March 8, 2023

Richard Revesz
Administrator
White House Office of Information and Regulatory Affairs
1600 Pennsylvania Ave NW
Washington, DC 20500

Dear Administrator Revesz,

I'm a Senior Policy Analyst at the Center for Progressive Reform. The Center is a nonprofit research and advocacy organization that conducts independent scholarly research and policy analysis, and advocates for effective, collective solutions to our most pressing societal challenges. Guided by a national network of scholars and professional staff with expertise in governance and regulation, we convene policymakers and advocates to shape legislative and agency policy at the state and federal levels and advance the broad interests of today's social movements for the environment, democracy, and racial justice and equity.

I have been studying the federal regulatory system for nearly 15 years, with a particular focus on making the process of rulemaking and implementation more inclusive of and responsive to the public. Accordingly, I applaud the White House Office of Information and Regulatory Affairs (OIRA) for taking on the crucial issue of "broadening public engagement in the Federal regulatory process." My colleagues and I at the Center have long called on OIRA to leverage its unique expertise and institutional position within the executive branch to explore this issue.

Along with other members of the public interest community, I have been pleased to participate in the earlier stages of this initiative, including the Open Engagement Session that OIRA conducted on November 17, 2022, and the opportunity to submit written comments, which concluded on December 2, 2022. With this letter, I would now like to take the opportunity to respond to the

recommendations on broadening public engagement and the questions that were included in the February 7 notice (hereinafter "the notice").[1] But first, I would like to begin by highlighting some general issues that are fundamental to the objective of promoting greater public engagement in the regulatory system.

Articulating a Positive Vision of the Federal Regulatory System

The first important step to promoting public engagement in the federal regulatory system is to embrace a positive vision of the federal regulatory system. After all, the public will have very little incentive to participate if the president himself does not explicitly recognize and assert that the regulatory system is a valuable part of U.S. democracy. For several decades now, public officials have proven reluctant to champion the regulatory system. So, it should be no surprise that many Americans now take a dim view of this crucial institution, and thus are unlikely to take full advantage of the public participation opportunities the regulatory system makes available to them. The Biden administration can and must use its platform to reverse this dynamic.

I was pleased to see some acknowledgement of the value of the regulatory system in the notice. For instance, it begins by stating "Federal regulations make a difference in people's lives every day—from improving access to safe, effective, and affordable hearing aids to ensuring people are safe at work." Even more importantly, one of the recommendations calls on agencies to "develop accessible material… describing why regulations matter."

The Biden administration can and must do more to articulate and promote a positive vision of the regulatory system – one that will effectively counter the negative narrative that has long dominated policy and political discourse around regulatory reform. Such a vision should comprise the following elements:

- The regulatory system is a crucial part of our constitutional democracy.
- A strong regulatory system provides the foundation for a healthy and inclusive economy.
- The policies the regulatory system delivers make all our lives better, whether it's ensuring the safety of water that comes from our kitchen faucets or holding banks accountable when they cheat their customers.
- A strong regulatory system makes us freer as individuals. We do not have to worry about whether the food on store shelves is safe to feed to our children.

[1] Off. Info. & Reg. Affairs, Off. Mgmt & Budget, Exec. Off. President, *Broadening Public Engagement in the Federal Regulatory Process*, https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/ (last visited Mar. 6, 2023).

When we're not burdened with illness by air pollution, we are better able to participate in the economy and pursue our full potential as individuals.

- The public servants who work at regulatory agencies are a critical part of our society. Driven by public spiritedness, they bring their professional expertise to the implementation of the law.

In future publications regarding the regulatory system, the administration should consciously consider whether and how that publication can be used to advance these messages.

The Value of Public Participation in the Federal Regulatory System

As the administration works to educate the public about the value of the regulatory system more broadly, it should be especially attentive to explaining why public participation in the regulatory system. At the same time, championing the various benefits of public participation will further encourage members of the public to take fuller advantage of the regulatory system's participatory opportunities.

Again, I was happy to see the notice give some attention to this issue. For instance, the opening acknowledges "the process of crafting Federal regulations provides opportunities for public comment." Later, the notice helpfully states, "The regulatory process works best when the government hears directly from members of the public, including members of underserved communities."

Still, I would encourage the Biden administration to do more to educate the public about why their participation in the regulatory system is important. First, the administration should seek to make the case that the regulatory system offers one of the most important forums for public engagement in our democracy. Indeed, the administration could explain how regulation offers the public a unique opportunity to shape the actual details of policies that affect them. This stands in stark contrast to voting for elected officials or on referenda where the public often is presented with just a binary choice. Moreover, the regulatory system offers the public a chance to remain engaged in our democracy on an ongoing basis *between elections*.

Second, much as the notice does, the Biden administration could explain how public participation contributes to better policy decisions. To be sure, good regulatory decision-making depends on specialized and technical expertise, especially that provided by agency staff. But it also requires the kind of unique situated knowledge that only affected members of the public can offer. As John Dewey aptly pointed out, "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert

shoemaker is the best judge of how the trouble is to be remedied."[2] It is thus essential that federal agencies take the necessary steps to obtain this kind of feedback so that it could be incorporated into their decision-making alongside the input provided by their expert staff.

Conversely, systematic disparities in regulatory engagement can lead to worse regulatory decisions. Such disparities can produce this result by leaving agency decision-makers with a skewed perception of the problem they are looking to address through regulation. Thus, the overall effectiveness of the regulatory system will be significantly improved if the public is leveraged as a countervailing power against the corporate entities that are the subject of regulations.

Third, the Biden administration should explain how the regulatory system provides an important mechanism for empowering members of the public, particularly those from structurally marginalized communities. Significantly, this message would complement the administration's broader efforts to advance social justice and equity. The regulatory system has the potential to be one of society's great equalizing forces, enabling all Americans to serve as a check on politically or economically powerful individuals and corporate entities. Similarly, when working well, it ensures that the public have some measure of control over our shared destiny as a nation.

Again, the Biden administration should utilize its platform to convey these messages about the value of the regulatory system to the public. Further, in its internal communications with agencies, the administration should champion the value public participation in these kinds of terms as a means for building an organizational culture within those agencies that genuinely embraces public engagement and the value it can bring to achieving their respective statutory missions.

Fulfilling the Democratic Potential of the Federal Regulatory System

Unfortunately, the many benefits of public participation in the regulatory system are not yet fully achieved in reality. As the notice observes, the full democratic potential of the regulatory system is not being realized because the public continues to face many barriers that prevent them from meaningfully engaging in the rulemaking process.

As it looks to promote public engagement, the Biden administration is correct to begin by identifying and cataloguing the many kinds of barriers that prevent meaningful participation. The notice generally identifies two broad categories of barriers. In turn, many of its recommendations for promoting public engagement are geared toward addressing those types of barriers.

[2] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 224 (Edited by Melvin L. Rogers, 2016).

