Volume 125 | Issue 1

Fall 2020

David versus Godzilla: Bigger Stones

Jerry Ellig
George Washington University

Richard Williams

Recommended Citation

Jerry Ellig & Richard Williams, *David versus Godzilla: Bigger Stones*, 125 DICK. L. REV. 47 (2020).
Available at: https://ideas.dickinsonlaw.psu.edu/dlr/vol125/iss1/3

David versus Godzilla: Bigger Stones

Jerry Ellig*& Richard Williams**

Abstract

For four decades, U.S. Presidents 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. Yet experience demonstrates that agency RIAs often fail to live up to the standards enunciated in executive orders and Office of Management and Budget (OMB) guidance. The Office of Information and Regulatory Affairs (OIRA) oversees agency compliance with the executive orders, but OIRA is about half the size it was when it was established in 1980. Regulatory agency staff outnumber OIRA staff by a ratio of 3600 to 1. We suggest four managerial changes that could increase OIRA's leverage: (1) Define what counts as success when an agency adopts a regulation and link this to the agency's strategic goals, (2) Use budget recommendations to enforce analytical requirements and achievement of agencies' Government Performance and Results Act (GPRA) objectives, (3) Combine regulatory budgets with agency budgets, and (4) Reward results, not activity.

Table of Contents

* Research Professor, Regulatory Studies Center, The George Washington University. Ph.D., economics, George Mason University, 1988; M.A., economics, George Mason University, 1986; A.B., economics, Xavier University, 1984. The authors wish to thank Robert Greene, A.J. McKeown, and Deema Yazigi for research assistance and Ted Bolema, Mark Febrizio, Marcus Peacock, Daniel Perez, two anonymous reviewers from the Mercatus Center, and participants in a research workshop organized by the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School at George Mason University for helpful comments on earlier drafts of this Article. Research on this paper was supported by the C. Boyden Gray Center for the Study of the Administrative State.

** Senior Affiliated Scholar, Mercatus Center at George Mason University and Affiliated Scholar, Center for Growth and Opportunity, Utah State University. Ph.D., economics, Virginia Tech, 1982; B.S., business administration, Old Dominion University, 1975.

INTRODUCTION

When General George Washington makes his entrance in the hit Broadway musical *Hamilton*, his first words are, "We are outgunned . . . outmanned . . . outnumbered . . . outplanned."[1] 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, a Memorandum of Agreement between the Department of the Treasury and the OMB also tasked OIRA with reviewing Internal Revenue Service rules, which it did not previously review.[2] Yet OIRA's staff has shrunk from 97 in 1980 to about 56 today, while the number of regulators in agencies grew from 115,000 in 1980 to 201,170 in 2010—an increase of 75 percent.[3] Regulatory agency staff outnumbers OIRA staff by almost 3600 to 1.[4] Given the enormous disparities in

1. Original Broadway Cast of Hamilton, *Right Hand Man, on* HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015).

2. U.S. DEP'T OF TREASURY, OFFICE OF MGMT. & BUDGET, MEMORANDUM OF AGREEMENT, REVIEW OF TAX REGULATIONS UNDER EXECUTIVE ORDER 12,866 (2018).

3. Figures were calculated by authors from data in MARK FEBRIZIO & MELINDA WARREN, REGULATORS' BUDGET: OVERALL SPENDING AND STAFFING REMAIN STABLE app. A-3 (2020). Calculations exclude independent regulatory agencies and the Transportation Security Administration, which accounts for more than 56,000 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. .

4. *Id.*

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.[5]

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.[6] President Clinton's Executive Order 12,866 outlines the principal requirements that currently apply.[7] Every subsequent administration has reaffirmed Executive Order 12,866.[8]

However, experience demonstrates that the executive orders, and OMB guidance[9] implementing the executive 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 agency's analysis.[10] The quality of the analyses and the use of economic analysis to inform regulatory decisions falls far short of the standards enunciated in executive orders. Consider that in any given year, an analysis of both monetized benefits and monetized costs accompanies less than one-third of all major final rules.[11] This rate is a considerable failure, since economically significant rules represent only about one percent of all rules.

5. *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs: Hearing Before the Subcomm. On Gov't Operations of the H. Comm on Oversight and Gov't Reform,* 114th Cong. (2016) ("*David vs. Godzilla, OIRA and the Federal Agencies"* testimony by Richard A. Williams, Vice President of Policy Research and Director of Regulatory Studies Program, Mercatus Center, George Mason University).

