

SPECIAL SECTION

Memos to the New OIRA Administrator

Introduction

BY IKE BRANNON

Shortly after taking office, the Biden administration issued several executive orders and other documents intended to change how the Executive Office of the President handles regulatory policy. President Biden's Executive Order 13992 repealed outgoing president Donald Trump's EO 13771, which established a "one-in, two-out" regulatory budget that constrained the number of regulations that could be issued. The Biden administration also put forth a memorandum on "Modernizing Regulatory Review" that placed a hold on all Trump administration rules that had not yet been finalized, to review them to decide whether to allow them to go forward — a standard procedure for any new administration.

The Modernizing Regulatory Review memorandum does several things. First, it reaffirms EO 12866, issued by President Bill Clinton and with roots going back to Ronald Reagan's administration, that requires that no major regulations be issued unless their estimated benefits outweigh their costs. Second, it directs executive branch agencies to expand how they do cost-benefit analysis (CBA) so that the analysis considers issues that are thought to be difficult to quantify but are a matter of some import to the Biden agenda, such as examining the distributional consequences of a regulation.

The memorandum also asks the Office of Information and Regulatory Affairs (OIRA), the office inside of the Office of Management and Budget (OMB) that conducts regulatory review, to work with agencies to develop new recommendations to improve and modernize that review to "promote public health and safety, economic growth, social welfare, racial justice, environmental

stewardship, human dignity, equity, and the interests of future generations."

These amount to a substantive change for OIRA, both in how it conducts CBA and how the office carries out its basic operations. That is an enormous challenge for the new OIRA administrator — who, a year into Biden's administration, has yet to be appointed. Previously, OIRA generally avoided proactively suggesting regulatory actions by agencies.

The Biden administration has yet to appoint a new OIRA administrator, despite changing the agency's operations.

In the following pages, former OIRA administrators Susan Dudley and Paul Ray each reviews the Biden memorandum and offers some thoughts on how OIRA can adapt to these new tasks and what pitfalls might present themselves. Former administrator John D. Graham discusses the importance of updating OMB's Circular A-4, which outlines how agencies should carry out CBA. Finally, *Regulation* contributing writer Sam Batkins discusses what the Biden memorandum and other regulatory policy actions reveal about the administration's agenda.

Regulatory Humility

◆ BY SUSAN E. DUDLEY

President Biden’s Modernizing Regulatory Review memorandum signals continuity in some regulatory practices and big shifts in others. It reaffirms long-standing bipartisan principles that require agencies to analyze the effects of alternative regulatory approaches, with the objective of ensuring that federal policies do more good than harm. These principles are essential to what I have called “regulatory humility,” which appreciates that even the most well-intentioned and intelligent regulators lack essential information on how policies will work in practice.

The memorandum also directs the Office of Management and Budget (OMB) to work with agencies to develop new recommendations to improve and modernize regulatory review to “promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.” It focuses on several areas of reform, some of which have more promise than others.

It specifically calls for revisions to OMB’s Circular A-4, the 2003 blueprint for conducting regulatory analysis. Circular A-4 is an authoritative source on regulatory analysis throughout the world because it is grounded in theory and empirical evidence, rather than prevailing political passions. It was developed through an open process that has also contributed to its legitimacy and stability across administrations. Although there likely are “developments in scientific and economic understanding” that could improve these guidelines, OMB should make modifications judiciously. The Biden administration should ensure opportunities for meaningful public comment and avoid engaging only with selected “stakeholders.”

Embracing humility / The memorandum rightly highlights the importance of understanding how regulations affect different members of society, especially “disadvantaged, vulnerable, or marginalized communities.” Although presidential policies have long directed agencies to consider distributional effects in their regulatory impact analyses, policy decisions would benefit from a more rigorous approach to understanding the potential benefits and burdens of alternative policies for different segments of the population.

Here, regulatory humility calls for an objective and dispassionate examination of the incidence of both regulatory benefits and regulatory costs to understand how different approaches to addressing a problem affect different groups. Regulatory interventions in the economy create opportunities for rent seeking, as well-connected interest groups lobby for policies that benefit a few, and individuals bearing the costs lack the organization

and resources to push back. A sound approach to distributional analysis will be cognizant of these rent-seeking costs, carefully and objectively evaluating both benefits and costs. Without such analysis, well-intentioned policies can harm vulnerable populations—for example, by reducing opportunities for employment, entrepreneurship, and human flourishing.

