

# Advice for the Biden-Harris Administration: Embrace Regulatory Humility

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*Time-tested regulatory practices can help ensure evidence-based policies take diverse perspectives and information into account.*

Susan E. Dudley | January 6, 2020

## Abstract

The Biden administration can increase the likelihood that its ambitious regulatory agenda will actually achieve its goals by embracing regulatory humility. That requires a disciplined approach to understanding regulatory impacts and tradeoffs; maintaining practices that encourage accountability; a commitment to learning, feedback, and evaluation; an openness to diverse views and inputs; reliance on flexible regulatory tools; and an appreciation that even the most well-intentioned and intelligent regulators will lack essential information on how policies will work in practice. Agencies need to balance competing considerations, and conduct a holistic, evidence-based assessment of all regulatory impacts. The time-tested principles in President Clinton's E.O. 12866 and President Obama's E.O. 13563 show us how.

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## Introduction

President-elect Biden said he will be president for all people, and he certainly displays more personal humility than President Trump. For his policies to achieve success, his administration must embrace regulatory humility as well.

By regulatory humility, I mean several things, beginning with a reluctance to supplant regulators' judgments for those of individuals without firm grounding. It requires an appreciation of the role that market forces, competition, and voluntary interactions have in supporting well-being in a dynamic, innovative, and flourishing society.

Regulatory humility does not imply no regulation, but it calls for a recognition that even the smartest regulators with the most altruistic motives may not have the information needed to achieve their goals without generating unintended consequences that undermine the desired outcomes, cause other negative effects, or both. President Clinton's EO 12866 and President Obama's EO 13563 encourage regulatory humility when they call upon federal agencies to consider these outcomes and effects.

I offer the incoming Biden-Harris administration five recommendations for embracing regulatory humility and securing better regulatory outcomes.

## 1. Strive to Understand Regulatory Impacts Before Regulating

Individually, we all weigh tradeoffs when deciding to take one action or another, sometimes explicitly and sometimes subconsciously. Since regulatory policies will affect not only the policymaker but many others not party to the decisions, they require careful and transparent *ex-ante* analysis. *Ex-ante* regulatory analysis that reflects regulatory humility rejects the [Nirvana fallacy](#), in which markets are seen as fragile, inequitable, and prone to failure, while government solutions are assumed to work exactly as planned. Instead, regulators should use the best available information to compare the likely effects of real-world markets with real-world regulation.

### a. Maintain requirements for *ex-ante* regulatory impact analysis.

The Biden-Harris team should maintain the requirements for *ex-ante* regulatory impact analysis embodied in [E.O. 12866](#) (Clinton 1993) and [E.O. 13563](#) (Obama 2011). Regulatory impact analysis informs policy decisions by laying out available evidence on the expected impacts (good and bad, intended and unintended) of different regulatory approaches. The analysis begins with an examination of the problem to be solved, recognizing that market forces, competition, and individual choice can be very effective regulators. It then identifies alternative approaches to addressing the identified problem, and examines, qualitatively as well as quantitatively, the associated benefits and costs. While no analysis will be perfectly

complete, the act of examining the problem to be solved and alternative possible solutions is invaluable.

Behavioral insights about the limits of rationality may have a role in devising successful regulations, but they should be [applied to regulators](#) as well. Assumptions that regulators are better able to judge individuals' preferences or [be more faithful agents](#) of individuals' interests than the individuals themselves should be supported with strong evidence, not just armchair theorizing.

## b. Consider distributional effects, not just net benefits.

Measures of net benefits (benefits minus costs) are important for identifying the most effective and efficient approaches to addressing problems. However, longstanding guidance also directs agencies to consider who bears the costs and who receives the benefits. EO 13563 explicitly counsels agencies to "[consider](#) (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."

Analysis of distributive impacts can help decision-makers set more compassionate, just, and equitable policies, and regulatory humility calls for an objective and dispassionate examination of the incidence of both regulatory benefits and regulatory costs to understand how alternatives affect different groups. The analysis should consider the distributional effects of no action, as well as action, and the [incidence of the costs](#) imposed by the regulation, as well as the benefits derived.

This is particularly important because regulation can introduce wealth transfers that make them particularly susceptible to [rent-seeking](#), as recipients lobby for expanding the benefits, while those bearing the costs push back. A sound analysis will recognize these rent-seeking costs as a problem.

