

“Executive Order 13563: Economic Growth and Public Protection”

Speech delivered at New York University School of Law, April 4, 2011

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I. A Distinctive Approach

The term “regulation” covers a great deal of territory. It can refer to prohibitions on discrimination on the basis of disability; to energy efficiency requirements; to automobile safety provisions; to safeguards against terrorist attacks; to restrictions on texting while driving; to efforts to reduce risks from chemicals; to bans on deceptive nutritional labeling; to required disclosure of relevant information about credit cards, school loans, and mortgages; to restrictions on air and water pollution; to incentives for automatic enrollment in savings plans; and to much more.

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.

In these remarks, I will be focusing on Executive Order 13563, “Improving Regulation and Regulatory Review,” in which President Obama set out a distinctive approach to federal regulation. Taken most generally, the Executive Order can be seen as a kind of constitution for the twenty-first century regulatory state. Taken more specifically, it is meant to lay the foundations for a regulatory system that protects public health and welfare while also promoting economic growth, innovation, competitiveness, and job creation. It sets out six sets of requirements to achieve that overriding goal.

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 view 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.”

More generally, the Executive Order makes an unprecedented commitment to promoting public participation in the rulemaking process – with a central goal of ensuring that rules will be informed, and improved, by the dispersed knowledge of the American people.

The commitment to public participation is closely associated with the Obama Administration’s goals, from the beginning, of promoting accountability to the public, of

providing people with information that they can readily find and use, and of improving judgments by receiving information from the many people who are likely to be affected by those judgments.

Second, the Executive Order calls for *careful analysis of the likely consequences of regulation*, including consideration of underlying science, or alternatives, of costs and benefits, and of simplified, harmonized, and flexible methods for achieving regulatory goals. Under the Executive Order, agencies may not proceed unless the benefits justify the costs (unless the law requires them to do so). In addition, agencies are required to maximize net benefits, to select the least burdensome alternatives, and to consider approaches that promote freedom of choice for the public.

It is important to see that the goals of public participation and careful analysis are mutually reinforcing. Participation can promote careful analysis, and careful analysis can facilitate public participation. On countless occasions – including recent weeks – public participation has helped to improve analysis and thus to improve rules, often by reducing costs in a time of economic difficulty. 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.

I will also be suggesting that the principles and requirements of Executive Order 13563 might help us to go beyond an unduly polarizing recent debate about regulation. In this domain, anecdotes, intuitions, and abstract statements -- about the potentially negative or positive effects of regulatory controls – do not take us terribly far. What is needed is a careful and objective analysis of actual and anticipated consequences, whether positive or negative.

With its emphasis on the importance of analysis, both prospective and retrospective, Executive Order 13563 suggests the possibility of distinguishing between what works and what does not, and in the process of showing what may be excessive and what may be insufficient. Armed with evidence, we should be able to provide important public safeguards, in the process saving lives, while also promoting innovation and economic growth.

II. Background

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

The modern era of regulatory review – what we might call Regulatory Review 1.0 -- 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. 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. It is important to ensure consistency with the law; careful assessment of legal requirements is a central part of interagency review.

Second, Executive Order 12291 called careful analysis of regulatory proposals, with particular reference to both costs and benefits and to consideration of less burdensome alternatives.

Since September 30, 1993, the process of regulatory review has operated under Executive Order 12866, issued by President Clinton. With some qualifications and significantly more detail, that Executive Order – what we might call Regulatory Review 2.0 -- 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.

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 public outreach to obtain thoughts and ideas. The outreach included a Federal Register notice that 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. Many of these comments emphasized the importance of public participation, consideration of costs and benefits, scientific integrity, and assessment of alternatives.

III. Executive Order 13563

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

A. General Principles

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

- predictability and certainty;
- the best available science;
- public participation;
- use of the least burdensome tools;

- considering costs and benefits, both quantitative and qualitative; and
- measuring, and seeking to improve, actual results.

Of these, the emphasis on predictability and actual measurement of results, are new. They reflect an appreciation of the need for clarity about regulatory requirements and for a culture that is focused on evidence of anticipated and observed effects.

The order also incorporates the principles, structures, and definitions of Executive Order 12866. In so doing, it refers to, and explicitly quotes five requirements from that Executive Order, all of which are 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, and it does so with greater clarity and firmness than has been done before. 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 – as the Department of Justice has emphasized in a recent rule.

If a regulation allows people with mental illness to join the workforce, and to receive reasonable accommodations, there is a benefit in terms of both dignity and equity – as the EEOC recently recognized in a recent rule. And if a regulation reduces the incidence of rape, there are benefits in terms of equity, human dignity, and fairness – as the Department of Justice has also recognized in a recent rule.

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. Attempting to bring rulemaking into the twenty-first century, it also requires use of the Internet to promote that open exchange. Agencies are 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.

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.” Among other things, this emphasis on early involvement should be seen as an effort to acquire relevant information and to avoid unintended harmful consequences.

