

As prepared for delivery

Economic Growth and Public Protection

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I. Challenges and Opportunities

The term “regulation” covers a great deal of territory. It can refer to efforts to reduce air pollution; to safeguards against terrorist attacks; to protection against discrimination on the basis of religion or sex; to consumer protection; to rules to protect worker safety.

From this catalogue, it should be clear that the consequences of regulation are highly varied. Some regulations save lives; some regulations save money; some regulations cost a great deal; some regulations preserve freedom of choice; some regulations amount to flat prohibitions; some regulations create jobs; some regulations eliminate jobs.

President Obama seeks to use the US year in APEC to promote and sustain good regulatory practices – practices that will support economic growth, job creation, innovation, and regional trade and investment, while also protecting public health and welfare.

Different APEC economies, of course, have different histories and face different challenges. But all of us are confronting a general question: How best to safeguard our citizens while also laying secure foundations for economic growth?

There are many possible answers to this question. For purposes of regulatory cooperation, consider just two.

First, we should be building our capacity to create and strengthen appropriate institutions, with the best processes and mechanisms for making sound regulatory choices. As we shall see, that goal requires that, with respect to regulation, we “look before we leap.” Call this the goal of **regulatory capacity**.

Second, we should be moving toward greater alignment of our technical requirements, consistent with each of our priorities, in order to promote economic growth and job creation. Call this the goal of **regulatory alignment**.

In these remarks, I will be focusing on regulatory capacity, and in particular on Executive Order 13563, “Improving Regulation and Regulatory Review,” in which President Obama recently set out a distinctive approach to federal regulation. The Executive Order is meant to draw on the best practices of the last generation. It sets out six sets of requirements to achieve its overriding goals.

I will spend some time elaborating each of these sets of requirements, but it may be useful to keep two general themes in mind. First, the Executive Order calls for *public*

participation. Before rules are finalized, or even proposed, agencies are directed to “seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.” Second, the Executive Order calls for *careful analysis of the likely consequences of regulation*, including consideration of alternatives, of costs and benefits, and of simplified, coordinated, and flexible methods for achieving regulatory goals.

It is important to see that the goals of public participation and careful analysis are mutually reinforcing. Participation in rulemaking (which can, and does, include those outside the United States) can promote careful analysis, and careful analysis can facilitate public participation. And those goals are related in turn to the general effort to promote predictability and certainty, in the process eliminating unnecessary or unjustified burdens on the private sector, and thus promoting economic growth.

II. Background

The new Executive Order has a history; it did not come out of a vacuum. Let me offer a few words by way of background.

In the United States, the modern era of regulatory review was initiated with Executive Order 12291, issued by President Reagan on February 17, 1981. That Executive Order set forth two requirements that have lasted for over thirty years.

First, the Office of Information and Regulatory Affairs helps to oversee federal rulemaking. What this means, concretely, is that draft rules from many agencies (involving environmental protection, education, health care, highway safety, and much more) are submitted to OIRA for its review and approval – which emphatically includes circulation to other agencies and offices within the executive branch for their comments and reactions. The purposes of such oversight are, among other things, to promote coordination among different parts of the executive branch; to ensure that regulations are consistent with the law as enacted by Congress; and to ensure that within the constraints of the law, such regulations fit with the president’s principles and priorities.

Second, Executive Order 12291 called for careful analysis of regulatory proposals, with particular reference to both costs and benefits and to consideration of less burdensome alternatives. This requirement helped spur the process of building strong analytic capacities within the Executive Branch of the United States government. There are, for example, excellent analysts at the Department of Transportation, the Environmental Protection Agency, and the Department of Health and Human Services.

Since September 30, 1993, the process of regulatory review has operated under Executive Order 12866, issued by President Clinton. With some qualifications, that Executive Order maintains the two central requirements of Executive Order 12291. Among other things, Executive Order 12866 calls (to the extent permitted by law) for careful consideration of costs and benefits, for tailoring regulations to impose the least burden on society, for selection of the approach that maximizes net benefits, for consideration of alternatives, and for a process of interagency review, coordinated by the Office of Information and Regulatory Affairs. One of the central goals of these principles is to ensure that regulation promotes, and does not undermine,

important economic goals, including economic growth. Regulation must be justified; the arguments on its behalf must be based on careful evidence, not on dogmas, intuitions, hopes, or fiat.

In January 2009, President Obama asked the Director of the Office of Management and Budget to produce, within 100 days, recommendations for a new Executive Order on regulatory review. In that period, the Office of Information and Regulatory Affairs engaged in a period of public outreach to obtain thoughts and ideas. The outreach included a notice in our Federal Register—the daily journal of the US Government—which produced over 180 comments; those comments are publicly available. The outreach also included a series of meetings with federal agencies, with state and local officials, and with private groups of many different kinds. Long before Executive Order 13563 was issued, the resulting comments and suggestions played a significant role in the operation of the Office of Information and Regulatory Affairs under President Obama.

