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Cost-Benefit Analysis and Related Guidelines: Input and Recommendations

Prepared for:

Consumer Products Alliance for Innovation and Growth (CPAIG)

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Purpose

This note provides input and recommendations on current Treasury Board Secretariat (TBS) guidance and directives regarding Cost-Benefit Analysis (CBA) and Regulatory Impact Analysis (RIA) to departments and agencies.

During the earlier consultations on the draft *Directive on Regulation*, on September 22, 2017 CPAIG submitted suggestions with respect to two specific gaps in the current regulatory process: better early engagement with stakeholders in the regulatory process, and greater transparency when promulgating detailed interpretive guidance regarding compliance with regulatory requirements.

However, most detailed guidance to departments on how best to regulate is not established in the general Directive. Rather it is found in the several TBS guides for departments – guides that cover the entire gamut from departments' first consideration of problems/risks to be addressed to how to write interpretative documents to assist stakeholders in complying with regulations. This note is focused on the material covered by these guides.

As the Government of Canada is aware, issues of quality CBA and RIA involve many processes throughout the regulatory life cycle. Comments provided will address the breadth of the suite of policies, guidance, tools and regulatory management processes.

Background

Canada has an advanced system of Regulatory Management

Compared to other OECD countries, Canada has a good track record in developing comprehensive policy and decision processes that promote quality regulatory programs[i]. Indeed, Canada is an historic driving force behind OECD's focus on regulatory policy and good regulatory management.

Beginning in the late 1970s, Canada was among the first OECD countries to introduce important standards for regulators to meet. Initiatives have included requirements for RIA (1978, for major regulations); forward regulatory planning (1978); centralized office(s) to review departmental analysis of major regulations (1978) and promote better regulatory practices (1979); overall regulatory policy and RIA for all proposals (1986); "Notice and Comment" as a component of consultation on all proposals (1986); a focus on early engagement of Canadians in developing and modifying regulations (beginning early 1990s[ii]); requirements for regulators to look beyond regulation development to compliance and enforcement (1995); evolving emphasis on assessing important impacts of regulations on what have now come to be called "inclusive growth factors" (which includes GBA+ analysis of effects on vulnerable groups, at-risk workers, indigenous populations, regions, employment, gender equality among others) as well as impacts on trade,

markets, business-at-large, and especially small business (from early 1990s onwards); red tape and administrative costs have been of particular attention (especially after 2012). Regulatory co-operation and alignment have been an integral part of guidance to regulators for decades. Triage was an important addition to the regulatory process in 2008 to help departments focus regulatory analysis resources.

The Government of Canada began treating regulators as an important group of Public Servants in the early 1990s; this has evolved into the TBS formally-recognizing the *Community of Federal Regulators* (CFR). Over time, the emphasis in mandatory policy requirements and guidance has shifted in response to changing circumstances and government priorities. Essential policy goals, however, have remained remarkably constant since the early 1990s.

Results of recent Government Consultation on the draft Directive on Regulation

In 2017, the Government launched an on-line consultation regarding a draft new *Cabinet Directive on Regulation*. That consultation identified a number of concerns, organized into seven theme areas by TBS[iii]:

- Engage early at the design and instrument choice stage for greater transparency
- Analyze regulatory costs, benefits and impacts systematically [and better]
- Consider [international] regulatory cooperation and regulatory alignment at all times
- Enhanced accountability, predictability, co-development, coordination and cooperation with the other levels of government
- Endorse mandatory and periodic reviews of the current stock of regulations
- Single portal for regulatory activities and easier access for regulated parties
- [Greater use of] incorporation by reference

Importance of Quality Regulatory Analysis

Most modern governments worldwide have recognized that the quality of their regulatory systems is a key driver of trade, investment, productivity, economic growth and the overall well being of citizens. With this recognition has come a desire to improve the quality of regulatory impact analysis to ensure that the benefits of regulation justify the costs imposed.

Many regulations — particularly those generating improved health, safety and environmental sustainability — benefit individual consumers, workers, investors or citizens. These benefits are important, and must be taken into account in any cost-benefit analysis.

The costs to comply with regulation, on the other hand, tend to be borne, in the first instance, for the most part by firms being regulated. These costs will be beneficial from a public interest perspective if, through careful design and implementation, derived benefits exceed imposed costs.

