

**RAISING THE AGENCIES' GRADES—PROTECTING
THE ECONOMY, ASSURING REGULATORY QUAL-
ITY AND IMPROVING ASSESSMENTS OF REGU-
LATORY NEED**

HEARING
BEFORE THE
SUBCOMMITTEE ON COURTS, COMMERCIAL
AND ADMINISTRATIVE LAW
OF THE
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HOUSE OF REPRESENTATIVES
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RAISING THE AGENCIES' GRADES—PROTECTING THE ECONOMY, ASSURING REGULATORY QUALITY AND IMPROVING ASSESSMENTS OF REGULATORY NEED

TUESDAY, MARCH 29, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4 p.m., in Room 2141 Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Gallegly, Reed, Ross, Cohen, and Johnson.

Also Present: Representative Conyers.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; John Hilton, Counsel; Johnny Mautz, Counsel; Allison Rose, Professional Staff Member; Ashley Lewis, Clerk; (Minority) James Park, Subcommittee Chief Counsel; and Susan Jensen Lachmann, Counsel.

Mr. COBLE. Good afternoon ladies and gentlemen. The Subcommittee will come to order.

As we strive for economic recovery, one thing is clear, overregulation and poor regulation can stunt economic growth; and, most importantly, job creation. Oftentimes when the Federal Government implements inefficient or unnecessary regulations, capital that could be used to invest in new jobs is alternatively used for compliance or withheld to cover anticipated regulatory costs.

Recently, the Mercatus Center published the results of its regulatory report card project which evaluated the government's compliance with the rulemaking process and assessed agencies' performance formulating and promulgating regulations. The results regrettably show that the Federal agencies are not doing an adequate job formulating and promulgating regulations.

According to the Mercatus study, agencies routinely fail to implement well, or even follow some of the basic steps of good rulemaking practice, including practices prescribed by executive orders on regulation. As one can see from the detail and complexity of the Mercatus report, there is no silver bullet that will resolve all of the problems that have been created by ineffective or unnecessary regulations. It is our hope, my hope, that we can extract a few com-

mon principles from today's hearing that can be incorporated into future legislation that will improve regulatory consistency, efficiency, and predictability so that it will yield better regulation when it is needed.

We will also explore today two potential reforms that already have begun to emerge from the results of the report card project, our earlier hearings, and even President Obama's recent statements on rulemaking. The first reform would create an additional procedure in the rulemaking process before the agency has settled on its course of regulation. Professor Peter Strauss, a witness at our last hearing, told us that the agency commitments during this phase of rulemaking, before a proposed rule is even published, often convert the Administrative Procedures Act notice and comment procedures into nothing more than a farce.

The second potential reform would implement stricter requirements for agencies to demonstrate a need to regulate before it issues regulations. Common sense tells us that just because an agency can make a new regulation does not mean that it should make a new regulation.

The first step in the process should be to ask whether a problem exists. If no problem requiring regulation does in fact exist, then the agency should proceed no further, it seems to me, to coin the old adage, "if it ain't broke don't fix it." You have heard that many times.

Congress must have assumed, when it enacted the APA, that agencies would only regulate when they could identify a problem that needed regulation. Executive orders, moreover, have long spelled out that agencies should identify specific market failures before they regulate. Astonishingly, however, the regulatory report card project showed that the single rulemaking step at which agencies performed the worst is demonstrating that there is a need for regulation at all. This suggests that it is time to include in the APA itself stricter requirements to demonstrate regulatory need. These and other reforms should help us to protect the economy and improve the quality of the regulatory agencies' work.

I look forward to hearing from our witnesses. I reserve the balance of my time.

I am pleased to recognize the distinguished gentleman from Michigan, the former Chairman of the Judiciary Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Coble. We come together this afternoon for the fifth consideration of the subject of the burden of regulation on business. The title of the hearing is Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need.

This is a very weighty subject since in the interim, we have not been creating more jobs for Americans, unemployment is the last economic indicia to be affected positively as we try to move out of a recession and in some places, a depression in others. We are not dealing with the 4-year ongoing mortgage foreclosure crisis, giving agencies less resources to protect health and safety of the air we breathe and the food that we eat.

And so I am beginning to wonder about the objective at the end and the effectiveness of a cost benefit analysis because these un-

verifiable assessments are probably as good an opinion as anybody else's around, but it may very well not be dispositive.

Now, we are in the process of trying to determine about the effects of regulatory failure. You know, there were regulations involved in the Japanese meltdown. We just heard today that they discovered that there are leaks that are now increasing the fear of contamination since they have been found in the foodstuffs, and other environmental tragedies.

Only last week we observed the 100th anniversary of that tragic New York fire that triggered so much regulation that we now are worried about overburdening businesses. And so the benefits of regulation are not, to me, contemplated, and I invite my witnesses, our witnesses, to share this part of my presentation with the rest of the Committee because benefits frequently far exceed the costs of regulation. And so if we are only talking about costs in terms of dollars and cents, one can miss the full impact of regulation.

I am hoping that this conversation will lead us to look at the incredible number of activities in which tragedy occurred, since the Triangle Shirtwaist Factory fire which has come down through a lot of activities, going back to the exploding gas tanks in the Ford Pinto discovered by a young attorney, Ralph Nader, the Three Mile Island nuclear meltdown, major bus crashes where people died because of a lack of regulating seat belts, coal mine explosions in West Virginia and so on. I will put the rest in the record.

I welcome our witnesses to a genuine discussion about this matter, and I thank Chairman Coble for the generosity and the time that has been allotted me.

Mr. COBLE. I thank the gentleman.

[The prepared statement of Mr. Conyers follows:]

**Statement of the Honorable John Conyers, Jr.
For the Hearing on "Raising the Agency's Grades - Protecting the
Economy, Assuring Regulatory Quality and Improving Assessments
of Regulatory Need" Before the Subcommittee on Courts,
Commercial and Administrative Law**

**Tuesday, March 29, 2011, at 4:00 p.m.
2141 Rayburn House Office Building**

Today's hearing is now the fifth hearing that this Subcommittee has held on the subject of regulatory reform.

As with the prior hearings, the subject of today's hearing focuses on a solution in search of a problem based on faulty assumptions and conclusions.

It would be so much more beneficial if the Majority focused its attention on serious problems, like creating more jobs for Americans, dealing with the now four-year long ongoing mortgage foreclosure crisis, and giving agencies more – not less – resources to protect the health and safety of the air we breath and the food we eat.

Instead, I get the strong sense that the Majority is following the same strategy it often does – repeat something often enough and people will begin think it is true, whether it is or not.

With respect to today's hearing, that talking point seems to be that agencies have "overburdened" businesses with regulations that are stifling economic growth.

My response remains the same. The Majority deliberately downplays the benefits of regulation and exaggerates its costs, when in fact, the benefits of regulation far exceed its costs, whether those benefits are defined in monetary terms or in terms of promoting values like protecting public health and safety and ensuring civil rights and human dignity.

The particular focus of today's hearing is the so-called Regulatory Report Card issued by the Mercatus Center, an industry-funded think tank.

These report cards purport to "grade" agencies' use of cost-benefit analysis. Perhaps not surprisingly, the Mercatus Center finds most agencies lacking in its admittedly subjective view.

I am skeptical of basing major policy decisions solely on a subjective and unverified assessment like that. But this hearing gives us another opportunity to explore important questions about the costs and benefits of regulations.

Agencies ought to retain the flexibility to head off problems and not wait for disaster to strike before regulating, and measures that needlessly hamstring that flexibility are dangerous.

Last Friday was the 100th anniversary of the Triangle Shirtwaist Factory fire, in which 146 workers - mostly immigrant women, some of them teenagers - were killed. That tragedy resulted directly from the lack of any regulation regarding workplace safety, fire safety, and employee rights.

Business owners at the time resisted attempts by government to reduce the risk of such a tragedy happening again in terms eerily similar to what we hear from House Republicans today, claiming the new regulations were needless, useless, and would wipe out industry in the state.

Since 1911, there have been at least 24 major examples of regulatory failure, including the sinking of the Titanic, the exploding gas tanks in the Ford Pinto, the Three Mile Island nuclear reactor meltdown, and the Union Carbide plant explosion in Bhopal, India. Just the most recent examples include:

1. The major bus crash in New York, where 15 people were killed and a lack of seat belts may have contributed to the loss of life.
2. The Massey coal mine explosion in West Virginia, which took the lives of 29 miners. In fact next month, will mark the one-year anniversary of that explosion.

3. The explosion of BP's Deepwater Horizon oil rig in the Gulf of Mexico, which stemmed from lax regulation of oil drilling platforms, is only the most prominent example.
4. The home foreclosure crisis, the 2008 financial crisis, and the ensuing Great Recession, all of which stemmed from the fact that regulators, under the Bush Administration, lacked the direction, resources and authority to confront the highly reckless behavior of the private sector, and particularly the lending and financial services industries.

I raise these examples to make the point that we ought not wait until another tragedy on the scale of the Triangle factory fire takes place. That fire was a dramatic illustration of why government must sometimes regulate industry to protect people.

I hope we keep that bigger picture in mind as we continue this ongoing discussion about the need for regulation.

Another question we ought to discuss is whether the real problem with the regulatory system is that agencies lack the resources needed to fulfill their responsibilities that they have been tasked to perform by Congress.

This possibility was brought home to me last month as I watched the Majority strip away funding for the Environmental Protection Agency and other agencies through a series of amendments to H.R. 1, the "Full-Year Continuing Appropriations Act, 2011."

Specifically, these amendments would prohibit these agencies from using any federal funding to promulgate and implement various regulations, especially those concerning environmental protection, the implementation of the Patient Protection and Affordable Care Act, and the consumer protection provisions and other financial reforms of the Dodd-Frank Wall Street Reform Act.

The Majority has forgotten that it was in direct response to these regulatory failures in the health care and financial realms that Congress passed the Dodd-Frank Act and other measures.

Do we really want to set ourselves up again for the kind of “regulatory Wild West” that got us into trouble in the first place?

Finally, we should consider how to account for benefits that are difficult to reduce to dollar figures. For example:

- What is the benefit of a rule that prohibits prison rape?
- What is the benefit of a rule requiring wheelchair access to a public restroom?

Reduced simply to dollar figures, the costs of such rules may indeed outweigh the benefits, given the relatively small number of people who would benefit from such rules.

But the benefits of regulations may go well beyond what can be discussed in dollar terms.

I, for one, believe that a rule that prevents even one person from being raped in prison or that allows one person to use a public restroom with dignity is worth the monetary cost on private prison corporations and businesses that would constitute public accommodations under federal law.

That is the fundamental role of governmental regulation and, indeed, of government itself - to use its power to protect the public, especially those who are most vulnerable to the whims of corporations' profit-maximizing ethos.

I thank our witnesses for being here today and look forward to their testimony.

Mr. COBLE. We have now been joined by the distinguished Ranking Member, the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Coble. Pardon my tardiness.

Today we consider the regulatory report card project undertaken by the Mercatus—Mercatus Center, not exactly on the tip of my tongue on a regular basis. These report cards purport to assess the quality of agencies use of regulatory analysis by assigning numer-

ical grades from zero to five for each of 12 questions used to assess performance of agencies for a possible 60 points if you hit the top five for 12 times. The hearing title implies that Mercatus' grades, "are accurate based on sound methodology."

The title also suggests we should, therefore, focus on changing the existing regulatory system based on this finding by the Mercatus Center. By Mercatus' own admission, however, the report cards, "are subjective and its grading is not transparent or capable of any third-party replication."

Although Mercatus says it has instituted a process to address these concerns, that process appears to involve only Mercatus scholars verifying each others conclusions, not any objective third-party analysis and intervention.

To the extent that the majority seeks to premise changes to the rulemaking process based only on Mercatus' findings, I find this, and I think the Nation would find it troubling. Perhaps I would be more comforted if it were not for the fact that Mercatus does not approach the issue of regulatory reform with a neutral perspective, the way that maybe, say the Administrative Conference of the United States might approach something. Mercatus was founded and is funded by the Koch brothers, not the beverage that we all enjoy but Charles and David Koch, the owners of Koch Industries, the second largest privately held company in the country, a company which has large oil and lumber interests among others. Oil and lumber are industries not normally desirous of any government regulation at all. They like to cut trees and decide when and how they will replenish their forests and take from the earth as much oil as they can, and we saw with Deepwater Horizon how good it is not to regulate oil drilling. Mercatus continues to be heavily funded by donations from some of the Nation's largest corporations, all of which have an interest in stifling economic health and safety regulations.

According to The Wall Street Journal, 14 of the 23 regulations that President Bush put on his regulatory hit list had been recommended first by the Mercatus Center. A lawyer described Mercatus' strategy this way: You take corporate money, you give it a neutral sounding think tank, hire people with pedigrees and academic degrees who put out credible-seeming studies, but they all coincide perfectly with the economic interests of their founders, kind of like an academic middle person. Mercatus' regulatory report card may or may not turn out to be accurate. The problem is we will never really know because there is no way to verify a subjective conclusion versus in-house doctoring.

We need to guard against enacting what might turn out to be needless analytical requirements based on possibly faulty findings by a think tank with a known regulatory agenda and contributors who have a particular desired outcome that they seek.

As I have said before, agencies must retain the ability to act to protect Americans' public health and safety and ensure the soundness of our Nation's economy and to guarantee that Americans' civil rights are not infringed upon. While recognizing that regulation can impose costs, we understand that, we should not ever forget that the benefits far outweigh the costs. America has had some of its greatest years of economic and job growth under the current

regulatory system. At a minimum, that seems to point to the conclusion there is no inconsistency in the regulatory system we have and economic and job growth. We ought to keep that in mind and proceed cautiously before further hampering agency rulemaking.

I yield back the balance of my time, and thank you for the allowance.

Mr. COBLE. I thank the gentleman from Tennessee. We have been joined by the distinguished gentleman from South Carolina, Mr. Gowdy, and the distinguished gentleman from Florida, Mr. Ross. Good to have you all with us. We will proceed with the hearing. I will give you some background on our witnesses who will appear today.

Mr. Richard Williams is the Mercatus Center Director of Policy Research. He served in the Office of Management and Budget for 27 years as the director of Social Sciences and the Center For Food Safety and Applied Nutrition in the Food and Drug Administration. Dr. Williams is a expert in benefit cost analysis and risk analysis, particularly related to food safety and nutrition. He has published in risk analysis and the Journal of Policy Analysis and Management, and has counseled foreign governments, including the United Kingdom, South Korea, and Australia. A Vietnam veteran, Dr. Williams received his Ph.D. and his MA in economics from Virginia Tech and his B.S. in business administration from the Old Dominion University. He has served as an adviser to the Harvard Center For Risk Analysis and taught economics at Washington and Lee University.

Mr. Jerry Ellig is a senior research fellow at the Mercatus Center at George Mason University where he has worked since 1996. Between August 2001 and August 2003, he served as deputy director and acting director of the Office of Policy Planning at the Federal Trade Commission.

Dr. Ellig also has served as a senior economist for the Joint Economic Committee on the U.S. Congress and as an assistant professor of economics at George Mason University. Dr. Ellig directed the Mercatus Center's regulatory report card project which assesses the quality of agency performance in promulgating major regulations. Dr. Ellig has published numerous articles on government regulation and business management in both scholarly and popular periodicals, and has coauthored and edited several books on competition, regulation, and environmental energy. He earned his Ph.D. degree and his M.A. in economics from George Mason University and his B.A. in economics from Xavier University.

Our third witness is Professor Robert L. Glicksman. Professor Glicksman has published widely on the subject of environmental and administrative law. Before coming to George Washington University in 2009, he taught at the University of Kansas School of Law where he was the Robert W. Wagstaff distinguished professor of law. A graduate of the Cornell School of Law, prior to joining the academy, Professor Glicksman worked in private practice at a firm in Washington, DC where he focused on environmental, energy and administrative law issues.

Professor Glicksman joined the Center For Progressive Reform in 2002, and has sat on its board of directors since 2008.

Our three witnesses bring glowing credentials to the table. We are glad to have you all with us. We try to go by the 5-minute rule that we apply to you all, and we try to apply it to ourselves as well. You will see when the amber light appears, that is your notice that time is evading. You will have 1 minute after that. When the red light appears, if you could wrap up shortly thereafter, we would be appreciative.

Dr. Ellig, if you would start us off.

