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# IMPROVING REGULATORY IMPACT ANALYSIS AT THE BRAZILIAN ELECTRICITY REGULATORY AGENCY

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**DISCLAIMER**

The opinions expressed in this paper reflect research efforts towards understanding RIA and do not necessarily express the views of the Brazilian Electricity Regulatory Agency – ANEEL.

**DEDICATION**

To my wife, who stood by my side and gave me the support and encouragement I needed for this endeavor. Thank you for your love, courage and companionship.

To my son, who accepted gracefully an enormous environment change in such a tender age. Thank you for your bravery, patience and constant happiness.

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**ABSTRACT**

Regulatory Impact Analysis (RIA) is a trending topic in the world and its use began recently in Brazil. The Brazilian Electricity Regulatory Agency (ANEEL) is one of the first Agencies to require the elaboration of RIA for its regulations, but there is still room for improvements. This paper relies on a checklist provided by the Office of Information and Regulatory Affairs – OIRA, to evaluate the RIAs produced by ANEEL between Aug. 8, 2014 and Jan 1, 2015. This evaluation indicates a trend of increasing quality but also suggests several items can be improved such as the assessment of baselines, the quality the information that is used and the way it is presented to the public, the evaluation of alternatives and the plain-language executive summary. A checklist specific to ANEEL is provided to encourage the self-evaluation of the quality of the RIAs and help to avoid common mistakes, thus keeping the agency moving in the right direction, towards the continued improvement of RIA. It is desired that the information herein will make a contribution to the current body of knowledge that exists about RIA within ANEEL and to the better overall regulation within Brazil, particularly in the energy sector.

## INTRODUCTION

On February 11, 2015 the Tribunal de Contas da União - TCU (Federal Court of Accounts of Brazil), issued a ruling (Acórdão nº 240/2015 – TCU – Plenário[1]) regarding the operation of several regulatory agencies. The TCU is an arm of the Legislative branch that, among other duties, audits the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables, as provisioned in art. 71 of the Brazilian Constitution

Among other issues, such as risk management policy, rules for the replacement of Directors, and budgetary autonomy, TCU recommended to several regulatory agencies in Brazil the adoption of the best practices regarding the use of Regulatory Impact Analysis (RIA) proposed by the Organization for Economic Co-operation and Development (OECD).

According to TCU, reference countries that use this tool (RIA), like the United States, Australia and the United Kingdom, have laws requiring the use of RIA and, moreover, have created central offices that guide and evaluate all of the analyses, in addition to maintaining extensive economic and social databases. The expected benefits of this recommendation are the improvement of interventions by agencies on the regulated sectors and greater participation, and therefore control, by society in regards to the intervention process.

For this particular subject TCU appears to be right. Regulation in Brazil has gone through several changes over the past few decades and now several agencies are responsible for the implementation of public policy across different fields. The regulatory process in general, however, still lacks the use of efficient impact assessment tools, has little popular participation and

[1] This ruling (in Portuguese) can be accessed through the link at the end of the following page: http://portal2.tcu.gov.br/portal/page/portal/TCU/imprensa/noticias/detalhes_noticias?noticia=5195394, and the agencies affected are the National Terrestrial Transports Agency (ANTT), the National Waterway Transportation Agency (ANTAq), the National Civil Aviation Agency (ANAC), the National Petroleum, Natural Gas and Biofuels Agency (ANP), the National Telecommunications Agency (ANATEL) and the National Electricity Regulatory Agency (ANEEL).

suffers the constant risk of capture by interest groups. Regulatory Impact Analysis (RIA) was just recently introduced into the Brazilian environment and its use has not yet been uniformly developed among the different institutions. Therefore, there is still opportunity for the development and adaptation of the tool (RIA) for the Brazilian environment.

In addition, research done by the OECD shows that even in more experienced countries, such as Canada, Australia, England and the USA there is still room for improvement due to accumulative learning. OECD also stated that, even though RIA is comprised of certain key elements, there is no "correct model" and every country should independently navigate through its own political, cultural and social environments.[2]

The National Electricity Regulatory Agency (ANEEL) was one of the first Brazilian agencies to require the use of this tool in its regulatory process. This paper reviews each RIA report produced so far by ANEEL, evaluates their quality and identifies the major problems faced by the agency are identified regarding the proper use of the RIA methodology. Based on the results of this evaluation, the paper then develops a RIA checklist that can be used to assist ANEEL`s officials in producing better quality RIAs.

Over the past several decades in the United States, most regulatory agencies have been required (or strongly encouraged) to use RIA, in different ways, under the oversight of the Office of Management and Budget (OMB), which carries out a coordinated review of agency rulemaking under Executive Orders 12866, 13563 and 13610. The American experience on this subject, therefore, is extremely valuable and will be helpful not only in developing the proposed checklist, but also in addressing the necessary autonomy of regulatory agencies versus the existence of an

[2] Regulatory impact analysis in OECD countries, page 3. http://www.oecd.org/gov/regulatory-policy/35258511.pdf

external evaluating body, such as OIRA, and also for better understanding of the methods used by American regulators to circumvent OIRA`s oversight.

Section 2 provides a brief history of RIA and its development around the world, including further information about RIA in Brazil. Section 3 provides information about the use of RIA tools at ANEEL, including a list of the 47 RIAs completed at the time of this writing. Section 4 is about the Office of Information and Regulatory Affairs – OIRA, and its role inside the American Federal Government including duties regarding the use of RIA. There is also a description of OIRA`s checklist and its main function. Section 5 provides an evaluation of the use of OIRA`s checklist in assessing the quality of ANEEL`s RIAs, and a template for ANEEL`s own checklist.

It is desired that the information herein will make a contribution to the current body of knowledge that exists about RIA within ANEEL and to the better overall regulation within Brazil, particularly in the energy sector.

## 1. BRIEF HISTORY OF RIA

### 1.a. What is Regulatory Impact Analysis

Making complex decisions is never easy, and most of the time it is even more difficult to predict with certainty the outcome derived from the decision-making process. For many different fields of study the decision-making process has become a subject of analysis, such as in psychology and neurology [3], economics (and its link to the previous field in behavioral economics), management, government, etc., and different theories arise periodically attempting to shed some light on the decision-making process of individuals, and groups of people such as families, companies and the government.

Regulatory Impact Analysis (or Assessment) – RIA, is a process that is made up of a set of tools and procedures (most, if not all of them, individually well known for some time) and now organized in a way that makes good sense.

RIA, as defined by OECD[4], "*is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. As*

[3] interesting reading can easily be find online about cognitive processes that include initiation and inhibition of behaviors, verbal reasoning, problem-solving, action planning, sequencing, self-monitoring, cognitive flexibility, integrated functioning of the nervous system in selecting and weighting information, etc.

[4] This definition can be found in OECDs website at http://www.oecd.org/gov/regulatory-policy/ria.htm, among several documents about the subject, including the 10 almost 20 year old best practices whose adoption was recently suggested by the Brazilian Federal Court of Accounts (box 3 at page 215 of the publication entitled Regulatory Impact Analysis – Best Practices in OECD Countries, 1997), namely: **1. Maximise political commitment to RIA.** Reform principles and the use of RIA should be endorsed at the highest levels of government. RIA should be supported by clear ministerial accountability for compliance. **2. Allocate responsibilities for RIA programme elements carefully**. Locating responsibility for RIA with regulators improves ''ownership'' and integration into decision-making. A central body is needed to oversee the RIA process and ensure consistency, credibility and quality. It needs adequate authority and skills to perform this function. **3. Train the regulators.** Ensure that formal, properly designed programmes exist to give regulators the skills required to do high quality RIA. **4. Use a consistent but flexible analytical method.** The benefit/cost principle should be adopted for all regulations, but analytical methods can vary as long as RIA identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses. Mandatory guidelines should be issued to maximise consistency. **5. Develop and implement data collection strategies.** Data quality is essential to useful analysis. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints. **6. Target RIA efforts.** Resources should be applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes. RIA should be applied to all significant policy proposals, whether implemented by law, lower level rules or Ministerial actions **7. Integrate RIA with the**

*employed in OECD countries it encompasses a range of methods. It is an important element of an evidence-based approach to policy making".*

OECD also states that some form of RIA has now been adopted by nearly all OECD members, but they have all nevertheless found the successful implementation of RIA to be administratively and technically challenging.

The official discussion about RIA among the majority of the OECD Countries took place during the 80s and 90s, but it is safe to conclude that the main ideas behind RIA began much earlier in the USA.

**1.b. The beginning of RIA in the USA**

There is not a complete consensus about the origin of RIA in the USA. If one wants to think abstractly, RIA simply can be described as a decision-making process, and it is possible to find examples of such processes as far back as the 18th Century.

In an interesting publication about Multi-Criteria Decision Making[5], the authors share some information about the early use of a system used to assess and weigh positive and negative aspects related to important decision making:

> "T*he earliest known reference relating to Multiple Criteria Decision Making (although not using that name) can be traced to Benjamin Franklin (1706–1790), the American statesman, who allegedly had a simple paper system for deciding his position on an important issue. He explained his procedure in a letter to a friend,*

**policy-making process, beginning as early as possible.** Regulators should see RIA insights as integral to policy decisions, rather than as an ''add-on'' requirement for external consumption. **8. Communicate the results.** Policy makers are rarely analysts. Results of RIA must be communicated clearly with concrete implications and options explicitly identified. The use of a common format aids effective communication. **9. Involve the public extensively.** Interest groups should be consulted widely and in a timely fashion. This is likely to mean a consultation process with a number of steps. **10. Apply RIA to existing as well as new regulation.** RIA disciplines should also be applied to reviews of existing regulation.

[5] Koksalan, M. Murat, Zionts, Stanley, Wallenius, Jyrki.; Multiple Criteria Decision Making : From Early History to the 21st Century. 2011.