I am concerned that the memorandum directs OMB and other agencies to “consider ways that OIRA can play a more proactive

Regulatory humility calls for an objective and dispassionate analysis of benefits and costs.

role” such that “regulatory review serves as a tool to affirmatively promote regulations that advance” the administration’s priorities. OIRA has always provided an important coordinating function across an administration, and as part of the Executive Office of the President it works with policy officials to ensure agencies’ regulatory actions are consistent with presidential priorities. However, as a former administrator and analyst at OIRA, I find the memorandum’s suggestion that OIRA take a more active role in identifying and promoting new regulatory initiatives unrealistic.

OIRA has a staff of about 45 career civil servants, a small fraction of the hundreds of thousands of regulatory staff at federal agencies, all of whom are highly motivated to expand their jurisdictions in new ways. OMB contributes to good government across all its functions by serving as a check on agencies’ natural desire to want more for their particular missions — whether it be more resources, more legislative authority, or more procurement — and OIRA is no exception. Asking OIRA, which is already stretched thin, to identify new regulatory initiatives is as unrealistic as asking OMB budget examiners to focus their attention on finding new ways for agencies to spend tax dollars.

Overall, the memorandum directs OMB and federal agencies to take some important steps to modernize regulatory review, but it also exudes a confidence — even hubris — in the federal government’s ability to act swiftly to address challenges without appreciating tradeoffs or recognizing the potential unintended consequences of acting too quickly or aggressively. To truly modernize regulation and achieve his ambitious policy agenda, President Biden must embrace regulatory humility. R

The ‘Modernizing Regulatory Review’ Memo

BY PAUL J. RAY

On the day he was inaugurated, President Biden issued to the heads of all executive departments and agencies a memorandum titled “Modernizing Regulatory Review.” The document warrants both praise and criticism. On the one hand, it reinforces longstanding principles of rationality and accountability. On the other, it gives the Office of Information and Regulatory Review (OIRA) a role that the office cannot and should not play.

The good / First, the good news: The memorandum begins by “reaffirm[ing] the basic principles of” President Bill Clinton’s Executive Order 12866. That order, which has been embraced by every subsequent administration, requires agencies to submit significant regulations to OIRA for review. That allows OIRA and other reviewing agencies to test the evidence and reasoning on which the regulations rely and to provide new data and perspectives. It promotes unity of action by resolving interagency disagreements on regulatory policy. And it allows appointees within the White House and at agencies to review regulations for consistency with the president’s priorities, enhancing the democratic accountability of the regulatory process. By reaffirming EO 12866, President Biden contributes to the long-term consensus that has made OIRA review a fixed feature in an ever-changing regulatory landscape.

The memorandum also endorses the key regulatory principles found in EO 12866. These include a preference for performance standards over stifling design requirements and a mandate that regulations’ benefits outweigh their costs. And while President Biden erred in revoking outgoing president Donald Trump’s EO 13891 on good guidance practices, the memorandum does recognize the need for reform in this area, directing the Office of Management and Budget (OMB) — OIRA’s parent agency — to “determine an appropriate approach with respect to the review of guidance documents.”

The bad / That’s where the good news ends. Biden’s memorandum also instructs OMB to “consider ways that OIRA can play a more proactive role in partnering with agencies to explore, promote, and undertake regulatory initiatives.” OIRA is to become a kind of regulatory consultancy, identifying opportunities to regulate that the agencies themselves failed to find. It is unclear

how OIRA’s few dozen civil servants, who are already tasked with reviewing regulations across the federal government in addition to many other important roles, are to take on this expansive mission.

Resource questions aside, OIRA is ill-suited for this new role. The office is designed to complement, rather than replace, other agencies’ regulatory functions. OIRA staffers often have deep expertise in the statutory programs of the agencies they review, but OIRA’s unique value lies in proficiencies all its own, developed from its review of thousands of rules, in matters common to all regulations. These include evaluating the soundness of data and their fitness for purpose, the validity of inferences drawn from those data, the effects (intended and otherwise) of regulations and of alternatives to them, and the place of a proposed regulation within the broader regulatory ecosystem. OIRA’s expertise in these matters leads to better regulatory outcomes for the American people; it does not equip OIRA to develop regulations of its own.

