RIAs: WHY DON'T THEY WORK?

A SUBMISSION TO THE BUSINESS COUNCIL FOR BRITAIN

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SUMMARY

- The UK government estimates that "the cost of regulations to the UK economy is between 10% to 12% of GDP – or over £100 billion – similar to the annual take in income tax".
- Regulatory Impact Assessments (RIAs) were introduced in 1998 in an attempt to improve the effectiveness of regulation. Whitehall now completes almost 400 RIAs every year.
- Sadly RIAs have failed to achieve their original laudable aim.
- The reasons for this failure to achieve better regulation include the following:
  - RIAs are often executed as a bureaucratic, routine task rather than being used to shape and inform the whole regulatory approach.
  - Cost-benefit analysis of proposed regulations can be poor. In 2005/6 only one third of RIAs had a proper calculation of the proposed regulation's impact on business. Similarly, cost-benefit analysis can be wrong: the Pension Protection Fund has been running for less than three years but has had to increase its annual levy on UK pension schemes to a total of £675 million – more than double the estimated cost set out in its RIA.
  - RIAs are treated, in the words of one trade body affected by burdensome regulation "as a bolt-on extra designed to justify a regulation." In May 2007, the Statutory Instrument on Section 240 of the Gambling Act, for example, was circulated to interested parties only two days before the consultation period expired.
  - Too many RIAs fail to assess the impact of non-compliance with regulation. In addition, there is very little assessment of whether regulations once implemented meet the policy goal set out by ministers.

- Parliament is failing to scrutinise adequately many of the Statutory Instruments (the mechanism by which most regulations are enacted). The last occasion on which the House of Commons annulled a Statutory Instrument was in 1979.
- There are few incentives for civil servants to undertake rigorous RIAs. As a result, RIAs are accorded neither the prominence nor weight they deserve.

RECOMMENDATIONS

1. Set up a central register, available on the internet from where draft and completed RIAs can be downloaded.
2. Introduce a scorecard system to ensure that RIAs have been properly drawn up. The Permanent Secretary or his or her equivalent in a government body or agency should be responsible for explaining a low score.
3. Bolster a new culture to reward better quality RIAs. Officials' promotion prospects should partly hinge on the quality of their contribution to effective RIAs. Establish an annual awards events for the best – and worst – RIA of the year.
4. There are three options for reform of the RIA process:
   - improve in-house compilation of such impact assessments through better training, enhanced project management and the scorecard approach;
   - bring in an independent governmental body to ensure that RIAs are correctly carried out, and that they take account of best-practice techniques (this would follow the US and Dutch precedents); or,
   - contract-out the RIA task to outside specialists, such as consulting firms or management consultants. This might prove particularly useful in those areas where RIAs have been seen as inadequate or where there is a particular need for a counter-balance to the sponsoring department.
5. Simplify the RIA process by stripping out the superfluous 'tests' that have been added over time, notably the so-called 'rural proofing' test and the requirement to assess whether a proposed regulation encourages 'sustainable development'.
6. Make post implementation reviews mandatory. An objective, quantified view on whether a specific regulation has achieved its goal and whether this has been done on a cost-effective basis is needed.
7. Introduce a sunset clause to all regulations so that Parliament can assess whether a statutory intervention is still justified. Do its objectives remain justifiable? Can they be achieved and does the regulation provide the most cost-effective solution?
8. Improve parliamentary scrutiny of RIAs. Select Committees in particular should be able to draw on the experience and expertise offered by the National Audit Office (NAO) so that they can scrutinise the quality of the RIAs produced by each individual department.

CHAPTER ONE
INTRODUCTION

Every political party believes in the idea of better regulation. And yet every political party, once in government, fails to achieve better regulation.

This matters. Regulation is not a free good. In a report published in 2005, The Better Regulation Task Force (BRTF) estimated that "the cost of regulation to the UK economy is between 10% and 12% of GDP – or over £100 billion – similar to the annual take in income tax."[1]

In a move to stem the tide of regulation, the Labour Government introduced Regulatory Impact Assessments (RIAs) in 1998. The aim was commendable: RIAs were meant to improve the effectiveness of regulations and legislation in general. Henceforth, the reasons for implementing new regulations would need to be justified, preferably on the grounds that their net benefits outweighed their costs. The Government ruled that any proposed legislation that has an impact on business, charities or voluntary bodies would be required to have a supporting RIA.

Sadly, while the motivation behind the establishment of RIAs was in many ways laudable, in practice they have failed to fulfil their original objectives. This study examines how RIAs have been used in the UK; why they are failing; and what can be done to improve them so that they can play a role in ensuring that regulatory initiatives are proportionate, consistent, transparent, carefully targeted and accountable to Parliament.

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[1] *Better Regulation Task Force 2005 Report*, 2006.

CHAPTER TWO
THE ORIGINAL IDEA

RIAs are a concept imported from the US, where they were first introduced by the Reagan administration in an attempt to improve the quality of regulation. This was done through an Executive Order which enabled the Office of Management and Budget (OMB)[2] to review proposed major regulations, especially in the areas of the environment, health and safety.

Policy makers recognised that regulation imposed substantial costs on business and citizens in general. Indeed, these costs can run into hundreds of billions annually.[3] Aware of this regulatory burden, Republican administrations sought to ensure that regulations were properly thought-through and generated net benefits. This subsequently evolved into a bipartisan initiative with President Bill Clinton building on the reform agenda and refining the assessment techniques employed to make sure benefits outweighed regulatory costs.[4] Most recently, in January 2007, a further executive order was implemented by President George W Bush, making changes that could have far-reaching and positive consequences for how the government weighs the costs and benefits of regulatory activity.[5] In

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[2] The OMB is the executive branch agency created in 1970 to assist the President in the development and implementation of budget, programme, management and regulatory policies.

[3] R W Hahn and R E Litan *The President's New Executive Order on Regulation*, AEI-Brookings Joint Center, 2007.

