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SANJAY PATNAIK: All right. Good afternoon, everyone. It's a great pleasure to welcome you to this event of the central regulation of markets at Brookings. My name is Sanjay Patnaik and I'm the center director. We have a great group of experts here today to talk about the proposed updates to OMB, circulars, A4 and A94. As you might know, those really guide government to benefit cost analysis, and the previous ones are multiple decades old. So a new scientific and economic understanding have made it necessary to update them. We have a great discussion moderated today by senior fellow Phil Wallach. He's at the American Enterprise Institute and a great group of panelists. Ted Gayer, the president of the Niskanen Center, Zachary Liscow. He is the chief economist of OMB, Connor Raso, who is the senior associate general counsel at the Pump Company Accounting Oversight Board. And Richard Revesz, the administrator of IRA. And we're going to have the discussion centered on the benefits of the new updates, as well as some concerns that people have raised. And so I'm really glad that all of you are here and I hope you enjoy at this great event. Thank you. Phil, over to you.

PHILIP A. WALLACH: All right. Well, thanks so much, Sanjay. And to Brookings and Ms. Cannon for helping organize this event. And thanks to those of you who are with us in the audience and to those who are joining online now and in the future. So let me start with a question for Administrator Revesz. So the first day of the Biden administration, we had this memorandum announcing sort of big changes potentially in the way the government would handle regulatory process. These new proposals and and the new executive order are the delivery on that. So what have we got here? Is this an incremental change to the way we do regulation or is it a big departure? Is it tweaks to the updated tweaks to update the practice of cost benefit analysis, which was pretty good before? Or is it a fundamental rethinking, as some people have said, to humanize a discourse that was written before?

RICHARD L. REVESZ: Oh, I think it's an either. Like, you know, most things, it's somewhere in the middle. It's it's not trivial, obviously, But but keep in mind, this is the most important thing, is that the whole package reaffirms the approach in executive order 12, eight, six, six and 13 five six, three, which are the Clinton and Obama executive orders that have been around since they were promulgated and have remained in effect across all intervening administrations. So reaffirms executive orders. It reaffirms the role of the Wire as the institution to perform centralized review of important regulations. It reaffirms the primacy of cost benefit analysis as the guiding analytical technique for for determining the impacts of regulations. So that's all consistent with all prior practice. Now, like all other good things, when something is this is less true about one's kids because, you know, just because they're 20 years old doesn't mean they're less good than when they were born. But but for documents like certainly for, you know, knowledge advances, market conditions change, The scientific and economic understanding moves forward. And and from time to time, it's time to update a document like that. And so we see this as an update to have it reflect the most recent scientific and economic understanding. I mean, even, you know, the the arguments about how by looking at more serious distributional consequences, we're departing from the original understanding of cost benefit analysis. We don't see it that way. I mean, both the Clinton and Obama executive orders talk about distribution, equity and human dignity. Certainly for the existing version, which dates back to the Bush administration, also talks about this makes space for taking distributional consequences into account. I think the problem there is that agencies in the regulatory process never got around to implementing these things in the way that they were intended. And so we try to give them a push and some tools to do a better job there.

PHILIP A. WALLACH: Okay. Well, let me turn next to the Zach Liscow. How should we think of the role of OIRA as changing it and making these executive order? And the proposed changes to for a while was obviously an important part of OMB. It's sort of the nerve center for regulation. Some people think of it as a gatekeeper. Is the gatekeeping role changing? Is it becoming more proactive? What do you think? I.

ZACHARY LISCOW: I'm going to pass that to Ricky.

PHILIP A. WALLACH: Fair enough.

RICHARD L. REVESZ: I don't think the role of a virus changing in any meaningful way. I mean, there obviously some tweaks. The executive order changes the threshold for regulations that get the full, full scale. All right. Treatment from 100 million to 200 million. But, you know, the way we look at it, 200, 200 million now or roughly what 100 million were in 1993 when the Clinton executive order was put in place, actually is less than what those would be. And and actually the 100 million number dates back to the Reagan administration from 1981. So, you know, so some adjustments seemed appropriate. One thing that we stress in the president stresses in the executive order is creating a more robust space for public participation, particularly by. To serve communities. And again, it's not like it was anyone ever thought, Oh, the only people who should participate in the process are highly sophisticated trade associations or national groups. And I said, Oh, that's where we should build the process. But as a practical matter, and for totally understandable reasons, it kind of worked out that way. And so we're trying to sort of create a nudge for agencies and also for a way itself through 1266 meetings that would create more opportunities for that. But again, I see these changes as very important, but happening fully, consistently with our traditional role, with the traditional role of these executive orders, with the traditional role of cost benefit analysis.

PHILIP A. WALLACH: All right. Let me try Zach again with a better economist question now. So the discount rate changes are one of the big, big ticket items here. I have to say it's a little bit a little bit confusing to follow the particulars. For somebody on the outside, we have three and seven before and now we have 1.7. I know that's that's a bit of a bit of an oversimplification. So can you walk us through where those changes are coming from, what they mean about how government agencies where the present versus the future?