Indeed, OIRA’s new “proactive role” would forfeit one of the great benefits of OIRA review: a degree of distance from regulatory development, which allows the office to escape the groupthink that can infect any organization. While OIRA is commonly asked to assist with general government-wide regulatory initiatives (such as setting regulatory cost goals under Trump’s EO 13771), enlisting the office to develop particular regulations is a different matter and risks compromising OIRA’s ability to bring “fresh eyes” to the regulations it reviews.

Conclusion / The reason given for OIRA’s new mission is the need to “mobilize the power of the Federal Government to rebuild our Nation.” I agree that our nation needs rebuilding, but regulations will not do that. That vital and difficult work falls to the American people, who are not raw material to be “rebuilt” by the officials elected to serve them.

The government would fill its serving role in this rebuilding better if actuated by the “regulatory humility” that former OIRA administrator Susan Dudley has advocated, a humility recognizing that agencies can and often do make mistakes. It would therefore see the value of OIRA’s original mission, facilitated by the office’s distance from the regulatory development process, of testing proposed regulations to ensure they rationally pursue the good of the American people. It would not compromise that mission by assigning OIRA “a more proactive role” in regulating.

Reforming Circular A-4

BY JOHN D. GRAHAM

Even though we are now more than a year into his administration, too little is known about President Biden's regulatory-reform agenda to make confident predictions about lasting change. However, one Biden instruction that could have a profound effect is the promised redo of the Office of Management and Budget's (OMB) Circular A-4, an obscure technical guidance document that governs the practice of cost-benefit analysis (CBA) at regulatory agencies. It has not been updated since 2003 and is ripe for expert review, public comment, and refinement.

This initiative can build on a significant revision of the Environmental Protection Agency's economic guidelines that was reviewed by a special committee of the EPA Science Advisory Board (SAB) in 2020. Here are some of the key issues that the OMB initiative might consider:

Retrospective analysis / The current Circular is aimed primarily at informing *ex ante* CBA, conducted before an agency proposes and finalizes a new regulation. More guidance is needed on how to apply CBA to an existing regulation, as there is bipartisan consensus that more retrospective evaluation of regulation should occur.

Discount rate / When the benefits and costs of regulations occur in different time frames, they cannot be compared properly without a time-preference adjustment. The current Circular recommends use of annual discount rates of 3% and 7% for future benefits and costs. The OMB tends to prefer 7% while agencies tend to prefer 3%, but standard practice is to present results using both rates.

The case for discounting is as sound today as it was in 2003, but the specific rates OMB is recommending merit reconsideration based on the best available evidence. The question of intergenerational discounting also should be reconsidered, especially given the prominence of the climate change issue, but the opportunity cost of displaced capital investments is relevant regardless of whether a regulation has intergenerational or intragenerational benefits.

Valuation of public health effects / The current Circular does not compel use of specific willingness-to-pay values for prevention of injury, illness, and premature death. Because the agencies have been slow to update their values over time, OMB should look carefully at current practices and make appropriate instruc-

tions. Agencies continue to make the dubious assumption that willingness-to-pay values for health effects do not vary among consumers or by regulatory context.

Co-benefits and indirect costs / Efforts to narrow CBA to coverage of only direct benefits and costs are misguided. The new Circular should embrace a comprehensive approach to considering benefits and costs, with special effort to incorporate indirect benefits and indirect costs, even though that would make the analysis more complicated.

Double counting, baselines, and multi-regulation interactions / The SAB review of EPA's economic guidelines stressed the need for agencies to use realistic "baselines" in CBA — the forecast of what will happen with policy and markets in the absence of the regulation under consideration. A "no change" baseline is rarely realistic. When several federal and state regulations are chasing the same problem, analysts need to avoid double-counting and ensure that only the incremental effects of the rulemaking under study are counted.

International effects / Current guidance instructs analysts to focus CBA on the welfare of Americans but report separately the effects of U.S. regulations on people outside the United States. I like this approach because it leaves the policy judgments to regulators and politicians, but there may be a more thoughtful way to handle this difficult issue.

Equity and the poor / Since the Kaldor-Hicks foundation of CBA was adopted in the 1930s, establishing the goal of maximizing overall utility, economists have sought refinements that would facilitate equity considerations about how the "economic pie" is distributed. The Biden administration is determined to bring more equity-oriented thinking into CBA, which I think is a good idea.

