

The Economic Significance of Executive Order 13,422

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Executive Order (E.O.) 13,422 is remarkably short, covering barely more than two pages and consisting primarily of a series of small wording changes and insertions into President Clinton's E.O. 12,866 that established the current regime of mandatory benefit-cost analysis for regulations promulgated by executive branch agencies. Despite its brevity, the new E.O. has been widely heralded by proponents and critics alike as the most significant change in the process of reviewing new regulations since E.O. 12,866 was released in 1993.¹

The purpose of this Essay is to assess the likely economic significance of the new E.O. Before evaluating the desirability of the new Order, one must first determine what effects, if any, it is likely to have on regulatory outcomes. My main conclusion is that both the accolades and the criticisms of E.O. 13,422 are overstated and based less on what the new E.O. says than on one's views about the desirability of benefit-cost analysis generally or one's evaluation of the Bush administration. The only provision in the new E.O. that plausibly could have a substantial effect is the requirement to undertake an economic impact analysis of certain types of guidance documents. The other changes to E.O. 12,866 are largely cosmetic and are unlikely to have much of an impact on either the quality of regulatory review or the outputs of regulatory processes. Moreover, E.O. 13,422 does not address the main shortcomings of the existing OMB regulatory review process: the inconsistencies in the quality and underlying assumptions of different mandatory benefit-cost analyses among agencies and even among regulations within the same agency.

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¹ For example:

On January 18, 2007, President George W. Bush issued E.O. 13422, making the most significant amendments to E. O. 12866 since it was published. The changes made by this new executive order are controversial, characterized by some as a "power grab" by the White House that undermines public protections and lessens congressional authority, and by others as a "paragon of common sense and good government."

CURTIS W. COPELAND, CONG. RESEARCH SERV., REPORT NO. RL33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422, at ii (2007), *available at* <http://www.fas.org/sgp/crs/misc/RL33862.pdf>.

I. Main Provisions of E.O. 13,422

The changes introduced by E.O. 13,422 fall into five categories. (1) The Statement of Regulatory Principles² is amended to require regulators to state in writing the problem that a regulation is intended to address (rather than simply to “identify” the problem), and the “market failure” rationale for regulation is given greater prominence in the statement of the types of problems that might give rise to a regulation.³ (2) Several amendments formally recognize the existence and legitimacy of “guidance documents,” and the new E.O. first defines “significant guidance documents” and then requires agencies to undertake a benefit-cost analysis of them.⁴ (3) Section 4(c)(1)(B),⁵ which requires that agencies submit an annual plan for the regulations that they anticipate adopting in the next fiscal year with “preliminary estimates” of the benefits and costs of each regulation, is amended to require that agencies also submit an estimate of the total benefits and costs of all of their anticipated regulations.⁶ (4) Section 6(a)(2)⁷ is amended to require that an agency’s Regulatory Policy Officer be a political appointee, and Section 4(c)(1)⁸ is amended to give the Regulatory Policy Officer a principal role in creating the agency’s regulatory plan.⁹ (5) The new E.O. states that agencies “in consultation with [the Office of Information and Regulatory Affairs (OIRA)], may consider” using formal rule-making procedures “for the resolution of complex determinations.”¹⁰

II. Written Problem Identification

The Statement of Regulatory Principles in E.O. 12,866 applies to all regulations, not just the “significant” regulations that require a benefit-cost analysis.¹¹ The new amendment contains an action item: an agency must “identify in writing the specific market failure . . . or other specific problem that it intends to address.”¹² In E.O. 12,866, agencies were only required to identify the problem giving rise to the regulation, but not to state the nature of the problem in writing.¹³ Under the E.O. 12,866 regime, it is hard to imagine how an agency could have failed to reveal the nature of the problem that led to

2 Exec. Order No. 12,866, 3 C.F.R. 638, 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

3 Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007).

4 *Id.*

5 Exec. Order No. 12,866, 3 C.F.R. at 642.

6 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

7 Exec. Order No. 12,866, 3 C.F.R. at 645.

8 *Id.* at 642.

9 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

10 *Id.*

11 Exec. Order No. 12,866, 3 C.F.R. at 641.

12 Exec. Order No. 13,422, 72 Fed. Reg. at 2763.

13 Exec. Order No. 12,866, 3 C.F.R. at 639.

a significant regulation requiring a benefit-cost analysis. The statement of the benefits of the regulation in even a crude benefit-cost analysis must reveal the problem for which the proposed regulation is the solution. Thus, the main effect of this new language is to require a written justification for *all* regulations, not just significant ones, and to assure prominence to the written statement of the problem for significant regulations.