**TESTIMONY OF JERRY ELLIG, SENIOR RESEARCH FELLOW,
MERCATUS CENTER, GEORGE MASON UNIVERSITY**

Mr. ELLIG. Thank you, Mr. Chairman, Ranking Member Cohen, Members of the Committee. My name is Jerry Ellig. I am a research fellow at the Mercatus Center at George Mason University. As the Chairman indicated in his introduction, I have also served in two out of three branches of the Federal Government. I probably won't get into the third. But each time I have left government and gone back to academia, I have walked out with a long list of studies I wished someone had done, experts I wished we had been able to consult if we had only been able to find them, to answer questions in order to make better policies and make better decisions in government. And that is really the genesis of the Mercatus regulatory report card, trying to figure out what is it that agencies actually do when they sit down to make decisions about regulation, and how well do agencies do the things that Presidents of both political parties have been telling them to do for several decades.

Some time ago in our schooling, most of us probably learned that there are a few basic things that we are supposed to do before making important decisions that affect us or affect the lives of other people. Really basic things, like identify the goal that we are trying to achieve, what outcome do we want, identify the nature of the problem we have to overcome to achieve the goal. Identify the various alternative ways of achieving that goal, and then weigh the pros and cons of alternatives. You might call that Decisionmaking 101.

Well, regulatory analysis, as required by Federal executive order, is simply Decisionmaking 101 applied to regulation. What we are trying to do in the Mercatus regulatory report card is assess how well agencies do these basic things that you would do before making any big decisions. We have examined all of the proposed economically significant regulations issued over the past few years, those are the really big ones. We used criteria drawn from the executive order that governs regulation, an OMB Circular 8-4 that lays out best practices for regulatory analysis. We look at the quality of the analysis, and we also look at the extent to which the agency claims to have used the analysis when it made decisions about the regulation.

So what do we find? We find that agencies do a lot of good things in their regulatory analysis. We also find that the average quality is low, the best ones are not stellar, there is wide variation in the quality of regulatory analysis, we see a lot of best practices in agency regulatory analysis, but they are not widely shared and no analysis does everything well. And we also see that often the regu-

latory analysis produced by agencies reads as if it were written after the major decisions about the regulation were made.

You might call this the ready fire aim approach to regulation. And these findings are consistent with the findings of other scholars at other institutions, other universities, resources for the future, other respected places, who have looked at smaller groups of regulations to try to figure out what is the quality of the analysis and what do agencies do with it.

Most importantly for the topic of this hearing, the biggest single deficiency we find in many agency regulatory analyses, not all, is insufficient definition and an explanation of the systemic problem that the regulation is supposed to solve. Now, that is a big mouthful of jargon. Let me give an analogy.

A couple of years ago I walked into the bathroom and found water on the floor. That wasn't the problem, that was the symptom. We had to do some analysis to solve the problem. We found out that there was a crack in a plastic pipe that, in turn, was caused by the fact that the toilet wasn't leveled and it was rocking back and forth and that is what cracked the pipe. After we did the analysis, we could solve the problem at minimal cost.

Now when I sit down to read agency regulatory analyses, they frequently read like somebody walking into a bathroom saying well, the problem is obvious, there is water on the floor. And the solution is obvious. We are going to make everybody buy a mop, and we will now take public comment on what types of mops we should require people to buy and how long the handle should be. Anyone who disagrees with the favored approach is accused of wanting to allow children to slip on wet floors.

Now, lest you think I am exaggerating, I have examples in my written testimony of a number of cases where we read agency regulatory analyses looking for the definition of the systemic problem; and essentially, there is either an assertion of a problem with no underlying cause-and-effect theory, no underlying empirical analysis, a symptom gets misdiagnosed as a problem, or the problem is simply stated as the purpose of this regulation is to implement such and such Public Law.

More broadly, about half the regulations we looked at scored a zero or a one on this criterion, indicating that there was a little bit of a perfunctory look at a problem or an assertion, but not much real analysis. Now, some did well; but about half of them just didn't do much.

We also find when we looked at the quality of the analysis that there isn't much difference across Administrations. So this is not a partisan issue or a political problem, it is an institutional problem that can only be solved with changes in the incentives that agencies face to do good analysis. So instead of ready-fire-aim, the system should be look before you leap.

Thank you for your time.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Ellig follows:]

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PROTECTING THE ECONOMY, ASSURING REGULATORY QUALITY, AND
IMPROVING ASSESSMENTS OF REGULATORY NEED**

MARCH 29, 2011

Jerry Ellig
Senior Research Fellow
Mercatus Center at George Mason University



**LOOK BEFORE YOU LEAP:
IMPROVING PRE-PROPOSAL REGULATORY ANALYSIS
MARCH 29, 2011**

Jerry Ellig
Senior Research Fellow

Committee on the Judiciary
Subcommittee on Courts, Commercial, and Administrative Law
U.S. House of Representatives

Mr. Chairman and members of the subcommittee:

Thank you for the opportunity to present this testimony. I am an economist and research fellow at the Mercatus Center, a 501(c)(3) research, educational, and outreach organization affiliated with George Mason University in Arlington, Virginia.¹ My principal research for the last 25 years has focused on the regulatory process, government performance, and the effects of government regulation. For this reason, I'm delighted to testify on today's topic.

Somewhere along the line in our schooling, most of us learn about a few basic steps to take before making a major decision. These steps include: (1) define the goal or goals you are trying to achieve, (2) understand the nature of the obstacles to be overcome or problems to be solved to achieve the goal, (3) develop a list of alternative ways to solve the problem, and (4) assess the pros and cons of each alternative. After taking these steps, deciding on a course of action may still be challenging. The decision may involve difficult tradeoffs between some of the pros and cons. But at least the decision will be informed by knowledge of the likely consequences of alternative actions. Call this "Decision Making 101." I don't know any reasonable person who would argue we should *not* do these things when making decisions that have really big effects on our lives or the lives of others.

Regulatory impact analysis is nothing more than Decision Making 101 applied to regulation: (1) define the outcome or outcomes the regulatory agency seeks to achieve, (2) understand the root causes of the problem that stands in the way of achieving the desired outcomes, (3) develop a wide variety of alternative ways to solve the problem, and (4) assess the pros and cons of each alternative. If we cut through all the jargon and details, these are the four main elements of regulatory analysis.

We expect federal regulation to accomplish a lot of important things, such as protecting us from financial fraudsters, preventing workplace injuries, preserving clean air, and deterring terrorist attacks. And regulation also requires sacrifices. Depending on the regulation, consumers may pay more, workers may receive less, our retirement savings may grow more slowly due to reduced corporate profits, and we may have less personal freedom. Regulatory analysis is the key ingredient that makes these tradeoffs more transparent to decision makers. So, understanding the effects of regulation has to start with sound regulatory analysis.

¹ This testimony reflects only the views of its author and does not represent an official position of George Mason University.

For more than three decades, executive orders have instructed federal agencies to conduct regulatory impact analyses and consider the results of those analyses when making decisions. On January 18, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review."² Executive Order 13563 "reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866."³ In fact, Executive Order 12866 reaffirmed the principles originally established 30 years ago with Executive Order 12991.

This reaffirmation is welcome. The analytical principles in Executive Order 12866 and the Office of Management and Budget's accompanying guidance in Circular A-4⁴ are sound. The administration's reaffirmation of those principles may help quell some uncertainty about future standards for regulatory review that has existed since the administration announced in January 2009 that it planned to revise the executive order.⁴

But how well do executive branch agencies do what presidents have been telling them to do for more than three decades? Scholarly research on regulatory analysis, including the Mercatus Center's own Regulatory Report Card, finds that agency regulatory analysis is often incomplete and seldom used in decisions. This pattern persists across administrations, suggesting that the source of the problem is institutional, not political. Fundamental institutional reforms are necessary to ensure that agencies conduct high-quality regulatory impact analysis and use it in decisions. In short, regulatory impact analysis needs to be (1) required, (2) objective, and (3) used.

The body of my testimony documents current problems with the quality and use of regulatory analysis and suggests some solutions. Let me briefly summarize my recommendations:

1. Regulatory impact analysis should be required. Regulatory analysis needs to be legislatively required for all federal agencies, including independent agencies.
2. Regulatory impact analysis should be objective. All too often, regulatory analyses read as if the agency first made most of the major decisions about the regulation, then handed the regulation off to its economists to produce an analysis to get the regulation through the OMB review process. Agencies should publish regulatory analysis, along with all underlying data and research, before writing proposed regulations. Agency economists should have the independence to conduct objective analysis, instead of being expected to produce an advocacy document that justifies decisions that have already been made.
3. Regulatory impact analysis should be used. When Congress requires regulatory agencies to consider particular factors in designing regulations, such as costs or efficiency, agencies usually explain how those factors affected their decisions. Congress should require all agencies to explain, when proposing regulations, how the major elements of regulatory analysis affected decisions about the regulation.

The Problem: Decisions Made Before Analysis

Presidential executive orders on regulatory review have had a limited effect on the quality and use of regulatory analysis. Case studies document instances in which regulatory analysis helped improve regulatory decisions by providing additional options regulators could consider or unearthing new

² Executive Order 13563, "Improving Regulation and Regulatory Review," *Federal Register* 76:14 (Jan. 21, 2011), 3821–23, http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo13563_01182011.pdf.

³ Office of Management and Budget, Circular A-4, "Regulatory Analysis" (Sept. 17, 2003), http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

⁴ Office of Management and Budget, "Federal Regulatory Review: Request for Comments," *Federal Register* 74:37 (Feb. 26, 2009), 8819, http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_FR_Notice_on_Regulatory_Review.pdf.

information about benefits or costs of particular modifications to the regulation.⁵ But Government Accountability Office studies and scholarly research reveal that in many cases, regulatory impact analyses are not sufficiently complete to serve as a guide to agency decisions. The quality of analysis varies widely, and even the most elaborate analyses still have problems.⁶

All too often, agency economists have to conduct regulatory analysis after most major decisions about regulations have already been made. The analysis then becomes an advocacy document written to justify the agency's decisions, or a mere paperwork exercise to fulfill requirements imposed by the Office of Management and Budget. Surveying the scholarly evidence on regulatory analysis, Robert Hahn and Paul Tetlock conclude that economic analysis has not had much impact, and the general quality of regulatory analysis is low. "Nonetheless," they note, "in a world where regulatory impacts are frequently measured in the billions of dollars, margins matter. Thus, economists should pay more attention to how economic analysis can contribute to improving benefits and costs on the margin."⁷

Most previous research examines subsets of economically significant regulations—often health, safety, and environmental regulations. Since 2008, the Mercatus Center's Regulatory Report Card has assessed the quality and use of regulatory analysis for all proposed, economically significant regulations issued by executive-branch agencies.⁸

We assess how well the agency defines and measures the outcome the regulation is supposed to produce, identifies and assesses the root cause of a market failure or other systemic problem the regulation seeks to solve, develops alternative approaches, and identifies the costs and benefits of the regulation. We evaluate the transparency, clarity, and documentation of models and data in the analysis. Finally, we assess the extent to which the agency used the analysis to make decisions and made provisions for retrospective analysis of the regulation. In short, we examine how well the executive-branch regulatory agencies do what presidents have been telling them to do for more than three decades.

The attached paper I coauthored with John Morrall, a 29-year veteran of the Office of Information and Regulatory Affairs who joined Mercatus as an affiliated senior scholar in 2010, summarizes the

⁵ Winston Harrington, Lisa Heinzerling, and Richard D. Morgenstern (eds.), *Reforming Regulatory Impact Analysis* (Washington, DC: Resources for the Future, 2009); Richard D. Morgenstern, *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington, DC: Resources for the Future, 1997); Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (New York: Cambridge University Press, 1991).

⁶ See Art Fraas and Randall Lutter, "The Challenge of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4" (Resources for the Future Discussion Paper 10-54, December 2010); Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* (Fall 2009): 1–96; Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader, and Petrea Moyle, "Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,868," *Harvard Journal of Law and Public Policy* 23, no. 3 (2001): 859–71; Robert W. Hahn, and Patrick Dudley, "How Well Does the Government Do Cost-Benefit Analysis?" *Review of Environmental Economics and Policy* 1, no. 2 (2007): 192–211; Robert W. Hahn, and Robert Litan, "Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe," *Journal of International Economic Law* 8, no. 2 (2005): 473–508; Robert W. Hahn, Randall W. Lutter, and W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2000); Government Accountability Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, Report GAO/RCED-98-142 (May 1998); Government Accountability Office, *Air Pollution: Information Contained in EPA's Regulatory Impact Analyses Can Be Made Clearer*, Report GAO/RCED 97-38 (April 1997).

⁷ Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?" *Journal of Economic Perspectives* 22, no. 1 (Winter 2008): 67–84.

⁸ Regulatory Report Card, Mercatus Center at George Mason University, www.mercatus.org/reportcard.

Regulatory Report Card results for 2008 and 2009.⁹ We assign a score to economically significant rules ranging from 0 to 5 points on 12 different criteria, for a total possible score of 60 points. In both 2008 and 2009, agency regulatory analyses earned an average of about 27 out of a possible 60 points, or 45 percent. If these were student papers, the average would be an “F.”

The highest score in 2008 was 43 points (72 percent), which the Department of Transportation earned for its proposed Corporate Average Fuel Economy regulation. The highest score in 2009 was 48 points (80 percent), for the combined DOT-EPA Corporate Average Fuel Economy and Greenhouse Gas Emission standards. The lowest score in 2008 was 7 points, for the Social Security Administration’s regulation on scheduling administrative law judges. The lowest score in 2009 was 3 points, for a Department of Energy regulation on loan guarantees. These latter two regulations are both budget regulations that affect how federal agencies implement spending programs. Budget-related regulations tend to receive much less thorough analysis and usually receive lower Report Card scores than most other kinds of regulations. These findings are all consistent with previous studies by academics and the Government Accountability Office that assess how well regulatory agencies comply with the executive orders governing regulatory analysis.

Table 1 shows average scores on each of our 12 criteria in 2008 and 2009. In general, the analyses score the best on the criteria that are easiest to satisfy, such as accessibility via the Internet, documentation of data and models, and clarity (criteria 1-4).

Table 1: Average Quality of Regulatory Analysis is Low

Criterion	2008 Average Score	2009 Average Score
Openness		
1. Accessibility	3.53	4.06
2. Data documentation	2.24	2.50
3. Model documentation	2.33	2.62
4. Clarity	2.93	2.83
Analysis		
5. Outcome definition	2.36	2.36
6. Systemic problem	1.80	1.60
7. Alternatives	2.29	2.21
8. Benefit-cost analysis	2.09	2.19
Use		
9. Some use of analysis	2.44	2.24
10. Considered net benefits	2.20	1.62
11. Measures and goals	1.36	1.29
12. Retrospective data	1.73	1.50
Total	27.31	27.02

Maximum possible score on each criterion is 5 points.
Maximum possible total score is 60 points.

⁹ Jerry Ellig and John Morrall, “Assessing the Quality of Regulatory Analysis: A New Evaluation and Data Set for Policy Research” (working paper, Mercatus Center at George Mason University, Dec. 2010), <http://mercatus.org/publication/assessing-quality-regulatory-analysis>.

Quality of Analysis

Few of the scores on individual criteria changed much between 2008 and 2009. There is some evidence that scores improved on some of the Openness criteria, such as accessibility and documentation—consistent with the Obama administration’s focus on transparency in the regulatory process. On average, explanations of how regulatory costs affect prices of goods and services also improved somewhat. Very modest improvements occurred in evidence of regulatory benefits and analysis of the distribution of benefits. In general, these changes involved improvements from poor scores to middling scores. This is why the score on criterion 8, benefit-cost analysis, increased slightly.

One of the major areas where regulatory analysis is weakest is identification of the systemic problem the regulation is supposed to solve (criterion 6). This is a key weakness. A systemic problem is a widespread problem that can be traced to a defect in the “rules of the game” that govern behavior—as opposed to the faults of a few “bad actors” that can be dealt with on a case-by-case basis. If the agency cannot identify and demonstrate the existence of a systemic problem that a regulation might solve, how can it assess whether the regulation is likely to solve the problem or identify alternative solutions that might be more effective? Given the low score on this criterion, it is perhaps not surprising that average scores are also relatively low on other criteria that assess the “meat and potatoes” of the analysis—definition of the outcome the regulation is supposed to accomplish (criterion 5), identification and assessment of alternatives (criterion 7), and assessment of costs and comparison of costs with benefits (criterion 8).

