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**TOWARD A MORE PERFECT UNION:  
Regulatory Analysis And Performance Management**

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# TOWARD A MORE PERFECT UNION: REGULATORY ANALYSIS AND PERFORMANCE MANAGEMENT

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## INTRODUCTION

Two separate but similar initiatives attempt to apply a scientific approach to improve government decision-making and results: performance management and regulatory analysis. Both initiatives seek to identify the nature of the problems government is trying to solve, develop alternative solutions, and evaluate the effectiveness and costs of the alternatives. Both require measurement of costs and outcomes. Both involve rigorous analysis to identify whether, and to what extent, government actions cause particular results to occur. Their analytical methods can be used *ex ante*, to evaluate alternative prospective courses of action, or *ex post*, to assess what consequences actually flowed from the alternative that was chosen and identify opportunities for improvement.

Yet, performance management and regulatory analysis rarely cross paths. Scholars who specialize in performance management tend to be in public administration or policy analysis departments; scholars who focus on regulatory analysis tend to be economists or lawyers. Ideologically, performance management is usually viewed as a means of making government more effective and customer-focused; regulatory analysis is often characterized as an attempt to throw sand in the gears of the regulatory state. For the U.S. government, the most prominent performance management directive is the Government Performance and Results Act (GPRA).<sup>1</sup> The principal source of regulatory analysis mandates is Executive Order 12,866.<sup>2</sup> In federal agencies, the plans and reports mandated by GPRA are usually the responsibility of the chief financial officer or a senior official in charge of management. Regulatory analysis is usually the responsibility of a policy office that writes regulations or an economic analysis division. Even in the President's Office of Management and Budget (OMB), which oversees both performance management and regulatory analysis, responsibility is divided. GPRA guidance and other performance-

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<sup>1</sup> Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (codified in scattered sections of 5 & 31 U.S.C.) [hereinafter GPRA].

<sup>2</sup> Exec. Order No. 12,866 of September 30, 1993, *as amended by* Exec. Order No. 13,258 of February 26, 2002 and Exec. Order No. 13,422 of January 18, 2007, *available at* [http://www.whitehouse.gov/omb/inforeg/eo12,866/eo12,866\\_amended\\_01-2007.pdf](http://www.whitehouse.gov/omb/inforeg/eo12,866/eo12,866_amended_01-2007.pdf) [hereinafter E.O. 12,866].

related initiatives are under OMB's deputy director for management. Regulatory analysis is overseen by the Office of Information and Regulatory Affairs (OIRA).

Due to these divisions, there are significant unexploited synergies between regulatory analysis and performance management. GPRA, and the performance-oriented practices it spawned, provide a vehicle to improve the quality of regulatory analysis in both executive branch and independent agencies. Similarly, the theory and practice of regulatory analysis suggests some opportunities to strengthen federal performance management in ways that more fully implement the spirit of GPRA. This article explores the actual and potential linkages between regulatory analysis and performance management in theory and in practice.

Part I outlines the major elements of performance management and regulatory analysis that are widely accepted by scholars specializing in each field. Part II describes the laws, executive orders, and OMB guidance documents that implement regulatory analysis and performance management in the federal government. Part III explains how performance management and regulatory analysis complement each other in practice. Part IV proposes additional steps federal decision makers could take to capture unexploited synergies.

## I. THE CONCEPTUAL LINK BETWEEN PERFORMANCE MANAGEMENT AND REGULATORY ANALYSIS

Performance management and regulatory analysis both seek to apply a scientific approach to generate information that aids government decision-making. The goal of performance management is "to improve government effectiveness by developing and using a more rigorous base of information and scientific evidence to guide decisions about program design, funding, implementation, and management."<sup>3</sup> The goal of regulatory analysis is to provide "a basis for improving rational, efficient methods of policy formulation in order to maximize the outputs of public policy in accordance with the values of a democratic society."<sup>4</sup>

### A. PERFORMANCE MANAGEMENT

The basic principles of performance management in government have been well-known for decades.<sup>5</sup> Performance management first focused on government programs' efficiency in converting resources into outputs.<sup>6</sup> The concept of tracking outcomes, and using outcome information to make management and budget decisions, gained currency in the 1990s.<sup>7</sup>

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<sup>3</sup> Carol J. Heinrich, *Evidence-Based Policy and Performance Management: Challenges and Prospects in Two Parallel Movements*, 37 AM. REV. PUB. ADMIN. 255, 256 (2007).

<sup>4</sup> Thomas O. McGarity, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991), 113.

<sup>5</sup> See, e.g., Harry P. Hatry, PERFORMANCE MEASUREMENT: GETTING RESULTS (Urban Institute 1999).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* See also Heinrich, *supra* note 3, at 256.

Two related developments brought outcomes to the fore. First was the rise of the “New Public Administration,” which focuses on holding government agencies accountable for results, rather than management of inputs and processes.<sup>8</sup> Second was the “reinventing government” trend named after David Osborne and Ted Gaebler’s popular book by that name.<sup>9</sup> Osborne and Gaebler presented persuasive arguments and evidence that government agencies could significantly improve the results they produced for citizens by treating citizens like customers who had to be pleased instead of subjects who had to do as they were told. The explicit mission of Vice President Al Gore’s National Partnership for Reinventing Government was to “reinvent government to work better, cost less, and get results Americans care about.”<sup>10</sup> In fact, the original name of this initiative was the National Performance Review.<sup>11</sup> “Reinventing government” was essentially a large-scale initiative to implement the outcome orientation of the New Public Administration in the U.S. government.<sup>12</sup>

Improved performance management should be a high priority for regulatory agencies. Two recent papers find that regulatory agencies are less likely to use outcome-oriented performance measures, and this likely impairs their performance. Rainey and Han Chun found statistically significant evidence that regulatory agencies are more likely to suffer from “evaluative goal ambiguity;” that is, regulatory agencies are less likely to use outcome-oriented indicators to gauge their accomplishments and more likely to measure activities and processes.<sup>13</sup> The same scholars found that higher levels of evaluative ambiguity were associated with lower agency scores on managerial effectiveness, customer service orientation, productivity, and work quality in a survey of federal employees administered by the National Partnership for Reinventing Government.<sup>14</sup> This result is consistent with other research suggesting that the greater ambiguity about goals and measures in government tends to reduce organizational effectiveness.<sup>15</sup>

Effective performance management requires four steps:

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<sup>8</sup> Suzanne J. Piotrowski and David H. Rosenbloom, *Nonmission-Based Values in Results-Oriented Public Management: the Case of Freedom of Information*, 62 PUB. ADMIN. REV. 643 (2002).

<sup>9</sup> David Osborne and Ted Gaebler, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (Addison-Wesley 1992).

<sup>10</sup> See archived web site of the National Partnership for Reinventing Government at <http://govinfo.library.unt.edu/npr/library/vision2000.html>.

<sup>11</sup> See history of the National Partnership for Reinventing Government at <http://govinfo.library.unt.edu/npr/whoweare/historyofnpr.html>.

<sup>12</sup> Piotrowski & Rosenbloom, *supra* note 8, at 646.

<sup>13</sup> Young Han Chun and Hal G. Rainey, *Goal Ambiguity in US Federal Agencies*, 15 J. PUB. ADMIN. RESEARCH & THEORY 1, 19-20 (2005).

<sup>14</sup> Young Han Chun and Hal G. Rainey, *Goal Ambiguity and Organizational Performance in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RESEARCH & THEORY 529, 543-44 (2005).

<sup>15</sup> See references cited in Han Chun and Rainey, *supra* note 13, at 1; *Id.* at 536-38; Ludwig von Mises, *BUREAUCRACY* (1983) at 60-63; Gordon Tullock, *THE POLITICS OF BUREAUCRACY* (1965) at 21-22.

## 1. Mission and Goals

The agency's or program's mission is its reason for existence. The mission and goals should identify the outcomes the organization or program seeks to accomplish.<sup>16</sup>

Outcomes are the actual benefits created, or harms avoided, for citizens. "*Outcomes are not what the program did but the consequences of what the program did.*"<sup>17</sup> Reduced injuries or fatalities, improved health, lower crime rates, or lower prices for consumers are good examples of outcomes. Pollutant emissions, enforcement cases brought, or regulations issued are outputs that may affect outcomes, but they are not outcomes. Analysis that focuses only on processes or outputs does not tell us whether or how the regulation affects the public's wellbeing. An agency's activities benefit the public only to the extent that they contribute toward the achievement of outcomes.

## 2. Strategic Planning

This is the process by which the agency identifies how its activities lead to outcomes, and then chooses the most effective means of accomplishing the outcomes. In an address to federal managers launching the second phase of the National Partnership for Reinventing Government, Vice President Al Gore captured the spirit of this approach:

President Clinton and I want the benefit of your boldest, most creative thinking. We want you to consider every option that can achieve the goal. I want the teams to lay out all of the options, even the ones that are so bold that they make you nervous. I want Cabinet Secretaries and agency heads ... to bring forward all of the options, even the ones that are so bold that they make them nervous. And I will discuss the options with the President, even some that are so bold that they make my eyes wide. We might not choose the boldest ideas you can come up with. But we want to know what they are.<sup>18</sup>

Effective strategic planning requires a realistic understanding of causality. A "logic model" explicitly articulates the hypotheses about how what actions will produce what results.<sup>19</sup> Ideally, programs or regulations are based not just on hypotheses about causality, but also on evidence demonstrating that the hypotheses are likely true.

## 3. Measurement

For each desired outcome, outcome indicators provide numerical measurements that track whether, and to what extent, the outcome is being achieved.<sup>20</sup> In most cases, external

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<sup>16</sup> Hatry, *supra* note 5, at 35-39 (emphasis in original).

<sup>17</sup> *Id.* at 15.

<sup>18</sup> Al Gore, Vice President Al Gore's Reinvention Phase II Remarks, <http://govinfo.library.unt.edu/npr/library/speeches/2586.html> (last visited Mar. 27, 2008).

<sup>19</sup> Hatry, *supra* note 5, at 48-51.

<sup>20</sup> *Id.* at 55.

factors beyond the government's influence will affect the values of outcome indicators. Telephone subscribership in a particular location, for example, can be affected by subsidies mandated by government regulations, but also by demographic shifts or overall economic conditions.<sup>21</sup> The most informative outcome indicators isolate the government agency's direct effect on the outcome from other causes and indicate how much of the change in the outcome was due to the government's action.<sup>22</sup> When such an indicator cannot be constructed, it is still often possible to assess the effects of government actions through field trials or statistical analysis that attempts to separate the effects of various factors.<sup>23</sup>

#### 4. Program Evaluation

Program evaluation is ex post assessment of the actual results produced by a program. One goal of program evaluation is to determine the extent to which the program actually accomplished its goals; outcome indicators thus become a useful input into program evaluation.<sup>24</sup> Program evaluations can also reveal unintended effects, both positive and negative.

Results of the planning and performance measurement process can be used for several purposes: informing legislators and the public about the agency's meaningful accomplishments, formulation and justification of budgets, operational resource allocation decisions, efficiency improvement, and motivating and rewarding government personnel.<sup>25</sup> Strategic plans are, of course, periodically revised, and one would hope that measured performance and program evaluations from one period help guide the revision of strategies, organizational structures, and actions in future periods.

#### B. REGULATORY ANALYSIS

The table below summarizes the most salient aspects of the regulatory analysis framework commonly advocated by economists and enshrined in several Executive Orders. (We include a "plain English" translation of each element for the benefit of non-economists). Use of this framework allows decision makers to clarify objectives, assess the need for regulation, identify the nature of the problem they are trying to solve, and understand the consequences of alternative courses of action, even if they never compare measured costs and benefits.<sup>26</sup>

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<sup>21</sup> Jerry Ellig & Joseph Rotondi, *Outcomes and Alternatives for Universal Telecommunications Service: A Case Study of Texas*, 12 TEX. REV. L. & POL. 1, 18 (2007).

<sup>22</sup> Maurice McTigue, Henry Wray, and Jerry Ellig, MERCATUS CENTER AT GEORGE MASON UNIVERSITY 8<sup>TH</sup> ANNUAL PERFORMANCE REPORT SCORECARD (2007) at 49.

<sup>23</sup> *Id.* See also Office of Management and Budget, What Constitutes Strong Evidence of a Program's Effectiveness?, [http://www.whitehouse.gov/omb/part/2004\\_program\\_eval.pdf](http://www.whitehouse.gov/omb/part/2004_program_eval.pdf) (last visited Mar. 27, 2008).

