





## I. INTRODUCTION

When General George Washington makes his entrance in the hit Broadway musical *Hamilton!*, his first words are, “We are outgunned ... outmanned ... outnumbered ... outplanned.”<sup>1</sup> Washington presciently described the position of the Chief Executive – and his Office of Information and Regulatory Affairs (OIRA) – vis-à-vis the administrative agencies that write regulations. Since 1981, OIRA’s regulatory review responsibilities have waxed and waned with the volume of regulations subject to review. Over that same time period, the office acquired major new responsibilities, such as production of the annual report to Congress on the benefits and costs of federal regulations. Since April 2018, OIRA has also been tasked with reviewing Internal Revenue Service rules, which it did not previously review.<sup>2</sup> Yet OIRA’s staff has shrunk from 97 in 1980 to about 53 today, while the number of regulators in agencies has grown from 115,000 in 1980 to 192,000 in 2019 – an increase of 68 percent.<sup>3</sup> OIRA’s staff is outnumbered by regulatory agency staff by about 3600 to 1.<sup>4</sup> Given the enormous disparities in resources and the significant potential reductions in human welfare if regulation is not adequately informed by economic analysis, this is truly a matchup of David versus Godzilla.<sup>5</sup>

All presidents since President Reagan have issued executive orders requiring agencies to conduct comprehensive regulatory impact analysis (RIA) for significant regulations to ensure that regulatory decisions solve social problems in a cost-beneficial manner.<sup>6</sup> President Clinton’s Executive Order 12866 outlines the principal requirements that currently apply.<sup>7</sup> Every subsequent administration has reaffirmed Executive Order 12866.<sup>8</sup>

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<sup>1</sup> *Right Hand Man*, HAMILTON, Avatar Studios (2015), <https://genius.com/Original-broadway-cast-of-hamilton-right-hand-man-lyrics>.

<sup>2</sup> Brent McIntosh and Neomi Rao, Memorandum of Agreement, The Department of the Treasury and the Office of Management and Budget, Review of Tax Regulations Under Executive Order 12866 (April 11, 2018).

<sup>3</sup> Figures calculated by authors from data in Susan Dudley & Melinda Warren, REGULATORS’ BUDGET: MORE FOR HOMELAND SECURITY, LESS FOR ENVIRONMENTAL REGULATION (2018), Appendix A-3. Calculations exclude independent regulatory agencies and the Transportation Security Administration, which accounts for more than 53,000 full-time equivalent employees because it took over airport security screening after 9/11. OIRA’s full-time equivalent employees have increased slightly from a low of 44 in 2010.

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

<sup>5</sup> Richard A. Williams, “David vs. Godzilla, OIRA and the Federal Agencies,” Testimony Before the House Committee on Oversight and Government Reform, Subcommittee on Government Operations, March 15, 2016.

<sup>6</sup> See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>7</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993);

<sup>8</sup> Exec. Order 13258, “Amending Executive Order 12866 on Regulatory Planning and Review” (February 26, 2002); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Dominic J. Mancini, *Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs”* 2 Memo M-17-21 (April 5, 2017) (“In addition, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory actions, including deregulatory actions, when making regulatory decisions, and issue regulations only upon a reasoned determination that benefits justify costs.”)

However, experience demonstrates that the executive orders, and Office of Management and Budget (OMB) guidance<sup>9</sup> implementing those orders, have been insufficient to ensure that regulation accomplishes important public goals without imposing unnecessary costs on the economy. Even when agencies conduct detailed RIAs, there are often significant gaps in the analysis.<sup>10</sup> The quality of the analyses and use of economic analysis to inform regulatory decisions falls far short of the standards enunciated in executive orders. Consider that in any given year, less than one third of all major<sup>11</sup> final rules are accompanied by analysis of both monetized benefits and monetized costs.<sup>12</sup> This is a considerable failure, given that economically significant rules represent only about 1 percent of all rules.

