

# Cost-Benefit Analysis, OIRA, and presidential rulemaking review

Administrative Law

Penn State Dickinson Law

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## 1972 Ford Pinto Impact Test



# Landmarks in OIRA's evolution and their chief features

- E.O. 12291** (Reagan): Agencies must supply CBA for all “major rules” (\$100 mil annual impact) before proposal.
- Prevents agencies for taking actions where costs exceed benefits.
- E.O. 12866** (Clinton): Expands scope of OIRA review to all “significant regulatory actions.”
- Imposes time limits and transparency requirements on OIRA review.



# Landmarks in OIRA's evolution and their chief features

- E.O. 13563** (Obama) Agencies must consider equity, dignity, fairness and distributional impacts in analysis.
- Agencies must review regulations already in place for improvements.
  - Agencies to consider behavior-shaping default rules, disclosure requirements, etc., as an alternative to command-and-control techniques.
- E.O. 13771** (Trump) Reducing Regulation and Controlling Regulatory Costs
- Unless prohibited by law, agencies should identify two regulations for repeal whenever they propose one new regulation.
  - Total incremental cost of all new regulations, including repealed regulations, should be  $\leq 0$ .



# OIRA in the regulatory process

## The Reg Map® Informal Rulemaking

ICF staff are available to discuss informal rulemaking and preparing supporting materials. <sup>1</sup> Visit us at [www.icf.com/regulatory](http://www.icf.com/regulatory). We also check out all comments received for a faster, cheaper, and better way to respond to public comments on proposed rules. To request a copy of the Reg Map, please email us at [regmap@icf.com](mailto:regmap@icf.com). Copyright ©2022 by ICF has prepared. All rights reserved. This document may not be reproduced in any form without permission.



### What is the Reg Map?

The Reg Map® is an online tool for the federal government agency "informal" rulemaking process. The Reg Map fulfills general requirements that apply to most federal agencies. In some cases, the OIRA conducted under "Open to Public Comment" (OTPC) rules that apply to a specific agency program, or subject may require an additional process beyond this. Informal rulemaking is also subject to a discovery prepared below.

### Most of rulemaking follows the Reg Map process?

In typical use, a rulemaking activity proceeds through Step 1 to Step 7, including OMB review of the proposal and final review for certain levels of significant regulatory actions per 5 U.S.C. 553. As the Reg Map shows, however, Congress has exempted some regulatory actions from OIRA review. Nevertheless, in addition, when rulemaking has been exempted, various courts have interpreted OIRA requirements over time, influencing how agencies use the "informal" rulemaking process in a practical but, some of which is explained in the Reg Map.

### Step 1

#### Consider Initiating Events

##### • Law activities

##### • Agency Initiatives

##### • Agency notices, including:

##### • Agency notices and proposals

##### • News items, webinars, or research

##### • Public comments

##### • Regulatory analyses of ongoing regulations

##### • Recommendations from the Reg Map, OIRA, and other agencies

##### • Changes in the regulatory environment

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### Other Potential Analyses

#### • Trade Agreements Act

#### • National Security

#### • Executive Order 13526

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#### • Executive Order 13526

### Step 2

#### Decide Whether Public Notice is Needed

#### • Agency Initiatives

#### • Agency notices, including:

#### • Agency notices and proposals

#### • News items, webinars, or research

#### • Public comments

#### • Regulatory analyses of ongoing regulations

#### • Recommendations from the Reg Map, OIRA, and other agencies

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### Step 3

#### Develop a Proposed Rule

#### • Agency Initiatives

#### • Agency notices, including:

#### • Agency notices and proposals

#### • News items, webinars, or research

#### • Public comments

#### • Regulatory analyses of ongoing regulations

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### Are the requirements described in the Reg Map applicable to all federal agencies?