*Joseph Priestly. Take a sheet of paper. On one side write the arguments in favor of a decision; on the other side the arguments against. Cross out arguments on each side of the paper that are relatively of equal importance. Franklin did in fact talk about weights, though he did not describe any actual use of weights. When all the arguments on one side have been crossed out, the side with arguments not crossed out is the side of the argument that should be supported. Franklin supposedly used this in making important decisions*." (Koksakam et al. 2011:1)

Regardless of this and several other possible interesting historical references, and taking into account the systematic and centralized review process inside the Executive branch of the U.S. Government, most authors credit the inception of RIA to the Nixon, Ford and Carter administrations.

On October 5, 1971, a memorandum[6] from the Office of Management and Budget to the Heads of Departments and Agencies, signed by Director George P. Shultz, officially established procedures for improving the interagency coordination of proposed agency regulations, standards, guidelines and similar materials pertaining to environmental quality, consumer protection, and occupational and public health and safety. At that time, OMB stated that the proposed and final regulations, standards, guidelines, and similar actions meeting the criteria outlined in the memorandum should be submitted to the Office of Management and Budget at least 30 days prior to their scheduled announcement. The regulations should be accompanied by a summary description indicating the following: the principal objectives of the regulations, standard, guidelines, etc.; alternatives to the proposed actions, that have been considered; a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with

[6] http://www.thecre.com/ombpapers/QualityofLife1.htm

the alternatives considered; and the reasons for selecting the alternative that is proposed. This "Quality of Life" review (QLR) process can be considered as the birth certificate of RIA in USA, but its gestation can be traced to the Systems Analysis Group in the Office of the Secretary of Army, which reviewed Army Corps of Engineers regulations in the Johnson Administration and provided experience and personnel for OMBs QLR.[7]

President Ford was more concerned about the inflationary impact of legislative proposals, regulations, and rules emanating from the Executive branch of the Government on the Nation. He issued, on November 27, 1974 Executive Order 11821, requiring a statement that the inflationary impact of rules or regulations by any Executive branch agency had been estimated in accordance with criteria and procedures established by OMB. The general categories of significant impact that had to be assessed, according to the abovementioned Executive Order were: cost impact on consumers, businesses, markets, or federal, state or local government; effect on productivity of wage earners, businesses or government at any level; effect on competition; and effect on the supply of important products or services.

Two years later, on December 31, 1976, with Executive Order 11949, the title of Executive Order 11821 was amended to read "Economic Impact Statements".

President Carter, on March, 23, 1978 through Executive Order 12044, required regulatory analysis for any regulation with major economic consequences for the general economy, for individual industries, geographical regions, and levels of government, identifying them as "significant".

According to this Executive Order, some requirements had to govern the preparation of regulatory analyses, such as:

[7] A detailed and well referenced text about the historical evolution of the centralized regulatory review is provided by Jim Tozzi at Administrative Law Review, volume 63, Special Edition, 2011, pages 37 to 69.

(a) Criteria. Agency heads had to establish criteria for determining which regulations require regulatory analyses. The criteria established should: ensure that regulatory analyses were performed for all regulations which would result in an annual effect on the economy of $100 million or more; or a major increase in costs or prices for individual industries, levels of government or geographic regions; and provide that under the agency head's discretion, regulatory analysis could be completed on any proposed regulation.

(b) Procedures. Agency heads should establish procedures for developing the regulatory analysis and obtaining public comment. Each regulatory analysis should contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.

It should be noted that, during its early stages, the legality of the review process by OMB, as mentioned by Tozzi, 2011:p. 57, was questioned by the agencies, the congress, and the press.

President Reagan made the next move with Executive Order 12291, on February 17, 1981, revoking Executive Order 12044 and requiring that each agency should, in connection with every major rule[8], prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis.

[8] "Major rule" meant any regulation that was likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This Executive Order also stated that, upon receiving notice that the Director of the Office of Management and Budget intended to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency should refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

Since congress had already created the Office of Information and Regulatory Affairs with the Paperwork Reduction Act of 1980, the regulatory review structure, and the basic concepts of RIA, as they exist today, were then in place.

This regulatory review structure went through some small changes, during the Clinton, George W. Bush and Obama Administrations, but the key aspects were preserved.

President Clinton issued Executive Order 12866 on September 30, 1993, which revoked Executive Orders 12291 and 12498, this last one issued in 1985 to focus on the regulatory planning process, all amendments to those Executive Orders and all guidelines issued under those orders.

OIRA and a regulatory review system had been in place for more than a decade at that time and, nevertheless, the first paragraph of Clinton`s Executive Order stated that "*the American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today*".

Though Executive Order 12866 did not use the term Regulatory Impact Analysis as did its predecessors, the term RIA continues to apply in practice. EO 12866 required the presentation, for each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, *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* (Sec 6, a.3.B.ii), following as set of 12 principles underlined at Sec 1.b[9].

[9] Since these principles seem to be a good reminder of how any Agency should act, here they are: (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem. (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively. (3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. (4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction. (5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity. (6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. (7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation. (8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt. (9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions. (10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies. (11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations. (12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Significant regulatory action, under Executive Order 12866, was defined as any regulatory action that was likely to result in a rule that could have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising from legal mandates, the President's priorities, or the principles set forth in the Executive Order. In practice, only those regulations that meet the first criterion (an annual effect on the economy of $100 million) are considered "economically significant" and are subject to more extensive RIA. (Dudley & Brito 2012, 41).

President George W. Bush retained this Executive Order with minor changes. With Executive Order 13563 of January 18, 2011 President Barack Obama reaffirmed these principles, structures, and definitions governing contemporary regulatory review, and reinforced the need for good public participation in the regulatory process and called for a retrospective analyses of existing rules.

Barack Obama also issued Executive Order 13579 on July 11, 2011 in which he encouraged Independent Regulatory Agencies[10] to comply with the provisions set by Executive Order 13563.[11]

Executive Orders 13609 of May 1, 2012 and 13610 of May 10, 2012 respectively, encouraged the promotion of international cooperation on regulatory issues and addressed the need for identifying and reducing regulatory burdens without, however, promoting significant changes in the established regulatory review process.

It should also be noted that, similar regulatory review and regulatory impact analysis processes have been implemented in the state level in the U.S. mainly focusing in reducing burdens on businesses[12] or, like the Ohio's Common Sense Initiative (CSI) to help create a more jobs-friendly regulatory climate[13].

Based on the historical evolution reported here (focused only on the main rules for simplification purposes), one can summarize the following:

a. The USA has a long history regarding the use of a centralized regulatory review process;

[10] 44 U.S. Code § 3502 - Definitions(5) the term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.

[11] Most Executive Orders apply only to executive branch departments and agencies, as "independent regulatory agencies are established to be somewhat independent from the president (Dudley & Brito, 2012, 47).

[12] Some examples are Connecticut (http://www.governor.ct.gov/malloy/cwp/view.asp?Q=533440&A=4010), Hawaii (http://dbedt.hawaii.gov/sbrrb/), and Virginia (http://townhall.virginia.gov/um/executivereview.cfm#dpb).

[13] http://www.governor.ohio.gov/PrioritiesandInitiatives/CommonSenseInitiative.aspx

b. OIRA (part of the Office of Management and Budget - OMB, which is an agency within the Executive Office of the President), is the Federal office that reviews draft regulations under Executive Order 12866;

c. The review is heavily based on impact assessments (or Regulatory Impact Analyses - RIAs[14]) prepared by Government agencies for significant regulatory actions;

d. RIAs should be prepared using a set of principles that require, among others, the proper identification of costs and benefits, evaluation of alternatives and promotion of public participation;

e. Independent Regulatory Agencies are not yet required to submit their regulations to OIRA, due to their specific nature.

**1.c. International diffusion of RIA**

The United Kingdom is widely recognized as the place where some of the first steps towards RI were taken in Europe. A White Paper[15] entitled "Lifting the Burden", presented before the UK Parliament during Margaret Thatcher`s administration, was published on July 16, 1985 (four years after the creation of OIRA in the USA), following a report entitled "Burdens on Business", developed by the Secretary of State for Trade and Industry. The Report showed that, at that time, Government requirements constituted a major drain on business - particularly small business - in terms of direct cost and of management time. The White Paper was an attempt to

[14] Regulatory Impact Analysis: A Primer (http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf), a document provided by OIRA in August 15, 2011, uses the term and its acronym RIA, which are widely accept and utilized in discussions about the subject.

[15] The UK Parliament`s webpage define White Papers as documents produced by the Government setting out details of future policy on a particular subject. A White Paper will often be the basis for a Bill to be put before Parliament. The White Paper allows the Government an opportunity to gather feedback before it formally presents the policies as a Bill. http://www.parliament.uk/site-information/glossary/white-paper/

correct the fact that, *for far too long, successive Governments - albeit with good intentions - have tended to stifle much needed enterprise with restriction and regulation*[16].

That White Paper established the need for an exercise on compliance costs by every Department of the Government – the Compliance Cost Assessment

At the debate in the House of Commons, Tony Blair (at that time a Member of the opposition in the Parliament) stated: "*at first blush, the White Paper is a shabby and irrelevant document from a Government whose ideology is unable to solve the real problems of our economy*". Later on Tony Blair became Prime Minister and played a big role in consolidating the use of RIA tools in the UK.

Some of the next steps taken by the UK regarding RIA are listed in an OECD report titled Better Regulation in the United Kingdom (2009, pages 39-40):

1986 - Establishment of a central task force, the Enterprise and Deregulation Unit set up in the Department of Employment. It is given the power to oversee and co-ordinate the anti-red tape efforts of individual departments. Deregulation units are set up and a Departmental Deregulation Minister is appointed in each department. Creation of the Deregulation Task Force, an independent advisory panel to the government.

1987 - The Enterprise and Deregulation Unit, now named Deregulation Unit is moved to the Department of Trade and Industry.

1989 - Creation of a Cabinet committee on regulation (with ministerial membership).

