

The Regulatory Plan

OPEN GOVERNMENT AND EVIDENCE-BASED REGULATION

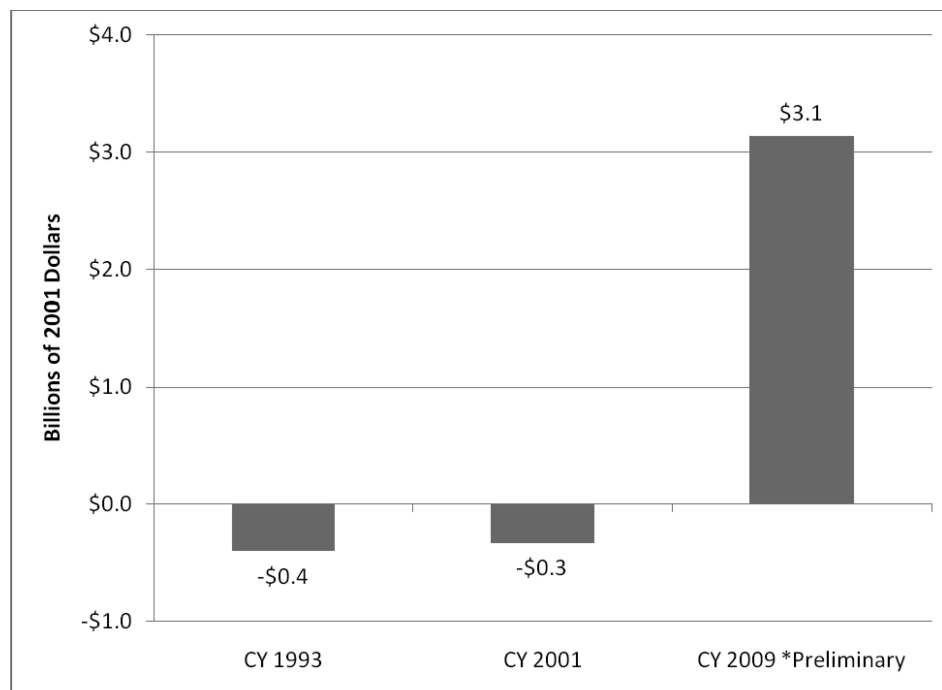
There is a close connection, even an inextricable relationship, between open government and evidence-based regulation. If regulatory choices are based on careful analysis of the evidence, and if opportunities are provided for public review and comment, we will be able to identify sensible and pragmatic approaches that are designed to promote entrepreneurship, innovation, job creation, and economic growth.

Since his inauguration, President Obama has placed a great deal of emphasis on open government. In requiring openness, the President has emphasized three separate points. First, he has stressed the importance of accountability. In his words, openness “will strengthen our democracy and promote efficiency and effectiveness in Government.” Second, the President has said that “[k]nowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge” and hence to “collective expertise and wisdom.” Third, he has emphasized the importance of providing people with information that they “can readily find and use.” For this reason, he has said that agencies “should harness new technologies” and “solicit public feedback to identify information of greatest use to the public.”

At the same time, the Administration has been placing a great deal of emphasis on sound analysis and on ensuring a careful accounting of the anticipated consequences of regulation, including both benefits and costs. While regulation can promote vital public goods, such as protection of safety, health, and financial stability, the President has said, “Sometimes regulation fails, and sometimes its benefits do not justify its costs.”

The word “analysis,” of course, includes a number of distinct but overlapping approaches, such as the cost-benefit analysis required by Executive Order 12866 and the regulatory flexibility analysis required by the Regulatory Flexibility Act. Executive Order 12866 requires agencies, to the extent permitted by law, to give careful consideration to both costs and benefits and to ensure that the benefits of regulation justify the costs. It is worth noting that, in part because of this Administration’s commitment to careful analysis, the quantified benefits of final rules significantly exceeded the quantified costs for calendar year 2009—and that the net benefits of final regulations for the first year of the Obama Administration far exceeded those of the first year for the Clinton and Bush Administrations:

**Figure 1: Annual Estimated Net Benefits of Major Rules
First Calendar Year of an Administration (1/21 to 12/31)**



It is important to emphasize that the monetized benefits are high. We have issued rules and undertaken initiatives that are saving lives on the highways and in workplaces; reducing air and water pollution; increasing fuel economy, thus saving money while reducing pollution; making both trains and planes safer; helping students to obtain school loans and so to attend college; protecting consumers and investors against manipulation, fraud, and conflicts of interest; increasing energy efficiency, saving billions of dollars while increasing energy security; combating childhood obesity; and creating a “race to the top” in education.

A central goal for the upcoming period is to ensure that regulations do not impose unjustified burdens and that if the costs and burdens are significant, they are producing even more significant gains. Analysis of regulatory consequences is part of a broad effort to subject regulatory decisions to public scrutiny, with close reference to evidence, and thus improving them—not least by pointing the way toward reduced burdens and innovative solutions.