6. *See* Exec. Order No. 12,291, 3 C.F.R. § 127 (1981).

7. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

8. Exec. Order 13,258, 3 C.F.R. § 13258 (2002); Exec. Order No. 13,563, 3 C.F.R. § 13563 (2011); OFFICE OF MGMT. & BUDGET, M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13,771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (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.").

9. U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS (2003), https://bit.ly/2OkNZEQ [https://perma.cc/3F68-LQ38].

10. *See infra* Section I.

11. 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. *See* Richard Williams, *Comparison of Final Rules with Monetized Benefits and Costs*, MERCATUS CTR. AT GEORGE MASON UNIV. (Apr. 23, 2012), https://bit.ly/3fnLJIX [https://perma.cc/G3ND-EN53]; Jerry Ellig, *Evaluating the Quality and Use of Reg-*

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 do not know whether their regulatory programs are making improvements. Without such information, knowing which programs, or even agencies, should continue to receive funding is impossible, even if the program or agency appears 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 did not notice anything wrong.[12]

To have the best possible chance of achieving positive regulatory outcomes, agencies must clearly identify their goals for a particular regulation and choose the best option to achieve those goals. A good RIA can help agencies do both. 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: (1) Define success at the outset and link regulations to the agency's strategic goals, (2) Use budget recommendations to enforce analytical requirements and achievement of agency GPRA objectives, (3) Link requests for fiscal budgets to regulatory budgets in the President's annual budget requests, and (4) Reward regulatory results, not regulatory activity.

Part I of this Article outlines the fundamental elements that a thorough RIA should include. Part I also discusses empirical research demonstrating that the quality and use of RIAs often falls short of the ideals envisioned in the executive orders and the Government Performance Results Act. Part II outlines our four proposals.

---

ulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013 11–12 (Mercatus Ctr. at George Mason Univ., Working Paper, 2016).

12. McKay Coppins, *Waiting for a Shutdown to End in Disaster*, ATLANTIC (Jan. 18, 2019), https://bit.ly/304IIqs [https://perma.cc/P9AZ-7W4E].

I. ANALYSIS, REVIEW, AND OVERSIGHT FALL SHORT

For nearly four decades, Presidents have required executive branch regulatory agencies to conduct economic analysis to inform the agencies' decisions about regulations.[13] Under President Reagan's Executive Order 12,291, OIRA reviewed all executive branch regulations. Under President Clinton's Executive Order 12,866, OIRA reviewed only "significant" regulations—generally, regulations that have an effect on the economy exceeding $100 million annually, have other material adverse effects, conflict with other agencies' actions, materially affect federal spending or loan programs, or raise novel legal or policy issues.[14] Regulations with economic effects exceeding $100 million annually or certain other material adverse effects listed in the executive order are often referred to as "economically significant," although that term of art appears nowhere in the executive order.[15]

The most extensive RIA requirements apply to economically significant regulations. A thorough RIA should do at least these four things:

(1) Assess the nature and significance of the problem the agency is trying to solve so the agency knows whether there is a problem that could be solved through regulation and, if so, the agency can tailor a solution that will effectively solve the problem;[16]

(2) Identify a wide variety of alternative solutions;[17]

(3) Define the benefits the agency seeks to achieve in terms of ultimate outcomes that affect citizens' quality of life, and assess each alternative's ability to achieve those outcomes;[18]

(4) Identify the good things that regulated entities, consumers, and other stakeholders must sacrifice in order to achieve the desired outcomes under each alternative.[19] In economics jargon, these sacrifices are known as "costs," but just like benefits, costs may involve far more than monetary expenditures.[20]

Without this information, agencies base regulatory choices on intuition (which may be faulty) or simply faith that the regulation

---

13. *See* Jerry Ellig & Jerry Brito, *Toward a More Perfect Union: Regulatory Analysis and Performance Management*, 8 FLA. ST. U. BUS. L. REV. 1, 21–31 (2009).

14. Exec. Order 12,866, *supra* note 7, § 3(f).

15. OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *Regulations and the Rulemaking Process*, https://bit.ly/32Z8yiK [https://perma.cc/W6EC-HC9W].