## c. Ensure the integrity, transparency, and objectivity of scientific inputs.

Many regulations depend on scientific inputs, such as the change in health risk expected from a change in exposure to particular pollutant. First, the Biden administration should recognize that these inputs can be highly uncertain, and resist the temptation to assert that [science alone](#) dictates one path or another. Further, because risk assessment necessarily involves assumptions and judgments as well as pure scientific inputs, the Biden administration should establish procedures and incentives to make more transparent the effect different credible risk-assessment inputs and assumptions have on the range of plausible outcomes. This would make risk assessment [more compatible](#) with the regulatory impact analysis it supports by informing decision-makers of the expected value and range of the benefits and costs of different interventions.

## 2. Equip the Office of Information and Regulatory Affairs to Assure Accountability

### a. Increase staff capacity for oversight.

For forty years, presidents have relied on the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget to coordinate regulatory activity across the government and to offer what President Obama [called](#) a “dispassionate and analytical second opinion” on agency regulatory proposals and supporting analyses. When it was first established in 1981, OIRA had a staff of close to 100 analysts. Now, despite increasing obligations, it employs around 60 full time professionals. The president’s regulatory review staff is outnumbered [3600 to 1](#) by the staff of agencies whose regulations it reviews. To support its regulatory oversight role without being a bottleneck for needed regulations, the Biden administration should increase the OIRA staff.

### b. Extend E.O. 12866 to cover independent regulatory agencies.

This is especially true if President Biden expands Executive Order 12866 to cover independent regulatory agencies, [which he should](#). Both E.O. 12866 and its predecessor excluded independent regulatory agencies from review in part to avoid conflict with the legislative branch over whether presidents’ more limited authority over these agencies precluded such review. A recent Justice Department [memo](#) resolves any uncertainty, stating conclusively that “the President’s constitutional authority ... extends to the supervision of all agencies that execute federal law, including so-called ‘independent’ agencies.” President Biden should issue an executive order extending the coverage of E.O. 12866 to these agencies. The OIRA review process may need to be [modified slightly](#) to accommodate the nature of multi-headed agency decision making, but it already reviews their information collection requests and could follow similar procedures to ensure the commissioners have the final authority for the regulations they issue.

## 3. Embrace Learning, Evaluation and Measurement

Policy makers will never have complete information on the future effects of regulatory actions, just as individuals acting in their own interest do not. A key condition of regulatory humility is to recognize that no amount of *ex-ante* analysis will accurately predict all outcomes. It understands the [planner’s paradox](#), where on paper government solutions always look better than the status quo because “all of the unseen difficulties with the planned solution — the data, assumptions, biases, and understandings of the world that turn out to be wrong — are invisible to the analyst because the data he considers are his own.”

### a. Implement a learning agenda.

Regulators must integrate opportunities for learning in everything they do. Individually, we are always modifying our behavior based on experience, and regulators should attempt to do the same.

Whenever possible, regulations should be designed to allow “natural experiments,” where different approaches can be tested and evaluated. National one-size-fits-all standards deny opportunities for learning. Agencies should also commit to gathering data needed to test whether *ex-ante* assumptions and estimates were realized in practice.

The Biden administration should establish procedures that incentivize learning through experimentation and measurement. While *ex-post* evaluation has a long tradition in other areas (particularly in programs financed through the fiscal budget), it has received [little attention](#) in the regulatory arena, despite government guidelines requiring it. In essence, *ex-ante* analyses are hypotheses of the effects of regulatory actions. Better regulatory evaluation would allow agencies and others to [test those hypotheses](#) against actual outcomes. This would not only inform decisions related to the benefits and costs of existing policy, but would [provide feedback](#) that would improve future *ex-ante* analyses and future policies.

## b. Evaluate the effects of regulation once implemented.

To incentivize more robust evaluation of regulations once they are in effect, the new administration could require agencies to test the validity of previous predictions of impacts, benefits, and costs before commencing new regulation. As a condition for issuing new regulations, it could require agencies to present a robust framework for later evaluation and a commitment to gather necessary data.

The Biden administration will face pressure to revoke as many Trump administration deregulatory actions as possible, but it should first try to learn from the Trump experiment. For example, what impacts did the regulatory waivers created in response to the Covid pandemic have? To the extent that regulations were modified pursuant to [E.O. 13771](#), how did those modifications affect outcomes?

