, GAO-05-939T (July 27, 2005), at 11.

*trillion dollars annually.*³ Other measures confirm the magnitude of federal regulation. The GAO reports that from 1996 through October 30, 2007, federal agencies submitted over 46,000 rules to Congress and GAO pursuant to the Congressional Review Act, described hereafter.⁴ Of these, 703 were so-called “major” rules having an annual impact on the economy of \$100 million or more or producing other significant effects. According to a recent analysis, the President’s fiscal year 2008 budget proposed \$46.6 billion in spending on regulatory activities carried out by over 250,000 full-time federal employees.⁵

II. Background on Need for Change

A. Statutory and executive order provisions for regulatory oversight

In recent decades, Congress and presidents of both parties have devoted considerable effort to scrutinizing federal rules. Major “regulatory reform” statutes enacted over this period include the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Congressional Review Act. In addition to such statutory requirements, all presidents from Richard Nixon to George W. Bush imposed mandates for federal agencies to analyze the costs (in the beginning) and benefits (later on) of their rules. From the Reagan Administration on, these mandates have been embodied in executive orders and implemented by OMB’s Office of Information and Regulatory Affairs (OIRA). The version now in effect is Executive Order No. 12866,

³ Jerry Brito and Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 *CommLaw Spectator* (2007), at 8, fn. 34, referring to the oft-cited study by W. Mark Crane, U.S. Small Business Administration, *The Impact of Regulatory Costs on Small Firms* (2005).

⁴ U.S. Government Accountability Office, *Congressional Review Act*, GAO-08-268T (Nov. 6, 2007), at 2.

⁵ Jerry Brito and Melinda Warren, Mercatus Center, George Mason University and Weidenbaum Center, Washington University in St. Louis, *Growth in Regulation Slows: An Analysis of the U.S. Budget for Fiscal Years 2007 and 2008* (June 2007), at 1. As the title of the article indicates, the \$46.6 billion figure actually represents a slight decrease in the rate of growth for regulatory spending from the prior fiscal year.

originally issued by President Clinton in 1993 and revised by President Bush in 2002 and 2007. Appendix I provides a brief overview of these statutes and executive orders.⁶

B. Gaps and limitations of existing provisions

The current statutory and executive order requirements undoubtedly bring more rigorous analysis to rulemaking. Presumably, many rules have been improved as a result of them, and their very existence probably serves to deter some ill-considered regulatory proposals that could not withstand the scrutiny they provide. However, a number of studies by GAO and others have pointed out their gaps and limitations. One major limitation is that they focus primarily on the development of rules at the front end rather than their actual performance once they take effect. While the Regulatory Flexibility Act and Executive Order 12866 address reviews of existing rules to some extent, their core regulatory analysis requirements target the development of new rules. The Unfunded Mandates Reform Act applies exclusively to the development of new rules.⁷

The regulatory analyses required by the statutes and by Executive Order 12866, including cost-benefit calculations and other assessments of anticipated effects, are necessarily based on assumptions made at the time a proposed rule is being developed. These assumptions, of course, may or may not prove accurate once the rule is implemented. For this and other reasons, the analyses are subject to considerable technical debate over their

⁶ For more on the evolution of the regulatory analysis requirements, see Jerry Brito and Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, *supra* note 3, at 7-14, and John D. Graham, et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *Fordham Urban L. J.* 953 (May 2006), at 955-965.

⁷ Even within the context of rule development, application of some requirements is limited. As GAO noted in recent congressional testimony, the regulatory analysis provisions of the Unfunded Mandates Reform Act and the Regulatory Flexibility Act apply only to rules developed through the notice and comment proposed rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553. The testimony further observed that it is common for agencies to issue “direct” and “interim” final rules without going through the proposed rulemaking process. U.S. Government Accountability Office, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-06-228T (Nov. 1, 2005), at 9-10.

methodologies as well as broader controversy over their fundamental credibility and value.⁸

The statutes and executive orders are subject to scope limitations as well. Both the Unfunded Mandates Reform Act and the principal regulatory analysis features of Executive Order 12866 exclude a major source of rules: those issued by “independent regulatory agencies.”⁹ Also, their key requirements are restricted to rules having an annual economic impact of \$100 million or more or other significant economic effects. For example, GAO identified fourteen definitional restrictions in the Unfunded Mandates Reform Act that severely limit its application.¹⁰ Another problem is ambiguity. For example, the Regulatory Flexibility Act does not apply to a rule if the issuing agency certifies that the rule will not have a “significant economic impact on a substantial number of small entities.” However, the failure of the Act to define this term has led to differing interpretations and inconsistent application across agencies.¹¹