The first category of barriers is what I would describe as a failure by agencies to "meet the public where it is at." In general, this occurs when agencies treat members of the public as if they were "professional" advocates or lobbyists, and thus do not make necessary accommodations that permit their meaningful participation. Common mistakes of this kind involve scheduling hearings during standard work hours, which are inconvenient for many people, and especially members of marginalized communities; hosting hearings at sites that are inaccessible to mass transit, or failing to offer a "remote" option for participation in hearings; neglecting outreach to communities, particularly rural ones, which lack reliable high speed internet; and failing to provide translation services for people who don't speak English as a first language.

The second category of barriers addressed in the notice arises from the inherently technocratic nature of many regulations. The regulatory system reflects a strong commitment to expertise-driven policymaking, with congressional mandates calling for technology-based solutions to our pressing social problems carried out by a diverse array of agency professionals. To be sure, this is not a bad thing in and of itself. The problem arises when agencies become so myopically focused on these technocratic issues that members of the public, and their situated knowledge, end up being shut out of the process. As noted above, such situated knowledge is critical in all regulatory decisions, and agencies must still make concerted and deliberate efforts to obtain it.

But there are at least two other types of barriers to public participation the Biden administration should consider as it seeks to promote public engagement in the regulatory system.[3] The first is the fact that effective public participation is exceedingly resource intensive. This related to the barrier of "failing to meet the public where it's at," but is conceptually distinct enough that it is worth considering separately. Paradoxically, this problem arises from having so many opportunities to participate. The public can thus become overwhelmed and is prevented from competing with better-resourced corporate entities in all of the available participatory forums. The lesson to be drawn is that ensuring meaningful participation requires focusing on the *quality* of a few participatory opportunities, rather than the *quantity* of opportunities offered.

The second type of barrier to public participation that the notice does not account for is that which arises from corporate dominance of the regulatory system. This barrier is important to consider because even when members of the public are able to overcome the other barriers and secure their spot at the decision-making table, their voice is often drowned out by those of the powerful corporate interests sitting next to them. Thanks to their vast resource advantages, corporate entities don't merely outnumber other

[3] For more on this framework of four types of barriers to public participation in the regulatory system, see ALEXANDRA KLASS ET AL. THE FEDERAL ENERGY REGULATORY COMMISSION'S NEW OFFICE OF PUBLIC PARTICIPATION: A PROMISING EXPERIMENT IN 'ENERGY DEMOCRACY' 20-22 (Ctr. Progressive Reform 2022), *available at* https://progressivereform.org/publications/ferc-public-participation-rpt/.

participants at virtually every step of a regulatory proceeding; they are also much more aggressive and often overwhelm agencies with document submissions.

The upshot is that to effectively address this type of barrier, it will not be enough to simply promote public engagement. Rather, to a certain extent, it will be necessary to prevent industry from abusing the process in ways that block meaningful participation by members of the public. To be sure, existing law likely places significant limits on the available options for addressing this burden through administrative measures. Nevertheless, it is worth acknowledging this type of burden for the purposes of this notice, given it will significantly limit the effectiveness of any reforms that emerge from its implementation.

Nearly All of the Recommendations in the Notice Would Strengthen Public Engagement in the Federal Regulatory System

With one notable exception, discussed below, I agree that the recommendations outlined in the notice would help promote public engagement in the regulatory system and thus are worth pursuing.

Below, I consider each of the recommendations I support, while offering some thoughts on why they would be beneficial.

Develop accessible material explaining key steps in the regulatory process, describing why regulations matter, and helping members of the public understand how to write comments.

> Reaction: The better the public understands the regulatory system and why it matters, the better they will be able to participate. Yet, it is not necessary to make every member of the public into an administrative law expert. Agencies will need to be deliberate and strategic in how they pursue this recommendation to ensure they are providing roughly the "right amount" of information about the mechanics of the regulatory system.

Proactively disseminate relevant materials, especially through partnerships with community-based organizations.

> Reaction: Historically, agencies have operated as passive receptacles for public input. To obtain meaningful input from most members of the public, especially those from structurally marginalized communities, this approach is insufficient. Instead, agencies must commit to conducting affirmative outreach to communities and individuals with a significant stake in the rulemaking. Importantly, though, such outreach must be strategic. For instance, agencies will likely have more success if they work through trusted intermediaries, especially "local community leaders."

Demonstrate how public comments make a difference in rulemaking by providing prominent examples.

> Reaction: The public is more likely to participate if they sincerely believe that their participation will make a difference. It is therefore crucial for agencies to show them that it does. Agencies should build on this recommendation by making it a regular practice to communicate with members of the public about how their input affected each regulatory decision they make.

Use plain language.

> Reaction: The increasingly technocratic nature of regulatory decision-making makes it imperative that agencies make the key issues of a particular rulemaking as accessible as possible to a general audience. A commitment to the use of plain language is an important part of that strategy.

Adapt material to mobile-friendly formats.

> Reaction: For many Americans, mobile phones are the only "computer" they have reliable access to. Consequently, making rulemaking materials available in usable formats for mobile phones will be an important step for agencies to take to ensure the rulemaking process is as broadly inclusive as possible.

Produce material in easily accessible formats, like infographics, videos, and short summaries.

> Reaction: As a strategy for communicating complex or technical information related to rulemaking to the public, this recommendation might be even more important than increased use of plain language. Many Americans are not comfortable learning through written materials. The use of alternative formats would thus be especially valuable for these individuals.

Use standardized language to describe key processes across agencies.

> Reaction: It is not clear how big a barrier non-standardized language has been for public participation. Nevertheless, this seems like a good idea in any event and one that could be implemented relatively cheaply.

Highlight key questions and issues on which agencies seek the public's views.

> Reaction: Implementing this reform would likely promote participation by reducing the effort required to engage meaningfully. To be effective, agencies should incorporate this strategy into all their communications with the public – especially affirmative outreach – not just things like *Federal Register* notices.

Consider opportunities for members of the public to provide input in multiple formats, for instance through recorded video or audio submissions in addition to written submissions.

> Reaction: As noted above, writing is not the preferred form of communication for many Americans. As such, permitting audio and video recordings is a great way to meet these individuals where they are at. The popularity of audio and video recording on social media indicates that many of the public are familiar with these formats and quite adept at expressing their views through them.[4]

Encourage agencies to engage with relevant stakeholders to develop ways to facilitate public participation in the regulatory process.

> Reaction: Nobody knows how to engage the public in the regulatory system better than the public. So, it makes sense to work with the public in designing reforms for improving public engagement.

Use the Regulatory Agenda… as a tool for encouraging public participation, including by asking agencies to conduct engagement when developing their submissions as feasible and to identify affected communities so that the agencies can then reach out to those communities for input.

> Reaction: This recommendation appears to embrace the idea that agencies should seek to engage with the public when developing their regulatory priorities. If so, then this recommendation should be a top priority because priority-setting is among the best opportunities for public engagement in the rulemaking process. It is the point at which the public's unique situated knowledge is of greatest value to agency decision-makers. Engaging with the public on priority-setting need not be limited to development of the Regulatory Agenda, though. This strategy for public engagement is important enough that agencies should explore other mechanisms for accomplishing this goal as well.