[4] President Clinton endorsed the essential principles of the Reagan-Bush orders in his Executive Order 12,866.

this exercise, the OMB and specifically, its Office of Information and Regulatory Affairs (OIRA), has proved a powerful mechanism to help ensure that regulations fulfil their goals and that adequate consideration has been taken of the available policy options.

REGULATORY IMPACT ASSESSMENTS IN THE UK

Introduced under the auspices of the Cabinet Office in 1998, the RIA process was developed with the aim of delivering policy objectives more successfully. The Cabinet Office published best practice guidelines for RIAs that, significantly, were hailed as 'excellent' by the OECD.[6]

RIAs are meant to provide an analytical framework to measure the probable impacts of a change in policy; and to assess the range of options available to implement such policy changes. The Cabinet Office claims that "it is a comprehensive and flexible tool" that considers any form of regulation, including formal legislation, Codes of Practice, and information campaigns. In doing so, RIAs are meant to assess the full range of potential impacts – whether economic, social and environmental, and where the impact may fall on business, the public sector, the voluntary sector and/or other groups.

In practice, RIAs are prepared in three phases: initial, partial and final. As the name suggests, an initial RIA is intended to be used during informal consultations within the sponsoring department or agency and, at a later stage, with other Whitehall departments. The partial version is then employed in formal public consultations regarding a proposed regulation. The final RIA is submitted to the responsible minister for his or her authorisation and signature before the regulation or legislation is presented to Parliament.

In considering the pros and cons associated with a draft regulation, civil servants and policy makers are meant to identify a wide range of possible options to achieve the desired goal. They are meant to include consideration of the following alternatives to legislation and formal regulations:

- a 'do nothing' option;
- self-regulation;
- an approach based on financial incentives for compliance; and,
- the involvement of representative trade bodies.

The Cabinet Office guidelines also note that the desired goal might be realised through the use of existing powers, rather than introducing new statutory measures.

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[5] For an expert viewpoint on this recent development, see R W Hahn and R E Litan, *Evaluating the New Executive Order on Regulation*, Testimony before the House Investigation & Oversight Sub-Committee, Science & Technology Committee, US Congress, 7 - 8 April 2007.

[6] OECD, *Regulatory Policies in OECD Countries – From Interventionism to Regulatory Governance*, 2002.

In formulating new regulations, policy makers are supposed to bear in mind and meet the so-called 'five Principles of Good Regulation', devised by the Better Regulation Task Force, an independent body set up by government to advise on regulatory issues and subsequently renamed the Better Regulation Commission.

The five principles of good regulation refer to:

- a regulation being proportionate to the risk;
- consistent, in so far as they are predictable and people know where they stand;
- transparent, meaning that they are open, straightforward and as user-friendly as possible;
- targeted, in other words focused on the problem with the minimum number of damaging side effects; and,
- accountable, in the sense that the regulation imposed is open to review by ministers and Parliament, representing the wider public.

Over the years, the scope of RIAs has greatly expanded. Originally, they consisted essentially of a cost-benefit analysis of the regulatory proposal along with a view on its specific impacts on the small business sector and competition within the marketplace. Five further tests have now been added to these requirements, including:

- a legal aid impact assessment, detailing the potential repercussions of the regulation on the workload of the courts and the Legal Aid Fund;
- a Health Impact Assessment, whereby major new regulatory measures must be assessed for their impact on health;[7]
- so-called 'rural proofing', an attempt to ensure that new policy initiatives measure their impact on rural areas;[8]
- a further requirement that RIAs should assess the likely impact on the promotion of race equality;[9] and,
- finally, a requirement to assess whether a proposed regulation encourages 'sustainable development'.[10]

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[7] This was a requirement introduced in the 2004 White Paper, *Choosing Health – Making Healthy Choices Easier*.

[8] This was a requirement announced in the Rural White Paper 2000.

[9] A statutory obligation placed on government departments by the Race Relations (Amendment) Act 2000.

[10] In this context, the RIA process adopted what is described as a sustainability policy appraisal tool – known as the Integrated Policy Appraisal or IPA for short. This move was announced in the Government's 2005 Sustainable Development Strategy.

CHAPTER THREE
DO THEY WORK?

Whitehall departments and government agencies now conduct hundreds of RIAs each year with 301 RIAs conducted in 2005/06 by 16 Whitehall departments and one major agency, the Food & Standards Agency.[11]

RIAs UNDERTAKEN IN 2005/6

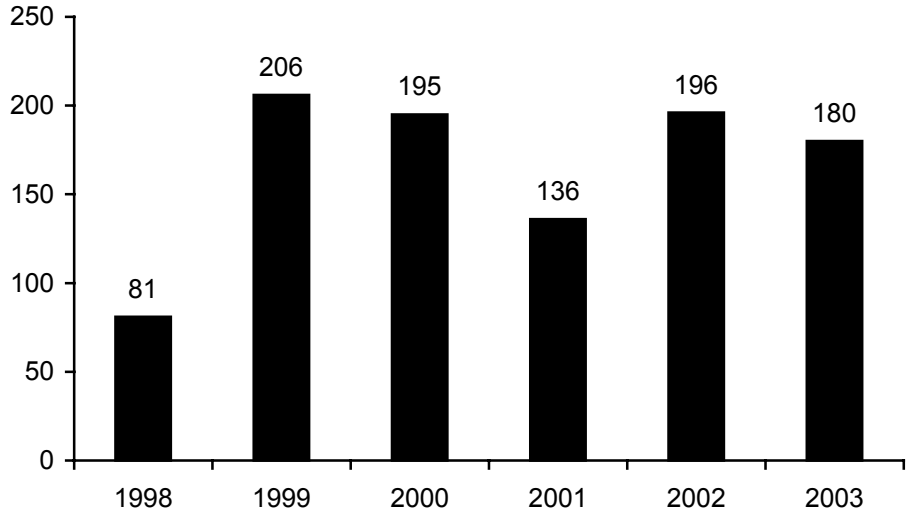
Department	RIAs in 2005/06	%of Total	Change from 2004/05
DEFRA	53	18	3
Transport	44	15	1
DTI	42	14	1
HMRC	37	12	17
DCLG	29	10	8
Health	22	7	- 5
Food Standards Agency	17	6	- 4
DCMS	13	5	4
Work and Pensions	10	3	8
Constitutional Affairs	9	3	3
Education and Skills	8	3	- 9
Home Office	5	2	- 33
Health & Safety Executive	5	2	- 3
Treasury	4	1	- 4
Cabinet Office	1	0	0
FCO	1	0	0
Defence	1	0	0
Total	**301**	**100**	**-13**

Source: T Ambler and F Chittenden, *The Burden of Business Regulation: who is watching out for us?*, British Chambers of Commerce, 2007.