A homely analogy illustrates why thorough analysis of the systemic problem is important if regulatory agencies are going to do the job Congress expects them to do. A few years ago at home, I found water on the floor of the bathroom. Over a few days, we had to employ a little trial-and-error scientific method to figure out whether the water came from a leak in the sink, a leak in the toilet, a leak in a valve supplying water to the sink or the toilet, or a leak in a pipe. We finally found a crack in the plastic cold water pipe. We also determined that the crack itself occurred because the toilet was not completely level; it rocked back and forth a bit, putting pressure on the pipe. Armed with this knowledge of the systemic problem, we replaced the broken piece of pipe and leveled the toilet.

All too often, agencies go no further in analyzing the systemic problem than saying, “Look, there’s water on the floor.” Since this definition of the problem is considered obvious, there is no perceived need to have a theory of how the water got there or evidence that the theory is true, and only solution considered is, “Buy a mop”—an expenditure that may be unnecessary (since an old rag will work just as well) and doesn’t really get to the root cause of the problem. To add insult to injury, anyone who wants to do more careful analysis gets accused of wanting to let children slip on wet floors.

Let me provide a few examples from specific regulations that illustrate the best and worst practices we’ve seen in analysis of the systemic problem.

Best Practice: HUD Proposed RESPA Regulation. The maximum possible score on criterion 6, definition of the systemic problem, is 5 points. Thus far, the only regulation we’ve evaluated that received 5 points on this criterion was a regulation proposed by the Department of Housing and Urban Development in 2008 under the Real Estate Settlement Procedures Act. The regulation would have revised the way certain real estate settlement charges related to mortgages are disclosed to consumers. The intended result was to reduce settlement costs for some consumers by making the charges easier to understand and compare across different lenders.¹⁰

In defining the problem, HUD’s regulatory analysis suggested that the complexity of real estate transactions and lack of information by some borrowers allow mortgage providers to collect higher fees from less informed or less sophisticated borrowers. Charging different customers different prices is not necessarily evidence of a “market failure,” because it does not necessarily lead to economic inefficiency. Car dealers, universities, and airlines often charge different customers different prices based on the

¹⁰ A full set of evaluation notes on this regulation is available at <http://mercatus.org/reportcards/real-estate-settlement-procedures-act-proposed-rule-simplify-and-improve-process>.

customer's sophistication, knowledge, or perceived willingness to pay; this practice allows the companies to cover their fixed costs without chasing away the price-sensitive customers. But the practice strikes many people as unfair when the seller charges some customers higher prices simply because they are less informed. It is arguably inefficient if the transaction or the disclosures are so complex that a significant subset of customers does not understand them well enough to compare competing loan offers.

Whether the problem is inefficiency or inequity or both, HUD's analysis identified a systemic root cause: asymmetries in information that are exacerbated by the current way certain loan terms are disclosed. The analysis offered a coherent theory explaining how the information problem could allow mortgage providers to charge some customers higher fees than others. It even explained why this pricing practice might not produce a "smoking gun" of excessive profits for mortgage lenders or brokers: the firms may find they have to pay out most of the rewards to salespeople who are especially skilled at inducing less-informed customers to over-pay for loans. In addition to a coherent theory, HUD offered empirical evidence that the theory is actually true. The analysis cited several studies by government entities and consulting firms that found consumers with less education, no financial counseling, or more complex shopping strategies tended to pay more for loans and settlement services. About the only faults we could find with HUD's analysis of the systemic problem were that one study with results contradictory to HUD's was merely mentioned in a footnote rather than fully addressed, and the analysis did not completely assess uncertainties about the existence or size of the problem. Nevertheless, HUD's treatment of the systemic problem is the best we have seen thus far.

Poor Practice: E-Verify in Federal Acquisition Regulations. This 2008 regulation required federal contractors to use the E-Verify system to ensure that they do not hire illegal workers. The closest the analysis came to identifying a systemic problem was asserting that federal contractors hire illegal workers because they do not "internalize" all of the costs associated with having a less stable labor force. This assertion is supported with neither a coherent theory nor empirical evidence.¹¹

Poor Practice: Side-Window Air Bag Standards. In 2009, the National Highway Traffic Safety Administration proposed standards for side window air bags to prevent passengers from being ejected in accidents. The accompanying analysis offered no explanation of why auto manufacturers would decline to include a seemingly cost-effective safety measure, why consumers would be unwilling to pay for safety, or why effects on third parties make the regulation desirable even if manufacturers and consumers are unwilling to pay for air bags that meet the new standards. In fact, the analysis even documents many things manufacturers are already doing to protect passengers from side-window ejection, including installation of side-window air bags.¹²

Poor Practice: Electronic Health Record Incentive Payments. In 2010, the Department of Health and Human Services proposed a rule implementing incentive payments to Medicare and Medicaid providers who adopt certified electronic medical record technology. The accompanying analysis offers no definition or examination of whatever systemic problem prevents health care providers from adopting this technology on their own. There are a few hints that the technology might have benefits to society that may not be captured by providers or patients, but this is not elaborated into a theory, and no evidence is presented to support such a theory.¹³ In the section labeled "Need for the Regulation," HHS simply states, "This proposed rule would implement the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5) that provide incentive payments to eligible professionals (EPs) and

¹¹ A full set of evaluation notes on this regulation is available at <http://mercatus.org/reportcards/employment-eligibility-verification>.

¹² A full set of evaluation notes on this regulation is available at <http://mercatus.org/reportcards/motor-vehicle-safety-standards-ejection-mitigation>.

¹³ A full set of evaluation notes on this regulation is available at <http://mercatus.org/reportcards/electronic-health-record-incentive-program>.

eligible hospitals participating in Medicare and Medicaid programs that adopt and meaningfully use certified electronic health record (EHR) technology.”¹⁴

In numerous cases, agencies do not even offer particularly strong assertions about a problem the regulation is supposed to solve. This happens most frequently with regulations implementing federal spending programs, like the electronic health records regulation. The regulatory analysis simply calculates the expenditures, and perhaps some benefits, with no analysis of the problem the expenditures are supposed to solve. Non-budget regulations also suffer from this deficiency on occasion. For example, a pair of regulations the Department of Justice proposed in 2008 to implement the Americans with Disabilities Act simply stated that the purpose of the regulations was to implement the act, with no explanation of why facility owners have made choices that sometimes conflict with the standards in the proposed regulations.

The regulations I’ve just mentioned may in fact solve some kind of systemic problem, but reading the agencies’ regulatory analysis, I can’t tell what it is. When I put more effort into understanding a leak in my bathroom than some regulatory agencies put into understanding the root causes of the problems they’re supposed to solve with really big regulations, there’s something seriously wrong with our regulatory process.

Use of Analysis

The Regulatory Report Card research team also searches the *Federal Register* notice for the proposed regulation to see if there is any evidence that the agency used information about the systemic problem, projected regulatory outcomes, alternatives, benefits, or costs to make decisions. We do not expect the analysis to dictate the decision via a rigid rule, such as “regulate only when monetized benefits exceed monetized costs.” Section 1 of Executive Order 12866 explicitly instructs agencies to regulate only when the benefits “justify” the costs, unless the law requires another approach. Thus, the results of the regulatory analysis are supposed to inform the decision, not determine the decision. Indeed, information about projected benefits or regulatory alternatives could affect the agency’s decision even if the agency is prohibited from considering costs (as with rules implementing the Clean Air Act). In these kinds of situations, we give agencies credit for using parts of the analysis, even if the agency did not use, or was prohibited from using, information about costs.

We look to see whether any of the information prepared for the regulatory analysis appears to have had any effect on the agency’s decisions. This approach might generate some “false positives” by giving agencies credit for using the analysis even when decisions were made for other reasons. Either way, agencies should be transparent about whether and how they have used regulatory analysis, and our project is the first to systematically try and determine this fact. We have found examples where agencies explicitly credit the regulatory analysis for affecting some significant decisions. But the average scores on our Use criteria are relatively low—less than 2.5 out of a possible 5 points on each of these criteria. Even under our relatively liberal definition of “use,” agencies claim to use the regulatory impact analysis for significant decisions only about 20 percent of the time at best:

- In 2008, agencies claimed the analysis affected a major decision for only 10 out of 45 proposed regulations.
- In 2009, analysis affected a major decision for only 9 out of 42 proposed regulations.
- In 2008, agencies chose the alternative that maximized net benefits or explicitly explained why they chose another option for 11 regulations.
- In 2009, they did so for 6 regulations.

¹⁴ Department of Health and Human Services, “Medicare and Medicaid Programs; Electronic Health Record Incentive Program; Proposed Rule,” *Federal Register* 75:8 (Jan. 13, 2010), 1975.

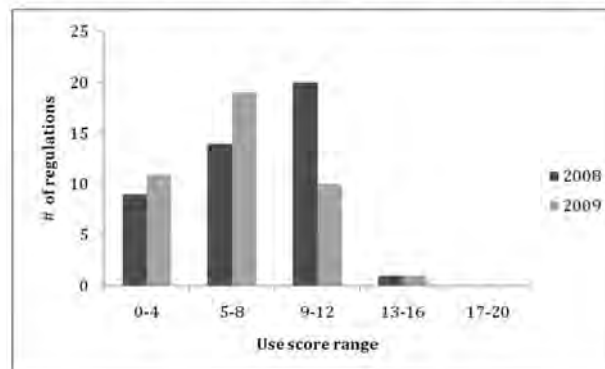
Scores are even lower on criteria 11 and 12, which indicate whether the agency commits to using the results of regulatory analysis in the future by establishing goals and measures for the regulation's outcomes and tracking data to measure the regulation's performance. The average scores on these criteria are barely above 1. This indicates that, on average, agency regulatory analyses provide some semblance of a framework for evaluating the regulation's effects on the future, but agencies have made no commitment to do so.

In a few cases, agencies do articulate goals for regulations, explain how regulations are linked to agency strategic goals under the Government Performance and Results Act, commit to gathering data for retrospective evaluation, or commit to some form of retrospective review in the future. Usually, however, they say little about this. In 2008, we found only 4 proposed economically significant regulations for which the agency established goals or measures for any major outcome the regulation was supposed to produce. In only two cases did the agency enumerate the data it would use to evaluate major outcomes the regulation was supposed to produce. For 16 out of 45 regulations, the agencies indicated that they might conduct some type of analysis in the future to assess some of the regulation's effects. Similarly, in 2009, we found 4 proposed regulations for which the agency established goals or measures for a major outcome and 2 regulations for which the agency indicated what data it would use to evaluate major outcomes of the regulation in the future. Agencies indicated they might conduct some kind of retrospective analysis for only 14 out of 42 proposed regulations.

The use of analysis in regulatory decisions decreased in 2009. This result is apparent from the average scores on criteria 9–12 for 2008 and 2009. It becomes even stronger when we perform econometric analysis that controls for the quality of regulatory analysis and the shift in the mix of regulations proposed in the two years.

However, it would be a mistake to portray the first year of the Obama administration as a retreat from stellar use of analysis in the Bush administration. Figure 1 shows the distribution of Use scores in 2008 and 2009. Neither year shows more than middling use of analysis. The principal difference is that the middle category shrinks in 2009, with more proposed regulations that either fail to use the analysis or make only a passing reference to it. If agencies do not specifically let the public know how or whether they have used these analyses, the public is left largely in the dark about how their decision were made.

Figure 1: Distribution of Scores for Use of Regulatory Analysis, 2008 and 2009



The good news is that for every criterion, a few regulatory analyses received a score of “5” for employing potential best practices, as table 2 shows. The line of table 2 labeled “Theoretical Highest Score” shows the score that could have been achieved in each year if one analysis had incorporated all of the best practices. Clearly, there is potential for tremendous improvement in the quality of regulatory analysis simply through better dissemination of best practices across agencies.

The *knowledge* required to produce better regulatory analysis exists, dispersed throughout agencies in the federal government. OMB Circular A-4 also summarizes a great deal of this knowledge. What’s lacking are institutional *incentives* to produce good analysis and use it to guide decisions.

Table 2: Diffusion of Best Practices Could Greatly Improve Average Quality

Criterion	2008 Average Score	2008 Highest Score	2008 # Earning Highest Score	2009 Average Score	2009 Highest Score	2009 # Earning Highest Score
Openness						
1. Accessibility	3.53	5	12	4.06	5	14
2. Data documentation	2.24	5	1	2.50	5	5
3. Model documentation	2.33	5	3	2.62	5	1
4. Clarity	2.93	5	3	2.83	4	10
Analysis						
5. Outcome definition	2.36	5	2	2.38	5	1
6. Systemic problem	1.60	5	1	1.60	4	4
7. Alternatives	2.29	5	1	2.21	5	1
8. Benefit-cost analysis	2.09	4	3	2.19	5	1
Use						
9. Some use of analysis	2.44	5	2	2.24	5	1
10. Considered net benefits	2.20	5	2	1.62	5	4
11. Measures and goals	1.36	5	1	1.29	4	1
12. Retrospective data	1.73	5	1	1.50	4	2
Total	27.31	43		27.02	48	
Theoretical Highest Score*		59			56	

Maximum possible score: 60 points.

The Solution: Institutional Change

It is not enough for the administration to reaffirm the analytical methods and approach to regulatory review embodied in Executive Order 12866 because this approach has produced mediocre results. The administration and Congress can both take further steps to ensure that all federal agencies conduct high-quality analysis of major proposed regulations and seriously consider the results of that analysis when they make regulatory decisions:

1. Regulatory impact analysis should be required. Currently, Executive Order 12866 requires regulatory impact analysis for significant regulations issued by executive agencies. The requirement is only as binding as OIRA chooses, or is allowed, to make it. Within the administration, OIRA is supposed to serve as a regulatory gatekeeper, ensuring that agencies conduct high-quality regulatory analysis and consider it seriously. OIRA can enforce Executive Order 12866 by returning regulations to agencies for further analysis. Yet OIRA has not returned a regulation to an agency since January 6, 2009, during the final days of the Bush administration.¹⁵ The Mercatus Regulatory Report Card finds that many regulatory analyses

¹⁵ <http://www.reginfo.gov/public/do/eoReturnLetters>.

have significant flaws and the quality of regulatory analysis appears to be unchanged since the Bush administration. Given those findings, it's curious that not a single regulation has been returned in two years. This signals that agencies can expect OIRA to rubber-stamp proposed regulations.

When evaluating regulations for the Regulatory Report Card, we have found that when Congress requires agencies to consider specific factors such as costs or efficiency, they usually do so. Congress could provide a backstop to OIRA by requiring federal agencies to conduct thorough regulatory impact analysis before they issue significant regulations. At a minimum, the analysis should present coherent theories and evidence that (1) define the ultimate outcomes of value to the public the regulation is intended to produce, (2) identify the systemic problem the regulation solves in order to produce those outcomes, (3) outline a wide variety of alternative ways of dealing with the problem, and (4) thoroughly assesses the benefits and costs of each alternative.

No administration has sought to apply the regulatory analysis requirements in executive orders to independent agencies, such as the Federal Communications Commission, the Commodity Futures Trading Commission, or the new Consumer Financial Protection Bureau. Yet the independent agencies issued 94 major regulations during the past ten years.¹⁶ In some cases, such as the Consumer Product Safety Commission and the Securities and Exchange Commission, Congress has seen fit to require some form of economic analysis when agencies issue significant regulations. Such requirements should be standardized and applied to all independent agencies. In addition, there should be an OIRA-like review mechanism before these agencies can issue regulations.

2. Regulatory impact analysis should be objective. Reality isn't optional. The goal of regulatory analysis is to produce knowledge about reality that can inform decisions. Executive Order 12866 requires agencies to consider a wide range of regulatory options. Regulatory impact analysis can reveal the consequences of different options decision makers face. Yet all too often, the regulatory impact analysis gets produced after key decisions have already been made. The timing also effectively gives the federal government a monopoly on producing regulatory impact analyses and inhibits the public's ability to affect the quality of the analysis when it might actually affect agency decisions.

Both problems could be mitigated if agencies were required to conduct and publish regulatory impact analyses (along with all underlying studies and data) for public comment before the proposed regulation is actually written. Agencies would have analysis of regulatory alternatives before they chose which alternative to pursue. In addition, the public would have the opportunity to replicate, improve, and comment upon the agency's economic analysis before the agency uses the analysis to make decisions. (This could be considered part of the advance consultation with stakeholders encouraged by section 2 of President Obama's new executive order.)