ZACHARY LISCOW: Yeah. Sure. So traditionally there was a four there has been two options, a 3% rate and 7% rate within 94 for an A cost analysis of government spending, which I've worked on, there's actually just been one rate 7%, but that 7% comes from the same source as the 7% and a four. So the thinking here is twofold. First, with respect to the 7% rate, like Ricky said, we're just paying attention to the most recent economic and scientific understanding. And when we talk to experts, it overwhelmingly seem like the method for coming up with that 7% was it was not super well founded anymore. You could not find actually, in the conversations I had, there were actually literally zero people who would defend 7% and not that many who would defend the method for fraud either. So that's why we no longer use that method. As for the 3%, so that 3% was calculated a couple decades ago using a certain method. When that was done, there was no regular process for updating it. For more recent data. They have changed over the course of a couple of decades, you know, as conditions in the world and what to do when you use the exact same method that was used to calculate 3% couple decades ago, you now get 1.7%, which is where which is where that comes from.

PHILIP A. WALLACH: And so tell us a little bit about the implications. I mean, obviously, it's just a variable in a math problem that's changing, but this has a compounding effect. And so it's a it's a big change.

ZACHARY LISCOW: Yeah. So it's a significant effect. You know, the less you discount, the more the future is weighted in the benefit cost analysis. And, you know, this has implications for things like climate impacts and such. And I guess our view is that we're following the best scientific economic evidence, and this is the number of that it that it happens to produce 1.7%. And, you know, we're going with the consequences, which in this case will mean in the future more but more so following the following the evidence that we get.

PHILIP A. WALLACH: Yeah. So let me follow up on that a little more. So when you you've changed that math problem, but there's also sort of a sense from these new changes that it's not all about math problems. Right? At the end of the day, there are there are some non quantifiable benefits that need to come in there, maybe some values that we can't monetize easily. So help me think through this. You have your math problem. Some things about how you do the math has changed, but you've also got these things that don't go into the math problem. How do we reconcile this?

ZACHARY LISCOW: Yeah. So the discount rate I think falls very squarely into the same method. New numbers based on changes in the world, you know, proposing a certain method like distributional weights to take into account distribution is, you know, totally consistent with like normal practice and economics. But of course, there's no like science out there that says, like, here's the way to do it. We are, of course, paying attention to all sorts of evidence when suggesting what the way it should be based on how in. Vigils behave in the world and what surveys say, people think about how the margins of declines. But of course, distribution is choosing to have an extent, a value judgment. And for that, you know, we're paying attention to practice out there on the world and economic practice takes into account distribution, as Ricky has said, the the executive orders on which these are based have pointed to distribution as an important consideration for for decades. And we're just saying, okay, here are suggestions for how one could go about doing it in ways totally consistent with ways the UK has done it for decades. The way that economic practice looks at these things, you know, the way that these things are taught and economics programs around the country and around the world.

PHILIP A. WALLACH: Okay. Thanks to our other panelists and then we'll get to discussion altogether. But let me just had a question down there at the end. So, Ted, you're someone who I think of as a champion of cost benefit analysis, as a discipline in a disciplining mechanism for agency thinking, not necessarily the last word or the only word in deciding what an agency should do, but a rigorous, incomprehensible two way to explain what it what it thinks a rule is going to do and why that would be good. So before this proposed rule was published, plenty of fans of cost benefit were nervous that the Biden administration's changes would somehow hollow out the practice. Now that we have the proposal, what do you think? Tell us your early impressions of what's good, bad and different and this and the set of changes.

TED GAYER: Great. Thanks, Phil, and thanks, everyone for being here. First, just to reiterate what Phil said, that's my view of benefit cost analysis. To me, it's a disciplining tool. It's a tool of how you make an assessment about a regulation, any policy trying to strip away your own ideological biases before you come to a decision. Now, that doesn't mean it's all calculated. Benefit costs are not quantifiable things. There are other considerations that go into it. But again, it's a it's a disciplining tool. And we should keep to the fidelity of the science behind it. Another way I think about it the same kind of in a different inverted way as like when I think of changing how we do benefit cost analysis. I asked myself how would my political and ideological opponents use these changes in ways that I think would move us away from what I think is a fair assessment. So with that as a basis, I would I would just reiterate what the administrator said. My assessment and I think his quote was this is a very important but fully consistent with our Irish traditional role. That's how I view the changes. I think that they, you know, yet again reaffirm the importance of an analytical approach to benefit cost analysis and regulatory review. I view a lot of the changes in the spirit of that, of updating our understanding of it. Again, they reestablish the primacy of benefit cost analysis as a as a tool in the regular regulatory decision making. They've throughout the whole document, updated kind of standard practice based on scientific developments and economic developments over the last 20 years. It's not. It's part of the executive order, the idea of creating a more robust space to make sure that you get more inclusive voices into the process is commendable. I don't know how you execute that, but I think as a as a goal, you know, regulatory capture is real and something we need to worry about and anything we can do to signal or I think the word that was used nudge agencies and OMB to kind of address that or to be kind of aware of that, I think again, creates fidelity of the process and the actual the disciplining tool of cost benefit analysis. We've already talked about some of the major changes. I think the the biggest one I think from a you know, from a regulation point of view is the discount rate change. It's a substantial reduction. It's a warranted reduction given what's happened to not just our economic understanding, but, you know, real interest rates in the last 20 years have changed dramatically. So this has reflected that reduction. Phil asked about the implications. So I would just say I don't know what anybody's view is on climate policy, but if you're ever in a thoughtful debate about climate policy, it almost always devolves or comes down to your consideration of two things time and space, meaning how much do we weigh the consequences of the future? Because that is where the consequences are most heavy. And if you have a high discount rate, it does come back to negligible, potentially negligible. So how you consider and that is a very fraught, hugely consequential decision. So that decision to lower the 1.9 will have, I think, very large implications there. And space, it's a global pollutant. So how do you weigh the benefits of U.S. actions that on on the rest of the world? I've written about this before. I think there's a citation to my article and a footnote. So I appreciate that. I was I and my coauthor Kim, this goes he was somewhat critical and skeptical of the Obama administration's justifications they had for the social costs of. Carbon using a global measure. One of the things we cited was this doesn't even isn't consistent with Circular four. We can't say that anymore. They addressed it. There is a question that isn't in there. Should I think I can't remember the exact language, but the exact language. But the language they use is in the spirit of what we talked about, which is when you're talking about U.S. domestic policy or traditionally in benefit cost analysis, you match the benefits to the jurisdiction of the cost. So if you want to use global benefits, the main justification, as we've seen it is, is some sense of reciprocity. We're doing this to lead the world so that they will respond or they're doing it and we have an agreement with them. Again, if you want to get specific on it, you should weight those benefits by the level of reciprocity, which is a tough thing to do. But I do think, again, the changes on the scope of the analysis and on the discount rate will have the biggest impacts on how we think about climate related regulation. So overall, I commend them for what they've done and I've got I'm going to save for later if they'll give me a chance at that. One concern this is my this is my opportunity to submit comments orally, perhaps, but but I should write about but I'll come back to that if I get enough time.