Perhaps the most significant failure, beyond incomplete analysis of proposed regulations, is the failure to track successes and failures of regulatory agencies. As a result, neither the president nor Congress nor the public have any knowledge of whether the billions (if not trillions) of dollars of expenditures to produce and comply with regulations are improving outcomes for the American people. In fact, even the agencies themselves don't know whether their regulatory programs are making improvements. Without such information, knowing which programs, or even agencies, should continue to be funded is impossible, even if they appear to be well-intentioned.

The partial government shutdown in January 2019 provides further evidence of public confusion. While some worried about falling airplanes or food contamination outbreaks, others noted that, outside of Washington and dire news reports, people not directly involved in the regulatory world didn't notice anything wrong.<sup>13</sup>

Clearly identifying the goals of a particular regulation and choosing the best possible option for achieving that goal (qualities a good RIA is expected to highlight) give agencies the best possible chance for achieving positive regulatory outcomes. The executive orders and OMB guidance lay out sound principles to guide regulatory analysis and decisions. We propose four managerial steps any administration could take to better enforce the requirements in the executive orders and to help ensure positive outcomes from regulatory programs: (A) Define success at the outset and link regulations to the agency's strategic goals, (B) Use budget recommendations to enforce analytical requirements and achievement of agency GPRA objectives, (C) Link requests for fiscal budgets to regulatory budgets in the president's annual budget requests, and (D) Reward regulatory results, not regulatory activity.

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<sup>9</sup> U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS (2003), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

<sup>10</sup> See *infra* Section II.

<sup>11</sup> A "major" rule is a rule whose economic impact exceeds \$100 million annually. Major rules include economically significant rules from executive branch agencies and rules with equivalent impact from independent agencies.

<sup>12</sup> See Richard Williams, *Comparison of Final Rules with Monetized Benefits and Costs*, MERCATUS CTR. AT GEORGE MASON UNIV. (Apr. 23, 2012), <http://mercatus.org/publication/comparison-final-rules-monetized-benefits-and-costs>; Jerry Ellig, *Evaluating the Quality and Use of Regulatory Impact Analysis* 11-12 (Mercatus Ctr. at George Mason Univ., Working Paper, 2016).

<sup>13</sup> <https://www.theatlantic.com/politics/archive/2019/01/capitol-hill-aides-wait-disaster-end-shutdown/580639/>.



Without this information, regulatory choices are based on intuition (which may be faulty) or simply faith that the regulation will produce a positive outcome. Given the enormous influence that both the benefits and costs of regulation have on our day-to-day lives, decision-makers have a responsibility to act based on knowledge of regulation's likely effects.

Regulatory review by OIRA is the president's principal institutional tool for managing the development of regulations. Different administrations may have different approaches and emphasis,<sup>21</sup> but it is clear that presidents of both political parties value centralized regulatory review.<sup>22</sup> It is also clear that enforcement has been a major issue for presidents from both parties. For example, President Carter commented that although he knew "dealing with the federal bureaucracy would be one of the worst problems [he] would have to face," at the end he realized it had been even "worse than [he] had anticipated."<sup>23</sup>

Some evidence shows that the requirements in the executive orders, coupled with review by OIRA, have induced agencies to engage in more thorough analysis than they otherwise would have undertaken. For example, "prescriptive" regulations that contain mandates or prohibitions receive more intensive OIRA review than regulations that implement budget programs, and prescriptive regulations tend to have more thorough RIAs.<sup>24</sup> Agencies also produce higher-quality RIAs when OIRA reviews the regulation for a longer period of time.<sup>25</sup> Agencies produce lower-quality analysis and explain its influence on decisions less extensively when OIRA is headed by an acting administrator, who has less political clout in the administration than a presidential appointee.<sup>26</sup> Case studies document instances in which regulatory analysis helped improve regulatory decisions by providing additional options regulators could consider or unearthing new information about benefits or costs of particular modifications to the regulation.<sup>27</sup>

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<sup>21</sup> Sally Katzen, *Cost-Benefit Analysis: Where Should We Go from Here?*, 33 *FORDHAM URB. L.J.* 101 (2005).

<sup>22</sup> *See Id.*; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 *HARV. L. REV.* 1075 (1986). *See also* Eric Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 *U. CHI. L. REV.* 1137 (2001) (arguing that presidents, regardless of ideology, can use analytical requirements and centralized regulatory review to mitigate the principal-agent problems inherent in managing regulatory agencies).