[11] The only departments not to conduct an RIA in 2005/06 were: the Office of the Deputy Prime Minister, the Department for International Development, the Law Officers' Department, the Northern Ireland Office, the Scotland Office and the Wales Office.

This was marginally higher than the previous year's total but appreciably above the annual totals recorded in previous years (these grew from 81 in 1998 to 206 in 1999 and then hovered below 2000 with the exception of 2001, an election year when fewer regulations were proposed). In calendar year 2006, according to the NAO, 378 RIAs were published.[12]

NUMBER OF RIAs CONDUCTED EACH YEAR BETWEEN 1998 AND 2003



Source: T Ambler and F Chittenden, op. cit.

Six Whitehall departments account for the majority of RIAs. DEFRA, Transport and the DTI head up the league table with Her Majesty's Revenue & Customs (HMRC), the Department of Communities & Local Government (DCLG) and the Department of Health following behind.

Departments are complying with the requirement to conduct RIAs. The question is: do these assessments add any real value?

Clearly, many departments appear to be complying with the requirement to conduct RIAs. But in practice do these assessment exercises add any real value? Remarkably enough, according to the official figures reproduced in the following table, the RIAs that have been undertaken demonstrate that one-off and recurring costs manifestly exceed quantified benefits.

A relatively small cluster of departments and agencies account for the greater part of both business costs and benefits linked to specific new regulations: the DWP, DTI, DCLG, HMRC and Department of Transport. Each year these bodies propose regulations that have far-reaching costs along with perceived benefits. In 2005/6, the DWP was responsible for two thirds of the one-off costs associated with regulation. However, the BCC judges that this may be a

[12] Conversation with the National Audit Office, 24 July 2007.

significant underestimate. Note that according to these official figures, two departments, the DTI and the Department for Communities and Local Government (DCLG), were responsible for 75% and 88% of the gross and net costs to business respectively.

BUSINESS COSTS AND BENEFITS OF REGULATION BY DEPARTMENT

	Business Costs £M		Business Benefits £ M	
	ONE-OFF	RECURRING	ONE-OFF	RECURRING
DTI	192	1,328	0	1,035
DCLG	60	1,237	0	319
Transport	90	345	0	105
DEFRA	90	133	210	165
Works & Pensions	1,299	131	0	0
Food Safety Agency	36	97	0	47
HMRC	303	74	13	311
Education & Skills	0	23	0	0
Health	16	20	0	12
Health & Safety Executive	5	4	0	1
Home Office	21	4	0	2
Constitutional Affairs	1	2	0	0
DCMS	18	0	0	31
Total	**2,131**	**3,398**	**223**	**2,028**
Net Costs To Business	1,907	1,370		

Source: T Ambler and F Chittenden, op. cit.

CRITICISMS OF THE RIAs

The NAO has been strongly critical of how RIAs have been used in practice.[13] For example, it pointed out that "RIAs are often complex, lengthy tasks". Consequently, it comes as no surprise to find that "RIAs were often seen by officials as a bureaucratic task rather than being integral to the process of policy making".[14]

Efforts have been made to improve the RIA process, particularly in relation to refining cost-benefit analysis. New ideas and techniques on how to improve cost-benefit analysis are regularly suggested. But such initiatives can never be more than an aid to judgement and a guide for comparing alternatives.[15] Benefits tend to be difficult to quantify,[16] and at least three different sets of stakeholders have to be considered separately: the general public who are also the consumers of regulated services; the executive arm of government, whether a Whitehall department or regulatory agency; and the businesses or voluntary bodies affected. The costs and benefits for

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[13] See in particular, NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006 and NAO, *Evaluation of Regulatory Impact Assessments 2006-07*, July 2007.

[14] NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006.

[15] See T Ambler and K Boyfield, *Road Map To Reform: Deregulation*, Adam Smith Institute, 2005.

[16] For a detailed discussion of the issues involved, see R Hahn and R Litan, *Counting Regulatory Benefits and Costs: Lessons for the US and Europe*, Regulatory Analysis 04-07, AEI – Brookings Joint Center for Regulatory Studies, 2004.

government are usually the easiest to assess, yet disturbingly it appears they may carry more weight than they should, relative to the other groups.

While some Whitehall departments – particularly the then DTI under Sir Brian Bender – have made some headway in setting up better regulation teams, others have not. For example, the DTI established a central team to promote the use of RIAs and to provide a quality control function. However, this is by no means universal and certain departments, such as the DCMS, have tended to rely on *ad hoc* groups of civil servants, many of whom move on to other responsibilities, which means there is no central core of knowledge and experience. As the new Chairman of the Better Regulation Commission, Rick Haythornthwaite observed shortly after taking up his post:[17]

> The principles of better regulation…have yet to get to the point of deeply influencing the behaviour of the departments.

From the analysis undertaken by the NAO, British Chambers of Commerce and others, it is clear that the purpose of RIAs is not always understood. The NAO identifies problems associated with persistent weaknesses in the assessments and a series of annual reports comments on a lack of clarity in the presentation of the analysis, which is often too long and repetitive. Summing up its findings, the NAO team noted:[18]

> RIAs are often done too late, with the wrong mindset and do not cover all policy interventions. They have not yet been a tool which has dramatically altered the regulatory landscape or the way Government thinks about regulation… In many cases, however, RIAs have not been used to question the need for intervention.