PHILIP A. WALLACH: Just tell us now to tell us now. Don't keep up.

TED GAYER: So my my one concern and it's a it's an interesting thing because I feel like I and my coauthor Skipper are kind of fighting an uphill battle on this. The change that they made, which I think is almost I've heard nobody comment on. And the reason you have nobody comment on is it's totally consistent with development economics in the last 20 years. But yet as a cause for concern. So if you look at circle four, they talk about justifications for regulation and traditionally justifications for regulations or market failures. It seems like public goods and externalities may be informational lapses or asymmetries and the development of the literature on economics and therefore reflected in the exchanges is using behavioral biases as a justification for regulation. Again, Kip and I have written critically of this. Our view is if you move from trying to regulate to help the environment, which are public spillover effects of pollution, for example, to really move it towards helping people not do self harm. So I think that's a movement in the wrong direction and moves us from our primary goal here. And as I've written and talked about before or written about what I think we should be super careful before we use purported consumer rationality for a justification for regulation. Again, you go back to what I said in my framing comments, which is I always ask myself what would my political and ideological opponents do with this change? And to me, it's a little bit fraught and risky. If you open up the possibility that you can justify a regulation by claiming and I would say historically, over the last decade with very little evidence that people are not making optimal decisions, that they're causing themselves harm by buying a low energy efficient, cheaper dishwasher instead of a high energy or high energy efficient, more expensive dishwasher. To me, that could just easily reflect different preferences, which are totally reasonable. And it just moves us, I think, in a precarious direction if we're starting to regulate. Because the regulator, who I should remind everybody, present company included, they would admit it, are people subject to biases themselves, are reporting that the consumers and firms are somehow acting irrationally. I just think that we've moved too far in that direction. And I think it's a it's something I would be very cautious about.

PHILIP A. WALLACH: All right. Thanks. I can give you or our guys a chance to to respond to that maybe and then go to Connor after that.

ZACHARY LISCOW: Those are there fair points. I would say as an academic, I may have written a paper that is not super different from that, but I think functionally, like, look, when you look at the regulation that we're going to have going forward, it's still going to be overwhelmingly the market failures that that we all agree we should be concerned about. You know, if there are, I think many, many people I think I think quite reasonably there are cases where there is very, very strong evidence, like people do not save enough for retirement. And if there can be a regulation that nudges people towards saving with, you know, minimal interventions, perhaps in ways that would still allow them to choose whether to save or not. Rather than mandating it, we want to open the space for regulations to do that in the presence of evidence and also the presence of of, you know, all the opportunity for participation that we're encouraging even more of here. So I think that there's nothing here that would suggest that we're moving away from knowledge as the market shares, as the primary thing. We just want to create a little more space for these other important cases where there is, you know, strong evidence.

TED GAYER: Can I just a quick, quick response. I agree with the case for retirement savings, and I agree that the answer for people not saving optimally are nudges. But my concern is things like energy efficiency. We've written on this. If you look at energy efficiency regulations, like for different appliances and if you look at the analysis done by the ranking, by the agencies themselves, the benefits are minimal. The environmental benefits are de minimis, quite honestly, compared to the costs. And the only way it passes a bit of cost analysis is if you say, well, people are just buying the wrong dishwasher or the wrong appliance and they're not making smart decisions. And and just on the nudge part, to me, the answer to that is slap a sticker. If you think I'm making a bad mistake, slap the sticker on it somehow. Give me the information, the nudge to tell me like, hey, this dishwasher might seem cheaper, but it's going to cost you in the long run. And then I can say, Yeah, but I'm moving in a year or I don't use my dishwasher that much or whatever the case may be. So I'm all for nudges. I just think that, again, as a disciplining tool for not too careful and we'll see how these are executed. It could really be used. And I think a lot of the energy efficiency regulations has been used to justify things that are not really good policy.

PHILIP A. WALLACH: All right. Let's see that there. For now. Let me turn to Connor. Connor, you've worked on agency rulemaking before, down and down in the trenches. Can you can you give us some insights into how high level documents like Circular A4 or the executive order, the just and promulgated actually get applied to specific rulemaking? So at what stage of the process are political appointees and economists and lawyers taking the instructions that come sort of from the central the central federal government? And how is this how does this new set of documents going to change their thinking?