16. Exec. Order 12,866, *supra* note 7, §§ 1(b)(1), 6(a)(3)(B)(i).

17. *Id.* § 6(a)(3)(C)(iii).

18. *Id.* §§ 6(a)(3)(C)(i), (iii).

19. *Id.*

20. *See id. See also* U.S. OFFICE OF MGMT. & BUDGET, *supra* note 9.

will produce a positive outcome. Given the enormous influence that both the benefits and costs of regulation have on our daily lives, decision-makers have a responsibility to act based on knowledge of a 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 emphases,[21] but it is clear that Presidents of both political parties value centralized regulatory review.[22] 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."[23]

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. 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.[24] Agencies also produce higher quality RIAs when OIRA reviews the regulation for a longer period of time.[25] Agencies produce lower quality analysis and explain how the analysis influences decisions less extensively when OIRA is headed by an acting administrator, who has less political clout in the administration than a presidential appointee.[26] Case studies

21. *See generally,* Sally Katzen, *Cost-Benefit Analysis: Where Should We Go from Here?*, 33 FORDHAM URB. L.J. 1313 (2006).

22. *See id.*; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080–82 (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).

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

24. *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. 179, 181 (2011).

25. *See* Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis*, 7 J. BENEFIT-COST ANALYSIS 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).

26. Ellig & Fike, *supra* note 25, at 539–40 (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis); Ellig,

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.[27]

For example, in his case study of a 2004 Environmental Protection Agency (EPA) regulation requiring power plants to design cooling water intake structures that minimize harm to marine organisms, Scott Farrow concluded, "EPA clearly chose an approach that imposed a considerably lighter burden on society . . . . The record provides substantial evidence that the agency considered a lower-cost alternative to meeting a standard with the potential to save approximately $3 billion in annualized dollars or approximately $40 billion in present value."[28]

Thus, evidence suggests that RIAs can make a difference. Nevertheless, the quality and use of regulatory impact analysis fall far short of the ideals enunciated in Executive Order 12,866:

- Scholarly research reveals that, in many cases, RIAs are not sufficiently complete to serve as a guide to agency decisions. The quality of the analysis varies widely, and even the most elaborate analyses still have problems.[29] Survey-

supra note 11, 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. 873, 937 (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).

27. 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).

28. Scott Farrow, *Improving the CWIS Rule Regulatory Analysis: What Does an Economist Want?*, *in* REFORMING REGULATORY IMPACT ANALYSIS 176, 182 (Winston Harrington et al. eds., 2009).

29. *See* Art Fraas & Randall Lutter, *The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4*, 3 ANN. REV. OF RES. ECON. 71 (2010); Jamie Belcore & Jerry Ellig, *Homeland Security and Regulatory Analysis: Are We Safe Yet?*, 40 RUTGERS L.J. 1 (2008); Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader & Petrea Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000); Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, 1 REV. ENVTL. ECON. & POL'Y 192 (2007); Robert W. Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 J. INT'L ECON. L. 473 (2005); Robert W. Hahn, Randall W. Lutter & W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?*, AEI-BROOKINGS JOINT CT. FOR REG. STUDIES (2000).

ing the scholarly evidence on regulatory analysis, Robert Hahn and Paul Tetlock conclude that economic analysis has not had much impact, and the general quality of regulatory analysis is low.[30]

- A Government Accountability Office (GAO) study examined the analysis accompanying a sample of 57 economically significant regulations issued between July 2011 and July 2013.[31] All included a statement explaining the need for the regulation and some discussion of benefits and costs.[32] Of those regulations, however, 19 percent included no discussion of alternatives, 24 percent had no monetary estimate of benefits, and 63 percent failed to calculate net benefits (benefits minus costs).[33] GAO emphasized that it only looked to see whether these elements were present or absent in the analysis; it did not evaluate their quality.[34]
- The Regulatory Report Card project at the Mercatus Center at George Mason University 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.[35] 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.[36] That is equivalent to an "F." The high-

30. Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?,* 22 J. ECON. PERSP. 67, 72–78 (2008). Most of the scholarly research focuses on effects of the Regulatory Impact Analysis, which is often written after major decisions are made. This may not account for economists' behind-the-scenes influence as the regulation is being developed.

31. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-714, FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT (2014).

32. *Id.* at 22–27.

33. *Id.*

34. *Id.* at 4.

