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Public Interest Comment¹ on

The Office of Management and Budget's
2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations

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The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the GW Regulatory Studies Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Office of Management and Budget's 2015 Draft Report to Congress offers suggestions for improving the information value of the Report, and does not represent the views of any particular affected party or special interest.

Introduction

Pursuant to the Regulatory Right-to-Know Act,³ the Office of Management and Budget (OMB) submits to Congress each year an accounting statement and associated report providing estimates of the total annual benefits and costs of federal regulations; an analysis of impacts of Federal regulation on State, local, and tribal government, small business, wages, and economic growth; and recommendations for reform.

¹ This comment reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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³ Consolidated Appropriations Act of 2001 (H.R. 5658, section 624, P.L. 106-554).

OMB's 2015 Draft *Report to Congress on the Benefits and Costs of Federal Regulations* (the Report) provides the public valuable information both on estimates of the effects of major executive branch regulations and also on OMB's focus and priorities. It also offers valuable recommendations that we agree "would allow for impact assessments to be more evidence-based, logically sound, and effectively communicated."⁴ This comment focuses on several topics covered in the Report, offers suggestions for improving retrospective review as a means to improve ex ante regulatory decisions, and raises questions about the private benefits associated with energy efficiency standards and the co-benefits attributed to some air quality standards.

Retrospective Review

Through a series of Executive Orders, including E.O. 13563 and E.O. 13610, President Obama has encouraged federal regulatory agencies to review existing regulations "that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." E.O. 13563 additionally instructs executive branch agencies to develop and submit to the Office of Information and Regulatory Affairs (OIRA) retrospective review plans "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Writing rules to facilitate review

Building off of these executive orders, in its draft report OMB notes the importance of planning for review during the rulemaking stage:

In addition, and importantly, rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects, including consideration of the data that will be needed for future evaluation of the rules' ex post costs and benefits.⁵

Writing and designing rules to facilitate ex post measurement is a critical component of retrospective review. It requires agencies to clearly identify the problem that a rule is intended to solve, state how progress will be measured, assess how these measures are connected to real-world outcomes, and identify the data sources that will be used to measure them. In 2014, the GW Regulatory Studies Center assessed 22 high-priority rules proposed by executive branch and independent agencies to evaluate whether agencies include plans for retrospective review as a part of their regulations. As part of this retrospective review project, we identified five key

⁴ OMB, page 59

⁵ OMB, page 7

components within a rule that would enable measurement after the fact and evaluated rules on how well they met these criteria.

Our analysis finds that agencies are not doing a good job of planning prospectively for retrospective review.⁶ Of the 22 rules we examined, not a single one included a plan for review. Agencies did a slightly better job of including five smaller components that could enable agencies to evaluate the effects of their rules: identifying the problem the rule seeks to address, including metrics that can be used to measure the success of the rule, linking proposed standards to desired outcomes, collecting information to measure effects, and committing to a timeframe for reviewing outcomes. Our findings are expressed in the table below.

The Senate is currently considering S. 1817, the Smarter Regulations Through Advance Planning and Review Act of 2015, which would require agencies to include a framework for reassessing a major rule at both the proposed and final rule stages. In light of the policy implications of proposed legislation and the findings of our recent research, we recommend that OMB consider providing agencies with guidance on how to write their rules to better facilitate ex post measurement. Specifically, OMB should encourage agencies to do the following in their proposed rules, especially economically significant rules:

Percent of Rules that Met Criteria for Prospective Retrospective Review	
Problem identified	64%
Metrics	36%
Measuring linkages	0%
Information collection	23%
Timeframe	0%

- Agencies should always identify quantifiable and directional goals of their rules. This information is crucial for assessing whether a rule has fallen short of, met, or exceeded its intended target. Independent agencies especially should make efforts to outline what they intend for their rules to accomplish. This transparency allows the public to know which benefits to expect in return for the opportunity costs incurred by new regulation, and what observers should strive to measure to assess the success of a rule.
- After determining the goals of their rules, agencies should proactively consider how to gather the information necessary to understand whether these goals are met. Considering information collection issues well in advance is necessary due to the requirements of the Paperwork Reduction Act. However, in many instances, it may be possible for an agency to rely on an existing information collection or agency database to aggregate the data necessary to evaluate a rule ex post. In these cases, agencies should assess existing data

⁶ Miller, Sofie E. *Learning from Experience: Retrospective Review of Regulations in 2014*. The George Washington University Regulatory Studies Center. November 3, 2015.

resources during the rule drafting stage and commit to evaluating relevant database information on a recurring basis.