Not all agencies are subject to the Reg Map. OIRA only reviews certain agency actions. Certain departments and independent agencies that exempt directly to the public, such as the EPA, are not subject to the Reg Map. However, the Reg Map also applies to independent regulatory agencies. It is important to understand that 5 U.S.C. 553(b)(1) exempts OIRA review for certain agencies and other applicable administrative actions. The Reg Map is only for agencies that are subject to the Reg Map. It does not apply to agencies that are exempt from the Reg Map.

### Step 5

#### Publish the NPRM

#### • Agency Initiatives

#### • Agency notices, including:

#### • Agency notices and proposals

#### • News items, webinars, or research

#### • Public comments

#### • Regulatory analyses of ongoing regulations

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# OIRA in the regulatory process

## Step 2

### Decide Whether Public Notice Is Needed

Unless other exemptions apply, APA sec. 553 requires public notice and comment to propose a rule or a showing of "good cause"—an agency demonstration that notice and comment are "impracticable, unnecessary, or contrary to the public interest" (omit Steps 3 through 6). Generally, this exemption applies only to cases where: the rule is a minor determination in which the public is not interested or that involves little to no agency discretion; advance notice would defeat the regulatory objective; immediate action is necessary to reduce imminent harm to people or property; or Congress implicitly waives notice-and-comment requirements.

#### "Good cause" options:

- Emergency rules
- Interim final rules (omit Steps 3 through 6 but provide comment period and final rule after Step 9)
- Rules that codify statutory language where agency has no discretion to change the provision
- Direct final rules (streamlined process for non-controversial rules that must be withdrawn if opposed)

## Step 3

### Develop a Proposed Rule

An NPRM proposes to add, revise, remove, or re-designate CFR provisions, and it must consist of a description or statement of the proposed regulatory text and a preamble to inform a non-expert reader of the proposal's basis and purpose. See 1 CFR 18.12.

#### The NPRM must explain:

- Legal basis: The statutory authority to issue rules for the regulated entities and the subject area
- Proposed provisions: A presentation of the proposed rule text or a description of the issues
- Rationale for each proposed provision: An explanation of why a rule is needed; what it would accomplish; and what data, research, analyses, and assumptions were used to develop the rule

#### Rule preamble should discuss:

- Regulatory background and history
- Alternatives the agency is considering
- Analyses describing compliance with applicable statutes or executive orders

Analyses begun in Step 3 must be finalized in Step 7.

### What Is Negotiated

### Send Proposed Rule to OMB for Review

OMB will review any rule an agency or OIRA considers "significant" under E.O. 12866. See E.O. 12866 sec. 6. (OIRA is the OMB office responsible for coordinating executive branch review of agency rulemaking documents and reviewing agency ICRs under the PRA.)

- 10-day OMB review for agency's preliminary "significant" determination
- 90-day OMB review for rule, assessments, and analyses (120 days if director of OMB grants extension)
- OIRA may waive review
- Agency head may request extension

An agency must submit with the rule an RIA (i.e., cost-benefit assessment) for any significant regulatory action.

#### Interagency review

**coordination:** OMB may circulate an NPRM to other agencies interested in the content.

OMB will invite the issuing agency to meetings requested by the public to discuss regulatory actions under review per E.O. 12866 sec. 6(b)(4).

E.O. 12866 does not subject independent regulatory agencies to OMB rule review requirements.

See [www.reginfo.gov/public](http://www.reginfo.gov/public) to keep up with OMB review actions and for other resources.

### NPRM

An agency must publish "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in the *Federal Register*, the official daily publication for federal agency actions. See APA sec. 553(b).

#### The NPRM also must include:

- Statement of the time, place, and nature of public rulemaking proceedings
  - Reference to the legal authority under which the rule is proposed
  - Regulation Identifier Number
- See [www.federalregister.gov](http://www.federalregister.gov) for the daily *Federal Register* and for other resources.