Interviews with agency economists reveal that they often face pressure to modify their analysis to support decisions that others in the agency have already made.¹⁷ One way to promote objective analysis is to separate economists from the program offices that propose regulations. Economists' work should be evaluated by other economists, with compensation and career advancement depending on the quality of their analysis—not on whether the analysis supports decisions the agency has already made for other reasons.

3. Regulatory impact analysis should be used. Use of regulatory analysis to make decisions about proposed regulations is more the exception than the rule. For 2008 and 2009, agency regulatory analysis appears to have affected some regulatory decision for only about one-fifth of the proposed regulations.

¹⁶ Office of Management and Budget, *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf.

¹⁷ Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (working paper, Mercatus Center at George Mason University, July 2008), http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf.

Either agencies ignore the regulatory analysis in the vast majority of cases, or they do not explain publicly how they have used it. At worst, the analysis often has little effect. At best, there is a significant transparency problem: agencies may be using the analysis without disclosing how.

Either problem could be mitigated if Congress directed agencies to supply such explanations. Specifically, agencies should be required to explain, when they propose regulations, how the following aspects of the regulatory analysis influenced their decisions:

- The ultimate outcomes of value to citizens the regulation is supposed to produce, and the evidence that the regulation will in fact produce those outcomes
- The definition and root cause of the systemic problem the regulation seeks to solve
- The alternative approaches to solving the problem the agency considered
- The benefits, costs, and net benefits of each alternative

Agencies should be permitted to consider all aspects of the regulatory analysis when making decisions, but not required to follow a rigid decision rule. Executive Order 12866 directs agencies to consider, when making regulatory decisions, “incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.” Agencies are to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”¹⁸ As the executive order recognizes, there are some very good reasons that agencies should not always be required to pick the regulatory option that maximizes the difference between monetized benefits and monetized costs. Unquantified values or other important public purposes may in some cases trump benefit-cost calculations.

In some cases, however, legislation prohibits agencies from considering certain effects of regulation, such as costs. There is much less justification for forcing some agencies to “fly blind” by prohibiting them from even considering some types of information from the regulatory impact analysis when making important decisions. Such prohibitions mandate ignorance.

Conclusion

Regulations produce hundreds of billions of dollars worth of benefits and costs. Yet all too often, the analysis required to make informed decisions about proposed regulations fails to satisfy the requirements adopted by presidents from both political parties during the past three decades. The problem is not political; it persists under both Democratic and Republican administrations. The problem is institutional, and only institutional change will solve it. Regulatory impact analysis should be legislatively required for all agencies. Congress can improve the objectivity of the analysis by requiring agencies to perform and publish the analysis, the underlying data, and the underlying source documents prior to writing regulations. Finally, Congress can encourage use of the analysis by requiring agencies to explain how key aspects of the analysis affected their decisions.

¹⁸ Executive Order 12866, secs. 1(5) and 1(6).

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WORKING PAPER

**ASSESSING THE QUALITY OF REGULATORY ANALYSIS:
A New Evaluation and Data Set for Policy Research**

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The ideas presented in this research are the authors' and do not represent official positions of the Mercatus Center at George Mason University.

**Assessing the Quality of Regulatory Analysis:
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**Assessing the Quality of Regulatory Analysis:
A New Evaluation and Data Set for Policy Research**

Abstract

Congress and the executive branch have attempted to improve the quality of regulatory decisions by adopting laws and executive orders that require agencies to analyze benefits and costs of their decision options. This paper assesses the quality and use of regulatory analysis accompanying every economically significant regulation proposed by executive-branch regulatory agencies in 2008 and 2009. It considers all analysis relevant to the topics covered by Executive Order 12866 that appears in the Regulatory Impact Analysis document or elsewhere in the *Federal Register* notice that proposes the rule.

Our research team used a six-point qualitative scale to evaluate each regulation on 12 criteria grouped into three categories: (1) Openness: How easily can a reasonably intelligent, interested citizen find the analysis, understand it, and verify the underlying assumptions and data? (2) Analysis: How well does the analysis define and measure the outcomes the regulation seeks to accomplish, define the systemic problem the regulation seeks to solve, identify and assess alternatives, and evaluate costs and benefits?; and (3) Use: How much did the analysis affect decisions in the proposed rule, and what provisions did the agency make for tracking the rule's effectiveness in the future?

We find that the quality of regulatory analysis is generally low, varies widely, and did not change much with the change of administrations between 2008 and 2009. The principal improvements across all regulations occurred on the Openness criteria. Budget or "transfer" regulations, which define how the federal government will spend money or collect revenues, have much lower-quality analysis than other regulations. Use of analysis is correlated with its quality, and use of analysis fell in 2009 after controlling for the quality of the analysis. Regulations implementing Recovery Act spending programs have better provisions for retrospective analysis than other transfer regulations.

Keywords: regulatory impact analysis, benefit-cost analysis, regulatory review, regulation

JEL categories: D61, D73, D78, H11, H83, K23, L51, P16

Introduction

For nearly four decades, presidential administrations have required executive-branch agencies to conduct some type of economic impact analysis when they issue major regulations. Since 1993, President Clinton's Executive Order 12866 has laid out the fundamental analytical steps agencies must take. The very first section of the executive order states that agencies must identify the problem they are trying to address and assess its significance, examine a wide range of alternatives to solve the problem, assess the costs and benefits of the alternatives, and choose to regulate only when the benefits justify the costs. Analytical requirements are especially rigorous for "economically significant" regulations, defined as regulations that "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 government or communities" (EO 12866, Sec. 2(f)(1)). Office of Management and Budget (OMB) Circular A-4, issued in September 2003, offered more detailed guidance on "best practices" in regulatory analysis (OMB 2003).

Despite executive orders and detailed guidance, the quality of agencies' regulatory analysis has been inconsistent at best:

- Several studies compared agencies' ex-ante predictions of regulatory benefits and costs with ex-post estimate of actual benefits and costs (Harrington et. al. 2000, OMB 2005, Harrington 2006). These studies found that, in the past, ex-ante estimates tended to overestimate both benefits and costs.
- In a series of papers, Robert Hahn developed and applied a yes/no checklist to evaluate whether agencies' Regulatory Impact Analyses have included a series of major elements that OMB expects them to include. The evaluations focused on final regulations issued by health, safety, and environmental agencies (Hahn and Dudley 2007, Hahn et. al. 1990, Hahn and Litan 2005, Hahn, Lutter, and Viscusi 2000). Surveying the evidence, Hahn and Tetlock (2008, 82–83) conclude that economic analysis has not had much impact, and the general quality of regulatory analysis is low. "Nonetheless," they note, "in a world where regulatory impacts are frequently measured in the billions of dollars, margins matter. Thus, economists should pay more attention to how economic analysis can contribute to improving benefits and costs on the margin."
- Belcore and Ellig (2008) employed a qualitative scoring approach to assess the quality of regulatory analysis at the Department of Homeland Security during its first five years; they conclude these analyses have been seriously incomplete but improved over time.

Most recently, Ellig and McLaughlin (2010) developed a 12-point qualitative framework to assess both the quality and use of regulatory analysis in federal agencies. They evaluated the quality and use of regulatory analyses of "economically significant" rules that were reviewed by OMB's Office of Information and Regulatory Affairs (OIRA) in 2008 and proposed in the

Federal Register.¹ The evaluation criteria are drawn from Executive Order 12866, OMB Circular A-4, and pre-existing scholarship on regulatory scorecards.² Ellig and McLaughlin found that the average quality of the 2008 regulatory analyses is low, both the quality and use of regulatory analysis vary widely, and there are significant opportunities for improvement through the diffusion of best practices. They also found that better analyses are more likely to be used in agency decisions, but only one-fifth of the regulatory analyses in 2008 appeared to have any effect on regulatory decisions (based on information agencies supplied in the preamble).

This study utilizes the Ellig and McLaughlin method to evaluate the quality and use of regulatory analysis for economically significant regulations proposed by executive-branch agencies in 2009. This is of interest for several reasons. First, a comparison of 2008 and 2009 would help identify whether the change of presidential administrations had any effect on the quality or use of regulatory analysis. Second, the Obama administration proposed in February 2009 to revise Executive Order 12866 (OMB 2009a); evaluating the quality and use of regulatory analysis in the Obama administration prior to the revision establishes a baseline to gauge the effects of any changes. Third, extending the evaluation to 2009 and subsequent years builds a larger data set, which may allow us to draw more reliable general inferences about the relative quality of analysis at different agencies or for different types of regulations.

Our principal findings include:

Quality is mostly unchanged in 2009. The average score for regulations proposed in 2008 and 2009 was virtually the same—27 points out of a possible 60. The most significant improvements occurred on Openness criteria, such as online accessibility of regulatory analyses and clarity. On average, explanations of how regulatory costs affect prices of goods and services also improved. Very modest improvements occurred in evidence of regulatory benefits and analysis of the distribution of benefits.

Analysis is less-widely used in 2009. Higher-quality analysis is more likely to be used in regulatory decisions. But for any given level of quality, regulatory agencies were less likely to use the analysis in 2009 than in 2008. This change is disturbing, because one of the most important reasons for doing regulatory analysis is so that decision makers can somehow use it to make better decisions. Of course, good regulatory analysis is also important for reviewers (like OMB) and stakeholders.

Quality is generally low. In both years, the average score is less than half of the possible 60 points. The highest-scoring regulation in 2008 earned 43 out of 60 possible points, equivalent to a grade of C. The highest-scoring regulation in 2009 earned 48 out of 60 possible points, equivalent to a B–.

¹ Economically significant regulations require an extensive Regulatory Impact Analysis (RIA) that assesses the need, effectiveness, benefits, costs, and alternatives for the proposed regulation. (EO 12866 Sec. 6(a)(3)(C))

² The qualitative evaluation method is based on the Mercatus Center's *Performance Report Scorecard*, a 10-year project that assessed the quality of federal agencies' annual performance reports required under the Government Performance and Results Act of 1996. For the most recent results, see McTigue et. al. (2009).

Diffusion of best practices could generate substantial improvement. In 2009, scores ranged from a high of 48 points to a low of just 3 points. In 2008, scores ranged from a high of 43 points to a low of 7 points. For each of our 12 criteria, at least one regulation earned the highest possible score of 5. But for 11 of our 12 criteria, less than a handful of regulations receive a 5. The fact that the highest-scoring regulation in 2009 resulted from collaboration between two agencies also suggests wider sharing of best practices can improve regulatory analysis.

Transfer regulations have worse analysis. Budget or “transfer” regulations, which determine how the federal government will spend or collect money, receive much lower scores. On average, transfer regulations received only 17 points in 2008 and 20 points in 2009, compared to an average of 32–34 points for non-transfer regulations.

Greatest strength: Accessibility on the Internet. Scores on this criterion averaged 4.06 out of 5 possible points in 2009 and 3.53 out of 5 possible points in 2008. These far exceeded average scores on any other evaluation criterion.

Greatest weaknesses: Retrospective analysis and identification of systemic problem. Few regulations or analyses set goals, establish measures, or provide for data gathering to assess the effects of the regulation after it is implemented. Few analyses provide a coherent theory and empirical evidence of a market failure, government failure, or other systemic problem the regulation is supposed to solve.

1. Evaluation Protocol

We evaluated the quality and use of regulatory analysis using 12 criteria grouped into three categories—Openness, Analysis, and Use:

1. Openness: How easily can a reasonably intelligent, interested citizen find the analysis, understand it, and verify the underlying assumptions and data?
2. Analysis: How well does the analysis define and measure the outcomes or benefits the regulation seeks to accomplish, define the systemic problem the regulation seeks to solve, identify and assess alternatives, and evaluate costs and benefits?
3. Use: How much did the analysis affect decisions in the proposed rule, and what provisions did the agency make for tracking the rule's effectiveness in the future?

Figure 1 lists the 12 criteria. Appendix 1 provides additional detail on the kinds of questions considered under each criterion. For a more extensive explanation and justification of this evaluation method, see Ellig and McLaughlin (2010). Individual “Report Cards” showing all scores and scoring notes for each regulation are available at www.mercatus.org/reportcard.

Ten of the 12 evaluation criteria closely parallel the Regulatory Impact Analysis checklist released by the Obama administration on November 3, 2010 (OMB 2010). This is not surprising, since both the administration's checklist and the Mercatus evaluation criteria are based on Executive Order 12866 and OMB Circular A-4. Appendix 2 presents a crosswalk chart comparing the OMB checklist with the 12 criteria used in this paper.

The principal Mercatus evaluation criteria not mentioned in the Obama administration's checklist are two criteria that assess whether the agency provided for retrospective analysis of the regulations' actual effects after it is adopted: criterion 11 (Measures and Goals) and criterion 12 (Retrospective Data). Although ex post, retrospective analysis has not received as much attention as ex ante analysis of proposed regulations; section 5 of Executive Order 12866 states that agencies should conduct retrospective analysis. OMB (2005) has recommended it repeatedly; most recently, OMB (2009b, 45) stated, “[W]e recommend that serious consideration be given to finding ways to employ retrospective analysis more regularly, in order to ensure that rules are appropriate, and to expand, reduce, or repeal them in accordance with what has been learned.” The Government Performance and Results Act arguably requires retrospective analysis of regulations (Brito and Ellig 2009). It is a major area of regulatory analysis where the United States lags other industrialized nations (OECD 2009, 92).

Figure 1: Regulatory Analysis Assessment Criteria**Openness**

1. **Accessibility:** How easily were the Regulatory Impact Analysis, the proposed rule, and any supplementary materials found online?
2. **Data Documentation:** How verifiable are the data used in the analysis?
3. **Model Documentation:** How verifiable are the models and assumptions used in the analysis?
4. **Clarity:** Was the analysis comprehensible to an informed layperson?

Analysis

5. **Outcomes:** How well does the analysis identify the desired benefits or other outcomes and demonstrate that the regulation will achieve them?
6. **Systemic Problem:** How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?
7. **Alternatives:** How well does the analysis assess the effectiveness of alternative approaches?
8. **Benefit-Cost Analysis:** How well does the analysis assess costs and compare them with benefits?

Use

9. **Some Use of Analysis:** Does the preamble to the proposed rule or the Regulatory Impact Analysis present evidence that the agency used the analysis?
10. **Cognizance of Net Benefits:** Did the agency maximize net benefits or explain why it chose another option?
11. **Measures and Goals:** Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?
12. **Retrospective Data:** Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?

Scoring Standards

For each criterion, the evaluators assigned a score ranging from 0 (no useful content) to 5 (comprehensive analysis with potential best practices). Thus, each analysis has the opportunity to earn between 0 and 60 points. In general, the research team used the guidelines in table 1 for scoring. Because the Analysis criteria involve so many discrete aspects of regulatory analysis, we developed a series of sub-questions for each of the four Analysis criteria and awarded a 0–5 score for each sub-question. These scores were then averaged to calculate the score for the individual criterion.

Table 1: What Do the Scores Mean?

5	Complete analysis of all or almost all aspects, with one or more "best practices"
4	Reasonably thorough analysis of most aspects and/or shows at least one "best practice"
3	Reasonably thorough analysis of some aspects
2	Some relevant discussion with some documentation of analysis
1	Perfunctory statement with little explanation or documentation
0	Little or no relevant content

Caveats and Qualifications

At the outset of this project, we had to address a seemingly simple question: What counts as a "regulatory analysis"? Most previous research focuses on the document required by OMB that is explicitly named the "Regulatory Impact Analysis" (Hahn and Dudley 2007, Hahn et. al. 1990, Hahn and Litan 2005, Hahn, Lutter, and Viscusi 2000). We adopted a broader definition that includes the entire preamble to the proposed rule, the freestanding document or section of the preamble labeled Regulatory Impact Analysis, and additional "technical support documents" that sometimes accompany a Regulatory Impact Analysis. Since different agencies organize their material in different ways, this approach helped ensure that we were fair to all agencies and included all material relevant to the topics a good regulatory analysis is supposed to address. We also needed to read the entire preamble to assess whether the agency used the results of the regulatory analysis or made provisions to conduct retrospective analysis in the future.

Given resource constraints, any evaluation project like this faces a fundamental choice between breadth and depth of the assessment. We assess whether the Regulatory Impact Analysis and preamble to the proposed rule make a reasonable effort at covering the major elements of regulatory analysis. Commenters on earlier versions of this paper who have detailed knowledge of particular regulations have usually told us that our evaluations seem too lenient. Others with more specialized knowledge will likely have additional important critiques of individual regulations, especially related to the quality, completeness or use of the underlying science. We have opted for less depth in favor of greater breadth. To the best of our knowledge, this is the

most-detailed assessment of the quality of regulatory analysis for all economically significant regulations proposed in a two-year period.