- Given the enormous estimated benefits—and, sometimes, enormous costs—that result from federal regulation, agencies should prioritize establishing strong linkages between the rules they issue and the benefits that are meant to result. This includes a consideration of mediating factors that may have accomplished goals in the absence of the rule, or undermined achievement of the stated metrics. Understanding the counterfactual and determining linkages between the rule and the measured outcomes is necessary to understand why an outcome was not achieved or to ensure that the policy itself resulted in the desired outcomes, rather than other factors beyond the agencies’ control.

Improving Regulatory Impact Analyses

Retrospective review is an opportunity to evaluate the success of existing rules and improve the regulatory impact analyses (RIAs) used to assess the impacts of future rules ex ante. The purpose of RIAs, as OMB notes in the Report, is to inform policy options when a regulatory decision is being made.⁷ However, in many cases RIAs do not necessarily serve that purpose. Too often, RIAs are conducted after a regulatory decision has already been made, and serves to justify or reinforce a decision rather than to inform it.⁸ This limits the usefulness of RIAs as decision tools.

The George Washington University Regulatory Studies Center recently released two working papers that offered recommendations for improving RIAs. One evaluates the potential for agencies to conduct “back-of-the-envelope” analyses of multiple policy options at the very beginning of the decision process. Back-of-the-envelope, or “BOTE,” analysis has the potential to inform regulatory decisions before they are made, allowing analysts to weigh the rough costs and benefits of multiple options.⁹ OMB may consider how such an analytical structure could fit into the existing regulatory process to reinforce the role of RIAs as tools to inform regulatory decisions.

As we have noted in comments on previous OMB Reports, estimates of the benefits and costs of regulations, individually and in the aggregate, conceal great uncertainty. The Reports acknowledge this, but the same limitations are identified in each annual report with little evidence that agencies are working to reduce key uncertainties. A second GW Regulatory Studies Center working paper focuses on improving the use of science in rulemaking and offers

⁷ OMB, p. 8

⁸ Dudley, Susan. Prepared statement for U.S. Senate Homeland Security and Governmental Affairs Committee hearing on “[Review of Regulatory Reform Proposals](#).” September 16, 2016.

⁹ Carrigan, Christopher, & Stuart Shapiro. *What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis*. The George Washington University Regulatory Studies Center. October 2014.

ten recommendations, of which four are particularly relevant for OMB to consider as it works to improve the usefulness of RIAs for decision-making:

- **Recognize that risk assessment necessarily involves assumptions and judgments as well as pure scientific inputs**, and establish procedures and incentives to make more transparent the effect different credible risk assessment inputs and assumptions have on the range of plausible outcomes. In this context, OMB offers a new recommendation that is worth pursuing: “An analysis that contains a set of unexplained results should be targeted for revision; indeed, the explanation of how quantitative (or non-quantitative) conclusions have been reached is at least as important as the conclusions themselves.”¹⁰
- **Increase the robustness of regulatory science by institutionalizing reforms that encourage greater feedback and challenge.** Successful reforms might involve pre-rulemaking disclosure of risk assessment information to engage broad public comment on the proper choice of studies, models, assumptions, etc. long before any policy decisions are framed, and “positions” established.
- **Institutionalize feedback through retrospective review of regulatory outcomes.** Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide a powerful incentive to improve the use of science for predicting the benefits of interventions. The five-year NAAQS reviews, for example, could be required to apply quasi-experimental (QE) techniques to gather and analyze epidemiology data and health outcome trends in different regions of the country and compare them against predictions.
- **Regulations should be designed to facilitate natural experimentation and learning.** Designing regulations from the outset in ways that allow variation in compliance is essential if we are to go beyond observing mere associations and gather data necessary to test hypotheses of the relationship between regulatory actions, hazards, and risks.¹¹

With respect to this last point, OMB recognizes that, to better enable measurement of rules’ effects, a high priority “is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law).”¹² Joseph Aldy’s recent report for the Administrative Conference of the United States emphasizes

¹⁰ OMB Report p. 58

¹¹ Dudley, Susan. [*Science and Policy: A Case Study of the National Ambient Air Quality Standards*](#). The George Washington University Regulatory Studies Center. September 2015.