⁸ See, for example: U.S. Government Accountability Office, *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, *supra* note 2 (assessments often incomplete, inconsistent with general economic principles, and based on different assumptions for the same key economic variables; concerns expressed about the accuracy and completeness of agency cost estimates); Alan Carlin, *The New Challenge to Cost-Benefit Analysis*, *Regulation*, 18, 20 (Fall 2005); Robert W. Hahn and Patrick Dudley, AEI-Brookings Joint Center for Regulatory Studies, *How Well Does the Government Do Cost-Benefit Analysis?* (Working paper 04-01, revised April 2005), at 11 (finding that the quality of regulatory impact analyses varies within and across administrations and is generally low); Robert W. Hahn and Erin M. Layburn, *Tracking the Value of Regulation*, *Regulation* (Fall 2003), at 16-17 (observing that OMB does not provide independent assessments of the quality of agency regulatory impact analysis submissions); and Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489 (May, 2002), at 1492-93 (suggesting that the Executive Order 12866 regulatory impact analyses “have had little impact on what agencies actually do”). On the other hand, the former administrator of ORIA maintains that regulatory impact analyses have improved in recent years. John D. Graham, et al., *Managing the Regulatory State: The Experience of the Bush Administration*, *supra* note 18. See also the working paper by Richard Williams, *The Influence of Regulatory Economists in Federal Health and Safety Agencies*

⁹ See note 38, hereafter, for a listing of these agencies.

¹⁰ GAO-05-939T, *supra* note 2, at 5. A more detailed GAO report on this subject, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (May 2004), describes the various exceptions. The exceptions include rules that enforce constitutional or civil rights, rules necessary for “national security,” rules relating to “emergencies” designated by the President and Congress, and rules that do not result in annual “expenditures” (as opposed to “costs”) of \$100 million or more. See GAO-04-637 at 13-14 and 26-27.

¹¹ *Id.* at 6 and the additional GAO reports cited there.

The provisions of the statutes and executive order that require or at least encourage retrospective reviews of existing rules also have their limitations. In particular, they have been applied sporadically and unevenly by the agencies. Last year GAO reported on the results of a comprehensive study of retrospective reviews.¹² The GAO study covered agency reviews of existing rules pursuant to section 610 of the Regulatory Flexibility Act, Executive Order 12866, and agency-specific statutes such as the Clean Air Act. GAO found wide variation among agencies concerning the extent to which they conducted retrospective reviews and the manner in which they reported on them. According to GAO, agencies performed certain required reviews infrequently.¹³ When mandatory reviews were conducted, they had little impact since the agencies usually concluded that no changes were needed.¹⁴ Another problem GAO highlighted was the lack of transparency in agency reviews and reporting practices; non-federal parties told GAO that they were rarely aware of the reviews.¹⁵ Still another problem was that agencies said they lacked the data necessary to conduct effective reviews.¹⁶ As GAO noted, other studies have likewise identified problems limiting the effectiveness of retrospective reviews.¹⁷

GAO offered a series of recommendations to improve retrospective reviews, including the following:

¹² U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (July 2007).

¹³ *Id.* at 11.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.* Agency officials also asserted that they had insufficient time and staff resources to devote to the reviews and complained of overlapping and duplicative review requirements.

¹⁷ See *id.* at 11, fn. 26. See also Congressional Research Service Report for Congress, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, RL 32801 (Jan. 14, 2008), and studies cited.

- When developing new rules, agencies should consider how they will measure the performance of the rule and what data will be needed for this purpose.
- The transparency of reviews should be enhanced by developing mechanisms to communicate review results to the public.
- Agency managers need to give sustained attention to supporting and improving regulatory reviews.
- OIRA and regulatory agencies should identify opportunities for Congress to revise the timing and scope of existing review requirements and perhaps consolidate such requirements.¹⁸

Looking more generally at the regulatory reform statutes and executive orders, GAO suggested two avenues to explore in order to make them more effective. One was to “broadly revisit the procedures, definitions, exemptions, and other provisions of existing initiatives to determine whether changes are needed to better achieve their goals.” The other was to put more emphasis on evaluations of existing rules, using lessons learned from such evaluations “to keep the regulatory process focused on results and inform future action to meet emerging challenges.”¹⁹

III. A New Approach and How It Can Help

The studies described above indicate that the current regulatory reform statutes need a general overhaul. This general revision could incorporate a statutory process to ensure outcome-oriented performance measurement and accountability for individual rules. However, revising the current statutes will be a complex, controversial, and time-consuming undertaking. In the interim, there is an alternative approach that could be implemented in far less time and that offers great potential to enhance regulatory accountability and effectiveness. This approach does not require the enactment of new legislation. Rather, it takes advantage of a law already on the statute books, albeit one

¹⁸ *Id.* at 53-54.