Conduct outreach to key communities and stakeholders when agencies are still formulating regulatory priorities, and communicate clearly and plainly to the public as appropriate about how agencies are thinking about policy problems, needs, and alternatives.

> Reaction: As noted above, the best time for the public to participate is as early in the process as possible. As the beneficiaries of regulations, the public is best able to identify the problems that agencies should focus on addressing as well as to shape the general contours of what a good solution should look like. In

[4] For more on how art can provide a means for engaging the public in the regulatory process, see James Goodwin, *Can Hip Hop Save Rulemaking?*, THE REGULATORY REVIEW, Aug. 5, 2019 https://www.theregreview.org/2019/08/05/goodwin-can-hip-hop-save-rulemaking/ (last visited Mar. 7, 2023).

contrast, the later stages of rulemaking are often when more complex questions of law, science, and technology must be resolved. The technocratic barriers that emerge at these later stages can be insurmountable for many members of the public. In this way, early engagement would enable meaningful public participation without unduly sacrificing important technocratic considerations of regulatory decision-making. Ensuring that agencies engage the public at these earlier stages in the rulemaking process should be a top priority for the Biden administration.

Consider using a variety of meeting and engagement formats, including online and in-person sessions, while ensuring that agencies take into account the barriers that members of some communities may face to participation (these might be related to work hours, disability, access to transportation and Internet access, language access, or knowledge of or trust in government agencies).

Reaction: By undertaking this reform, agencies would be in a better position to "meet the public where it's at." Such affirmative steps to reduce unnecessary barriers would go a long way toward increasing public participation. As suggested above, effectively implementing this reform would benefit greatly from engaging with the public and learning from them about the barriers they face. Agencies should consider going beyond these ideas and identify other opportunities to reduce impediments to meaningful public participation. For instance, consistent with statutory authorities, agencies investigate the possibility of providing basic childcare services at public hearings, which might better enable working parents to participate.

Encourage agency review of public engagement in the rulemaking process… and conduct outreach where it might be needed based on the review.

Reaction: It is critical that agencies take responsibility for ensuring that they have heard from all relevant stakeholders during the rulemaking process. Without a conscious effort to do so, members of structurally marginalized communities are too easily overlooked. To implement this recommendation effectively, agencies could consider developing in advance a "public engagement plan" that is tailored to the unique circumstances of the rule, and periodically evaluate compliance with the plan throughout the rulemaking process ensure that it has been followed. Moreover, agencies would likely find it beneficial to engage the public in the creation of these plans.

Encourage agencies to study the effectiveness of their community engagement strategies and change what might not be working.

Reaction: As this recommendation recognizes, ensuring effective public participation is not an exact science. Agencies will likely have to engage in some

trial and error as they work to make improvements. To get the most out of this iterative process of improvement, agencies will have to engage in a continuous process of review and learning. As with other aspects of promoting public engagement, agencies would likely find it beneficial to engage the public in this review and learning process.

The Administration Should Not Work with Trade Associations as a Mechanism for Reaching Out to Small Businesses

The notice only contains one recommendation that I disagree with. Under this recommendation, agencies would "Proactively disseminate relevant materials, especially through… industry intermediaries (such as trade associations)."

Several decades of experience with the Small Business Administration's (SBA) Office of Advocacy has made clear that trade associations are not a reliable intermediary for reaching small businesses.[5] That is because trade associations often work to advance the interests of their large firm members, which are often directly at odds with the unique interests of the small firms within the relevant industry. For instance, trade associations working the SBA Office of Advocacy often take positions on regulations that benefit large firms, but which are inconsistent with the interests of affected small businesses.

The administration should instead alternative mechanisms that agencies can employ to conduct outreach to small businesses. For example, U.S. post office would be a potentially valuable option. Post offices exist in nearly every community in the United States, and they often serve as the primary means through which the federal government directly interfaces with nearly every small business in the country.

Other Recommendations the Administration Should Consider for Promoting Public Engagement in the Federal Regulatory System

As noted above, the public faces several types of barriers that prevent them from engaging meaningfully in the regulatory system. The recommendations contained in the notice address some of these types of barriers, but not all. In addition, there are additional strategies the administration should consider for adding those barriers it does consider.

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[5] *See* SIDNEY SHAPIRO & JAMES GOODWIN, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY'S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY (Ctr. Progressive Reform White Paper 1302, 2013), *available at* https://cpr-assets.s3.amazonaws.com/documents/SBA_Office_of_Advocacy_1302.pdf; Rena Steinzor et al., THE SMALL BUSINESS CHARADE: THE CHEMICAL INDUSTRY'S STEALTH CAMPAIGN AGAINST PUBLIC HEALTH (Ctr. Progressive Reform Issue Alert 1501, 2015), *available at* https://cpr-assets.s3.amazonaws.com/documents/Small_Biz_Charade_Silica_1501.pdf.

I urge the administration to consider the following recommendations for promoting public engagement in the regulatory system.

Centralized regulatory review and cost-benefit analysis. Historically, both of these of these institutions have functioned as barriers to public engagement – both by increasing the costs of participation and by amplifying the voice of well-resourced corporate interest. Fortunately, the administration is already considering comprehensive reforms for these institutions with its Modernizing Regulatory Review[6] initiative. As it works to carry out this initiative, the administration should give careful attention to ways that OIRA's role in the rulemaking process and cost-benefit analysis can each be reformed to promote public engagement in the regulatory system.[7]

"Translating in." Many of the recommendations focus on improving how agencies communicate with the public – and rightly so. But communication is a two-way road, and efforts to improve public participation must also give due attention to how agencies account for and incorporate the communications it receives from the public. The fact of the matter is the public generally does "talk like" the well-resourced, repeat players that agencies are accustomed to dealing with, and it is fundamentally unreasonable to expect them to do so. The concern this raises is that the culture and norms that prevail at many agencies may nevertheless create this expectation, even if subconsciously. For instance, the engineers, scientists, and lawyers at agencies are likely to be predisposed to communications from other engineers, scientists, and lawyers.

Rather than training the public to talk like lobbyists, the Biden administration should explore how to make agencies more receptive to lay members of the public. For instance, agencies could institute training for existing staff on relevant "soft skills." Agencies can work toward this objective by using their hiring practices to diversify their personnel, particularly those personnel that will interface with the public. In particular, agencies should seek to hire more individuals with training in sociology, anthropology, and community organizing.

Regulatory Participation Plans and Statements. One of the challenges that the administration faces with carrying out this public engagement initiative is ensuring that its resulting reforms are durable and become fully institutionalized into the operating procedures of agencies. Unfortunately, I did not see any clear attention in the recommendations for accomplishing this objective. One option would be for the

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[6] Memorandum from President Joseph H. Biden, Jr., to the Heads of Executive Departments and Agencies on Modernizing Regulatory Review (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.