It is also disturbing to discover that Whitehall departments have not kept a record of the number of RIAs that reject the regulatory proposal or recommend the introduction of a non-regulatory option.[19]

RIAs have therefore failed to live up to their original purpose and have proved a disappointment. As a recent NAO report concluded:[20]

> RIAs should be a cornerstone of evidence-based policy making but our results indicate that they were not always being used effectively. The majority of RIAs were competent, with fewer cases of poor quality analysis, although there were continued weaknesses in the quality of economic analysis and insufficient consideration of the impact of proposed changes. All too often, however, RIAs were not an integral part of the policy making process as they were not used to inform and facilitate all stages of policy formation – from initial development through to implementation and review.

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17 House of Lords, 29th Report of Session 2005-6, *The Management of Secondary Legislation*, 2006.

18 NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006.

19 Ibid., page 3.

20 NAO, *Evaluation of Regulatory Impact Assessments 2006-07*, July 2007.

"Some RIAs appear to have been compiled with less precision and vigour in the last couple of years"

– Stephen Sklaroff, Director General of the Finance and Leasing Association

CHAPTER FOUR
WHY DON'T THEY WORK?

RIAs have failed to meet their proponents' expectations. And things are getting worse: many of those who are subject to regulation by government and its agencies remarked that RIAs have deteriorated in recent years rather than improved. Stephen Sklaroff, newly-appointed Director General of the Finance and Leasing Association (FLA) and former Deputy Director General of the Association of British Insurers (ABI) voices the concerns of many when he notes:[21]

> One's general impression is that the RIA process is not yet an integral part of policy-making. What is more, in financial services some RIAs appear to have been compiled with less precision and vigour in the last couple of years.

What has gone wrong?

A "BUREAUCRATIC SHAM"

RIAs often seem to be executed as a routine task rather than in accordance with their original objective (which was to shape and inform the whole process of deciding whether, and in what form, regulations should be introduced).

[21] Interview with the author held on 11 June 2007.

Crucially, it seems that if a regulation is politically sensitive or if it needs to be introduced quickly, the RIA process proves largely ineffective. As the NAO reported:[22]

> Our analysis showed that the RIA process was often ineffective if started late, the policy area was politically sensitive or regulations needed to be introduced quickly.

Ideally, RIAs should be employed at the beginning of the policy making process, to evaluate which policy options suggested by civil servants might be worth pursuing. More often than not, however, the policy decision has already been taken by the time the RIA exercise is bolted on to a recommendation to introduce some new piece of legislation or new regulation. As a senior representative of one leading trade association in the leisure field observes, "the whole process is a bureaucratic sham."[23]

Only one third of RIAs completed in 2005/6 made any quantified estimate of costs to business.

POOR COST-BENEFIT ANALYSIS

The NAO has noticed a marked reluctance to subject estimates to external challenge among the four government bodies it scrutinised. Furthermore, there was a distinct paucity in the range of costs "often put forward within RIAs for framework legislation."[24] These criticisms are echoed by the BCC which noted only a third of the RIAs completed in 2005/6 made any quantified estimate of the costs to business. Worryingly, the majority of RIAs (nearly 55% of them) either claimed that such costs were insignificant or were simply not quantified. Nor were benefits scrutinised adequately; only 39% of the RIAs issued in 2005/6 attempted to quantify the claimed benefits to business. Hence, most RIAs are produced without any proper calculation of the proposed regulation's potential burden on business.[25]

What is particularly disappointing about this shortfall is that departments appear to be falling down in tapping the wide range of specialist expertise, including economic and statistical skills, available within their own organisations, leaving aside the possibility of drawing on outside expertise. As Ed Humpherson, an Assistant Auditor General at the NAO, observed:[26]

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[22] See NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006, page 3.

[23] Source: author's interview.

[24] See NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006.

[25] In 2005/6 less than 8% of RIAs analysed by the BCC quantified additional costs to SMEs compared with larger firms that are usually better able to absorb regulatory measures. See T Ambler and F Crittenden, op. cit.

[26] Interview with the author held on 23 May 2007.

> There are lots of good economists and a surprisingly rich culture of evaluation within Whitehall: either commissioning evaluation or undertaking it.

Far too often, however, those who are skilled at the evaluation of available policy options are not the same individuals responsible for the formulation of policy making and proposed regulations. As Humpherson concludes:[27]

> The frustrating thing is that, for all the expertise and knowledge embedded within Whitehall departments, particularly in economics and statistics, there seems to be an institutional barrier to deploying that expertise effectively in the production of RIAs.

The RIA was circulated to interested parties on 1 May 2007, just two days before the consultation period expired on 3 May 2007.

A "BOLT-ON EXTRA DESIGNED TO JUSTIFY A REGULATION"

These shortfalls in the RIA process are also indicative of Whitehall departments' poor project management skills. As the NAO emphasises, sound project management is essential if RIAs are to achieve their goals.

Good project management would allow civil servants to identify the key tasks required to conduct a proper RIA. At present, these skills are often lacking. For example, the RIA produced an RIA in connection with the Statutory Instrument on Section 240 of the Gambling Act, which deals with slot machines in pubs, clubs, casinos and bookmakers' shops. This is a market that is estimated by the Gambling Commission to generate £2.1 billion a year. However, the RIA was circulated to interested parties on 1 May 2007. The deadline for responses was 3 May 2007 – just two days later. This obviously left those affected by the proposed regulation with inadequate time in which to respond. What made matters worse was that the RIA lacked any concrete figures on the estimated costs and benefits associated with the regulation, designed (among other things) to control the denomination of notes that can be inserted, the display of information on machines and access to winnings.[28]

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[27] Ibid.