Because agencies are required only to identify a problem, not to measure it, the new provision does not appear to require much work but could add to transparency by identifying the purpose of a regulation. Thus, the requirement to provide a written explanation seems to be a reasonable good governance measure. Nevertheless, this requirement is not likely to have any impact on regulatory policy because it is not plausible that agencies are busily writing rules that agency officials believe address no problem. Moreover, if the purpose of this change was to clarify the agency's responsibilities, the new wording does not succeed, because it does not specify how the agency can satisfy the requirement for a written identification of the problem. Presumably, the purpose is to give policy review officials in the Office of Management and Budget, participants in the regulatory process, and citizens in general a clear, crisp statement of the purpose of a proposed regulation. If so, the new requirement should have been that the agency must include a written statement of purpose in the preamble to a new regulation. As it stands, the written statement could appear only in a private communication to someone who is neither a participant in the regulatory proceeding nor a relevant government official.

Some critics of E.O. 13,422 focus on an inversion of wording in the recitation of categories of problems that a regulation might address. The old E.O. wording required that an agency, when issuing proposed new regulations, "identify the problem that it intends to address (including, where applicable, the failure of private market . . .)." ¹⁴ According to these critics, the rearrangement of the list of problems puts added emphasis on market failures as a rationale for regulation. I believe that this criticism is unjustified for four reasons.

First, the language of the section still lists purposes other than market failures that can be used as justifications for a regulation. The identification of a market failure as a source of the problem is not required. The new E.O. does not eliminate or amend the list of benefits that may be achieved by a regulation. This list still includes as potential benefits: "economic, environmental, public health and safety; distributive impacts; and equity." ¹⁵

Second, the new E.O. adds a clear new section 10 to E.O. 12,866 stating that "[n]othing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof." ¹⁶ This statement

14 Exec. Order No. 12,866, 3 C.F.R. at 638.

15 *Id.* at 639.

16 Exec. Order No. 13,422, 72 Fed. Reg. at 2765.

enables an agency to develop regulations in response to any purpose that is set forth in the agency's statutory mandate. Whereas this statement has no legal impact because an executive order cannot repeal or amend a statute, it does make clear that the amendments to the E.O. are not intended to create any friction with congressional mandates in regulatory statutes.

Third, the "market failure" concept is extremely general. In economics, the term "market failure" refers to any departure of a market outcome from a perfectly competitive equilibrium in which all consequences of a market transaction are fully taken into account.¹⁷ Among these market failures are market power on behalf of either buyers or sellers, third-party effects such as environmental and public health externalities that neither buyers nor sellers take fully into account, gains from illegal activities such as crime and discrimination, and incomplete information on behalf of either buyers or sellers. As revealed by the contents of textbooks in the field, benefit-cost analysis includes methods for taking into account most social policy concerns.¹⁸ Thus, even if E.O. 13,422 elevates the role of the market failure paradigm in regulatory policy analysis, which is doubtful, this change is likely to have little or no practical significance.

Fourth, under E.O. 12,866, as amended by E.O. 13,422, agencies are not required to reject regulations that have negative net expected benefits. Indeed, among advocates of benefit-cost analysis, the continuing promulgation and enforcement of significant regulations that have substantial negative net benefits constitutes the main failure of mandatory benefit-cost analysis as implemented by every administration for more than thirty years. Given this reality, no rearrangement of items in the list of problems giving rise to regulations is likely to deliver either a significant victory or defeat to advocates of benefit-cost analysis.

III. Guidance Documents

Guidance documents have been a problematic feature of regulation for a very long time. Guidance documents typically offer a clarification or interpretation of a regulation or a statute but are not themselves binding regulations. Guidance documents become problematic when they advise firms or citizens how to comply with a regulation. As a hypothetical example, an agency might adopt a regulation that establishes a performance standard, and