[7] *See* James Goodwin, *The Progressive Case Against OIRA*, CTR. PROGRESSIVE REFORM, Jan. 5, 2019 https://progressivereform.org/publications/progressive-case-against-oira/; James Goodwin, *The Progressive Case Against Cost-Benefit Analysis*, CTR. PROGRESSIVE REFORM, Aug. 20, 2020, https://progressivereform.org/publications/progressive-case-against-cost-benefit-analysis/ (last visited Mar. 7, 2023). Progressive case against Cost-benefit analysis

administration to consider directing agencies to carry out Regulatory Participation Plans and Statements.

For each rulemaking, agencies should create a tailored Regulatory Participation Plan based on a standardized framework that OIRA creates. The goal of the Plan should be to ensure that agencies are getting input from the right members of the public at the right stages of the regulatory development process. Agencies should consider consulting with relevant members of the public as they develop each individual Plan. To ensure that the Plans are being implemented effectively, they should include mechanisms for agencies to periodically track progress during the rulemaking process. This will enable agencies to identify any unforeseen gaps and make any necessary course corrections before finalizing rules. In other words, agencies should commit to learning through doing and be flexible enough to revise their Plans as needed to promote the overall goal of effective public engagement.

At the end of the process, agencies should create a Public Participation Statement, which documents what public participation mechanisms were employed, why they were selected, and what impact public participation had on the substance of the final rule. These Statements could become part of the suite of important supporting documents for regulations, supplementing or even reducing reliance on cost-benefit analyses. Ideally, over time, and in conjunction with relevant legal reforms, these Statements could also be deployed to minimize improper interference from courts during judicial review (*e.g.*, to obtain higher levels of deference; to defeat Major Questions Doctrine arguments; etc.).

Training communities for sustained, durable engagement in the rulemaking process. To be most effective, efforts to promote engagement in the regulatory system should look beyond participation in any one particular rulemaking – though, that is an important step. Instead, the goal should be to create a citizenry that remains actively engaged in the regulatory system. Consequently, the administration should consider recommendations aimed at building the civic infrastructure for durable and ongoing participation by communities and individuals.

As noted above, one of the functions that the regulatory system should serve in our democracy is by providing the public with a means for serving as a countervailing force against politically and economically powerful individuals and corporate interests. A civic infrastructure that supports durable engagement in the regulatory system will, of course, be an essential precondition for achieving this objective. One option the administration should consider for pursuing this strategy is to create programs for training individuals to become community “regulatory leaders,” who can then in turn help organize their communities to become effective regulatory advocates.

Notifying the public of how they have influenced each rulemaking. As noted above, one vital step the administration can take to promote public participation is informing the public how they have influenced each rulemaking. This recommendation can help ensure ongoing, durable participation in the regulatory system.

Promoting public participation in compliance monitoring and enforcement activities. The notice correctly identifies the value of getting the public involved at various stages of the rulemaking process, particularly at the earliest stages. Similarly, the later stages of regulatory implementation – specifically, compliance monitoring and enforcement of finalized rules – also offer valuable opportunities for public participation. As with priority-setting, the lived experiences and situated knowledge of individuals and communities are invaluable inputs for successful compliance and enforcement programs. The administration should explore how agencies can get the public involved in their compliance monitoring and enforcement activities, consistent with their legal authorities.

Promoting "community science." The various scientific activities that agencies undertake – including such actions as original research and compliance monitoring – provide still more valuable opportunities to draw on the public's lived experience and situated knowledge. The administration should work with agencies to identify opportunities for members of the public to assist on these scientific endeavors. To operationalize this recommendation, agencies will need to determine what kind of training or certifications are needed and material support they can provide to the public for conducting such research (e.g., computer software, monitoring equipment, etc.). Finally, agencies will need to commit to making their scientific research as accessible to the public as possible.

Limiting improper industry dominance of the rulemaking process. As noted above, improper industry dominance is one of the most significant barriers to public participation in the regulatory system. Given its distinctive nature, addressing this barrier will require special attention and targeted solutions. To be sure, the administration will find that existing legal requirements will limit the reforms it can pursue to address this problem. Nevertheless, the administration should explore such options as universally applicable limits on submissions during notice-and-comment, stronger controls on *ex parte* contacts, and procedures for ensuring that stakeholders do not submit manipulated scientific research.

The administration should also identify and eliminate any administrative procedures and analyses that have traditionally been biased in favor or dominated by industry. For example, reforms to OIRA's role and the institution of cost-benefit analysis being

pursued under the Modernizing Regulatory Review initiative would be an opportunity for achieving this goal.[8]

In exploring this issue, the administration is likely to find that existing law serves to reinforce improper industry dominance in the rulemaking process. Even though the administration would not be able to do anything on its own to remove these legal impediments to public participation, it should still create a comprehensive catalogue of any problematic legal requirements, thereby building a legislative agenda for addressing them. This agenda would then be ready for action whenever there is a Congress willing and able to tackle the problem of improper industry dominance in the regulatory system.

Identifying legal constraints to improved public engagement. When it comes to setting policy on engagement in the regulatory system, the president has considerable authority and thus President Biden will be able to accomplish a great detail administratively with this initiative. Nevertheless, as previously indicated, there are likely several laws that create or reinforce barriers to public engagement. This is especially the case with regard to legal requirements that have the effect of enabling improper industry dominance of the rulemaking process. The administration should consider creating a process to survey relevant laws and document any that might create barriers to effective and meaningful public engagement. This survey in turn can be used to support a concerted legislative agenda to promote greater civic engagement in the regulatory system.

Establishing an Interagency Council on Public Engagement. When it comes to devising effective strategies for promoting greater public engagement in the regulatory system, agencies can and should be the proverbial "laboratories of democracy." As they learn through experimentation about what works and what does not, agencies should seek to share their findings with each other. The administration should consider creating a formal interagency council or establishing some other mechanism through which agencies would be able to share best practices and lessons learned for promoting public participation.

Conclusion

I appreciate your attention to this input on the notice and its recommendations for promoting greater public engagement in the regulatory system. I look forward to continuing working with you on this critical issue. Attached, you will find copies of several of materials cited in the footnotes for your ease of reference. If you have any questions about any of the ideas raised in this letter, please do not hesitate to reach out.

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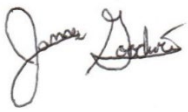
[8] RENA STEINZOR ET AL., BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (Ctr. Progressive Reform White Paper 1111, 2011), *available at* https://grist.org/wp-content/uploads/2011/11/oira_meetings_1111.pdf.

Sincerely,



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Enclosures

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Can Hip Hop Save Rulemaking?

James Goodwin

An arts-based framework could re-democratize the rulemaking process.

Public participation is one of the cornerstones of U.S. administrative law, and perhaps nothing better exemplifies its value than the notice-and-comment rulemaking process through which stakeholders can provide input on a proposed rule. Yet there remains an inherent tension in the democratic potential of this process. In reviewing final rules, courts demand that agencies demonstrate that those rules are responsive to any

substantive comments they receive. But courts generally limit this requirement to comments containing legal or technical information.