By promoting accountability, open government policies can help to track government’s own performance. In that way, such policies make public officials accountable for what they do, including in the regulatory arena. Performance review matters; it is a hallmark of this Administration. Regulatory analysis is best seen as a form of performance review for Federal rules, typically done in advance (and sometimes done retrospectively).

Before acting, regulators should attempt to obtain a clear and concrete understanding of the likely consequences of what they propose to do. In its 2009 Report on the Benefits and Costs of Federal Regulations, OMB specifically underlined the relationship among careful analysis, evidence-based regulation, and open government. As the Report says, “Indeed, careful regulatory analysis, if transparent in its assumptions and subject to public scru-

tiny, should be seen as part and parcel of open government. It helps to ensure that policies are not based on speculation and guesswork, but instead on a sense of the likely consequences of alternative courses of action. It helps to reduce the risk of insufficiently justified regulation, imposing serious burdens and costs for inadequate reason. It also helps to reduce the risk of insufficiently protective regulation, failing to go as far as proper analysis suggests. We believe that regulatory analysis should be developed and designed in a way that fits with the commitment to open government.”

With these points in mind, the Office of Information and Regulatory Affairs issued (in November 2010) an “Agency Checklist” for Regulatory Impact Analysis, designed to promote clarity and transparency with respect to the anticipated effects of regulation (see http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf). The checklist emphasizes that agencies must assess costs and benefits (to the extent feasible), explore alternatives, and demonstrate the need for regulatory action. In these ways, we have been seeking to increase openness and improve our regulatory practices.

The second function of open government is very different: Openness promotes not merely accountability, but also access to widely dispersed information. The central idea is that officials often lack information that is held by numerous others, especially in the private sphere. When it is working well, open government can ensure that rules are properly informed by such information, which will often help to increase benefits, reduce costs, or identify new and creative alternatives.

Consider the rulemaking process itself. A large advantage of notice-and-comment rulemaking is that it allows agencies to offer proposals, and supporting analyses, that are subject to public scrutiny, and that can benefit from knowledge that is widely dispersed in society. On numerous occasions in the last 21 months, final rules have been significantly different from proposed rules, and public comments are a key reason.

In its 2010 Report on the Benefits and Costs of Federal Regulations, OMB specifically noted that “some regulations have significant adverse effects on small business” and that “it is appropriate to take steps to create flexibility in the event that those adverse effects cannot be justified by commensurate benefits.” To tap dispersed knowledge, OMB requested public suggestions about regulatory changes that might serve to promote economic growth, with particular reference to increasing employment, innovation, and competitiveness. More specifically, OMB sought suggestions for regulatory reforms that have significant net benefits, that might increase exports, and that might promote growth, innovation, and competitiveness for small business, perhaps through increasing flexibility. We continue to seek such suggestions in an effort to reduce the risk that regulation will impose unjustified costs or contain unjustified rigidity—and to square important regulatory goals with the interest in economic recovery.

Finally, in emphasizing the value of providing access to information that people “can readily find and use,” the President signaled a distinctive idea—that openness promotes learning by making data and evidence accessible. Anecdotes, speculation, and guesswork can be replaced with information and evidence. The point bears directly on the role of regulatory impact analysis. Such analysis is something that members of the public can “find and use,” not least because advance notice promotes predictability and avoids unfair surprise.

In its Memorandum of July 23, 2010, on the Regulatory Plan and Unified Agenda, the Office of Information and Regulatory Affairs noted:

“Executive Order 12866 identifies a number of principles that you should keep in mind, to the extent permitted by law, as you set priorities and prepare your submissions.

First, Executive Order 12866 directs agencies to propose or adopt a regulation ‘only upon a reasoned determination that the benefits of the intended regulation justify the costs’ (recognizing that some benefits are difficult to quantify but are nonetheless essential to consider, such as visibility in national parks).

Second, it requires each agency to ‘tailor its regulations to impose the least burden on society . . . taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.’

Third, it requires agencies to ‘identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as the public.’

Fourth, it directs agencies to design regulations ‘in the most cost-effective manner to achieve the regulatory objective.’

Fifth, it asks each agency to ‘avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.’

Sixth, it directs agencies to ‘select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.’”

OIRA asked agencies to “comply with these requirements as you develop your submissions.” It also asked agencies, among other things, to “highlight rulemakings that simplify or streamline regulations and reduce or eliminate unjustified burdens” and to identify “regulations that are of particular concern to small businesses.” Before they can be finalized, the regulations on the plans that follow will, of course, be subject to a rigorous process of assessment and scrutiny, with careful attention to the foregoing principles. The list of regulations is intended to provide a public account of regulations that are under consideration; agencies are under no obligation to issue these regulations (unless some independent source of law requires them to do so).

In the current economic environment, it is especially important to see that analysis and openness are mutually reinforcing. If the two are taken together, they can help to promote important social goals, to eliminate unjustified costs, and to identify approaches that will promote entrepreneurship, innovation, job growth, and competitiveness.