<sup>24</sup> Hatry, *supra* note 5, at 174.

<sup>25</sup> *Id.* at 158-78.

<sup>26</sup> McGarity, *supra* note 4, at 112 (defining regulatory analysis as application of policy analysis to regulation). Policy analysis consists of these steps (which parallel ours): (1) identify the problem; (2) break

## SIX KEY STEPS IN REGULATORY ANALYSIS

- 1. Identify the desired outcomes**  
Figure out what you're trying to do and how you'll know you did it.
- 2. Assess evidence of market failure or other systemic problem**  
Figure out whether government needs to do something, and if so, why.
- 3. Identify the uniquely federal role**  
Figure out what the federal government needs to do.
- 4. Assess effectiveness of alternative approaches**  
Think about different ways to do it and find the one that works best.
- 5. Identify costs**  
Figure out what you have to give up to do whatever you're trying to do.
- 6. Compare costs with outcomes**  
Weigh pros and cons.

### 1. Identify the desired outcomes<sup>27</sup>

For the purposes of regulatory analysis, an outcome may satisfy the economist's definition of a net social "benefit," or it may simply be some result that policymakers deem worthwhile.<sup>28</sup> The key point is that an outcome indicates the ultimate effect of the regulation on human wellbeing.<sup>29</sup> To effectively identify how a proposed regulation would affect outcomes, decision makers need to define the outcome they are trying to affect or achieve, outline a theory of causality or "logic model" that shows how the regulatory proposal is likely to achieve the desired outcome(s)<sup>30</sup>, and establish measures

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it down into its constituents; (3) clarify and rank preexisting goals; (4) identify alternative policies for resolving the problem; (5) investigate the consequences of each alternative, using available information and clearly specified assumptions; (6) measure the consequences against the goals; and (7) select the policy that best advances the goals. *Id.*

<sup>27</sup> *Id.* ("clarify and rank preexisting goals").

<sup>28</sup> OFFICE OF MANAGEMENT AND BUDGET, *Circular A-4: Regulatory Analysis* (Sept. 17, 2003), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> [hereinafter *Circular A-4*] (" . . . Congress establishes some regulatory programs to redistribute resources to select groups.").

<sup>29</sup> "In constructing measures of "effectiveness," final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided." *Circular A-4* at 12.

<sup>30</sup> E.O. 12,866 § 1.7 ("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

that indicate *whether* and *how much* of the outcome is achieved as a result of the regulation.<sup>31</sup>

## 2. Assess evidence of market failure<sup>32</sup> or other systemic problem<sup>33</sup>

Regulatory economists generally accept that government action can enhance consumer welfare in the case of a clear “market failure” that cannot be addressed adequately by other means.<sup>34</sup> Some forms of “market failure” may arise as a result of barriers to entry or other constraints on private parties created by previously existing policies.<sup>35</sup> While such policy-driven problems are not technically “market” failures, the problems are likely to persist in the absence of some additional government action. The fundamental solution is to correct the original policy.<sup>36</sup>

There are two reasons why regulatory analysis should explicitly identify a market failure or some other systemic problem underlying the need for action. If, in fact, there is no market failure or other systemic problem, then government action will likely do more harm than good. If there is a market failure or other systemic problem, then government action can more effectively correct the problem if it has been accurately identified and understood.<sup>37</sup>

## 3. Identify the uniquely federal role

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regulation or guidance document.”). Circular A-4 at 2 (“Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks.”).

<sup>31</sup> Circular A-4 at 9 (“Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively.”).

<sup>32</sup> The term “market failure” is perhaps an unfortunate piece of economics jargon, because to most people the term “market” implies some form of commercial, for-profit business activity. Market failure then presumably refers to any situation in which commercial activity fails to solve a perceived problem. For many economists, however, the term “market” often has a much broader meaning, referring to any type of voluntary interaction in which people mutually coordinate their activities rather than take directions from a higher (governmental) authority. We use the term in this broader sense. A “market failure” occurs when voluntary activity fails to direct resources to the uses that people value most.

<sup>33</sup> McGarity, *supra* note 4, at 112 (“identify the problem”).

<sup>34</sup> The Original Executive Order 12,866 required agencies to identify the relevant problem in terms of “the failure of private markets or public institutions that warrant new agency action[.]” Exec. Order No. 12,866 at § 1(a) and § 1(b)(1). Executive Order 13,492 underscores this step by amending requiring agencies to “identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action[.]” Exec. Order No. 13,492 at §1. Circular A-4 provides substantial guidance to agencies on how to identify and describe a market failure. Circular A-4 at 4-5.

<sup>35</sup> Susan E. Dudley, PRIMER ON REGULATION (2005) 39, available at [http://www.mercatus.org/repository/docLib/20060510\\_Primer\\_on\\_Regulation\\_Dudley\\_Dec\\_2005\\_Final\\_a\\_s\\_Posted.pdf](http://www.mercatus.org/repository/docLib/20060510_Primer_on_Regulation_Dudley_Dec_2005_Final_a_s_Posted.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



The fact that a market failure or other systemic problem prevents the achievement of desired policy outcomes does not automatically mean that the federal government will provide the most effective remedy. Federal regulation may help promote a uniform national solution, but leaving regulation at the state or local level may foster experimentation and choice.<sup>38</sup> As OMB Circular A-4 explains:

In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be more efficiently addressed locally.<sup>39</sup>

#### **4. Assess effectiveness of alternative approaches<sup>40</sup>**

A finding that market failure justifies *some* federal role does not mean that *any conceivable* federal role will do. Government has a wide variety of options to influence outcomes. These include direct provision of broadband service by government, various public-private partnerships, performance-based regulation, command-and-control regulation, nonbinding guidance, information disclosure regulations, antitrust enforcement, removal of entry barriers, commercial law, tort law, and contract law.<sup>41</sup> For any postulated outcome and market failure, regulators should assess which alternative is likely to achieve the goal most effectively.<sup>42</sup>

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<sup>38</sup> *Id.* at 39-40.

<sup>39</sup> Circular A-4 at 6. *See also* E.O. 12,866 § 1(b)(9) (directing agencies to “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.”).

<sup>40</sup> McGarity, *supra* note 4, at 112 (“identify alternative policies for resolving the problem ...” “investigate the consequences of each alternative”).

<sup>41</sup> E.O. 12,866 § 1(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.”). Circular A-4 at 6 (“Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.”). *See also* Exec. Order 12,866 §6(a)(3)(B)(iii) (requiring agencies to assess “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.”). Circular A-4 describes possible alternatives agencies should consider. Circular A-4 at 7-9.

<sup>42</sup> Agency regulatory analysis is to include “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

## 5. Identify costs<sup>43</sup>

The accurate measure of the cost of any government action is its opportunity cost: what did we as a society give up in order to devote resources to taking the action?<sup>44</sup> Government and private expenditures only partially measure the forgone benefits associated with a particular course of action.<sup>45</sup> Sound regulatory analysis also identifies hidden and indirect costs that are less obvious than direct expenditures.<sup>46</sup> One major study estimates that the annual cost of compliance with federal regulations totals \$1.1 trillion.<sup>47</sup>

When federal agencies and private firms spend money to enforce and comply with regulations, the money has to come from somewhere. Government, of course, gets money from taxes and borrowing.<sup>48</sup> Businesses and other entities ultimately have to get the money by charging customers or reducing payments to the owners of resources the firm uses.<sup>49</sup> In both cases, the costs of regulation are likely to affect the prices that consumers pay for the things they buy.<sup>50</sup>

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feasible, a quantification of those benefits[.]” Exec. Order 12,866 § 6(a)(3)(C)(i). “A regulation may be appropriate when you have a clearly identified measure that can make government operate more efficiently. In addition, Congress establishes some regulatory programs to redistribute resources to select groups. Such regulations should be examined to ensure that they are both effective and cost-effective.” Circular A-4 at 5.

<sup>43</sup> McGarity, *supra* note 4, at 112 (“investigate the consequences of each alternative”); *Id.* at 113 (“Congress ... and the President ... wanted agencies to analyze regulatory problems in more detail, paying particular attention of the economic impact of the regulations.”).

<sup>44</sup> Dudley, *supra* note 35, at 42.

<sup>45</sup> E.O. 12,866 §6(a)(3)(B)(ii) (requiring agencies to assess “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 . . . , health, safety, and the natural environment[.]”). *See also* Circular A-4 at 14-42 (explaining how to identify and calculate costs and explaining the concept of “opportunity cost”).

<sup>46</sup> Circular A-4 at 37.

You should include these effects in your analysis and provide estimates of their monetary values when they are significant:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings.

*Id.*

<sup>47</sup> W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Report Prepared for the Office of Advocacy, U.S. Small Business Administration, RFP No. SBHQ-03-M- 0522 (Sept. 2005) 1, available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

<sup>48</sup> *See, e.g.*, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009 13, available at <http://www.whitehouse.gov/omb/budget/fy2009/pdf/budget.pdf> (showing that federal taxation accounted for 18.8 percent of Gross Domestic Product in fiscal 2007). *Id.* at 15 (showing a federal deficit of \$162 billion in fiscal 2007).

<sup>49</sup> Analyzing the effects of cost-increasing regulation is similar to analyzing the “incidence” of a tax. One of the most well-known tenets of the economics of taxation is that the party that formally “pays” a tax does

When prices or taxes increase due to regulation, consumers pay more. Some consumers may also pay higher prices than they otherwise would due to regulations intended to prevent “discriminatory” pricing.<sup>51</sup> In addition to these direct costs are the indirect costs that arise when consumers respond to the price increases by purchasing less of the products or services whose prices have increased.<sup>52</sup> The value that this lost output would have created for consumers and producers is called the “deadweight loss” or “excess burden” associated with the tax or regulation.<sup>53</sup> Scholarly research finds that the deadweight loss associated with general taxation ranges from 25 to 40 cents per dollar raised.<sup>54</sup> An OMB “rule of thumb” assumes that the deadweight loss associated with federal taxation equals 25 percent of revenues.<sup>55</sup> The deadweight loss associated with regulation can be much higher.<sup>56</sup>

## 6. Compare costs with outcomes<sup>57</sup>

Cost information cannot be considered in isolation. A costly regulation may nevertheless create significant positive outcomes that are valuable to policymakers and citizens.<sup>58</sup> Information on outcomes and costs can be combined in a variety of ways to aid decision making, such as analysis of cost-effectiveness or comparison of costs and benefits.<sup>59</sup>

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not necessarily bear the burden of the tax. The incidence of the tax—who really pays—depends on the elasticities of supply and demand, as well as the competitiveness of the market. *See, e.g.*, Edgar Browning & Jacqueline Browning, *PUBLIC FINANCE AND THE PRICE SYSTEM* (1979).

<sup>50</sup> *Id.*

<sup>51</sup> Michael Crew & Charles Rowley, *Toward a Public Choice Theory of Monopoly Regulation*, 57 *PUBLIC CHOICE* 49 (1988); Richard A. Posner, *Taxation by Regulation*, 2 *BELL JOURNAL OF ECONOMICS* 22 (1971).

<sup>52</sup> Dudley, *supra* note 35, at 42.

<sup>53</sup> Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 *FED. COMM. L.J.* 37, 57–60 (2006).

<sup>54</sup> Jerry Hausman, *Efficiency Effects on the US Economy from Wireless Taxation*, 53 *NAT’L TAX J.* 733 (2000).

<sup>55</sup> OFFICE OF MANAGEMENT AND BUDGET, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, Circular No. A-94 Revised, Transmittal Memo No. 64, October 29, 1992, available at <http://www.whitehouse.gov/omb/circulars/a094/a094.html>.

<sup>56</sup> *See, e.g.*, Ellig, *supra* note 53, at tbl. 1.

<sup>57</sup> McGarity, *supra* note 4, at 112 (“investigate the consequences of each alternative ... measure the consequences against the goals ... select the policy that best advances the goals.”).

<sup>58</sup> E.O. 12,866 §1(b)(6) (requiring agencies to 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.”)

<sup>59</sup> McGarity, *supra* note 4, at 153-55. Circular A-4 explains to agencies the differences between Cost-Benefit Analysis and Cost-Effectiveness Analysis. Circular A-4 at 9-12.