### What Is Incorporation by Reference?

With the approval of the Director of the *Federal Register*, an agency may incorporate material into rules by simply referencing it. Such material must be:

- Published
- Reasonably available to and usable by affected individuals
- Not produced by the agency

Congress authorized this process to reduce the volume of language published in the *Federal Register* and CFR. The legal effect is that the referenced material is treated as if it were newly published

An agency must give the public a meaningful opportunity to submit written comments, in paper or electronic form, and it must consider all "relevant matter presented." See APA sec. 553(c). E.O. 12866 recommends a comment period of at least 60 days.

The E-Government Act of 2002 requires agencies to provide for electronic filing of public comments and make dockets available online (Pub. L. 107-347 sec. 206(d)). See [www.regulations.gov](http://www.regulations.gov), the online portal for submitting public comments.

Courts have interpreted the APA requirements noted above to mean that **agencies must provide responses to significant issues raised in the comments**. Significant issues are relevant points that, if adopted, would require a change to the agency's proposed rule.

the agency of sec. 553(c). **must not be capricious" provide a rational decision). See A final rule is the scope of an "outgrowth" rule. A final substantially NPRM so long provided add the public of for changes were adopted.**

- Final rule do**
- Explain the adopted a for the age including changes fr
  - Discuss an significant
  - Update an begun in 5
  - Set an effe applicable (see Step

## Specific Analyses for Most Frequent Analyses

### E.O. 12866 and E.O. 13563, Regulatory Review

RIA required for "significant regulatory actions which include those that would:

- Have a \$100 million or more annual effect on the economy (in current dollars)
- Raise novel legal or policy issues
- Have other significant impacts

If the annual effect is \$100 million or more, the rule is "economically significant" and requires

- Cost-benefit analysis of policy alternatives

# OIRA in the regulatory process

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## Step 6

### Analyze Public Comments

An agency must give the public meaningful opportunity to submit written comments, in paper or electronic form, and must consider all "relevant matter presented." See APA sec. 553(c). E.O. 12866 recommends a comment period of at least 60 days.

The E-Government Act of 2002 requires agencies to provide for electronic filing of public comments and make dockets available online (Pub. L. 107-47 sec. 206(d)). See [www.regulations.gov](http://www.regulations.gov), the online portal for submitting

## Step 7

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### Develop a Final Rule

A final rule presents the CFR provisions adopted and must incorporate into the preamble a concise general statement of the basis and purpose for the agency decision. See APA sec. 553(c). **Final rule choices must not be "arbitrary and capricious" (i.e., fail to provide a rational basis for the decision).** See 5 U.S.C. 706. **A final rule must be within the scope and a "logical outgrowth" of the proposed rule.** A final rule can be substantially different from the NPRM so long as the agency provided adequate notice to the public of the possibility for changes of the type that were adopted.

Final rule documents:

## Step 8

### Send Final Rule to OMB for Review

OMB will review any rule deemed "significant" under E.O. 12866. Agencies must ensure that a rulemaking schedule accounts for at least a 90-day OMB review period for significant rules. OIRA may permit a shorter period of review in exigent circumstances. **The agency must revise the regulatory package to address OMB concerns and respond to any interagency review comments.** E.O. 12866 also includes requirements relating to OIRA communications with individuals outside the executive branch about the substance of a regulatory action under review. After publication of the regulatory action in the *Federal Register*, an agency

## Step 9

### Publish Final

**Effective date:** The APA specifies that agency rule generally may not take effect until at least 30 days after publication in the *Federal Register*, except for a rule that grants an exemption, relieves a restriction or for "good cause." See APA 553(d). Agencies can set a delayed *effective date* (date which regulatory change implemented in CFR) for all rule provisions and can even more delayed *compliance date* (date by which regulated persons must comply) for all or all of the rule requirements.

### Congressional Review Act

(5 U.S.C. ch. 8): Under the CRA, before most final rules take effect, an agency must submit them and supporting information to the House, the Senate, and the GAO. Rules defined as "major" under the CRA take effect for at least 60 days (30 days for non-major rules).