17 See Francis M. Bator, *Anatomy of Market Failure*, 72 Q.J. ECON 351, 351-79 (1958).

18 See, e.g., ANTHONY E. BOARDMAN ET AL., *COST BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* (3d ed. 2005). This book contains chapters on distributional weights to take into account the effects of programs on income distribution and "contingent valuation" surveys to estimate the value of conserving natural resources and endangered species. Another example is the use of the estimated increase in consumers' surplus (price reduction times quantity sold) as a measure of the benefits of antitrust enforcement in FED. TRADE COMM'N, *STRATEGIC PLAN FISCAL YEARS 2003-2008*, at 15 (2003), available at <http://www.ftc.gov/opp/gpra/spfy03fy08.pdf>.

then issue a guidance document stating that a certain remedial action—an implicit technical input standard—will be presumed to satisfy the performance requirement. Such a guidance document could be beneficial to regulated parties because it allows them to avoid having to prove compliance with a performance standard; however, the regulated party still bears the burden of proof that a remedial measure that is not included in the document also satisfies the standard.

The problem with using guidance documents in this fashion arises from the fact that it drives a procedural cost wedge between two remedial actions. In principle, an agency could use a guidance document to force regulated entities to adopt measures that exceed the performance standard as long as the higher cost of these remedies is smaller than the cost of demonstrating that another, cheaper measure complies with the standard. Using guidance documents in this manner is an example of “regulatory creep,”¹⁹ i.e., increasing the stringency of a regulation without having to defend the new implicit standard in either a benefit-cost analysis or its rule-making process.²⁰ Likewise, an agency could use guidance documents to undercut its own performance regulations by stating that it regards a particular technical fix as sufficient for compliance even though this action does not satisfy the performance standard. While either type of abusive use of guidance documents probably could be successfully challenged in court, a regulated firm may decide not to challenge a regulation that is implicit in a guidance document because the expense of litigating the matter exceeds the cost of passive compliance. As a result, valid appeals to the courts challenging the use of implicit regulations in guidance documents might not be pursued.

The new E.O. does two things. First, it legitimizes the use of guidance documents by asserting that they can play a valuable role in making regulation more transparent and compliance easier. Second, it requires a benefit-cost analysis for “significant” guidance documents, thereby making the requirements for regulations and guidance documents similar.

A new section 3(h) defines a guidance document as “significant” if it has an annual economic effect of \$100 million or more; has a material adverse effect on the economy, a sector of the economy, the environment, public health, or government; contains a serious inconsistency with an action of another agency; has a material effect on entitlements, grants, user fees or loan

19 Regulatory creep refers to a gradual broadening and strengthening of regulation that is not based on the underlying statutory law, court decisions, or proper administrative processes. See Clive Jones, *Regulatory Creep. Myths and Misunderstandings*, RISK & REG., Winter 2004, at 6.

20 “The growing number of such guidance documents may be seen with some concern by the industry, as they may result in increasing development costs. Indeed, there is some danger of requirements augmenting unnecessarily by ‘Regulatory Creep.’” HELENE I. DUMITRIU, GOOD DRUG REGULATORY PRACTICES: A REGULATORY AFFAIRS QUALITY MANUAL 11 (Thomas O. Hintze ed., 1997).

programs; or raises novel legal or policy issues.²¹ These are the same four characteristics that are listed in Section 3(f) of E.O. 12,866 in the definition of a “significant regulatory action” that requires a benefit-cost analysis.²² But E.O. 13,422 excludes from the “significant” category guidance documents that arise from formal rule-making, pertain to military or foreign relations, deal with agency organization and management, or otherwise have been declared exempt by OIRA.²³ Executive Order 12,866 contains no such exclusions for regulations.

In principle, the requirement to subject significant guidance documents to mandatory benefit-cost analysis could be important. The key issue is whether, despite their non-binding nature, some guidance documents establish new rules that impose costs on regulated entities. The evidence on this point consists of general statements of concern by some industry officials. I have not been able to locate any clear examples, let alone any systematic study, of the misuse of guidance documents by regulatory agencies.²⁴ The Bush administration presented no such evidence when E.O. 13,422 was issued. Nevertheless, the definition of a “significant guidance document” does identify items that theoretically are equal in importance to “significant regulatory actions.” If such documents exist, there is no good reason to treat them differently than regulations that have the same effect.