CONNOR RASO: Well, thank you and thank you for having me here, Sanjay and Phil. And I just quickly say here on my own behalf for not speaking for anybody at my agency. I think the process has probably already begun. I think there are probably briefing memos from the economists and the lawyers who work on this sort of outlining and summarizing how these changes compare with current agency guidance. I think most of the agencies have their own internal guidance, some public some nonpublic about economic analysis. And I'm sure that these changes, you know, especially with respect to the EO, which is final and of course the circular is out for public comment with respect to the you know, I'm sure agencies are briefing upward. My overall take, Phil, is that some of these changes are going to have an impact right away. So agencies are very, very, very aware of the review process and they're going to have a good sense of, okay, I was not automatically going to review rules that are between 100 and 200 million is still made discretionary, but that a change like that would would or the support, assuming it's adopted the discount rate change that can be plugged in right away. But other changes and I think Ted alluded to this a little bit, are going to take a lot of work. And I think some of that work is going to be with OIRA. I think some of that work is going to be interagency work. And so I'll just give a couple examples. One is increasing engagement of underserved groups. And as others have said, this is a hard thing to do. It's something that's been talked about a long time. I think were took an important step actually, in issuing contemporaneous guidance with the executive order to agencies. It's about, I don't know, ten or 15 pages of question and answers. And it has a lot of detail and some ideas about engagement. What do we mean by examples of underserved groups? And I think that's it's helpful because I would will actually play out varies a lot between agencies. And so for some agencies, underserved groups look very different, for example, the FCC than they might housing the Department of Housing and Urban Development. And so I was giving agencies more help, a lot more help than just a line in the executive order. But I think agencies are going to have to do their own outreach with their constituencies and they're going to have to develop their own internal guidance. And so it's going to it's going to take time and work. Another example this I'll quickly highlight, and I think this is an underappreciated part of the document is this is saying agencies start to make use of new technology in the rulemaking process. So new technology to address mass comments, new technology to use to address technologies like chat between and its competitors. And this gives agencies a nudge, as Mr. Revesz said, but that agencies are going to need to do a whole lot more work internally. And I'm sure there'll be discussions with the tech folks, the budget folks between agencies and with the IRA. So this gets the process started. The last one I'll quickly note, and this is one where I hope the public comments are helpful on sort of. Three four is the distributive impacts. One of my former coauthors in this area said sort of writing about cost benefit analysis. Writing guidance about cost benefit analysis is a lot more fun than actually doing cost benefit analysis and specific rules. And my experience, Phil, from my government work is that doing distributive analysis in a principal way is really hard. It's hard enough to try to measure, much less quantify, much less monetize a lot of costs and benefits, especially benefits. But then trying to break them down into different subpopulations that we care about is even harder. And so this is a really hard thing to do. And so I hope commenters have some additional suggestions for how the circular can give agencies more, more ideas. And again, it's hard because it plays out differently in different agencies. But that's one where I think the circular builds out a lot more. But I think it's going to take even more agency work with these nudges to develop their own internal methodologies and frameworks for doing this more consistently and better.

PHILIP A. WALLACH: Thanks. Let me let me follow up on that. For for anyone who cares to answer, what's the danger if this goes badly, I guess, or it's. Is there any sense that if we're doing this distributional analysis badly, we're going to end up with bad rules? Or are we going to justify rules that shouldn't have been undertaken in the first place? We're one of the critics of these changes worried about essentially.

RICHARD L. REVESZ: Well, maybe I could start. I mean, for starters, we want to understand how regulations costs and benefits get distributed among relevant subpopulations. And this is kind of like independent of what happens after that. I mean, it's we already do it for for aggregate benefit. It's in costs and also for aggregate benefits and costs. We asked the agency to analyze alternatives and typically analyze three alternatives. I mean, typical cases, you know, the agency goes with the one in the middle, but they also analyze one that's somewhat more stringent and one that's somewhat laxer and maybe determines that the one in the middle that they want to go with has higher net benefits. And well, it might be the case, you know, no way. Despite the commands of prior executive orders, no agency has really seriously looked at the distributional consequences of the alternatives. They just look at these things in the aggregate. And from our perspective, that's a mistake. It could be, for example, that there are two alternatives and one has slightly higher net benefits, but confers all those benefits on very wealthy people who for whom they make less of a difference. And another one has slightly lower net benefits and confers those benefits on very disadvantaged populations. I mean, figuring this out doesn't actually prescribe an answer, and the answer might depend on the statute. I mean, some statutes have call for taking account of impacts on particularly sensitive populations as sometimes happens in the environmental field. But we want to know also if we knew, for example, that the people who are facing a lot of this pollution are people who also face all kinds of other forms of pollution that might spur research into figuring out whether there are non-linear charities and the harm functions. That is, if you exposed to a whole bunch of them, whether the cumulative effects are worse than the sum of the individual effects. And so if we knew that that was going on, we might actually want to learn other things. I think the only I can't imagine thinking that learning this is the tremendous I mean, obviously there's a cost in doing that and there is kind of a potential delay in rules if this is going to happen. And I think we are not envisioning like an immediate straightjacket so that the day that certainly for gets finalized, agents are going to be doing this across the board all the time. In every case, I think we have to use their judgment as they already should be using in doing analysis. You know, like for a rule that has tens of billions of dollars of impacts, spending a fair amount of time and energy and money on analysis is a good thing for a rule that has impacts in the hundreds of thousands of dollars, probably not so much. So there have to be some. Sensible approach. You know, I think we do. I mean, I recognize that agencies are not going to be good at doing this from day one. I think Obama can play a role in, for example, and we have something called the Regnery Community of Practice in which we bring together regulatory lawyers from around the executive branch, and we might, for example, identify a good distribution analysis and kind of use that as the theme for one of these monthly meetings so that other agencies can see how one agency cope with it. So I think it will be like a learning process. It's not going to be immediate, but we think this information is is really important. And and again, it's something other administrations are worried about as well. It's something that standard mainstream practitioners of cost benefit analysis would say this can be relevant information. I don't think anyone would say, oh, this is like just irrelevant and inconsistent with the methodology. And if you even like, think about this stuff, you have destroyed the methodology. This is very much in the mainstream. How agencies then do these trade offs is more complicated and and I don't know how prescriptive will be. I think it again, as I said, I think it will depend a lot on individual statutes.