Finally, we caution the reader about drawing direct policy conclusions about particular regulations based on our analysis. Criteria 1–8 only evaluate the quality of regulatory analysis. We do not evaluate whether the proposed rule is economically efficient, fair, or otherwise good public policy.

The same caveat applies to the Use criteria. Criteria 9 and 10 assess the extent to which analysis of the regulation’s outcomes or benefits, the systemic problem, the alternatives, and costs informed the agency’s decisions about the regulation. On these criteria, we took great pains to avoid imposing the value judgment economists often make: that the agency should choose the most economically efficient alternative, as determined by a comparison of quantified benefits and costs. If an agency used some analysis of a regulation’s benefits to make decisions, even if it did not consider costs or efficiency, it could receive some points on criterion 9. Similarly, if an agency demonstrated that it was fully cognizant of the net benefits of alternatives, but explicitly rejected the alternative with the greatest net benefits in favor of some other alternative for clearly articulated reasons, it could receive points on criterion 10. As a result, an agency can earn points on these two criteria even in cases where it is prohibited by law from considering costs, such as the EPA’s national ambient air quality standards. We believe this approach is consistent with the spirit of Executive Order 12866 (sec. 1), which identifies multiple factors in addition to efficiency that are supposed to guide agency decisions: “[I]n choosing among regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

Criteria 11 and 12 assess the extent to which the agency demonstrated its willingness to evaluate the regulation’s actual effects in the future. Ideally, agencies would articulate goals, measures, and data that they could use to assess both realized benefits and costs, thus assessing the regulation’s economic efficiency. In practice, so few regulations include any provisions for retrospective analysis that the handful of high scores occur in cases where agencies have at least identified goals, measures, and data that could be used to assess the regulation’s effectiveness.

Improving the transparency of regulatory documents and the quality of regulatory analysis are necessary but not sufficient to improve public policy. Nevertheless, stakeholders or the agencies themselves may find these analyses useful as a starting point for identifying weaknesses in agency analyses. For example, if an agency has identified only one or two closely related regulatory alternatives, stakeholders may be able to identify additional alternatives that may accomplish the goal at a lower cost.

2. Results for 2009

2.1 Best and Worst Analyses

Table 2 lists all 42 economically significant proposed regulations for 2009. The best analysis was for the combined Environmental Protection Agency–Department of Transportation regulation on greenhouse gases from light-duty vehicles and Corporate Average Fuel Economy (CAFE) standards. This regulation received the highest total score (48 points) as well as the highest Analysis score (18 points). The two agencies collaborated on developing the regulation and the analysis. The regulatory analysis discusses the “conundrum” associated with the identified market failure. The agencies recognize that their estimates of the private benefits of increased fuel efficiency outweigh private costs, yet consumers do not voluntarily purchase as many fuel-efficient cars as economic rationality would suggest. This sort of disclosure should prove invaluable to stakeholders who wish to comment more extensively on the merits of the rule that requires increases in fuel efficiency. The result suggests that more extensive sharing of best practices could improve the quality of regulatory analysis. This regulation received a score six points higher than the next-best regulation in 2009 and five points higher than DOT’s CAFE regulation in 2008.

Capturing second place in 2009 are three energy-efficiency regulations from the Department of Energy and the Department of Homeland Security’s regulation limiting concentrations of live organisms permitted in discharged ballast water from ships.

The three worst analyses came from the Department of Education (General and Non-Loan Programmatic Issues, 14 points) and the Department of Energy (Weatherization Assistance, 10 points; Loan Guarantees for Projects that Employ Innovative Technologies, 5 points). Like most of the low-ranking regulations, all three of these are budget or “transfer” regulations. Transfer regulations, italicized in table 2, outline how the federal government will spend money, set fees, or administer spending programs. Most of these regulations score poorly, continuing a trend observed in 2008 (Ellig and McLaughlin 2010, 14–15).

The best analysis in 2009 received 48 points, or 80 percent of the maximum possible score. The worst received just five points (8 percent). The range of scores widened compared to 2008. In 2008, scores ranged from seven points to 43 points. If these were student papers, the best one in 2009 would have received a B-, and the best one in 2008 would have received a C.

2.2 Summary Statistics

Table 3 summarizes average total scores and scores on the three categories of criteria for 2008 and 2009. The average score in 2009 was 27.02 points out of a possible 60, or 45 percent. The average for 2008 was 27.31, virtually the same. The very low t-statistic indicates that the difference is not statistically significant; for all practical purposes, the averages are the same.³

³ In plain English, that means the total scores for 2008 and 2009 are like two sets of ping pong balls pulled at random out of the same bucket; any difference in the averages is random chance. There is likely no difference at all between the total scores for the two years.

Table 2: Scores for 2009 Proposed Regulations

Proposed Rule	RIN	Department	Total	Openness	Analysis
Greenhouse Gases from Light-Duty Vehicles	2060-AP58	DOT/EPA	48	15	18
Energy Conservation: Small Electric Motors	1904-AB70	DOE	42	16	14
Energy Efficiency Standards for Commercial Clothes Washers	1904-AB93	DOE	40	14	14
Energy Efficiency Standards for Pool Heaters etc.	1904-AA90	DOE	40	14	14
Living Organisms in Ships' Ballast Water Discharged in U.S. Waters	1625-AA32	DHS	40	15	15
Nutrition Labeling of Single-Ingredient Products	0583-AC60	USDA	38	14	16
Title V Greenhouse Gas Tailoring Rule	2060-AP86	EPA	38	15	11
Emissions From New Marine Compression-Ignition Engines	2060-AO38	EPA	37	15	16
Portland Cement NESHAP	2060-AO15	EPA	35	17	11
Greenhouse Gas Mandatory Reporting Rule	2060-AO79	EPA	34	12	10
Migratory Bird Hunting	1018-AW31	Interior	34	13	12
Emission Standards, Reciprocating Internal Combustion Engines	2060-AP36	EPA	33	14	11
<i>End Stage Renal Disease Prospective Payment System</i>	<i>0938-AP57</i>	<i>HHS</i>	<i>32</i>	<i>13</i>	<i>9</i>
Lead; Opt-out and Recordkeeping Provisions	2070-AJ55	EPA	32	16	13
Primary National Ambient Air Quality Standard for Nitrogen Dioxide	2060-AO19	EPA	32	11	14
Motor Vehicle Safety Standards, Ejection Mitigation	2127-AK23	DOT	31	12	11
<i>School Improvement Grants</i>	<i>1810-AB06</i>	<i>ED</i>	<i>31</i>	<i>13</i>	<i>7</i>
Primary National Ambient Air Quality Standard for Sulfur Dioxide	2060-AO48	EPA	30	12	12
Medical Examination of Aliens	0920-AA26	HHS	28	14	12
Positive Train Control	2130-AC03	DOT	26	10	7
<i>Prospective Payment Skilled Nursing Facilities</i>	<i>0938-AP46</i>	<i>HHS</i>	<i>26</i>	<i>11</i>	<i>8</i>
<i>Electronic Health Record Incentive Program</i>	<i>0938-AP78</i>	<i>HHS</i>	<i>25</i>	<i>13</i>	<i>7</i>
<i>Home Health Prospective Payment System</i>	<i>0938-AP55</i>	<i>HHS</i>	<i>25</i>	<i>11</i>	<i>8</i>
<i>Prospective Payment System for Inpatient Rehabilitation Facilities</i>	<i>0938-AP56</i>	<i>HHS</i>	<i>25</i>	<i>13</i>	<i>8</i>
<i>Hospital Inpatient and Long-Term Care Prospective Payment System</i>	<i>0938-AP39</i>	<i>HHS</i>	<i>24</i>	<i>14</i>	<i>5</i>
Hazard Communications Standard	1218-AC20	DOL	24	13	7
<i>Outpatient Prospective Payment</i>	<i>0938-AP91</i>	<i>HHS</i>	<i>24</i>	<i>13</i>	<i>6</i>
<i>Race to the Top Fund</i>	<i>1810-AB07</i>	<i>ED</i>	<i>23</i>	<i>9</i>	<i>5</i>
<i>Revisions to Payment Policies Under the Physician Fee Schedule</i>	<i>0938-AP40</i>	<i>HHS</i>	<i>23</i>	<i>11</i>	<i>6</i>
<i>State Fiscal Stabilization Fund Program</i>	<i>1810-AB08</i>	<i>ED</i>	<i>23</i>	<i>13</i>	<i>5</i>
Renewable Fuels Program	2060-AD81	EPA	21	11	6
<i>Special Community Disaster Loans Program</i>	<i>1660-AA44</i>	<i>DHS</i>	<i>20</i>	<i>11</i>	<i>6</i>
<i>Investing in Innovation</i>	<i>1855-AA06</i>	<i>ED</i>	<i>19</i>	<i>11</i>	<i>4</i>
<i>Hospice Wage Index for FY 2010</i>	<i>0938-AP45</i>	<i>HHS</i>	<i>18</i>	<i>9</i>	<i>4</i>
<i>Housing Trust Fund Program</i>	<i>2506-AC23</i>	<i>HUD</i>	<i>18</i>	<i>10</i>	<i>3</i>
<i>Revisions to the Medicare Advantage Program</i>	<i>0938-AP77</i>	<i>HHS</i>	<i>18</i>	<i>8</i>	<i>4</i>
<i>Credit Assistance for Surface Transportation Projects</i>	<i>2105-AD70</i>	<i>DOT</i>	<i>17</i>	<i>11</i>	<i>8</i>
<i>Expansion of Enrollment in the VA Health Care System</i>	<i>2900-AN23</i>	<i>VA</i>	<i>17</i>	<i>11</i>	<i>3</i>
<i>Children's Health Insurance Program (CHIP)</i>	<i>0938-AP53</i>	<i>HHS</i>	<i>15</i>	<i>8</i>	<i>1</i>
<i>General and Non-Loan Programmatic Issues</i>	<i>1840-AC99</i>	<i>ED</i>	<i>14</i>	<i>8</i>	<i>2</i>
<i>Weatherization Assistance Program</i>	<i>1904-A097</i>	<i>DOE</i>	<i>10</i>	<i>6</i>	<i>3</i>
<i>Loan Guarantees for Projects that Employ Innovative Technologies</i>	<i>1901-AB27</i>	<i>DOE</i>	<i>5</i>	<i>3</i>	<i>2</i>
Averages			27.02	12.00	8.38

Note: Regulations in red italics are budget or "transfer" regulations.

Some slight shifts in scores may have occurred in two of the categories between 2008 and 2009. The average Analysis score was largely unchanged. The average Openness score increased by about one point—from 11.04 in 2008 to 12 in 2009. The average Use score fell by about a point, from 7.73 in 2008 to 6.64 in 2009. These differences are statistically significant at the 85 percent confidence level. This is suggestive, but not nearly as strong an indicator as the 95 percent confidence level economists normally use as the standard to infer a likely relationship. Based on this comparison of averages for all kinds of regulations, perhaps the transparency of regulatory analysis increased in 2009, and actual use to make decisions may have decreased, but the difference is not clear enough to tell for sure.

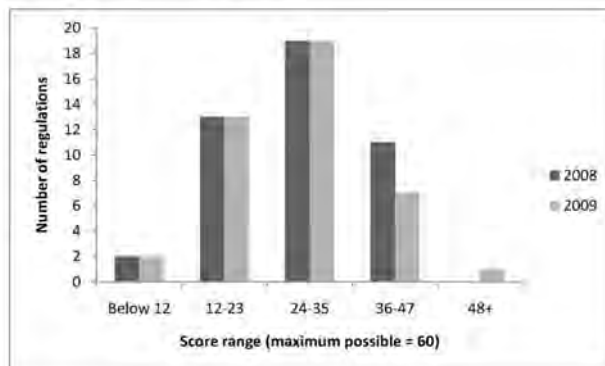
Figure 2 shows that the distribution of scores was roughly the same in both years. The only differences are that the joint DOT/EPA regulation received a score of 48 in 2009, and several more regulations in 2008 received scores in the 36–47 range.

Table 3: Average Scores, 2008 vs. 2009

	2008 (n=45)	2009 (n=42)	Change	T-stat.
Total Score	27.31	27.02	−0.29	0.14
Openness	11.04	12.00	0.96	1.46
Analysis	8.53	8.38	−0.15	0.16
Use	7.73	6.64	−1.09	1.48

Maximum possible total score = 60. Maximum possible score on each category = 20

Figure 2: Distribution of Scores



2.3 Average Scores by Criterion

Table 4 shows the average score for each criterion in 2008 and 2009. For each criterion, at least one regulation earned the highest possible score of 5 in most cases. Best practices, however, are not widely shared. The “# Earning Highest Score” column demonstrates that, except for Availability, very few regulations earn a score of 5 on any individual criterion. The “Theoretical Highest Score” is the score a hypothetical regulation could have earned if it had incorporated all of the best practices identified that year. For 2009, the highest-scoring regulation is much closer to the theoretical highest score than in 2008.

Table 4: Scores by Criterion

Criterion	2008 Average Score	2008 Highest Score	2008 # Earning Highest Score	2009 Average Score	2009 Highest Score	2009 # Earning Highest Score
1. Accessibility	3.53	5	12	4.06	5	14
2. Data Documentation	2.24	5	1	2.50	5	5
3. Model Documentation	2.33	5	3	2.62	5	1
4. Clarity	2.93	5	3	2.83	4	10
5. Outcome Definition	2.36	5	2	2.38	5	1
6. Systemic Problem	1.80	5	1	1.60	4	4
7. Alternatives	2.29	5	1	2.21	5	1
8. Benefit-Cost Analysis	2.09	4	3	2.19	5	1
9. Some Use of Analysis	2.44	5	2	2.24	5	1
10. Considered Net Benefits	2.20	5	2	1.62	5	4
11. Measures and Goals	1.36	5	1	1.29	4	1
12. Retrospective Data	1.73	5	1	1.50	4	2
Total	27.31	43		27.02	48	
Theoretical Highest Score*		59			56	

Very few of the score changes between 2008 and 2009 are statistically significant.⁴ Moreover, changes in averages for some criteria appear to be driven by the changing mix of regulations rather than an actual change in the quality of agencies’ analysis. An accurate assessment of changes, therefore, requires separate consideration of transfer and non-transfer regulations.⁵

⁴ Summary statistics for all criteria, and the sub-questions for criteria 5–8, are in appendix 3.

⁵ Statistically significant changes in averages for the entire set of regulations, without distinguishing between transfer and non-transfer regulations, are in appendix 4.

2.4 Transfer vs. Non-Transfer Regulations

Several previous studies using 2008 data, as well as table 2, demonstrate that the quality and use of analysis for transfer regulations is well below the quality and use of analysis for non-transfer regulations (Ellig and McLaughlin 2010, McLaughlin and Ellig 2010). Indeed, OMB (2008, 12–17) observes that although transfer regulations generate social costs via mandates, prohibitions, and price distortions, agencies do not usually estimate the social benefits and costs of transfer regulations.

Table 5 confirms that the quality and use of analysis for transfer regulations is much lower in both 2008 and 2009. In 2008, for example, the average total score for transfer regulations (17 points) is 47 percent below the average score for non-transfer regulations (32 points). Similarly, in 2009 the average total score for transfer regulations (21 points) is 40 percent below the average total score for non-transfer regulations (34 points). These differences occur for Openness, Analysis, and Use. Openness has the smallest gap, but even there, transfer regulations score 20–30 percent below non-transfer regulations.

Table 5: Transfer vs. Non-Transfer Regulations, Average Scores

	Transfer 2008 (n=15)	Non-Transfer 2008 (n=30)	Difference	T-stat.
Total Score	17.07	32.43	15.37	8.03
Openness	8.6	12.27	3.67	4.16
Analysis	3.53	11.03	8.53	8.71
Use	4.93	9.13	4.20	4.99
	Transfer 2009 (n=22)	Non-Transfer 2009 (n=20)	Difference	T-stat.
Total Score	20.54	34.15	13.65	6.84
Openness	10.5	13.65	3.15	4.32
Analysis	4.91	12.20	7.29	8.9
Use	5.14	8.3	3.16	3.18

All differences are statistically significant at greater than the 99 percent level of confidence. Maximum possible total score = 60. Maximum possible score on each category = 20.