In the end, one’s view about the new requirements for guidance documents is likely to depend on one’s views about mandatory benefit-cost analysis for binding regulations. For proponents of benefit-cost analysis, extending the coverage of mandatory analysis to significant guidance documents as defined in E.O. 13,422 is only logical. If few significant guidance documents actually exist, the new provisions will generate little benefit, but also add little cost, as few guidance documents will be reviewed. If a substantial number of guidance documents do have a significant impact, then the case for subjecting them to mandatory benefit-cost analysis is identical to the argument in favor of E.O. 12,866. In this case, review of significant guidance documents may be costly, straining the resources of OIRA and regulatory agencies that already lack sufficient resources to undertake high-quality analyses of significant regulations. Whether one believes that these additional reviews are worth the cost turns on one’s views about the merits of mandatory benefit-cost analysis in general. Because every President since Gerald Ford has required benefit-cost analysis in the process of promulgating at least some regulations, one should not be shocked to learn that another presidential advocate of benefit-cost analysis has extended the requirement to

21 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

22 Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

23 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

24 The absence of empirical evidence has led Jones to conclude that “regulatory creep” may be an “urban myth.” *See* Jones, *supra* note 19, at 6.

guidance documents that have an impact similar to that of significant regulations.

IV. Benefits and Costs of the Regulatory Plan

The new E.O. requires that agencies estimate the total benefits and costs of all regulations contained in their annual regulatory plans. A common criticism of this provision is that it represents a first step down the slippery slope to a regulatory budget,²⁵ that is, an annual cap on the total costs imposed by new regulations during a fiscal year. The new E.O. is not the first step towards a regulatory budget—that first step was E.O. 12,866, which required that agencies provide provisional estimates of expected benefits and costs for each anticipated regulation in their annual plan. The new provision requires only that the estimates for each regulation be added to provide a total estimated impact of agency actions. Because the estimated benefits and costs for each regulation are part of the plan, any numerate person could do the necessary addition.

Notwithstanding the *de minimis* nature of the new requirement, it is puzzling why the Bush administration even bothered to include this adding-up requirement. The annual regulatory plans are neither binding nor extremely predictive of the regulations that agencies actually will adopt during the coming year. The primary reason that the cost estimates in regulatory plans are inaccurate is that one of the main jobs of regulatory agencies, especially in the health and safety field, is to respond to unanticipated problems as they arise. Regulations that are responses to dramatic new information or emergencies cannot be predicted and so typically are not mentioned in regulatory plans for the year in which they are adopted.

Even for regulations that have long gestation periods and so are anticipated with reasonable accuracy, the estimates of benefits and costs that are included in annual plans are not much more than educated guesses. These estimates typically are made before an agency knows the specific regulation that it will adopt, and hence before a benefit-cost analysis is conducted.

If a regulatory budget were adopted, its target would be to cap the cost of promulgated regulations. Thus, it would apply to the regulations that are adopted in a fiscal year. The difference between planned and promulgated regulations is similar to the difference between authorizations and appropriations for federal construction projects. Public works agencies typically have a long list of planned and even congressionally authorized projects that, in a given fiscal year, lack appropriation and so are not

25 The regulatory budget was first proposed in ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* (1983). Nordhaus was a member of President Carter's Council of Economic Advisers and Litan was Deputy Director of the Office of Management and Budget under President Clinton.

undertaken. The regulatory budget is about actual actions (parallel to appropriations), not plans (parallel to authorizations).

For all of these reasons, the provision about estimating the overall benefits and costs of planned regulations is not a significant change. No matter one's view of the regulatory budget, the new E.O. does not bring it any closer to reality.

V. The Regulatory Policy Officer

E.O. 13,422 makes two changes regarding an agency's Regulatory Policy Officer (RPO). These are better understood if considered in the reverse order in which they appear in E.O. 13,422. Section 6(a)(2) is amended to require that the RPO be a presidential appointee, and to remove the statement that the RPO "shall report to the agency head."²⁶ This provision is the source of the claim that E.O. 13,422 is a "White House 'power grab'."²⁷ But this interpretation is somewhat vitiated by the changes to section 4(c)(1).²⁸ In E.O. 12,866, this section required that the annual regulatory plan "shall be approved personally by the agency head."²⁹ The new wording states that "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office."³⁰

Together, these provisions allow an agency head to control the agenda of an agency, but in the absence of an action by the agency head to initiate a regulation, they empower the RPO to do so. These provisions do not allow the RPO to remove a regulation from the priority list adopted by the agency head, and thus do not represent a usurpation of the agency head's authority. Instead, they create a second path by which new regulations may be initiated—unless such new actions are explicitly cancelled by the agency head. This path has the potential to increase substantially the number of regulations considered. Some agencies are very large and have many responsibilities, so perhaps some agency heads may not be able to make considered decisions about regulatory priorities in a timely fashion. Of course, we do not know if this is the case, for, once again, the Bush administration has provided no detailed explanation of the rationale for these changes. But if any President experienced difficulty in getting agencies to submit timely regulatory plans or to begin the process of developing important new regulations, and if there is a good structural explanation for these delays, then the new provisions ought to expedite matters.