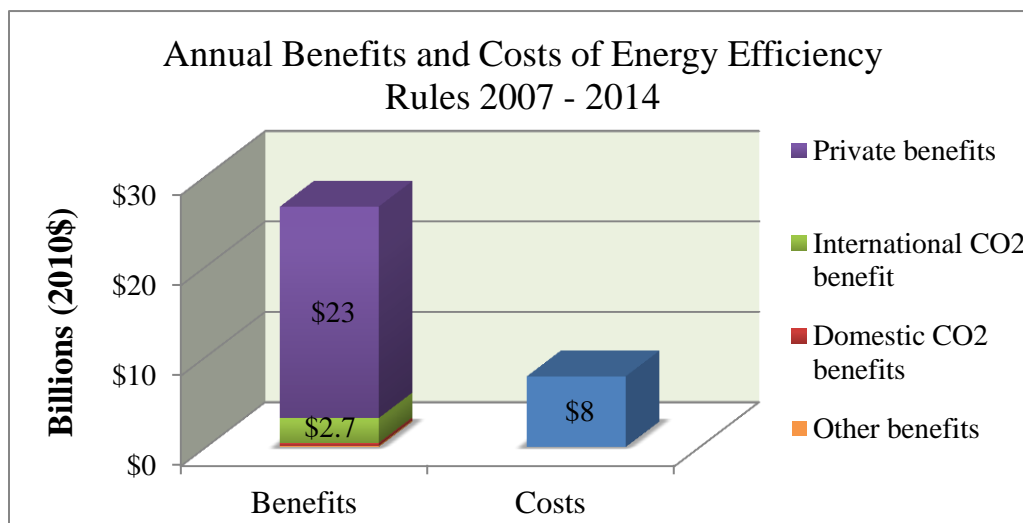
¹² OMB, p. 7

the importance of writing rules with experimental and quasi-experimental designs to structure the rule for ex post review and ensure collection of relevant data.¹³

Energy Efficiency: “Extraordinary Claims Require Extraordinary Evidence”

In tables 1-1 and 1-2, OMB lists twenty Department of Energy regulations with between \$16.4 billion and \$29 billion in annual benefits (in 2010 \$), all of which were issued by the Office of Energy Efficiency and Renewable Energy (EERE). Six of these rules, tallying up to \$8.8 billion (2010 \$) in annual benefits, were finalized in the last fiscal year covered by the report. These rules establish energy and water efficiency standards for household and commercial appliances, including refrigerators, furnaces, lamps, and freezers.

Considering the number of energy efficiency rules and their increasing use in recent years, it is important to consider what benefits these rules provide to the public. To this end, the George Washington University Regulatory Studies Center released a working paper this fall tallying the cumulative benefits and costs of energy efficiency standards promulgated by EERE between 2007 and 2014. We find that the vast majority—88%—of the regulatory benefits claimed by EERE in these rules are “private benefits” that accrue to consumers and commercial purchasers when they no longer have the option to buy appliances that use more energy or water long-term.¹⁴ The figure below represents the distribution of benefits and costs from energy efficiency rules issued between 2007 and 2014.



¹³ Aldy, Joseph. [Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy](#). A report for the Administrative Conference of the United States, Washington, DC. Page 6. 2014.

¹⁴ Miller, Sofie E. [Whose Benefits Are They, Anyway? Examining the Benefits of Energy Efficiency Rules 2007 – 2014](#). The George Washington University Regulatory Studies Center. September 2, 2015.

These “private” benefits are the cost savings on energy or water bills that consumers are estimated to enjoy over the life of a more energy efficient appliance. Because this cost saving is a benefit felt exclusively by the private consumer or business, rather than society at large, the benefits that justify EERE’s energy efficiency rules are “private benefits” rather than public benefits. This is in contrast to the language of E.O. 12866, which instructs regulators to promulgate only such rules as are made necessary by “compelling *public* need.” Without the \$23 billion in private benefits, the costs of these standards outweigh the public benefits by \$4.6 billion (2010\$) annually.

