SPECIAL SECTION

Revising Circular A-4

Introduction

BY IKE BRANNON

In general, Republican presidencies try to impose bureaucratic procedures that limit agencies' scope for issuing regulations, while Democratic presidencies tend to go in the opposite direction.

The last two administrations have not been exceptions to this. The Trump administration issued a requirement that an agency wishing to proffer one new rule would have to also propose to end two existing rules that were obsolete, unnecessary, or too costly to justify their continued existence. Shortly after taking office, the Biden administration ended that requirement and asked agencies to take special care to consider the effects of regulations on minority groups as well as the environment. The administration averred that those special interests do not get proper consideration when a regulatory agency is doing its cost–benefit analysis to impose a new rule. (See "Memos to the New OIRA Administrator," Spring 2022.)

More recently, the Biden White House proposed changes to two standard regulatory guidance documents designed to help agencies promulgate regulations and conduct cost–benefit analysis on any new rules. One of those documents is Circular A-4, which sets forth how agencies should do a Regulatory Impact Analysis (RIA).

One proposed change to A-4 would direct agencies to consider the possibility that labor market monopsonies may artificially depress wages, which might bias the values used when calculating the Value of a Statistical Life (VSL) in cost–benefit analysis. An artificially low VSL would lead to fewer regulations being deemed as cost-effective. In their essay below, Tom Kniesner and Kip Viscusi argue that there is no evidence that monopsony has a significant effect on U.S. labor markets. Moreover, even if our economy were rife with wage-depressing monopsonies, Kniesner and Viscusi's research indicates that would not affect VSL estimates in a material way.

In their essay, Stuart Shapiro and Christopher Carrigan suggest that proposed changes to Circular A-4 to have cost–benefit analyses consider the distributional analysis of the effects of a rule could have an inadvertent outcome in making such analyses more difficult to conduct and make the RIAs that accompany proposed rules longer and even less accessible to affected groups. While politicians value the distributional effects of a policy change, estimating those effects can be difficult and time-consuming, especially for relatively minor rules, and waiting for an agency to deliver an analysis can delay rulemaking. They suggest that agencies should be encouraged to provide relevant analysis earlier in the rulemaking process, even if the analysis is less rigorous than used in current rulemaking. More timely data would help stakeholders more than more precise data that appear much later.

Finally, Ron Bird echoes the sentiments of Shapiro and Carrigan, arguing that the proposed changes to the A-4 Circular are going to make it more difficult for groups potentially affected by a rule change to understand what policymakers think will be the outcome of the change. It will also further delay those groups in providing their input on proposed rules in a timely manner. Bird suggests that the A-4 proposal be modified to increase the length of the comment period from the standard 30–60 days to 90–180 days.

When I worked in the Office of Information and Regulatory Affairs in the aftermath of the 9/11 terrorist attacks, the public had a mere 24 hours to comment on proposed regulations that dealt with improving safety in airports and airplanes. Little public opposition was heard about that miniscule comment period, so other agencies quietly began shortening their comment periods. A short comment period meant fewer comments and less work—and fewer changes—to the proposed rule. Finally, a few affected parties began to complain loudly, the press picked it up, and the practice largely ceased.

There is, of course, a fine line in telling agencies how to do an RIA. They should have the flexibility to tackle their analysis in the most sensible and cost-effective way, yet we don't want them to take advantage of a system with few strictures in place and produce an RIA that is irrelevant to the task. (Once, during my OIRA tenure, the

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Environmental Protection Agency submitted a 300-page tome with the words "REGULATORY IMPACT ANALYSIS" written in pen above the crossed-out "ENGINEERING REPORT" at the top of the cover.)

Unfortunately, the very nature of the relationship between OIRA and the executive branch agencies—which too often view conducting an RIA as an unnecessary hurdle—means that it remains important to create sensible ground rules to guide the agencies in this task.