This approach to judicial supervision of agency rulemaking is just one of many forces that have helped transform what should be a democratic rulemaking process into a technocratic exercise. On the plus side, expertise-centered rulemaking has substantially improved regulatory quality. These gains, however, have come with some important unintended consequences.

For one, the growing hegemony of technocratic decision-making dehumanizes the rulemaking process, resulting in an process that is unmoored from authentic human experiences—pain, hope, fear, loss—and from shared values like dignity, fairness, and justice. Worse still, overly technocratic rulemaking reinforces existing social inequalities by systematically excluding the voices of those who cannot "buy" the kind of specialized legal or technical expertise that holds sway with agency decision-makers. All too often, these voices belong to the members of the communities most impacted by the harms a regulation is meant to address. These individuals have acquired direct knowledge of these problems through their lived experience but rarely have the means to translate it into technocratic language.

In contrast, the entities with sufficient resources to overcome administrative law's doctrinal barriers to meaningful participation in the rulemaking process tend to be corporations (along with the trade associations, advocacy organizations, and think tanks they financially support) that are the focus of regulations. The practical result is that these doctrines end up privileging the perspective of the regulated community. This skewed perspective in turn risks producing decisions that give short shrift to the public interest, a result directly at odds with the goals of the authorizing statutes.

So how can we make the voices of ordinary Americans heard in the rulemaking process in a way that does not punish them for lacking law degrees or PhDs? Can we imagine a rulemaking process that not only invites but weighs the lived experiences of Americans who are more comfortable with hip hop music or street art than with legal briefs or dose-response curves? How can we capture their experiences about air pollution or predatory loans?

Art offers several unique advantages for re-democratizing the rulemaking process, especially those art forms that might be thought of as folk art, which are characterized

by their authenticity, universal accessibility, and distinct cultural significance. Whether captured in the medium of visual arts, music, or literature, folk art is generally available for everyone's use and is readily understandable to all. It has the capacity not just to convey valuable information, but to establish meaningful connections between the artist and audience, even if they come from highly disparate backgrounds.

Among folk art forms, hip hop is especially important for some of the most marginalized members of our society. For African Americans, members of lower-income, urban communities, and others, hip hop has long provided a powerful means for social and political commentary. But why stop there? One can imagine someone from the upper Midwest writing a graphic novel depicting how agricultural pollution has tainted her community's drinking water. Or to illustrate how rights to access justice in the courts have been curtailed, someone from suburban Oklahoma might create a collage comprising the dozens of forced arbitration agreements to which he is subject.

Incorporating hip hop and other forms of art into the rulemaking process could be as simple as agencies explicitly inviting submissions through their standard notices of proposed rulemaking. Modern technology should make it relatively easy for agencies to accept submissions in a wide variety of audio and visual formats. Those materials could thus become part of the relevant rulemaking docket.

To help organize the process, agencies could hire artists to compile the submissions into anthologies or even to create original artwork that draws upon the public submissions. These materials could be discussed as part of the preamble to the final rule and, if applicable, would be available for judges to consider during judicial review.

Precedent for these activities can be found in the New Deal-era Federal Writers' Project. As Naomi Klein explains, one of the purposes of this and other Works Progress Administration-sponsored art programs was to "mirror a shattered country back to itself and in the process, make an unassailable case for why New Deal relief programs were so desperately needed." Likewise, art can help make the case for why we need to clean up air pollution in urban areas or to protect consumers against forced arbitration agreements.

I recommend calling the rulemaking art anthologies a "people's regulatory impact analysis" because they would perform a function similar to that of the current regulatory impact analyses that executive branch agencies already conduct. According to their supporters, these existing analyses provide valuable information about a regulation's likely economic impacts and help guide an agency's use of discretion within the boundaries of its legal authority.

A people's regulatory impact analysis could do even more by providing an important counterweight to agencies' current form of regulatory impact analysis. Whereas these current cost-benefit analyses dehumanize the people who regulations are meant to help by reducing them to unrecognizable dollars-and-cents abstractions, a people's regulatory impact analysis would build up and validate the lived experience of real people by sharing their stories in their own words.

The use of people's regulatory impact analyses should find support across the political spectrum. For conservatives, it would answer their (inaccurate) claim that so-called "bureaucrats" are out of touch with real Americans. For progressives, it would align with their proposals to enhance meaningful opportunities for public participation in the rulemaking process. Given its New Deal provenance, the practice of allowing for a people's regulatory impact analysis would also fit within the vision laid out in the Green New Deal.

Administrative law experts have long recognized the essential role that public participation plays in the rulemaking process. People's regulatory impact analyses promise to breathe new life into these principles without displacing the contributions of technocratic expertise in regulatory decision-making.

James Goodwin is a Senior Policy Analyst with the Center for Progressive Reform.

Tagged: Administrative Law, New Deal, notice-and-comment rulemaking, Regulatory Impact Analysis, Regulatory Innovation, Rulemaking

Center for Progressive Reform

The Progressive Case Against OIRA

James Goodwin | January 5, 2019

Responsive Government Defending Safeguards

The White House Office of Information and Regulatory Affairs (OIRA) has long been known as the "most powerful government agency you've never heard of." That such a thing should exist at all in a democracy like ours is just this side of terrifying.

Make no mistake, though, corporate interests have heard of OIRA – and more to the point, they have long known that if they wanted to wield influence over the regulations that affected them, that was the place to do it. As for the rest of us, to the extent that we are able to engage in the rulemaking process at all, we do so through the increasingly marginalized notice-and-comment process established by the Administrative Procedure Act. On paper at least, these comments, filed in response to regulatory agencies' proposals, are supposed to serve as the main avenue for the public to weigh in on pending regulatory policies; in reality, they have become an elaborate sideshow, while the real action takes place in OIRA's black box.

OIRA has been short-circuiting the rulemaking process in this manner since early in the Reagan administration, when **Executive Order 12291** first empowered it to review draft regulations being developed by executive branch agencies before they could be released to the public. While that order was eventually repealed, **Executive Order 12866** – which replaced it and which remains in effect today – retained the core of OIRA's centralized regulatory review "framework."

OIRA's centralized review framework includes the following key features:

- OIRA retains wide latitude to review nearly any agency rule it wishes, but especially those that are likely to be of greatest interest to politically powerful industries.
- Agencies cannot share with the public their proposed and final rules until OIRA has completed its review of them. OIRA uses this "gatekeeping" authority to demand changes to the draft rules it receives, or even to block them altogether.
- The primary metric that OIRA using during its review for evaluating the "quality" of regulations is **cost-benefit analysis**. This standard is **irrelevant to or even prohibited** by nearly every statute that authorizes the regulations that OIRA reviews. But for OIRA, it has the desirable features of being (1) malleable enough to justify nearly every change it demands and (2) reliably biased against protective safeguards, reinforcing OIRA's broader efforts to weaken or block rules opposed by politically powerful interests.

