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This article was sent to you by jhill@omb.eop.gov0GG?OTheArticle: OMB Proposes Changes in Regulatory Decision-Making
_____   --   OMB?s Office of Information and Regulatory Affairs (OIRA) proposed new guidance February 3 that instructs federal agencies how to make regulatory decisions, including the specific analytical methods that should be employed.
In many ways, this proposed guidance (which is open for public comment until April 3 as part of OIRA?s draft annual report on the costs and benefits of regulation) mirrors the old Clinton-era guidance it revises. But there are subtle differences --which OIRA is in position to enforce through its regulatory review authority -- that raise the bar for new health, safety and environmental protections. Specifically, the guidance:

Emphasizes monetization and ?net benefits? decision-making (follow the anchor link for further discussion). OIRA?s proposed guidance demands that agencies put health and safety benefits in terms of dollars and cents, so they can calculate and demonstrate ?net benefits? (benefits minus costs).

Requires discounting of lives saved in the future. OIRA?s proposed guidance directs agencies to use *two* separate discount rates -- 7 percent and 3 percent -- in calculating the ?value of a statistical life? and present the results of both. This rests on the assumption that a life saved in the future is worth less than a life saved today.

Demands cost-effectiveness analysis for all major health and safety standards. OIRA?s proposed guidance requires cost-effectiveness analysis -- looking at the ratio of *costs* to units of benefits (i.e., number of lives saved) -- for all major health and safety rules.

Promotes use of ?life years? in evaluating fatality benefits. Agencies commonly base benefit estimates on the ?value of a statistical life? (VSL), drawn from the number of lives expected to be saved by regulatory action. On top of VSL estimates, OIRA?s proposed guidance asks agencies to consider using ?value of statistical life years? (VSLY), which looks at the number of life years saved as opposed to the number of lives. This would skew against protections for the elderly, who have fewer life years remaining.

Implies that OIRA will revise agency analysis to compare one protective measure against another. OIRA asks agencies to hand over underlying data, so that it can standardize analysis and compare the *costs* and benefits of protective measures government-wide.

Advises agencies to consider potential technological innovations by regulated entities. Frequently, regulated entities are able to drive down compliance costs over time through technological advances or "learning by doing," which are not typically predicted by cost-benefit analysis. OIRA?s proposed guidance instructs, ?Estimates of costs should be based on credible changes in technology over time,? adding that

?regulatory performance standards and incentive-based policies may lead to cost-saving innovations that should be taken into account.?

Emphasizes monetization and ?net benefits? decision-making. OIRA, under the leadership of John Graham, places cost-benefit analysis at the heart of regulatory decision-making. The phrase ?cost-benefit analysis? conjures the image *of* even-handed, dispassionate decision-making. Yet in the regulatory context, this means putting health, safety and environmental benefits in terms of dollars and cents to show ?net benefits? -- benefits minus costs. This process is not easy and involves many value-laden choices, which OIRA?s guidance specifies (see discussion of ?discounting? below).

Frequently, benefits prove extremely difficult or even impossible to monetize, which skews cost-benefit analysis to favor inaction. For instance, EPA recently proposed a rule to protect the trillions of fish and aquatic organisms that are sucked up and killed each year by power plants, which use rivers, estuaries, and oceans to cool their systems. In performing its cost-benefit analysis, EPA did not monetize losses of invertebrate species, such as lobsters, crabs, and shrimp, as well as endangered or threatened species, nor did it consider the interrelationships of the species affected. Rather, EPA?s estimate was based exclusively on the commercial value of the fish that would have been caught had they not already been killed by power plants. This accounts for less than 20 percent *of* the total fish killed by cooling systems.

EPA acknowledged the problems with its analysis, and used the non-monetized benefits to argue for a relatively protective standard, which it submitted to OIRA for review on September 10, 2001. During its review, however, OIRA forced EPA to adopt a less protective option that showed fewer benefits, but greater ?net benefits? by EPA?s estimates (click here for an extensive discussion). This meant the qualitative benefits -- because they could not be monetized -- were essentially ignored.

OIRA?s guidance enshrines this dismissive treatment of non-quantifiable factors: ?Non-quantifiable benefits or costs may be important in tipping an analysis one way or the other, but you should not use non-quantifiables as ?trump cards,? especially in cases where the measured net benefits overwhelmingly favor a particular alternative.? It?s not clear exactly what this means (What?s meant by ?tipping? or ?trump cards??). But there?s no question about the message to agencies: If you want it counted, it better be monetized. The Clinton guidance also pushes agencies to monetize, but adds that ?we recognize that monetizing some of the effects of regulations is difficult, if not impossible."

Requires discounting of lives saved in the future. ?Discounting? -- already common practice in monetizing benefits -- rests on the premise that a life saved today is worth more than a life saved tomorrow. The further in the future a life is saved as a result of regulatory action today, the more it will be discounted from its ?present value,? and the less likely the action will pass a cost-benefit test. OIRA?s proposed guidance directs agencies to use two separate discount rates -- 7 percent and 3 percent -- in calculating the ?value of a statistical life? and present the results of both. The Clinton guidance refers agencies to OMB Circular A-94, which was revised at the end of the first Bush administration and also advises a 7 percent discount rate. Perhaps the biggest difference is the current OIRA?s commitment and aggressiveness in enforcing this approach.