[28] RIAs have appeared to play no effective role in influencing policy making within the gambling sector. But the raft of regulations generated by the Gambling Act will impose substantial costs on bookmakers and casinos of various types along with the operators of pubs and clubs. Furthermore, the RIA process has failed to determine whether these regulations are the most effective way of combating problem gambling and whether this is the best approach to tackling any perceived abuse of gambling. Significantly, while acknowledging that "the industry has a good track record of self regulation in many areas of operation" the DCMS gave no supporting evidence for its conclusion that industry self-regulation would be unable to enforce compliance and "deliver the necessary outcomes in cases of breach". In short, the DCMS has done little to demonstrate that the regulatory compliance costs involved could not be spent in far more effective ways. As Russ Phillips, Deputy Chief Executive of the Association of British Bookmakers (ABB) comments, "RIAs are often not an integral part of the policy making process. Far too often they appear to be bolt-on extras designed to justify a regulation which commands strong ministerial support".

Other departments have also claimed that detailed implementation will be tackled once secondary legislation goes out for consultation. This is often too late for significant amendment to be made to the proposed regulation. It merely confirms that departments are not using the RIA process right from the start to challenge regulatory initiatives.

Departments have claimed that detailed implementation will be tackled once secondary legislation goes out for consultation. This is often too late for significant amendment to be made to the proposed regulation and confirms that many departments are not using RIAs from the outset (as they should).

It is also clear that departments fail to tap the in-house technical expertise available to them, leaving aside the possibility of commissioning outside experts to comment and review proposed regulations. As the NAO points out, "assessing impacts requires technical expertise in the policy area, as well as a broader understanding of economics, law, risk management and enforcement activity."[29] Whitehall is falling down in tackling these challenges. If departments do not have adequately qualified or experienced staff, they should recruit them from outside the Civil Service or simply use specialist assistance.

A further omission was any real discernible work on the impact on competition within the marketplace. Regulations can affect competition: they can distort costs, the availability of resources and the ease of market entry and exit. In this respect, the NAO criticises departments' failure to involve the OFT, specifically its regulatory review team, which could have much to contribute.

POOR COMPLIANCE

With regard to compliance, a particular weakness is the widespread assumption by civil servants that a regulation would be universally observed. However, some regulations are only loosely enforced. Others are simply ignored by some of those who are meant to comply with them. In short, full compliance cannot always be guaranteed. Yet departments rarely analyse the implications of non-compliance. Significantly, as the NAO observes:[30]

> This may arise because departments regard less than full compliance as an admission that the regulatory proposal may not be fully successful in changing behaviour… We consider that this mindset must change if departments are to reap the full benefits of the impact assessment process.

Regulations are designed to change behaviour. It must therefore be essential that RIAs should review how regulations can be complied with and

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[29] See NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006.

[30] See NAO, *Evaluation of Regulatory Impact Assessments 2005-6*, 2006.

enforced. One of the glaring omissions pervading far too many RIAs is any proper evaluation of what the repercussion may be of less than complete compliance. For example, in the case of the RIA which accompanied the DCMS's Gambling Bill, no mention was made of the current level of compliance with relevant legislation, nor was there any consideration of how less than full compliance would effect costs and benefits. There may, for instance, be a temptation to return to illegal gambling (as occurred prior to the reforming 1960s legislation). Under the proposed new licensing regime it can be argued that the regulatory fees are so prohibitive that it may encourage some maverick operators to consider running an illegal betting business.

Finally, there is a striking lack of *ex post* evaluation. Whitehall departments have invariably focused their attention on estimating – *ex ante* – how a regulation may impact on a range of stakeholders in terms of a range of costs and benefits. What is often missing is any work on assessing whether regulations – once implemented – are actually meeting the policy goals set by ministers. Again, some departments, such as the former DTI, are better than others, notably the Home Office and DCMS. But with a few notable exceptions the overall impression is that once regulations have been passed, their impact is not scrutinised.

POOR PARLIAMENTARY SCRUTINY

Most UK regulations are enacted through the use of Statutory Instruments (SIs), often referred to as secondary legislation. Over the years, all governments have made increasing use of secondary legislation. Whenever ministers and officials wish to introduce a new regulation, the use of an SI is invariably the way in which it gains parliamentary approval.

All SIs must now be accompanied by an explanatory memorandum, setting out the reasons for the measure, along with an RIA detailing estimated costs and benefits. Most SIs require the approval of both Houses of Parliament. This is done in one of two ways: either through an affirmative process, whereby SIs must gain the positive approval of both Houses (although SIs relating to financial matters only require the support of the Commons); or through the negative process, whereby SIs laid before both Houses are deemed to be approved unless either a peer or MP objects within 40 days.[31]

This system is a shambles. Owing to the vast number of SIs that are presented, parliamentary scrutiny is at best cursory. Only modest amendments are ever made to SIs. It is rare for them to be rejected or substantially amended. The last time the House of Commons annulled an SI was almost 30 years ago in the case of the Paraffin (Maximum Retail Prices) (Revocation) Order (SI 1979, no 797).

Accordingly, it can be argued that parliamentarians are not fulfilling their constitutional role as adequate scrutinisers of government legislation and

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[31] *Statutory Instruments Factsheet*, House of Commons Information Office, January 2007.

regulation, whether generated in Whitehall or in Brussels. For example, in the 2003/4 parliamentary session, the Commons Joint Committee on Statutory Instruments reviewed 1,371 SIs: only 90 were referred on technical aspects. None of these appear to have been challenged on substantive grounds.[32]

This failure of Parliament has drawn particularly strong criticism from the BCC, which pointed out that:[33]

> Parliament has erected insurmountable barriers to deregulation whilst maintaining a supine posture when facing new regulation.

Judged on its recent performance, Parliament has made no effective headway in tackling the deregulation agenda and it has failed to properly scrutinise in any detail the avalanche of regulations.