35. The Report Card originally consisted of 12 criteria based on requirements in Executive Order 12,866. Trained evaluators award the RIA a score of 0–5 points on each criterion. It was later revised to cover six 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 11, at 14–17.

36. Ellig, *supra* note 11, at 18.

est-scoring regulation ever evaluated received 18 points, equivalent to an A-.[37]

- The number of regulations accompanied by information on monetized benefits and costs is only a tiny fraction of the overall number of proposed rules.[38] For example, between 2008 and 2013, agencies proposed 14,795 federal regulations. About 9.5 percent of these were considered significant and hence eligible for OIRA review. About two 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.[39]
- For two-thirds of the economically significant, proposed regulations that cleared OIRA review between 2008 and 2013, agencies provided no explanation of how they used the RIA to inform their decisions.[40]
- While executive branch oversight by OIRA has helped, one former OIRA administrator described OIRA oversight as producing "marginal results."[41]

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[42] or legislation[43] to correct the problem. Here, however, we focus on managerial reforms that any administration could implement without new executive orders or legislation.

---

37. *Id*.
38. Williams, *supra* note 11.
39. Ellig, *supra* note 11, at 11–12.
40. Ellig, *supra* note 11, at 25.
41. Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15, 19 (2011).
42. 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).
43. Christopher Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017).

II. 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 12,866 directing them to do so.[44] As a result, agencies often fail to indicate clearly what counts as a successful outcome of a proposed regulation and how long a regulation needs to achieve a successful outcome. 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 regulation largely solves the problem and no additional regulation will be necessary. Without this information, regulations are likely to be less effective and more costly than necessary.

The GAO 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.[45] Scholars and policymakers repeatedly call for greater focus on retrospective analysis of regulations.[46] Just one economically significant regulation proposed between 2008 and 2013 had an RIA that included a reasonably complete framework for retrospective analysis of the regulation's effects.[47] Indeed, it is difficult to find any discussion of goals, measures, or provisions for retrospective review at all in the Notices of Proposed Rulemaking or RIAs for economically significant regulations proposed dur-

44. Exec. Order No. 12,866, *supra* note 7, § 1(b)(1).

45. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, RE-EXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 4–8 (2007); Randall Lutter, *The Role of Retrospective Analysis and Review in Regulatory Policy*, 10–15 (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 (2014).

46. 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 1527–28. 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, at 1319.

47. Ellig, *supra* note 11, at 26.

ing those years—even when the RIA contained information that agencies could have used to develop goals, measures, and retrospective review plans.[48] 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.[49]

President Carter's Executive Order 12,044, issued 42 years ago, provided that an agency head could not approve a regulation until determining that the agency had developed a plan to evaluate the regulation after it was implemented.[50] Subsequent executive orders all had provisions requiring agencies to develop plans for retrospective review of existing regulations, and the orders empowered either the OMB Director or the Vice President to designate regulations that should be reviewed.[51] None, however, continued the Carter approach of requiring the agency to develop a retrospective review plan before an agency could issue the regulation.

President Trump's Executive Order 13,771 motivated agencies to initiate extensive retrospective analysis efforts by imposing incremental regulatory budgeting and requiring agencies to remove two existing regulations for each new one.[52] Agencies now find themselves in the difficult position of trying to identify which existing regulations are the best candidates for review. The absence of clear agency goals and measures for regulations hampers retrospective review because it is not always clear what analysts or decision-makers should observe that would tell them whether the regulation is accomplishing its goals, or at what cost.

The 2-for-1 and regulatory budgeting requirements in Executive Order 13,771 have been controversial,[53] and future administrations may or may not continue these requirements. But there is another method, already authorized in existing law, that an administration can use to motivate retrospective analysis.

---

48. *Id.*

49. *Id.* at 19.

50. Exec. Order 12,044, 43 Fed. Reg. 12,661, § 2(d)(8) (1978).

51. *Id.* § 4; Exec. Order 12,291, *supra* note 6, § 3(i); Exec. Order 12,866, *supra* note 7, § 5; Exec. Order 13,258, 3 C.F.R § 13258, § 10 (2002); Exec. Order 13,563, *supra* note 8, at § 1.