This analytical and value-laden choice has significant implications for regulation aimed at preventing cancer, which frequently has a long latency period, or other diseases of old age. For example, in the case of EPA?s standard for arsenic in drinking water, the agency argued that it did not have enough data on the latency period for cancer caused by arsenic to apply a discount rate. Yet in an independent analysis that almost led to the repeal of the standard, Robert Hahn and Jason Burnett of the AEI-Brookings Joint Center for Regulatory Studies (a leading proponent of cost-benefit analysis) rejected EPA?s analysis, and instead assumed a latency period of 30 years, applying a 7 percent discount rate over this period --which OIRA?s guidance describes as ?the base-case for regulatory analysis.? This reduced the ?value of a statistical life? from $6.1 million (EPA?s estimate based on studies measuring the extra amount -- or

?wage premium? -- required to attract workers to dangerous jobs) to $1.1 million. (For further discussion, click here.)

Perhaps even more striking, at a discount rate of 5 percent, one life saved today is worth more than one billion lives saved 500 years from now, as Professors Lisa Heinzerling and Frank Ackerman point out in their excellent booklet, Pricing the Priceless.

Demands cost-effectiveness analysis for all major health and safety standards. Cost-effectiveness analysis does not monetize benefits. Rather, it looks at the ratio of costs *to* units of benefits (i.e., number of lives saved). The Clinton guidance says that agencies may use cost-effectiveness analysis in place of a ?net benefits? analysis if they have difficulty monetizing. The new proposed guidance, on the other hand, requires both types of analyses for all major health and safety rules.

Cost-effectiveness analysis avoids some of the problems of monetization of benefits, but nonetheless, it too can lead to skewed and timid decision-making. For example, a cost-effectiveness analysis that looks at costs relative *to* the number of lives saved would miss a whole slew of other significant benefits, such as non-fatal disease or injury, effects on ecosystems, and equity considerations. Moreover, the least protective regulatory alternatives are frequently estimated *to* be the *most* cost-effective. This is because additional levels of protection are forecast to require increasingly demanding and more costly methods. Forcing decisions based on a cost-effectiveness test may lead an agency to inappropriately choose a less protective alternative -- because it *is* the most ?cost-effective.?

In addition, OIRA?s proposed guidance requires agencies to incorporate the concept of discounting for cost-effectiveness analysis, meaning it will appear less cost-effective to save lives in the future as opposed to right away. Again, this could mean fewer protections *to* prevent cancer or other diseases of old age that have a long latency period.

Promotes use of ?life years? in evaluating fatality benefits. Agencies commonly base benefit estimates on the ?value of a statistical life? (VSL), drawn from the number of lives expected *to* be saved by regulatory action. During his time as OIRA administrator, however, Graham has promoted the use of ?value of statistical life years? (VSLY), which looks at the number of life years saved as opposed to the number of lives. Again, this skews decision-making against protections for the elderly, who have fewer life years remaining.

OIRA?s proposed guidance does not direct agencies to use VSL or VSLY. Instead, it says that ?agencies should consider providing estimates of both VSL and VSLY, while recognizing the developing states of knowledge in this area.? The Clinton guidance also notes VSLY as a way *to* measure fatality benefits, but adds, ?You should keep in mind that regulations with greater numbers of life-years extended are not necessarily better than regulations with fewer numbers of life-years extended. Longevity may be only one of a number of relevant considerations pertaining to the rule.?

Implies that OMB will revise agency analysis to compare one protective measure against another. In the president?s budget submission to Congress last year, Graham stresses the importance of ?league tables? for setting regulatory priorities across federal agencies. These tables are intended to compare the costs and benefits of one type of regulation, such as auto safety, to another, such as environmental protection. In presenting his own league table (discussed further here), Graham implies the administration should contract efforts at environmental protection (e.g., health standards) because safety regulation (e.g., addressing accidents) is more cost-effective and produces greater ?net benefits.? Yet this presents a false choice (leaving aside whether it is true), forcing an unnecessary tradeoff between one protection and another. In reality, we can do both -- and we do.

Nonetheless, OIRA seems to have league tables in mind when it says, ?It is difficult for OMB to draw meaningful cost-effectiveness comparisons between rulemakings that employ different cost-effectiveness measurements. As a result, agencies should provide OMB with the underlying data, including mortality

and morbidity data, the age distribution of the affected population, and the severity and duration of disease conditions or trauma, so that OMB can make apples-to-apples comparisons between rulemakings that employ different measures.?

Advises agencies to consider potential technological innovations by regulated entities. Cost considerations are inherently easier *to* monetize than benefits. For example, they may involve purchases of new equipment or the hiring of additional personnel. Yet ironically, this does not mean cost estimates are any more accurate.

Frequently, regulated entities are able *to* drive down compliance costs over time through technological advances or "learning by doing," which are not typically predicted by cost-benefit analysis. As a result, agency cost estimates often prove overblown in the real world. In examining estimated costs next to actual costs for 13 major rules, economists Eban Goodstein and Hart Hodges found estimated costs were at least double the actual costs for all but one. For instance, EPA estimated in 1990 that acid rain controls would cost electrical utilities about $750 per ton *of* sulfur dioxide emissions; yet the actual cost today is less than $100 per ton, billions of dollars less than what was initially anticipated.

To its credit, OIRA seems *to* indicate that agencies should incorporate likely adaptive responses. proposed guidance instructs, ?Estimates of costs should be based on credible changes in technology over time,? adding ?regulatory performance standards and incentive-based policies may lead to cost-saving innovations that should be taken into account.?

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