III. Executive Order 13563

Executive Order 13563 was issued on January 18, 2011. It has six key provisions.

A. General Principles

The order begins with governing principles. It emphasizes the need for

- the best available science,
- public participation,
- use of the least burdensome tools,
- considering costs and benefits, and
- measuring, and seeking to improve, actual results.

It also incorporates the principles, structures, procedures, and definitions of Executive Order 12866. In so doing, it refers to, and quotes, five requirements from that Executive Order, specifically focused on identifying costs and benefits and minimizing burdens. For example, it states that agencies may propose or adopt a regulation only after a reasoned determination that the benefits justify the costs, and that they must select the approach that maximizes net benefits. In this way, the order explicitly embraces cost-benefit analysis (to the extent permitted by law).

The Executive Order also emphasizes the importance of quantification. It directs agencies “to use the best available techniques to quantify anticipated present and future benefits as accurately as possible.” But it candidly recognizes that some values may be “difficult or impossible to quantify”; such values include equity, human dignity, fairness, and distributive impacts. If, for example, a regulation makes it easier for wheelchair-bound employees to use bathrooms without relying on their colleagues, there is a benefit in terms of dignity. And if a regulation reduces the incidence of rape, there are benefits in terms of equity, human dignity, and fairness.

B. Public Participation

Executive Order 13563 makes an unprecedentedly strong commitment to public participation in rulemaking. It directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. As I have noted, the public is not limited to citizens of the United States. If our decisions would have adverse effects on international trade, or harm those in other nations, our doors are open to listen to relevant concerns. We have listened in the past and we will listen in the future. In fact, we have a publicly available account of all rules pending before OIRA, on reginfo.gov, and we have a special, easily accessible list of rules anticipated to have an international impact.

Attempting to bring rulemaking into the twenty-first century, the new order also requires use of the Internet to promote that open exchange. Agencies are generally asked to provide a period of 60 days to enable public comment. Agencies are not merely required to provide the public with an opportunity to comment on their rules; they must also provide timely online access to relevant scientific and technical findings, thus allowing them to be scrutinized. Everyone in the world can have access to proposed rules and findings on regulations.gov – at least if they have an Internet connection.

The Executive Order also directs agencies to act, even in advance of rulemaking, to seek the views of those who are likely to be affected. This group explicitly includes “those who are likely to benefit from and those who are potentially subject to such rulemaking.”

C. Integration and Innovation

Executive Order 13563 directs agencies to take steps to harmonize, simplify, and coordinate rules. It emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. In order to reduce costs and to promote simplicity, it requires greater coordination. Such coordination may occur within offices in a single agency or across agencies. The order also explicitly connects the goal of harmonization with the interest in innovation, directing agencies to achieve regulatory goals in ways that promote that interest. In this way, the Executive Order is designed to increase clarity and certainty.

D. Flexibility

As I have noted, some regulations contain mandates or bans, while others do not. Executive Order 13563 directs agencies to identify and to consider flexible approaches that reduce burdens and maintain freedom of choice for the public. Such approaches may include, for example, public warnings, appropriate default rules, or provision of information “in a form that is clear and intelligible.” In the past, information has sometimes been provided in a way that is not a model of clarity and intelligibility. The order is meant to ensure that information provision is actually useful to those for whom it is intended.

E. Scientific Integrity

Many regulations depend on science, and it is important to distinguish between scientific judgments and judgments of policy. Executive Order 13563 calls for scientific integrity. It directs each agency to ensure the objectivity of the information on which it relies to support its regulatory actions. In implementing guidance, the President’s Science Adviser stated, “Science,

and public trust in science, thrives in an environment that shields scientific data and analyses from inappropriate political influence; political officials should not suppress or alter scientific or technological findings.”¹ Section 5 of Executive Order 13563 extends the President’s Memorandum and implementing guidance to the context of regulatory actions.

F. Retrospective Analysis

Executive Order 13563 calls for retrospective analysis of existing rules. It asks for “periodic review” to identify “rules that may be outmoded, ineffective, insufficient, or excessively burdensome.” It directs agencies to produce preliminary plans for periodic review of significant rules and to submit them to OIRA within 120 days. Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles set forth in Sections 1 through 5 remain fully applicable, and should help to orient agency thinking.

IV. Twenty-First Century Regulation

Executive Order 13563 is best understood as an effort to provide direction on both the “flow” of new regulations and the “stock” of existing regulations. With a clear emphasis on economic growth, the order stresses the importance of “imposing the least burden on society,” with attention to cumulative costs; of ensuring that benefits justify costs; of identifying and assessing alternatives; and of maximizing net benefits. There is an effort here to ensure that regulations are not imposed unless they are truly justified.

