HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

Adrian Vermeule
John H. Watson, Jr. Professor of Law

Jessica Hertz
Office of Management and Budget
Washington DC

March 5, 2009

Dear Ms. Hertz:

This letter responds to your inquiry of March 4 soliciting comments on the President's regulatory review process.

As the earlier commentators have made excellent suggestions, I have only a few points to add. I will speak generally of "agencies." I believe that the President has the authority to subject independent as well as executive agencies to a regulatory review order, and that it would be good policy to do so. The legal questions that course of action would pose are familiar, however, so I will not canvass them here.

1. Uniformity

In general, regulatory guidelines should attempt to produce greater uniformity of approach across agencies, assuming a general framework of cost-benefit analysis. The issues on which uniformity should be required fall into two classes: those as to which there is no reason, even in theory, for agencies to have different approaches, and those as to which there are theoretical reasons for disuniformity, but the institutional costs of disuniformity outweigh the benefits. I will give one example of each type:

Discount rates. There is no reason, even in principle, for agencies to use different discount rates, because the effect of time does not differ across agencies. Uniformity allows officials and the public to compare the costs and benefits to future generations of regulations adopted by different agencies. The President should require all agencies to use identical discounting procedures.

A separate question is what the uniform discount rate should be. On theoretical grounds, I believe that the correct answer is the market rate of return on investment. However, this is actually a second-decimal consideration. Within some reasonably narrow range, it is more important that the discount rate be settled uniformly across agencies than that it be settled correctly.

Value of a statistical life (VSL). In principle, different people attach different values to life, producing different VSLs. An agency with unlimited time and resources could perfectly tailor VSLs to each person or class of persons and to each regulation. However, because

agencies' resources are limited and because tailoring makes it difficult for outside monitors to assess what agencies are doing, the institutional costs of individuating VSLs radically outweigh the benefits. At present, agencies use disparate VSLs, seemingly without any rational basis for doing so, and this makes it extremely difficult for officials and the public to compare agencies' regulatory performance and priorities. On institutional and democratic grounds, agencies should be required to use a standard VSL.

2. Guidance Documents

One of the major differences between the regulatory review orders of Presidents Reagan and George W. Bush, on the one hand, and President Clinton, on the other, was that the former covered guidance documents and interpretive rules while the latter covered only regulations intended to have the force and effect of law. I believe the former approach is correct and deserves bipartisan approval. Covering only legislative regulations distorts agencies' incentives, causing some marginal substitution of guidance documents for legislative rules merely to avoid OMB oversight. There is no social benefit to that effect.

3. Partial Ordering and Non-valuable Goods

One of the major criticisms of cost-benefit analysis is that it requires attaching economic valuations to incommensurable, incomparable or non-valuable goods. However, this claim loses much of its force if cost-benefit analysis can use partial orderings. (See Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. Legal Stud. 931, 939-41 (2000)). Instead of requiring each and every regulatory option to be assigned a net benefit as measured by willingness-to-pay, partial ordering allows two (or more) options to be deemed incommensurable or incomparable vis-à-vis one another, yet both may be comparable to some third option and ranked as superior to that option. For a stylized example, suppose the choices are (1) a regulation that will reduce CO_2 emissions through cap-and-trade; (2) a regulation that will reduce CO_2 emissions through command and control measures; and (3) the status quo of inaction on CO_2 emissions. Even if the agency cannot give net benefit estimates that rank (1) and (2) vis-à-vis each other, it may be able to rank both as superior to (3). Agencies should be allowed to give incomplete rankings, at least if they clearly explain why doing so is necessary; partial ordering can usefully exclude bad options.

This point is not just theoretical. For draft statutory language (never enacted) that would have instituted something like partial ordering, see Breyer et al., Administrative Law and Regulatory Policy (6th ed. 2006) (p. 169). The draft language would have allowed agencies to adopt a "more costly alternative" because of "scientific, technical or economic uncertainties" or "unquantifiable benefits," so long as the agency explains the problem and so long as "the rule adopts the least cost alternative of the reasonable alternatives necessary to take into account such uncertainties or benefits." While this decision procedure is not precisely identical to partial ordering, it is in the same spirit.

With all best wishes for your project,

Sincerely,

Adrian Vermeule

Adrian Vermeule