The foundation that this framework is built upon – and that gives it its real strength – is OIRA's abject lack of transparency. OIRA's centralized review is by far the least transparent step in the rulemaking process, and we shouldn't be surprised that both political officials in the White House and well-connected corporate interests have taken full advantage. For its part, OIRA encourages behind-closed-doors lobbying, and corporate interests opposed to the public interest have dominated this opportunity. There they find a receptive audience in OIRA's staff, which is stocked with economists and others who by training or ideology are skeptical of regulations. Working together outside of public view, OIRA staff, White House political officials, and corporate lobbyists enjoy relative freedom to elevate narrow political interests to the exclusion of sound policy, science, and even the law. To the extent that any changes that are made in the process require a public justification, one can be readily manufactured ex post by means of a contrived cost-benefit analysis.

Corporate interests have worked for decades to rig nearly aspect of the rulemaking process in their favor against the public. OIRA's centralized review is a key element of that strategy. And it will continue to serve as an insurmountable obstacle to the achievement of progressive policies as long as it remains in place. Whether you're working to advance Medicare for All, the Green New Deal, or some other essential policy goal, all progressive advocates should unite behind a complete overhaul of OIRA, refocusing its mission toward protecting people and the environment, and away from its current role as the last wall of defense between corporate America and statutory obligations it finds inconvenient.

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OIRA in the Trump Era

No presidential administration in U.S. history has been as hostile to regulatory protections for health, safety and the environment as the Trump administration. Unsurprisingly, the role of the most anti-regulatory office in the federal government – OIRA – has **changed** as a result. OIRA's role as the "wrecker of regs" has become less important for the simple reason that rules arrive on its doorstep already deeply slanted toward corporate interests. Under Trump, agencies are helmed by individuals whose principal qualification seems to be fundamental opposition to the mission of the very agencies they lead. Thus, by the time draft proposed and final rules arrive at OIRA, they've already been tailored to satisfy lobbyists for affected corporations.

Accordingly, OIRA's intensive reviews of agency rules, which in the past commonly missed deadlines by months or even years, have given way to the Trump OIRA's alacritous reviews of the administration's biggest deregulatory actions in record time. Any objective "quality control" role OIRA might have played in the past as part of the centralized review process has gone out the window, too. The cost-benefit analyses that Trump administration's agencies have produced in support of their rollbacks have been scandalously poor, while the administration has accumulated a historically

poor record in the courts, losing the vast majority of its cases in which it sought to defend its rollbacks against legal challenge.

Instead, much of OIRA's work under Trump has focused on promoting the administration's implementation of **Executive Order 13771**, the so-called "two-out, one-in" order. This pernicious directive requires federal executive agencies to eliminate at least two of their existing rules before they can issue any new "significant" rules. On top of that, it demands that the costs associated with any new rules be fully "offset" or more through cost reductions achieved by eliminating existing regulations. Trump administration agencies liberally cite this order in defense of their aggressive efforts to weaken or repeal a slew of Obama-era safeguards. It has also provided them with convenient cover for not pursuing regulatory responses to new and emerging threats to the public interest, such as PFAS in drinking water or the outbreak of the COVID-19 pandemic.

Building an OIRA that Puts People First

The first step in overhauling OIRA is to clearly redefine its mission: A progressive OIRA will be singularly focused on helping agencies achieve their protective missions in a timely and effective manner. To do that, OIRA can take advantage of its unique position within the executive branch to work with executive branch agencies to identify the obstacles they face in implementing protective safeguards, whether those obstacles are unique to the particular agency or more cross-cutting in nature. OIRA can then work to develop and promote necessary reforms to address those obstacles, including through the adoption of new innovative administrative policies or, where applicable, advocacy for legislative changes.

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To be sure, OIRA will still need to conduct a centralized review function, but this process must be fundamentally overhauled to bring it back within the

bounds of the law and constitutional principles. First and foremost, that means restoring agencies as the primary locus of decision-making power. The limited role left to OIRA would be facilitating inter-agency coordination; serving as an honest broker to resolve interagency disputes; and providing a "quality control" check on rules with an eye toward surviving judicial challenges and promoting public understanding of how the rule will make lives better.

It will be impossible to accomplish such a radical reorientation without also changing OIRA's organizational culture. That will involve changing the composition of OIRA's workforce so that it includes fewer economists and more individuals with the training and experience to understand the human impacts of regulation. It will also require placing individuals in leadership positions who have a demonstrated commitment to the public interest goals of statutes, and not those who have passed through the revolving door from Corporate America. Above all, it will require an unflinching commitment to complete transparency. OIRA's involvement must become the most transparent step in the rulemaking process to ensure the integrity and legitimacy of all of its actions.

Learn More About OIRA and the Need for a Progressive Overhaul

CPR Member Scholars and staff keep a careful eye on OIRA, posting frequently to *CPRBlog* about its work, and also keeping up on legislative oversight and proposals that involve OIRA. Read the **most recent posts here**. Peruse all of our OIRA-focused reports and white papers **here**.

Visit our **clearinghouse page** on OIRA, cost-benefit analysis, and the need for reform of the regulatory system.

Responsive Government Defending Safeguards

Center for Progressive Reform

The Progressive Case Against Cost-Benefit Analysis

James Goodwin | August 20, 2020

Responsive Government Defending Safeguards

In cost-benefit analysis, small government ideologues and corporate interests have fashioned a powerful weapon for attacking regulatory safeguards and undercutting landmark laws. Much of that power derives from the elaborate mythology that its proponents have woven around the methodology over the course of the past four decades. Depending on how the story is told, cost-benefit analysis either serves as a modest, "neutral" tool for evaluating the quality of regulations or, more ambitiously still, it provides the sole objective means for revealing the "best"

Read more in this series

Also from James Goodwin:

regulatory solutions. This framing has the salutary effect of casting as sloppy, naïve, or even dangerously irrational those who might have the audacity to prefer laws written to protect health, safety, and the environment to actually be protective.

Restoring Scientific Integrity to the Regulatory System Means Overhauling Cost-Benefit

Cost-Benefit Analysis Is Racist

Overview: Beyond 12866: A Progressive Plan for Reforming the Regulatory System

For its supporters, the real genius of the cost-benefit analysis myth is that it distracts from the fact that the methodology is in fact neither neutral nor objective. On the contrary, it surreptitiously privileges certain subjective values (*i.e.*, a preference for corporate profit over health and safety) to the exclusion of others that might favor stronger safeguards (*e.g.*, fairness and equity). And, while its methodologies are malleable enough to make it an effective advocacy tool, cost-benefit analysis nevertheless remains intrinsically biased against protective regulations, leaving defenders of stronger safeguards waging one uphill battle after another. What's more, far from being rigorous and systematic, those methodologies are shockingly unscientific, arbitrary, and at times even bizarre. Consequently, the results that cost-benefit analysis produces are typically unmoored from reality and completely devoid of the credibility and legitimacy its supporters have sought to cultivate for it.