26 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

27 See COPELAND, *supra* note 1, at CRS-1.

28 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

29 Exec. Order No. 12,866, 3 C.F.R. at 642.

30 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

The requirement that the RPO be a presidential appointee is a natural consequence of the elevated policy initiation authority that has been granted to this office. An RPO who acts solely in an advisory capacity and who, at most, proposes an action agenda that then must be “approved personally” by the agency head, appropriately can be a senior civil servant.³¹ But an RPO with substantial policy responsibility should be a political appointee—just as the agency head is a political appointee—and was when the head had sole authority to establish regulatory priorities. Together, these two changes do not dramatically increase the politicization of regulatory processes because they retain the practice of giving agenda authority only to political appointees and preserve the supremacy of politically appointed agency heads.

VI. Formal Rulemaking

E.O. 13,422 mentions formal rulemaking twice. Section 6(a)(1) is amended to include a new sentence that states that an agency may “consider” using formal rulemaking; however, before initiating a formal rulemaking process, the new Order requires that an agency consult with OIRA and allow a comment period of sixty days on whether to proceed.³² In addition, according to the new section 3(h)(2)(A), guidance documents that are issued in connection with regulations that are adopted through formal rulemaking are exempted from being classified as significant and, as a result, are not subject to mandatory benefit-cost analysis.

These provisions certainly are something of a puzzle. Agencies already have the discretion to adopt formal rulemaking, so the new section 6(a)(1) adds nothing to an agency’s authority or discretion, although agencies rarely exercise that option because of the complexity and procedural burdens on the agency for writing regulations in this way. But “consultation with OIRA” is something new.³³ Does this mean that OIRA is contemplating a proactive strategy to induce more formal rulemaking procedures? The exemption of guidance documents from OIRA review indicates that there is little danger that OIRA will embark on a campaign to bring back formal rulemaking. A more plausible interpretation is that guidance documents on regulations emanating from formal rulemaking were exempted from being classified as significant because of possible legal problems arising from an OIRA review (but not a formal public review) of these documents. Once such an exemption was granted, OIRA may have wanted to play a role in a decision by an agency, however unlikely, to initiate formal rulemaking. If this reading of the purpose of these provisions is correct, then E.O. 13,422 makes formal rulemaking even

31 Exec. Order No. 12,866, 3 C.F.R. at 642.

32 Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

33 *Id.*

less likely than before because OIRA support is not likely to be forthcoming even if an agency considers pursuing this path.

VII. Missing in Action Provisions

For advocates of benefit-cost analysis, the most important aspect of E.O. 13,422 is that it does not address any of the major problems with the implementation of mandatory benefit-cost analysis of significant regulations. One will search in vain in the extensive scholarly literature on the merits of benefit-cost analysis for an in-depth discussion of any of the issues that are addressed in E.O. 13,422. Indeed, the biggest puzzle about the reaction to E.O. 13,422 is how either the advocates or the critics of benefit-cost analysis in regulation could possibly regard the new E.O. as a significant change in the regulatory review process, given what they have written during the past three decades on this issue.³⁴

Many dogs do not bark in E.O. 13,422. A few that come to the mind of a long-time advocate of mandatory benefit-cost analysis are as follows.³⁵ First, neither regulatory agencies nor OIRA have adopted common values for important parameters of benefit-cost analysis, such as the value of a statistical life-year, adjustments (if any) for the quality of life, and the discount rate to be applied to future benefits and costs. Second, many agencies have not developed a system for external expert review of either the scientific basis or the applications of the principles of economic analysis in their benefit-cost analyses. Third, agency benefit-cost analyses use estimates of key components of benefits and costs that are subject to substantial uncertainty, yet typically they do not include a sensitivity analysis to quantify the range of uncertainty in their ultimate estimates of net benefits. Fourth, agencies do not effectively

34 The scholarly literature on the merits of mandatory benefit-cost analysis is extensive. For a compendium of scholarly essays on the issue, see MATTHEW D. ADLER & ERIC A. POSNER, *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC AND PHILOSOPHICAL PERSPECTIVES* (2000). For a comprehensive, sometimes critical, but generally favorable analysis of the merits of benefit-cost analysis, see CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002). Among the more prominent criticisms are Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002), and Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L. J. 1981 (1988). For an extensive reply to the critics of benefit-cost analysis, see ROBERT W. HAHN, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, *IN DEFENSE OF THE ECONOMIC ANALYSIS OF REGULATION* (2005), available at <http://aei-brookings.org/admn/authorpdfs/redirect-safely.php?fname=../pdffiles/phpFe.pdf>.