Comparing costs and benefits does not automate decisions, because different decision makers may ascribe different values to the costs or benefits.<sup>60</sup> Even when benefits can be expressed in monetary terms, the dollar amounts usually reflect the value of the benefits to the “average” or “typical” person.<sup>61</sup> Cost-benefit analysis may mask significant diversity in the value that different people attach to the benefits.<sup>62</sup> For this reason, a complete cost-benefit analysis should also identify who bears the costs and who reaps the benefits.<sup>63</sup> Even so, two different decision makers, armed with the same information about cost effectiveness or the same cost-benefit comparisons, can still reasonably disagree about what to do based on their values.

### C. NEXUS BETWEEN REGULATORY ANALYSIS AND PERFORMANCE MANAGEMENT

There are five principal parallels between performance management and regulatory analysis:

1. Performance management requires articulation of a mission and outcome-oriented goals. Regulatory analysis begins by identifying the desired outcomes the regulation is supposed to achieve.
2. Performance management requires strategic planning, to identify how the agency’s actions affect outcomes and choose the most effective means of achieving the outcomes. Regulatory analysis requires that the regulatory agency assess the systemic problems regulation seeks to solve, assess the effectiveness of alternative means of achieving the outcomes and identify the federal government’s unique role in achieving them.
3. Performance management requires outcome indicators that track how the agency will affect outcomes. Either the indicators should identify the agency’s contribution to the outcomes, or a supporting analysis should demonstrate how and to what extent the agency’s actions can be expected to affect the measured outcomes. Regulatory analysis requires a similar identification of outcome measures and analysis of cause and effect.
4. Performance management requires ex post program evaluation to determine whether the agency’s programs have actually achieved their intended results. Although it has not been neglected in the past, sound regulatory analysis includes a similar ex post examination of the actual effects of regulation.<sup>64</sup>

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<sup>60</sup> Hatry, *supra* note 5, at 211 (“The calculations of monetary value usually require numerous assumptions that can be quite controversial.”). For a fuller explication, see McGarity, *supra* note 4, at 142-53.

<sup>61</sup> Dudley, *supra* note 35, at 43.

<sup>62</sup> *Id.*

<sup>63</sup> Circular A-4 at 14 (“Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency.”).

<sup>64</sup> E.O. 12,866 § 5 (directing executive agencies to develop plans for retrospective review of existing regulations).

5. Finally, effective performance management implies performance budgeting, which explicitly links expenditures with the outcomes those expenditures are expected to achieve. Regulation, by its nature, generates costs for government and for other parties; sound regulatory analysis identifies these costs and allows decision makers to compare them with outcomes.

Effective performance management of regulatory agencies requires regulatory analysis. Conversely, regulatory analysis is nothing more than sound strategic planning and performance management applied to regulation.

## II. THE PRACTICAL LINK BETWEEN PERFORMANCE MANAGEMENT AND REGULATORY ANALYSIS

Beyond the theory lies the reality of how the twin concepts of performance management and regulatory analysis have been implemented in federal law. Performance management finds its legislative home in the Government Performance and Results Act of 1993, while the main regulatory analysis mandate can be found in Executive Order 12,866. Neither standing alone brings to bear all of the benefits of their foundational concepts, but each can each be used to supplement the other.

### A. THE GOVERNMENT PERFORMANCE AND RESULTS ACT

Spurred by the reformist mood of the early 1990s, Congress in 1993 passed GPRA with wide bipartisan support.<sup>65</sup> Its purpose was to improve performance and increase the public's confidence in government "by systematically holding Federal agencies accountable for achieving program results."<sup>66</sup> GPRA and the Clinton administration's initiative to "reinvent government" were inspired by experience suggesting that government served the public more effectively when it focused on the ends rather than the means.<sup>67</sup>

The roots of GPRA can be seen in the Chief Financial Officers Act of 1990, which sought to improve agencies' financial management, and created the office of Deputy Director for Management at the Office of Management and Budget (OMB), as well as the position of CFO at 23 large agencies.<sup>68</sup> Among other things, the Deputy Director was charged with overseeing managerial systems at federal agencies "including the systematic

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<sup>65</sup> Maurice McTigue, Henry Wray, and Jerry Ellig, MERCATUS CENTER AT GEORGE MASON UNIVERSITY 7<sup>TH</sup> ANNUAL PERFORMANCE REPORT SCORECARD (2006) at 21, available at [http://www.mercatus.org/publications/pubid.2265/pub\\_detail.asp](http://www.mercatus.org/publications/pubid.2265/pub_detail.asp) ("With heavily bipartisan sponsorship, the Government Performance and Results Act passed the Senate by voice vote, passed the House without objection, and was signed by President Clinton in 1993.").

<sup>66</sup> GPRA § 2(b)(1).

<sup>67</sup> See Part I.A, *supra*.

<sup>68</sup> Chief Financial Officers Act of 1990, Pub. L. 101-576, 104 Stat. 2838 (codified in scattered sections of 31 U.S.C.) [hereinafter CFO Act].

measurement of performance,”<sup>69</sup> and the new CFOs were charged with developing accounting systems that “provide[] for ... the systematic measurement of performance.”<sup>70</sup> The Senate Government Affairs Committee’s report on GPRA noted, however, that neither the CFO Act nor its legislative history explained what “systemic measurement of performance” meant and suggested that GPRA was intended to clarify the matter.<sup>71</sup> Remarking that unless clear expectations were set, the bureaucracy would resist performance measurement, the report stated: “The mandate for its implementation must be unambiguous. The specific requirements must be clear. And the effort must be sustained.”<sup>72</sup>

GPRA sets out three clear requirements. First, it requires each agency to produce what the Act calls a “strategic plan,” which must cover a period of at least five years.<sup>73</sup> In it the agency must define its missions, and state its general goals and objectives, “including outcome-related goals and objectives.”<sup>74</sup> The strategic plan must also explain how the agency plans to achieve its goals, identify program evaluations used to reevaluate goals and objectives, and set forth a schedule of program evaluations.<sup>75</sup> A program evaluation is defined as “an assessment, through objective measurement and systematic analysis, of the manner and extent to which Federal programs achieve intended objectives.”<sup>76</sup>

Second, GPRA requires agencies to produce annual performance plans identifying measures that will be used to assess “the relevant outputs, service levels, and outcomes of each program activity” and resources required to produce those results.<sup>77</sup> Goals must be expressed “in an objective, quantifiable, and measurable form” unless the agency determines this is not feasible and the Office of Management and Budget approves an alternative evaluation scheme.<sup>78</sup> Goals and measures can aggregate or disaggregate programs as long as the plans and reports do not “omit or minimize the significance of any program activity constituting a major function or operation for the agency.”<sup>79</sup> Agencies thus have a great deal of flexibility in crafting goals and measures, as long as they reflect the major functions and results for which the agency is responsible.

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<sup>69</sup> *Id.* § 202, 31 U.S.C. § 503(b)(2)(a).

<sup>70</sup> *Id.* § 205, 31 U.S.C. § 902(a)(3)(D)(iv).

<sup>71</sup> S. REP. NO. 103-58, at 332 (1993).

<sup>72</sup> *Id.*

<sup>73</sup> 5 U.S.C. §§ 306(a)(1) & 306(b).

<sup>74</sup> 5 U.S.C. §§ 306(a)(1)-306(a)(2).

<sup>75</sup> 5 U.S.C. § 306.

<sup>76</sup> 31 U.S.C. § 1115(f)(2).

<sup>77</sup> 31 U.S.C. § 1115(a)(4).

<sup>78</sup> 31 U.S.C. § 1115(a)(2).

<sup>79</sup> 31 U.S.C. § 1115(c).

Third, agencies must produce annual performance reports that compare actual program performance with the goals in the performance plan.<sup>80</sup> If the agency fails to meet a goal, it must explain why and present a plan for remedying the deficiency.<sup>81</sup> The performance report must also summarize the results of program evaluations concluded in that fiscal year.<sup>82</sup>

Finally, GPRA moved toward linking results with expenditures by initiating pilot projects in “performance budgeting.”<sup>83</sup> A performance budget presents the varying levels of outcomes that can be expected to result from different budgeted amounts of expenditures.<sup>84</sup> Performance budgeting directly addresses one of the principal concerns expressed in the congressional findings: that policy and spending decisions paid insufficient attention to program results.

Through these statutory requirements, GPRA instituted radical positive changes to the way agencies measure their performance. Consistent with the performance management and regulatory analysis frameworks, GPRA requires that agencies state the desired outcomes of their activities in advance, and that they do so in measurable terms. Before GPRA, an agency might have operated a community development grants program without a clear articulation of the outcomes it expected the program to generate. Also in line with performance management and regulatory analysis, GPRA requires retrospective review of program performance to discover whether the stated goal has been reached. What is key about this type of backward-looking review is that it measures whether the desired outcome (e.g. a ten percent reduction in poverty) has been achieved. Prior to GPRA, measuring outputs (e.g. number of grants awarded) was the norm.

Every year, since the first full cycle of GPRA reporting was completed in 1999, a research team at the Mercatus Center at George Mason University has evaluated the quality of the performance reports produced by the 24 “CFO Act agencies” that account for 99 percent of federal outlays.<sup>85</sup> The evaluation criteria are derived from the provisions of GPRA and scholarly research on performance management.<sup>86</sup> While agencies have complied with GPRA by producing the required documents, the quality of reporting has varied widely. Nevertheless, reporting quality has improved substantially since the first reports covering fiscal 1999.<sup>87</sup>

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<sup>80</sup> 31 U.S.C. § 1116.

<sup>81</sup> 31 U.S.C. § 1116(d)(3).

<sup>82</sup> 31 U.S.C. § 1116(d)(5).

<sup>83</sup> 31 U.S.C. § 1119.

<sup>84</sup> 31 U.S.C. § 1119(c).

<sup>85</sup> McTigue et al., *supra* note 22, at i. A complete set of annual Scorecards is available at <http://www.mercatus.org/programs/pageID.350,programID.4/default.asp>.

<sup>86</sup> *Id.* at 5-7.

<sup>87</sup> Each report is evaluated on 12 criteria using a 5-point scale. *Id.* at 9. Thus, scores can range between 12 and 60 points. *Id.* The average score has increased from 31.2 in fiscal 1999 to 36.4 in fiscal 2006, in spite of the fact that the evaluation team tightens the scoring criteria each year to reflect the previous year’s best practices. *Id.* at 10. For average scores, see Jerry Ellig, MERCATUS CENTER AT GEORGE MASON

Despite GPRA's revolutionary nature and substantial progress in performance reporting, GPRA does not implement every aspect of performance management or regulatory analysis.

First, although GPRA does require agencies to produce "strategic plans," it does not necessarily require agencies to engage in strategic planning. That is, while GPRA requires agencies to state their goals and how they intend to achieve them, it says nothing about how agencies should choose the activities they will pursue to reach their desired outcomes. In contrast, the performance management and regulatory analysis view of strategic planning requires that an agency consider alternative means to achieve desired ends and conduct a cost-benefit analysis on each alternative to identify the most effective and efficient course of action. GPRA does not explicitly require agencies to engage in this sort of planning or analysis as an input into the strategic plan. Agencies are also not required to determine if a market failure exists before pursuing an activity or regulation, nor must they determine whether a particular course of action duplicates existing state or local initiatives. There is simply an implicit expectation that agencies will plan strategically and choose the most effective and efficient course of action. Perhaps such an explicit requirement was omitted because the Clinton administration's steady drumbeat of admonishments to make government "work better, cost less, and get results" may have made it seem unnecessary.<sup>88</sup>

Second, while GPRA requires agencies to report annually on their performance, there is no statutory requirement that they incorporate the results into their strategic planning. If a goal is not met, the agency must explain its plan to remedy the deficiency or explain why the goal is not feasible and must be changed.<sup>89</sup> This requirement gives agency managers an opportunity to use performance results to revise their strategic plans, but they are not required to do so. They might respond to performance shortfalls by setting new numerical goals, adopting new performance measures, or adopting sundry initiatives aimed at improving performance without altering their fundamental goals or strategies.

Finally, GPRA lacks a strong mechanism forcing managers to actually use the strategic plans and performance information to manage agencies. Section 10 states that private citizens have no standing to sue for enforcement of the Act.<sup>90</sup> There is only the implicit understanding that poor performance may affect an agency's budget. Therefore, GPRA can be seen as imposing little more than a reporting requirement. Once an agency has produced its goals and performance documents, it has complied with GPRA. The Act does not provide a way to check the quality of those reports. As we will see, this is in

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UNIVERSITY 1<sup>ST</sup> ANNUAL PERFORMANCE REPORT SCORECARD (2000) at ii; McTigue et al., *supra* note 22, at tbl. 1.