ZACHARY LISCOW: Let me add a second class on that. So in outside of the regulatory space, in terms of discretionary grant spending, which is what a 94 covers versus a 4% regulation. So actually, outside of OIRA, we're actually work agents who are actually working on a couple of pilots now on distributional rates, in particular FEMA and the Army Corps. And I think that these are going to be helpful case studies. I think it's they're they provide examples where it's kind of really easy to get concrete. So if you look at FEMA, it's distributed several billion dollars a year through discretionary grant programs. They're distributing to particular places where it's actually fairly easy to know how rich and poor people are. And we've seen over the past several years, FEMA is actually much criticized for distributing grants disproportionately to to well-off places. And it's actually fairly easy to see how the methods that are currently used will lead to this outcome when measuring benefits. One of the most important pieces of that is housing prices and where housing prices tend to be higher and wealthier communities. So what this means is that we tend to be sending our FEMA disaster prevention money disproportionately to well-off areas. Now, we think that that's unfair. I don't think that's a huge leap to say that it's unfair to just things that are disproportionately well-off areas. And, you know, of course, the other questions of mechanically how to do this. But it is we will see how going forward, how how, how to do it. You know, the cost to doing it wrong would be in as you spend the money in the wrong places, you spend the money in the places where you don't improve well-being the most. But we think that the method that we are suggesting, again, just like in the regulatory context, not mandating, just suggesting here's one alternative. Here's one way to do arts agencies. You know how to have discretion is one way to do it. So we spend money the best and do it in a way that's fair across communities across the country.

TED GAYER: Can I take a stab at your answer? I just wanted to reaffirm most of what they both said. I think your question was what's not to like about more distribution analysis? I see what they've done. Here is what the administrator said. The originally four has distribution analysis and it's just as a paragraph as opposed to really like fleshing out how you can go about doing it. And I think so guidance on that I think is really important. You ask why somebody might not like it. Sometimes the distribution also sometimes triggers people irrationally, perhaps. And then the bigger question, the bigger concern, which predates these reforms, too, is what I think the administrator said, which is like there's a real strong role here for a lot of Ira on sort of both in an educating and disciplinary measure to make sure that distributional analysis are used, not selectively. Right. Like a lot of environmental regulations are progressive in the sense that the people that are most harmed by the pollution tend to be poor communities and you have distributional ways for equity weights heavier on there. But a lot of the costs also fall on them as well. So, so long as it's applied symmetrically, then I think, of course, it's the right thing to do.

CONNOR RASO: I'll just say very quickly, as an agency lawyer, I do think there's a big difference between the agencies who do a cost benefit analysis pursuant to a statute that is explicitly judicially reviewable. Like when I used to work at the FCC as opposed to the OIRA review, where courts have generally not reviewed the analysis at all, or if they have much less stringently. And so you may see the agency lawyer worry about the more we put out there, the more. That a. Litigant wants to attack this rule and can critique and argue misses the mark. And so the agency may worry. Especially if it gets some judicial review about showing more cards for judicial review.

PHILIP A. WALLACH: Yeah. Let me follow up on that. So litigation judges role in the whole regulatory process is sort of hanging over all these proceedings because so much of an important regulatory work has strayed into the courts these days. That's sort of what we all expect and that's what happens. So anyone have any thoughts about how these changes may be designed to help rules withstand judicial scrutiny or whether they might open up new avenues to legal challenge in the coming years?

RICHARD L. REVESZ: Well, my view about this is that. I mean, judges do look at the economic justifications of regulations, even ones where the analysis is done to comply with all kinds of the executive order. I mean, the executive order does say that failure to comply with the executive order is not judicial reviewable. So no one would say, oh, you know, we're going to try to say anything aside because you didn't, you know, submit something, whatever. But on the other hand, typically agencies include in their regulatory materials these analysis. And, you know, courts sometimes do fairly aggressive, arbitrary and capricious review and sometimes set aside regulations because the analysis wasn't. Up to snuff. I mean, I actually don't think I mean, in fairness, that there is any judicial decision. It's not that I'm aware of that says, okay, we're going to strike down a regulation because the TIME series in 84 is 20 years old. I mean, arguably that would be a reasonable thing to do. It seems arbitrary to like rely on something that's so old. On the other hand, I mean, be shocking to me if a court struck down a regulation, because we've now updated that time series by relying on the most recent 30 year period, just like they did in 2003. I mean, again, I can't predict what every judge in the country would do with. It would strike me as that. That would be like, really wrong. So my feeling is, you know, we're trying to rely on the best scientifically common understanding. We're putting this out for robust public comment. We're having a peer review process where we're examining an arm's length choice of the peer reviewers. We're hoping the contractor that we've hired to do this arm's length process will pick leading people and.