More timely and accessible analysis would help the potentially affected parties understand the potential consequences of a proposed rule and work with the government to minimize its cost or maximize its efficacy. *R*

VSL and Labor Market Competition

BY THOMAS J. KNIESNER AND W. KIP VISCUSI

The Biden administration has articulated several shifts in microeconomic policy emphasis. Among the most prominent concerns is the role of possible noncompetitive forces in labor markets, which have implications for equity and efficiency as well as for updating the regulatory review process to incorporate noncompetitive influences. The concerns are articulated in two presidential executive orders: EO 14036, intended to mitigate noncompetitive forces in product and labor markets, and EO 14094, intended to include recent research developments in the regulatory review process.

Our focus here is on whether the administration's view that there are noncompetitive labor market influences also leads to downward biases in the value of a statistical life (VSL) used to monetize mortality risks in regulatory impact analysis. The VSL suggested for use by the Office of Management and Budget in the latest proposed draft of Circular A-4 is in the $10 million to $12 million range and is to be adjusted regularly for inflation and real income growth. The new issue raised by concern with noncompetitive forces is whether there is a need for additional correction for possible employer monopsony power. Based on our examinations of the VSL in different labor market contexts, we do not find that there is any current rationale for increasing the VSL to account for possible noncompetitive forces.

VSL and labor market noncompetition / The U.S. Treasury has produced a lengthy report on estimates of the amount of labor market noncompetition in the United States. The report does not document any inequity and inefficiency consequences from this noncompetition, but instead jumps straight to policy recommendations that go so far as to have the Department of Justice pursue criminal cases against employers. Most recently the general counsel of the National Labor Relations Board issued a memo stating her opinion that noncompete provisions in employment contracts and severance agreements most typically violate the National Labor Relations Act. Our concern here follows a different thread of the labor market effects of noncompetition, which is whether it biases downward the estimates of the VSL, which in turn reduces the assessed benefits of risk regulations.

It is useful to review how labor markets work. Jobs have many different attributes, including the wage rate and the fatality rate. Workers considering jobs will face a variety of employment possibilities. The best wage available at different health risk levels will be greater for higher fatality risk jobs. More dangerous jobs tend to pay more. Workers select the wage and fatality risk combination they most prefer. The slope of the market wage offers at the risk level selected by the worker reveals the VSL. In particular, it indicates how much extra pay the worker demands for an increase in the risk.

Perfectly competitive labor markets are not required for riskier jobs to have to pay more. However, if the labor market is not competitive, the locus of the best available jobs at any given risk level—known as the hedonic wage equation—will be flatter and lower. That is, the lack of maximally competitive buyers will both lower the wage level and reduce the marginal compensation for additional fatality risk. As a result, noncompetitive labor markets should produce a lower VSL. It is important to note that monopsony's qualitative effects as just described are similar to lower estimated VSLs for disadvantaged groups such as blacks and Mexican immigrants who do not speak English.

Estimates of VSL controlling for noncompetitive forces / Emerging research cited in the Treasury Department report experiments with how to measure monopsony power and how to infer its wage consequences. A straightforward approach has been to append variables connected to the degree of monopsony to an estimated hedonic wage equation. The set of variables believed to be connected to the degree of employer wage-setting power has included measures of local labor market concentration, which researchers have questioned regarding their use for anti-monopsony policy.

For the topic of possible employer monopsony power, we continue to embrace the philosophy that simpler is better, or KISS (Keep It Sophisticatedly Simple). As we have already noted, discussions of monopsony power focus on noncompetitive aspects of industries or occupations, such as licensing laws and noncom-

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pete agreements. Our strategy here is to examine how the wage equations used to estimate the VSL are affected by controlling for detailed occupation and industry information. If monopsony power is important, then adding industry and occupation controls should boost the implied VSL by conditioning out all economically relevant industry and occupation characteristics. The difference between a VSL estimated by wage regression equations with and without labor market employer concentration controls via the worker's detailed industry-occupation cell gives an indication of monopsony power (among other things associated with the local labor market). It also serves as a check on the interpretation of the difference in the height and slope of the hedonic wage equation as possible monopsony power estimates.