[16] http://hansard.millbanksystems.com/commons/1985/jul/16/lifting-the-burden

1995 - Creation of an advisory panel (made up of business people). Deregulation Unit is moved to the Cabinet Office. Seven business taskforces are set up to look at sector specific regulations.

1997 - Deregulation Unit is renamed the Better Regulation Unit. Deregulation Task Force is renamed the Better Regulation Task Force (BRTF), and new members are appointed by the Prime Minister.

1999 - Regulatory reform ministers are appointed in each department. The Better Regulation Unit is renamed the Better Regulation Executive (BRE). A public sector team is set up in the BRE to give hands on advice to public sector service deliverers in order to facilitate compliance with reporting and paperwork requirements. A panel for regulatory accountability (ministerial committee chaired by the Prime Minister) is established to take an overall look at the regulatory implications of the government regulatory plans and to ensure necessary improvements are made in the regulatory system and in the performance of individual departments.

2000 - The Small Business Service is set up to provide a single organization dedicated to helping small firms and representing them within the government.

2004 - House of Lords Merits of Statutory Instruments Committee is set up to strengthen the scrutiny of secondary regulations (statutory instruments).

2007 - Better Regulation Executive is relocated to Department for Business, Enterprise and Regulatory Reform (BERR). Small Business Service is folded into the BERR, as the BERR Enterprise Directorate.

2008 - Local Better Regulation Office (LBRO) is established.

In 2009 the Regulatory Policy Committee was set up and in 2012 it became an independent advisory non-departmental public body providing the government with external, independent scrutiny of new regulatory and deregulatory proposals.

Along with the Reducing Regulation Cabinet sub-committee - RRC (which has oversight of Government policy on regulation, including the Principles of Regulation),the Better Regulation Executive – BRE (a Directorate within BIS that leads the regulatory reform agenda across the Government), the Better Regulation Units – BRU (which are departmental teams responsible for promoting the principles of good regulation and advising departmental policy makers), and the National Audit Office (NAO) also has a role reviewing Regulatory Impact Analyses.

The Green Book[17], a good source of guidance on how to produce assessments in the UK, defines regulatory impact assessment (RIA) as

> "*a policy tool that assesses the impact, in terms of costs, benefits and risks of any proposed regulation that could affect businesses, charities or the voluntary sector. It is Government policy that all government departments and agencies where they exercise statutory powers and make rules with general effect on others must produce an RIA. They should also produce an RIA for proposed European legislation that will have an effect on businesses, the public sector, charities or the voluntary sector in the UK*."

In the Preface of the Third Edition Joe Grice, Chief Economist and Director of Public Services, HM Treasury, remembers that an *appraisal, done properly, is not rocket science, but it is crucially important and needs to be carried out carefully*.

OECD has been a major player throughout the world in regards to RIA and its implementation among member and non-member countries. Several reports presented on the OCDE website[18] give the perception of a growing evolution on the concept of RIA for the different

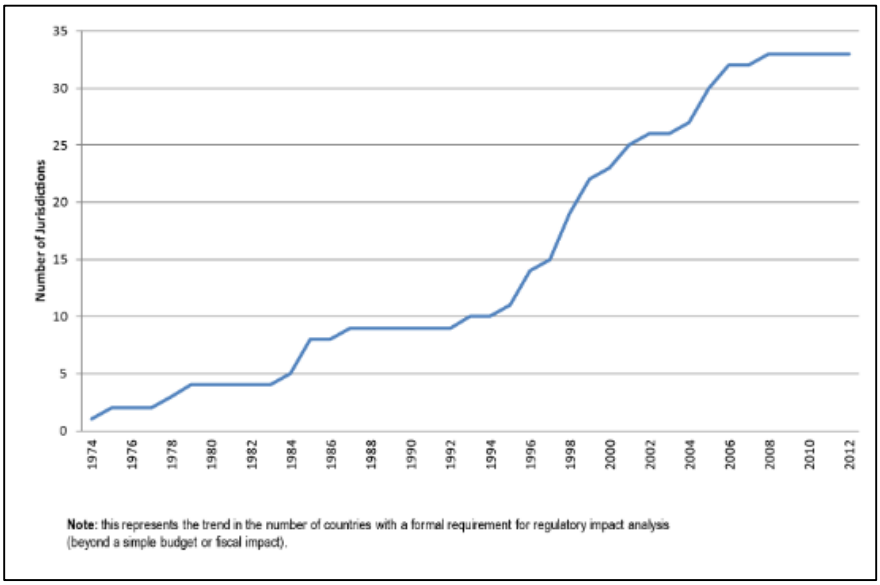
[17] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220541/green_book_complete.pdf
[18] One of the most recent ones is entitled "Sustainability in Impact Assessments: A Review of Impact Assessment Systems in Selected OECD Countries and the European Commission" and provides a comprehensive view about how

countries that have adopted this tool in the regulatory process, as well as the conclusion that there are no two countries with the exact same RIA system.

Another important source of knowledge about impact assessments is the European Commission, which adopted RIA in 2003 and, since then, has increased its use widely. Its Impact Assessment Guidelines[19], published in 2009, also provides important information about RIA procedures. For the European Commission,

> *Impact assessment is a set of logical steps to be followed when you prepare policy proposals. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts.*

The graph below[20] shows the trend in RIA adoption across OECD jurisdictions, and demonstrates significant growth over the last two decades.




Graph 1 – Adoption of RIA across OECD jurisdictions

RIA is performed in Countries such as Australia, Korea, The Netherlands, Poland, Switzerland and the already hereinbefore mentioned United Kingdom and United States.

[19] http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf

[20] http://www.oecd.org/gov/regulatory-policy/ria.htm

The diffusion of RIA throughout this many countries is remarkable, but RIA does not mean the same thing everywhere and does not include regulatory review systems and/or oversight bodies in all cases[21]. From the beginning, it is possible to observe that the development of the tools for regulatory impact evaluation in a country depend on a wide range of variables but, in most cases, the basic concepts are somewhere present, some degree of comparison is possible and, therefore, benchmarks can be established.

The development of RIA within so many different contexts (political, economic, historical, regulatory, etc.) also enables newcomers to learn from the mistakes and errors faced by the pioneers which is very helpful, although that does not always translate into easy and fast implementation.

### 1.d. RIA in Brazil

Setting aside some early individual developments in the field of impact analysis in Brazil, it is fair to state that RIA was introduced in Brazil by the OECD, and its Review of Regulatory Reform from 2008 entitled "Brazil – Strengthening Governance for Growth"[22] set in motion the structuring of the 'Brazilian' way of doing RIA.

Some previous conditions were in place to make this first step easier. First was the creation of several Independent Regulatory Agencies within the Brazilian Government in the late 1990s, as a part of a large scale privatization effort under Fernando Henrique Cardoso`s Government and secondly was the creation of PRO-REG.

[21] A good discussion about this topic can be found in RADAELLI, C. M. Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment. Journal of European Public Policy, v. 12, n. 5, p. 924-943, 2005

[22] http://www.biblioteca.presidencia.gov.br/publicacoes-oficiais-1/catalogo/orgao-essenciais/casa-civil/programa-de-fortalecimento-da-capacidade-institucional-para-gestao-em-regulacao-pro-reg/oecd-reviews-of-regulatory-reform-brazil-strengthning-governance-for-growth

The Constitutional Amendment 8, on August 8, 1995 altered the text of article 21 of the Brazilian Constitution, stating that the Union shall have the power to operate, directly or through authorization, concession or permission, the telecommunications services, as set forth by law, which law shall provide for the organization of the services, the establishment of a regulatory agency and other institutional issues.

The Constitutional Amendment 9, of November 9, 1995 further altered the Brazilian Constitution (article 177, which refers to the monopoly of the State regarding petroleum), stating that a law should address the structure and duties of the agency responsible for regulating the monopoly of the union on this issue.

Those two amendments to the Constitution provided the groundwork for the creation of ANATEL and ANP, respectively the National Agency of Telecommunications and the National Petroleum Agency. ANATEL was established by Law 9472, of July 16, 1997 and ANP was established on August 6, 1997 through Law 9478.

Nevertheless, the first Brazilian Federal Agency established under this newly developed way of thinking was the National Electricity Regulatory Agency – ANEEL (Law 9427, of December 26, 1996).

Others followed and today Brazil counts on several regulatory bodies known as "agencies", to be responsible for everything from cinema to terrestrial transport, supplementary health and civil aviation, among others.

The proliferation of agencies, necessary in that particular context of the Brazilian Government[23], was not well received by later administrations, and the official reason for that was the excess of autonomy of the Agencies and lack of social control.

[23] Alexandre Gheventer (2009), summarizes well the main reason Brazil created the Agencies: *It is important to emphasize that, although the idea of independent regulatory agencies may have found inspiration in the North*

After some years of discussion about the agencies, and several unsuccessful attempts at changing the way they were working, the Program for the Strengthening of the Institutional Capacity for Regulatory Management (PRO-REG) was created in 2007[24], with the support of the Inter-American Development Bank.

A 2008 OECD Review of Regulatory Reform, before mentioned, provided PRO-REG with a set of recommendations, including the implementation of Regulatory Impact Analysis as an effective tool for improving regulatory quality.

Since then, especially through PRO-REG (which provides training and experts, organizes international visits and seminars on the subject), but also counting on individual efforts taken by the Agencies, RIA has become a trending topic in the matter of good regulation in Brazil.

It should be mentioned, however, that, as in many other countries, Brazil had independent (and not so independent) regulatory bodies throughout its history and for a long time before the administration of Fernando Henrique Cardoso. Also there existed a set of impact assessment requirements and even an oversight body.