For any given level of benefits, it is unambiguously in the national interest to achieve these at minimal cost -- to maximize "net" benefits to Canadians. Designing cost-effective regulation that achieves the goal of maximizing net benefits requires an understanding of the interplay of regulatory costs, productivity and competitiveness.

Worldwide, developed countries have tried to address these issues through improvements in their regulatory impact analysis policies and processes. Good regulatory impact analysis encompasses a range of tools and techniques aimed at assessing the effects of regulation.

International Regulatory Best Practices

The OECD recognizes that having quality regulations and properly managed regulatory programs are critical to inclusive economic growth. Member governments have put in place increasingly comprehensive approaches to oversee/promote the development of cost-effective regulations by departments and agencies, as required by the OECD Council's *Recommendation on Regulatory Policy and Governance*[iv]. More advanced countries recognize that good impact analysis, the on-going review of performance and effective engagement with stakeholders throughout the regulatory life cycle are all necessary.

Indeed, Canada led in developing a "life cycle"[v] approach in its over-arching regulatory policy, and as expressed in both the current *Cabinet Directive on Regulatory Management* (2012) and the draft *Cabinet Directive on Regulation* (2017).

The current Canadian policies and guidance, listed below, reflect the articulated life-cycle stages[vi]. The Policy and guide numbers are added for ease of reference.

Mandatory Policy and Formal Process Requirements for Regulators

1. Cabinet Directive on Regulatory Management
2. Guide to the Federal Regulatory Development Process
3. Process Guide for Governor in Council Submissions (Other than Regulations)

Guidance focused on Stages of the Regulatory Life Cycle

4. Guidelines for Effective Regulatory Consultations
5. Guide on Forward Planning and Related Measures to Improve the Transparency and Predictability of the Federal Regulatory System
6. Assessing, Selecting, and Implementing Instruments for Government Action
7. Canadian Cost-Benefit Analysis Guide: Regulatory Proposals (mandatory, Cabinet Approved)
8. Guidelines on International Regulatory Obligations and Cooperation
9. Counting Administrative Burden Regulatory Requirements
10. Hardwiring Sensitivity to Small Business Impacts of Regulation: Guide for the Small Business Lens

Developing and Presenting Regulatory Proposals

11. Controlling Administrative Burden That Regulations Impose on Business: Guide for the "One-for-One" Rules
12. Handbook for Regulatory Proposals: Performance Measurement and Evaluation Plan
13. RIAS Writer's Guide 2009

Program Management and Review

14. Guide on Improving Service Performance for Regulatory Authorizations
15. Guide for Developing and Implementing Interpretation Policies

Tools/Forms for Use by Agencies

- Regulatory Impact Analysis Statement (RIAS): Low-Impact Template
- Regulatory Impact Analysis Statement (RIAS): Medium- and High-Impact Template
- Triage Statement Form
- Small Business Lens Checklist

Generally, in our view, Treasury Board Secretariat Regulatory Affairs Sector (TBS) is pretty good at reflecting in its guides and policies the "best practices" that have been identified and promoted by the OECD.

TBS' guides and policies are intended to be helpful to regulators. A significant challenge to TBS, however, is to ensure (1) that regulators fully understand their obligations under the regulatory policy, and (2) that regulators have the capacity to adopt, and actually do adopt, the best practices outlined in guidance provided by TBS.

Regulators should understand how the policy and guides help them do a better job at achieving public objectives:

- Regulators should not view analysis requirements as simply hurdles to be overcome or just as a way to legitimize decisions they want to see made;
- They should not avoid open and transparent assessment and discussion of risks or impacts to avoid creating problems with stakeholders – whether industry, NGOs or the public-at-large;
- They should not avoid engaging with industry under the unfounded pretense that industry stakeholders are somehow "untrustworthy".

Process Improvements for CBA and RIA

The Issue

As noted above, during consultations on the draft Directive, concerns with the draft Directive address relate directly to TBS guidance. The questions that must be addressed are:

- Why do stakeholders continue to identify the shortcomings described above?
- Despite close to 40 years of continuously evolving policies, guidance, tools, training and processes, why does the OECD consider Canada – a leader in so many ways – only "average" in quality control?[vii] And
- How can the suite of policies and processes, and their related guidance and tools, be modified to improve outcomes for all Canadians?