NO COUNTERBALANCING FORCES

Part of the problem with regulation is the lack of effective counter-balance to the sponsoring government department. If a department wishes to spend taxpayers' money on tackling some perceived public policy issue, it needs the sanction of the Treasury; but if it wants to promote a new regulation, which also imposes costs on the public, there is currently no equivalent counter-balance.

If a department wishes to spend taxpayers' money on tackling some perceived public policy issue, it needs the sanction of the Treasury; but if it wants to promote a new regulation, which also imposes costs on the public, there is currently no equivalent counter-balance.

What is more, there are few penalties or incentives on civil servants and officials to undertake rigorous RIAs.[34] Civil servants tend to move quite frequently, and the more ambitious ones have often moved on before the quality of RIAs can be effectively measured. As a result, RIAs are accorded neither the prominence nor weight that they deserve.

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[32] For further details, see Ambler and Chittenden, op. cit.

[33] Ambler and Chittenden, op. cit.

[34] Significantly, the 2006 NAO report on RIAs highlighted "a lack of accountability on policy officials for delivering good quality RIAs."

CHAPTER FIVE
WHERE DO WE GO FROM HERE?

Recognising that there is scope for improvement, the Cabinet Office's Better Regulation Executive is currently undertaking a consultation exercise to ascertain stakeholders' views on how RIAs can be made more effective. The Government is due to issue its proposals on reform by the end of November 2007. How then can matters be improved?

A CULTURE CHANGE

In some aspects, reform needs to be cultural: changing the way in which RIAs are carried out requires a fundamental change in the mindset of the Civil Service. As shown earlier, when officials consider new policy proposals, their first priority should be to ascertain whether any new regulatory powers are needed at all. The first response should be to ask themselves whether the desired policy outcome can be realised more effectively via other means, such as self or co-regulation. This is not happening at the moment.

The position is "not irretrievable" in the words of the NAO's Ed Humpherson.[35] Through better training and the dissemination of best practice, underperforming departments and government bodies can be encouraged to adopt RIAs as a core function within their policy making role. And other initiatives could help: rewarding officials for demonstrating that they have taken a rigorous approach compiling RIAs would send an important message. Bonuses might also be paid for accurate and rigorous RIAs, and promotions awarded. It would also be helpful to see a national

[35] Interview with the author held on 23 May 2007.

awards competition set up by an outside body or media publisher to reward exemplary RIAs in different sectors of the economy (equally, it may also be beneficial to institute an award for the worst RIA of the year).[36]

A CENTRAL REGISTER

One immediate practical reform would be to establish a central register, available on the internet, where anyone interested could download draft as well as completed RIAs. These should be amended in the light of additional information with regard to quantified costs and benefits.

THREE OPTIONS TO IMPROVE THE PROCESS

Turning to the RIA process itself, essentially, there are three options.

1. To continue to conduct RIAs on an in-house basis, but to try to improve the process by adopting a scorecard approach (see below), better training procedures and a post-implementation evaluation.
2. To appoint an outside, independent body with the remit of ensuring that RIAs are correctly carried out, and that they took account of best-practice techniques including a one page summary and scorecard setting out the RIA's conclusions. Departments and agencies would continue to be responsible for the drawing up of RIAs. The independent body might be the NAO, the Prime Minister's Panel for Regulatory Accountability (PRA)[37] or a purpose-designed new body established to perform this task.
3. To transfer responsibility for RIAs to a non-government body with the necessary skills. The task of undertaking RIAs could be opened up to the private sector with the aim of creating a vibrant market in the compilation of such assessments. Parliamentary select committees together with the NAO would be responsible for ensuring that RIAs were carried out to an appropriate impartial and robust standard.

OPTION ONE: IMPROVING IN-HOUSE RIAs

A Scorecard

One reform which would help to improve the way individual departments compiled their RIAs would be to establish a scorecard system. Each RIA should be issued with a scorecard that records whether specified tasks have been completed, with points being awarded for tasks that have been met, with a zero score shown for where this has not been achieved. The suggested sorts of questions that should be asked in this scorecard are shown in the following table:

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[36] See T Ambler and K Boyfield, *Roadmap to Reform: Deregulation*, Adam Smith Institute, 2005.

[37] The PRA was established in 2004. It scrutinises all new regulations that are judged to impose a significant cost on business prior to them becoming law.

A SAMPLE SCORECARD

	Yes	No	Score	Notes
Was the RIA initiated at an early stage as an integral part of the policy making approach?				
Is a 'do nothing' alternative included in the RIA?				
Are estimated costs quantified?				
Are estimated benefits quantified?				
Have stakeholders been consulted?				
Has the minimum recommended 12 week consultation period been observed?				
Have in-house specialists contributed to the RIA?				
Has outside expert advice been used?				
Have non economic factors been analysed, including competition issues?				
Has the impact on SMEs been taken into account?				
Does the RIA measure the impact of non compliance?				
Does the RIA provide quantified information for monitoring costs?				
Does the RIA estimate enforcement costs?				

The introduction of such scorecards would encourage the proper implementation of RIAs. They would greatly assist Parliament – through the existing range of Select Committees – review the way in which RIAs have been employed by each department and its associated agencies and economic regulators over the course of the preceding year. Where it proves beneficial, the Public Accounts Committee could ask the NAO to provide advice to Select Committees or indeed to carry out agreed audits of specific RIAs (to a degree, this is already helping: for example, the House of Lords Select Committee on Regulation has already asked the NAO to conduct a review of RIAs undertaken by economic regulators).

Ministers, the senior officials and office holders of these bodies would then be more accountable for the way in which RIAs are employed. Those heads of the department (the Permanent Secretary or his or her equivalent) that score poorly would be encouraged to do something about it. This may involve redeploying staff, so that those skilled in evaluation have an early input into the policy making process, as urged by the NAO. It may also require the training or replacement of some staff (who either lack the experience and skill base to conduct RIAs or indeed the motivation).

Simplification

The RIA process should be greatly simplified. This can be achieved by reviewing whether the five new tests that have been added over time are really necessary. The 'rural proofing' test and the requirement to assess whether a proposed regulation encourages 'sustainable development' would be early priorities for reconsideration.