The Decree 468, of March 6, 1992 established rules for the drafting of normative acts of the Executive branch and provided for the filing of documents subject to the approval of the President. This early norm, developed under the Administration of Fernando Collor, set forth a series of questions that needed to be addressed during the elaboration of normative acts inside the Executive branch, namely:

1. Must action be taken?

*American experience, we can`t lose sight of the fact that the implementation of these agencies in Brazil occurred under the context of the privatizations and the economic opening. The agencies` autonomy was the strategy adopted by the Brazilian State to generate credibility, which is a specific problem of the Latin American institutions. Getting credibility means indicating to the market that the rules are stable and, therefore, firms can have legal confidence on property rights, which stimulates investments.*

[24] Decree 6062 of March 16, 2007.

2. What alternatives are available?

3. Should the union take action? Does it have constitutional or legal competence to do so?

4. Must a law be proposed?

5. Must the action be taken now?

6. Should the law be term limited?

7. The normative act corresponds to the expectations of the citizens and is intelligible to all?

8. Is the normative act enforceable?

9. Is there a balanced relationship between costs and benefits?

This Decree was later revoked and today's regulation comes from Decree 4176 of March 28, 2002. This Decree has a larger set of questions in place, some of them listed below[25]:

- What is the objective?
- What will happen if nothing is done? (Example: the problem will become more serious? Will it remain stable? Can the problem be overcome through social dynamics, without the intervention of the State? With which consequences?)
- What alternatives are available?
- What is the burden being imposed on recipients of the regulation (calculate or, at least, assess the extent of these costs)?
- Can recipients of the regulation, in particular small and medium-sized enterprises, support these additional costs?

[25] The full text of the Decree and the list of questions can be obtained (in Portuguese) at http://www.planalto.gov.br/ccivil_03/decreto/2002/D4176.htm

- Do the measures proposed impose additional costs to the budget of the union, the states and the municipalities? What are the possibilities that exist to face these additional costs?
- Was a cost-benefit analysis made? What conclusion was reached?

Finally, under this Decree, the President's Office has the oversight authority through the Government Action Coordination Undersecretary (recently renamed Government Policy Analysis and Monitoring Undersecretary, which is also responsible for PRO-REG).

Brazil is now ready for RIA, and the Regulatory Agencies are fertile ground for it to be implemented and thrive. The staff that works within these agencies is highly qualified, politically independent, familiar with good regulatory practices and most of them are eager to use impact assessment tools in order to present regulatory options to decision makers (usually a Board of Directors).

Some agencies have taken the lead on the use of RIA in Brazil, such as the Sanitary Vigilance Agency and ANEEL (respectively similar to the FDA and FERC, both Independent Regulatory Agencies in the USA).

ANVISA was the first Agency in the Brazilian Federal Government to be chosen by PRO-REG as a pilot project for the development of RIA. In 2007, even before the OECD peer review report, ANVISA, together with the Office of the Presidency (Casa Civil), the Ministry of Treasury, and the Planning, Budget and Management Ministry, with the support of the OECD, held an International Seminar on Regulatory Impact Analysis. This seminal meeting was attended by several international experts in the fields of RIA and regulatory oversight, such as Donald McRae, from the UK Better Regulation Committee, Jim Tozzy, former senior career official in OIRA; and Carlos Garcia Fernandez, from the Federal Better Regulation Commission of Mexico

(Commission Federal de Medora Regulatory - COFEMER). The international seminar led to the production of a book, published in 2009, entitled Regulation and Regulatory Agencies - Governance and Regulatory Impact Analysis [26], whose reading is recommended for better understanding of the context of the emergence of RIA in Brazil, and in particular within ANVISA.

PRO-REG has been working diligently to spread RIA through the Brazilian Regulatory Agencies, and there has been some progress made, but Brazil still has a long way to go on this subject. There is not yet a 'Brazilian' way of doing RIA. There is not yet federal major regulation on this matter, not to mention a defined role for a central regulatory oversight body, which could easily be interpreted as a way to control agencies that should be independent by law, and politicize the regulatory process.

[26] http://www.anvisa.gov.br/divulga/public/Regulacao.pdf

## 2. RIA AT ANEEL

### 2.a. First steps

As the first regulatory agency in Brazil and a major player in the development of national regulation policy, and in many regards a model of quality, transparency and public participation for other institutions to follow both inside and outside of Brazil, ANEEL already had in place a system that enabled a good outcome of its regulatory process.

In Brazil, RIA had already been a topic of interest for quite some time when it officially reached the country and some of ANEEL`s employees had prior exposure to the major concepts of impact analysis both in the European and the US environments before 2010, when PRO-REG, on June 10, made an official presentation about RIA and regulatory quality to ANEEL`s top staff.

This event set in motion a series of initiatives geared towards the implementation of RIA at ANEEL. In the following month, ANEEL visited the UK as a part of a technical cooperation program between the Brazilian and British Governments and 60 days after the introduction of RIA, a pilot project was created for the use of RIA.[27] With the help of PRO-REG, and also through some individual initiatives, ANEEL intensified the training for a small group of staff constituting of an informal workgroup to analyze the use of RIA`s methodology.

On December 21, 2010 at the start of the process of regulation of the Ombudsman Service for the electric power distributors, the superintendence (department) responsible for this subject at ANEEL produced the Technical Note 283/2010-SMA/ANEEL[28], providing a simple qualitative

[27] This Pilot Project aimed to regulate the use of intelligent metering for low-tension consumers, and evaluated six different possible scenarios in a deeper than usual cost and benefit analysis (including a sensitive analysis for the major variables), and still is one of ANEEL`s good examples of RIA, especially because the outcome of the analysis was different than originally expected by the group of regulators involved. On August, 17, 2011, ANEEL and PRO-REG held a videoconference with OIRA, which commented on the work performed by ANEEL in the Project Pilot.
[28] http://www.aneel.gov.br/aplicacoes/consulta_publica/detalhes_consulta.cfm?IdConsultaPublica=204

analysis of three regulatory alternatives (including the baseline). This early attempt aimed to provide information about what impact the regulator thought the rule would have on consumers, the distribution companies, and even ANEEL, and to support the public consultation process (similar to the Advance Notice of Proposed Rulemaking process in the USA) initiated the following day. After collecting this first set of public comments, ANEEL issued its first public Regulatory Impact Analysis on September 1, 2011, along with several documents related to Public Hearing 046/2011[29].

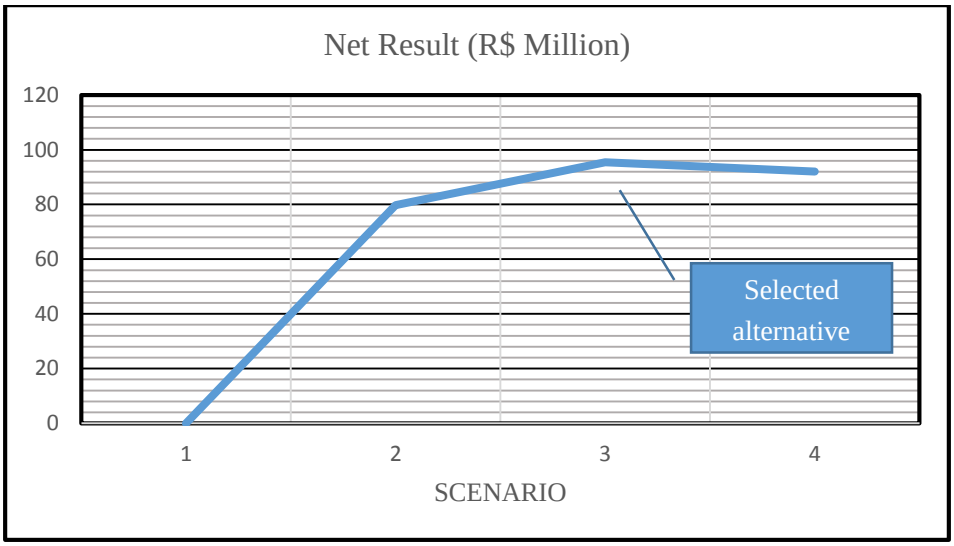
Although recognizing that the pioneering aspects of this RIA and the need for several improvements, ANEEL provided answers to a set of 22 questions derived from Decree 4176/2002 (the closest regulation to RIA in Brazil at the moment), including ones regarding the objective of the regulation, identification of stakeholders, baseline, alternatives and the relationship between costs and benefits.

The results of the cost-benefit analysis are summarized in Table 1 and shown in Graph 2.

| Scenario | Costs (R$ Million) | Benefits (R$ million) | Net Result (R$ million) |
|---|---|---|---|
| 1 (baseline) | 85.1 | 85.1 | 0.0 |
| 2 | 87.7 | 167.6 | 79.8 |
| 3 | 110.3 | 205.7 | 95.4 |
| 4 | 113.0 | 205.0 | 92.0 |

Table 1 – Results of RIA in Technical Note 127/2011-SMA/ANEEL

[29]The RIA is actually the Annex I of the Technical Note 127/2011-SMA/ANEEL, of July 15, 2011, available at http://www.aneel.gov.br/aplicacoes/audiencia/dspListaDetalhe.cfm?attAnoAud=2011&attIdeFasAud=566&id_area=13&attAnoFasAud=2011. It should also be noted that, in ANEEL`s regulations, a Public Hearing is similar to the notice of proposed rulemaking (NPRM) process in the USA. It is mainly conducted through the Internet and may or not have an actual face to face meeting.




Graph 2 – Results of RIA in Technical Note 127/2011-SMA/ANEEL

At the end of 2011 the informal workgroup listed several recommendations regarding the implementation of RIA at ANEEL[30], including the creation of a formal constitution for a Technical Committee for the Support of RIA, the selection of new pilot projects among the issues identified in the 2012/2013 Regulatory Agenda, and the analysis of ANEEL`s regulatory stock.

The proposed group was in fact formally created, with the primary objective of editing a resolution about the use of RIA at ANEEL.

**2.b. Regulation of RIA at ANEEL**

Ordinance (Portaria) 2181, of March 13, 2012 established the Technical Committee to Support Regulatory Impact Analysis within ANEEL, with the priority task of developing, by July 31, 2012, a normative resolution to formalize the establishment of RIA in ANEEL and create the procedures necessary to be observed within the agency to achieve this purpose[31].