<sup>88</sup> See mission of the National Partnership for Reinventing Government at <http://govinfo.library.unt.edu/npr/library/vision2000.html>.

<sup>89</sup> GPRA § 4, 31 U.S.C. § 1116(d)(3).

<sup>90</sup> GPRA § 10, 31 U.S.C. § 1115 note.



contrast to Executive Order 12,866, which gives OMB the authority to delay a regulation if an agency has not conducted a proper regulatory analysis.

## B. EXECUTIVE ORDER 12,866 AND THE OIRA REVIEW PROCESS

For several decades, a series of executive orders have required executive agencies to perform economic analysis of the effects of proposed regulations.<sup>91</sup> The Office of Information and Regulatory Affairs, within the Office of Management and Budget, oversees agencies' regulatory analysis and can delay some regulations if it believes either that the agencies' analysis is inadequate or that the decision in the rule did not take into account the findings of the analysis. The executive branch has not sought to require independent agencies to perform regulatory analysis or submit regulations to OMB for review.

The cost of federal regulation, which is paid by consumers, workers, and shareholders, is very large. The most recent estimate suggests that compliance with federal regulations costs approximately \$1.1 trillion.<sup>92</sup> Every president since Gerald Ford has relied on a formal system to review new regulations before they are issued. As we will see, these regulatory review programs have been implemented largely through executive order and have found a home exclusively in the Executive Office of the President. Regulatory review is the mechanism by which the president checks his own administration's regulations. It is the executive's tool "to combat the tunnel vision that plagues the thinking of single-mission regulators," as former OIRA Administrator John Graham has said.<sup>93</sup> And as the D.C. Circuit found in *Sierra Club v. Costle*, a case challenging the executive's power to influence agency rulemaking (in this instance the Carter White House's involvement in influencing an EPA rule), regulatory review is within the president's purview:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.<sup>94</sup>

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<sup>91</sup> See E.O. 12,866 and Circular A-4.

<sup>92</sup> Crain, *supra* note 47, at 1. This figure far exceeds the figures reported in the Office of Management and Budget's annual report on the costs and benefits of federal regulations, because the OMB report covers only those regulations adopted during the previous ten years. See Office of Management and Budget, Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations, [http://www.whitehouse.gov/omb/inforeg/2007\\_cb/2007\\_draft\\_cb\\_report.pdf](http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf) (last visited Mar. 27, 2007).

<sup>93</sup> John D. Graham, Remarks to the Board of Trustees the Keystone Center, June 18, 2002, *available at* [http://www.whitehouse.gov/omb/inforeg/keystone\\_speech061802.html](http://www.whitehouse.gov/omb/inforeg/keystone_speech061802.html).

<sup>94</sup> *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

The recurring themes evident in these programs are an insistence that regulatory agencies consider possible alternatives to achieving the outcome that is their target, and that they estimate the costs of these alternatives.

Regulatory review has its origins in President Nixon's so-called "Quality of Life" review process.<sup>95</sup> Soon after the establishment of the EPA in 1970, the White House took notice of the cost—both to society and the treasury—of the new regulation spawned by the Clean Water Act and other newly minted environmental laws.<sup>96</sup> Alarmed by a multi-million dollar supplementary budget request by the EPA in December 1970, the OMB concluded that the effects of EPA's regulation on the budget and on the private sector were going unchecked and that it should take on this mission.<sup>97</sup>

If agencies' regulations were to be checked (at least for budgetary reasons), they had to be reviewed before they were promulgated—something the White House had not theretofore done. OMB Director George Schultz sent a letter to EPA Administrator William Ruckelshaus in 1971 "asserting authority to review *and clear* EPA's regulations."<sup>98</sup> At the same time, the White House established a "Quality of Life Committee" composed of Cabinet members, including the EPA administrator, and senior White House staff.<sup>99</sup> Its purpose was to formulate a regulatory review process for significant regulations in order to ensure that the costs of alternatives had been considered.<sup>100</sup>

The resulting review process was established in a memorandum from OMB Director George Schultz dated October 5, 1971.<sup>101</sup> First it required the covered agencies to submit to OMB "a schedule . . . covering the ensuing year showing estimated dates of future announcements of all proposed and final regulations, standards, guidelines or similar matters"<sup>102</sup> that were "significant"<sup>103</sup> in nature. More notably, it also required the agencies to submit significant proposed rules to OMB at least 30 days before their publication and accompanied by "the principal objectives of the regulations, standard,

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<sup>95</sup> Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, REGULATION, Spring 1997, available at <http://www.cato.org/pubs/regulation/reg20n1a.html>; GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 46 (1984).

<sup>96</sup> GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 46-47 (1984).

<sup>97</sup> *Id.* at 47.

<sup>98</sup> *Id.* at 48.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Memorandum from George P. Schultz to Heads of Department and Agencies (Oct. 5, 1971) available at <http://www.thecre.com/ombpapers/QualityofLife1.htm>.

<sup>102</sup> *Id.*

<sup>103</sup> A "significant" rule was defined as a rule that would "have a significant impact on the policies, programs, and procedures of other agencies; or impose significant costs on, or negative benefits to, non-Federal sectors; or increase the demand for Federal funds for programs of Federal agencies which are beyond the funding levels provided for in the most recent budget requests submitted to the Congress." *Id.*

guidelines, etc.; alternatives to the proposed actions, that have been considered; a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered; and the reasons for selecting the alternative that is proposed.”<sup>104</sup> OMB then began to circulate the proposed rules and their explanations to other agencies for comment and forwarded the feedback to the issuing agency, something it does with most policy statements and proposals.<sup>105</sup>

Intentionally left out of this interagency review process for political reasons was a mechanism by which conflicts among agencies would be resolved.<sup>106</sup> In practice, the White House often played arbiter.<sup>107</sup> If nothing else, the Quality of Life Review process, by forcing agencies such as the EPA to answer certain questions, curbed reflexive rulemaking and made regulators consider alternatives and take into account the cost of the rules they were proposing.

While the Quality of Life review process continued through 1977,<sup>108</sup> President Gerald Ford expanded regulatory review to address concerns about the effect of regulation on inflation, then a major national concern.<sup>109</sup> Ford sought and received legislation establishing the Council on Wage and Price Stability (CWPS) in August 1974.<sup>110</sup> Among other things, the council was charged with reviewing regulations to ascertain their impact on the economy.<sup>111</sup> Three months after establishing the CWPS, President Ford issued Executive Order 11,821 establishing procedures for preparing Inflation Impact Statements, which addressed the economic effect of proposed rules on productivity and competition.<sup>112</sup> The CWPS reviewed the statements prepared by executive branch agencies and then filed comments on the public record with those agencies.<sup>113</sup>

President Ford was also interested in addressing the impact of regulation by independent regulatory agencies. As Murray Weidenbaum tells it,

In July 1975, President Ford met with the members of ten independent regulatory commissions and urged them to reform their regulatory processes. Because the so-called independent agencies are not subject to the jurisdiction of presidential executive orders, President Ford and his staff tried to coax them into following the spirit, if not the letter, of his directive. Ford focused on four reforms: (1) measuring and considering the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; Eads & Fix, *supra* note 96, at 48.

<sup>106</sup> *Id.* at 48-50

<sup>107</sup> *Id.* at 49.

<sup>108</sup> *Id.* at 52.

<sup>109</sup> Weidenbaum, *supra* note 95.

<sup>110</sup> Eads & Fix, *supra* note 96, at 50; Weidenbaum, *supra* note 95.

<sup>111</sup> *Id.*

<sup>112</sup> Weidenbaum, *supra* note 95.

<sup>113</sup> Weidenbaum, *supra* note 95, Eads & Fix, *supra* note 96, at 51-52.

costs and benefits of proposed regulations; (2) reducing the backlog and delays in regulatory proceedings; (3) suggesting changes in the legislation under which each regulatory commission operates, including deregulation where appropriate; and (4) assuring that the consumers' interests prevail in regulatory proceedings.<sup>114</sup>

At this time the FTC began a program of self-assessment similar to the Inflation Impact Statements<sup>115</sup> and other independent agencies, such as the Nuclear Regulatory Commission, have since established policy offices to engage in similar regulatory analysis. To this day the independent agencies, such as the FTC and the FCC, have remained outside the scope of Executive regulatory review.<sup>116</sup>

President Jimmy Carter continued the formalization of the regulatory review process begun in the Ford administration. In 1978 Carter established the cabinet-level Regulatory Analysis Review Group (RARG) with authority to review major proposed rules.<sup>117</sup> He also issued Executive Order 12,044 in March 1978, which replaced Ford's Economic Impact Statement with the "Regulatory Analysis."<sup>118</sup> The Order was remarkably similar to the Nixon and Ford efforts. It required proposed rules with an effect on the economy of \$100 million or more to be reviewed before they were published in the Federal Register, and required the agencies' analysis to "contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others."<sup>119</sup> Also, much like the 1971 Schultz memo, Executive Order 12,044 required agencies to prepare and publish a semiannual agenda "of significant regulations under

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<sup>114</sup> Weidenbaum, *supra* note 95. It should be noted that it whether an executive order mandating regulatory review can apply to independent regulatory agencies is a debated question. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, AEI-Brookings Joint Center for Regulatory Studies Working Paper 02-4 (Mar. 2002) at 40, available at <http://www.aei-brookings.org/publications/abstract.php?pid=220>.

<sup>115</sup> Weidenbaum, *supra* note 95.

<sup>116</sup> Whether independent agencies such as the FCC and FTC can be made subject to an Executive Order mandating regulatory review remains a controversial question. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PENN. L. REV. 1489, 1531-37 (2002). While the President has the authority to fire at will any executive agency head that does not comply with an executive order mandating review, an independent agency head may be dismissed only for good cause. *Id.* at 134. It is unclear whether ignoring an executive order mandating review would constitute sufficient for dismissal since Congress created independent agencies precisely so that the executive would not control them. As a result, no president has pressed the matter and independent agencies are explicitly exempt from review. E.O. 12,866 § 3(b).

<sup>117</sup> Eads & Fix, *supra* note 96, at 55-56; Weidenbaum, *supra* note 95.

<sup>118</sup> Exec. Order No. 12,044, available at <http://www.presidency.ucsb.edu/ws/print.php?pid=30539>.

<sup>119</sup> *Id.*

development or review.”<sup>120</sup> This obligation was later codified into law during the last year of the Carter Administration in the Regulatory Flexibility Act.<sup>121</sup>

It was under the administration of Ronald Reagan, however, that we saw the crystallization of the regulatory review process as we know it today. The stage for this was set during the last year of the Carter administration with the passage of the Paperwork Reduction Act.<sup>122</sup> That Act created the Office of Information and Regulatory Affairs within OMB.<sup>123</sup> Its primary purpose was to enforce the Act’s limits on the amount of reporting agencies could require from the private sector.<sup>124</sup> President Reagan, however, expanded the role of OIRA.

One month into his presidency, Reagan signed Executive Order 12,291 titled “Federal Regulation” and mandating that “Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.”<sup>125</sup> The order required agencies to prepare regulatory impact analyses for proposed “major rules.”<sup>126</sup> What constituted a “major rule” was left largely to the discretion of OMB.<sup>127</sup> Although the order did not mention OIRA specifically, but only OMB generally, the review of regulatory impact analyses fell to OIRA.<sup>128</sup> As a result, federal agencies could not publish notices of proposed rulemaking until OIRA had completed a regulatory review and its concerns had been addressed.<sup>129</sup>

At the same time, President Reagan established a “Task Force on Regulatory Relief,” headed by Vice President George H.W. Bush, which gave direction to OIRA.<sup>130</sup> Unlike the Nixon, Ford, and Carter programs of regulatory review, which did not address how an impasse between the agency and the reviewing authority would be settled,<sup>131</sup> the Reagan system placed the power to hold back regulations in the hands of OIRA. The Task Force

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<sup>120</sup> *Id.*

<sup>121</sup> Weidenbaum, *supra* note 95; 5 U.S.C. § 602 (2007).

<sup>122</sup> 44 U.S.C. § 3501 *et seq.* (2007).

<sup>123</sup> 44 U.S.C. § 3503 (2007).

<sup>124</sup> 44 U.S.C. § 3504 (2007).