Post-implementation reviews

Post-implementation reviews should be introduced as a matter of routine. This is a reform that is strongly backed by the NAO. Currently, no one can cast any objective, quantified view on whether regulations issued by departments, government bodies and regulatory agencies have achieved their original purpose; and whether they have been cost-effective in doing so.

As part of this post implementation evaluation all regulations should carry a 'sunset clause' for a specific period of time. This would provide an opportunity for Parliament to assess whether this statutory intervention is still justified and to consider whether the objectives remain justifiable, achievable and cost effective.

OPTION TWO: MOVING RIAs TO AN EXTERNAL GOVERNMENT BODY

Transferring responsibility for compiling RIAs to an outside body – such as the NAO or the newly created Department for Business, Enterprise and Regulatory Reform (incorporating the Better Regulation Executive, previously part of the Cabinet Office) – is also worth considering. Its primary advantage would be to ensure that an outside body would take an independent view on whether proposals for new regulatory interventions were justified. In this context, it should be noted that the Dutch Government has established an independent agency, named ACTAL,[38] to advise the Government on proposals and regulations that can be removed from the statute book.

The drawback with this option is that the final responsibility for drafting a RIA would lie outside the originating department or agency. Consequently, there is a danger that civil servants may shrug their collective shoulders and leave the impact assessment process to others. Departmental officials would then be less involved in the evaluation process, which if it was badly project-managed, could lead to problems surrounding officials' sense of policy ownership. But in the case of some regulations, food standards say, or occupational pensions regulations, an outside overseer may prove beneficial – if only on a trial basis.

The NAO, which has won praise for its reviews of the RIA process to date, may not be the appropriate agency to fulfil such a role since it answers to Parliament and not ministers. To ask it to perform any preliminary audit

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[38] ACTAL, the Dutch Advisory Board on Administrative Burdens, was established as an independent advisory body in May 2000 to advise the Dutch government on reducing red tape. ACTAL claims to act as a watchdog and facilitator, assisting the Dutch government to achieve its objective of reducing the overall administrative burden on businesses and citizens by a 25% net reduction by 2007. ACTAL's website, www.actal.nl, points out that the administrative burden on businesses in the Netherlands is €16.4 billion (or 3.6% of GDP). A 25% reduction is equivalent to €4.1 billion. The Netherlands Bureau for Economic Policy Analysis, a well respected economic research institute, has calculated that a 25% reduction of the overall administrative burden on companies leads to a 1.5% increase in real GDP for the Netherlands and a 1.7% increase in labour productivity.

may impair its objectivity and its constitutional position as an arm of the legislature. It should also be remembered that the Office of Information and Regulatory Affairs (ORIA) in the US is a unit within the OMB, which serves the US executive branch of government.

Accordingly, if this avenue is to be followed, a new body may need to be formed along the lines set by the Dutch agency, ACTAL, or the US ORIA. Yet in the UK, past experience in establishing independent government units or agencies is not encouraging. Whether any new agency, or indeed an expanded Better Regulation Executive, now that it has been transferred to the new Department for Business, Enterprise and Regulatory Reform, would be able to exert any real influence over departments' proposals for new regulatory measures remains uncertain.

OPTION THREE: OPENING UP RIAs TO THE FREE MARKET

That leaves us with the third option: to open up the RIA process to the competitive free market. The European Commission has – perhaps surprisingly – led the way here, having asked outside consultants to undertake regulatory impact assessments and some of these have been of a very high standard.[39] Why not follow this precedent and experiment with opening up the RIA process to outside assessors?

The UK already has a number of experienced firms of consulting economics and public policy analysts, including London Economics, NERA, Oxera and Frontier Economics. These companies are well acquainted with undertaking impact assessment studies. Indeed, Europe Economics has published a handbook on impact assessment best practice for policy makers throughout the EU.[40] It has also given training seminars to the staff of the European Commission on how to conduct impact assessments as well as conducting a similar exercise for a major regulatory agency in the UK. It should also be borne in mind that these firms are skilled in undertaking policy assessment reviews on behalf of their private sector clients.

If departments were obliged to tender publicly the task of undertaking RIAs, a much-needed outside input of expertise may be added. Established firms of economic consultants, together with the large accounting practices (PWC, Deloitte, Ernst & Young, KPMG and others) and management consulting firms (McKinsey's, Bain & Co, Boston Consulting Group, etc.) could bid for such work in competition with academic institutions (such as the LSE) and new start-up firms.

In this context, Parliament would have an important role to perform in ensuring that any RIA drawn up by an outside body met certain required standards. In ensuring that this audit was professionally undertaken, parliamentary select committees should be able to draw on the experience

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[39] See for example C Radaelli and F De Francesco, *Regulatory Quality in Europe: concepts, measures and policy processes*, Manchester University Press, 2006.

[40] *Impact Assessment, A Europe Economics Handbook*, April 2005. www.europe-economics.com

and expertise offered by the NAO. This would probably mean that the NAO may have to recruit more qualified staff to make sure RIAs were up to scratch.

This option effectively contracts-out a crucial part of policy making outside the familiar confines of Whitehall. It would represent a dramatic change in the way in which Britain is governed.

This option effectively contracts-out a crucial part of policy making outside the familiar confines of Whitehall. It would represent a dramatic change in the way in which Britain is governed. If an RIA suggested that a new regulation would lead to no net benefit, the onus would then be on ministers and senior officials to justify to Parliament why it was required. This should, it is to be hoped, curb the natural if extremely expensive enthusiasm of politicians of all parties to be seen to be "doing something".

APPENDIX
TWO BRIEF CASE STUDIES

THE PENSIONS BILL CASE STUDY

A striking example of how inaccurate a RIA can prove is the gross miscalculation of the costs associated with a crucial change in the law relating to pensions.