¹⁹ GAO-05-939T, *supra* note 2 (“highlights” page).

that tends to be overlooked as a tool for regulatory reform: the Government Performance and Results Act of 1993 (GPRA).²⁰

As its name suggests, GPRA was designed to shift the focus of federal performance management and accountability from process to results. Rather than measuring success by activities and outputs (*e.g.*, number of rules issued or inspections conducted), the Act sought to emphasize the outcomes resulting from these activities and outputs (*e.g.*, safer workplaces, healthier food). The late Senator William Roth, principal sponsor of GPRA, observed during Senate debate that the legislation represented a fundamental reform in the way the Federal Government does business, bringing about a new form of accountability to the American taxpayers: accountability by federal agencies for the results they achieve when they spend tax dollars.²¹

The Act's findings and purposes section²² noted that federal program managers were "seriously disadvantaged in their efforts to improve program efficiency and effectiveness, because of insufficient articulation of program goals and inadequate information on program performance" and that "congressional policymaking, spending decisions, and program oversight are seriously handicapped by insufficient attention to program performance and results." To address these shortcomings, the Act was intended to:

- systematically hold federal agencies accountable for achieving program results;
- improve program effectiveness and accountability by promoting a new focus on results;
- help federal managers improve service delivery by requiring them to plan for meeting program objectives and by providing them with information about program results; and

²⁰ Pub. L. No. 103-62, 107 Stat. 285 (Aug. 3, 1993).

²¹ 139 Cong. Rec. 13833 (1993). S. Rep. No. 103-58 (June 16, 1993) and H.R. Rep. No. 103-106 (May 25, 1993) provide additional legislative history on GPRA.

²² Section 2 of GPRA, 107 Stat. 285.

- improve congressional decision-making by providing more objective information on achieving statutory objectives, and on the relative effectiveness and efficiency of federal programs and spending.

GPRA covers virtually all executive branch departments and agencies, including independent regulatory agencies, and thus reaches the full range of agencies having significant regulatory functions.²³ It requires each agency to develop a comprehensive mission statement along with long-term (five-year) strategic goals and objectives, including outcome-related goals and objectives, covering its major functions and operations.²⁴ Agencies must also prepare annual performance plans containing goals and measures for each of their program activities, which are to include indicators assessing outcomes.²⁵ Finally, agencies must report annually to the Congress and to the public on their performance results against these goals and measures.²⁶

GPRA operates at a higher level than individual rules, focusing on federal departments and agencies as a whole.²⁷ However, the Act's analytic framework along with its established reporting mechanism is well suited to assessing and tracking the effectiveness of federal program activities at virtually any unit of analysis. As described above, the core elements are:

- one or more long-term goals for the unit of analysis, expressed as measurable outcomes that clearly identify the intended public benefits;

²³ See 5 USC 306(f).

²⁴ 5 U.S.C. 306(a) and (b).

²⁵ 31 U.S.C. 1115(a). The Act defines "outcome measure" as "an assessment of the results of a program activity compared to its intended purpose." *Id.* at 1115(f)(2).

²⁶ See generally 31 U.S.C. 1116.

²⁷ For this reason a regulatory agency's GPRA plans and reports do not now contain the detailed information needed to assess the performance effectiveness of individual rules, although they would be relevant. In particular, the agency's GPRA strategic plan would provide the source for determining whether an individual rule supported the agency's overall mission and strategic goals.

- annual performance measures that provide a valid and verifiable basis for tracking progress toward the long-term goals; and
- annual reports on performance results against the goals and measures for the applicable year.

In order to be valid, a performance measure must credibly link the actual impact of the unit of analysis (*e.g.*, rule) to the intended outcome, so as to establish cause and effect. In the regulatory context, this is one reason why retrospective analysis of the performance of rules is so important. Developing credible outcome-oriented performance metrics is certainly challenging. However, as illustrated by the specific examples taken from federal agency performance reports listed in appendix II, it can be done.

OMB's "Performance Assessment Rating Tool" (PART) illustrates how the GPRA framework can be adapted to individual federal programs and activities. PART uses standard sets of questions to rate the effectiveness of specific federal programs, including regulatory programs.²⁸ Of particular relevance here, PART questions include the following:

- Does the program have a limited number of specific long-term performance measures that focus on outcomes and meaningfully reflect the purpose of the program?
- Does the program have ambitious targets and timeframes for its long-term measures?
- Does the program have a limited number of specific annual performance measures that demonstrate progress toward achieving the program's long-term measures?

²⁸ For background on PART, including its assessment criteria and specific program assessments, see <http://www.whitehouse.gov/omb/part>. For additional background, see Eileen Norcross and Joseph Adamson, Mercatus Center, George Mason University, *An Analysis of the Office of Management and Budget's Program Assessment Rating Tool (PART) for Fiscal Year 2008*; John B. Gilmour, IBM Center for the Business of Government, *Implementing OMB's Program Assessment Rating Tool (PART): Meeting the Challenges of Integrating Budget and Performance* (2006).

- Does the program have baselines and ambitious targets and timeframes for its annual measures?