**From:** Rowell, Arden [<mailto:karowell@illinois.edu>]  
**Sent:** Wednesday, May 23, 2012 6:10 PM  
**To:** Sunstein, Cass R.  
**Cc:** [Cass\\_Sunstein@hks.harvard.edu](mailto:Cass_Sunstein@hks.harvard.edu)  
**Subject:** thoughts on when \$ costs exceed \$ benefits

Dear Cass,

I have been working on the question of what should be done with rules where the monetized costs exceed the monetized benefits.

I've written up two things about this. The first is just a short opinion piece (called "Why OIRA should reject the rear-view camera rule") that I've attached, and which should be published on RegBlog shortly. The second is a more scholarly essay called "Partial Valuation and Cost-Benefit Analysis." It's still quite drafty, but I've (rather heroically) attached a version of it in case you find it interesting. I am also keeping [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2062987](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062987) updated with the newest version, if you end up with more reading time down the line.

The basic thought in both pieces is that we ought not to regulate where monetized costs outweigh monetized benefits, even if we think money is incommensurable with many of the goods being valued. My reasoning is based on the practice of monetizing by reference to willingness to pay. If a regulation requires more money than the cost people are willing to pay for it in money, then the question of whether they value the regulation in other non-monetary currencies is beside the point. If it is too much to pay in any resource, including money, then it is too much to pay.

Hope you're doing well!

All best,  
Arden

PennState

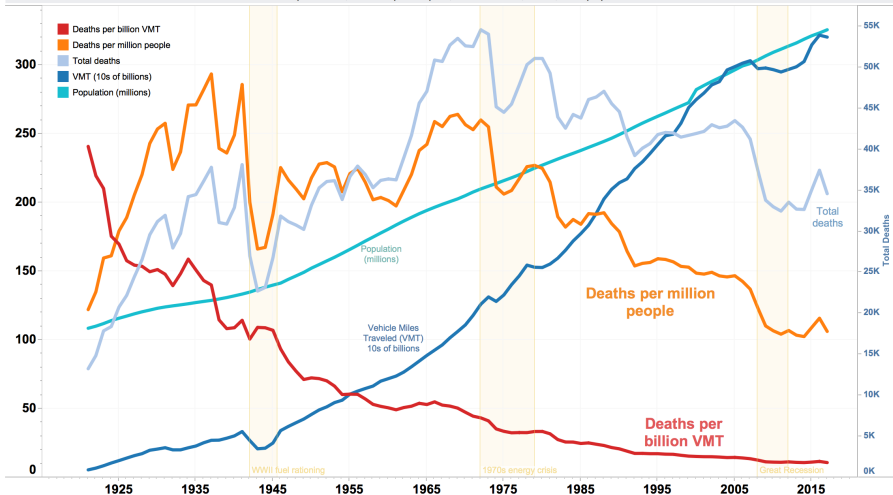
# The Costs and Benefits of Motor Vehicle Safety

NHTSA estimates total costs from FMVSSs from 1968 through 2019 at over \$1 trillion. NHTSA estimates those safety standards saved 861,578 lives over that period. NHTSA estimates the net benefits (including both economic and non-economic impacts) at \$16.3 trillion in 2019 dollars.