52. Exec. Order 13,771, 82 Fed. Reg. 9339 (2017).

53. *See, e.g.*, Bridget C.E. Dooling, *Update: Litigation Challenging Trump's Regulatory "Two for One" EO*, YALE J. ON REG. (Sept. 4, 2018), https://bit.ly/328FSDB [https://perma.cc/434X-7BUN]; Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93, 94 (2018); Caroline Cecot & Michael A. Livermore, *The One-in, Two-out Executive Order is a Zero*, 166 U. PA L. REV. ONLINE 1, 1 (2017).

Language in the Government Performance and Results Modernization Act of 2010 (GPRAMA),[54] which amended the Government Performance and Results Act of 1993 (GPRA),[55] creates an opportunity for an administration to integrate retrospective evaluation of regulations with performance reporting and budget decisions. The GPRA requires agencies to set strategic goals, identify measures that indicate progress toward those goals, set targets for those measures, and report annually on progress. Each agency is expected to report annually on its success in hitting those milestones and, if not, identify the reasons and identify new strategies to improve performance.[56] The GPRAMA requires agencies to identify high-priority goals every two years, report on progress toward these goals quarterly, and identify every program, tax expenditure, and regulation that contributes toward those goals.[57]

Budget recommendations based on assessments of regulation's actual effects are the President's primary tool under GPRA to focus public discussion on retrospective analysis in a way that could affect decisions. As part of an administration's GPRA reporting, OMB should require agencies to group related regulations and any accompanying guidance into regulatory programs and evaluate the effectiveness of these programs in accomplishing the agencies' strategic goals. Since most regulatory costs do not appear in the federal budget, OMB should require agencies to assess the realized public and private costs of their regulatory programs so the true costs can be compared with the benefits.[58]

When agencies propose a regulation, OIRA should require agencies 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 (DHS) 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

54. Global Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866.

55. Gov't Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

56. *Managing for Results in Government*, U.S. GOV'T ACCOUNTABILITY OFF., https://bit.ly/304iggP [https://perma.cc/2SYT-RT7S] (last visited July 6, 2020).

57. U.S. GOV'T ACCOUNTABILITY OFF., NO. GAO-14-268, REEXAMINING REGULATIONS: AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS 8 (2014).

58. *See* JERRY ELLIG ET AL., GOVERNMENT PERFORMANCE AND RESULTS: AN EVALUATION OF GPRA'S FIRST DECADE 154–55 (2012).

of the regulatory program that support these strategic goals, and explains how the Department could measure the benefits associated with each goal.

TABLE 1: REGULATORY BENEFITS AND MEASURES TIED TO DEPARTMENT'S STRATEGIC GOALS[59]

DHS Strategic Goal / Objective Supported	US VISIT Goals / Objectives	Exit Objectives	Exit Benefit	Measure
Strategic Goal 2 – Prevention				
Strategic Objective 2.1 Secure borders against terrorists, means of terrorism, illegal drugs, other illegal activity	**Security** Enhance the security of United States (U.S.) citizens and travelers.	**Biometrically verify aliens' identity**	Increased National Security	Qualitative in terms of cost of terrorism and reduction of costs due to border security as well as unquantified security benefits.
Strategic Objective 2.6 Improve the security and integrity of our immigration system	**Integrity** Ensure the integrity of the U.S. immigration system.	**Provide mechanism to identify visa overstays**	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 U.S. (Subsequent detection and prosecution cost avoided)
		Accurate Matching of Arrival and Departure Records	Improved Exit Processing over existing biographic systems	Dollar value of accurately matching records
				Percentage of exit records matched to entry records (Number of exit transactions matched to entry transactions as percentage of total exit transactions)
		Improvement in Effectiveness of Government Resources	Improved ICE Efficiency Attempting Apprehension	Value associated with the reduction of time spent seeking wanted persons no longer in the country
				Qualitative improvement in efficiency in geographic targeting of visa violators
			Improved DIG Efficiency Processing Exit/Entry data	Value of improved processing efficiency
			Improved compliance with NSEERS requirements due to the improvement in ease of compliance	Quantitative, not monetized: Increase in expected NSEERS compliance rates.
		Facilitate travel	Increase in economic activity created through the expansion in the number of Visa Waiver Program eligible countries	Value of additional domestic economic activity created by the increased number of travelers arriving from countries with relaxed visa requirements. Measured but not included in the aggregate present value of benefits

A 2014 GAO study notes that few agency executives participating in roundtable discussions with the study's authors could identify examples where the agency linked retrospective review of regulations with assessments of agency progress toward its performance goals under GPRA.[60] GAO recommended that agencies should de-

59. U.S. VISITOR & IMMIGRANT STATUS INDICATOR TECH. PROGRAM, AIR/SEA BIOMETRIC EXIT PROJECT: REGULATORY IMPACT ANALYSIS 67–69 (2008).

60. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 57, at 35.

velop retrospective review plans when they adopt a regulation to better integrate retrospective review with GPRAMA reporting:

> Ensuring that agencies build in such performance metrics and a timeline for evaluating regulations after implementation would not only help facilitate retrospective analyses, but also help to lay a foundation to more closely tie retrospective analyses to reviews of broader agency priority goals. Moreover, GPRAMA's requirements for agencies to identify and assess how their various programs and activities, including regulations, contribute to agency performance goals and APGs [annual performance goals] further underscore the need for agencies to take such action.[61]

OMB's guidance to agencies on implementing Executive Order 13,771 takes steps in this direction. It primarily requires regulatory agencies to establish performance indicators, goals, and targets in their annual performance plans that would monitor the number of retrospective evaluations, number of deregulatory actions, and the net cost or cost savings from regulatory and deregulatory actions.[62] Agencies customarily have at least one GPRA strategic goal related to improved management, and these kinds of performance indicators are likely to fall under this catchall management goal. But the guidance also noted that agencies should develop performance indicators and goals that would assess the contribution of regulatory programs to their other priority goals:

> In addition, agencies should establish and report other meaningful performance indicators and goals for the purpose of evaluating and improving the net benefits of their respective regulatory programs (*i.e.,* all of the existing regulations in place that address a specific regulatory objective). This likely will require measuring the costs and benefits of regulatory programs and setting goals for improving those programs' net benefits. The effort to improve net benefits may be conducted as part of developing agency strategic and performance plans and priority goals, and may use existing quarterly and annual performance review processes to assess progress against these objectives. Please consult with your OIRA desk officer during your agency's development of new performance indicators for evaluating the net benefits of regulatory programs.[63]

Experience with GPRA implementation for programs suggests agencies need much more than a reporting requirement to drive

---

61. *Id*. at 34.
62. OFFICE OF MGMT. & BUDGET , *supra* note 8, at 3.
63. *Id*. at 3.

improved regulatory analysis and performance. Research shows that the GPRA definitely improved the quality of performance reporting by many agencies.[64] The quality of performance information available to federal managers, and use of that information in decisions, also improved, but results varied widely across different agencies.[65] Indeed, some reports concluded that GPRA did little to systematically increase agencies' use of performance information.[66] In 2001, OMB noted that "[p]erformance measures are insufficiently used to monitor and reward staff, or to hold program managers accountable."[67] Ten years later, OMB stated, "The ultimate test of an effective performance management system is whether it is used, not the number of goals and measures produced. Federal performance management efforts have not fared well on this test."[68] The Bush administration attempted to link budget recommendations to performance information,[69] but congressional appropriations committees chaired by members of the President's own party showed little interest in this information or in performance-based budgeting generally.[70]

The 2014 GAO report on retrospective analysis and performance goals offers a cautionary note that motivates our next recommendation: "[A]dditional opportunities for improvement depend in part on efforts to ensure that agencies are consistently held accountable for implementing existing guidance."[71]

B. Use Budget Recommendations to Enforce Analytical Requirements and Achievement of Agency GPRA Objectives

Agency RIAs often make some effort to comply with Executive Order 12,866, but still fall short of the standards envisioned in the executive order. Tying agency budgets to compliance with the executive order is a tool that could underscore an administration's

---

64. ELLIG ET AL., *supra* note 58, at 3–25.

65. *Id.* at 177–202.

66. *See* DONALD MOYNIHAN, THE NEW FEDERAL PERFORMANCE SYSTEM, IMPLEMENTING THE GPRA MODERNIZATION ACT 10–11 (2013).

67. *Id.* at 11.

68. *Id.*

69. *See* Eileen Norcross, *An Analysis of the Office of Management and Budget's Program Assessment Rating Tool* 1–2 (Mercatus Ctr. at Geo. Mason Univ., Working Paper, 2005); Eileen Norcross & Kyle McKenzie, *An Analysis of the Office of Management and Budget's Program Assessment Rating Tool for Fiscal Year 2007* 2–3 (Mercatus Ctr. at Geo. Mason Univ., Working Paper, 2006).