A 'They,' Not an 'It'

One reason supporters have found it so easy to muddy the debate over cost-benefit analysis is that the term connotes several different but conceptually distinct analytical approaches. Each has different theoretical foundations, practical weaknesses, and, ultimately, purposes they are fit to serve. The failure to observe these distinctions – or, to be more accurate, the strategic disregard of them – has put cost-benefit analysis supporters in the enviable position of defending what amounts to a nearly omnipotent phantom.

One common conceptualization of cost-benefit analysis is that of Benjamin Franklin's "prudential algebra." This approach involves drawing a line down the middle of the piece of paper and listing the pros and cons of a given decision in the resulting two columns. Simple and elegant but decidedly unsophisticated, the modest purpose of

this exercise is to help the decision-maker organize her thoughts in an intuitive and visually compelling manner that enables her to make a gut determination about whether or not to proceed. This approach only works for binary decisions (*e.g.*, "yes" vs. "no" or "red" vs. "blue"). Also, there is no pretense that it produces anything like an "optimal" decision or reflects "comprehensive" knowledge of the world. Instead, good enough is good enough. Prudential algebra is often fairly equated with "common sense," and one would be hard-pressed to find anyone who would regard the approach as "controversial."

In stark contrast to Franklin's prudential algebra is the conceptualization of cost-benefit analysis favored by economists. Grounded in the conceit that a "good" society is one that myopically focuses on maximizing the size of its economy, the economists' pseudoscientific cost-benefit analysis aspires to promote regulatory decision-making that achieves "perfect" economic efficiency. In the parlance of economists, it seeks out "optimal" regulatory decisions by identifying the point at which the marginal costs of a given level of regulation are equal to its marginal benefits.

The theoretical foundation of the economists' pseudoscientific cost-benefit analysis raises all kinds of serious ethical concerns. For one thing, growing the economic pie was certainly not the only goal the Founders had in mind when they set out "to form a more perfect Union." For another, this supposed pursuit of economic efficiency ignores something that is vital to all Americans: The issue of distributional fairness that arises when costs and benefits are borne by different actors. At its worst, cost-benefit analysis allows polluters to induce a certain number of asthma attacks in a certain number of children, provided the polluter can make lots of money doing it. At its best, cost-benefit analysis may limit the cases of pollution-induced asthma to a number that somehow squares with the costs of preventing some of that pollution. In neither case are the kids with asthma or their parents consulted or their interest in

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health seriously weighed. Instead, someone first cooks up a dollar-cost for an asthma attack that ignores parents' preference for health, then multiplies by the number of attacks, and finally compares the product to the cost polluters would pay to clean up their mess. The result is considered an economically optimal regulation, which must be cold comfort to parents pacing an emergency room waiting area knowing that their children's health has been sacrificed to achieve an economically optimal number of asthma attacks.

Beyond these kinds of ethical outrages, the theoretical grounding for cost-benefit analysis also sets up the methodology for all kinds of intractable practical problems as well. Of course, identifying such "optimal" solutions to a problem assumes the kind of comprehensive knowledge that could never be achieved in reality. It also requires converting every element of the analysis into a common metric – namely, dollars and cents – to allow for direct comparison. For many regulations, that means putting a monetary value on things are not sold in the marketplace, such as protecting human lives or preventing an endangered species from going extinct. Cost-benefit analyses practitioners nevertheless try to put a price on these benefits, resorting to techniques that could hardly be described as scientific, rigorous, or credible. These include divining the price of a human life by extrapolating from the slight increases in pay that some workers earn for doing dangerous jobs, and using arbitrary public surveys to assign a monetary value to an acre of undamaged wetland.

Taken together, this version of cost-benefit analysis looks vastly different from Franklin's prudential algebra. Rather than applying to an inherently binary decision, it purports to select from among literally an infinite number of possibilities. In so doing, it pretends to bring to bear infinite knowledge to identify the perfect solution. Cast in these terms, this doesn't strike the same notes of "common sense" or relative harmlessness that Franklin's prudential algebra does. Rather, as a decision-making aid, it sounds fundamentally misguided and worse than useless.

Opponents of regulation, of course, prefer the economists' version of cost-benefit analysis. The practical difficulty involved in performing the analysis alone serves their needs by endlessly delaying new rules and wasting scarce agency resources. More importantly, though, it also discourages agencies from pursuing stronger regulations and affirmatively pushes them to adopt weaker ones.

Yet, when challenged on the obvious theoretical and practical flaws of the economists' version of cost-benefit analysis, its supporters quickly, and predictably, move to portray the methodology as indistinguishable from Franklin's prudential algebra. All they are doing, they claim, is trying to ensure that regulatory decisions do more good than harm. Who could be against that? But later, when it comes time to challenge the rule in the courts or with relevant policy officials, opponents of regulatory safeguards just as quickly – and just as predictably – return to cost-benefit analysis as their weapon of choice. In these venues, they put forward whatever arguments they can contrive that purportedly demonstrate how the particular safeguard at issue fails to achieve the Holy Grail of economic optimality. Unfortunately, all too often, these venues have proven themselves to be sympathetic to such arguments.

The Executive Order-ification of Cost-Benefit Analysis

Considering the privileged position that cost-benefit analysis has come to enjoy in the regulatory universe, it rests on a legal foundation that is remarkably precarious. No act of Congress or binding law compels its use. Rather, it is the outgrowth of an anti-regulatory executive order issued by America's first anti-regulatory president.

Issued early in President Ronald Reagan's first term, **Executive Order 12291** directed executive branch agencies to perform cost-benefit analyses for all their biggest rules and to base their decision-making on these analyses "to the extent permitted by law." More specifically, the order directed agencies to estimate in "monetary terms" the costs and benefits of their draft regulations and to use those estimates to make a "determination of the potential net benefits." It also sought to ban agencies from issuing any new rules for which the benefits did not "outweigh" the costs, and instead directed agencies to design their regulations to "maximize the net benefits to society." In other words, the order sought to replace the time-tested process for how agencies had been making regulatory decisions – following the directives set

The order charged the White House Office of Information and Regulatory Affairs (OIRA) with supervising agency development of new rules and the supporting analyses. In practice, that meant agencies had to submit copies of their draft proposed and final rules along with the accompanying cost-benefit analyses for a closed-door

forth in statutes like the Clean Air Act, for example – with the economists' version of cost-benefit analysis.

review by OIRA's cadre of political operatives and economists.

To ensure agency compliance with these cost-benefit analysis requirements, the order charged the White House **Office of Information and Regulatory Affairs (OIRA)** with supervising agency development of new rules and the supporting analyses. In practice, that meant agencies had to submit copies of their draft proposed and final rules along with the accompanying cost-benefit analyses for a closed-door review by OIRA's cadre of political operatives and economists. The agency couldn't proceed with the rulemaking until the drafts and supporting analyses received OIRA approval. This gatekeeping role empowered OIRA staff to demand changes to agencies' rules and cost-benefit analyses, and indeed to even block them altogether.