Where do these \$23 billion in private benefits come from? In many cases, EERE’s regulations do not provide consumers with new choices: often, products meeting EERE’s efficiency standards are already available in the market. Instead of increasing product options, these efficiency standards typically reduce the types of products available by mandating an efficiency threshold. The logic that EERE is willing to follow seems to be that consumers are willing to pay more for fewer options, an extraordinary claim indeed.

Because consumers are faced with a tradeoff between upfront costs and long-term savings when they purchase energy-using durables, these purchases provide a direct example of how consumers and businesses value present versus future consumption. Instead of taking these revealed preferences as indications of legitimate preferences, DOE argues that they reveal behavioral biases that could be resolved through regulation.

In the Report, OMB recommends that regulatory analysis should conform to the guidance that “extraordinary claims require extraordinary evidence.” OMB uses as an example the idea that an agency would calculate a benefit to a regulated agent from a rule that violated the agent’s revealed preferences:

As an example, consider a regulation mandating that security personnel, for the sake of having a better view of potential hazards or the ability to respond more quickly to threats, stand while on duty. The agency implementing this regulation may state in its draft impact analysis that the affected security workers experience a rule-induced benefit, rather than a cost (i.e., discomfort), because sitting for long periods of time has been shown to have negative health consequences; this claim ignores the security workers’ revealed preference for sitting, and therefore, unless it can be supported by detailed evidence on the affected population’s inability to maximize utility (including both health and comfort), it should be omitted from the analysis.¹⁵

¹⁵ OMB, p. 57

The parallel to energy efficiency regulations is clear: EERE claims significant private benefits to consumers from being mandated to buy only high-efficiency appliances, regardless of what their previous purchasing habits revealed about their preferences. Such an extraordinary claim, according to OMB, requires justification from extraordinary evidence. In a recent article, Mannix and Dudley agree:

How much is the average consumer willing to pay in order to be prohibited from buying, for example, an incandescent light bulb? After all, prior to the regulation, not buying the incandescent bulb is free. Why would anyone pay to have that choice imposed on them?¹⁶

If it were true that consumers are willing to pay to have their options restricted it would mean that, absent choice-constricting regulation, consumers are missing out on billions of dollars of benefits annually. In a recent paper Gayer and Viscusi note that a more likely explanation is that “there is something incorrect in the assumptions being made in the regulatory impact analyses.”¹⁷

OMB’s recommendation to agencies is a good one, and OMB would be wise to examine how well EERE follows this guideline when issuing rules that result in large private benefits at the expense of product choice and consumer preferences.

Co-Benefits

OMB recommends¹⁸ that “Benefits and costs of a regulation should be assessed in a consistent manner.” Although it does not say so explicitly, this recommendation appears to be directed to the problem of co-benefits. In recent years, EPA has increasingly used ancillary co-benefits to justify its regulations.¹⁹ The Report notes “the large estimated benefits of EPA rules issued pursuant to the Clean Air Act are mostly attributable to the reduction in public exposure to fine particulate matter (referred to henceforth as PM).” In the 2012 mercury and air toxics rule, 99% of total benefits derived, not from any reduction in mercury emissions, but from ancillary reductions in PM emissions. These PM benefits presumably could be achieved at lower cost by regulating PM directly, which EPA already does.²⁰ The mercury rule eventually was vacated by

¹⁶ Mannix, Brian F., and Susan E. Dudley. 2015. “The Limits of Irrationality as a Rationale for Regulation.” *Journal of Policy Analysis and Management* Vol. 34, No. 3, page 707.

¹⁷ Gayer, Ted, and Kip Viscusi. 2013. “Overriding consumer preferences with energy regulations.” *Journal of Regulatory Economics* 43:248–264.

¹⁸ OMB, p. 56

¹⁹ Dudley, Susan. “[OMB’s Reported Benefits of Regulation: Too Good to be True?](#)” *Regulation*, Vol. 36, Number 2. Summer 2013.