<sup>23</sup> Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2273 (2001).

<sup>24</sup> *See* Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 *ADMIN. L. REV. (SPECIAL EDITION)* 179 (2011).

<sup>25</sup> *See* Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* 7 *J. BEN. COST. ANAL.* 523 (2016); Stuart Shapiro & John F. Morrall III, *Does Haste Make Waste? How Long Does it Take to Do a Good Regulatory Impact Analysis*, 20 *ADMIN & SOC'Y* 1 (2013).

<sup>26</sup> Ellig & Fike, *Id.* at 539-40 (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis); Ellig, *supra* note 12, at 73-75 (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis of alternatives, benefits, and the extent to which the agency explained how the analysis affected its decisions); Reeve Bull and Jerry Ellig, *Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis*, 70 *ADMIN. LAW REV.* 101, 163 (2018) (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis of alternatives, benefits, and the extent to which the agency explained how the analysis affected its decisions).

<sup>27</sup> REFORMING REGULATORY IMPACT ANALYSIS (Winston Harrington et al. eds., 2009); RICHARD D. MORGENSTERN, *ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT* (1997); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).



- The Mercatus Center’s Regulatory Report Card assessed the quality and use of RIAs for economically significant, prescriptive regulations that cleared OIRA review between 2008 and 2013. It awarded scores that range from 0 to 20 points for the quality of analysis.<sup>35</sup> For the period 2008 to 2013, the average Report Card score for “prescriptive” regulations that contain mandates or prohibitions was 10.7 out of 20 possible points.<sup>36</sup> That’s equivalent to an “F.” The highest-scoring regulation ever evaluated received 18 points, equivalent to an A-.<sup>37</sup>
- The number of regulations accompanied by information on monetized benefits and costs is only a tiny fraction of the overall number of proposed rules.<sup>38</sup> For example, in the 2008-2013 period, 14,795 federal regulations were proposed. About 9.5 percent of these were considered significant and hence eligible for OIRA review. About 2 percent of the rules were economically significant, with a full RIA required. Of the 1 percent of rules that were prescriptive regulations rather than budget regulations, only 82 – 0.6 percent of all rules proposed – had monetized figures for both benefits and costs.<sup>39</sup>
- For two-thirds of the regulations evaluated in the Regulatory Report Card between 2008 and 2013, agencies provided no explanation of how they used the RIA to inform their decisions.<sup>40</sup>
- While executive branch oversight by OIRA has helped, one former OIRA administrator described OIRA oversight as producing “marginal results.”<sup>41</sup>

Myriad causes contribute to these shortcomings in the quality and use of regulatory analysis and the failures of regulatory agencies to report outcome results of their regulatory programs. Scholars and commentators have written extensively about the need for new executive orders<sup>42</sup> or legislation<sup>43</sup> to correct the problem. Here, however, we focus on managerial reforms that any administration could implement without new executive orders or legislation.

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<sup>35</sup> The Report Card originally consisted of 12 criteria based on requirements in Executive Order 12866. Trained evaluators award the RIA a score of 0-5 points on each criterion. It was later revised to cover 6 criteria based on the Executive Order’s substantive requirements. The scoring methodology has been published in a peer-reviewed journal, and statistical analysis finds that the evaluator training results in consistent scoring across evaluators. See Jerry Ellig & Patrick A. McLaughlin, *The Quality and Use of Regulatory Analysis in 2008*, 32 RISK ANALYSIS 255 (2012). For an explanation of the scoring systems and steps taken to ensure that the scores are comparable across the two systems, see Ellig, *supra* note 12, at 14-16.

<sup>36</sup> Ellig, *Id.* at 18.

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

<sup>38</sup> Williams, *supra* note 12.

<sup>39</sup> Ellig, *supra* note 12, at 11-12.

<sup>40</sup> Ellig, *supra* note 12, at 25.

<sup>41</sup> Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101, 104 (2011).

<sup>42</sup> Robert Hahn & Cass Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

<sup>43</sup> Christopher Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. LAW REV. \_\_\_ (2017).