PHILIP A. WALLACH: Sounds so reasonable. I don't know how anyone could ever think it was capricious.

RICHARD L. REVESZ: That's the hope. That's the hope.

RICHARD L. REVESZ: Connor you have any thoughts?

CONNOR RASO: Oh, I would just say, yeah, the financial regulatory context where we don't send our our rules over to whatever it is, independent regulatory agencies is a little different in that the court explicitly reviews a provision of the statute that requires cost benefit. And there the D.C. Circuit especially has really jumped in and said, you've overweighted this study, you misread that study. And so I think it's a it's a little bit more intensive. It is a more intensive review than the more general, arbitrary, capricious review. And I also do believe that a review helps agencies in the court by having an independent review. So I think I was doing a deliberative process, an inclusive process for socializing these changes that reflect developments in the economics that I think will help agencies. It'll help give them a backing for for a type of cost benefit analysis that I think will sort of help do a better job of analyzing the rules. So I think this is all to the good. And some of you are envy agencies with respect to litigation and cost benefit because I think they're in a stronger position.

PHILIP A. WALLACH: Soon we're going to turn to questions from the audience. So get ready for that. Well, let me ask one more question for anyone who has thoughts before that. So I'm just a humble political scientist up here with you, lawyers and economists. One question that's always interested me is whether the process itself matters or whether all this concern about the process is just because we care about what policy gets chosen in the end. So, you know, there's a lot a lot of what is emphasized in the executive order and the proposed changes to A4 have to do with making clear who our is meeting with, making it easier for certain groups to petition to become involved in the process, maybe at an earlier stage. Does all that only matter because it's going to cash out in different policies at the back end? Or does it matter that the process functions just better for for its own sake?

RICHARD L. REVESZ: I think the process matters for its own sake, and it might lead to better decisions as well. I mean, look, I mean, obviously you want to hear from a broad set of affected people in communities. And if you're not hearing from some important subgroup, you might not make decisions that are as good because you might not, for example, know what some of the impacts are, or you might focus too much on the consequences that have been brought to your attention by the groups that happen to participate. I think there's real value in the process. I think there's really real value in having a broader group of Americans feel that the government hears them. And this is kind of an important part of President Biden's general approach to equity and inclusion. It's not just this executive order and in this guidance document, but a much broader set of things. But I think at the end of the day, it might lead to some somewhat different policies. But even if it doesn't, at least people will feel that the government is hearing their concerns and take them seriously.

PHILIP A. WALLACH: In their thoughts.

TED GAYER: Yeah, I would just second and I think it matters both for the outcome and also the process in itself matters, the challenges. We'll see. I mean, anybody who runs an organization knows this challenge too. I've often used the phrase of in places where I work, where we want our decision making to be inclusive and efficient. And those two things are frequently in tension. So again, commendable that with that they've that they've updated this and they've recognized that you need to have a process that's not just inclusive but transparent, that that matters for the legitimacy of what we're trying to do here, while also matter for the substance that we're trying to do. But as has been sort of a long recognized challenge with the regulatory process and with OIRA, that they've got a heavy workload. And so with some of the other changes think are trying to ease some space for them to be able to do so.

RICHARD L. REVESZ: It's definitely the right trade off and we'll try to deal with that in a way that maximizes net benefits. Perfect.

PHILIP A. WALLACH: All right. So I have two questions in and the audience in the room here. Anybody I got, I got. Okay. Yes, sir. Do we have a microphone for you? Please introduce yourself and ask a question.

AUDIENCE MEMBER: I got on of array, a group of the COVID, the climate resilience adaptation. Now the water Ukraine, with its supply chain issues there, revealed the importance of so-called contingent capabilities. So things that the government should invest that are not useful in the normal course of business, but they're useful under certain risk scenarios, and that's why they're very important. Unfortunately, the NPV methodology is not well suited for that kind of analytics because it's all or nothing now or never. The base case, one of the biggest innovations in the last 20 years in project finance has been something called real options analysis, which has been used by our friends in UK and Australia. But for some reason, even though it's an American innovation, it was started at MIT by Myers. Most of the financial experts and I don't want to put you on the spot here, you have not even heard about this area and it applies option pricing methods to evaluate contingent capabilities embedded in projects both in terms of resilience but upside opportunities as well. So without kind of trying to put you on the spot, have you heard about this? Have any of you and is there any thought to kind of embed this in some sort of cost benefit analysis on the government side?

PHILIP A. WALLACH: Thank you.