Both GPRA and PART tend to be viewed primarily as tools for performance budgeting. Neither has achieved much success in this arena so far, largely because congressional appropriators have yet to take an interest in outcome-oriented performance information.²⁹ However, outcome-oriented performance management and accountability principles have application well beyond budgeting and appropriations. They should prove particularly useful in the context of federal rules, which are already subject to extensive scrutiny and where there is no shortage of interested parties eager to engage on a wide range of performance effectiveness issues.

IV. Recommended Near-Term Solution

The initial and immediately actionable way to adapt the GPRA framework to federal rules is issuance of a new executive order. Specifically, the executive order should require that (1) those individual rules intended to achieve significant public benefits incorporate GPRA-type outcome-oriented performance metrics and (2) performance against these metrics be systematically tracked and reported using GPRA annual performance reports.³⁰

²⁹ See, e.g., Maurice McTigue, Henry Wray, and Jerry Ellig, Mercatus Center at George Mason University, *8th Annual Performance Report Scorecard: Which Agencies Best Inform the Public?* (2007), at 28: “[M]any congressional oversight and appropriations committees have shown scant interest in using . . . performance information to make decisions on program design and budgeting. Republicans and Democrats, liberals and conservatives, might rightfully disagree based on values, priorities, or honestly different assessments of whether particular results are worth the cost. But surely they could muster a bipartisan consensus to examine the performance information before they decide.” See also Budget of the United States Government, Fiscal Year 2009, Analytical Perspectives (February 2008) at 14, noting that congressional use of PART performance information “has been limited.” A similar problem exists at the state level, according to a recent “report card” by the Pew Center on the States’ Government Performance Project. While strategic planning and developing results-oriented performance information have become a routine and accepted part of governing, “[o]ne of the biggest obstacles to progress in managing for performance is the disconnect between the production of performance information and its use in the budgeting process, particularly by legislators.” *Measuring Performance: The State Management Report Card for 2008*, Governing (March 2008), at 26, 27. On a positive note, the report predicts: “Nobody expects a legislative turnaround to happen soon or without snags. But it will come.” *Id.* at 28.

³⁰ A similar system was recommended in 2005 by GAO in a report entitled “Economic Performance: Highlights of a Workshop on Economic Performance Measures,” GAO-05-796SP, July 2005. The point of

A. Proposed Executive Order

The key elements of the proposed executive order are set out below.

1. Performance metrics for rules. The executive order should require agencies to develop for each of their covered rules (see below) the following performance metrics:

- one or more long-term performance goals that clearly specify the outcome(s) the rule is designed to achieve in terms of measurable public benefits;
- a concise explanation of how the rule's goals advance the issuing agency's mission and strategic goals as set forth in its GPRA strategic plan;
- a benefit analysis presenting evidence that the rule is likely to affect the intended outcomes, accompanied by quantification, where possible, of the rule's likely effect on the performance goal, and
- annual performance measures that provide valid and verifiable indicators of progress toward achieving the rule's long-term goals.

2. Consultation with stakeholders and OMB review. Agencies would consult with their stakeholders in developing draft performance metrics for a covered rule. Such consultation should of course be part of, but not limited to, notice-and-comment rulemaking processes. At a minimum, the agency would be required to make the proposed goals and measures publicly available when drafted and to invite public participation in reviewing and finalizing them. The agency also would be required to provide the proposed goals and measures to OMB for review. OMB's reviews would focus primarily on whether (1) the proposed goals were expressed as measurable outcomes and (2) the annual measures were valid and verifiable indicators of progress toward the outcome goals. OMB would not be expected to substitute its judgment for the agency's concerning the substantive merits of the goals and measures. Rather, its role

the report was more to use of benefit-cost analysis to evaluate overall government programs rather than what is suggested here, tying individual regulations to mission goals.

would be to assure that the goals were appropriately outcome-oriented and subject to credible measurement.³¹ OMB would approve the proposed goals and measures under these criteria or return them to the agency for further consideration. The goals and measures would be finalized through a transparent process involving the agency's stakeholders.

3. Performance reporting. Once rules were finalized, the issuing agency would report performance results for them each year as part of its annual GPRA performance reports. As is the case for other GPRA goals and measures, the agency's reports would explain any performance shortfalls affecting covered rules and describe improvement strategies. The goals and measures for rules would be subject to adjustment from time to time, as are other GPRA goals and measures.

4. Rules covered. The ultimate objective would be to cover all new rules that lend themselves to outcome-oriented performance measurement and accountability and that are significant enough to justify it.³² Essentially, this means rules that are intended to have a substantive effect on achieving important public benefits. This would be a larger universe than those rules that satisfy the current definition of "economically significant," *e.g.*, rules with an annual economic impact of \$100 million or more. Many rules would not qualify, such as those dealing with internal agency practice and procedures. OMB should be responsible for determining, in consultation with agencies and stakeholders, the rules to be covered. It could start by tasking the agencies to develop, in consultation with their stakeholders, and submit to OMB recommendations on which rules should be covered. Given the implementation challenges, which are discussed below, it would be best to begin with a pilot approach targeting a limited number of representative rules from a range of agencies. The rules initially selected should be the best candidates for testing the executive order's concepts and implementation techniques and thereby developing best practices for general application.