### III. Improving the Quality of Regulatory Impact Analysis

#### a. Define Success at the Outset and Link to the Agency's Strategic Goals

Agencies often fail to adequately assess the nature and significance of the problems they are trying to solve with regulations, despite specific language in Executive Order 12866 directing them to do so.<sup>44</sup> As a result, they often fail to indicate clearly what counts as a successful outcome of a proposed regulation and how long they expect before that successful outcome will be achieved. Consequently, it is hard to identify whether the agency is making progress, the point at which the regulation will no longer be necessary, or the point at which the problem will largely be solved and no additional regulation will be necessary. In the absence of this information, regulations are likely to be less effective and more costly than necessary.

The Government Accountability Office and independent scholars have found that few agencies engage in genuine retrospective review of regulations – i.e., evaluations to ascertain the actual benefits and costs of regulations after they are implemented.<sup>45</sup> Scholars and policymakers repeatedly call for greater focus on retrospective analysis of regulations.<sup>46</sup> For the years 2008-2012, the Mercatus Center's Regulatory Report Card included criteria that assessed whether the agency articulated goals and measures to gauge the results of the regulation and indicated what data it would use to evaluate the regulation's results after it is adopted.<sup>47</sup> Just one regulation in the sample had an RIA that included a reasonably complete framework for retrospective analysis of the regulation's effects.<sup>48</sup> Indeed, it is difficult to find any discussion of goals, measures, or provisions for retrospective review at all in the NPRMs or RIAs for economically significant regulations proposed during those years – even when the RIA contained information that could have been used to develop goals, measures, and retrospective review plans.<sup>49</sup> The quality of analysis criterion with the lowest score is analysis of the systemic problem the regulation seeks to solve – another critical piece of information needed to define what counts as success.<sup>50</sup>

President Carter's Executive Order 12044, issued 41 years ago, provided that an agency head could not approve a regulation until determining that the agency had developed a plan to

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<sup>44</sup> Exec. Order 12,866, *supra* note 7, § 1(b)(1).

<sup>45</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, RE-EXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007); Randall Lutter, *The Role of Retrospective Analysis and Review in Regulatory Policy*, (Mercatus Ctr. at George Mason Univ., Working Paper No. 12-14, 2012); Joseph E. Aldy, LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY, Report Prepared for the Administrative Conference of the United States (2014).

<sup>46</sup> In 2002, Robert Hahn and Cass Sunstein recommended that agencies should be required to generate retrospective analysis of their major regulations with the help of OIRA in identifying which regulations qualify as major and thus worthy of retrospective analysis. See Hahn and Sunstein, *supra* note 42, at 1527. In 2006, former OIRA administrator Sally Katzen recommended agencies focus less on cost-benefit analysis methodology, and instead focus on retrospective review, believing that society would get more rational regulations if an agency's limited resources were spent examining previous regulations and institutions. See Katzen, *supra* note 21.

<sup>47</sup> Ellig & McLaughlin, *supra* note 35; Ellig, *supra* note 12 at 14.

<sup>48</sup> Ellig, *Id.* at 26.

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

<sup>50</sup> *Id.* at 19.



required to group related regulations and any accompanying guidance into regulatory programs and evaluate the effectiveness of these programs in accomplishing their strategic goals. Since the majority of regulatory costs do not appear in the federal budget, agencies should also be required to assess the realized public and private costs of their regulatory programs so that they can be compared with the benefits.<sup>59</sup>

When agencies propose regulations, they should be required to identify goals and measures, derived from the agency’s strategic goals, that can be used to evaluate the regulation’s actual effects after it is implemented. Table 1, reproduced from the RIA for a proposed Department of Homeland Security regulation to establish a program to biometrically identify visitors leaving the United States, demonstrates how to match the results and measures of success for a regulation with a department’s strategic goals. The table lists two departmental strategic goals, identifies the goals of the regulatory program that support these strategic goals, and explains how benefits associated with each goal could be measured.