## 4. Be Transparent and Open to Wisdom from Diverse Sources.

The [Administrative Procedure Act](#) will be 75 years old this year. It established procedures for making regulatory requirements public and ensuring opportunities to comment on proposals before they are finalized. As essential as the notice-and-comment rulemaking process is in U.S. regulatory framework, by the time comments are requested, regulators have often formed an unwavering position on the approach an action should take, so comments only effect change at the margins.

### a. Engage public input earlier in the regulatory process.

[Earlier public engagement](#), through the use of advanced notices of proposed rulemaking (as [recommended](#) by President Obama’s Jobs Council), or request for comments on supporting documents, data, models, or analyses well before preferred regulatory approaches have been

determined, could bring to bear diverse sources of information and perspectives that could inform and improve resulting regulations.

The Biden administration could build on E.O. 13563, which requires that “regulations ... be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.” In addition to seeking input on [advance notices](#), it might ask agencies to share “[back of the envelope](#)” analyses that consider the effects of a wide range of alternatives earlier in the rulemaking process. Given the importance of risk assessment information to the regulatory analysis, the [pre-rulemaking disclosure](#) of risk-assessment information could engage broad public comment on the proper choice of studies, models, assumptions, etc. long before any policy decisions are framed, or positions established.

## b. Facilitate feedback on proposals and comments.

The new administration could also encourage agencies to increase the use of “[reply comments](#).” Often, comments are submitted in the final days of the comment period, probably because that’s human nature, because commenters need the full comment window to gather and present material, or because they want to avoid giving opposing parties a chance to respond to their arguments. This leads to a one-way flow of information, where commenters respond to agencies’ questions, and then agencies make decisions based on information received. Missing from this process is the opportunity for members of the public to respond to or engage with the information presented in comments. Providing a reply comment window for the public to offer feedback on other comments could address this. Usually, the reply comment period is limited to responding to comments, not to raise new issues.

## c. Make sub-regulatory guidance transparent.

Transparency and opportunities for public input are important for sub-regulatory guidance as well. Although guidance documents, by definition, do not have the force of law, regulated entities and sometimes enforcement officials often treat them as if they do. The Trump administration [required](#) agencies to “take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public.” These transparency requirements of [E.O. 13891](#) are supported by recommendations of the American Bar Association and [Administrative Conference of the United States](#), and the Biden administration should retain them.

## 5. Regulate Smarter

If all you have is a hammer, everything looks like a nail. The hammer that regulators wield is the ability to command certain behaviors or investments.

## a. Choose regulatory forms that don't impede innovation.

Both [economic theory](#) and [empirical research](#) suggest that the form a regulation takes can have significant impacts on innovation and productivity, with regulations that rely on economic incentives and information provision being superior to those based on command and control. Regulatory humility demands attention to regulatory form. Recognizing this, E.O. 12866 encourages agencies to “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.” E.O. 13563 urges agencies to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public [including] warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.”

If the Biden administration is to achieve its ambitious regulatory agenda without damaging economic growth and productivity, it must use regulatory forms that don't discourage private sector innovation, entrepreneurship, and creativity. It should consider whether regulation at the federal level will achieve superior results to policies that defer to states and local governments which can better reflect diverse situations and preferences.

## b. Focus on clarity and consistency.

Smarter regulation also depends on clarity and consistency. [Recent research](#) suggests that regulatory uncertainty can impede [investment and employment growth](#). E.O. 13563 acknowledges that regulatory requirements “may be redundant, inconsistent, or overlapping.” It encourages agencies to choose approaches that “promote such coordination, simplification, and harmonization,” and identify “means to achieve regulatory goals that are designed to promote innovation.”

## Embracing Regulatory Humility

The Biden administration can increase the likelihood that its ambitious regulatory agenda will actually achieve its goals by embracing regulatory humility. That requires a disciplined approach to understanding regulatory impacts and tradeoffs; maintaining practices that encourage accountability; a commitment to learning, feedback, and evaluation; an openness to diverse views and inputs; reliance on flexible regulatory tools; and an appreciation that even the most well-intentioned and intelligent regulators will lack essential information on how policies will work in practice. Regulatory agencies naturally take an adversarial posture when enforcing regulations against those who violate them, but it is important to remember that the process of *designing* regulations should not be adversarial. Agencies need to balance competing considerations, and conduct a holistic, evidence-based assessment of all regulatory impacts. The time-tested principles in President Clinton's E.O. 12866 and President Obama's E.O. 13563 show how.