³¹ Ideally, specific and measurable outcome goals would be set forth in authorizing legislation as well.

³² Existing rules could be phased into this process to the extent practical.

5. Agencies covered. The executive order should cover all agencies with significant regulatory responsibilities, including the independent regulatory agencies. OMB generally does not review independent regulatory agency rules. However, independent regulatory agencies are fully subject to GPRA and the rationale for the executive order proposed here applies equally to them. Omitting the independent regulatory agencies would create a serious gap. Moreover, the limited nature of OMB’s reviews would not impinge upon their independence. In this context, OMB’s responsibility would be to ensure that the agency has adopted valid and verifiable performance metrics to support a rule’s intended outcomes—not to second guess whether those outcomes should be pursued or whether the rule should be issued. Any possible concern in this regard, however, could be eliminated by incorporating into the executive order an “escape clause” modeled on the Paperwork Reduction Act, which permits an independent regulatory agency to override a negative response from OMB by majority vote of its members.³³

B. Key Implementation Steps

Simply issuing an executive order along the foregoing lines will not guarantee success. Rather, success in bringing about effective performance measurement and accountability for rules will turn on two key implementation steps.

1. Agency incentives. The executive order must be accompanied by agency personnel practices (including Senior Executive Service contracts and bonuses) that provide the agency’s managers with incentives to support outcome-oriented performance measurement and accountability. Research shows that high-performing public sector organizations create a clear “line of sight” between individual performance and organizational success, and that they link individual performance expectations and rewards to agency missions, strategic goals, and results.³⁴ Individual managers cannot be

³³ See 44 U.S.C. 3507(f).

³⁴ GAO’s considerable work in this area documents the importance of these principles. See generally: *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational*

held directly accountable for mission outcomes that are beyond their control. However, performance within the scope of their responsibilities should directly align with and support the accomplishment of mission outcomes. For example:

- Performance expectations, assessments, and rewards for agency managers who are responsible for developing and implementing outcome-oriented performance metrics for rules should take into account (1) the quality of the goals and measures they produce; (2) the accuracy of performance reporting; and (3) the actions they take in response to reported performance results.
- Performance expectations and rewards for agency managers of regulatory programs should also be aligned with and structured to achieve the substantive outcome goals and measures to the greatest extent consistent with their individual responsibilities.

2. Ongoing stakeholder participation. It is essential that agency stakeholders play an active role in developing the goals and measures as well as monitoring reported performance results. Agencies should affirmatively encourage and facilitate stakeholder participation at each stage of the process. Active engagement from a range of stakeholders with contrasting viewpoints will be particularly valuable in the case of controversial and highly contested rules. Stakeholders also should pay close attention to the results and related analyses provided by agencies in their annual GPRA performance reports. GPRA has yet to achieve its potential in the budget arena due largely to the failure of Congress to engage. By contrast, the regulatory arena already is populated by many intensely interested stakeholders with diverse viewpoints who already engage in vigorous debate over the merits of federal rules. Presumably, they will prove more than

Success, GAO-03-488 (March 2003); *Results-Oriented Cultures: Insights for U.S. Agencies from Other Countries' Performance Management Initiatives*, GAO-02-862 (August 2002); *Managing for Results: Emerging Benefits From Selected Agencies' Use of Performance Agreements*, GAO-01-115 (October 2000); *Human Capital: A Self-Assessment Checklist for Agency Leaders*, GAO/OCG-00-14G (September 2000).

willing to take advantage of new tools that offer the opportunity to enhance the quality of debate through the infusion of outcome-oriented, fact-based performance data.

C. Application and Overcoming Challenges

Bringing outcome-oriented performance management to federal rules will take patience and thoughtfulness. The Mercatus Center has evaluated and issued “scorecards” for the GPRA performance reports of cabinet departments and major agencies for each year since the first reporting cycle was completed in fiscal year 1999. As the most recent Mercatus scorecard notes, the average scores for the reports have increased since 1999 albeit gradually and with occasional slippage from year to year.³⁵ The scorecard evaluations confirm that most federal agencies face conceptual and practical challenges when it comes to devising and implementing outcome-oriented performance metrics. These challenges will carry over into the regulatory arena. If they are to be overcome, the desire for perfection cannot become the enemy of the good. Developing meaningful, outcome-oriented goals and measures will necessarily proceed incrementally, often by trial and error.