In fact, the current guides DO promote the types of behaviour among regulators that are sought by industry and other stakeholders. For instance, with respect to the concerns identified by the online consultation on the draft new Directive, the guides promote:

- Consulting early on problems and potential solutions (not just on draft regulations) – addressed in guide/policy numbers 1, 4, 5 and 6.
- Systematic, high quality analysis of costs, benefits and impacts – addressed in guide/policy numbers 1, 6, 7, 9 and 10.
- CPAIG had commented on how interpretive documents can add additional costs, beyond those foreseen in a RIAS. It recommended publishing such documents early – availability is addressed in guide/policy number 15, but timing is not.
- Regulatory cooperation and alignment must always be considered – addressed in guide/policy numbers 1, 6, 7 and 8.
- Enhanced accountability, predictability, co-development, coordination and cooperation with the other orders of government – addressed in guide/policy numbers 1, 5, 6, 7 and 8.
- Mandatory and periodic reviews of the current stock of regulations – addressed in guide/policy numbers 1 and 14.
- Greater use of incorporation by reference – addressed in guide/policy numbers 1 and 6.
- Single portal for regulatory activities and easier access for regulated parties – minimally addressed in guide/policy number 1 which directs departments to take advantage of opportunities to work with other departments and agencies.

A recent OECD Working Paper by Deighton-Smith, Erbacci and Kauffman[viii] (hereafter WP3) highlighted a number of challenges in getting regulators to follow guidance on inclusive growth factors. To paraphrase:

- Regulators often believe that the negative impacts of proposals are small;
- Regulators lack needed data, technical understanding of impacts, time and/or resources to undertake analysis;
- Regulators may attempt to avoid problems with stakeholders by hiding information; and

- General use by regulators of RIA as a legitimization tool rather than an informative instrument to improve decision-making.

This important Working Paper argued that if the RIA process is used to address inclusive growth (that includes GBA+), then early engagement with stakeholders is necessary, along with better formal screening mechanisms and greater engagement by regulatory oversight authorities.

The difficult challenges raised in WP3 are, arguably, endemic throughout the OECD area to all government-wide systems of regulatory governance that "require" or "encourage" individual regulatory agencies to undertake good regulatory impact analysis and effective stakeholder consultations. In Canada, these challenges can be addressed, at least in part, by strengthening TBS oversight authority, and by "tweaking" the regulatory process to ensure issues are transparently addressed.

WP3's insights, combined with the consultation results regarding the draft new *Cabinet Directive on Regulation*, point to a number of focused policy/guidance and process changes, building on the already good governance base.

Technical Requirements and Impact Measures in CBA and RIA

This section addresses some technical requirements and impact measures in CBA and RIA that are of concern to industry.

CBA Values

There are numerous values used in CBA such as discount rates, values for mortality risks (e.g. VSL), morbidity risks (e.g. QALY, cost of injuries), values for environmental amenities (e.g. social cost of carbon), and so on. Some of these values and their valuation methods are discussed in the CBA Guide. However, there are concerns about 1) the consistency in how such values are derived and applied in regulatory CBA across government, 2) whether the values and methods to estimate them by regulators are up to date, reflecting the most recent research and, above all, 3) that the values are publicly available/transparent to all.

There is a need to ensure greater consistency, timeliness, transparency and accessibility to data and information for regulators and affected stakeholders on such standard CBA values and measures. TBS should maintain a database of key values to be used by departments in CBA based on the most up to date research.

Improving Regulators' Assessment of the Full, Dynamic Impacts of Regulation

The literature on regulatory impacts is clear: there is a robust, direct link between regulations, productivity and competitiveness. The impacts of regulation include static costs such as direct

compliance costs, but also dynamic impacts that are harder to quantify, such as impacts on the ability of firms to compete and innovate.

A country's regulations, productivity and competitiveness are key interrelated drivers of the overall well being of its citizens. In a competitive world, countries that have lower productivity growth jeopardize their standard of living and overall societal well-being.