[30] Technical Note 73/2011-SRD-CGA-ASS-SPG-SGE-SPE-SMA/ANEEL, of December 15, 2011.
[31] http://www.aneel.gov.br/cedoc/prt20122181.pdf

The group proposed a regulation regarding the use of RIA at ANEEL and, between August 23 and November 16, 2012, sought public comment a notice of proposed rulemaking (audiência pública)[32]. The proposed regulation was based on extensive information about the current implementation of RIA, mainly in the European Commission, Mexico (COFEMER), UK, USA and OECD, and also the experience of ANVISA in Brazil.

ANEEL received 20 written contributions to the originally proposed regulation, mainly from the regulated companies, associations, individual distribution companies, consumer protection entities, and other Government departments, such as the Ministry of Treasury.

Finally, on March 12, 2013 ANEEL`s Board of Directors issued the Normative Resolution 540, approving ANEEL`s Organization Norm 40, which provides rules for conducting Regulatory Impact Analysis – RIA – within the framework of the Agency[33].

This short 9-articles rule, was put in effect 120 days after its publication in the Official Gazette and, therefore, RIA became obligatory for every normative act[34] issued by ANEEL after August 8, 2013.

The rule comprises, in article 2, a concept of RIA as a process through which information is provided about the need for and the consequences of a proposed regulation, an evaluation of whether the potential benefits of the measure outweigh the estimated costs, a determination as to whether, among all evaluated alternatives to achieve the objective of the proposed regulation, the action provides the greatest benefits to society.

[32] The public hearing process in ANEEL refers basically to the availability of the proposed text for the standard or rule (and supporting information) on the home page of the Agency, and in the collection of contributions from society through an email specific to each Audience. See also 28.
[33] http://www.aneel.gov.br/aplicacoes/audiencia/arquivo/2012/064/resultado/ren2013540.pdf
[34] The Resolution uses the term normative act generically, to differ them from the approbatory and authoritative acts, and internal administrative rules.

Article 4 states that the RIA report must contain, at a minimum, information concerning the following aspects:

I. identification of the problem to be solved;

II. justifications for the possible intervention of the agency;

III. desired goals with regulatory intervention;

IV. Effective date of the proposed amendments to the current regulation;

V. analysis of the impacts of the options considered and the option chosen;

VI. identification of possible amendments or repeals of regulations in force in light of the intended new regulation; and

VII. identification of ways for monitoring the results arising from the new regulation.

The resolution also states that the RIA, presented in the form of a table contained in its annex, should be subjected to a public hearing, together with the proposed normative act.

Finally, it is also anticipated that the rule will be evaluated three years after its publication, in 2016.

The Technical Committee to Support Regulatory Impact Analysis in ANEEL is still in place, but now its main objective is to monitor and give technical support to ANEEL`s regulatory areas in RIA application, including through the guidance about how to use Regulatory Impact Analysis tools in the technical notes; and coordinate the exchange of experiences with other regulatory agencies in Brazil and abroad[35].

[35] http://www.aneel.gov.br/cedoc/prt20132867.pdf

## 2.c. Results by the end of 2014

Between August 8, 2013 and January 1, 2015, ANEEL published 118 notices of proposed rulemaking, and reopened the consultation procedures for 7 ongoing rulemaking processes. Since the RIA regulation establishes that the RIA reports must be submitted to a public participation process together with the text of the proposed regulation, one should expect a similar amount of RIAs produced in the same period. Nevertheless, considering that 56 of those rules were homologating or authoritative acts, or even internal administrative rules (therefore not subject to a mandatory RIA process), and that in 22 of those processes the inapplicability of the RIA process was justified[36] and accepted by ANEEL`s Board of Directors, the actual quantity of RIAs produced in that period was 47.

Tables 2 and 3 provide a list of the regulations in which a RIA was produced, and the date it was made available for the general public.

| N. | Date and NPRM number | Subject |
|---|---|---|
| **1** | 08.15 - 094/2013 | Seasonality and modulation of the physical guarantee of electric power generation plants and energy seasonality linked to Itaipu Power Plant |
| **2** | 08.19 - 093/2013 | Review of the modules 6 and 8 of the PRODIST (Distribution Procedures) |
| **3** | 08.15 - 095/2013 | Electric energy trading rules applicable to the new accounting and settlement system (NSCL). |
| **4** | 09.04 - 098/2013 | Transition rules applicable to commercial contracts and operation routines of the ones impacted by the interconnection of isolated systems from Macapá and Manaus to the National Integrated System |
| **5** | 09.19 - 103/2013 | Electric Energy Trading Rules charging module applicable to the new accounting and settlement system (NSCL |
| **6** | 11.07 - 121/2013 | Regulation of Ordinances MME n. 455/2012 and 185/2013. |
| **7** | 11.28 - 124/2013 | Improvement of the Electric Energy Trading Rules, 2014 version, applicable to the new accounting and settlement system-NSCL |
| **8** | 12.23 - 129/2013 | Granting of authorization for construction and operation of Photovoltaic Generation |
| **9** | 12.23 - 026/2013 (2nd phase) | Update the of the Accounting Manual |

Table 2 – ANEEL`s RIA production in 2013

[36] Article 5 of the RIA regulation allows the Unit responsible for the rulemaking process to justify the inapplicability or a RIA process in that particular case, but the way that should be done is not written.

| N. | Date and NPRM number | Subject |
|---|---|---|
| **10** | 01.29 - 002/2014 | Methodology of calculation of the cost of capital to be used for the compensation of electric energy generation facilities in quota regime |
| **11** | 02.19 - 003/2014 | change in the Normative Resolution 337/2008 to enable the restitution of financial surpluses of the Energy Reserve Account (Coner) for eligible players for the payment of the Reserve Power Charge –EER |
| **12** | 03.13 - 078/2011 (3rd & 4th phases) | Modules 3 and 4 of the PRORET |
| **13** | 04.08 -008/2014 | Reimbursement of the cost of generating for the concessionaires of the isolated systems benefiting the Fuel Consumption Account (CCC). |
| **14** | 04.24 - 014/2014 | Allocation of costs and benefits in the event of reduction of thermoelectric generation motivated by the use of spilled water for electric power generation |
| **15** | 04.24 - 015/2014 | nine modules of the electric energy trading rules |
| **16** | 05.15 - 019/2014 | Recalculation of the Tariff for the use of the transmission system (TUST) paid by generation plants. |
| **17** | 06.05 - 021/2014 | Improvement of the normative resolution n° 443/2011 |
| **18** | 06.05 - 022/2014 | Minimum maintenance plan and monitoring of maintenance of transmission facilities |
| **19** | 06.11 - 023/2014 (1st & 2nd phases) | Methodology for periodic tariff review (RTP) of distributors |
| **20** | 06.11 - 024/2014 | Asset control manual of the electricity sector |
| **21** | 06.18 - 025/2014 | Cost of acquisition of meters required for the application of discounts for irrigation and aquaculture activities, as well as other conditions for granting the discounts |
| **22** | 06.26 - 027/2014 | Quality of the public service of electricity transmission, coupled with the availability of equipment in the Basic Network |
| **23** | 06.27 - 028/2014 | Characterization of the charge and of the electric system that treats the module 2 of Prodist |
| **24** | 06.27 - 029/2014 | Methodology of setting thresholds for the DEC and FEC Indicators of continuity |
| **25** | 07.03 - 031/2014 | Realization of investments that are considered in the tariffs, in order to maintain the quality and continuity of the service by hydropower plants |
| **26** | 07.24 - 036/2014 | Guidelines of the mediation process in ANEEL |
| **27** | 07.31 - 037/2014 | Improvement of 8.3 and 11.1 sub-modules of PRORET and normative resolution 167/2005 |
| **28** | 08.07 - 039/2014 | Use of the transmission system |
| **29** | 08.14 - 041/2014 | Evaluation and monitoring of investments in the distribution system to serve the Olympic Games and Paralympic Games Rio 2016 |
| **30** | 08.21 - 042/2014 | Financial guarantees associated to energy marketing within the CCEE |
| **31** | 08.21 - 043/2014 | Disclosure of information related to marketing within the CCEE |
| **32** | 08.28 - 046/2014 | Changes in modules 1, 2 and 6 of the PRODIST and in the normative resolution 395/2009 |
| **33** | 09.18 - 048/2014 | Tariff structure methodology of the distribution concessionaires and TUSDg |
| **34** | 09.18 - 050/2014 | Private Projects |
| **35** | 10.02 - 052/2014 | More objective definition of Interruption in emergency situation |
| **36** | 10.15 - 056/2014 | Change in marketing rules applicable to the NSCL |
| **37** | 10.15 - 057/2014 | Simplifying the process of analysis of the basic projects of small hydropower plants |
| **38** | 10.16 - 054/2014 | Price limits of settlement of differences (PLD) |
| **39** | 11.05 - 061/2014 | Additive to the concession contracts of power distribution companies |
| **40** | 11.06 - 062/2014 | Improvement of the conditions and procedures applicable to the shutdown and the impugnment of CCEE members |
| **41** | 11.06 - 063/2014 | Compatibility of energy delivery form of regulated energy trading contracts CCEARs for availability |
| **42** | 11.06 - 064/2014 | Review of the physical guarantee quota allocation |
| **43** | 11.12 - 065/2014 | Rule for the seasonality of the guaranteed energy of plants for ballast and energy allocation |
| **44** | 12.05 - 069/2014 | Regulatory Geographic Information System |
| **45** | 12.12 - 070/2014 | Development of operational holding activities by the transmission companies |
| **46** | 12.18 - 026/2014 (2nd phase) | Calculating losses on distribution (7 Module of PRODIST) for RTP |
| **47** | 12.18 - 072/2014 | Sharing of human resources and infrastructure within the electricity sector |

Table 3 – ANEEL`s RIA production in 2014

The assessments that were produced in this period did not have a standardized form. Some of them were embedded in the text of the Technical Notes that followed the text of the proposed regulations, and some of them were displayed as an appendix of the Technical Notes.

