Regulatory Costs: Probably Much Higher than People Think

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The Perils of Trying to Count

[T]here are known knowns; there are things we know that we know.

There are known unknowns; that is to say, there are things that we now know we don't know.

But there are also unknown unknowns – there are things we do not know we don't know.

—Donald Rumsfeld
February 12, 2002

Does Anyone Really Know How Much Regulation Costs?

- OMB Reports to Congress
  - Excludes most statutory regulation
  - Limited coverage, 10-yr horizon
  - Reliance on unvalidated agency estimates
  - Excess precision given uncertainty
- Crain & Crain (2010)
  - Limitations on model, control variables
  - Dependent on OMB RtC methods
  - Excess precision given uncertainty

Structural Defects in EO 12866

1. § 6(a) requires agencies to do specific things early that they generally ignore and OMB does not enforce.

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Structural Defects in EO 12866

2. § 6(a)(3)(A) requires agencies to designate draft regulations as "significant" or economically significant based on mere belief, without the benefit of economic analysis.

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

Structural Defects in EO 12866

3. § 6(a)(3)(B) requires agencies to perform some amount of economic analysis for "significant" rules. They rarely do, and OMB does not enforce it.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

Structural Defects in EO 12866

4. § 6(a)(3)(C) requires agencies to perform RIAs for "economically significant" rules.
   - The quality standards in Circular A-4 are weak
   - OMB does not enforce them
   - Misclassified rules stay so, get no analysis
   - RIAs are performed after decisions are made to justify and defend them, not inform them
   - OIRA review time is wasted on improving RIAs

Structural Defects in EO 12866

5. Agencies have monopoly and monopsony powers over economic analysis.
   - *Monopoly power.* low quantity, high price given product quality
   - *Monopsony power*. agency chooses quality

Structural Defects in EO 12866

6. <u>EO 12866 defects undermine CRA</u>
   - CRA applies only to ‘major’ rules
   - OIRA decides what’s ‘major’
   - ‘Major’ ≈ ‘economically significant’
   - Misclassified rules are excluded
   - Agency RIAs are structurally defective but go unchallenged.
     - OMB won’t disclose its opinions.
     - Monopsony power prevents production of better analyses.

Exhibit A

PTO, Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions; NPRM

America Invents Act that the Director, in prescribing rules for the *inter partes*, post-grant, and covered business method patent reviews, consider the effect of the rules on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete timely the instituted proceedings.

An electronic filing system (without any exceptions) that is rigidly applied would result in unnecessary cost and burdens, particularly where a party lacks the ability to file electronically. By contrast, if the proposed option is adopted, it is expected that the entity size and sophistication would be considered in determining whether alternative filing methods would be authorized.

6. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rules:

37 CFR 1.99 provides for the submission of information after publication of a patent application during examination by third parties.

37 CFR 1.171–1.179 provide for applications to reissue a patent to correct errors, including where a claim in a patent is overly broad.

37 CFR 1.291 provides for the protest against the issuance of a patent during examination.

37 CFR 1.321 provides for the disclaimer of a claim by a patentee.

37 CFR 1.501 and 1.502 provide for *ex parte* reexamination of patents. Under these rules, a person may submit to the Office prior art consisting of patents or printed publications that are pertinent to the patentability of any claim of a patent, and request reexamination of any claim in the patent on the basis of the cited prior art patents or printed publications. Consistent with 35 U.S.C. 302–307, *ex parte* reexamination rules provide a different threshold for initiation, require the proceeding to be conducted by an examiner with a right of appeal to the Patent Trial and Appeal Board, and allow for limited participation by third parties.

37 CFR 1.902–1.997 provide for *inter partes* reexamination of patents. Similar to *ex parte* reexamination, *inter partes* reexamination provides a procedure in which a third party may request reexamination of any claim in a patent on the basis of the cited prior art patents and printed publication. The *inter partes* reexamination practice will be eliminated, except for requests filed before the effective date, September 16, 2012. *See* § 6(c)(3)(C) of the Leahy-Smith America Invents Act.

Other countries have their own patent laws, and an entity desiring a patent in a particular country must make an application for patent in that country, in accordance with the applicable law. Although the potential for overlap exists internationally, this cannot be avoided except by treaty (such as the Paris Convention for the Protection of Industrial Property, or the Patent Cooperation Treaty (PCT)). Nevertheless, the Office believes that there are no other duplicative or overlapping foreign rules.