70. ELLIG ET AL., *supra* note 58, at 203–20.

71. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 57, at 35.

commitment to sound regulatory analysis.[72] Direct budgetary consequences would create a powerful incentive for agencies to improve the quality and use of RIAs. It would also provide an unequivocal signal that the administration believes regulators should understand the consequences of their actions before making decisions.

Tighter integration of regulatory review with budget decisions is hardly unprecedented. From 1970 through 1976, OMB budget officials conducted centralized review of regulations under what was then called the Quality of Life Review (QLR) process.[73] When submitting proposed regulations, final regulations, standards, and guidance documents for OMB review, agencies included a memo discussing the anticipated benefits and costs of the action and of alternatives.[74] Jim Tozzi, one of the OMB officials responsible for these reviews, noted that the involvement of budget examiners motivated agency compliance:

> In understanding the significance and influence of the QLR reviews, it must be recognized that they were conducted by the budget side of OMB. This meant that they were often conducted or supervised by personnel who, as a result of their work on such analyses in the Corps of Engineers, were experienced in conducting benefit-cost analyses. It also meant that the budget powers of OMB could be brought to bear on the agencies.[75]

Viewed in this light, our proposal represents a middle ground between the QLR process (review of regulations by budget examiners skilled in benefit-cost analysis) and the current practice (review of regulations by OIRA experts in regulatory impact analysis).

The incremental regulatory budget adopted in Executive Order 13,771 gives the administration an even more finely-honed tool to link high-quality analysis with budgeting. OMB could set an agency's *regulatory* budget, not just its *fiscal* budget, based in part on how reliably an agency's analysis of regulations demonstrates that the agency is likely to achieve the intended results at a reasonable cost. This should not be a subjective exercise but one in which OIRA develops quality standards and "grades" for RIAs. OIRA should publish the grades on its website.

72. *See* Christina Forsberg, Reducing Regulation 1 (June 11, 2009) (unpublished manuscript) (on file with authors at Mercatus Ctr. at Geo. Mason Univ.).

73. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 46 (2011).

74. *Id.* at 45.

75. *Id.* at 46.

During the Obama administration, the OIRA developed a checklist that indicates the major elements an RIA should contain.[76] The checklist also includes standards for the analysis and data; for example, RIAs should rely on "the best reasonably obtainable scientific, technical, and economic information," and the agency should make its data, sources, and methods available on the Internet so that others can replicate the agency's findings.[77] OIRA could grade RIAs based on how well they comply with that checklist. OIRA may rely on the Information Quality Act and its checks to help assure scientific quality.[78]

OMB budget review should include an assessment of the agency's success in achieving strategic goals via regulation at minimum cost. Regulatory programs should be discontinued if they cannot or are unlikely to achieve goals in the near future, or if the goal has been achieved or is no longer appropriate.[79] This change would leverage GPRA's reporting requirements to prompt agencies to develop an ongoing program of retrospective analysis of regulations. Assessing regulatory performance as part of the agency's budget review would strengthen the agency's incentive to take retrospective analysis and reporting seriously.

Achieving this goal requires delicate balancing within the executive branch. OIRA should be responsible for developing measures and assessing compliance with the executive orders on 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 report specific agencies' 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, the President should recommend future agency budgets to Congress based on achieving results. This includes completing the required reports on achieving the goals and, in the longer run, actually achieving those goals. When agencies continue

---

76. OFF. OF INFO. & REG. AFF., AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS (2010).

77. *Id.*

78. Presidential Threat Protection Act of 2000, Pub. L. No. 114 Stat. 2715 (requiring the Office of Management and Budget to promulgate guidance to agencies ensuring the quality, objectivity, utility, and integrity of information—including statistical information—disseminated by federal agencies).