But the devil is in the technical details, and the current Circular offers little technical guidance on how to do this. Simply listing each disadvantaged and marginalized group in the Circular will not help much because agencies cannot possibly perform a CBA for every group. A good place to start may be a CBA focused on the poor, as well as one for society as a whole. Surely regulators should be informed whether America's poorest citizens are made better off or worse off by a proposed regulation, using the preferences of the poor as the yardstick.

Employment effects in CBA / When CBA is performed with the assumption of a full-employment economy, a regulation does

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not affect the level of employment; it simply reallocates labor within the economy. In fact, using regulation to move labor (and capital) from one purpose to another is presumed to be costly and require benefit justification. If the economy is not likely to operate at full employment for a sustained period of time, the analysis becomes more complicated, and it may make sense for the new Circular to look at that issue.

Behavioral economics, market welfare, and regulatory design / Advances in behavioral economics need to be incorporated into

the Circular. When is a finding from behavioral economics strong enough to establish a market failure? When should regulatory agencies consider choice-preserving nudges as an alternative to coercive regulations? The new Circular should offer guidance on those questions.

A good revision of Circular A-4 cannot occur quickly. It requires a rigorous process that involves participation from multiple federal agencies, the Council of Economic Advisers, stakeholders, and experts in universities, think tanks, and state and local governments. R

The Biden Regulatory Agenda

BY SAM BATKINS

President Biden began his term in office by reinstating much of the Barack Obama administration's regulatory apparatus. For instance, on the same day he was inaugurated, his administration issued a document affirming the basic principles of Obama's Executive Order 13563, which instructed executive branch agencies to design a process to retroactively review current regulations to see if their benefits were, indeed, larger than their costs. It also repealed outgoing president Donald Trump's EO 13771 establishing a "one-in, two-out" regulatory budget, which constrained the regulatory agencies to some degree.

However, the Biden administration also indicated that the Office of Information and Regulatory Affairs (OIRA), which is tasked with reviewing executive agencies' major regulatory activities, would take a more proactive and expansive approach to its regulatory agenda. Biden issued a memorandum, entitled "Modernizing Regulatory Review," that goes beyond the regulatory policy of the Obama era, establishing four distinct but related priorities:

- OIRA will continue to fulfill its duty of inter-agency regulatory review, despite some progressive objections.
- It updates OIRA in ways that reflect "new developments in scientific and economic understanding" by asking the agency to account for societal costs and benefits that are difficult to quantify.
- It asks OIRA to examine the distributional effect of regulations.
- It urges OIRA to take a more proactive role to advance regulations that will yield significant benefits.

Obama redux or progressive vision? / Both liberals and conservatives have taken issue with OIRA at times. Some progressives have criticized OIRA (especially during Republican administrations)

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as a deregulatory cudgel intent on suppressing public health and safety protections to protect businesses. Republicans have derided OIRA (during Democratic administrations) as a transactional middleman that does little more than slow down onerous regulations that will eventually be published.

As in most political debates, the truth largely sits in the middle. For Biden, an incrementalist approach would have OIRA hew to the Obama administration's progressive vision while bolstering the pro-regulatory tilt of Biden's own administration.

Concerning the Biden memorandum specifically, it is unclear what "new developments in scientific and economic understanding" will mean in practice. Without a robust sample of regulations to review — and it will take time to build this sample — along with some public commentary from OIRA, it will be difficult to discern the administration's new vision. One possibility is that it becomes more ecumenical and goes beyond scholarly research in the evidence it uses to justify its actions.

It is easier to guess the effects of asking agencies to consider "benefits that can be difficult to quantify." Unlike under President Bill Clinton's EO 12866, which required that major regulations' benefits outweigh their costs, strictly speaking Biden administration regulations no longer must have benefits that exceed their costs. Instead, regulations must only *justify* their costs, understanding that there are some regulations with benefits that are difficult or impossible to quantify.

There are always benefits that are difficult to quantify, but a concern is that political agendas will result in executive branch agencies coming up with a litany of valid and dubious unquantifiable benefits in a manner that obliterates any fealty to honest cost-benefit analysis (CBA) and the agencies become able to pursue an agenda without any pushback from OIRA.