<sup>125</sup> Exec. Order No. 12,291, *available at* <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Although “major rule” was defined as \$100m or more in §1(b), in §3(b) the director/taskforce is given authority to treat other rules as major rules. *Id.*

<sup>128</sup> *Id.*; Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, CRS Report, May 28, 2004, at 4.

<sup>129</sup> Weidenbaum, *supra* note 95.

<sup>130</sup> Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, CRS Report, May 28, 2004, at 3.

<sup>131</sup> Eads & Fix, *supra* note 96, at 48-50. The White House staff and the president were often the mediators. Include Carter intervention on cotton dust standards here. *Id.*

on Regulatory Relief would then, in Murray Weidenbaum's words, "often act[] as a court of appeals for issues on which the OIRA and the regulatory agencies could not agree."<sup>132</sup>

The regulatory review process established in Executive Order 12,291 and carried out by OIRA went largely unchanged through the presidency of George H.W. Bush.<sup>133</sup> The only major change was that the Task Force on Regulatory Relief was replaced by the "Council on Competitiveness," also headed by the Vice President (in this case Dan Quayle), and supported by OIRA.<sup>134</sup>

President Bill Clinton made significant changes to the regulatory review process by abolishing the Council on Competitiveness and rescinding President Reagan's Executive Order 12,291.<sup>135</sup> President Clinton issued Executive Order 12,866 in September 1993, articulating a new regulatory review process that was less a radical departure and more an evolution consistent with past programs.<sup>136</sup> The most significant change was that it was no longer in OMB's complete discretion to decide what constituted a "major rule." Instead of "major rules" the new executive order refers to "significant regulatory action," and it enumerated the type of rules that could come under OIRA review.<sup>137</sup> Chief among those was the limitation that proposed rules would be considered significant if they might "have an annual effect on the economy of \$100 million or more[.]"<sup>138</sup> Predictably, this caused the number of rules reviewed by OIRA to drop markedly.<sup>139</sup>

Although it changed the *process* of regulatory review, the Clinton Executive Order kept the substance of regulatory analysis that had been developing since the Nixon Quality of Life reviews. The framework it announced maintained the emphasis on identifying all practical alternatives to regulation and selecting the most cost-effective option:

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. . . . When an agency determines that a regulation is the best available method of

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<sup>132</sup> Weidenbaum, *supra* note 95.

<sup>133</sup> Copeland, *supra* note 130, at 9-10; Weidenbaum, *supra* note 95.

<sup>134</sup> Weidenbaum, *supra* note 95; Copeland, *supra* note 130, at 10.

<sup>135</sup> Weidenbaum, *supra* note 95.

<sup>136</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>137</sup> OIRA only reviews "significant" rules. E.O. 12,866 § (6)(a)(3)(F)(1). All proposed regulation that has a potential economic impact of \$100 million or more are automatically considered "significant." E.O. 12,866 § 3(f)(1). A proposed rule may also be considered significant if it creates "a serious inconsistency or otherwise interfere with an action taken or planned by another agency," or if it raises "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [E.O. 12,866]." E.O. 12,866 § 3(f).

<sup>138</sup> *Id.*

<sup>139</sup> From an average of about 2,500 rules reviewed annually before 1993, to an average of about 600 rules reviewed annually after 1993. Copeland, *supra* note 130, at 12.

achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. . . . 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. . . . 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.<sup>140</sup>

Additionally, Executive Order 12,866 embodied the evolution of modern regulatory analysis by adding a new first step to the regulatory analysis framework. It ordered, “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.”<sup>141</sup> This first step, to identify the market failure or other problem, is a critical and often dispositive step.

President George W. Bush recently issued Executive Order 13,422 amending Executive Order 12,866 that, among other procedural changes, underlines the importance of identifying a problem to be addressed by regulation.<sup>142</sup> The new order requires agencies to “identify *in writing* the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions)[.]”<sup>143</sup> This requirement highlights the insight first expressed in the Clinton Executive Order 12,866 that cost-benefit analysis is not the only criterion used to assess whether a regulation is necessary; a market failure or some other systemic problem must also be identified.

Like GPRA, the review process embodied in Executive Order 12,866 encompasses much, but not all, of the performance management and regulatory review frameworks discussed in Part I. Both GPRA and 12,866 require agencies to state at the outset the outcomes they intend to achieve through their activities. Unlike GPRA, however, the Executive Order also mandates that agencies identify the market failure or systemic problem that justifies their actions, as well as analysis of alternative courses of action, and consideration of costs and benefits in order to identify the most effective alternative. However, OIRA review is limited to regulation by executive agencies (independent commissions are exempt from the Executive Order) and to “significant rules,” which are generally those have an economic impact of \$100 million or more.<sup>144</sup> In contrast, GPRA applies to all

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<sup>140</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>141</sup> *Id.*

<sup>142</sup> Exec. Order No. 13,422; Curtis W. Copeland, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, CRS Report, Feb. 5, 2007, at 3-4.

<sup>143</sup> Exec. Order No. 13,422. Emphasis added.

<sup>144</sup> Independent agencies are explicitly exempted from OIRA review. E.O. 12,866 § 3(b). OIRA only reviews “significant” rules. E.O. 12,866 § (6)(a)(3)(F)(1). All proposed regulation that has a potential

federal agencies, executive or independent, and to all of their activities, “significant” or not.<sup>145</sup>

Also in contrast to GPRA, and to the performance management and regulatory analysis framework, the OIRA review process is primarily focused on ex-ante analysis of agency activity. While Executive Order 12,866 requires executive agencies to develop a program to periodically review existing regulations,<sup>146</sup> few agencies seem to heed the directive. This is evidenced by the fact that OMB’s annual report on costs and benefits of federal regulations uses estimates from the regulatory analyses agencies prepared when they enacted the regulations, rather than ex post analyses of the costs and benefits that actually occurred after the regulations were adopted.<sup>147</sup>

Regulatory agencies conduct numerous retrospective reviews of regulations, but these reviews only occasionally provide ex post estimates of costs and benefits of either the regulation or of possible alternatives. A recent GAO report found that nine federal agencies conducted more than 1,300 regulatory reviews between 2001 and 2006, of widely varying scope.<sup>148</sup> The report notes, “Our limited review of agency summaries and reports on completed retrospective reviews revealed that agencies’ reviews more often attempted to assess the effectiveness of their implementation of the regulation rather than the effectiveness of the regulation in achieving its goal.”<sup>149</sup> The agencies GAO examined were much more likely to alter their regulations as a result of reviews initiated at their own discretion, rather than reviews mandated by law or executive order.<sup>150</sup> Reviews that did not change regulations nevertheless achieved other objectives, such as providing Congress with information about a regulation’s effects, provoking changes in agency guidance to regulated entities, or developing new ideas for further study.<sup>151</sup>

### C. OTHER STATUTORY MANDATES OF REGULATORY REVIEW

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economic impact of \$100 million or more are automatically considered “significant.” E.O. 12,866 § 3(f)(1). A proposed rule may also be considered significant if it creates “a serious inconsistency or otherwise interfere with an action taken or planned by another agency,” or if it raises “novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in [E.O. 12,866].” E.O. 12,866 § 3(f).

<sup>145</sup> GPRA makes special exemptions for “the Central Intelligence Agency, the General Accounting Office, the Panama Canal Commission, the United States Postal Service, and the Postal Rate Commission.” 5 U.S.C. § 306(f); *see also* GPRA § 7.

<sup>146</sup> E.O. 12,866 § 5.

<sup>147</sup> *See* Office of Management and Budget, Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations, [http://www.whitehouse.gov/omb/inforeg/2007\\_cb/2007\\_draft\\_cb\\_report.pdf](http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf) (last visited Mar. 27, 2007).

<sup>148</sup> Government Accountability Office, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007) at 16-19.

<sup>149</sup> *Id.* at 20.

<sup>150</sup> *Id.* 30-33.

<sup>151</sup> *Id.* at 34.



While regulatory analysis has largely been a tool employed by the Executive, Congress has also mandated regulatory analysis on several occasions. It has required regulatory analysis in laws aimed at checking the burden imposed by regulation on smaller entities, as well as in the organic laws of some agencies. Below is a brief survey of some of those mandates.

### 1. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 sought to curb the number of unfunded mandates imposed on State and local governments.<sup>152</sup> To that end Title I of the Act established rules for the House and the Senate to consider the impact of regulations on small entities.<sup>153</sup> Title II of the Act applies to regulatory agencies and requires them to analyze the impact of proposed regulations on small entities.<sup>154</sup> Specifically, Section 202 of the Act requires agencies to prepare a regulatory impact statement for proposed regulations that might result in the “expenditure by State, local, and tribal governments, in the aggregate, or by the private sector,” of \$100 million or more in a year.<sup>155</sup> That statement must include a “qualitative and quantitative” analysis of the costs and benefits of the Federal mandate, as well as an assessment of the mandates effect on “health, safety, and the natural environment[.]”<sup>156</sup>

The Act also requires agencies to consider regulatory alternatives. For proposed regulations requiring a regulatory impact statement, Section 205 directs agencies to “identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for” State, local, and tribal government or the private sector in the case of a private sector mandate.<sup>157</sup> The agency may nevertheless choose the regulatory alternative that is not the least costly or burdensome as long as the agency head published with the rule an explanation of the decision.<sup>158</sup>

### 2. Regulatory Flexibility Act

The Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act requires agencies to consider, and find ways to mitigate, the burden of any regulation that would “have a significant economic impact on a substantial number of small entities.”<sup>159</sup> To accomplish this goal, agencies must perform for each

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<sup>152</sup> Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Title II.

<sup>155</sup> 2 U.S.C. § 1532.

<sup>156</sup> 2 U.S.C. § 1532(a)(2).

<sup>157</sup> 2 U.S.C. § 1535(a).

<sup>158</sup> 2 U.S.C. § 1535(b)(1).

<sup>159</sup> 5 U.S.C. § 602(a)(1).

proposed regulation a “regulatory flexibility analysis” that outlines the reason for and objectives of the regulation, the agency’s statutory authority, other overlapping federal regulations, the compliance burden on small entities, and alternatives that would minimize the burden on small entities while still accomplishing the regulation’s purpose.<sup>160</sup> Alternatives can include (but are not limited to) different compliance or reporting requirements for small entities, use of performance rather than design standards, or exemptions for small entities.<sup>161</sup> The Small Business Administration’s Office of Advocacy assists agencies with this analysis and reports annually on their compliance with the law.<sup>162</sup> This office claims that the legislation has resulted in one-time cost savings of \$54.1 billion for small businesses, plus annual recurring cost savings exceeding \$20 billion.<sup>163</sup>

The Act analysis utilizes many of the principal tools of regulatory analysis, but for the express purpose of examining the effects of proposed regulations on small entities rather than the general public interest. The results of a regulatory flexibility analysis can, however, feed into a larger regulatory analysis when they reveal information about the incidence of costs and benefits.

Another requirement of the Act is periodic retrospective analysis of promulgated regulations that affect small entities.<sup>164</sup> Each agency is required to publish on a regular basis a plan for reviewing existing rules “to determine whether such rules should be continued without change, or should be amended or rescinded . . . to minimize any significant economic impact of the rules” on small entities.<sup>165</sup> Among other things, the review plan must consider “the continued need for the rule” and “the extent to which the rule overlaps, duplicates or conflicts” with other Federal, State, or local rules.<sup>166</sup>

### 3. Agency-Specific Laws

Several agency-specific statutes include aspects of regulatory analysis. For example, the Consumer Product Safety Act requires that consideration of new regulations be commenced with an advanced notice of proposed rulemaking that clearly states the goal of the proposed regulation and the alternatives available to achieve it. In these advanced notices, the Consumer Product Safety Commission must include a statement of the nature of the risk associated with the product in question, information about any standard that currently applies to the product and why the Commission believes that it does not

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<sup>160</sup> 5 U.S.C. § 603.

<sup>161</sup> *Id.*

<sup>162</sup> See, e.g., Small Business Administration, Annual Reports of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, *available at* <http://www.sba.gov/advo/laws/flex/>.

<sup>163</sup> Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving its Goal?*, 23 FORDHAM URBAN L.J. 1119, 1131 (2006).

<sup>164</sup> 5 U.S.C. § 610.

<sup>165</sup> 5 U.S.C. § 610(a).