In a previous article using panel data with extensive model specification searches, we found that the estimated VSLs that include the consequences of monopsony power were one-third to one-half lower than when monopsony power is controlled for with detailed industry and occupation indicators. The VSL as currently estimated typically controls for the negative effects of monopsony power (employer concentration) on the slope and level of the hedonic wage equation so that adjustments need not be made to VSL estimates currently in play for the degree of labor market competition.

Summary and conclusion / Another way of thinking of what we are saying is that we have examined VSL estimates from less ambitious but more robust econometric models that bypass any attempt to measure the wage effects of differences in monopsony power, in favor of removing it along with other forces of industry and occupation on wage outcomes and VSL. The results are in essence the opposite of what might be feared by policymakers. The controls for detailed industry and occupation of employment should also help to purify estimates of effects of the situation where employer monopsony power is accompanied by product market monopoly power such that both forms of noncompetition impinge on the wage setting process.

The procedure we have explained here provides a good indication of whether there is a large-scale problem in the application of VSL estimates as currently produced by researchers. There is no such monopsony bias problem in VSL estimates. The approach for using VSL as described in the draft of Circular A-4, and as typically applied in benefit–cost analysis in general, should stand unchanged. *R*

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Using A-4 to Make Regulatory Analysis Easier to Understand

BY STUART SHAPIRO AND CHRISTOPHER CARRIGAN

Earlier this year, the Office of Management and Budget (OMB) published a draft revision of Circular A-4 and solicited public comment on the changes. The document provides guidance for executive branch agencies required to conduct Regulatory Impact Analyses (RIAs) of a subset of their regulations under Executive Order 12866. The circular was last revised in 2003, and few would argue that a re-examination of how regulatory benefits and costs are analyzed is not merited. In this article, we focus on what we view as a possible missed opportunity to encourage broader engagement with RIAs to allow them to play a more useful role in agency decision-making.

Improving transparency and process / The academic literature identifies at least three roles that analysis can play in the regulatory process:

- Serve as a decision-making criterion, especially since benefit–cost analysis provides the user with a clear decision rule regarding whether to proceed with a regulatory policy.
- Increase transparency to allow interested parties to both monitor a regulator's activities and engage in the rulemaking process.
- Aid agencies' regulatory planning, allowing them to compare potential regulatory approaches systematically while prioritizing regulatory needs.

The proposed updates to Circular A-4 generally focus on the first of these roles, and the justification given by OMB's Office of Information and Regulatory Affairs (OIRA) for the changes reinforces this impression. The first sentence of the preamble states, "Assessing benefits and costs of alternative regulatory options

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through analysis helps agency policymakers arrive at sound regulatory decisions." However, as it is used in practice, analysis generally does not function as a decision-making criterion in the regulatory process, especially because EO 12866 merely suggests that the rule's benefits should "justify its costs." Therefore, despite the attention given to analysis as a decision-making criterion, the direct effects of the proposed changes on actual regulatory decision-making may be more limited than many expect.

Still, further revisions to Circular A-4 could position RIAs to more effectively contribute to the other roles noted above. To do so, we offer the following thoughts.

Clarity and conciseness / RIAs accompanying rules are already long, complicated, and technical, and becoming more so. As a result, the typical interested party does not have the training to comprehend the level of analytical rigor that characterizes current analyses, and their length often precludes even those with the ability to participate from doing so. Regardless, analysis and participation can be complements: public participation can lead agencies to better understand the issues they are analyzing and, in doing so, improve their economic analysis and the rules themselves. An RIA that is done well and explained clearly can help the public better understand how regulations affect them and, simultaneously, allow them to give valuable input to encourage more thoughtful regulatory decisions by agencies.

Unfortunately, an emphasis in the revised Circular A-4 on applying more advanced analytical tools to produce precise estimates of benefits and costs could easily lead to agency RIAs that are even more complex and, hence, less transparent than they are now. Given that a goal of President Biden's associated EO 14094 is to ensure the regulatory process is "designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities," this issue should be acknowledged and addressed.