Few regulations are unambiguously positive or negative in their impacts on productivity and competitiveness and, therefore, should be subjected to thorough impact assessments as part of the cost-benefit analyses process. In trying to maximize net benefits, regulators need to pay close attention to a range of complex factors regarding the productivity and competitiveness impacts of regulation. Despite development over the years of tools such as the Business Impact Test, the Regulatory Cost Calculator and the Small Business Lens, regulators rarely assess the full, dynamic impacts of a regulation in their CBAs.

To do this, regulators need to develop a thorough understanding of the current baseline and the potential level of productivity and competitiveness effects at the firm, industry, economy-wide levels, and the behavioural reaction to a regulation by impacted businesses across the economic value chain, which enables a determination of the effects / effectiveness / impact on productivity and competitiveness.

Regulatory impacts on business fall generally into 3 categories:

1. **Direct impacts:** These are the impacts on direct costs to businesses to comply with a regulation, and include operating and maintenance costs (capital and labour), and administrative costs (labour). One generally accepted approach that provides structure to estimating direct regulatory costs is to use a standard cost model (SCM) approach. The SCM model has been adopted by the TBS in their Regulatory Cost Calculator; federal departments are expected to use the Calculator as part of the One-for One and Small Business Lens requirements. Over the past decade since the introduction of these tools, federal regulators have seemed preoccupied with these important, but only partial, indicators of regulatory impacts on business. Indirect impacts and overall economic impacts need to be properly assessed as well. This is a common shortcoming in most regulatory analyses.

2. **Indirect impacts:** Indirect impacts include gains/losses in investment, production and revenue. Consultation with industry is critical to understand and estimate indirect impacts. Surveys and questionnaires can be used, but such approaches tend to be anecdotal and difficult to scale to sector totals in a meaningful way. Other more rigorous approaches include production function models, where changes in output can be estimated based on changes in production costs. One approach that has been used successfully is cash flow modeling, which can assess the impacts of changes in direct compliance costs on revenues, net income, and return on investment (ROI). It also has the benefit of addressing the full

range dynamic impacts on business, such as delays in market access, which can be a major cost imposed by some consumer product regulation.

3. **Economic impacts:** These are the broader economic impacts that are the most difficult to measure. Normally estimates require complex economic models to assess impacts at the industry sector or economy-wide level for several indicators, including output, employment, labour income, and taxes paid. A standard technique for estimating economic impacts of an industry is input-output modeling, which calculates economic impacts using assumptions about inter-industry purchases per dollar of output of an industry. Statistics Canada publishes input-output tables for the Canadian economy that show the various economic linkages between industries. The value of input and output used in an industry is organized by commodity. These tables can be used to determine the impact of a change of final demand of a commodity on various industries, and by province. Again, these tools are rarely employed in CBA by federal regulators.

About 10 years ago, TBS and Industry Canada had engaged Canadian industry in consultations on development of a market assessment framework for regulators to use to improve their regulatory analysis, and to better estimate the full impacts on proposed regulations in their CBAs and RIASs. However, the commitment to industry (including members of CPAIG) to introduce such tools to improve analysis on major or high impact regulations was never realized, and shortcomings in regulatory analysis have continued.

Recommendations

We recommend seven changes/additions to the regulatory guides and process. We believe these changes would support and improve implementation and adherence to the new Cabinet Directive on Regulation. We recommend:

1. ***Early Engagement*:** For all problems or risks that might have solutions involving significant impacts on Canadian industry, departments and agencies should be required to engage industry (and other stakeholders as necessary) in order to: 1) determine whether a problem/risk exists requiring a regulatory solution, 2) develop alternative regulatory and/or non-regulatory options that may be effective in achieving objectives, and 3) determine the nature and likely magnitude of impacts. These should be summarized in a preliminary Triage Statement. Stakeholders should be notified of upcoming engagements/consultations through various Government of Canada and departmental websites and notification in Canada Gazette Part I. (Guidance on Assessing, Selecting and Implementing Instruments for Government Action should be modified).

2. ***Forward Regulatory Planning*:** No proposed regulatory initiative, which is likely to have potentially "high" impacts, should be included in the Annual Forward Regulatory Plan unless the early engagement effort described above has been completed. Those engagement efforts should be summarized in a publicly available document and, along with a "preliminary Triage Statement,"[ix] should be published on the web and referred to in the Annual Forward Regulatory Plans. (Guidance on Forward Planning needs to be modified).