Because transfer regulations generally receive lower scores, a shift in the mix of transfer vs. non-transfer regulations could affect changes in average scores from one year to the next. In 2008, there were 15 proposed economically significant transfer regulations, accounting for 33 percent of proposed economically significant regulations. In 2009, there were 22 proposed economically significant transfer regulations, accounting for 52 percent of proposed economically significant regulations. The increase mostly reflects five regulations proposed in 2009 that implemented provisions of the American Recovery and Reinvestment Act. Thus, one might expect that the average quality and use of regulatory analysis would be lower in 2009 than in 2008 simply because more transfer regulations were proposed in 2009.

Table 6: Score Changes on Individual Criteria and Questions, Transfer vs. Non-Transfer Regulations

	2008 (n=30)	2009 (n=20)	Change	T-stat.
Non-Transfer Regulations				
Total Score	32.43	34.15	1.72	0.94
Openness	12.27	13.65	1.38	1.91*
Criterion 1 – Availability	3.30	3.95	0.65	1.69*
Criterion 2 – Data Documentation	2.63	3.15	0.52	1.66*
Criterion 3 – Theory and Model Documentation	2.83	3.30	0.47	1.49
Analysis	11.03	12.20	1.17	0.20
Criterion 5 – Outcomes	3.10	3.55	0.45	1.63
Question 5D – Evidence Regulation Will Affect Outcome	2.40	3.15	0.75	1.88*
Criterion 8 – Cost-Benefit Analysis	2.60	3.10	0.5	2.15**
Question 8C – Effects on Prices of Goods and Services	1.70	3.30	1.60	3.91***
Question 8G – Calculates Cost-Effectiveness	1.43	2.35	0.92	2.35**
Question 8I – Incidence of Benefits	2.07	2.95	0.88	2.33**
Use	9.13	8.3	-0.83	0.35
Transfer Regulations				
Total Score	17.07	20.55	3.48	1.70*
Openness	8.60	10.50	1.90	2.11**
Criterion 3 – Theory and Model Documentation	1.33	2.00	.67	1.88*
Criterion 4 – Clarity	1.80	2.45	.65	2.37**
Analysis				
Criterion 5 – Outcomes	0.87	1.31	0.45	1.61
Question 5A – Articulate Desired Outcome	1.80	2.45	0.65	1.52
Question 5D – Evidence Regulation Will Affect Outcome	0.20	1.00	0.80	2.86***
Criterion 6 – Systemic Problem	0.60	1.00	0.40	1.79*
Question 6B – Coherent Theory of Systemic Problem	0.47	0.86	0.40	1.64
Question 7A – List Alternatives	1.07	1.91	0.84	2.18**
Criterion 8 – Cost-Benefit Analysis	1.07	1.36	0.30	1.51
Use	4.93	5.14	0.20	0.83

Statistical significance: *90 percent ** 95 percent

Maximum possible score on individual criteria or questions = 5.

Table 6 shows changes in mean scores calculated separately for transfer and non-transfer regulations. We report statistics for individual criteria or questions only when the differences approach statistical significance.

For non-transfer regulations, there are very few improvements. Average Openness scores improved from 12.27 points to 13.65 points. The difference is almost statistically significant at the 95 percent level. Within the Analysis category, there is weak evidence of improvement on criterion 5 (Outcomes), largely because agencies provided more evidence that the regulation will accomplish the intended outcomes. Criterion 8 (Cost-Benefit Analysis) also saw improvement due to better scores on three questions: question 8C (Effects on Prices of Goods and Services), question 8G (Evaluation of Cost-Effectiveness) and question 8I (Incidence of Benefits). These changes are consistent with the administration's goals of improving the transparency of the regulatory process, identifying benefits of regulation, and expanding the focus on distributional issues. We caution, however, that the changes are quite small, and the improvements under the Analysis category mostly just move the average scores closer to 3.

Transfer regulations show slightly more improvement than non-transfer regulations. The average Openness score improved, largely due to increases in scores on criterion 3 (Theory and Model Documentation) and criterion 4 (Clarity). The improvement on criterion 4 is actually significant at the 98 percent level. All four Analysis criteria saw higher average scores in 2009 than in 2008. However, all of these scores remained well below 2 in 2009. This indicates only that more analyses presented a small amount of discussion or evidence relevant to these criteria instead of saying nothing. While these improvements are certainly welcome, the low levels of the scores indicate that analysis of transfer regulations has a long way to go before it is as good as the analysis of non-transfer regulations.

We draw the following conclusions from this breakdown between transfer and non-transfer regulations:

- The only category of criteria that appears to have improved for both transfer and non-transfer regulations is Openness.
- The few improvements in the Analysis criteria for non-transfer regulations seem consistent with the Obama administration's regulatory priorities.
- Improvements in some of the Analysis criteria for transfer regulations largely reflect the presence of some content or assertions where previously there were none.
- Regulators made little commitment to retrospective analysis of regulations proposed in either year.

2.5 Total Scores by Agency

Another way to control for factors that might affect the average quality or use of regulatory analysis is to break scores down by agency. Some agencies may do a better job of

analysis than others. Some may tackle analytical problems that are inherently more difficult. Yet others may have different mixes of transfer regulations and non-transfer regulations. Table 7 presents average scores by agency for 2008 and 2009, with and without transfer regulations.

When all regulations are included, five agencies increased their average total scores in 2009, and five agencies reduced their average total scores. When transfer regulations are excluded, four agencies increased their average total scores in 2009, and four agencies reduced their average total scores. Given that most agencies proposed small numbers of economically significant regulations, few agencies proposed comparable numbers of economically significant regulations in both years, and six agencies proposed economically significant regulations only in 2008, it is difficult to infer any general pattern of improvement or deterioration from these results.

However, it is clear that the presence or absence of transfer regulations in a given year has a big effect on some agencies' scores. Scores for the Departments of Energy, Homeland Security, Transportation, and Health and Human Services climb noticeably in one or both years when transfer regulations are excluded. Omitting transfer regulations, Energy and Homeland Security leapfrog Agriculture, EPA, and Interior in the 2009 rankings, and HHS edges past Labor.

Table 7: Average Total Scores by Agency

All Regulations	2009 Average Score	# of Regulations	2008 Average Score	# of Regulations	2008-09 Change
Joint DOT/EPA	48.0	1	NA	0	NA
USDA	38.0	1	28.0	1	+10.0
Interior	34.0	1	27.3	4	+6.7
EPA	32.5	9	39.5	2	-7.0
DHS	30.0	2	38.0	2	-8.0
Energy	27.4	5	27.0	1	+0.4
DOT	24.7	3	32.3	6	-7.6
Labor	24.0	1	34.1	6	-10.1
HHS	23.6	12	20.7	11	+2.9
Education	22.0	5	22.0	2	0
HUD	18.0	1	41.0	1	-23.0
Veterans	17.0	1	10.0	1	+7.0
Justice		0	35.0	3	NA
Treasury		0	27.0	1	NA
Fed Acquisition		0	24.0	1	NA
State		0	13.0	1	NA
Defense		0	12.0	1	NA
SSA		0	7.0	1	NA
Non-Transfer Regulations	2009 Score	# of Regulations	2008 Score	# of Regulations	2008-09 Change
Joint DOT/EPA	48.0	1	NA	0	NA
Energy	40.7	3	27.0	1	+13.7
DHS	40.0	1	38.0	1	+2.0
USDA	38.0	1	28.0	1	+10.0
EPA	32.5	9	39.5	2	-7.0
Interior	34.0	1	27.3	4	+6.7
DOT	29.0	2	32.3	6	-3.3
HHS	28.0	1	29.0	2	-1.0
Labor	24.0	1	34.1	6	-10.1
HUD		0	41.0	1	NA
Justice		0	35.0	3	NA
Treasury		0	27.0	1	NA
Federal Acquisition		0	24.0	1	NA

Maximum possible average total score = 60.

5. Use of Analysis

Previous research found that use of the analysis was positively correlated with the quality of the analysis in 2008. Scores on criteria 9–12, which evaluate use of analysis, are positively correlated with the Analysis score and overall quality, defined as the sum of the Openness and Analysis scores, criteria 1–8 (Ellig and McLaughlin 2010). An additional year gives us a larger data set to test whether this relationship still held and whether it changed in 2009.

5.1 Total Use Score

Table 8 shows the results from regressing the Use score on the Quality score, along with several control variables. A one point increase in the Quality score is associated with a 0.25–0.31 point increase in the Use score, and this correlation is highly statistically significant. The result also seems quantitatively significant. The standard deviation of Quality is 6.86; a one-standard-deviation change in Quality implies about a two-point change in Use. Given that the mean Use score is 7.21, variation in Quality seems to explain a great deal of the variation in Use.⁶

The Year 2008 dummy tests whether Use scores tend to be different in 2008 and 2009. It shows that Use is about 1.3 points higher in 2008, after controlling for Quality. This result indicates a 1.3-point shift in the intercept of the regression equation. One might also speculate that the slope of the line might be different in the two years. When we run the same regressions using $\text{Quality} \times \text{Year}$ as an explanatory variable instead of the year dummy, we get roughly the same results with a bit worse statistical fit.⁷

The year appears to make a big difference, considering that the mean Use score is only 7.21 and its standard deviation is 3.45. However, it would be a mistake to portray the first year of the Obama administration as a retreat from stellar use of analysis in the Bush administration. Figure 3 shows the distribution of Use scores in 2008 and 2009. Neither year shows more than middling use of analysis. The principal difference is that the middle class shrinks in 2009, with more regulations that either fail to use the analysis or make only a passing reference to it.

Models 3 and 4 in table 8 include control variables for transfer regulations, to see if tendencies to use analysis differ for this type of regulation. In general, the relationship between Use and Quality seems no different for transfer regulations than for non-transfer regulations. However, the transfer regulations that implement provisions of the American Recovery and Reinvestment Act appear to be marginally more likely to use the analysis. The Use score for these five regulations averages 7 points, compared to an average of 5 points for other transfer regulations in 2009. The difference in averages stems from relatively high Use scores for two Education Department regulations that provide grants to states for education reform: the School Improvement Grants (13 points) and the Race to the Top Fund (9 points). School Improvement Grants earned a relatively high Use score because the regulations focus the grants on education reforms that have research demonstrating their effectiveness, and because the regulation includes

⁶ Using only the four Analysis criteria 5–8 as the independent variable produces roughly the same results with a bit worse statistical fit.

⁷ Results are in appendix 5.

provisions to gather data and evaluate the effectiveness of the reforms funded by the spending. The Race to the Top fund did not make much use of analysis to create the regulation, but it did establish goals and require states to submit data to evaluate the effectiveness of the reforms funded by the regulation.

5.2 Ex-Ante Use vs. Retrospective Analysis

The total Use score consists of scores for two types of criteria that might be affected differently by the quality of analysis. Criteria 9 and 10 assess the extent to which the agency used the analysis to make decisions in the proposed regulation. Criteria 11 and 12 assess the extent to which the agency provided for retrospective analysis in either the preamble to the regulation or the Regulatory Impact Analysis. To see whether Quality has different effects on these variables, table 9 replicates the regressions in table 8 using criteria 9–10 as a dependent variable and using criteria 11–12 as a dependent variable.

The quality of analysis clearly has a positive, statistically significant correlation with both the use of analysis to craft the regulation and on provisions for retrospective analysis. The effect is about twice as large for the former as for the latter.

The Year dummy variable, however, shows that Quality has a differential effect in 2008 only for use of analysis to craft the regulation. Agencies were no more likely to make provisions for retrospective analysis in 2008 than in 2009. This is perhaps unsurprising, given that Executive Order 12866 and Circular A-4 place little emphasis on retrospective analysis.

Finally, the Transfer dummy variable indicates that agencies were neither more nor less likely to use analysis in crafting transfer regulations or provide for retrospective analysis. The Recovery Act dummy shows that these regulations tend to have better retrospective analysis provisions—again largely because of the higher scores of the two education reform regulations.

These regressions identify some significant correlations, but we are not sure if they imply causation. Perhaps decision makers choose to use analysis when they are confident it is higher quality. Or perhaps analysts prepare better analysis when they are confident the decision makers will use it. Similarly, the higher Use scores in 2008 might reflect a stronger commitment to using regulatory analysis in the Bush administration, but other hypotheses might also explain the difference. To the extent that regulations proposed in 2009 were already in process in 2008, perhaps the Bush administration simply pushed out the regulations that were better-supported by analysis in 2008 and left the rest for the Obama administration to deal with. Alternatively, the difference could just reflect the fact that 2009 was a transition year (perhaps because new members of an administration have to “learn” how to use economic analysis). Forthcoming data on the quality and use of regulatory analysis in 2010 may allow us to test these and other hypotheses. Systematic interviews of federal regulatory personnel, such as those conducted by Williams (2008), could provide additional (and perhaps even better) insights.

Table 8: Quality of Analysis vs. Use of Analysis

Explanatory Variables	Dependent Variable: Use of Analysis Score (Criteria 9–12)			
	(1)	(2)	(3)	(4)
Quality (Criteria 1–8)	0.30 [6.98***]	0.31 [7.28***]	0.27 [3.99***]	0.25 [3.83***]
Year 2008 Dummy		1.34 [2.31***]	1.15 [1.85*]	1.33 [2.14**]
Transfer Regulation			-0.80 [-0.85]	-1.19 [-1.25]
Recovery Act Regulation				2.25 [1.70*]
Constant	1.14 [1.24]	.33 [0.34]	1.64 [0.91]	1.82 [1.02]
N	87	87	87	87
Adjusted R ²	0.36	0.39	0.39	0.40

Ordinary least squares regressions; t-statistics in parentheses.
 Statistical significance: ***1 percent **5 percent *10 percent

Figure 3: Use of Analysis Scores by Quintile

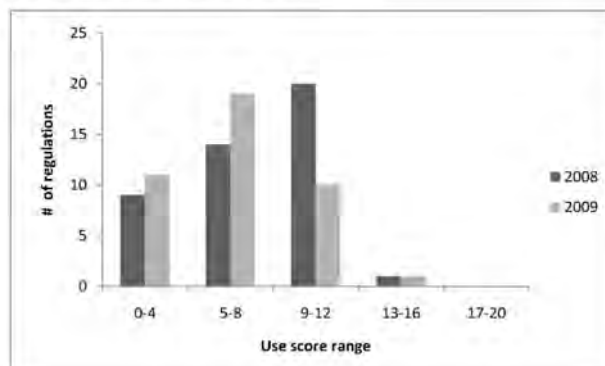


Table 9: Quality of Analysis vs. Separate Scores for Ex-Ante and Retrospective Analysis

Explanatory Variables	Dependent Variable: Ex Ante Use of Analysis (Criteria 9–10)			
	(1)	(2)	(3)	(4)
Quality (Criteria 1–8)	0.20 [6.05***]	0.20 [6.30***]	0.17 [3.46***]	0.17 [3.37***]
Year 2008 Dummy		0.94 [2.18**]	0.83 [1.78*]	0.87 [1.82*]
Transfer Regulation			–0.51 [–0.72]	–0.58 [–0.80]
Recovery Act Regulation				0.45 [0.45]
Constant	0.34 [0.50]	–0.22 [–0.32]	0.60 [0.44]	0.64 [0.47]
N	87	87	87	87
Adjusted R ²	0.29	0.32	0.32	0.31

Explanatory Variables	Dependent Variable: Provisions for Retrospective Analysis (Criteria 11–12)			
	(1)	(2)	(3)	(4)
Quality (Criteria 1–8)	0.11 [3.98***]	0.11 [4.04***]	0.09 [2.19**]	0.08 [2.00**]
Year 2008 Dummy		0.39 [1.06]	0.32 [0.81]	0.47 [1.29]
Transfer Regulation			–0.29 [–0.49]	–0.61 [–1.01]
Recovery Act Regulation				1.80 [2.15**]
Constant	0.79 [1.39]	0.56 [0.91]	1.04 [0.90]	1.18 [1.04]
N	87	87	87	87
Adjusted R ²	0.15	0.15	0.14	0.18

Ordinary least squares regressions; t-statistics in parentheses.
Statistical significance: ***1 percent **5 percent *10 percent

5.3 Use by Individual Agencies

Is the reduction in Use scores widespread, or concentrated in a few agencies? Table 10 sheds light on this question by calculating changes in average Use scores for individual agencies, including and excluding transfer regulations.

