

As prepared for delivery

Open Government is Analytic Government (and Vice-Versa)

Remarks on the Occasion of the 30th Anniversary of the Regulatory Flexibility Act

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In the domain of regulation, one of the most noteworthy developments of the last decades has been the emergence of a new set of analytic requirements, designed to ensure that before agencies proceed, they “look before they leap,” obtaining a sense of the consequences. With its emphasis on careful consideration of the effects of regulation on small business, the Regulatory Flexibility Act is of course a central example.

In the same period, an equally noteworthy development has been the emergence of disclosure as a regulatory tool. In many areas, disclosure is used as a method for improving the performance of both private and public institutions. By using public comment and disclosure of key findings with respect to regulation and small business, the Regulatory Flexibility Act is again a central example.

My central claim in these remarks is that there is a close connection, even an inextricable relationship, between analytic government and open government. If regulatory choices are based on careful analysis, and subject to public scrutiny and review, we will be able to identify new and creative approaches designed to maintain and to promote entrepreneurship, innovation, competitiveness, and economic growth. These points have special importance in a period in which it is crucial to consider the effects of regulation on small business -- and to ensure, in accordance with the first declaration of purpose in the Regulatory Flexibility Act, that agencies “seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”

Disinfectant, Data, and Dispersed Knowledge

Since his inauguration, President Obama has placed a great deal of emphasis on open government. In January 2009, the President issued a memorandum calling for a “presumption in favor of disclosure” under the Freedom of Information Act. He also issued a memorandum on

openness in general, asking for new measures to promote transparency, participation, and collaboration.

In requiring openness, the President has emphasized three separate points. First, he has stressed the importance of accountability and quoted the words of Supreme Court Justice Louis Brandeis: “Sunlight is said to be the best of disinfectants.”

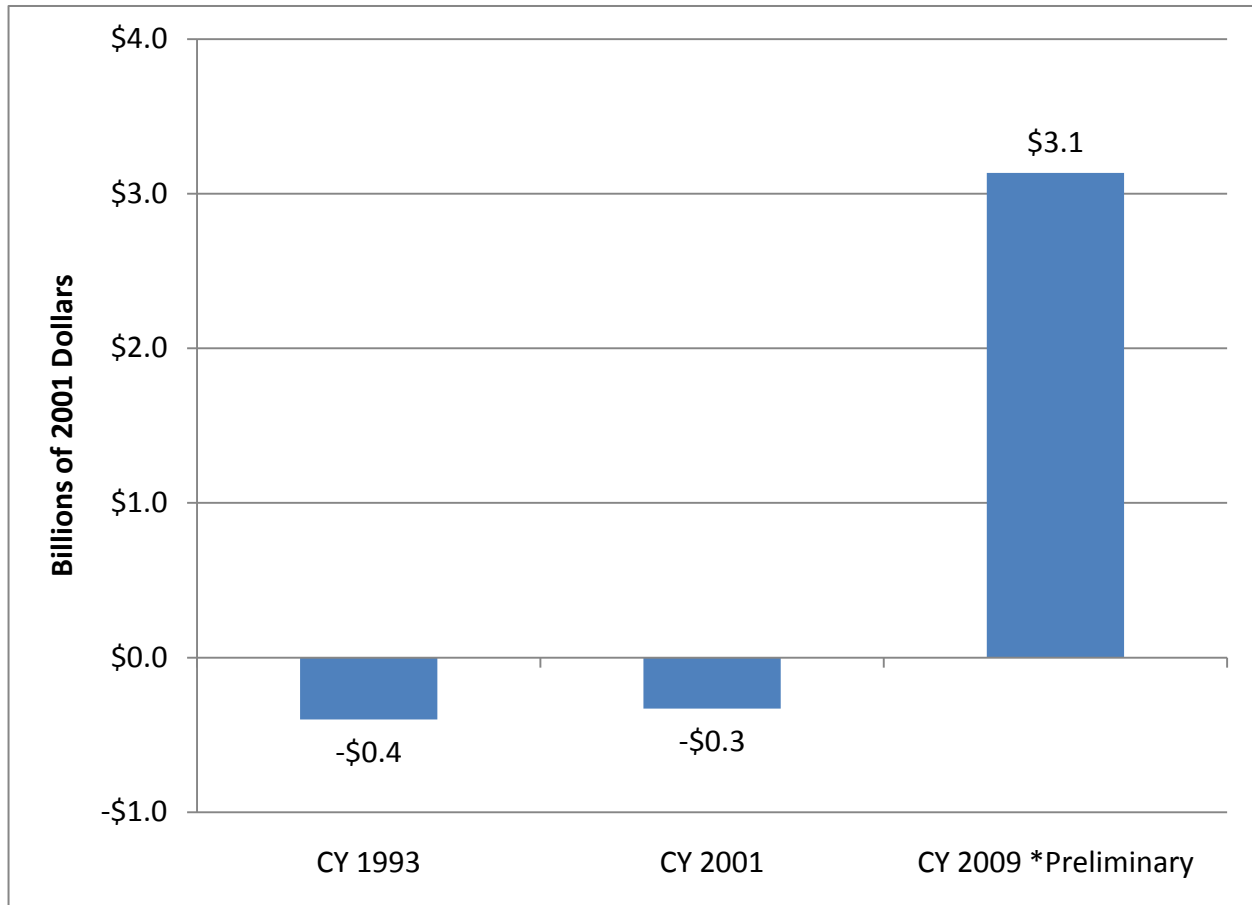
Second, he has said that “[k]nowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge” and hence to “collective expertise and wisdom.”