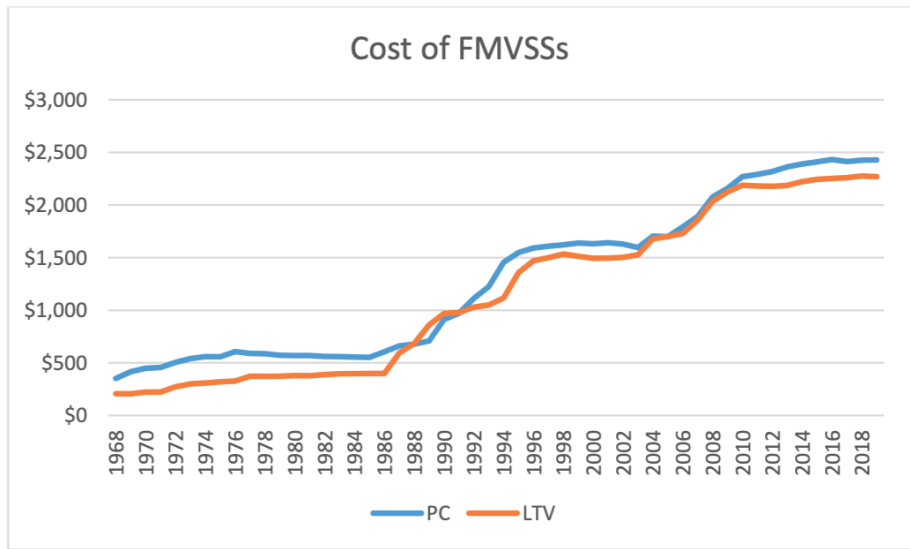


## US motor vehicle

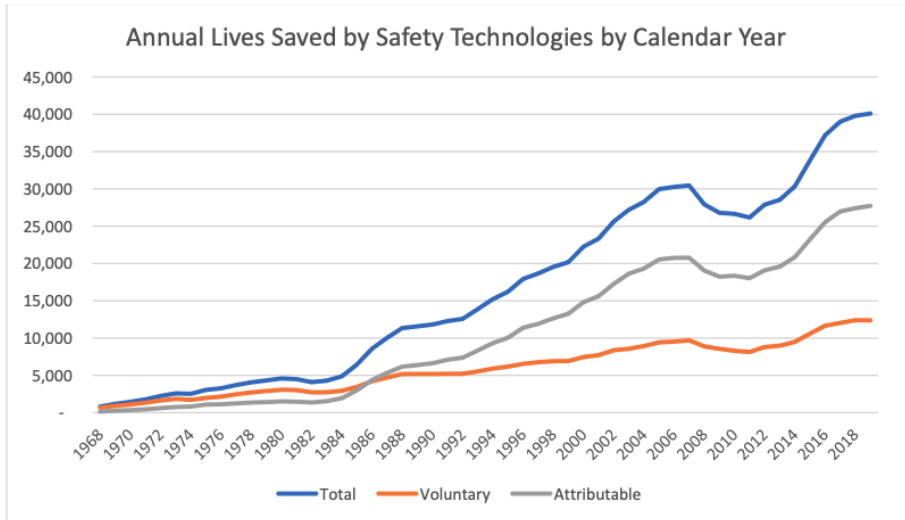
deaths per VMT, deaths per capita, total deaths, VMT, and population



# The Costs and Benefits of Motor Vehicle Safety

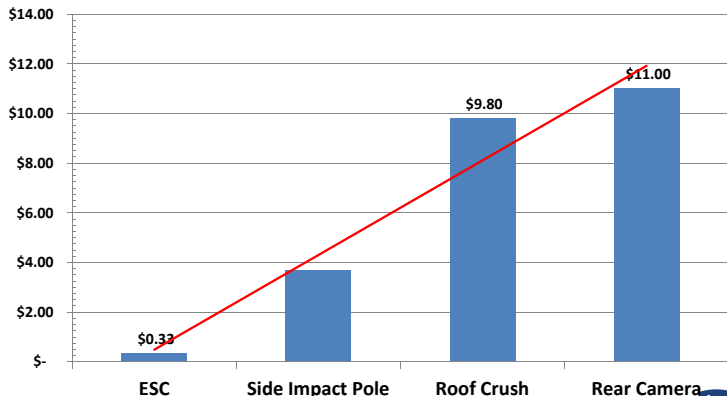


# The Costs and Benefits of Motor Vehicle Safety



# Cost comparisons of NHTSA Rules

## Cost per Statistical Life Trend (\$, Million) NHTSA "Billion Dollar" Rules





## Gulbransen Act: relevant text

### 122 STAT. 639-640

(b) Rearward Visibility.—Not later than 12 months after the date of the enactment of this Act, the Secretary shall initiate a rulemaking to revise Federal Motor Vehicle Safety Standard 111 (FMVSS 111) to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons. . . . Such standard may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver's field of view. The Secretary shall prescribe final standards pursuant to this subsection not later than 36 months after the date of enactment of this Act.