RICHARD L. REVESZ: Yeah, thank you. I mean, I think probably everyone here is focused on this at some point. Right. About I mean, an anecdote from my prior life, prior meaning before I joined the government that prior and more like existential, I, I once brought, you know, represented a group that challenge the Interior Department's five year offshore drilling plan on the grounds that it didn't take into account option analysis, because basically what the Interior Department had done was exactly what you said, is it looked like, you know, the cost benefit analysis, well, what's the value of the resource now and what is the current estimate of the environmental and other costs? And if the value of the resource was more than they authorized leases, But there were numerous uncertainties, especially on the environmental side, about what exactly the damage to oil spills in the Gulf of Mexico would look like. And so the litigation was designed to force the Interior Department to look at the option value of delay, because obviously the decision was not binary. Do you like drill now or do you never drill? You could also wade in, acquire more information, and then make a decision in the future. And we actually won in the D.C. Circuit. So it's not just that we brought this litigation. Judge Garland, now the attorney general, wrote the opinion for the D.C. Circuit and said, yes, the option of either delay is a real thing. The Interior Department, that they can go down. I mean, that was the good part. I mean, that was the good news. The bad news was that he also said that if economic techniques for evaluation are insufficiently developed, the Interior Department doesn't need to value something, that it doesn't have the analytical capability to value. In the next five year report, they devoted about ten pages out of 100 page document to a qualitative analysis of the option value, but they still had not developed the capability to actually quantify it and monetize it. So I would say, yes, I think you understand this is a thing. In fact, I mean, at least in that context, is the D.C. Circuit opinion saying you actually have to do it? You know, one of the things we are working on that's. Related to this is we're working on a project we just launched is called Frontiers of Cost Benefit Analysis, and it's sort of how to basically create conditions for quantifying monetizing elements that have been hard to quantify, monetize. And I think this is this is one of them. So I think that the the concept is well known and understood, but the problem is the quantification of monetization techniques haven't been as developed in these contexts as they are in like financial markets, like stock options and things of that sort.

PHILIP A. WALLACH: Yeah, it sure. Hundreds. A great number. I know I have a question that was submitted online before the event, even about the peer review that the circular 84 is going to be put out for. That seems like an unusual thing for a proposed government document. Can you tell us something about that process and why it's happening and what you hope for from it?

RICHARD L. REVESZ: You know, I think it's a best practice for scientific documents of this sort, and we wanted to follow the best practice. There was something called peer review of certainly for Bud. But basically what happened I don't mean this like negatively. The government reached out to six people and asked them to be the peer reviewers, and they were distinguished people. But obviously, you know, in this and is a society that sometimes kind of lacks as much trust as there might have been, You know, this could be seen as, you know, you call your friends and your friends say nice things about your piece of work. So we wanted to avoid that because, you know, my goal in this is to come up with a document that is widely understood to be the best one can do in this area. It also would make it more difficult for if a subsidy administration wanted to change that document, that would make it more difficult to do because it would have that kind of like imprimatur of the scientific community. So we decided that kind of a best practice for doing peer reviews of this sort is for the government to hire a contractor. Obviously, we wrote some guidelines for the contractor to follow where the guidelines are. Basically, we want people who are the leading people in this field as determined by their academic publications and things of that sort. And then there's kind of a nomination process that goes to the contractor. The contractor makes a selection.

PHILIP A. WALLACH: And will it be blind in the end or like their identities will be known or unknown.

RICHARD L. REVESZ: They'll be known.

PHILIP A. WALLACH: They will be known, but they won't have been who you who you would have selected. Not yourself necessarily.

RICHARD L. REVESZ: It's the contractor who's selecting it. Selecting the contractors like that.

PHILIP A. WALLACH: And is that happening on sort of the same time frame as the notice and comment?

RICHARD L. REVESZ: Well, it's a little delayed. So the comment period ends 60 days after April 7th, which I think is June 6th, won't be a day off. So I don't want any of you to rely on what I said in deciding when you file your comments.

PHILIP A. WALLACH: Check the Federal Register

RICHARD L. REVESZ: Yeah, check with our register. But it's around the end of the first week of June. We have the same day, April 7th. We called for nominations for peer reviewers and the period for nominations is now passed. We're now in the period in which the contractor is doing some due diligence around the nominees. So, you know, my guess is that we'll probably have a peer review panel selected or the contract was like one around the time that the comment period closes. So, you know, the peer reviewers, I think, are getting their 30 days to their peer review. So it's going to be later, not a lot later, but somewhat later.

TED GAYER: Will their comments be public to. Right.

RICHARD L. REVESZ: And the public comments will be also. Yes.

PHILIP A. WALLACH: Question from Sanjay.

SANJAY PATNAIK: Great one. Thanks so much for this great discussion. And thanks again to Ted and his campaign center for co-hosting this with us. And a couple of questions. One for Ricky. You mentioned the importance or the increasing importance of distributional effects. Right. Looking at those. Can you talk a bit more how you go about determining how to divide the population, different groups? Because there are a lot of different ways to do it and decide how which distributional effects to look at. You can type socioeconomic, you can do it racial, etc.. So that's one aspect. The second question goes to SAC, picking up on Ted's point, which is really, really key. I think that like regulation was originally intended for market failures and is moving now beyond this for the behavioral side, can you talk a bit more about the rationale why why you think we are moving in this direction? And then maybe for the entire panel, I'm curious in terms of process, how has the advent of AI and tried to keep it in things like that affected your perception of comments? Right. Like a lot of the comments nowadays are submitted actually by bots of how you take feedback into account and how you develop and implement your guidance. It started with Ricky with the first question on the.

PHILIP A. WALLACH: I mean, I was focused on Zach's question to remind you.

SANJAY PATNAIK: That. Distributional effects like how.