For example, we largely agree with the impetus behind emphasizing distributional analysis in the revised Circular A-4. In addition to their implications for economic efficiency, many regulations have distributional effects, and providing information on those effects could theoretically increase transparency associated with these regulatory decisions. However, asking agencies to produce a detailed distributional analysis is likely to have the unintended consequence of further lengthening RIAs, making them even less accessible to the affected communities.

Better planning / The revised Circular A-4 can also be expected to promote RIAs that are less likely to function as planning tools. Perhaps the key element that allows analysis to function in a planning role is the consideration of reasonable alternatives. While revised Circular A-4 does address the importance of considering alternatives, the heightened analytical focus on the preferred agency approach can mean less serious consideration of reasonable alternatives, particularly those that differ in marginal ways from the preferred approach.

The timing of the RIA is also important. In the current environment, analysis is typically made public concurrent with the issuance of a Notice of Proposed Rulemaking (NPRM), which is too late in the process to allow any participation based on it to shape the rulemaking in fundamental ways. Similarly, to function as an agency planning tool, analysis must again be performed before the agency has already decided on its preferred approach.

As one potential solution, we recommend back-of-the-envelope analysis on a broader set of regulatory alternatives that would be performed earlier in the process. In the context of the changes to Circular A-4, this would entail producing a public analysis well before the NPRM is issued, given that agencies may be resistant to making significant changes to rules at that point. Such an analysis would present numerous regulatory alternatives and "rough" estimates of both their benefits and costs, as well as possible effects on particular populations. In fact, it may even be sufficient to note the direction and approximate magnitude of the differences between alternatives. For example, a reasonable back-of-the-envelope discussion might simply suggest something like: "Increasing the emissions threshold by 1 part per million would decrease costs 10-fold and increase the incidence of illness only marginally. However, most of the increase in illness would be in communities located near stationary sources."

Ensuring that affected communities—both those bearing the costs and those reaping the potential benefits of regulatory changes—can see these RIAs and provide feedback before a preferred option is chosen in an NPRM is critical. In addition, making it more likely agencies would faithfully perform back-of-the envelope analysis on a broader set of feasible alternatives earlier in the process means considering the incentives of the agencies. One general approach that could help would be to offer "carrots" to agencies for faithfully performing back-of-the-envelope analysis.

Help from OIRA / In revising Circular A-4, OIRA would do well to give careful thought to how analysis is presented by agencies as well as when it is performed. While we ideally would like to see agencies incentivized to produce an earlier and simpler analysis that is made publicly available, some small process changes could also begin to cultivate this mindset among agencies. These include encouraging or requiring agencies to:

- Include an executive summary for each RIA that lists the benefits and costs of the policy chosen and realistic alternatives.
- Analyze alternatives that represent marginal differences in stringency and are realistic options, and present the results to the public early in the process.
- Experiment with different modes of soliciting public input before issuing NPRMs.
- Consider alternatives that may be precluded by statute, including discussing the agency's perspective on the legality of those alternative approaches in their NPRMs.

In sum, the new Circular A-4 should facilitate transparency and act as an input to regulatory agency decision-making rather than to simply support existing agency decisions. That will require setting up agencies to perform analysis well before the NPRM is released, consider more reasonable alternatives, and present the analysis in a way that is comprehensible to those the rule will affect. Restructuring the regulatory process in these ways will position RIAs to occupy a more useful place in that process, allowing it to fulfill its potential to inform the public and aid agency planning. R

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Better Regulatory Review and Public Participation

BY RONALD BIRD

The Office of Information and Regulatory Affairs (OIRA) recently published for public comment a draft proposal for revision of Circular A-4, which provides agencies with guidance regarding how to conduct regulatory analyses required by statutes and executive orders.