In the period since the Executive Order was issued, we have seen important examples of the benefits of public participation. The EEOC’s new rules on disability have been vigorously applauded not only by the American Association of People with Disabilities but also by the U.S. Chamber of Commerce, which emphasized responsiveness to public comments. The EPA’s final rule on air pollution from boilers is far less burdensome than the proposed version, in part because engagement with public comments has identified less expensive means of achieving public health and environmental goals.

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.

This provision connects closely with a burden reduction initiative during the last months, focusing in part on administrative simplification, which produced significant new steps to eliminate paperwork and reporting burdens on the American public. And in the important area of fuel economy, the Environmental Protection Agency and the Department of Transportation have been working closely together, harmonizing and coordinating their requirements into a widely applauded national standard that has been applauded by automobile companies and environmentalists alike.

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.”

The reference to “appropriate default rules” signals the possibility that important social goals can be obtained through simplification – as, for example, in the form of automatic enrollment. We know that automatic enrollment plans in the domain of savings can greatly increase participation. With respect to savings, the Administration has taken numerous steps to promote such plans. We also know that simplification of existing requirements can often promote compliance and participation and that complexity can have serious unintended consequences. In many domains – including education – we have taken strong steps toward greater simplicity. Indeed, a recent burden reduction initiative is expected to save more than 60

million hours annually in paperwork and reporting burdens; and a new initiative, focusing on small business and benefits programs, is expected to save still more.

Disclosure is often an appropriate and low-cost regulatory tool, but 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 – “clear and intelligible” -- to those for whom it is intended. By pointing to the potential use of disclosure, the order takes a strong stand in favor of consideration of flexible approaches that “maintain freedom of choice for the public.” In this way, it is connected with a number of proposed or final rules in recent years, which seek to provide clear disclosure in multiple realms, and thus to enable people to make informed choices. Such rules involve such diverse topics as fuel economy, tire safety, energy efficiency, nutrition, educational choice, credit cards, and much more.

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 Here, then, is an explicit distinction between the appropriate domain of “scientific data and analyses” and the appropriate domain of politics. Section 5 of Executive Order 13563 extends the President’s Memorandum and implementing guidance to the context of regulatory actions.

F. Retrospective Analysis

The provisions discussed thus far govern the issuance of new regulations. But Executive Order 13563 also 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. This is an unprecedented and indeed historic effort to revisit a large number of existing rules.

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. Here, then, is an effort to ensure a government-wide review of existing significant regulations, with the goal of streamlining, modifying, expanding, or repealing them in light of what has been learned.

¹ John Holdren, *Memorandum for the Heads of Agencies and Departments, Scientific Integrity* (December 17, 2010).

As I will discuss shortly, numerous agencies have reached out to the public, asking for how best to maintain that consistent culture of retrospective review, and also for identification of rules that might be streamlined or repealed.

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. I would like to underline four points in particular.

1. For the first time, the order draws explicit attention to the importance of certainty and predictability, and it offers an unprecedentedly strong requirement of quantification. This requirement is connected with our effort to ensure that the benefits of rules justify the costs – an effort that is reflected in the fact that in its first two fiscal years, the net benefits of final rules in the Obama Administration are over three times the net benefits of those in the first two years of the Clinton Administration – and over ten times those of the first two years of the Bush Administration.
2. 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. We have worked to improve both regulations.gov and reginfo.gov, the two principal portals for federal regulations – and the comments that appear on regulations.gov receive very careful attention, thus improving rules.
3. 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. Science is one thing; politics and policy are different matters. Of course policy judgments are exceedingly important, and they should be informed by scientific judgments; but the two are not the same.
4. 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.” 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.” These reforms include an effort to ensure that

regulations are written and implemented in ways that lend themselves to experimental evaluation and creation of independent review to assess the effectiveness of regulations.

In its guidance on the order, OIRA has emphasized the importance of applying its key sections, particularly public participation, to retrospective analysis. And indeed, a number of agencies have involved the public in their efforts to reconsider existing rules. For example, the Department of Energy, the Social Security Administration, the Equal Employment Opportunity Commission, the Department of Labor, the General Services Administration, the Department of Treasury, the Department of Justice, the Department of Housing and Urban Development, the Department of Commerce, the Department of Interior, and the Department of Transportation have all asked the public to assist in the identification of rules that warrant reassessment.

The EPA, DOL, and DOT have gone further. All have created a website for that specific purpose and sought to engage the public in the process of retrospective review.

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, indeed they promote all of those goals, and they are also 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 have adverse effects on competitiveness; 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 change. For this reason, it is also indispensable to create assess expensive regulations on a continuing basis, to see if they still make sense, or if important modifications would be desirable.

For regulation, we need a highly empirical culture – one that uses the best available techniques to project consequences before the fact, and that is also equipped to investigate what is working and what is not.

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 American 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 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.” With humility and determination, let’s get to work.