Agencies should be able to clearly articulate the intended long-term results a rule seeks to achieve and how those results advance the agency mission and strategic goals. Thus, developing outcome goals for rules should not be problematic. Indeed, an agency should not issue a rule whose intended results it cannot articulate or explain. In this regard, the proposal envisions goals that are expressed as tangible and measurable results—not abstract rhetorical assertions of the public interest that sometimes pass for statements of purpose. A far greater challenge is to convert those results into specific performance measures that are valid (*i.e.*, relevant to rule’s goals and attributable to its effects) and verifiable (*i.e.*, capable of documentation through credible data).

³⁵ Maurice McTigue, Henry Wray, and Jerry Ellig, Mercatus Center at George Mason University, 9th *Annual Performance Report Scorecard; Which Agencies Best Inform the Public?* (2008), at 17. Indeed, this most recent year was one of retrenchment.

Not all measures can be expressed as end outcomes. So-called intermediate outcome measures and other measures that logically indicate progress toward the end outcome are useful and often essential. For example, the end outcome of healthier air might be subject to intermediate outcome measures expressed as annual reductions in harmful emissions. Also, given the many external factors that come into play, it is often difficult to attribute outcomes to federal actions. Agencies should, however, be able to identify links between their actions and social outcomes through such tools as influence diagrams. These diagrams include all other entities and actions that play a role in the final desirable outcome. They can be extremely useful to help agencies to maximize their ability to achieve outcomes.

Agencies and their managers must be encouraged to be innovative, to take reasonable risks, and, most of all, to be candid. The worst approach is to create perverse incentives that inhibit these qualities and, instead, encourage “gaming” the system by setting non-challenging goals and measures that may be easily documented and achieved but have little bearing on outcomes. In this regard, the scorecard work shows that agency performance reports indicating perfect or near-perfect performance are cause for skepticism rather than celebration. They usually signify that the goals and measures were not challenging, that the reporting was not candid, or both.

Figure 1 provides a hypothetical example of what the performance metrics for a rule might look like.

Figure 1

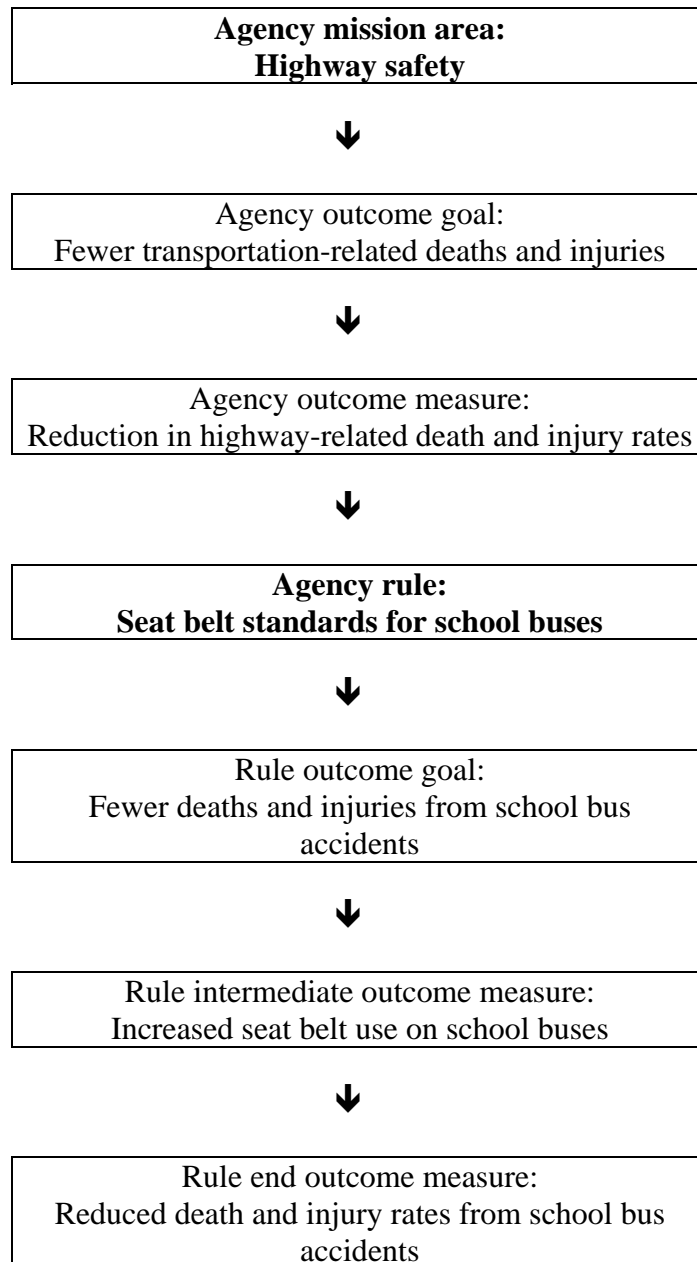


Figure 2 gives examples of actual performance goals and measures for federal regulatory programs.³⁶ While not broken down to specific rules, they illustrate the kinds of goals and measures that could be applied to rules.