At the same time, the order offers a set of distinctive ideas. It draws explicit attention to the importance of certainty and predictability, and it offers a strong requirement of quantification. The public participation section will bring federal rulemaking into the twenty-first century, with its emphasis on the use of the Internet for public comment, and its requirement that “relevant scientific and technical findings,” and not merely rules themselves, must be made available for public comment.

The section on science applies the principles of scientific integrity to the rulemaking process. Here, then, is a clear emphasis on the importance of distinguishing between judgments about science and judgments about politics, or even policy. Of course, policy judgments are exceedingly important, and they should be informed by scientific judgments; but the two are not the same.

The sections on simplification and flexibility should be understood as efforts to reduce burdens and to promote freedom of choice. When sectors and industries face overlapping and inconsistent requirements, they may be subject to unjustified and excessive burdens. Simplification can reduce costs significantly. So too, flexible approaches, such as warnings and disclosure, are sometimes the best means of achieving regulatory goals.

¹ John P. Holdren, Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity (Dec. 17, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

Insofar as the order requires retrospective analysis, it is connected to a longstanding recommendation from many informed observers. Consider this suggestion from Professor Michael Greenstone (recently Chief Economist at the Council of Economic Advisers): “The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. This is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions.”² By contrast, retrospective analysis can help show what works and what does not, and in the process can help to promote repeal or streamlining of less effective rules and strengthening or expansion of those that turn out to do more good than harm. Greenstone thus urges a series of reforms designed to “instill a culture of experimentation and evaluation.”³ These reforms include (1) an effort to ensure that regulations are written and implemented in ways that lend themselves to experimental evaluation and (2) creation of independent review to assess the effectiveness of regulations.

We have already taken numerous steps to promote “look back.” Many agencies have asked for public comments on how to proceed – and on rules that should be simplified or eliminated. The Environmental Protection Agency and the Department of Transportation have created websites specifically for that purpose.

V. Regulatory Alignment

My principal emphasis has been on regulatory capacity, not regulatory alignment. In some ways the alignment question is more difficult, because different economies have different situations and needs, and it is legitimate to strike different balances. But it is also clear that diverse approaches can compromise trade and therefore growth, in a way that is unhelpful for our economic goals. Sometimes differences in approach do not stem from significant differences in situations and needs, and a great deal is to be gained from promoting greater alignment.

I might note, for example, that Mexico recently declared that, for certain classes of electronic products (including televisions and computers), compliance with US standards would be deemed “equivalent” to compliance with Mexican standards, and further certification would not be necessary. This approach is helpful to trade; it is also helpful to Mexican consumers.

We are carefully exploring other efforts to promote alignment with Mexico, Canada, and Europe. If we could make progress elsewhere, we could benefit the citizens of many nations.

VI. Conclusion

It is understatement to say that, taken in the abstract, regulation has become a highly polarizing issue. On one view, regulations typically or frequently endanger economic growth, job creation, innovation, and competitiveness. On a competing view, regulations have no such adverse effects, and they are indispensable means of protecting public health and welfare.

Abstract statements of this kind are difficult to defend. Some regulations impede job creation; other regulations promote job creation. Some regulations create unnecessary barriers to

² Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in *NEW PERSPECTIVES ON REGULATION* 111, 113 (David Moss & John Cisternino eds., 2009).

³ *Id.* at 118.

trade; others do not. To understand the likely consequences of regulations, it is indispensable to use the best available techniques to project both benefits and costs, and to be as quantitative as possible. Of course prospective assessments may err and circumstances may change. For this reason, it is also indispensable to assess expensive regulations on a continuing basis, to see if they still make sense, or if important modifications would be desirable.

I have said that Executive Order 13563 stresses, at once, the goals of public participation and sound analysis, and that these goals are mutually reinforcing. Analysis of likely consequences frequently benefits from enlisting the dispersed knowledge of the public; affected stakeholders often have valuable information not only about benefits and costs, but also about new and creative ways of meeting regulatory challenges. They are in an especially good position to know whether (in the words of the Executive Order) rules are “accessible, consistent, written in plain language, and easy to understand.” At the same time, regulations must not be based on intuition, anecdote, interest-group pressure, or dogma; careful analysis is an important safeguard here.

By simultaneously emphasizing the importance of participation and sound analysis, Executive Order 13563 provides a foundation for regulatory choices that will, in its own opening words, “protect public health, welfare, safety, and our environment while promoting economic growth, innovation, and job creation.” Through greater regulatory cooperation within APEC, these choices can, in turn, promote free and open trade and investment in the region.

In all of our respective economies, and with humility and resolve, let us get to work.