<sup>166</sup> 5 U.S.C. § 610(b).

adequately deal with the stated risk, and “a summary of each of the regulatory alternatives under consideration by the Commission (including voluntary consumer product safety standards)[.]”<sup>167</sup> After considering comments from the public on the advanced notice, if the Commission continues with the regulatory proceeding, it must then issue a notice of proposed rulemaking that includes a regulatory analysis. The Act states:

No consumer product safety rule may be proposed by the Commission unless . . . the Commission publishes in the Federal Register the text of the proposed rule, including any alternatives, which the Commission proposes to promulgate, together with a preliminary regulatory analysis containing—

(1) a preliminary description of the potential benefits and potential costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs; . . .

(4) a description of any reasonable alternatives to the proposed rule, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed rule.<sup>168</sup>

Another agency-specific regulatory analysis mandate can be found in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.<sup>169</sup> That Act established the Office of Risk Assessment and Cost-Benefit Analysis in the U.S. Department of Agriculture to comply with new regulatory analysis obligations imposed on the department.<sup>170</sup> Among those is the obligation to publish every six months a regulatory analysis for “each proposed major regulation the primary purpose of which is to regulate issue of human health, human safety, or the environment[.]”<sup>171</sup> According to the Act, these analyses must include a statement of the risk that the regulation aims to avoid and a comparison of the risk relative to other regulated risks, as well as a cost-benefit analysis.<sup>172</sup>

The Safe Drinking Water Act Amendments of 1996 also introduce regulatory analysis to the EPA’s rulemaking. In enacting the amendments, Congress found that “in considering the appropriate level of regulation for contaminants in drinking water, risk assessment, based on sound and objective science, and benefit-cost analysis are important tools for

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<sup>167</sup> 15 U.S.C. § 2058(a).

<sup>168</sup> 15 U.S.C. § 2058(c).

<sup>169</sup> Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, 7 U.S.C. § 2204e.

<sup>170</sup> 7 U.S.C. § 2204e(a).

<sup>171</sup> 7 U.S.C. § 2204e(b)(1).

<sup>172</sup> 7 U.S.C. § 2204e(b)(1).

improving the efficiency and effectiveness of drinking water regulations to protect human health[.]”<sup>173</sup>

For each regulated contaminant, the EPA is authorized to set a maximum level that will be allowed in drinking water.<sup>174</sup> In determining that level, the Act requires the Agency to consider “health risk reduction benefits,”<sup>175</sup> as well as the costs related to compliance with the proposed maximum contaminant level<sup>176</sup> and “incremental costs and benefits associated with each alternative maximum contaminant level considered.”<sup>177</sup> After analysis, if the costs do not justify compliance with the proposed level, the agency may set maximum contaminant level “that maximizes health risk reduction benefits at a cost that is justified by the benefits.”<sup>178</sup> When it sets a maximum level, the agency is also required to publish a list of alternative “feasible technologies” that will achieve compliance.<sup>179</sup>

Finally, the Securities and Exchange Commission, an independent commission that is not subject to Executive Order 12,866, is charged by its enabling statute to consider whether a proposed regulation “will promote efficiency, competition, and capital formation.”<sup>180</sup> This mandate standing alone does not seem like much. However, answering the PART questions related to whether the Commission conducts regulatory analysis for the rules it promulgates, the SEC has stated that the efficiency mandate “has been interpreted as a requirement to conduct cost-benefit analyses.”<sup>181</sup>

### III. SYMBIOSIS BETWEEN GPRA AND REGULATORY ANALYSIS

Regulatory analysis is performance management applied to regulation. Just as regulatory analysis and performance management are mutually reinforcing concepts, so are GPRA and Executive 12,866 mutually reinforcing mandates. The Office of Management and Budget is charged with overseeing both, and its implementation of the mandates has taken advantage of the tools available in one to strengthen the other.

#### A. HOW GPRA STRENGTHENS REGULATORY ANALYSIS

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<sup>173</sup> Safe Drinking Water Act Amendments of 1996, Pub. L. 104-182, 110 Stat. 1613 (codified in scattered sections of 42 U.S.C.), at § 3(7).

<sup>174</sup> 42 U.S.C. § 300g-1(b).

<sup>175</sup> 42 U.S.C. § 300g-1(b)(3)(C)(i)(I) & (II).

<sup>176</sup> 42 U.S.C. § 300g-1(b)(3)(C)(i)(III).

<sup>177</sup> 42 U.S.C. § 300g-1(b)(3)(C)(i)(IV).

<sup>178</sup> 42 U.S.C. § 300g-1(b)(6)(a).

<sup>179</sup> 42 U.S.C. § 300g-1(b)(4)(E).

<sup>180</sup> 15 U.S.C. § 77b(b).

<sup>181</sup> Office of Management and Budget, ExpectMore.gov: Regulation of Major Securities Market Participants, <http://www.whitehouse.gov/omb/expectmore/detail/10009060.2007.html> (last visited March 27, 2008) at § 3.RG2.

As we have seen, the executive's regulatory review process does not apply to independent regulatory agencies, nor to most regulations costing less than \$100 million, and it is heavily focused on prospective review of proposed regulations rather than retrospective review of existing regulations. OMB's implementation of GPRA can help address those gaps in order to strengthen regulatory analysis and make GPRA reporting have real consequences for agencies.

One arguable shortcoming of Executive Order 12,866 is that administrations have not sought to apply it to independent agencies. These agencies, therefore, do not generally engage in regulatory analysis unless required by specific legislation, and such legislative requirements lack the specific guidance on elements and methods laid out in Executive Order 12,866 and OMB Circular A-4. GPRA, on the other hand, applies to all agencies and, as we have seen, the performance management framework that GPRA embodies shares a nexus with regulatory analysis. While this is not the same as formal regulatory analysis subject to OIRA review under Executive Order 12,866, GPRA's performance management mandates allow OMB to expect at least some regulatory analysis from independent regulatory agencies. By the same logic, while most of Executive Order 12,866's regulatory analysis requirements apply only to "significant" regulations, the analytical framework embodied in GPRA is applicable to all regulations that serve as tools to reach an agency's outcome-related goals.

In practice, OMB does in fact seem to require all agencies to consider regulatory analysis as they work to comply with GPRA. Congress gave OMB the responsibility to implement GPRA's requirements.<sup>182</sup> To that end, OMB has issued a guidance document that instructs agencies on how to comply with GPRA.<sup>183</sup> OMB's Circular A-11 is the Executive's manual on the development and execution of the budget, and Part 6 is titled "Preparation and Submission of Strategic Plans, Annual Performance Plans, and Annual Program Performance Reports."<sup>184</sup> This document underscores OMB's expectation of proper regulatory analysis when regulation is involved.

For example, Circular A-11 requires agencies to report "efficiency measures."<sup>185</sup> Efficiency measures are defined in the Circular:

**Efficiency Measures** – Effective programs not only accomplish their outcome performance goals, they strive to improve their efficiency by achieving or accomplishing more benefits for a given amount of resources. Efficiency measures reflect the economical and effective acquisition, utilization, and management of resources to achieve program outcomes or produce program outputs. They may also reflect ingenuity in the

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<sup>182</sup> See, e.g., GPRA §§ 306(a), 1115(a), & 1117.

<sup>183</sup> OFFICE OF MANAGEMENT AND BUDGET, *Circular No. A-11: Preparation, Submission, and Execution of the Budget* (Jul. 2007) §§ 200-230, available at [http://www.whitehouse.gov/omb/circulars/a11/current\\_year/a\\_11\\_2007.pdf](http://www.whitehouse.gov/omb/circulars/a11/current_year/a_11_2007.pdf) [hereinafter Circular A-11].

<sup>184</sup> *Id.*

<sup>185</sup> Circular A-11 § 220(c).

improved design, creation, and delivery of services to the public, customers, or beneficiaries by capturing the effect of intended changes made to outputs aimed to reduce costs and/or improve productivity, such as the improved targeting of beneficiaries, redesign of goods or services for simplified customer processing, manufacturability, or delivery.<sup>186</sup>

As we've seen, the foremost method of judging regulatory efficiency is by conducting a retrospective regulatory analysis.

Aside from its Circular A-11 guidance, OMB has also developed the Program Assessment Rating Tool (PART) to help it implement GPRA. PART is a framework "used to evaluate a program's purpose, design, planning, management, results, and accountability to determine its overall effectiveness."<sup>187</sup> It is also intended to help OMB and Congress make performance budgeting decisions.

PART is a questionnaire that OMB requires agencies to complete about their programs and which it scores to produce a rating of the program's performance and management. PART questionnaires contain 25 questions divided into four categories: program purpose and design, strategic planning, management, and results.<sup>188</sup> Each section receives a score between 0 and 25 points. The program's total score is a weighted average of the four scores: purpose and design (20 percent), strategic planning (10 percent), management (20 percent), and results (50 percent). If information on results is available, a program can be rated Effective (85 points and above), Moderately Effective (70-84 points), Adequate (50-69 points), or Ineffective (0-49 points). Regardless of the numerical score, a program can also be rated "Results Not Demonstrated" if it has not established goals and measures and collected data to evaluate performance.<sup>189</sup>

OMB also assigns programs into one of seven categories and asks different questions of each type of program. The seven PART categories are: Direct Federal, Competitive Grant, Block/Formula Grant, Regulatory, Capital Assets and Service Acquisition, Credit, and Research and Development.

PART seeks to link measurement of program results with GPRA's requirements for measurement of the agency's overall results: "When annual plans and reports include programs that have been assessed in the PART, the measures used for GPRA should be the same as those included in the PART."<sup>190</sup> OMB also advises that agency strategic goals should group multiple (presumably related) program outcome goals.<sup>191</sup>

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<sup>186</sup> Circular A-11 § 200.3.

<sup>187</sup> Office of Management And Budget, ExpectMore.gov: The Program Assesment Rating Tool (PART), <http://www.whitehouse.gov/omb/expectmore/part.html> (last visited Mar. 27, 2007).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Circular A-11 § 200.2.

<sup>191</sup> Circular A-11 § 200.3.

“Programs” include regulatory programs. Numerous PART questions reflect the fundamental tenets of performance management and regulatory analysis.<sup>192</sup>

- Does the program address a specific and existing problem, interest, or need?
- Is the program designed so it is not redundant or duplicative of any other federal, state, local, or private effort?
- 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?
- Are independent evaluations of sufficient scope and quality conducted on a regular basis or as needed to support program improvement and evaluate effectiveness and relevance to the problem, interest, or need?
- Are all regulations issued by the program/agency necessary to meet the stated goals of the program, and do all regulations clearly indicate how the rules contribute to the achievement of the goals?
- Did the program seek to take into account the views of all affected parties (e.g., consumers; large and small businesses; state, local, and tribal governments; beneficiaries; and the general public) when developing significant regulations?
- Did the program prepare adequate regulatory impact analyses if required by Executive Order 12,866, regulatory flexibility analysis if required by the Regulatory Flexibility Act and SBREFA, and cost-benefit analyses if required under the Unfunded Mandates Reform Act; and did those analyses comply with OMB guidelines?
- Does the program systematically review its current regulations to ensure consistency among all regulations in accomplishing program goals?
- Are the regulations designed to achieve program goals, to the extent practicable, by maximizing net benefits of its regulatory activity?
- Has the program demonstrated adequate progress in achieving its long-term performance goals?
- Do independent evaluations of sufficient scope and quality indicate that the program is achieving results?

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<sup>192</sup> The list below comes from Office of Management and Budget, Guide to the Program Assessment Rating Tool (PART), OMB Guidance No. 2007-02 (Jan. 29, 2007), available at [http://www.whitehouse.gov/omb/part/fy2007/2007\\_guidance\\_final.pdf](http://www.whitehouse.gov/omb/part/fy2007/2007_guidance_final.pdf).

- Were programmatic goals (and benefits) achieved at least incremental societal cost and did the program maximize net benefits?

These questions clearly highlight OMB's concern that regulatory agencies identify and measure outcomes, conduct program evaluations to determine whether regulation actually caused the desired outcomes to occur, and take all social costs of regulation into account in order to maximize the net benefits of regulation. It is not sufficient that a regulatory agency engage in activities intended to produce desired outcomes; the agency must also examine whether it actually did produce the outcomes, and at what cost.

The questions dealing with prospective regulatory analysis also indicate that, prior to adoption of a regulation, OMB expects regulatory agencies to have solid evidence that a proposed regulation is likely to accomplish its outcomes at an acceptable cost. True, one of these questions includes qualifying phrases indicating that it is only relevant if the agency is required to perform regulatory analysis under Executive Order 12,866 or a statutory mandate. All of the other questions, however, lack these qualifiers. Regulatory agencies are expected to articulate and measure results, achieve results, avoid conflict with other government or private efforts, conduct program evaluations, minimize costs, and maximize net benefits, regardless of whether they are covered by the executive order or legislative regulatory analysis mandates.