In June 2004 the Department of Works and Pensions (DWP) issued a revised RIA for the second reading of the Pensions Bill in the House of Lords. This estimated that UK companies would save £80 million a year as a result of this proposed legislation. The RIA stated that the largest funding cost would be the annual levy for the Pension Protection Fund (PPF), which it estimated would amount to £300 million in the first year after the compulsory premium was imposed on all employers offering occupational pension schemes.

This estimate was greeted with considerable scepticism at the time. Watson Wyatt, a leading firm of actuaries and benefit consultants, estimated that the Bill would, in fact, impose additional costs on companies of more than £400 million a year.

The PPF has now been established but although it has only been in operation for less than three years it has already been obliged to raise the annual levy on UK pension schemes to a total of £675 million – more than double the estimated cost set out in the revised RIA.

Why was the RIA so misleading? According to Colin Singer, a partner with Watson Wyatt, the problem lay with the fact that "The DWP is looking at its own Bill through rose-tinted spectacles."

At the time the Bill was being considered in Parliament, he pointed out that the department "has failed to respond to feedback to its initial analysis of the costs of the Pensions Bill."[41]

In practice, the DWP failed to take into account the huge uncertainty surrounding the cost of the PPF. Where similar protection schemes have been established overseas, notably in the US, the experience has been one characterised by substantial costs, far higher than forecast, imposed on the remaining well-run pension schemes in a move to prop up under-funded schemes in declining industries. If one major insolvent company, such as an airline, with a large under-funded final salary scheme were to end up in the PPF, it would impose significant additional costs on remaining employers.

What is more, the savings that were predicted in the RIA were considerably overstated. Experienced professional advisers argued that the DWP overestimated the number of schemes that would take advantage of the reduction in required levels of indexation schemes. The pensions industry has also frequently pointed out that the DWP underestimated the administrative costs associated with statutory regulatory intervention.

If these wide-ranging costs had been reflected more accurately in the RIA it is open to question whether the Pensions Bill would have been passed in the way it was by Parliament.

The Pension Protection Fund has been running for less than three years. But it has already been obliged to raise the annual levy on UK pension schemes to a total of £675 million – more than double the estimated cost set out in RIA… If these wide ranging costs had been reflected more accurately in the RIA it is open to question whether the Pensions Bill would have been passed in the way it was by Parliament.

REGULATION OF PUBS, BARS AND CLUBS

There are nearly 60,000 pubs in the UK. Over 80% are run as small businesses including the 18,000 freehouses owned and managed by the licensee. Currently, licensees are required to administer and comply with diverse rules spanning a wide range of legislation, including health and safety, employment and licensing regulations.

The British Beer and Pub Association (BBPA) represents over 35,000 pub licensees throughout the UK. It has pointed out that:[42]

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[41] See Watson Wyatt press release, 10 June 2004.

> The increase in regulation over the last ten years has had a measurable and marked impact on the cost of running pubs, to the extent that the number of managed pubs has fallen from 14,000 in 1996 to just over 10,000 in 2006.

To be commercially viable and meet the additional regulatory requirements, it is now estimated that a managed pub must generate £750,000 a year in revenue, three times the figure required just ten years ago.

The Licensing Act implemented in 2003 was meant to simplify and update the regulation of this sector. It failed. Licensees are now confronted with an application form extending to 27 pages. They must complete the document and provide full copies to no less than eight responsible authorities plus the Licensing Authority.

RIAs in particular have proved to be disappointingly poor. While all of them are supposed to include a "small business litmus test", some RIAs in practice only pay lip-service to this requirement. The consultation on the proposed smoking ban contained in the Health Improvement Bill contained only a partial RIA and made no reference whatsoever to a small business test. Despite pleas from the industry, no proper RIA was ever issued on these proposals, which has had a major impact on rural pubs in particular.

In general, RIAs affecting the pub and hospitality sectors have proved to be issued as after thoughts with a noticeable lack of quantified estimates on the perceived benefits and costs associated with policy changes. In particular, departments such as the Home Office, have been unwilling to amend RIAs in the light of changes to regulatory proposals, even where these have a substantial impact on the aggregate costs associated with a regulation. As Dr Martin Rawlings of the BBPA observes:[43]

> When the draft regulations to the Licensing Act 2003 were published, it was announced that licensees – both existing and prospective – would have to advertise their application in the local press, no amendment was made to the RIA even though it was estimated the cost involved would average £200 across 120,000 licensed premises in the UK: a total of £24,000,000.

This is a clear example of where RIAs are an inaccurate guide to the true costs or benefits associated with a measure. Clearly, departments should review RIAs in the light of regulatory proposals. Lamentably, they rarely seem to do so.

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[42] British Beer and Pub Association response to *Community Pubs: an all-party parliamentary group inquiry*, April 2006.

[43] Correspondence with the author 29 June 2007.

CENTRE FOR POLICY STUDIES

POLICY INTO ACTION

The Centre for Policy Studies was founded by Sir Keith Joseph and Margaret Thatcher in 1974 and is one of Britain's best-known and most respected centre-right policy research centres. Its Chairman is Lord Blackwell, a former Head of the Prime Minister's Policy Unit with extensive business experience. Its Director is Ruth Lea, whose career spans the civil service, the City, and the media (ITN). She was also the Head of the Policy Unit at the Institute of Directors.

The CPS is the champion of the small state. It believes people should be enabled and encouraged to live free and responsible lives. It tirelessly promotes Britain as an independent and democratic country. This is an exciting agenda for the 21st century – and the right agenda for the 21st century.

The role of the Centre for Policy Studies is twofold. First, it is to develop a coherent, yet practical, alternative set of policies that roll back the state, reform public services, support families and challenge the threats to Britain's independence. Policies are one thing but the CPS is committed to producing policies that can be put into action.

Second, it is to create the environment in which these policies can be adopted by government. The CPS seeks to influence and persuade government, politicians, the media and other opinion-formers that these policies would, if enacted, significantly change and improve people's lives.

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