The notice also proposes changes to the rule of practice to consolidate the procedure for notifying the Office and other parties in the proceeding when a party seeks judicial review of a Board decision. In fiscal year 2010, the Board issued 7,312 decisions, and only 61 notices of appeal were filed with the Office and no civil action was commenced. In fiscal year 2011, the Board issued 7,551 decisions, and only 100 notices of appeal were filed with the Office and 7 civil actions were commenced. As such, the average rate for fiscal years 2010 and 2011 was 1.13% ((61/7,312 + 107/7,551)/2 × 100). Based on current projections with additional resources, it is anticipated that the Board will issue 10,500 decisions in fiscal year 2013. Thus, it is estimated that 137 notices of appeal (and notices of election) would be filed with the Office. Historically, one third of *inter partes* reexamination proceedings have been appealed to the Board. Based on an assumption that the appeal rate from the Board for the new proceedings will be 50% of the historic rate, 57 additional notices of appeal will be filed based on the new trials sought in fiscal year 2013. Based on the percentage of small entity owned patents that were the subject of *inter partes* reexamination (32.79%) and the percentage of small entity owned patent applications or patents that were the subject of an interference declared in fiscal year 2010 (19.62%), it is estimated that 63 small entities will be required to file notices of appeal and notices of elections.

The proposed rule also requires that a copy of the notice of appeal or notice of election and complaint be provided to the Board, thus an additional 194 (137 + 57) copies would be required.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 13258 (Feb. 26, 2002) and Executive Order 13422 (Jan. 18, 2007).

The Office estimates that the aggregate burden of the proposed rule for implementing the new review procedures is approximately $80.6 million for fiscal year 2013. The USPTO considered several factors in making this estimate.

Based on the petition and other filing requirements for initiating a review proceeding, the USPTO initially estimated the burden of the proposed rules on the public to be $209,131,529 in fiscal year 2013, which represents the sum of the [illegible] annual (hour) respondent cost burden ($190,280,456) plus the estimated total annual non-hour respondent cost burden ($18,851,073) provided in Item (O)(II) of the Rulemaking Considerations section of this notice, *infra*. However, since the Leahy-Smith America Invents Act also eliminates *inter partes* reexamination practice (except for requests filed before the effective date of September 16, 2012) and interference practice as to applications and patents that have an effective filing date on or after March 16, 2013, (with a few exceptions), the burden of the proposed rules should be offset by the eliminations of these proceedings and their associated burdens.

It is estimated that 460 new requests for *inter partes* reexamination would have been filed in FY 2012 if the Leahy-Smith America Invents Act had not been enacted. This estimate is based on the number of proceedings filed in fiscal years 2011 (374), 2010 (280), and 2009 (258). Elimination of 460 proceedings reduces the public's burden to pay filing fees by $4,048,000 (460 filings with an $8,800 filing fee due) and the public's burden to prepare requests by $21,160,000 (460 filings with $46,000 average cost to prepare). Based on the assumption that 93% of the requests would be ordered (consistent with the fiscal year 2011 grant rate), the burden to conduct the proceeding until close of prosecution will reduce the public's burden by $89,880,000 (428 proceedings that would be estimated to be granted reexamination multiplied by $210,000 which is average cost cited in the *AIPLA Report of the Economic Survey 2011* per party cost until close of prosecution reduced by the $46,000 request preparation cost). Additionally, the burden on the public to appeal to the Board would be reduced by $5,358,000 based on an estimate that 141 proceedings would be appealed to the Board which is estimated based on the number of granted proceedings (428) and the historical rate of appeal to the Board (⅓) and an average public cost of $38,000). Thus, $120,446,000 in public burden will be eliminated by the elimination of new filings of *inter partes* reexamination (the sum of $4,048,000 (the filing fees), $21,160,000 (the cost of

Paperwork burdens: $209m/yr
Other costs: not estimated

Economically Significant? No
RIA? No

REGULATORY CHECKBOOK

So, What Do We Really Know?

- <u>About known knowns</u>
  - Monopolist/monopsonist agency bias
  - OMB's effect is limited, its insights bottled up
  - All estimates are too precise given uncertainty
  - *We are overconfident about known knowns*

So, What Do We Really Know?

- About known unknowns
  - Converting known unknowns into known knowns is risky
  - Political will is limited and selective
  - *We are willfully ignorant about known unknowns*
- About unknown unknowns
  - Surprises convert unknown unknowns into known unknowns
  - Our mental models insulate us from recognizing surprises
  - *Ignorance is bliss*