Including all regulations, four agencies improved their average Use scores between 2008 and 2009: Interior, Agriculture, Health and Human Services, and Veterans Affairs. Except for Agriculture, all of these improvements were less than one point. Seven agencies saw their average Use scores fall, and all of these reductions exceeded two points. Thus, improvements are small, and reductions are widespread.

Some of these changes were driven by the increased proportion of transfer regulations in 2009. Excluding transfer regulations, four agencies increased their Use scores: Interior, Agriculture, Health and Human Services, and Energy. Interior's score increased by just 0.7 point; all the others increased by at least two points. Four agencies saw their Use scores fall when transfer regulations are excluded: Homeland Security, Transportation, EPA, and Labor. Each of these four reductions was two points or greater. Excluding transfer regulations thus suggests that some agencies had noticeable improvements in their Use scores, while about the same number saw noticeable reductions.

The changing mix of transfer vs. non-transfer agencies had a big effect on results for four agencies: Energy, Homeland Security, Transportation, and Health and Human Services. Excluding transfer regulations actually increases Energy's Use score; with transfer regulations, Energy's Use score falls. Excluding transfer regulations leads to a much bigger increase in Health and Human Services' Use score: a 5.5 point increase instead of a 0.7 point increase. Finally, excluding transfer regulations cuts the reduction in Homeland Security's and Transportation's Use scores by more than half.

The regression equations in tables 8 and 9 show that use of analysis to make decisions about regulations is lower in 2009, even after controlling for transfer regulations. Tabulations in table 10 suggest that the primary reason for the statistically significant decline in Use scores in 2009 appears to be the reductions in Use scores at Transportation and EPA. Of all the agencies whose average Use scores fell, Transportation proposed two regulations in 2009 and EPA proposed nine. No other agency whose Use score for non-transfer regulations fell in 2009 proposed more than one non-transfer regulation in 2009.

In fairness, we should also note that the combined DOT/EPA CAFÉ/greenhouse gas emissions regulation earned the highest Use score in 2009: 15 points. In addition, the caveat we applied to table 7 applies to table 10 as well. Because the number of regulations is so small, it is hard to make reliable generalizations about particular agencies. For that, more years of data are needed.

Table 10: Use by Individual Agencies

All Regulations	2009 Average Score	# of Regulations	2008 Average Score	# of Regulations	2008-09 Change
Joint DOT/EPA	15.0	1	NA	0	NA
Interior	9.0	1	8.3	4	+0.7
USDA	8.0	1	5.0	1	+3.0
Energy	7.4	5	10.0	1	-2.6
EPA	7.2	9	10.5	2	-3.3
Education	7.0	5	9.0	2	-2.0
DHS	6.5	2	12.0	2	-5.5
HHS	5.6	12	5.5	11	+0.1
HUD	5.0	1	10.0	1	-5.0
DOT	4.5	3	10.0	6	-5.5
Labor	4.0	1	8.7	6	-4.7
Veterans	3.0	1	2.0	1	+1.0
Justice		0	11.7	3	NA
Treasury		0	9.0	1	NA
Fed Acquisition		0	4.0	1	NA
SSA		0	3.0	1	NA
State		0	2.0	1	NA
Defense		0	1.0	1	NA
Non-Transfer Regulations	2009 Score	# of Regulations	2008 Score	# of Regulations	2008-09 Change
Joint DOT/EPA	15.0	1	NA	0	NA
Energy	12.0	3	10.0	1	+2.0
DHS	10.0	1	12.0	1	-2.0
Interior	9.0	1	8.3	4	+0.7
DOT	8.5	2	10.0	6	-2.5
USDA	8.0	1	5.0	1	+3.0
EPA	7.2	9	10.5	2	-3.3
HHS	7.0	1	2.0	2	+5.0
Labor	4.0	1	8.7	6	-4.7
HUD		0	10.0	1	NA
Justice		0	11.7	3	NA
Treasury		0	9.0	1	NA
Federal Acquisition		0	4.0	1	NA

Maximum possible Use score = 20.

6. Conclusions

This study expands on existing research by applying a consistent set of standards to assess the quality and use of regulatory analysis for all economically significant regulations proposed in two different years. We find that the average quality of analysis is not high. The quality and use of regulatory analysis is especially poor for transfer regulations that define how the federal government will spend or collect money. But Regulatory Impact Analyses and *Federal Register* preambles present many examples of best practices that could improve the quality and use of analysis significantly if they were diffused more widely.

Our comparison of regulations in 2008 and 2009 generates several insights relevant to contemporary regulatory policy discussions. We find very little evidence that the quality of regulatory analysis changed between 2008 and 2009. The most significant improvement occurred in accessibility of regulatory analyses on the Internet. While this is a welcome improvement that is consistent with the Obama administration's focus on government transparency, improvements on a few other criteria were generally small and, at best, usually improved average scores from poor in 2008 to middling in 2009. In addition, we find substantial evidence that agencies were less likely to use the analysis to make decisions about proposed regulations in 2009 than in 2008.

This research also raises numerous questions that deserve further inquiry. We have not, by and large, identified why the quality and use of regulatory analysis exhibits the patterns revealed in this paper. For example, it is not obvious why some non-transfer regulations receive better analysis than others. Subject matter, deadlines, differing statutory mandates, explicit policy preferences, or department-specific factors may be part of the explanation.

It is also not clear why the quality of regulatory analysis changed very little between 2008 and 2009. Does this mean career staffers at agencies and/or OIRA consciously promote continuity between administrations? Another factor that may have played a role is that it is likely that the Bush administration focused greater effort on improving the quality of its "midnight" final regulations in 2008 relative to its proposed regulations, while the Obama administration is likely to have placed a greater focus on its own newly proposed regulations. This would suggest that the quality of analysis for proposed rules should have improved in 2009—unless most of the regulations proposed in 2009 were already in the pipeline in 2008. Research on what happened to the quality and use of analysis for final rules might shed further light on this issue.

Our data also indicate a statistically significant reduction in OIRA review time for non-transfer regulations in 2009 (from 66 to 40 days), but not for transfer regulations, which averaged about 35 days in both years. McLaughlin (2010) finds that midnight regulations receive shorter review times at OIRA. Whether OIRA review time impacts quality and use is an area ripe for further research.

Finally, we do not know why the use of regulatory analysis to make regulatory decisions declined in 2009. Indeed, we are not even sure if good analysis leads to use in decisions, or if decision makers' openness to analysis promotes good analysis, or if some third set of factors

causes both of these. Creating consistent data on the quality and use of regulatory analysis is the first step toward answering these questions.

References

- Belcore, Jamie, and Jerry Ellig. 2009. "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* (Fall), 1-96.
- Brito, Jerry, and Jerry Ellig. 2009. "Toward a More Perfect Union: Regulatory Analysis and Performance Management," *Florida State University Business Review* 8:1 (Spring/Summer), 1-55.
- Ellig, Jerry, and Patrick McLaughlin. 2010. "The Quality and Use of Regulatory Analysis in 2008," Working Paper, Mercatus Center at George Mason University (June 22), <http://mercatus.org/publication/quality-and-use-regulatory-analysis-2008>.
- Executive Order 12866, *Federal Register* 58:190 (Oct. 4, 1993), 51735-44.
- Hahn, Robert W., Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader, and Petrea Moyle. 2000. "Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866," *Harvard Journal of Law and Public Policy*, 23:3, 859-71.
- Hahn, Robert W., and Patrick Dudley. 2007. "How Well Does the Government Do Cost-Benefit Analysis?" *Review of Environmental Economics and Policy*, 1:2, 192-211.
- Hahn, Robert W., and Robert Litan. 2005. "Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe," *Journal of International Economic Law* 8:2, 473-508.
- Hann, Robert W. Randall W. Lutter, and W. Kip Viscusi. 2000. *Do Federal Regulations Reduce Mortality?* Washington, DC: AEI-Brookings Joint Center for Regulatory Studies.
- Hahn, Robert W., and Paul C. Tetlock. 2008. "Has Economic Analysis Improved Regulatory Decisions?" *Journal of Economic Perspectives* 22:1 (Winter), 67-84.
- Harrington, Winston. 2006. "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews." Discussion Paper 06-39. Washington, DC: Resources for the Future.
- Harrington, Winston, Richard Morgenstern, and Peter Nelson. 2000. "On the Accuracy of Regulatory Cost Estimates." *Journal of Policy Analysis and Management*, 19:2, 297-332.
- McLaughlin, P. A. "The Consequences of Midnight Regulations and Other Surges in Regulatory Activity." *Public Choice*, forthcoming 2010.
- McLaughlin, Patrick, and Jerry Ellig. 2010. "Does Haste Make Waste in Regulatory Analysis?," Working Paper, Mercatus Center at George Mason University.

McTigue, Maurice, Henry Wray, and Jerry Ellig. 2009. *10th Annual Performance Report Scorecard: Which Federal Agencies Best Inform the Public?* Arlington, VA: Mercatus Center at George Mason University.

Office of Management and Budget. 2010. "Agency Checklist: Regulatory Impact Analysis" (Nov. 3), http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf.

_____. 2009a. "Federal Regulatory Review, Request for Comments," *Federal Register* 74:37 (Feb. 26), 8819.

_____. 2009b. *2009 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities*. Washington, DC: Office of Information and Regulatory Affairs.

_____. 2008. *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities*. Washington, DC: Office of Information and Regulatory Affairs.

_____. 2005. *Validating Regulatory Analysis: Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Washington, DC: Office of Information and Regulatory Affairs.

_____. 2003. *Circular A-4* (Sept. 17).

OECD. 2009. *Indicators of Regulatory Management Systems*.
<http://www.oecd.org/dataoecd/44/37/44294427.pdf>.

Williams, Richard. 2008. "The Influence of Regulatory Economists in Federal Health and Safety Agencies," Working Paper, Mercatus Center at George Mason University (July),
<http://mercatus.org/publication/influence-regulatory-economists-federal-health-and-safety-agencies>.

Appendix 1

Major Factors Considered When Evaluating Each Criterion

Note: Regardless of how they are worded, all questions involve qualitative analysis of how well the RIA and the *Federal Register* notice address the issue, rather than “yes/no” answers.

Openness

1. How easily were the RIA, the proposed rule, and any supplementary materials found online?

How easily can the proposed rule and RIA be found on the agency’s website?

How easily can the proposed rule and RIA be found on Regulations.gov?

Can the proposed rule and RIA be found without contacting the agency for assistance?

2. How verifiable are the data used in the analysis?

Is there evidence that the analysis used data?

Does the analysis provide sufficient information for the reader to verify the data?

How much of the data are sourced?

Does the analysis provide direct access to the data via links, URLs, or provision of data in appendices?

If data are confidential, how well does the analysis assure the reader that the data are valid?

3. How verifiable are the models and assumptions used in the analysis?

Are models and assumptions stated clearly?

How well does the analysis justify any models or assumptions used?

How easily can the reader verify the accuracy of models and assumptions?

Does the analysis provide citations to sources that justify the models or assumptions?

Does the analysis demonstrate that its models and assumptions are widely accepted by relevant experts?

How reliable are the sources? Are the sources peer-reviewed?

4. Was the agency’s analysis comprehensible to an informed layperson?

How well can a non-specialist reader understand the results or conclusions?

How well can a non-specialist reader understand how the analysis reached the results?

How well can a specialist reader understand how the analysis reached the results?

Are the RIA and relevant portions of the *Federal Register* notice written in “plain English”?

(Light on technical jargon and acronyms, well-organized, grammatically correct, direct language used.)

Analysis

For each Analysis criterion, the lettered sub-questions each receive a score of 0–5, and these are averaged and rounded to produce the score on the criterion.

5. How well does the analysis identify the desired outcomes and demonstrate that the regulation will achieve them?
 - A. How well does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?
 - B. How well does the analysis identify how these outcomes are to be measured?
 - C. Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?
 - D. Does the analysis present credible empirical support for the theory?
 - E. Does the analysis adequately assess uncertainty about the outcomes?
6. How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?
 - A. Does the analysis identify a market failure or other systemic problem?
 - B. Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?
 - C. Does the analysis present credible empirical support for the theory?
 - D. Does the analysis adequately assess uncertainty about the existence and size of the problem?
7. How well does the analysis assess the effectiveness of alternative approaches?
 - A. Does the analysis enumerate other alternatives to address the problem?
 - B. Is the range of alternatives considered narrow or broad?
 - C. Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?
 - D. Does the analysis adequately address the baseline—what the state of the world is likely to be in the absence of further federal action?
8. How well does the analysis assess costs and benefits?
 - A. Does the analysis identify and quantify incremental costs of all alternatives considered?
 - B. Does the analysis identify all expenditures likely to arise as a result of the regulation?
 - C. Does the analysis identify how the regulation would likely affect the prices of goods and services?
 - D. Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?
 - E. Does the analysis adequately address uncertainty about costs?
 - F. Does the analysis identify the approach that maximizes net benefits?

- G. Does the analysis identify the cost-effectiveness of each alternative considered?
- H. Does the analysis identify all parties who would bear costs and assess the incidence of costs?
- I. Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

Use

- 9. Does the proposed rule or the RIA present evidence that the agency used the Regulatory Impact Analysis?

Does the proposed rule or the RIA assert that the analysis of outcomes, benefits, the systemic problem, alternatives, or costs affected any decisions?

How many aspects of the proposed rule did the analysis affect?

How significant are the decisions the analysis affected?

- 10. Did the agency maximize net benefits or explain why it chose another option?

Did the analysis calculate net benefits of one or more options so that they could be compared?

Did the analysis calculate net benefits of all options considered?

Did the agency either choose the option that maximized net benefits or explain why it chose another option?

How broad a range of alternatives did the agency consider?

- 11. Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?

Does the RIA or *Federal Register* notice contain analysis or results that could be used to establish goals and measures to assess the results of the regulation in the future?

In the RIA or the *Federal Register* notice, does the agency commit to performing some type of retrospective analysis of the regulation's effects?

Does the agency explicitly articulate goals for at major outcomes the rule is supposed to affect?

Does the agency establish measures for major outcomes the rule is supposed to affect?

Does the agency set targets for measures of major outcomes the rule is supposed to affect?

- 12. Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?

Does the RIA or *Federal Register* notice demonstrate that the agency has access to data that could be used to assess some aspects of the regulation's performance in the future?

Would comparing actual outcomes to outcomes predicted in the analysis generate a reasonably complete understanding of the regulation's effects?

Does the agency suggest it will evaluate future effects of the regulation using data it has access to or commits to gathering?

Does the agency explicitly enumerate data it will use to evaluate major outcomes the regulation is supposed to accomplish in the future?

Does the analysis demonstrate that the agency understands how to control for other factors that may affect outcomes in the future?

Appendix 2: Crosswalk of 2010 OMB Regulatory Impact Analysis Checklist with Mercatus Regulatory Report Card evaluation criteria

OMB Checklist	Mercatus Evaluation Criteria
Does the RIA include a reasonably detailed description of the need for the regulatory action?	Criterion 6: How well does the analysis demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?
Does the RIA include an explanation of how the regulatory action will meet that need?	Criterion 5: How well does the analysis identify the desired outcomes and demonstrate that the regulation will achieve them?
Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?	Criterion 7, question D: Does the analysis adequately assess the baseline—what the state of the world is likely to be in the absence of further federal action?
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?	<p>Criterion 2: How verifiable are the data used in the analysis?</p> <p>Criterion 3: How verifiable are the models or assumptions used in the analysis?</p> <p>Criterion 4: Was the analysis comprehensible to an informed layperson?</p> <p><i>Criterion 3 includes an assessment of whether the models and assumptions are based on peer-reviewed or otherwise reliable publications. However, the Mercatus evaluation does not assess the quality of the underlying science.</i></p>
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?	<p>Criterion 1 takes the first step by assessing how easily the RIA itself can be found on the Internet.</p> <p>Criteria 3 and 4 include an assessment of how easily the reader could find the underlying data, sources, and methods from information or links provided in the RIA or the <i>Federal Register</i> notice.</p>
To the extent feasible, does the RIA quantify and monetize the anticipated benefits from the regulatory action?	Criterion 5, question 2: How well does the analysis identify how the outcomes are to be measured?