79. *See* Patrick McLaughlin & Richard Williams, *The Consequences of Regulatory Accumulation and a Proposed Solution* 46 (Mercatus Ctr. at George Mason Univ., Working Paper No. 14-03, 2014).

to expend resources on goals that are not achieved or are not achievable, the President should recommend budget reductions consistent with eliminating the nonworking programs. 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.[80] Under one proposal, the President's budget would include proposed figures for the cost of regulations for each agency that congressional budget committees could use as part of their budget resolutions to limit the annual cost of an agency's regulations.[81]

Executive Order 13,771 already provides a framework that the executive branch can use to budget regulatory costs. The executive order states that OMB should give agencies 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 nine billion dollars in fiscal year 2019.[82] If agencies have not been producing results in their regulatory programs, and subsequently have smaller agency budgets for the forthcoming year, the President and Congress should also decrease the budgets allocated to the agencies for private regulatory expenses.

D. Reward Results, Not Activity

Agencies often state that they will hold executives accountable for achievement of the agency's strategic goals and objectives.[83] It is not clear that this happens.

Regulatory agencies, and particularly the regulatory staff, often regard the production of regulations, rather than the produc-

80. *See* Jason J. Fichtner et al., *Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget*, PUB. BUDG. & FIN. 40, 46 (2018).

81. *See id.* at 43.

82. OFFICE OF MGMT. BUDGET, REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2019 1 (2019).

83. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., Executive Performance Management (2010), *available at* https://bit.ly/39wPXvy [https://perma.cc/5FPP-ZSSB]; OFFICE OF THE SEC'Y OF DEF., SENIOR EXECUTIVE SERVICE PERFORMANCE PLANNING AND EVALUATION (1989), *available at* https://bit.ly/3jFEvTa [https://perma.cc/D7YD-QXBS].

tion 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 the year's regulations, with percentages of the number of regulations finished compared to the planned number of regulations.

Using the number of regulations produced results in a bias to adopt more regulations, regardless of the value of those regulations, since a steady stream of new regulations indicates that the agency is hard at work "solving problems." 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 ten regulations and we decided that eight did not warrant regulation, which would be better.'"[84]

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, the Executive Branch should evaluate and reward agencies and their managers based on the demonstrated benefits they produce for the public, regardless of whether those benefits stem from new regulatory actions or decisions not to regulate.[85] Agencies should directly link those benefits to achieving agency performance objectives under GPRA. In fact, OMB should reward agencies 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 obesity rates by providing more useful information, an agency can take a survey after the agency makes the information available and allows adequate time for the regulation to produce results. OMB should make this information on regulatory results from all agencies available in a consistent format in one area on OMB's website.

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

85. Clearly, putting forth "straw dog" regulations just so they can be rejected would not be considered a successful performance outcome.

Ideally, agencies should reward decision-makers for the actual net benefits their decisions produce for the public, particularly when 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."[86] To avoid creating an additional incentive for biased estimates, OMB should base such rewards on independent, external evaluations of regulatory programs' effects, rather than agency self-evaluations.[87] 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 sometimes 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, OMB should take care to ensure that agencies do not artificially inflate these results by proposing unrealistic goals for regulations and then deciding the regulations 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.

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.

These requirements would help correct current incentives that prompt agencies to produce regulations in order to show that they are productive. If accompanied by solid, objective analysis, a list of

86. ELLIG ET AL., *supra* note 58, at 142.
87. *See, e.g.*, ALDY, *supra* note 45, at 17–25.

major decisions not to regulate would help build the case for refraining from regulating when the evidence suggests caution is warranted.

CONCLUSION

Citizens expect federal regulation to accomplish a lot of important things, such as protecting us from financial frauds, preventing workplace injuries, preserving clean air, and deterring terrorist attacks. Regulation also requires sacrifices. Depending on the regulation, consumers may pay more, workers may receive less, our retirement savings may grow more slowly due to reduced corporate profits, and we may have less personal freedom. Regulatory impact analysis is the key ingredient that makes these tradeoffs more transparent to decision-makers and to the public. So, understanding the effects of regulation must start with sound prospective *and retrospective* regulatory impact analysis. Tying agency budgets and personnel bonuses to effective analysis and, ultimately, positive outcomes can go a long way to maximizing the value regulatory agencies create for citizens.

OIRA is tasked with enforcing executive orders on regulatory analysis and regulatory review. But like George Washington at the outset of the American Revolution, OIRA is "outgunned, outmanned, outnumbered, [and] outplanned."[88] In sheer size, OIRA will inevitably play David to the administrative state's Godzilla. Our proposals in Part II above are modest attempts to equip David with some bigger and better stones.

88. *Right Hand Man*, *supra* note 1.

***