Third, he has said that transparency enables people to find 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 that the President has stressed the importance of open government, the Administration has been placing a great deal of emphasis on the importance of sound analysis and of ensuring a careful accounting of the anticipated consequences of regulation. As 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, including 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 our commitment to careful analysis, the quantified benefits of final rules significantly exceeded the quantified costs for the calendar year 2009 -- and that the first year of the Obama Administration was far better, in terms of net benefits, than the first year of the Clinton and Bush Administrations:

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



As you are all aware, the Regulatory Flexibility Act also requires a great deal of analysis with respect to the effects of regulation on small business. It firmly embeds a principle of “look before you leap.” Among other things, it requires

- an accounting of the number of small entities to which rules apply;
- an exploration of significant alternatives that minimize significant impacts on small entities;
- a description of reporting, record-keeping, and compliance requirements; and
- a response to significant issues raised by public comments.

Along with several other statutes and executive orders, the RFA thus imposes analytic demands on government, attempting to ensure that important decisions are properly informed.

Drawing on the President’s emphasis on sunlight, dispersed knowledge, and data that people can “readily find and use,” I will be making a simple point here: Analysis in general, and the RFA in particular, should be seen as part of a broad effort to subject regulatory decisions to public

scrutiny, with close reference to evidence, and thus improving them -- not least by increasing benefits, decreasing burdens, and pointing the way toward creative and often original solutions.

Sunlight

When the President quoted Justice Brandeis' words, he referred to the principle of **accountability**. The basic idea is that officials should be held accountable for their action and inaction – and that accountability requires transparency.

In the President's words, "accountability is in the interest of the Government and the citizenry alike." In establishing a "presumption in favor of disclosure," the President said, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of government at the expense of those they are supposed to serve."

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

These points bear directly on the requirements of the RFA. In areas including environmental protection and worker safety, some risks are large and others are small. For business, and particularly small business, some precautions are expensive and burdensome while others are not. Some precautions have unintended bad consequences, perhaps by creating excessive burdens, potentially with adverse effects on entrepreneurship, innovation, and job creation. Other precautions have unintended good consequences, not only by protecting the environment and saving lives but also by spurring creativity, reducing costs, and creating jobs. As the RFA recognizes, some precautions have disproportionate effects on small business, which may have a hard time handling requirements that do not affect larger enterprises quite so much.

Before acting, regulators should attempt to obtain a clear and concrete understanding of the likely effects of what they propose to do. To do that, they should enlist sunlight as a disinfectant. This is a central goal of the RFA insofar as it requires, in advance, a statement of the need for rules, a description of alternatives that minimize economic effects on small entities, and a process that calls for responsiveness to public comments.

In its 2009 Report on the Benefits and Costs of Federal Regulations, OMB specifically underlined the relationship between careful analysis and open government. As the Report says, "Indeed, careful regulatory analysis, if transparent in its assumptions and subject to public scrutiny, 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.”

In particular, we emphasized that “[i]f members of the public have fresh evidence or ideas about improvement of existing regulations – including expansion, redirection, modification, or repeal – it is important to learn about that evidence or those ideas. A general goal is to connect the interest in sound analysis with the focus on open government, in part by promoting public engagement and understanding of regulatory alternatives.” The Report went on to urge that “the best practice is to accompany all significant regulations with (1) a tabular presentation, placed prominently and offering a clear statement of qualitative and quantitative benefits and costs of the proposed or planned action, together with (2) a presentation of uncertainties and (3) similar information for reasonable alternatives to the proposed or planned action.”

In these ways, we have been seeking to increase sunlight and thus to improve our regulatory practices. It should be clear that our steps to date are complementary to, and help promote, the goals of the RFA.

Dispersed Information

The second function of transparency is very different: Transparency promotes not merely accountability and use of data, but access to widely dispersed information.

Here the theme of **public participation** moves to the fore. Open government ensures that public officials can benefit from dispersed information, ideas, and creativity.

To understand the point, we would do well to consult one of the great theorists of dispersed information, Nobel Prize winner Friedrich Hayek, whose most important contribution to social thought is captured in his short 1945 paper, “The Use of Knowledge in Society.”¹

Hayek emphasizes the unshared nature of information -- the “dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.” For Hayek, a key problem is how to incorporate that unorganized and dispersed knowledge. That problem cannot possibly be solved by any particular person or board. Planners and officials cannot have access to all of the knowledge held by diverse people.