Circular 11 and PART also help to address the perception that GPRA does little more than force agencies to generate reports. Circular 11 ties performance reporting to budgeting by instructing agencies to "prepare performance budgets in lieu of the annual performance plans that satisfy all statutory requirements for the annual performance plan."<sup>193</sup>

For all of the GPRA reports, OMB instructs agencies "not only to meet the basic requirements, but to describe the relationship between the results they expect to achieve and the resources they are requesting."<sup>194</sup> Measured outputs should lead to outcomes in a logical fashion.<sup>195</sup> Most strategic goals, however, should be outcomes, and each strategic goal should encompass outcome goals for a (presumably related) group of programs.<sup>196</sup> The strategic plan should focus on the principal activities and results that accomplish the agency's mission.<sup>197</sup>

OMB emphasizes the link between strategic planning and budgeting: "Strategic plans should guide the formulation and execution of the budget. A strategic plan is a tool to be used in setting priorities and allocating resources consistent with these priorities."<sup>198</sup>

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<sup>193</sup> Circular A-11 § 200.1.

<sup>194</sup> Circular A-11 § 200.2.

<sup>195</sup> *Id.* at § 200.3.

<sup>196</sup> *Id.* at § 210.1.

<sup>197</sup> *Id.* at § 210.1.

<sup>198</sup> *Id.* at § 210.1.



OMB requires agencies to submit performance budgets that satisfy all the legislative requirements of annual performance plans.<sup>199</sup> The performance budget should describe strategies to achieve outcomes: “These strategies include program, policy, management, *regulatory*, and legislative initiatives and approaches[.]”<sup>200</sup>

Like GPRA, PART is intended to inform policy and budget decisions as well as agencies’ internal management decisions. OMB’s discussion of PART notes that the detailed PART findings should influence budget recommendations.<sup>201</sup> Several studies find that programs with higher PART scores tend to receive larger budget increases.<sup>202</sup> The president tends to recommend funding increases for programs rated effective and moderately effective, and funding decreases for programs rated ineffective or results not demonstrated.<sup>203</sup> Congress shows the same tendency, though not to the same extent as the president.<sup>204</sup> The majority of programs recommended for termination in the president’s fiscal 2008 budget were rated ineffective or results not demonstrated.<sup>205</sup> Thus PART, like GPRA, is more than just a reporting exercise; real consequences result from PART evaluations.

Finally, as we have seen, while Executive Order 12,866 does provide for retrospective review of rules to determine whether they have been effective, it mainly focuses on prospective analysis of significant regulations. As a result, GPRA complements 12,866 nicely because it includes ex post performance analysis and reporting. Circular A-11 requires agencies to submit performance reports that report performance measures for the past fiscal year, including baseline and trend data for the measures, and discussing reasons for successes and shortfalls.<sup>206</sup> The annual performance report must also include program evaluations.<sup>207</sup> A program assessment is defined as “A determination, through objective measurement and systematic analysis, of the manner and extent to which Federal programs achieve intended objectives.”<sup>208</sup> Circular A-11 specifies, “Most relevant are rigorous evaluations that make positive or negative conclusions about the impact attributable to the program.”<sup>209</sup>

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<sup>199</sup> *Id.* at § 51.8, 200.1.

<sup>200</sup> *Id.* at § 56-1.

<sup>201</sup> See Office of Management and Budget, ExpectMore.gov: Frequently Asked Questions, <http://www.whitehouse.gov/omb/expectmore/faq.html> (last visited Mar. 27, 2007) (see question 19).

<sup>202</sup> See Eileen Norcross and Joseph Adamson, *An Analysis of the Office of Management and Budget’s Program Assessment Rating Tool (PART) for Fiscal Year 2008* 26 (Mercatus Center at George Mason University Working Paper 2007), available at [http://www.mercatus.org/repository/docLib/20070725\\_Analysis\\_of\\_PART\\_for\\_FY\\_2008.pdf](http://www.mercatus.org/repository/docLib/20070725_Analysis_of_PART_for_FY_2008.pdf).

<sup>203</sup> *Id.* at 25.

<sup>204</sup> *Id.* at 27.

<sup>205</sup> *Id.* at 29.

<sup>206</sup> Circular A-11 § 230.2.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at § 200.3.

<sup>209</sup> *Id.* at § 230.2 (i).

To the extent agencies enact regulations to achieve program outcomes, they must measure their performance and report results to comply with GPRA. If a regulatory agency produces poor regulatory analysis, or no regulatory analysis, its budget may suffer because it cannot demonstrate that it is achieving intended outcomes. Thus, the budget process provides an enforcement mechanism OMB can use to encourage even the independent agencies to conduct high-quality regulatory analysis.

## B. HOW REGULATORY ANALYSIS STRENGTHENS GPRA

GPRA is strengthened less by mandates requiring regulatory analysis, such as Executive Order 12,866, than it strengthens those mandates. However, there is nevertheless a positive effect.

One of the shortcomings of GPRA's implementation of the performance management concept is that while GPRA requires agencies to publish "strategic plans" and "performance plans," it does not require agencies to engage in the type of genuine strategic planning described in Section I.A. That is, there is no requirement that agencies consider alternative means to achieve their stated ends, nor that they develop a logic model, combined with evidence, that explains how the course of action they choose will result in their intended outcomes. These may be best practices in performance management, but GPRA does not explicitly require them. To the extent regulation is an agency's tool, regulatory analysis mandates shore up this weakness in GPRA by requiring agencies to demonstrate how they have evaluated their options.

For example, just as OMB's Circular A-11 guides agencies on how to comply with GPRA, its Circular A-4 explains how to comply with Executive Order 12,866. Unlike GPRA or Circular A-11, A-4 is explicit on the type of planning and analysis that is expected of agencies:

A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.

To evaluate properly the benefits and costs of regulations and their alternatives, you will need to do the following:

- Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks. A similar analysis should be done for each of the alternatives.
- Identify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a "no action" baseline: what the world will be like if the proposed rule is

not adopted. Comparisons to a “next best” alternative are also especially useful.

- Identify the expected undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives. These should be added to the direct benefits and costs as appropriate.<sup>210</sup>

This type of prospective analysis also complements GPRA performance reporting, which is focused on retrospective measurement of results achieved.

#### IV. RECOMMENDATIONS

Performance management and regulatory analysis are highly complementary undertakings, both in theory and in practice. Executive Order 12,866 and OMB Circular A-11 are the primary tools an administration possesses to shape agencies’ performance management and regulatory analysis. These documents incorporate many key principles of performance management and regulatory analysis that are well-grounded in scholarly literature. Yet no administration has fully exploited the potential synergies.

The following revisions to these documents would ensure that federal regulatory analysis more fully reflects best practices in performance management, and that federal performance management more fully reflects best practices in regulatory analysis.

##### A. REVISIONS TO EXECUTIVE ORDER 12,866

#### **1. Incorporate GPRA-style performance measurement into proposed regulations**

Intuition and evidence both suggest that much of the value of strategic planning and performance measurement stems from what managers learn from going through the process, rather than the value of the plan or report after it is written. As Dwight Eisenhower remarked, “Plans are useless, but planning is indispensable.”<sup>211</sup> Agency efforts have greater focus, direction, and effectiveness when a tangible outcome is defined, measures are identified, and goals are set.<sup>212</sup> There is no reason regulators would not benefit from such an improved focus when writing regulations.

Therefore, Executive Order 12,866 should explicitly require agencies to:

- identify the specific outcomes of value to the public that the regulation is supposed to produce;

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<sup>210</sup> Circular A-4 at 2-3.

<sup>211</sup> BrainyQuote, Dwight D. Eisenhower Quotes, [http://www.brainyquote.com/quotes/authors/d/dwight\\_d\\_eisenhower.html](http://www.brainyquote.com/quotes/authors/d/dwight_d_eisenhower.html) (last visited Mar. 27, 2007).

<sup>212</sup> See discussion of the relationship between strategic planning and agency effectiveness in Part I.A, *supra*.

- explain how these outcomes are related to one or more strategic goals in the agency’s GPRA-mandated strategic plan;
- identify what indicators the agency will use to measure progress toward these outcomes;
- estimate ex ante marginal benefits of proposed and final rules that measure, in terms of outcomes, how much of a goal the regulation is expected to achieve;
- determine what kinds of retrospective program evaluations will be necessary to identify how the regulation has affected outcomes; and
- track and report the annual progress (through one or multiple regulations) toward achieving a given goal and the social costs expended toward achieving that goal.

The proposed outcomes, goals, and measures should be included in any Notice of Proposed Rulemaking so that the public has an opportunity to comment on them.

There is precedent for regulatory agencies seeking comment on goals and performance measures for individual regulations. In 2005, the Federal Communications Commission sought public comment on goals and performance measures for telecommunications “universal service” programs.<sup>213</sup> These programs, created via regulatory proceedings at the FCC, impose charges on interstate telecommunications services in order to subsidize rural telephone companies, telephone service for low-income households, Internet service for schools and libraries, and telecommunications services for rural health care facilities.<sup>214</sup> It is perhaps unfortunate that the FCC did not seek comment on performance measures until 11 years after GPRA and nine years after passage of the legislation directing the FCC to create the programs, but the FCC’s action demonstrates that it is entirely feasible for a regulatory agency to do so.

Our suggested change to EO 12866 is much more specific and detailed than the executive order’s current requirements. The executive order does require agencies to assess the anticipated benefits of the significant regulations they propose.<sup>215</sup> But the benefits need not be quantified,<sup>216</sup> and in practice agencies often define them so broadly that outcomes are not well-identified.<sup>217</sup> Nor does the executive order require regulators to link the

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<sup>213</sup> Federal Communications Commission, *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, WC Docket No. 05-195 et. al. (adopted June 9, 2005) at ¶ 24. **See also the CPSC annual planning exercise which involves the entire staff and the public?**

<sup>214</sup> *Id.* at ¶ 3.

<sup>215</sup> E.O. 12,866 § 6(a)(3)(B)(ii).

<sup>216</sup> *Id.* at § 1.

regulation's outcomes to the agency's strategic goals, identify indicators to measure progress after the regulation is implemented, or set goals for the indicators. In short, there is no real commitment to accountability for results at the time regulations are issued.

A major benefit of our proposal is that it would compel agencies to do the homework necessary to produce truly informative annual performance reports. GPRRA requires annual tracking of outcome indicators in relation to goals.<sup>218</sup> Regulatory agencies, by definition, accomplish at least some of their strategic goals through regulation; an agency that is nothing but a regulatory agency accomplishes all of its strategic goals through regulation.<sup>219</sup> Regulatory agencies should be able to "roll up" outcomes from regulations or groups of regulations into measures of accomplishment of their strategic goals. Alternatively, the principal outcome measures for the regulations that contribute most significantly to achievement of a strategic goal might also be used as outcome measures for the strategic goal.

One potential criticism of this proposed change is that it might be taken to imply that the only benefits that count for regulatory analysis are those that can be quantified. We intend no such thing. The best outcome indicators are those that directly measure ultimate outcomes, but such indicators are not always feasible.<sup>220</sup> Sometimes the best indicators available measure only intermediate outcomes. Indicators that measure activity might sometimes be acceptable if rigorous research has documented how changes in the activity actually cause changes in the outcome of interest. Thus, a requirement that regulatory agencies must identify observable indicators for performance evaluation is not the same as a requirement that they must quantify all benefits or ignore non-quantifiable benefits when deciding whether or how to regulate.

## **2. Require independent annual retrospective cost and benefit estimates**

Section 5 of Executive Order 12,866 requires agencies to periodically review significant regulations to determine whether they should be modified or eliminated.<sup>221</sup> An expansive interpretation of this section would take it to mean agencies should evaluate the costs and benefits of regulations after they have been adopted, regulated entities have complied, and secondary effects have worked their way through the economy. Apparently few agencies have interpreted the language this way, as evidenced by OMB's annual report on the costs and benefits of federal regulations, which relies largely upon estimates that

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<sup>217</sup> See, e.g., Jamie Belcore and Jerry Ellig, Mercatus Center at George Mason University, *Homeland Security and Regulatory Analysis: Are We Safe Yet?*, unpublished manuscript on file with authors, tbl. 4 (finding that the Department of Homeland Security defines specific outcomes for no more than five of the 13 major regulations it issued between its inception in 2003 and the end of 2007).