²⁰ Dudley, Susan. “[Justices debate benefits and costs of EPA mercury power plant rule.](#)” *The Conversation*. March 31, 2015.

the Supreme Court,²¹ and the agency's reliance on co-benefits was questioned in the course of the litigation.²²

In principle, a benefit-cost analysis should account for all of the effects of a regulatory decision: indirect as well as direct, delayed as well as immediate, improbable as well as probable, unintentional as well as intentional. In practice, the analyst must define reasonable bounds on what to include. The challenge is to define those boundaries in a way that not only produces a reasonably accurate and complete analysis, but also one that remains unbiased. The problem with "co-benefits" is not that ancillary benefits are being included, but that they are being included selectively. Even the name suggests that the boundaries of the analysis were adjusted to capture additional benefits while excluding additional costs.

The discussion in the Report indicates that OMB recognizes the problem: "Consistency should also be kept in mind when assessing ancillary effects of a rule; estimating indirect benefits without attempting to estimate indirect costs, or estimating indirect costs without attempting to estimate indirect benefits, can yield very misleading results as regards rule-induced net benefits."

International Trade and Investment Effects

In its recommendations, the Report notes that it continues to support earlier recommendations for "regulatory cooperation with international trading partners," among others. One important step for better international regulatory cooperation is early notice of regulatory activity that may affect international trade and investment. Since 2008, OMB has asked agencies to flag such regulations under development in the semi-annual Unified Agenda of Regulatory and Deregulatory Activity. A recent GW Regulatory Studies Center working paper quantifies how many of the thousands of rules published every year by U.S. agencies are likely to have a significant effect on international trade and investment and analyzes how well agencies are performing at flagging these rules.²³ It finds that most agencies are not accurately identifying many economically significant regulations with international effects through the Unified Agenda.

Conclusions

This report is valuable in that it presents, in a uniform format, agencies' prospective estimates of the benefits and costs of economically significant regulations. The Report also offers useful

²¹ Michigan et al v. EPA. http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf

²² Dudley, Susan. "[Supreme Court's EPA Mercury Ruling is a Victory for Common Sense Regulation.](#)" *The Conversation*. June 30, 2015.

²³ Perez, Daniel R. [Identifying Regulations Affecting International Trade and Investment: Better Classification Could Improve Regulatory Cooperation.](#) The George Washington University Regulatory Studies Center. November 10, 2015.

recommendations for improving the analysis supporting new regulations and how regulations are presented to the public. However, as we have noted in comments on previous years' Reports,²⁴ the representation of trends is misleading.

Figure 1-1 of the Report presents annual benefits and costs for each of the 10 fiscal years covered. OMB builds this graph with agencies' prospective estimates developed prior to a rule's issuance, but removes benefits and costs for regulations that have since been vacated by courts or superseded by subsequent implementing regulation. While this is necessary to avoid double counting when aggregating regulatory benefits and costs across years to estimate totals, it skews estimates of benefits and costs to current years when looking at trends. Current year estimates include agencies' most optimistic estimate of the outcome of their newly promulgated regulations. It will not be until future years that adjustments will be made to account for subsequent regulations or court actions.²⁵ Further, OMB appears to make these adjustments inconsistently. The Supreme Court has vacated EPA's 2011 Mercury and Air Toxics rule, but it is still included in OMB's tally,²⁶ while previous rules aimed at these emissions are excluded.²⁷

OMB's recommendation to agencies that "extraordinary claims require extraordinary evidence" should be applied to the energy efficiency rules that result in an estimated \$29 billion in annual benefits in OMB's Report. OMB would be wise to examine how well EERE follows this guideline when issuing rules that result in large private benefits at the expense of product choice and consumer preferences.

Retrospective review of federal rules continues to be a priority for OMB. As OMB evaluates options for increasing the efficacy of agencies' reviews, it should consider establishing guidelines to agencies on how to write regulations that better facilitate ex post measurement of results. This guidance could provide agencies with the tools they need to begin prospectively planning for retrospective review at the beginning of the rulemaking process.

²⁴ <http://regulatorystudies.columbian.gwu.edu/public-comments>

²⁵ Note that OMB does not attempt to revise ex ante estimates of benefits and costs based on actual experience with a regulation's effects, so under this approach, past year estimates can only be reduced.

²⁶ OMB, page 40.

²⁷ OMB, footnotes 19 and 31.