Figure 2

Agency/Program	Strategic Outcome Goal	Annual performance goals/measures
Agriculture Department: Food safety and inspection	Reduction in the prevalence of foodborne illnesses from meat, poultry and egg products	Prevalence of Salmonella on raw meat and poultry products (Annual targets expressed as percentage reductions) Percentage of ready-to-eat meat and poultry products testing positive for Listeria bacteria (Annual targets expressed as percentage reductions)
Transportation Department: Railroad Safety Program	Reduction in transportation-related deaths and injuries	Fewer rail-related accidents and incidents per million train-miles Fewer grade crossing incidents per million train-miles Fewer train accidents per million train-miles, broken down by cause: human factors, track, and equipment
Treasury Department: National bank supervision	Percentage of National banks with high ratings according to industry standards	Percent of problem banks rehabilitated, as measured by industry standards (Annual targets expressed as percentage of such banks) Percent of banks that are well capitalized (Annual targets expressed as percentage of such banks)

³⁶ The examples are taken from PART assessments published on OMB's web site www.expectmore.gov (last visited June 26, 2008).

V. Conclusion

To summarize:

- As key tools of federal policy implementation which impose major economic impacts, federal rules need to be mission-related, effective, and accountable for their results.
- Current regulatory reform statutes and executive orders do not provide for the comprehensive performance assessment of federal rules.
- GPRA provides a framework for articulating and measuring regulatory outcomes and holding rules accountable for those outcomes.
- An executive order should be issued requiring GPRA-type, outcome-oriented performance goals and measures for rules with significant public policy objectives.
- The success of the executive order will depend upon holding federal regulatory officials accountable for its effective implementation and actively engaging agency stakeholders in the development of performance metrics as well as the assessment of performance results.

While the implementation challenges are considerable, so too are the potential benefits. In the near term, federal regulation should become more transparent and accountable, thereby enhancing public confidence. Also, the information developed should improve the quality of prospective and retrospective reviews of rules under the current regulatory reform processes. The most important longer-term benefit will be more effective rules that deliver better performance results for the public in terms of enhanced health, safety, security, economic well-being, and the other important public outcomes that the rules and their issuing agencies exist to serve.

Appendix I
Overview of Major Regulatory Reform
Statutes and Executive Orders

The Paperwork Reduction Act³⁷ requires agencies to provide advance public notice and to obtain approval from OMB for rules that involve the collection of information (including recordkeeping requirements) from ten or more non-federal persons. The Act applies to virtually all executive branch agencies with regulatory responsibilities, including the so-called “independent regulatory agencies.”³⁸ However, the Act contains an “escape clause” permitting an independent regulatory agency to override OMB’s disapproval of an information collection by majority vote of its members.³⁹ The Act also created the Office of Information and Regulatory Affairs (OIRA) within OMB.

The Regulatory Flexibility Act⁴⁰ requires agencies to conduct a “regulatory flexibility analysis” of proposed rules that have a significant economic impact on a substantial number of small entities, including small businesses as well as small governmental units and not-for-profit organizations. The analyses must consider, among other things, alternative ways of accomplishing the objectives of the rule in a way that would minimize its impact on small entities. Also, section 610 of the Act⁴¹ requires agencies to review

³⁷ The Act was originally enacted in 1980 and is codified as amended at 44 U.S.C. 3501-3520. For additional background on the Act, see Jeffrey S. Lubbers, *Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995*, 49 Admin. L. Rev. 111 (Winter 1997).

³⁸ The Act defines “independent regulatory agencies” to mean the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a federal independent regulatory agency or commission. 44 U.S.C. 3502(5).

³⁹ 44 U.S.C. 3507(f).

⁴⁰ This Act also dates from 1980. It was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act and is codified as amended at 5 U.S.C. 601-612.

⁴¹ 5 U.S.C. 610.

within ten years existing rules that have a significant impact on small entities to determine whether they should be continued or altered so as to minimize their impacts. This act was amended in 1996 by the Small Business Regulatory Enforcement and Fairness Act which added, among other things, the ability of affected small entities to pursue legal challenges to various provisions of the act.

Title II of the Unfunded Mandates Reform Act of 1995⁴² requires agencies to prepare a “qualitative and quantitative assessment of the costs and anticipated benefits” of proposed rules containing federal mandates that impose annual costs exceeding \$100 million on state, local, or tribal governments or on the private sector.⁴³ The Act does not apply to independent regulatory agencies.⁴⁴

The Congressional Review Act⁴⁵ requires agencies to submit reports on new rules to Congress and to GAO. The reports to GAO are to include, among other things, a copy of any cost-benefit analysis the agency did for the rule.⁴⁶ Agencies generally must delay the effective date of “major” rules for sixty days in order to give Congress the opportunity to disapprove them by enactment of a joint resolution.⁴⁷ The Act defines a “major” rule as one that will have an annual economic impact of \$100 million or more or other specified economic impacts.⁴⁸

⁴²Pub. L. No. 104-4, 109 Stat. 48 (March 22, 1995). Title II of the Act is codified at 2 U.S.C. 1531-1538. Title I deals with congressional legislative proposals containing unfunded mandates.