RICHARD L. REVESZ: Do you, how you make the groups, how you slice the groups. Yeah. Thanks. Yeah. So the current draft, then again, the current draft is a draft and maybe we'll learn more from the comments on peer review gives the agencies a fair amount of discretion on how they would pick the relevant populations. We do ask that they follow a consistent approach except where there are reasons not to, so it doesn't look like manipulable. But so for example, I mean, some agencies have statutory requirements to consider impacts on affordability, like issue for the Energy Department on appliance efficiency standards. So that might make it might make sense for them to look at income bands, which they already do actually to some extent. EPA, you know, has lots of commands around environmental justice and might, you know, define subgroups differently. But the goal is not to create a straitjacket, but to create some kind of consistent framework that agencies could use and defend. And and so that would be our guidance. And then agencies have to take that guidance. They might then write more specific guidance for themselves in the way that Connor suggested.

SANJAY PATNAIK: So that's kind of like the danger that you get like pendulum swings, right? If each agency can decide that you might have one agency during one administration thinking that these groups would be looked at and then maybe have a different administrator from different president who kind of rolls that back or it looks at different groups. So is there a way to, like, make it more consistent?

RICHARD L. REVESZ: Well, I mean, for example, President Biden last month issued a very extensive executive order on environmental justice. And so presumably an agency in the executive branch is going to follow the commands of that executive order. You know, you're right. I mean, if a different administration said, okay, we actually don't care about this, I'm going to repeal that executive order. We only care about, you know, impacts on mining communities. You know, then that would suggest using a different set of subgroups. But it would be, you know, consistent with kind of an overarching policy set by the administration.

ZACHARY LISCOW: On behavioral economics and behavioral failures. I think the starting point here is like just how long it's been since these were revised. It's kind of remarkable that something of this significance has been like has been for revising 20 years in the case of 94 revise in 30 years. There's just been a huge change and and economics and especially and kind of the application of these behavioral failings to replication of policy issues, these behavioral billings. It totally makes sense if you're writing a writing circular circa 1992, when 8094 was written, like you don't include that, you don't include behavioral failings. There wasn't the empirical evidence there, wasn't there? The theoretical underpinnings for starting in 2023 and what you care about is efficiency, or what you care about is well-being. It seems negligent to not at least have as a possibility as a motivation for regulation in the face of, you know, several decades now of evidence of individual failures to optimize, which would lead to the possibility that government can intervene and increase, increase efficiency. So we regard this as as one of the strongest examples of just massive, massive change in the economic scientific literature, which, you know, kind of ineluctably leads to at least opening the door to these kinds of dimensions. Was there a third question I forgot? Yeah, it's my left.

PHILIP A. WALLACH: Do you still like commentors now that they might be robots?

RICHARD L. REVESZ: Well, actually, that's one of the things the executive order asks us to look into. And we will. We are in the process of getting a workstream started around, you know, how to deal with this, how to deal with the duplication when I might be creating a lot of these things. I can't say we really have the answers yet, but but it's definitely something we're focused on. And the executive order asks us to come up with some policy.

TED GAYER: Yeah, maybe you don't have the answers for the follow up question I have is are you looking into how to deal with what might. Be a. Tsunami of bot created comments? Or are you also looking at. The. Possibility of using AI to process comments?

RICHARD L. REVESZ: Well, they're clearly good uses of AI and maybe not so good use of the way I The first one is tsunami of bot comments is not so good and that definitely happens. I mean, I've actually looked in, you know, this a little bit. There are some regulations where, you know, Barack Obama files any comments. You know, you know, Hitler calls a bunch of comments how this you know, like.

PHILIP A. WALLACH: It's nice of him to be concerned from.

ZACHARY LISCOW: It's might be real.

RICHARD L. REVESZ: So, you know, that's not good, obviously. I mean, look, if someone is someone, you know, tells ChatGPT look, you know, I'd like a draft of comments that, you know, oppose this rule because it's, you know, whatever, you know, bad for the quality of drinking water in my community. And if this thing comes up with something credible and the person looks at it and says, yep, you know, maybe said maybe doesn't, but takes ownership for it, I mean, I, I again, we haven't done this work, but I don't think that we would say, oh, that is like inappropriate. I think they'll be fine. And it might actually be a way in which less sophisticated groups can actually have their voices heard. Now, having said all that, how look, I mean, obviously some things are easy if like dead people are filing multiple comments, you know, something's wrong, but they'll obviously be harder cases. And how do we distinguish them and the extent to which we can use technology to do that? You know, so for example, like the, you know, duplicate comments, if like someone puts out something and, you know, a million people file the same comment, that's, you know, one thing. But if there are either subtle changes on those that kind of like the feeds, the duplication software, that's kind of a problem. And there's probably more sophisticated ways of dealing with that.

TED GAYER: Yeah, and my only point is you might be able to use AI as a as a way to be able to separate the good from the bad.

RICHARD L. REVESZ: Right. And I think that's know, the idea. I don't think we yet forgot how to do it.

TED GAYER: Yeah. Yeah.

PHILIP A. WALLACH: We're coming to the end of our time here. So let me turn it over to Ted for a few last comments.

TED GAYER: Yeah, I just want to say thank you. Thank you to all the panelists. It's a great discussion. And thanks to my friend Phil for moderating and for leading us today. And thanks to Sanjay and the whole Brookings team for hosting the event, Putting it on. Sanjay knows this. I actually started the Center on Regulation of Markets, I don't know, decades ago, so a decade or so ago. So it's just nice to see it thriving under your leadership. And it's good to be back at Brookings and see you and all my friends here. So thanks, everyone from joining. I think there's some people might be milling around and saying, if you want to socialize or some drinks in the back. And again, thanks for having the event. Thank you. Well.

TED GAYER: All right. Thank.