Hayek’s initial concern was the price system. He claimed that it “is more than a metaphor to describe the price system as a kind of machinery for registering changes, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers.” Hayek describes this process as a “marvel.” Later in his career, Hayek emphasized

¹ 35 Am. Econ. Rev. 519 (1945), reprinted in *The Essence of Hayek* 211 (Chiaki Nishiyama and Kurt Leube eds.) (Stanford: Hoover, 1984).

that a number of social institutions, and not only the market, have the function of aggregating dispersed knowledge.

Hayek was building on an ancient insight: Aristotle claimed that when diverse people “all come together . . . they may surpass – collectively and as a body, although not individually – the quality of the few best. . . .”

In the current era, it is far easier than ever before to have access to dispersed knowledge. 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 eighteen months, final rules have been significantly different from proposed rules, and public comments are a key reason.

With its emphasis on public comment, the Regulatory Flexibility Act reflects the same understanding. The initial regulatory flexibility analysis is subject to a comment period, followed by a final analysis that explores significant issues. For EPA and OSHA, the panel process is an especially good example. The goal is to make sure that the process of developing regulations (even pre-proposal) is closely informed by the real world experience of small entities that will be subject to their requirements.

At its best, the panel process helps to identify imaginative solutions that achieve important regulatory objectives with reduced burdens on small businesses. (As noted in the RFA, differing timetables, simplification of reporting requirements, and use of performance rather than design standards can help.) In some cases, the process not only identifies unintended or adverse side effects but also helps point the way toward approaches that are more efficient because they are better integrated into the existing business practices of regulated entities.

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.” And 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. In particular, 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 economy recovery.

Data

In emphasizing the value of providing access to information that people “can readily find and use,” the President signaled a distinctive idea – that transparency promotes learning by making

data and evidence accessible. Anecdotes, speculation, and guesswork can be replaced with information and evidence. Indeed, that is a central goal of transparency. In multiple domains, and for the private and public sectors alike, transparency ensures that more data is available.

The point bears directly on the role of analysis. The RFA creates a process by which the public is able to find (among other things) (1) a succinct statement of the need for and the objectives of relevant rules; (2) a summary of the significant issues raised by the public, alongside a summary of the agency's assessment of those issues; and (3) a description of the projected reporting, recordkeeping, and other compliance requirements. Importantly, small entities are entitled to participate in the RFA process, to help shape rules, and to see relevant material long before regulations are put in place. This material is something that they can "find and use," not least because advance notice promotes predictability and avoids unfair surprise.

Practice

This is not the place for an empirical analysis of the countless regulations that have been improved by analysis and transparency. In many cases, a careful accounting of costs and benefits has helped to move regulations in better directions. In many cases, engagement with the public, including affected stakeholders, has uncovered important facts and perspectives. In many cases, small business has been able to bring important information to bear, helping to promote a better balance among the relevant variables.

In their joint fuel economy rule, for example, EPA and DOT incorporated significant flexibilities for small volume manufacturers, addressing concerns expressed during the comment period. So too, the USDA's "Access to Pasture" final rule benefits significantly from the reactions of small farms. The rule imposes new requirements on farmers who participate in the Certified Organic labeling program. Many small farms expressed concerns about various provisions of the proposed rule that would, in their view, prove unnecessarily burdensome. In response, the final rule relaxed or eliminated many of these provisions. In a number of rules, EPA has incorporated significant flexibility for small business, sometimes with exemptions, sometimes with delayed compliance dates. These are just a few illustrations of rules that have benefited from a process that ensures that analytic government is also open government.

More generally, OMB has issued two relevant data calls to agencies. The first, in April, asks for burden reduction initiatives that promote administrative simplification and adds: "OMB is aware that information collections may impose significant burdens on small businesses. Because of economies of scale, a collection may be more burdensome for a small entity than for a large one. We encourage agencies to identify ways to achieve significant reductions in burden upon small entities."

The second, in July, reminded each agency of its obligation 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." We also asked each agency to "identify

regulations that are of particular concern to small businesses. These regulations should be discussed in a separate section of the introductory narrative.” With these steps, we have been encouraging agencies to reduce burdens and costs, in a way that connects closely with the goals of the RFA.

Conclusion

I have noted that over the last decades, there have been simultaneous efforts to increase and improve analysis and to increase and improve transparency. These efforts have emerged along different tracks, but they should be taken together. In the last twenty months and more, we have emphasized, at once, the importance of careful analysis and openness, and treated these commitments as inextricably intertwined.

Open government is animated by three central goals: using sunlight as a disinfectant, obtaining access to dispersed information, and providing people with information that they can readily find and use. Regulatory analysis, including analysis of anticipated effects on small business, is part and parcel of open government.

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 reduce unjustified burdens, and to identify approaches that will promote entrepreneurship, innovation, job growth, and competitiveness, not least for the millions of small businesses that are indispensable to economic recovery and growth.