3. ***Transparent Planning*:** Forward Regulatory Plans should include a description in of how departments prepared the plan and explain how the plan reflects departmental and government priorities. For those proposals that are expected to have significant impacts on Canadian industry, the Forward Regulatory Plan should provide specific details on how the regulator will consult with industry stakeholders throughout the process of developing regulatory and non-regulatory options, as well as the CBA and the RIAS. (Guidance on Forward Planning needs to be modified).

4. ***TBS Engagement*:** TBS, prior to publication of forward regulatory plans, should engage the main regulatory departments (Canadian Food Inspection Agency, Environment and Climate Change Canada, Fisheries and Oceans Canada, Health Canada, Industry Canada, Transport Canada and possibly others). They should review the forward plans, the results of early engagement, and future consultation opportunities. In cases where TBS believes departmental priorities would benefit from some changes, possibly to be reflect overall government priorities, they could issue "prompt letters" similar to those used by the Office of Information and Regulatory Affairs in the United States.

5. ***Publishing Interpretative Documents*:** Section 7.4.1 of the Guide for Developing and Implementing Interpretation Policies states that "Departmental interpretation policies must include a commitment to engage stakeholders, as appropriate, when developing, reviewing or refining practices and materials for providing information and guidance on regulatory compliance and answering questions." Arguably, with respect to documents that affect how regulated businesses will comply with regulations and what their costs could be, documents must be available early before the regulation is promulgated. We strongly recommend, therefore, that current guidance be enhanced to require that Departments publish, on the web, draft interpretative documents at the same time as draft regulations are published in Canada Gazette Part I[x]. Each RIAS should link to these documents for ease of reference by stakeholders. Final versions should be published at the same time as final regulations are published in Canada Gazette Part II. (RIAS Writer's Guide would also need to be changed.)

To move forward, we further suggest that TBS conduct two or three "pilots" with respect to the above recommended process changes. We note that Health Canada is "home" to the Community of Federal Regulators and so is a good prospect for being a pilot.

Essentially, these five recommendations seek to formalize the early stages in the regulatory process. Greater transparency should make it more difficult for regulatory departments and agencies to evade good regulatory practices.

The following changes will improve transparency and the quality of impact analysis. These should be able to be implemented in short order:

6. **Publish Key Variables For CBA:** To ensure greater consistency, timeliness, and transparency in the use of various values and measures in CBA by federal regulators, TBS should develop, maintain and update a readily accessible database for all key CBA values/measures. This database should reduce analysis resource requirements by departments. (The Canadian Cost-Benefit Analysis Guide: Regulatory Proposals will need changes.)

7. **Better Analysis of Impacts on Market, Productivity and Competitiveness:** TBS should elaborate more clearly in the CBA and RIA guides how regulators are to take into account impacts on markets, productivity and competitiveness and to report them to Canadian in the RIAS. The interim "Guide to Market Assessment - A Guide for Regulatory Analysts, Managers and Facilitators" and all background materials supporting that draft guide that were prepared by Industry Canada and TBS in March 2009 should be re-examined, updated and incorporated as needed into the suite of guides supporting the new Cabinet Directive on Regulation.

How these Recommendations will address the issues

None of the proposed changes introduce elements that should not be there already, if departments and agencies fully bought-into the Cabinet Directive requirements and recognized that they would be able to regulate better if they followed best practices.

What these recommendations are intended to do is ensure that if departments ignore best practices that they would be forced to do so in a very public way.

By engaging with stakeholders earlier, and more seriously, than is currently typical with regulatory proposals, regulators will be able to:

- Better define problems, risks and issues and identify potentially effective solutions that have considerable stakeholder buy-in
- Better define the nature and amount of later analysis required, i.e. to ensure proportionality in analysis which is a clear government objective

- Develop better regulations or alternative solutions

The goal of having departmental planning processes documented is to lessen the chances that forward regulatory plans primarily reflect bottom-up wish lists and hobbyhorses. The goal is to have thoughtful management of public risks publicly displayed.

By having greater TBS engagement at the planning stages, potential problems may be able to be avoided with respect to regulatory cooperation and alignment (international, inter-governmental or inter-departmental). And dialogue between TBS and departments may help focus departments and agencies on priority risks to the public.