# Cost per life saved of different federal regulations

**Table 1** Regulatory expenditure per life saved (adapted from Tengs et al 1995).

Regulation	Year	Agency	Cost per life saved (millions of 1995 dollars)
Unvented space heater ban	1980	CPSC	0.1
Seatbelt/air bag	1984	NHTSA	0.1
Aircraft cabin fire protection standard	1985	FAA	0.1
Steering column protection standards	1967	NHTSA	0.1
Underground construction standards	1989	OSHA	0.1
Aircraft seat cushion flammability	1984	FAA	0.6
Trihalomethane in drink water	1979	EPA	0.5
Alcohol and drug controls	1985	FRA	0.5
Auto fuel system integrity	1975	NHTSA	0.5
Aircraft floor emergency lighting	1984	FAA	0.7
Concrete and masonry construction	1988	OSHA	0.7
Passive restraints for trucks and buses	1989	NHTSA	0.8
Auto side impact standards	1990	NHTSA	1.0
Children's sleepwear flammability ban	1973	CPSC	1.0
Auto side-impact standards	1990	NHTSA	1.0
Metal mine electrical equipment standards	1970	MSHA	1.7
Trenching and evacuation standards	1989	OSHA	1.8
Hazard communication standard	1983	OSHA	1.9
Trucks, buses and MPV side-impact	1989	NHTSA	2.6
Grain dust explosion prevention	1987	OSHA	3.3
Rear lap/shoulder belts for autos	1989	NHTSA	3.8
Standards for radionuclides in uranium mines	1984	EPA	4.1
Ethylene dibromide in drinking water	1991	EPA	6.8
Asbestos occupational exposure limit	1972	OSHA	9.9
Benzene occupational exposure limit	1987	OSHA	10.6
Electrical equipment in coal mines	1970	MSHA	11.1
Arsenic emission standards for glass plants	1986	EPA	16.1
Cover/move uranium mill tailings	1983	EPA	53.6
Acrylonitrile occupational exposure limit	1978	OSHA	61.3
Coke ovens occupational exposure limit	1976	OSHA	75.6
Arsenic occupational exposure limit	1978	OSHA	127.3
Asbestos ban	1989	EPA	131.8
1,2-Dichloropropane in drinking water	1991	EPA	777.4
Hazardous waste land disposal ban	1988	EPA	4,988.7
Municipal solid waste landfills	1988	EPA	22,746.8
Formaldehyde occupational exposure limit	1987	OSHA	102,622.8
Atrazine/alachlor in drinking water	1991	EPA	109,608.5
Hazardous waste listing for wood-preserving chemicals	1990	EPA	6,785,822.0

2007 dollars are 1.38 times higher than 1995 dollars



# Cost per life saved of different federal regulations

(Millions of 1995 dollars)

Unvented space heater ban	1980	CPSC	0.1
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Alcohol and drug controls	1985	FRA	0.5
Auto fuel system integrity	1975	NHTSA	0.5
Aircraft floor emergency lighting	1984	FAA	0.7
Concrete and masonry construction	1988	OSHA	0.7
Passive restraints for trucks and buses	1989	NHTSA	0.8
Auto side impact standards	1990	NHTSA	1.0
Children's sleepwear flammability ban	1973	CPSC	1.0
Auto side-impact standards	1990	NHTSA	1.0
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