**Table 1. Regulatory Benefits and Measures Tied to Department’s Strategic Goals**

<b>DHS Strategic Goal / Objective Supported</b>	<b>US VISIT Goals / Objectives</b>	<b>Exit Objectives</b>	<b>Exit Benefit</b>	<b>Measure</b>
<b>Strategic Goal 2 - Prevention</b>				
<b>Strategic Obj. 2.1</b> Secure borders against terrorists, means of terrorism, illegal drugs, other illegal activity	<b>Security</b> Enhance the security of the United States (US) citizens and travelers	<b>Biometrically verify aliens’ identity</b>	Increased National Security	Qualitative in terms of cost of terrorism and reduction of costs due to border security as well as unquantified security benefits.
<b>Strategic Obj. 2.6</b> Improve the security and integrity of our immigration system	<b>Integrity</b> Ensure the integrity of the US immigration system	<b>Provide mechanism to identify visa overstays</b>	Improved Detection of Visa Overstays	Percentage of visa overstays (number of visa overstays detected as percentage of total alien travelers) ----- Cost savings from preventing a prior visa overstayer from entering US

<sup>59</sup> JERRY ELLIG, MAURICE MCTIGUE & HENRY WRAY, GOVERNMENT PERFORMANCE AND RESULTS: AN EVALUATION OF GPRA’S FIRST DECADE 154-155 (2012).









regulation. OIRA should make recommendations to OMB budget examiners. Others higher up in the administration would finalize the president's budget recommendations to Congress. The president's budget should include reporting of successes and failures at achieving regulatory goals to ensure that Congress takes the reports seriously.

In addition to rewarding agencies for better compliance with executive orders, future agency budgets should be recommended to Congress based on achieving results. This includes doing the required reports on achieving the goals and, in the longer run, actually achieving those goals. Where agencies continue to expend resources on goals that are not achieved or are not achievable, the president should recommend budget reductions for programs that seek to accomplish those goals. When agencies are acting on specific delegated authorities from Congress, and are unable to achieve results, the president should request legislation to fix poorly performing regulations.

### c. Combine Regulatory Budgets with Agency Budgets

The most comprehensive way of combining evidence-based review of regulations with budgetary consequences would be to fully integrate regulatory budgeting with fiscal budgeting.<sup>71</sup> Under one proposal, the president's budget would include proposed figures for the cost of regulations for each agency that could be used by congressional budget committees as part of their budget resolutions to limit the annual cost of an agency's regulations.<sup>72</sup>

Executive Order 13771 already provides a framework that the executive branch can use to budget regulatory costs. The executive order states that agencies are to be given a projected cost, or cost savings for the costs of their regulations for the coming fiscal year. For example, the Department of Health and Human Services was expected to reduce the cost of its regulations by nearly \$9 billion in fiscal year 2019.<sup>73</sup> If agencies have not been producing results in their regulatory programs, and subsequently have smaller agency budgets for the forthcoming year, it should follow that the budgets allocated them for private regulatory expenditures (i.e., the cost of regulations) should also be decreased.

Civil servants in agencies and OMB should be financially rewarded for identifying regulatory programs that are not working. The reverse is also true. Civil servants, or groups of civil servants who either find better ways to implement existing programs or develop new programs under existing laws that create net benefits for citizens, should also be financially rewarded.

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<sup>71</sup> Jason J. Fichtner, Patrick A. McLaughlin, and Adam N. Michel, *Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget*, PUB. BUDG. & FIN. 40 (2018).

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

<sup>73</sup> [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Regulatory\\_Budget\\_for\\_Fiscal\\_Year\\_2019.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2019.pdf)



#### d. Reward Results, Not Activity

Agencies often state that executives are to be held accountable for achievement of the agency's strategic goals and objectives.<sup>74</sup> It is not clear that this happens.

Regulatory agencies, and particularly the regulatory staff, often regard the production of regulations, rather than the production of benefits for the public, as their primary output. For example, one of us worked at the Food and Drug Administration's Center for Food Safety and Applied Nutrition. Outside of the center director's office was a chart that contained all of the year's regulations, with percentages of the number of regulations finished compared to the planned number of regulations.