The complexity of the RIAs was also very heterogeneous, an indication that the methods and their applications were evolving as regulators received feedback from the Board of Directors and also from stakeholders (during the public participation process).

Finally, the number of RIAs performed by ANEEL in such a short period is also an indication of the acceptance of this methodology by the technical staff of the agency and of the extensive support provided by senior management and the Board of Directors, which repeatedly reiterated the need for compliance with the rules regarding RIA as well as praised the outstanding reports for their quality.

## 3. THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS – OIRA

### 3.a. The role of OIRA on reviewing drafts of proposed and final regulations

As mentioned above, the Office of Information and Regulatory Affairs is a Federal office established in 1980 by the Paperwork Reduction Act. OIRA is one of the statutory offices of the Office of Management and Budget and has 42 full-time career civil servants that have expertise in a variety of fields, from economics, law and statistics to toxicology, engineering and epidemiology[37].

Its main duties[38] are:

a. To review government collections of information from the public under the Paperwork Reduction Act;
b. To review drafts of proposed and final regulations under Executive Order 12866;
c. To develop and oversee the implementation of government-wide policies in the areas of information technology, information policy, privacy, and statistical policy;
d. To oversee agency implementation of the Information Quality Act, including the peer review practices of agencies.

As mentioned by President Obama[39], the purpose of the review of Federal by OIRA "*have been to ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical ''second opinion'' on agency actions".*

[37] https://www.whitehouse.gov/omb/oira/about
[38] Dudley (2011, p. 114) summarizes the role of OIRA as follows: *Its role, like that of OMB`s budget, management, and legislative divisions, is to provide the President with a tool to check federal agencies natural proclivity to want more (whether is more budget resources , more autonomy in legislative matters, more information, or more regulatory authority).*
[39] http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf

When submitting a significant regulatory action for review, along with a set of information listed in E.O. 12866, each agency should provide OIRA with an assessment of the potential costs and benefits of the regulatory action, and this assessment is commonly referred to as RIA.

According to Dudley (2011, p. 118), *the goal of the regulatory impact analysis (RIA) designed according to this philosophy* (the one expressed in E.O. 12866) *is to provide a transparent accounting of the information available about the need for and consequences of a regulatory proposal and alternatives. It should lay out for policymaker's information on the risks and trade-offs of different paths. As a result, the RIA has emerged as an integral part of government accountability – a nonpartisan*[40] *tool for understanding the likely effects of regulation.*

As stated by OIRA in the document entitled "Regulatory Impact Analysis: A Primer"[41], of 2011, to provide a complete RIA, agencies should follow these steps:

- Describe the need for the regulatory action
- Define the baseline
- Set the timeframe of analysis
- Identify a range of regulatory alternatives
- Identify the consequences of regulatory alternatives
- Quantify and monetize the benefits and costs
- Discount future benefits and costs

[40] It should be noted that this nonpartisan aspect of the regulatory review plays a major role in the better acceptance of OIRA`s role in the U.S. The absence of multiple parties and government coalitions also help RIA and the regulatory review and, therefore, a mere "cut and paste" approach by other countries should be carefully considered so as not to thwart an implementation of regulatory impact assessments, or retreat into performance already achieved by virtue of political difficulties.

[41] https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf

- Evaluate non-quantified and non-monetized benefits and costs
- Characterize uncertainty in benefits, costs, and net benefits

This 16 page long document along with the 48 page long Circular A-4[42], of September 17, 2003, are key references regarding impact analysis within the U.S. Government.

Circular A-4 mentions that good regulatory analysis cannot be conducted according to a formula. It also states that "*conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions".*

Nevertheless, RIA in the U.S. relies largely on analytical approaches, with wide use of both cost-benefit analysis (CBA) and cost-effectiveness analysis (CEA), and the complexity due to the approximately 500 regulatory reviews performed each year by OIRA certainly demands a well-qualified staff comprised of individuals from multiple disciplines.

For more in depth research, OIRA`s website provides a helpful set of links to several documents here listed and to several other sources of information regarding legislation, support documents and procedures.

### 3.b. The relationship between OIRA and Agencies regarding RIA

The legality of the regulatory review process conducted within the Executive Office of the President during its first years was widely questioned by the agencies, the Congress and the press[43]. Although the regulatory review process has now been accepted by the major players, there

[42] https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf
[43] Examples are provided by Tozzi (2011, p. 57).

is still discussion among scholars about the relationship between the removal authority the President has over the heads of non-independent agencies and the power to control decision making entrusted by law to agency heads[44].

There are several benefits that can be listed as a result of a good relationship between Agencies and OIRA. Mendelson and Wiener (2014, 471) provide a good summary of the reasons for this consortium of interests:

> *An agency might favor undergoing OIRA review, in general or at least with regard to a particular rule, because of the prospect that the review, through technical expertise and the interagency process, could contribute useful information and improve the quality of the agency's analyses and policy outcomes. Relatedly, agencies might view OIRA review as contributing useful input on presidential and public values, because of OIRA's proximity to the President (and the OIRA Administrator having been appointed by the President). OIRA review might also increase the likelihood of the agency's successfully promulgating a particular rule, as where the review convinces OIRA to become an ally of the rule, or where the review convinces other parties, whether inside or outside the government, to become allies of the rule. Regulatory Impact Analyses (RIAs) using CBA might even strengthen the targets and policy instruments in the rule. In addition, OIRA review could improve the likelihood that the rule will survive judicial review, possibly because it represents a presidential imprimatur or because it represents approval by technical experts that the agency's analysis and reasoning are of higher quality and arguably non-arbitrary.*

Mendelson and Wiener (2014, 472) also provide several reasons why an agency might dislike OIRA`s review process:

> *On the other hand, an agency may resist OIRA review, in general or for a particular rule, for a number of reasons. Agencies may be irked by oversight that they perceive as intruding into their decision processes. Agencies may also have concerns about cost and delay due to OIRA review, about the considerations that OIRA review may incorporate, and about the substantive elements that OIRA may seek to put in the rule. Senior officials at agencies (appointed by the President and confirmed by the Senate and exercising authority delegated by Congress) may dislike having their policy initiatives reviewed by career civil servants at OIRA (although the OIRA Administrator is also appointed by the President and confirmed by the Senate).*

[44] Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?* , 79 Fordham L. Rev. 2487 (2011). Available at: http://ir.lawnet.fordham.edu/flr/vol79/iss6/2

Nevertheless, OIRA`s 2014 Draft Report to Congress on the benefits and costs of federal regulations and unfunded mandates on State, Local, and Tribal Entities[45] provides a good picture of the current use of RIA:

a. The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2003, to September 30, 2013, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $217 billion and $863 billion, while the estimated annual costs are in the aggregate between $57 billion and $84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.
b. Some rules are anticipated to produce far higher net benefits than others. Moreover, there is substantial variation across agencies in the total net benefits expected from rules. A significant majority of rules have net benefits, but over the last decade, a few rules have net costs, typically as a result of legal requirements.
c. During fiscal year 2013 (FY 2013), executive agencies promulgated 54 major rules, of which 30 were "transfer" rules – rules that primarily caused income transfers. Most transfer rules implement Federal budgetary programs as required or authorized by Congress.
d. The independent regulatory agencies, whose regulations are not subject to OMB review under Executive Orders 12866 and 13563, issued 18 major final rules in FY 2013. The majority of rules were issued to regulate the financial sector.

[45] https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf

e. The estimated annual net benefits of major Federal regulations reviewed by OMB from January 21, 2009, to September 30, 2013 (this Administration), for which agencies estimated and monetized both benefits and costs, is approximately $200 billion.

While the estimated costs and benefits are counted in billions of Dollars, indicating substantial compliance with E.O. 12866, there are still several tactics used by agencies to avoid OIRA, such as[46] splitting an economically significant rule into several smaller, or the use of guidance documents instead of regular rules.

### 3.c. OIRA and Independent Regulatory Agencies

In Brazil, the existence of a genuinely independent agency at first sounds strange but, in fact, these bodies exist and their nature requires a deeper analysis.

As pointed by Dudley & Brito (2012, p. 29), Independent Regulatory Agencies, or Commissions (IRCs) *do not fall clearly into the realm of any of the three branches of government. Members of these commissions must reflect a balance of political parties, are appointed to specific terms by the president, and are confirmed by Congress*.

Independent Regulatory bodies were encouraged, by E.O. 13579, to comply with the provisions set by E.O 13563 and, therefore, were directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Nevertheless, section 3, b of E.O. 12866 is still in force and independent regulatory agencies, as defined in 44 U.S.C. 3502(10) are not yet subject to regulatory review by OIRA[47].

[46] Further information about agency avoidance to OIRA is provided by Mendelson, N.A. & Wiener, J. B. Responding do agency avoidance of OIRA. Harvard Journal of Law & Public Policy. Vol. 37. May 13, 2014. Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5887&context=faculty_scholarship

[47] It should be noted that there is one bill in Congress to affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies (the Independent Agency Regulatory Analysis Act of 2013, S. 1173, 113th), introduced on June 18, 2013, sponsored by Senator Robert

Although some authors may conclude that the process of centralized regulatory review has improved regulatory analysis beyond what would otherwise be the case[48], it might be argued[49] that, for the independent regulatory agencies, OIRA should act more like a technical body of experts, than as the herald of the President and that OIRA's nonbinding advice would maintain the balance of the current institutional relationship between elected bodies and independent commissions.

However, Dudley (2011, p 127-128) points out that, due to the absence of subjection of the Independent Regulatory Agencies to OIRA oversight, not only are the presidential checks and balances weaker for them than for executive departments and agencies, but the analytical support for their regulations tends to be weaker as well.