<sup>218</sup> 31 U.S.C. § 1116(b)(1).

<sup>219</sup> If they did not accomplish their strategic goals through regulation, they would not be called regulatory agencies.

<sup>220</sup> See Part I.A.3, *supra*, and references cited therein.

<sup>221</sup> E.O. 12,866 § 5.

agencies produce in their Regulatory Impact Analyses prior to adoption of the regulations.<sup>222</sup>

To remedy this problem, Section 5 of the executive order should be amended to require agencies to arrange for and publicly release independent annual assessments of the ex post costs and benefits of existing regulations. Such analysis need not be conducted on a regulation-by-regulation basis. It is often possible to group many closely related regulations that aim at the same outcomes and generate the same kinds of costs; indeed, in many cases it may be difficult to identify separate effects of closely related regulations that are already on the books.<sup>223</sup>

An “independent” analysis would be one that satisfies the criteria for independence outlines in OMB’s PART guidance:

To be independent, non-biased parties with no conflict of interest should conduct the evaluation. Evaluations conducted by the program itself should generally not be considered “independent;” however, if the agency or program has contracted out the evaluation to a third party this may qualify as being sufficiently independent. Evaluations conducted by an agency’s Inspector General or program-evaluation office would be considered independent.<sup>224</sup>

An annual reporting requirement does not imply that agencies must conduct a de novo study of costs and benefits of every regulation every year. If a thorough study occurs in one year and the agency is reasonably confident that underlying conditions have not changed in ways that would significantly alter costs or benefits, then the results of that study should be useful for multiple years. In other cases, certain quantitative relationships used to estimate the effects of the regulations (such as consumer price elasticities of demand) may be relatively stable from year to year, and the agency could update the previous year’s study simply by inserting more recent data.

Requiring ex post assessment of costs and benefits of regulations annually would have several benefits. First, the information generated would serve as an input into OMB’s annual study of the costs and benefits of regulation, thus permitting OMB to finally produce an annual report consistent with the intent of Congress.<sup>225</sup> Second, periodic retrospective estimates would help agencies assess, and hopefully improve, the accuracy of the prospective estimates they make when considering new regulations.<sup>226</sup> This could

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<sup>222</sup> See notes 146-147 and accompanying text.

<sup>223</sup> See, e.g., Ellig, *supra* note 53.

<sup>224</sup> Office of Management and Budget, PROGRAM ASSESSMENT RATING TOOL GUIDANCE NO. 2008-01 (JAN. 29, 2008) at 31-32, available at [http://www.whitehouse.gov/omb/part/fy2008/part\\_guid\\_2008.pdf](http://www.whitehouse.gov/omb/part/fy2008/part_guid_2008.pdf).

<sup>225</sup> Regulatory Right-to-Know Act, Pub. L. No. 106-554 § 624, 31 U.S.C. § 1105 note.

<sup>226</sup> For classic examples of studies comparing *ex ante* and *ex post* estimates of the effects of regulation and deregulation, see Clifford Winston, *Economic Deregulation: Day of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263 (1993); Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, J. ECON.

occur either because agencies learn specific things that help them better understand how to evaluate similar regulations, or simply because the experience of overseeing *ex post* evaluations hones the staff's analytical abilities. Third, the requirement would create incentives for regulatory agencies to better integrate regulatory analysis with their strategic planning and performance measurement since they may be able to save a substantial amount of time and effort by devising performance measures for regulations that would track actual cost and benefit outcomes.

## B. REVISIONS TO OMB CIRCULAR A-11

GPRA requires agencies to produce strategic plans, annual performance plans, and annual performance reports. It does not explicitly require agencies to do sound strategic planning or use the plans and reports to guide action. Yet GPRA's statement of purpose,<sup>227</sup> as well as the Senate Government Affairs Committee's report on GPRA,<sup>228</sup> indicate that the spirit of the law goes beyond reporting to include action. Congress required agencies to do strategic planning and performance reporting with the expectation that planning and reporting would lead to better management, different budgeting decisions, and improved performance. Similarly, by developing PART—a GPRA-style analysis of programs with budgets—OMB has indicated that planning and reporting are not goals in themselves, but rather guides to action. Several amendments to Circular A-11 would help ensure that strategic planning and performance reporting live up not only to the letter of GPRA, but to the spirit as well, by incorporating time-tested principles of performance management and regulatory analysis.

### 1. Require analysis of alternatives in strategic planning and performance reporting

GPRA says that agencies must produce strategic plans; it does not explicitly say that agencies must consider alternative ways of achieving desired outcomes. Yet our discussion of both strategic planning and regulatory analysis clearly indicates that consideration of alternatives is a critical element of sound decision-making. “Steer, Don’t Row” was one of the fundamental credos of the reinventing government movement that spawned GPRA.<sup>229</sup>

OMB could promote consideration of alternatives through two changes to Part 6 of Circular A-11. First, the circular should instruct agencies to include in their strategic plans a discussion of the benefits and costs of alternative ways of accomplishing their goals—much like Executive Order 12,866 requires agencies to consider a wide range of alternative regulations and alternatives to regulation. In several places, the Executive Order urges consideration of a wide scope of alternatives, including modification or

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PERSPECTIVES 12:3 (1998), at 89-110; Jerry Ellig, *Railroad Deregulation and Consumer Welfare*, J. REG. ECON. 21:2 (2002), at 143-67.

<sup>227</sup> GPRA § 2(b)(4).

<sup>228</sup> S. REP. NO. 103-58, at 328-329 & 336 (1993).

<sup>229</sup> Osborne & Gaebler, *supra* note 9, at 25-44

repeal of existing regulations,<sup>230</sup> economic incentives,<sup>231</sup> information disclosure,<sup>232</sup> performance standards,<sup>233</sup> and “nonregulatory actions.”<sup>234</sup> Second, the circular should instruct agencies to include in their annual performance reports a discussion of alternative approaches to remedy performance shortfalls (failures to meet goals). Agencies should identify other federal programs that might accomplish the same outcomes more effectively—a task rendered much easier by the existence of PART evaluations—but they should also be required to consider non-federal and non-governmental means of accomplishing the outcomes they failed to achieve.

For regulatory agencies, these changes would effectively clarify the executive order’s requirements for consideration of a broad range of alternatives. More importantly, the mandate to evaluate alternatives would be extended to a different level. It would force regulatory agencies to consider alternatives at the broad, strategic level as well as for individual regulations. Because Circular A-11 applies to independent as well as executive agencies, our proposed changes would also encourage independent agencies to consider a wide range of alternatives—something they do not currently have to do unless required by specific legislative mandates.

We recognize that the Constitutional question of whether an administration could apply E.O. 12,866 to independent agencies is a controversial one,<sup>235</sup> and we do not intend to join that controversy here. We suspect, however, that a good deal of the controversy over the applicability of the executive order to independent agencies arises because of OIRA’s ability to review and return regulations under the executive order.<sup>236</sup> By instructing agencies in Circular A-11 to consider alternatives when developing and revising strategies and plans, the president would not be asserting any authority to review, return, or delay any particular regulations issued by independent agencies.

## **2. Require assessment of costs and benefits of regulation in performance reports**

Since regulatory agencies accomplish their goals through regulation, they should be expected to understand and report on the results produced by their regulations. A GPRA performance report is the appropriate place for agencies to report on the benefits and costs that resulted from all the regulations that substantially advance their strategic goals. Circular A-11 should require agencies to enumerate in their performance reports the primary regulations or groups of regulations that contribute to the accomplishment of each strategic goal, along with an assessment of outcomes and costs.

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<sup>230</sup> E.O. 12,866 § 1(b)(2).

<sup>231</sup> E.O. 12,866 § 1(b)(3).

<sup>232</sup> *Id.*

<sup>233</sup> E.O. 12,866 § 1(b)(8).

<sup>234</sup> E.O. 12,866 § 6(a)(3)(c)(iii).

<sup>235</sup> *See* note 116.

<sup>236</sup> E.O. 12,866 § 6(b)(2)(C)(3).



If a regulatory agency truly understands how its major regulations or groups of regulations accomplish its goals, this should not be hard to do. If its strategic goals and measures are outcome-oriented, then these outcomes should be related to (if not identical to) the outcomes its principal regulations are supposed to accomplish. Executive branch agencies should find this requirement easy to comply with if they are also complying with our related proposed change in EO 12,866, requiring agencies to report annually on the costs and benefits of their regulations. For independent agencies, this change to Circular A-11 might provide the primary motivation to conduct retrospective analysis.

### **3. Require regulatory agencies to report on opportunity costs**

GPRA authorized experiments in performance-based budgeting.<sup>237</sup> OMB advanced the concept further in Circular A-11 by directing agencies to prepare performance-based budgets in order to satisfy GPRA's requirement for annual performance plans.<sup>238</sup> For fiscal 2007, OMB authorized a "pilot" performance reporting format that permitted agencies to publish their performance information along with their congressional budget justifications.<sup>239</sup> This too might be interpreted as a step toward integration of performance and cost information.

For many types of federal programs, comparing outcomes with the cost to the federal treasury should provide a reasonable means of assessing benefits and costs. But regulation is different. Regulatory agencies accomplish outcomes not by spending federal tax dollars, but by directing citizens to do specific things with their own resources. Therefore, Circular A-11 should explicitly direct agencies to report on the opportunity cost to society of regulations related to their strategic goals, not just their expenditures to promulgate and enforce regulations.

Currently, agencies report performance information in either their annual performance report or in the performance section of their combined performance and accountability reports. They report budgetary cost information in their annual financial report or in the financial section of their combined performance and accountability reports. Identifying the social costs of regulation requires many of the same methods, and is fraught with the same uncertainties, as assessing the outcomes of regulation. Therefore, it is probably more logical to require agencies to report the social cost information with their performance data rather than their financial data.

#### CONCLUSION

Effective performance management of regulatory agencies requires regulatory analysis. Conversely, regulatory analysis is nothing more than sound strategic planning and

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<sup>237</sup> 31 U.S.C. § 1119.

<sup>238</sup> Circular A-11 § 220.

<sup>239</sup> OFFICE OF MANAGEMENT AND BUDGET, *Circular No. A-136: Financial Reporting Requirements* (Aug. 23, 2005), at §III.1, available at [http://www.whitehouse.gov/omb/circulars/a136/a136\\_revised\\_2007.pdf](http://www.whitehouse.gov/omb/circulars/a136/a136_revised_2007.pdf).

performance management applied to regulation. Given this relationship, it is perhaps surprising that few scholars have explored the potential for synergies.

Performance management finds its legislative home in the Government Performance and Results Act of 1993, while the main regulatory analysis mandate can be found in Executive Order 12,866. Neither standing alone brings to bear all of the benefits of their foundational concepts, but each can each be used to supplement the other.

We offer several suggestions to accomplish this goal. Executive Order 12,866 should be amended to require agencies to (1) articulate outcome-oriented goals and measures when they propose new regulations, and (2) produce annual estimates of the ex post benefits and costs of all regulations. OMB Circular A-11 should be amended to require agencies to (1) analyze meaningful alternatives in their strategic plans and performance reports, (2) identify benefits and costs of regulations that advance their strategic goals, and (3) report on social opportunity costs of regulation instead of just the budgetary cost of promulgation and enforcement.

Implementing our recommendations could require substantial time and resources. However, the effects of regulation on U.S. citizens are also substantial. OMB's most recent estimate, admittedly based on ex ante calculations, suggests that the benefits of significant regulations issued during the past ten years total \$99-484 billion, and the costs total \$40-46 billion.<sup>240</sup> An independent, "top-down" estimate pegged the total cost of existing U.S. regulations at more than \$1 trillion annually.<sup>241</sup> Ex post estimates of the cost of regulation for specific sectors of the economy are also substantial; for example, one of the authors estimated that the total cost to consumers and industry of the ten costliest FCC regulations tops \$41 billion annually.<sup>242</sup> If better regulatory analysis and strategic management could improve the effectiveness or reduce the cost of regulation by only a few percentage points, the marginal benefits of the analysis would surely exceed the marginal costs.

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<sup>240</sup> Office of Management and Budget, *supra* note 92, at 2.

<sup>241</sup> Crain, *supra* note 47, at v.

<sup>242</sup> Ellig, *supra* note 53, at tbl. 1.