Using the number of regulations as a result that managers strive to achieve creates a bias in favor of adopting more regulations, since a steady stream of new regulations indicates that the agency is hard at work "solving problems." Pay, bonuses, career advancement, and recognition go to staff who successfully complete regulatory proceedings.<sup>75</sup> As one agency economist noted, "Success is putting out 10 regulations a year and bigger regulations are bigger successes. They don't say, 'We examined 10 regulations and we decided that 8 did not warrant regulation, which would be better.'"<sup>76</sup>

Another former agency economist who worked on RIAs told us that when money got tight, the agency started awarding plaques in lieu of performance bonuses. Typically, the "performance" that merited the award of a plaque was the completion of a major regulatory proceeding. "I had a colleague who deserved a dozen plaques for regulations she stopped by asking the kinds of questions an economist would normally ask," he noted. But plaques were a reward for regulatory activity, not a reward for improvements in regulatory decisions.

Two managerial changes can help correct this problem.

First, agencies and their managers should be evaluated and rewarded based on the demonstrated benefits they produce for the public, regardless of whether those benefits stem from

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<sup>74</sup> See <https://www.hhs.gov/sites/default/files/hr-resource-library-430-6.pdf>, [https://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01\\_009799.pdf](https://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01_009799.pdf), [www.dtic.mil/dtic/tr/fulltext/u2/a268045.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a268045.pdf).

<sup>75</sup> Richard Williams, *The Influence of Regulatory Economists in Federal Health and Safety Agencies* 6 (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-15, 2008) at 7.

<sup>76</sup> *Id.*

new regulatory actions or decisions not to regulate.<sup>77</sup> Those benefits should be directly linked to achieving agency performance objectives under GPRA. In fact, agencies should be rewarded for putting in realistic “triggers” that allow them, or anyone, to check the outcome performance of a regulation at the appropriate time(s). For example, if the goal is to reduce the rates of obesity by providing more useful information, a survey can be taken after the information has been available and time has been allowed for results to be achieved. The trigger would be the time to check the reduction in average weight. This information on regulatory results from all agencies should also be made available in a consistent format in one area on OMB’s website.

Ideally, agencies should reward decision-makers for the actual net benefits (benefits minus costs) their decisions produce for the public, particularly where it is possible to measure both. This sounds like a tall order, but as Ellig et. al note, “Though establishing causal links between a regulation and outcomes may sometimes be difficult, it beats the alternative: blind faith that a regulation will accomplish the intended results simply because we want it to.”<sup>78</sup> To avoid creating an additional incentive for biased estimates, any such rewards should be based on independent, external evaluations of the effects of regulatory programs, rather than agency self-evaluations.<sup>79</sup> Of course, there can be significant lags before goals are achieved, and it may be difficult to attribute results to particular individuals. In these cases, agencies should be able to base rewards on known observable precursors of results. The key point is that agencies should not reward managers or staff based on regulatory activity or output.

Second, an administration can raise agencies’ and the public’s awareness that the decision *not* to regulate, when appropriate, can produce as much or more benefit to the public as a decision to regulate. Agencies should be required to report annually on the major instances in which they considered regulating but concluded that federal regulation would not be appropriate, either because the problem was insignificant (or would soon become insignificant), alternatives to federal regulation could better accomplish the regulatory objective, there is no federal regulatory solution, or the prospective costs exceeded the prospective benefits. However, care should be taken by OMB to ensure that agencies do not artificially inflate these results by proposing unrealistic goals for regulations and then deciding they are not worth pursuing. It may be advisable to give an agency credit for not regulating only when the agency rejects outside petitions for regulations that fall into one of the above criteria.

These requirements would help correct current incentives that prompt agencies to produce regulations in order to show they are productive. If accompanied by solid, objective analysis, a list of major decisions not to regulate would help build the case for refraining from regulating when the evidence suggests this is warranted.

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<sup>77</sup> Clearly, putting forth “straw dog” regulations just so they can be rejected would not be considered a successful performance outcome.

<sup>78</sup> Ellig et al., *supra* note 59, at 142.

<sup>79</sup> For examples, see Aldy, *supra* note 45 at 17-25.