The debate taking place in the USA can be very useful for the Brazilian reality. Even with a very different historical background concerning agencies and oversight, Brazil is currently disseminating RIA among its regulatory agencies (which are set in a similar way to the Independent Regulatory Agencies in the USA). As of yet however, the use of RIA by other offices in the executive branch is not required (and that is the opposite of what happens in the USA), there

"Rob" Portman (Republican Junior Senator from Ohio) and bipartisan cosponsored by Sen. Susan Collins (R-ME) and Sen. Mark Warner (D-VA). https://www.govtrack.us/congress/bills/113/s1173.

[48] Fraas & Lutter (2011), while trying to measure the effectiveness of executive orders on regulatory planning and review and the resulting process of centralized regulatory oversight comparing the behavior of regulatory agencies and IRCs prior to E.O. 13579, concluded that the analysis conducted by the IRCs is generally the minimum required by statute; that they offer only a qualitative discussion of benefits and costs and present this discussion without any formal review of alternatives and that they generally do not analyze economic effects in a manner intended to meet any identifiable standards for such analysis,

[49] Maria Sole Porpora. The introduction of Regulatory Impact Assessment in American Independent Regulatory Commissions. September, 2014. Osservatorio sull'Analisi d'Impatto della Regolazione. Available at http://www.osservatorioair.it/wp-content/uploads/2014/10/OssAIR_Porpora_RIA-US-Indep-Reg-Commission_P2-2014.pdf

is no centralized regulatory review process in place[50], and much discussion exists about if there should be such a body.

### 3.d. OIRA`s RIA checklist

OIRAs website offers a wide range of information about RIA, how it should be implemented by agencies, and a variety of information about Statistical Programs and Standards.

Among these documents is a short checklist, published on October 28, 2010 and designed to assist agencies in producing RIAs, as required for economically significant rules by Executive Order 12866 and OMB Circular A-4. The checklist is a set of 16 questions (two of them with some secondary questions), referenced to the Executive Orders or to Circular A-4, and stated in a way that enables the agencies to properly verify, in advance, if the RIA will meets the executive requirements.

The questionnaire is as follows:

1. Does the RIA include a reasonably detailed description of the need for the regulatory action?
2. Does the RIA include an explanation of how the regulatory action will meet that need?
3. Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?
4. Is the information in the RIA based on the best reasonably obtainable scientific, technical, and economic information and is it presented in an accurate, clear, complete, and unbiased manner?

[50] Although some review can be made by the Executive Office (Casa Civil) under Decree 4176, of 2002, on the rules edited by the Presidency.

5. Are the data, sources, and methods used in the RIA provided to the public on the Internet so that a qualified person can reproduce the analysis?
6. To the extent feasible, does the RIA quantify and monetize the anticipated benefits from the regulatory action?
7. To the extent feasible, does the RIA quantify and monetize the anticipated costs?
8. Does the RIA explain and support a reasoned determination that the benefits of the intended regulation justify its costs (recognizing that some benefits and costs are difficult to quantify)?
9. Does the RIA assess the potentially effective and reasonably feasible alternatives?
    a. Does the RIA assess the benefits and costs of different regulatory provisions separately if the rule includes a number of distinct provisions?
    b. Does the RIA assess at least one alternative that is less stringent and at least one alternative that is more stringent?
    c. Does the RIA consider setting different requirements for large and small firms?
10. Does the preferred option have the highest net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires a different approach?
11. Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?
12. Does the RIA use appropriate discount rates for benefits and costs that are expected to occur in the future?
13. Does the RIA include, if and where relevant, an appropriate uncertainty analysis?

14. Does the RIA include, if and where relevant, a separate description of distributive impacts and equity?
    a. Does the RIA provide a description/accounting of transfer payments?
    b. Does the RIA analyze relevant effects on disadvantaged or vulnerable populations (e.g., disabled or poor)?
15. Does the analysis include a clear, plain-language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory action under consideration, including the qualitative and non-monetized benefits and costs?
16. Does the analysis include a clear and transparent table presenting (to the extent feasible) anticipated benefits and costs (quantitative and qualitative)?

## 4. OIRA`S CHECKLIST AND THE QUALITY OF ANEEL`S RIAS

### 4.a. Main results from applying OIRA`s checklist

Between August 8, 2013 and January 1, 2015, ANEEL produced 47 RIAs. All of them are available on the Internet along with the text of the corresponding proposed rule at the time of notice of the proposed rulemaking (NPRM). This process is known as a "public hearing" by ANEEL. Therefore, it is possible to access the full text of the assessments and all supporting documentation, made available by the Agency and evaluated using OIRA`s checklist.

For simplification purposes, only seven items of the checklist were selected, namely:

1. Does the RIA include a reasonably detailed description of the need for the regulatory action?
2. Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?
3. Is the information in the RIA based on the best reasonably obtainable scientific, technical, and economic information and is it presented in an accurate, clear, complete, and unbiased manner?
4. Are the data, sources, and methods used in the RIA provided to the public on the Internet so that a qualified person can reproduce the analysis?
5. Does the RIA explain and support a reasoned determination that the benefits of the intended regulation justify its costs (recognizing that some benefits and costs are difficult to quantify)?
6. Does the RIA assess the potentially effective and reasonably feasible alternatives?
7. Does the analysis include a clear, plain-language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory

action under consideration, including the qualitative and non-monetized benefits and costs?

Most of the RIAs developed by ANEEL were presented as a set of two documents: a Technical Note (Nota Técnica) and a summary table. The latter can present itself as a stand-alone document or, more commonly, as an annex to the technical note. The summary table is required by a resolution that regulates RIA in ANEEL, but typically the more complex aspects of the analyses, as well as most of the data used, are within the text of technical notes, since this is the document historically used by technicians to present their analyses and arguments.

The documents presented for each NPRM were analyzed in accordance with the seven questions selected from the checklist and grades were given for each RIA, in a scale of colors as follows:

| Grade | 0 | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|---|
| Color | | | | | | |

Table 4 – Scale of the grades given to ANEEL`s RIAs

The results are presented in table 5, and a series of conclusions can be derived from them.

First of all, it must be pointed out that the evaluation presented here is not aimed at specific departments of ANEEL or any of the specific subjects presented in the RIAs but rather seeks to demonstrate (even in a simplified and highly subjective form), the overall quality of the RIAs at the Agency based on the perspective of the items evaluated.

| N. | Date and NPRM number | Detailed description | Appropriate baseline | Best information | Open data | Benefits justify costs? | Alrternatives | Plain-language executive summary |
|---|---|---|---|---|---|---|---|---|
| 1 | 08.15 - 094/2013 | | | | | | | |
| 2 | 08.19 - 093/2013 | | | | | | | |
| 3 | 08.15 - 095/2013 | | | | | | | |
| 4 | 09.04 - 098/2013 | | | | | | | |
| 5 | 09.19 - 103/2013 | | | | | | | |
| 6 | 11.07 - 121/2013 | | | | | | | |
| 7 | 11.28 - 124/2013 | | | | | | | |
| 8 | 12.23 - 129/2013 | | | | | | | |
| 9 | 12.23 - 026/2013 (2nd phase) | | | | | | | |
| 10 | 01.29 - 002/2014 | | | | | | | |
| 11 | 02.19 - 003/2014 | | | | | | | |
| 12 | 03.13 - 078/2011 (3rd & 4th phases) | | | | | | | |
| 13 | 04.08 -008/2014 | | | | | | | |
| 14 | 04.24 - 014/2014 | | | | | | | |
| 15 | 04.24 - 015/2014 | | | | | | | |
| 16 | 05.15 - 019/2014 | | | | | | | |
| 17 | 06.05 - 021/2014 | | | | | | | |
| 18 | 06.05 - 022/2014 | | | | | | | |
| 19 | 06.11 - 023/2014 (1st & 2nd phases) | | | | | | | |
| 20 | 06.11 - 024/2014 | | | | | | | |
| 21 | 06.18 - 025/2014 | | | | | | | |
| 22 | 06.26 - 027/2014 | | | | | | | |
| 23 | 06.27 - 028/2014 | | | | | | | |
| 24 | 06.27 - 029/2014 | | | | | | | |
| 25 | 07.03 - 031/2014 | | | | | | | |
| 26 | 07.24 - 036/2014 | | | | | | | |
| 27 | 07.31 - 037/2014 | | | | | | | |
| 28 | 08.07 - 039/2014 | | | | | | | |
| 29 | 08.14 - 041/2014 | | | | | | | |
| 30 | 08.21 - 042/2014 | | | | | | | |
| 31 | 08.21 - 043/2014 | | | | | | | |
| 32 | 08.28 - 046/2014 | | | | | | | |
| 33 | 09.18 - 048/2014 | | | | | | | |
| 34 | 09.18 - 050/2014 | | | | | | | |
| 35 | 10.02 - 052/2014 | | | | | | | |
| 36 | 10.15 - 056/2014 | | | | | | | |
| 37 | 10.15 - 057/2014 | | | | | | | |
| 38 | 10.16 - 054/2014 | | | | | | | |
| 39 | 11.05 - 061/2014 | | | | | | | |
| 40 | 11.06 - 062/2014 | | | | | | | |
| 41 | 11.06 - 063/2014 | | | | | | | |
| 42 | 11.06 - 064/2014 | | | | | | | |
| 43 | 11.12 - 065/2014 | | | | | | | |
| 44 | 12.05 - 069/2014 | | | | | | | |
| 45 | 12.12 - 070/2014 | | | | | | | |
| 46 | 12.18 - 026/2014 (2nd phase) | | | | | | | |
| 47 | 12.18 - 072/2014 | | | | | | | |

Table 5 – Results of the evaluation of the 47 RIAs edited by ANEEL between August 8, 2014 and Jan 1, 2015

Table 5 shows that the elements which received the best ratings refer to the detailed description of the need for regulatory action. This is not unique because it is a feature of the regulatory process used by ANEEL that precedes the inclusion of RIA. The staff of the Agency, as well as senior management and external stakeholders, have always demanded and sought to introduce careful descriptions of the reasons that led to the actions of ANEEL and, after the adoption of the RIA tools, this feature remained unchanged (although with some degree of variance).