35 This list is taken from two publications by Kenneth J. Arrow et al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?*, 272 SCIENCE 221, 221-22 (1996), and KENNETH J. ARROW ET AL., *BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES* (1996). For examples of systematic mistakes in implementing benefit-cost analysis, see the series of reports by Robert W. Hahn and Robert E. Litan on the web site of the AEI-Brookings Joint Center for Regulatory Studies, <http://www.brookings.edu/experts/hahn.aspx> and <http://www.brookings.edu/experts/litan.aspx>, the last of which is ROBERT W. HAHN & ROBERT E. LITAN, *AN ANALYSIS OF THE TENTH GOVERNMENT REPORT ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS* (2007), available at <http://www.brookings.edu/~media/Files/rc/papers/2007/06regulation/200706hahn.pdf>.

analyze reasonable regulatory alternatives. Section 1(a) states the agencies “should assess all costs and benefits of available regulatory alternatives.”³⁶ Section 1(b)(8) states that agencies “shall identify and assess alternative forms of regulation,”³⁷ and section 6(a)(3)(C)(iii) requires that agencies consider “potentially effective and reasonably feasible alternatives” to a proposed regulation.³⁸ Agencies rarely implement the “best practice” version of this requirement, which is to consider a small but significant increase and decrease in the stringency of the regulation they propose. As a result, whether an agency’s proposed regulation plausibly is economically optimal cannot be determined from the information in the benefit-cost analysis even when the estimated net benefits are strongly positive. Fifth, as documented in Robert Hahn and Robert Litan’s series of reviews of the regulatory agencies’ implementation of benefit-cost analysis,³⁹ agencies do a poor job of reviewing existing regulations. Section 5(a) of E.O. 12,866 requires that an agency “periodically review its existing significant regulations to determine whether such regulations should be modified or eliminated.”⁴⁰ As a practical matter, this requirement is largely ignored by both agencies and OIRA. Executive Order 13,422 does not address any of these issues.

The weaknesses of mandatory benefit-cost analysis undermine the effectiveness of regulation. Moreover, the failure is symmetrical; many inefficient regulations are in force, and a comparable number of effective proposed regulations have never been adopted. One researcher estimates that the United States could save as many lives as are saved by current regulations at half the cost, or twice as many lives at the cost of existing regulations.⁴¹ The provisions of E.O. 13,422 will not improve this poor performance.

VIII. Conclusions

Executive Order 13,422 is not very important in the grand scheme of regulatory policy. My interpretation of the amendments to E.O. 12,866 is that they address no substantial unresolved controversies about regulatory review and that for the most part they should be viewed as housekeeping changes to the regulatory review process. Only the provisions regarding guidance documents have the potential to affect regulatory outcomes in a substantial manner, and even here the likely impact is small, pending further information about the frequency of guidance documents that pass the test for significance.

36 Exec. Order No. 12,866, 3 C.F.R. at 638-69.

37 Exec. Order No. 12,866, 3 C.F.R. at 639.

38 *Id.* at 646.

39 *See supra* note 35.

40 Exec. Order No. 12,866, 3 C.F.R. at 644.

41 Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in *RISKS, COSTS AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION* (Robert W. Hahn ed., 1996).

A new administration in 2009, even one that favors substantially more stringent regulation than the Bush administration, is not likely to make any significant changes to the regime of E.O. 12,866, as amended by E.O. 13,422. Notwithstanding the critics of benefit-cost analysis, the political popularity of OMB's regulatory review procedures cuts across the political spectrum. Just as the conservative Bush administration saw no need to make fundamental changes to the regulatory review policies of the moderate Clinton administration, so, too, a new President in 2009 is unlikely to regard a dramatic change in these procedures as an urgent priority. In a few years the uproar over E.O. 13,422 is likely to be a forgotten footnote in the history of regulatory policy.