Executive Order 12291 generated significant controversy and was eventually repealed by President Bill Clinton. Significantly, though, **Executive Order 12866**, which President Clinton issued as a replacement, retained much of the earlier order's framework, including its mandates for OIRA-centralized review and cost-benefit analysis procedures that applied to executive branch agencies' biggest rules. One notable difference was that the Clinton order directed agencies to show that the benefits merely "justify" their costs, rather than requiring that benefits "outweigh" costs. While later executive orders have made some modest technical changes, the cost-benefit analysis framework established in Executive Order 12866 still remains in effect today. At least on paper.

Cost-Benefit Analysis in the Trump Era

The arrival of the Trump administration made it clear that as powerful a tool as the economists' cost-benefit analysis can be for advancing anti-regulatory goals, even it has its limits. To support their aggressive assault on safeguards, the Trump administration's agencies have desperately sought to show that its individual rollbacks can pass a cost-benefit analysis test. But, finding that the extreme nature of these policies exceed even the standard anti-regulatory tricks of cost-benefit analysis, agencies have resorted to analyses that are ham-fisted, riddled with errors, or dependent upon leaps of logic that defy all human reason and experience. Even

then, there have been a few rollbacks for which the rulemaking agency was still unable to reverse-engineer an analysis that produced a finding of net benefits.

One such bit of thumb-on-scale methodology is at work in the administration's push to exclude from consideration so-called co-benefits of safeguards. The Environmental Protection Agency's (EPA) Mercury and Air Toxics Standard, issued during the Obama administration, is a prime example. When power plants are forced to reduce mercury emissions, it turns out they also reduce the amount of fine particulate matter they emit, a significant source of heart and lung disease, saving both lives and money. That's undeniably a benefit of the rule. But in their zeal to leave polluters free to pollute, the Trump administration would bar the inclusion of such benefits on the grounds that reducing particulate matter emissions wasn't the objective of the provision of the law under which the EPA was regulating. The Trump argument makes no attempt to square that approach with the quest for economic "efficiency" that undergirds the entire cost-benefit enterprise. How could it? Instead, the EPA simply intends to blot out massive benefits with a tiny bottle of white-out.

Whatever trust one may have held towards the objectivity and credibility of cost-benefit analysis before the Trump administration, it should have been all but dispelled by now. The last few years have revealed once and for all what critics of the methodology have long asserted: Cost-benefit analysis is a political tool of arithmetic advocacy, pure and simple. Some are just more artful in wielding it than others.

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In retrospect, such flagrant abuses of cost-benefit analysis shouldn't have been surprising. One of President Trump's first official acts was to issue **Executive Order 13771**, which established the now-infamous "2-out, 1-in" cap on new regulations, as well as a strict regulatory budgeting system that requires executive branch agencies to ensure that the incremental cost increases from new regulations are at least fully offset by the incremental cost savings

achieved from repealing the existing regulations. The inevitable consequence of this cost-only focus is that cost-benefit analysis is rendered irrelevant by definition. Any new regulation – no matter how large the net benefits it produces – is prohibited unless and until the issuing agency repeals at least two existing regulation and ensures the resulting cost savings at least fully offset the new costs of the new regulation. In this way, the pretense of rational regulatory decision-making that cost-benefit analysis sought to promote has become yet another victim of the Trump administration's aggressive anti-safeguards agenda.

There is an irony here, of course. When it comes time to write the epitaph on the regulatory policy of the Trump presidency, he won't just go down as the most anti-regulatory in history; he will also be remembered as the most anti-cost-benefit analysis, as well.

Restoring Integrity to Regulatory Analysis

The economists' pseudoscientific version of cost-benefit analysis that has carried such sway in the U.S. regulatory system over the last 40-plus years should be more properly regarded as an aberration or an unfortunate detour. Progressives can and should work to get the practice of regulatory analysis back on the proper track, one that better accords with constitutional principles, legal requirements, and scientific integrity.

As a first step, we need to recognize – or *re*-recognize – that Congress has already determined the proper approach for weighing the pros and cons of individual regulatory decisions. They are right there in the statutes themselves, in plain sight, if ignored by the anti-regulation crowd. It is unnecessary to create a new approach out of whole cloth, and it is self-defeating for progressives to uncritically follow an approach that was specifically invented to block the kind of protective safeguards we support.

Rejecting cost-benefit analysis doesn't mean turning a blind eye to the effects of regulations, as the methodology's supporters have misleadingly claimed. To the contrary, it means paying careful attention to the specific instructions that Congress provided to agencies in the statutes that it adopted. Tellingly, in drafting these statutes, Congress has frequently considered but rarely ever adopted the

economists' cost-benefit analysis as the relevant decision-making standard. Instead, these statutes have consistently included standards that specifically prohibit the use of this version of cost-benefit analysis or for which the methodology is completely irrelevant. These include the broad range of technology-based standards included in many environmental, public, health, and safety laws. Each is designed to prioritize public protections, while still providing a reliable check on regulatory costs that is tied to the availability of certain technologies and the economic position of affected industries. Considering that members of Congress are – at least in theory – democratically accountable while OIRA economists and industry lobbyists are unquestionably not, the usurpation of those statutory standards by economists' cost-benefit analysis represents a direct threat to both our constitutional system of governance and the democratic legitimacy of our regulatory system. Moreover, while the president in whose White House OIRA's economists serve is democratically accountable, he or she is not empowered to ignore statutory mandates. Laws mean what they say, and presidents are bound by them.

Improving regulatory analysis should thus begin with a focus on ensuring meaningful attention to the decision-making factors and criteria embedded in statutory standards and effectuating the values and policy goals they represent. OIRA can support this effort by affirmatively assisting agencies to develop internal policies and practices to strengthen and systematize such standard-focused analyses. One focus of this effort should be improving communications with the general public regarding how these analyses are conducted and how final decisions were affected by them. Likewise, agencies should also explore how they can better tailor their outreach to the public – particularly among marginalized communities – to ensure they are receiving the input they need to properly account for regulatory costs and benefits in a manner that is consistent with their authorizing statutes.

Progressives should also demand that regulatory analysis be cleansed of its accumulated methodological irregularities and other evaluative techniques that lack a firm scientific grounding. These might include the arbitrary disregard or discounting of "co-benefits," the attempt to assign monetary values to regulatory impacts that are not already monetized in the marketplace, and the use of inappropriately large discount rates for measuring future regulatory impacts.

Finally, progressives should urge that agencies reorient their analyses so that they better account for important but easy-to-overlook values that are central to the American identity, including justice, fairness, and equity. In light of the growing public concern for economic inequality and systemic racism brought on by George Floyd protests and the Black Lives Matter movement, agencies should strive to use these analyses to better understand the distributive impacts, both good and bad, that their regulations can have.

Learn More About Cost-Benefit Analysis and the Need for a Progressive Overhaul of the Regulatory System

CPR Member Scholars and staff have researched and written extensively about cost-benefit analysis, its long reach, and its many abuses and misuses. Read the **most recent posts here**. You may also want to read their **reports and op-eds on cost-benefit**.

Visit our **clearinghouse page** on cost-benefit analysis, OIRA, and the need for reform of the regulatory system.

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