Will these proposed changes make the regulatory process longer? No, because better early engagement with stakeholders will improve later stages in the regulation-making process. TBS engagement should not add significantly to time and effort required.

Will the proposed changes require additional resources? Departments and stakeholders would need to devote more resources up front (some regulators may have adequate processes currently for some regulatory proposals). On the other hand, later stages in the regulatory process should be smoother and more efficient.

We further suggested that TBS conduct two or three "pilots" with respect to these four recommended process changes. This would allow TBS to:

- Determine whether the regulations and regulatory impact analysis in fact appear to have improved when these steps are undertaken
- Determine impacts on departments and stakeholders
- Determine how satisfied stakeholders with a process with greater upfront engagement
- Determine how best to provide guidance to regulators

How publishing Interpretative Documents will address Concerns

Industry is concerned that interpretative documents can introduce new costs, beyond those identified in a RIAS. These documents generally provide more explicit detail regarding how regulatees must or can comply with regulations; details that may well affect compliance costs. Industry stakeholders want to see more detail on implementation (i.e. the interpretative documents) earlier, and have a chance to comment before regulations are finally approved.

There is no reason why draft interpretative documents cannot be produced in time to be published, on the web, at the same time as Canada Gazette Part I. Drafting instructions for the lawyers in either departmental legal services units or the Department of Justice Legislative Drafting Section (often in the form of draft regulations) need to be provided by regulators in sufficient detail to be translated into rules following drafting standards; the lawyers should not be creating substance. To have produced instructions regulators should already have sufficient

information to produce interpretative documents (legal text should not substantially alter the regulatory obligations involved).

Departments would have to organize themselves to produce the documents earlier than they are used to, but they do not have wait for "final text" to be prepared in order to draft interpretative documents. Overall, resources to preparing needed interpretative documents should not be changed.

Other Key Issues

Further input and recommendations for TBS will be forthcoming from CPAIG on the following issues:

1. **Institutional Capacity:** need to improve institutional capacity across government to prepare high quality CBA and RIA.

2. **An Effective Challenge Function to Support Innovation and Competitiveness**: how the central challenge function within the federal government can be enhanced to ensure that Cabinet receives accurate assessments of the benefits, costs and competitiveness implications of regulatory proposals.

3. **Appeal Mechanism:** options for a neutral/3rd party appeal mechanism for affected industry stakeholders where cost and competitiveness concerns are not being adequately considered by regulators.

Endnotes

[i] See Figure 1.5, pg. 29 in *OECD Regulatory Policy Outlook 2015*, OECD 2015.

[ii] See for example the *Federal Regulatory Policy: 1995*, Treasury Board 1995.

[iii] See https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/what-we-heard-online-consultation-draft-cabinet- dracabinet-directive-regulation.htmldirective-regulation.html.

[iv] The 1995 OECD *Council Recommendation on Improving the Quality of Government Regulation* (available among the archived legal instruments at https://legalinstruments.oecd.org/en/instruments?mode=advanced&reference=C(95)21~2FFINAL) required member countries to introduce systems to develop better regulations. This was updated in 2012 by the *Recommendation on Regulatory Policy and Governance*, available at http://www.oecd.org/gov/regulatory-policy/49990817.pdf .

[v] For a schematic of the regulatory life-cycle, see section 2.0 in *Guidelines for Effective Regulatory Consultations*, available at https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/effective-regulatory-consultations.html .

[vi] See the Treasury Board Secretariat website https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools.html .

[vii] Table 1.1, pg. 31, OECD Regulatory Policy Outlook 2015, OECD 2015.

[viii] Pages 15 and 16 in Rex Deighton-Smith, Angelo Erbacci and Celine Kauffmann (2016), *Promoting inclusive growth through better regulation: the Role of Regulatory Impact Analysis*, OECD Regulatory Policy Working Paper No. 3, OECD Publishing Paris. http://dx.doi.org/10.1787/5jm3tqwqp1vj-en .

[ix] This would be similar to the existing *Triage Statement*, but it would need to be modified to reflect the early stage of consideration.

[x] This recommendation was included in earlier CPAIG commentary.