The revision is well-intentioned in its attempts to provide agencies' access to important research advances in economic cost–benefit analysis and public policy decision-making tools over the past 20 years. However, it gives inadequate attention to public input as vital to the rulemaking process, and implementation of OIRA's A-4 revisions by agencies subject to politically determined rulemaking schedules may lead to obfuscation, reduced transparency, and discouragement of public input.

An improved A-4 would do the following:

- Encourage agencies to conduct systematic evaluations of costs, benefits, and compliance of regulations already in place before undertaking rulemakings to revise them and ensure that the interested public has input into the process.
- Encourage agencies to expand use of advance notices of proposed rulemakings to promote public input for selection of regulatory alternatives to be examined and for development of data sources and analysis methods by which the costs, benefits, and other economic and societal effects of regulatory alternatives will be compared before an agency identifies its preferred approach.
- Ensure that agencies provide ample time for public comment at each stage of the process.

Each of these has already been practiced by some agencies in some contexts, and no new authority would be needed to encourage or require agencies to adopt these practices, especially for economically significant rulemakings. Together, these practices could do more to improve the quality of public participation and agencies' decisions than any of the items proposed for the revision of A-4.

Evaluation before regulation/ Current A-4 guidance and the proposed revision implicitly assume that an agency's regulatory action is in response to a newly discovered market failure. In reality, most rulemakings today are revisions to existing regulations. While the need for any regulation of markets requires grounding in evidence of market failure, revisions to existing regulations should also consider the question of regulatory failure. Is revision of the regulation needed because the underlying market failure or other salient conditions have changed, because flaws in the design of the current regulation have been found, or because the existing regulation has not been enforced effectively? In the latter case, no new rulemaking is justified, and instead the responsibility of the agency is to use its resources to achieve better compliance with the standard already in place through better compliance assistance or more effective enforcement.

The 2014 OSHA rulemaking to increase the stringency of occupational silica exposure limits is a case in point. The agency used ill-health data to justify making the standard more stringent and more costly when, in fact, lax enforcement of the existing standards accounted for most of the continuing illness reports.

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Agencies should not be allowed to hide their own enforcement failures by imposing new regulatory costs on the majority who already comply while letting the bad actors profit from noncompliance. By using the evaluation analysis stage to conduct surveys and otherwise collect data, the agency may be able to obtain valuable information to inform policy decisions.

Engage the public / Some agencies, most notably the Energy Efficiency Office in the Department of Energy, have previously used the advance notice of proposed rulemaking devices to engage the public to provide input before selecting a proposed regulatory approach in order to solicit public input to recommend alternative regulatory specifications. This approach has been effective in engaging the public in the substantive process, arguably improving the quality of ultimate regulatory decisions. While adding this step may increase the length of time of the total rulemaking process, the approach may improve outcomes and help agencies avoid potential litigation from regulated entities.

Provide ample time / Agencies often publish proposed rules in the *Federal Register* that allow only 60 to 90 days for public comment input. When the publication of the proposed rule is the first information that interested parties receive about the intentions and justifying analysis of the regulatory agency, such short notice is inadequate for meaningful public response, as there is too little time for meaningful collection of relevant data or conducting alternative empirical analyses. Short comment periods effectively shut out meaningful public participation in the regulatory process and make a mockery of the requirements of the Administrative Procedure Act. The more sophisticated analytical methods proposed by the Office of Information and Regulatory Affairs (OIRA) in the proposed A-4 revision would exacerbate this problem. OIRA should use its persuasive power in Circular A-4 to better ensure the rights of the public to participate meaningfully in the regulatory process.

For economically significant rulemakings, OIRA should expect agencies to provide at least a 180-day period for public comment response, which should only be reduced if the agency has previously engaged the public in prior evaluations of existing standards. Some may object to the resulting delays in the process, but these delays may be less than the delays and false starts that often result from a process in which the public is excluded by executive agencies and, instead, must pursue the alternative route of judicial review and ultimately legislative action under the Congressional Review Act.

Good, efficient, and effective regulation results from a collaborative process in which all interested parties have a voice throughout the entire process. *R*