Analyzing the distributional aspects of regulation is another carryover from the Obama administration. Its EO 13563 permitted each agency to consider "values that are difficult or impos-

sible to quantify, including equity, human dignity, fairness, and distributive impacts.” At the time, that language was somewhat controversial, but both “pro-regulatory” and “anti-regulatory” actions can be difficult to quantify and can harm — or help — those along the economic ladder.

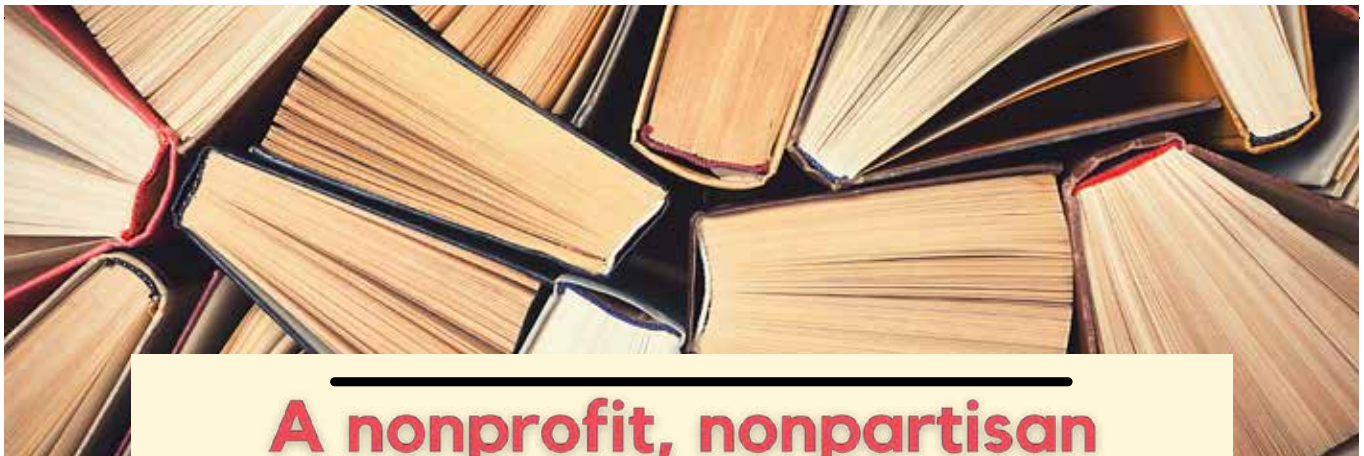
It should be noted that advocates of CBA do not argue that difficult-to-quantify costs or benefits should be ignored. Serious scholars of the discipline encourage a complete accounting of benefits and costs, which includes a thorough qualitative discussion of inputs that cannot be easily quantified. OIRA and the White House should ensure a faithful consideration both *for* and *against* a particular intervention. With Democratic administrations, the general rule is that a proposed regulation with relatively equal benefits and costs tends to move forward, while a Republican administration delays it — until the next Democratic administration. That any agency finds particular effects on one end of the economic ladder, or tweaks a rule to maximize those benefits, should hardly make headlines.

Obama’s EO 13563 did not give clear examples for possible “proactive” efforts from OIRA. Scholars will need to monitor both OIRA and its parent agency, the Office of Management and Budget, to determine the effect of this provision, if any, although they may resemble former OIRA administrator John Graham’s Prompt Letters that he issued during the George W. Bush administration.

This vagueness could imply the White House and OIRA might simply suggest certain paths for regulation, rather than receiving virtually all direction from the agency and further centralize decision making within the White House. The latter would be a continuation of a decades-long trend. If the former is the case, then it would be more innocuous. It has been common practice for regular “check-ins” between agencies and OIRA before formal submission of a rule for inter-agency review, and this provision may simply put that practice into writing.

One fear is that OIRA may use this to play a pro-regulation role, suggesting new actions that could “yield significant benefits.” That has never been OIRA’s role: agencies implement congressional directives and OIRA is more of a procedural check than a substantive one.

A regulatory prediction / Given current headlines about COVID-19, international affairs, and the ongoing fights between the political left and right, regulatory policy will likely have an even smaller public profile than it has in the past. President Biden’s actions to repeal the Trump regulatory regime and largely borrow from the Obama legacy will hardly put OIRA or inter-agency review onto newspaper front pages. The Biden legacy, at least after the first four years, will look like Obama’s, and the shadow of COVID will make discerning any real differences between the two difficult. R



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