The assessment of the baselines, however, show a considerable lack of quality. This is gathered from the general evaluation of the RIAs, where it is possible to observe that in the vast majority, the RIAs were prepared after the selection of the option considered best suited among all alternatives. Whereas the option to regulate had remarkable preference over the maintenance of the status quo, the more careful development of this item was normally considered unnecessary.

Most of the information in the RIAs was based on reasonably appropriate sources (scientific, technical and economic). In some cases where there was a lack of information, a search of these instances was demonstrated among the stakeholders, through questionnaires submitted during previous processes of public participation. However, it was determined that there is still room for improvement in regards to the quality of the information, especially if more time is devoted to the process of regulatory impact assessment.

In relation to the information presented, there is a clear need for improvements. Many of the proposed regulations are complex and require several datasets for a complete and careful evaluation, but the documents made available by ANEEL on the Internet do not allow for, in several cases, the reproduction of the analyses. Many of the assessments contained traces of

subjectivity of the evaluators and the conclusions were highly dependent on the individual perception of the technicians about the historical context of the intended regulation.

There were only a few RIAS that developed some reasoning in relation to the quantification of benefits and costs. For the most part, the RIAs presented qualitative assessments and with poorly developed fundamentals. There were no examples found of classic cost-benefit evaluation or even simple cost compliance assessments (although the compliance cost assessment is the ideal one for some of the proposed regulations, and it could be performed with simple models as the Standard Cost Model).

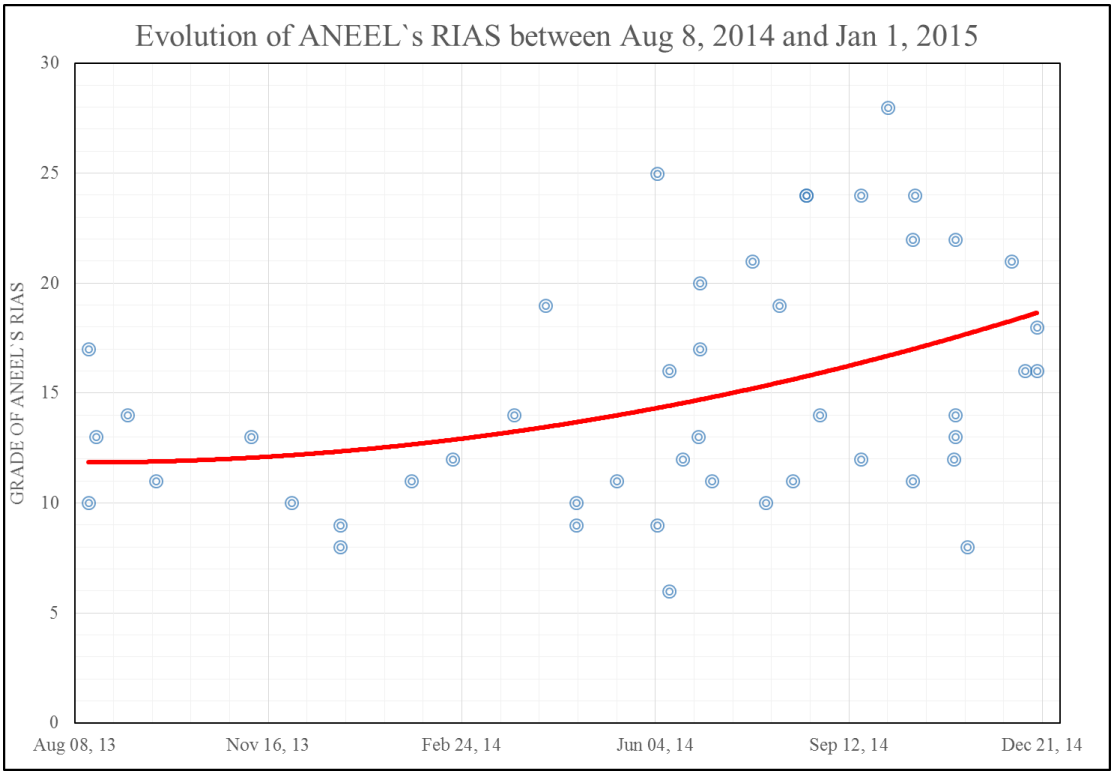
As for the alternatives, the most common example was a set of two options: Do not regulate or regulate as proposed. A few of the RIAs presented a more developed set of alternatives, and those were typically the ones with the best overall evaluation.

Finally, OIRA`s checklist calls for a clear, plain-language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory action under consideration, including qualitative and non-monetized benefits and costs. This is an area where ANEEL`s RIA process needs much improvement, especially regarding the clear, plain-language aspects. Nevertheless, the summary table required by ANEEL`s RIA regulations could easily be used for that purpose.

In general, it is possible to observe that, even though there is still a lot of room for improvement, the overall quality of ANEEL`s RIAs has improved significantly since its implementation. There are  some good examples that can be followed, but major improvements are needed in regard to the evaluation of the baseline, selection and evaluation of alternatives,

quantitative analysis and presentation of data and results for the general public (not only qualified stakeholders).

The evolution of the assessments presented by ANEEL between Aug. 8, 2014 and Jan 1, 2015 is shown in Graph 3. This was developed using the overall grades given for each RIA, plotted according to the date the RIA was made available for the general public (the opening day of the correspondent NPRM). The trend line shows clear improvement during 2014, but also some results that are more dispersed.




Graph 3 – Evolution of ANEEL`s Regulatory Impact Analysis

**4.b. Development of ANEEL`s own checklist**

After careful consideration of the results provided in section 5.a., and also taking into account the theoretical discussions about RIA and the regulation presented in ANEEL`s

Organization Norm 40, of March 12, 2013, it is possible to conclude that a checklist, if present and correctly used, can significantly improve the outcome of the regulatory impact analysis.

However, each checklist must be set up in accordance with the local reality and the applicable regulations.

The first step in order to propose a checklist specific for ANEEL is to begin with OIRA`s check-list. Some adaptation will be necessary in order to comply with ANEEL`s regulations and to conform to the Brazilian experience towards RIA.

The resulting checklist is as follows:

1. Does the RIA include a reasonably detailed description of the need for the regulatory action? Are there non-regulatory options? What are the major groups affected by the problem?
2. Does the RIA include an explanation of how the regulatory action will meet that need? What are the goals and the expected effects of ANEEL`s actions?
3. Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?
4. Is the information in the RIA based on the best reasonably obtainable scientific, technical, and economic information and is it presented in an accurate, clear, complete, and unbiased manner?
5. Are the data, sources, and methods used in the RIA provided to the public on the Internet so that a qualified person can reproduce the analysis?
6. To the extent feasible, does the RIA quantify and monetize the anticipated benefits and costs from the regulatory action? Are the non-financial costs and benefits listed?

7. Does the RIA explain and support a reasoned determination that the benefits of the intended regulation justify its costs (recognizing that some benefits and costs are difficult to quantify)?
8. Does the RIA assess the potentially effective and reasonably feasible alternatives?
    a. Does the RIA assess the benefits and costs of different regulatory provisions separately if the rule includes a number of distinct provisions?
    b. Does the RIA assess at least one alternative that is less stringent and at least one alternative that is more stringent?
    c. Does the RIA consider setting different requirements for large and small firms?
9. Does the preferred option have the highest net benefits (including potential economic, environmental and other advantages; distributive impacts; and equity), unless a statute requires a different approach?
10. Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?
11. Does the RIA use appropriate discount rates for benefits and costs that are expected to occur in the future?
12. Does the RIA include, if and where relevant, an appropriate uncertainty and risk analysis?
13. Does the RIA include, if and where relevant, a separate description of distributive impacts and equity?
14. Does the RIA analyze relevant effects on the consumer?

15. When will the preferred option become effective? Does any other regulation have to be altered or revoked? How and when will the outcome of the proposed solution be evaluated?
16. Does the analysis include a clear, plain-language executive summary, including an accounting statement that summarizes the benefit and cost estimates for the regulatory action under consideration, including the qualitative and non-monetized benefits and costs?

Considering that in Brazil there is not currently a regulatory oversight body , the use of this small set of questions could encourage as a self-evaluation of the quality of the RIAs done by ANEEL and help to avoid common mistakes, thus keeping the agency moving in the right direction, towards the continued improvement of RIA and, above all, smart regulation.

## CONCLUSIONS

Scott Jacobs, a World renowned proponent of RIA, on November 17, 2008, during an International Regulatory Reform Conference held in Berlin[51], quoted an old study done by the EPA (Environmental Protection Agency) that said that US$1 spent on RIA can reduce the overall cost of the regulation by US$10,000.

This number may or may not be the same all the time and in all countries, but certainly will be much worse if bad RIA is produced. As the final quality of the assessments improves, not only will regulatory outcomes improve, but more will be learned about the regulatory process.

But this can only be achieved if RIA is not seen as an obstacle, a part of the bureaucracy, or more red tape. When implementing RIA, regulators may resist them, since good RIA requires a great deal of preparation, disclosure of thinking, public participation and, above all, regulatory humility.

What should always be stressed is that, once in place, and correctly used, RIA tools provide a unique set of methods that significantly help policy officials make the right decisions and allocate the scarce public resources properly.

ANEEL appears to be moving in the right direction. RIA has been introduced into the culture of the Agency and the results are beginning to appear, but there is still a lot to be done, and much to be learned from abroad and from fellow Brazilian agencies that are also implementing this tool.

[51] As mentioned in the video available at https://www.youtube.com/watch?v=19gM3-1aeU0 (1h21'40"). BertelsmannStiftung, 2008.

It is hoped that the evaluation and the checklist provided in this paper will help to foster ANEEL`s development on the subject, keep the debate heated, and provide a comparative learning from one of the great theoretical sources of RIA.

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