⁴³ 2 U.S.C. 1532(a).

⁴⁴ See 2 U.S.C. 1502(1) and 658(1).

⁴⁵ Enacted as title II, subtitle E, of Pub. L. No. 104-121, 110 Stat. 847, 868 (Mar. 29, 1996), and codified at 5 U.S.C. 801-808.

⁴⁶ 5 U.S.C. 801(a).

⁴⁷ The congressional disapproval process, which is described in 5 U.S.C. 802, has been invoked only once in the Act’s history. The joint resolution in that case disapproved an ergonomics rule submitted to Congress in the waning days of the Clinton Administration; it was signed into law by President Bush shortly after he took office. See Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

⁴⁸ 5 U.S.C. 804(2). The other specified impacts are: “a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant

Executive Order No. 12866 (“Regulatory Planning and Review”), was originally issued by President Clinton in 1993 and was amended by President Bush in 2002 and 2007.⁴⁹ Executive Order No. 12866 requires agencies to prepare and submit to OIRA regulatory impact analyses of “significant” proposed regulatory actions, which are defined to include rules likely to have an annual economic effect of \$100 million or more or to “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.”⁵⁰ Among other things, the agency analysis is to include: an assessment of the potential costs and benefits of the proposed regulatory action; an explanation of how it is consistent with a statutory mandate; and, to the extent feasible, a quantification of its anticipated costs and benefits. The executive order also requires each agency to submit to OIRA a program to review significant existing rules, “consistent with its resources and regulatory priorities.”⁵¹

Executive Order 12866 includes provisions encouraging government-wide coordination and a federal unified regulatory agenda. In this regard, it instructs agencies to prepare an annual agenda of all rules they are considering and a regulatory plan covering the most significant regulatory actions that each agency expects to issue in a given fiscal year.⁵² The plan is to include, among other things, a summary of the legal basis for the rule and a

adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”

⁴⁹ The current text of Executive Order 12866 as amended appears at 5 U.S.C. 601 note. While this is the most significant executive order dealing with federal rules, a number of other executive orders apply to federal rules and regulatory activities. Examples are: Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Property Rights”), 53 Fed. Reg. 8859 (Mar. 15, 1988), 5 U.S.C. 601 note; Executive Order 12988 (“Civil Justice Reform”), 61 Fed. Reg. 4729 (Feb. 7, 1996), 28 U.S.C. 519 note; Executive Order 13132 (“Federalism”), 64 Fed. Reg. 43255 (Aug. 10, 1999), 5 U.S.C. 601 note; and Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”), 67 Fed. Reg. 53461 (Aug. 16, 2002), 5 U.S.C. 601 note.

⁵⁰ See generally section 6 of the Executive Order; the definition of “significant regulatory action” is contained in section 3(f).

⁵¹ See generally section 5 of the Order.

⁵² See generally section 4 of the Order.

statement of the need for it. The executive order's regulatory impact analysis requirements for significant proposed and existing rules do not apply to independent regulatory agencies. However, the independent agencies are subject to the executive order's unified regulatory agenda and regulatory planning requirements.

Appendix II
Examples of Outcome-Oriented Goals and Measures

<i>Agency</i>	<i>Goal</i>	<i>Measure(s)</i>	<i>Source</i>
Environmental Protection Agency	Healthier outdoor air	Cumulative percent reduction in . . . ozone in monitored counties from 2003 baseline	FY 2007 Performance and Accountability Report (PAR), page II-34
Department of Homeland Security	Eliminate the flow of undocumented migrants via maritime routes to the United States	Percent of undocumented migrants who attempt to enter the United States via maritime routes that are interdicted or deterred	FY 2007 Performance Highlights, page 14
Labor Department (Occupation Safety and Health Administration)	Improve workplace safety and health	Workplace fatalities per 100,000 workers (for sectors covered by the Occupational Safety and Health Act)	FY 2007 PAR, page 122
Labor Department (Mine Safety and Health Administration)	Reduce mine fatalities and injuries	Mine industry fatal injury incidence rate (per 200,000 hours worked) Mine industry all-injury incidence rate (per 200,000 hours worked)	FY 2007 PAR, page 125
Nuclear Regulatory Commission	Ensure protection of public health and safety and the environment	Number of significant adverse trends in industry safety performance with no trend exceeding Abnormal Occurrence Criterion 1.D.4	FY 2007 PAR, page 9
Transportation Department	Reduction in transportation-related deaths and injuries	Number of fatal general aviation accidents Rail-related accidents and incidents per million train miles Transit fatalities per 100 million passenger-miles traveled	FY PAR, page 103