To the extent feasible, does the RIA quantify and monetize the anticipated costs?	Multiple questions under criterion 8 (Benefits and Costs) assess how well the analysis identifies, quantifies, and monetizes costs.
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)?	Criterion 8, question F: Does the analysis identify the approach that maximizes net benefits? Criterion 8, question G: Does the analysis identify the cost-effectiveness of each alternative considered?
Does the RIA assess the potentially effective and reasonably feasible alternatives?	Criterion 7: How well does the analysis assess the effectiveness of alternative approaches?
Does the preferred option have the highest net benefits (including potential economic, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires a different approach?	Criterion 10: Did the agency maximize net benefits or explain why it chose another option?
Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?	Criterion 9: Does the proposed rule or RIA present evidence that the agency used the Regulatory Impact Analysis? Criterion 10: Did the agency maximize net benefits or explain why it chose another option?
Does the RIA use appropriate discount rates for the benefits and costs that are expected to occur in the future?	Considered under criterion 5, question 2: How well does the analysis identify how the outcomes are to be measured?, as well as several questions about measurement and comparison of benefits and costs under criterion 8 (Benefits and Costs).
Does the RIA include, if and where relevant, an appropriate uncertainty analysis?	Criterion 5, question E: Does the analysis adequately assess uncertainty about the outcomes? Criterion 6, question D: Does the analysis adequately assess uncertainty about the existence and size of the problem? Criterion 8, question E: Does the analysis adequately address uncertainty about costs?

Does the RIA include, if and where relevant, a separate description of the distributive impacts and equity (including transfer payments and effects on disadvantages or vulnerable populations)?	<p>Criterion 8, question H: Does the analysis identify all parties who would bear costs and assess the incidence of costs?</p> <p>Criterion 8, question I: Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?</p>
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?	Criterion 4: Was the analysis comprehensible to an informed layperson?
Does the analysis include a clear and transparent table presenting (to the extent feasible) anticipated benefits and costs (qualitative and quantitative)?	Criterion 4: Was the analysis comprehensible to an informed layperson?
<i>Goals and measures to assess results of the regulation in the future – No content.</i>	Criterion 11: Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?
<i>Provisions for gathering data to assess results of the regulation in the future – No content.</i>	Criterion 12: Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?

Appendix 3: Summary Statistics on All Criteria and Sub-Questions

2008

Variable	N	Mean	Std. Dev.	Min	Max
Total	45	27.30	9.46	7	43
Openness	45	11.04	3.26	4	18
Analysis	45	8.53	4.48	0	16
Use	45	7.73	3.31	1	14
Criterion 1	45	3.53	1.36	0	5
Criterion 2	45	2.24	1.19	0	5
Criterion 3	45	2.33	1.30	0	5
Criterion 4	45	2.93	1.21	0	5
Criterion 5	45	2.36	1.40	0	5
5A	45	3.31	1.52	0	5
5B	45	2.71	1.74	0	5
5C	45	2.22	1.59	0	5
5D	45	1.67	1.60	0	5
5E	45	2.00	1.86	0	5
Criterion 6	45	1.80	1.47	0	5
6A	45	2.31	1.68	0	5
6B	45	2.00	1.75	0	5
6C	45	1.71	1.59	0	5
6D	45	0.82	1.28	0	5
Criterion 7	45	2.29	1.36	0	4
7A	45	2.78	1.86	0	5
7B	45	1.96	1.45	0	5
7C	45	1.98	1.64	0	5
7D	45	2.04	1.30	0	5
Criterion 8	45	2.09	0.996	0	4
8A	45	2.93	1.16	0	5
8B	45	3.18	1.01	1	5
8C	45	1.38	1.34	0	5
8D	45	1.56	1.47	0	5
8E	45	1.78	1.80	0	5
8F	45	1.91	1.66	0	5
8G	45	1.04	1.17	0	5
8H	45	2.82	1.13	1	5
8I	45	1.60	1.34	0	5
Criterion 9	45	2.44	1.32	0	5
Criterion 10	45	2.20	1.46	0	5
Criterion 11	45	1.36	1.03	0	5
Criterion 12	45	1.73	1.10	0	5

2009

Variable	N	Mean	Std. Dev.	Min	Max
Total	42	27.03	9.37	5	48
Openness	42	12.00	2.82	3	17
Analysis	42	8.38	4.52	1	18
Use	42	6.64	3.56	0	15
Criterion 1	42	4.05	0.85	2	5
Criterion 2	42	2.50	1.50	0	5
Criterion 3	42	2.62	1.23	0	5
Criterion 4	42	2.83	0.88	1	4
Criterion 5	42	2.38	1.43	0	5
5A	42	3.36	1.61	0	5
5B	42	2.52	1.63	0	5
5C	42	2.21	1.60	0	5
5D	42	2.02	1.56	0	5
5E	42	1.76	1.69	0	5
Criterion 6	42	1.60	1.15	0	4
6A	42	2.21	1.70	0	5
6B	42	1.50	1.29	0	4
6C	42	1.21	1.24	0	4
6D	42	0.88	1.31	0	4
Criterion 7	42	2.21	1.42	0	5
7A	42	2.83	1.58	0	5
7B	42	1.86	1.32	0	5
7C	42	1.90	1.76	0	5
7D	42	1.93	1.44	0	5
Criterion 8	42	2.19	1.15	0	5
8A	42	2.83	1.34	0	5
8B	42	3.24	1.32	0	5
8C	42	2.07	1.69	0	5
8D	42	1.60	1.48	0	5
8E	42	1.76	1.59	0	5
8F	42	1.33	1.66	0	5
8G	42	1.24	1.54	0	5
8H	42	3.00	1.17	0	5
8I	42	1.86	1.47	0	5
Criterion 9	42	2.24	1.36	0	5
Criterion 10	42	1.62	1.56	0	5
Criterion 11	42	1.29	0.97	0	4
Criterion 12	42	1.50	1.04	0	4

Appendix 4: Average changes without separating transfer and non-transfer regulations

The table below shows the change in average scores on individual criteria and on sub-questions for the Analysis criteria. We only report average scores whose differences are statistically significant at the 85 percent level or higher. Even for individual criteria or questions, there is very little evidence that average scores changed much between 2008 and 2009. As noted in the text, some of the changes identified below are driven by the increased proportion of transfer regulations in 2009.

Score Changes on Individual Criteria and Questions

	2008 (n=45)	2009 (n=42)	Change	T-stat.
Openness				
Criterion 1 – Accessibility	3.53	4.05	0.51	2.10**
Analysis				
Question 6B – Coherent Theory of Systemic Problem	2.00	1.50	–0.50	1.60
Question 6C – Empirical Evidence of Systemic Problem	1.71	1.21	–0.50	1.62
Question 8C – Effects on Prices of Goods and Services	1.38	2.07	0.69	2.13**
Question 8F – Identifies approach that maximizes net benefits	1.91	1.33	–0.58	1.62
Use				
Criterion 10 – Decision Cognizant of Net Benefits	2.20	1.62	–0.58	1.80*

Statistical significance: *90 percent **95 percent

Maximum possible score on any criterion or question = 5 points.

The increase on criterion 1 (Accessibility) indicates that agency regulatory analyses were somewhat easier to find online in 2009 than in 2008. This reflects the fact that regulatory analyses were easier to find on agency websites and *Federal Register* preambles provided clearer information about how to obtain a copy of the Regulatory Impact Analysis. Some of the improvement may also stem from the redesign of the regulations.gov web site, which may have made regulations and accompanying analysis easier to find.

The lower average scores on questions 6B (Coherent Theory of Systemic Problem) and 6C (Empirical Evidence of Systemic Problem) suggest that agencies may be somewhat less likely to demonstrate that proposed regulations actually address a market failure, government failure, or other systemic problem in 2009. Average scores were already quite low in 2008; this weakness may have gotten even weaker in 2009.

The higher average score on criterion 8C (Effects on Prices of Goods and Services) indicates that agencies were more likely in 2009 to discuss the effects of regulatory costs on the prices of goods and services. This is something that agencies usually do either reasonably well or pretty poorly; there are few mid-range scores. The increase from 1.38 to 2.07 implies that this improvement occurred only for a few regulations, or that agencies provided just a bit more discussion or evidence in place of unsupported assertions.

The lower scores on question 8F (Identifies Alternative that Maximizes Net Benefits) and criterion 10 (Decision Cognizant of Net Benefits) suggest that regulatory analyses in 2009 were less likely to assess the net benefits of alternatives, and decision makers were less likely to consider net benefits when choosing among alternatives. Agencies usually do these things either reasonably well or not at all, so this shift suggests that fewer regulations in 2009 identified or considered net benefits of alternatives.

Appendix 5: Use vs. Quality Employing Quality x Year Interaction Variable

Explanatory Variables	Dependent Variable: Use of Analysis Score (Criteria 9-12)			
	(1)	(2)	(3)	(4)
Quality (Criteria 1-8)	0.30 [6.98***]	0.28 [6.26***]	0.23 [3.67***]	0.22 [3.41***]
Year 2008 Dummy X Quality		0.06 [2.2]***]	0.05 [1.79*]	0.06 [1.98**]
Transfer Regulation			-0.88 [-0.95]	-1.28 [-1.34]
Recovery Act Regulation				2.07 [1.57]
Constant	1.14 [1.24]	1.06 [1.18]	1.64 [0.91]	2.70 [1.63]
N	87	87	87	87
Adjusted R ²	0.36	0.39	0.38	0.40

Ordinary least squares regressions; t-statistics in parentheses.
 Statistical significance: ***1 percent **5 percent *10 percent

Mr. COBLE. Dr. Williams.

TESTIMONY OF RICHARD A. WILLIAMS, DIRECTOR OF POLICY RESEARCH, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. WILLIAMS. Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thank you for the invitation to testify today. My name is Richard Williams. I have been involved in rulemaking and the regulatory process for over 30 years, first as a regulatory analyst, and then as a senior manager for the Food and Drug Administration, and those are issues I continue to care deeply about. I also worked briefly in the Office of Information and Regulatory Affairs. Today, I serve as director of policy studies at the Mercatus Center at George Mason University.

From my experience in research, I believe the regulatory process we have today is not what was originally intended 60 years ago when we passed the Administrative Procedures Act, which was to create a rational, transparent, and inclusive process. When the APA was passed, then-Senator Pat McCarran, who was the Chairman of the Committee on the Judiciary, called it a widely heralded advance in democratic government.

But one of the biggest problems with our regulatory process is that decisions are made first without any analysis or whether or not we know regulation is needed. And more importantly, without stakeholders being involved in that decision. By the time a proposal is generated, most of the significant issues have been decided and rules are steamrolled through to the final rule. The reason regulatory agencies decide early is that their incentives are to crank out new regulations, whether needed or not.

After all, passing regulations is the business of regulatory agencies, and their success is measured and rewarded based on this activity. The problem with deciding early is that we are regulating in the dark, that is without sufficient knowledge of whether a regulation is needed or will work. This isn't just FDA.

In a paper I did interviewing senior economists in many regulatory agencies, I discovered that virtually all agencies make decisions early, and anyone inside or outside the agency who tries to suggest that regulation is not necessary generally finds that view unwelcomed.

Analyzing that problem is part of what economists do in regulatory impact analyses; but if your goal is to regulate as opposed to solving a problem, there is no reason to wait for analysis. Perhaps that is one reason why my colleague, Dr. Ellig, shows that defining the problem is one of the agency's biggest issues: if you are vague about the problem you are trying to define, then no one can accuse you of failing to solve a problem.

Another problem with deciding early is that stakeholders end up commenting on decisions, not problems. Now some stakeholders do get their voices heard in agencies prior to decisions being made, but these are often firms or activists who want a particular regulation to serve their own ends. As this also advances what the agency is trying to do, those are welcomed voices. But those that are confined to the comments after proposals have been issued will find any objections they raise to regulating will receive a short and decisive dismissal. And it normally goes something like: the agency dis-

agrees or you didn't provide enough information to convince the agency.

The result of all this activity is that we end up regulating far too often when it is not effective or not needed. That is why we now have 226 volumes of regulations, taking up 163,000 pages of rules, and we still continue to add 4,000 new regulations each year with this broken process.

Certainly one tragic outcome of this, beyond our effect on competitiveness, is we can't focus our resources on regulations that are truly needed and effective. We can fix this by changing the incentives that agencies face. However, we can no longer rely on executive orders as every President since Richard Nixon has tried to do.

Only Congress can fix this. One way they can do it is by statutorily insisting that agencies start with a step to determine if a regulation is necessary. This would be something like a preproposal publication that the agency would investigate and contain elements like a clear definition of the problem that the agency seeks to solve and the evidence that it relied on to define the problem, an explanation of and evidence for why the problem warrants Federal intervention, an exploration of a range of options that the agency believes might solve the problem, and a preliminary estimate of benefits and costs of each option.

All of this would be published to provide stakeholders and the public an opportunity to evaluate the agency's data and research, and contribute additional information. As OIRA Director Sunstein says, they can take advantage of the fact that knowledge is widely dispersed in society, and public officials can benefit from access to that dispersed knowledge. In commenting on a preliminary analysis like that, stakeholders and the public are much more likely to comment broadly from their collective wisdom and expertise on both what the actual problem is and whether or not it needs a regulatory solution. Use of this knowledge will help us solve our problems much more effectively than our current process. While much more needs to be done to address institutional barriers to problem-solving, an essential first step will be in the establishment of some kind of an evidence-driven and inclusive process for defining the problem and the potential options to address it.

Thank you.

Mr. COBLE. Thank you, Dr. Williams.

[The prepared statement of Mr. Williams follows:]



IMPROVING THE REGULATORY PROCESS

**WRITTEN TESTIMONY OF
RICHARD A. WILLIAMS, PH.D.
DIRECTOR OF POLICY STUDIES,
MERCATUS CENTER AT GEORGE MASON UNIVERSITY**

**“RAISING THE AGENCIES GRADES—PROTECTING THE ECONOMY, ASSURING
REGULATORY QUALITY AND IMPROVING ASSESSMENTS OF REGULATORY NEEDS”**

**SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

MARCH 29, 2011



IMPROVING THE REGULATORY PROCESS

MARCH 29, 2011

Richard Williams
Director of Policy Studies

Committee on the Judiciary
Subcommittee on Courts, Commercial, and Administrative Law
U.S. House of Representatives

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify today on the “Raising the Agencies Grades—protecting the economy, assuring regulatory quality and improving assessments of regulatory needs.” I am an economist and the director of policy studies at the Mercatus Center, a 501(c) (3) research, educational, and outreach organization affiliated with George Mason University. For over three decades, I have been involved in rulemaking and regulatory analysis, first as a regulatory analyst then senior manager at the Center for Food Safety and Applied Nutrition (CFSAN) at the Food and Drug Administration (FDA). I also worked for a short time in the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) reviewing rules from other agencies.

The United States has a large regulatory system that is producing regulations at a fantastic rate. Each year, the Federal Register publishes nearly 80,000 pages, the equivalent of 400 novels, that announce new regulations. The result of this publication is the production of over 4,000 regulations per year.

The regulatory system is large, but regulations are largely produced in the dark. In many cases, regulators don’t even know if there is a problem that needs to be solved, much less the best way to solve a potential problem. They don’t know if the public thinks there is a problem. They don’t know if the public has better solutions for any potential problem.

They don’t know, because it’s not in the agencies’ interests to know. If an agency were to determine through regulatory analysis that there is no problem or that a method other than federal regulation will solve the problem, what’s its reward? Agencies are not rewarded, either with budgets or political support, for not passing regulations. They are rewarded for producing them. Further, they are rarely excoriated for

producing unnecessary or ineffective rules, but they are frequently taken to task when the slightest problem manifests itself in any area under their jurisdiction for failure to regulate or enforce.

Because of the incentives they face, agencies make decisions to regulate before any evidence that might suggest regulations are not needed. They do so purposely with little—if any—input from stakeholders or internal analysis. This means that much of the regulatory process mandated by the Administrative Procedures Act is a farce in terms of the intent of that Act. According to Senator Pat McCarran, then Chairman of the Committee on the Judiciary in 1946, the APA was intended to be a “widely heralded advance in democratic government.”¹

Our institutions, including our Executive Orders and all of our existing regulatory procedural laws, have brought us to this point, and only a change in our regulatory institutions will change the outcomes. Our goal ought to be fewer, more targeted, and more effective regulations that solve real problems.

WHAT ACTUALLY HAPPENS

At FDA, the informal rulemaking process begins with new legislation, a petition, or an internal push to create a new regulation. Following that, a senior program manager typically makes a preliminary decision about the regulation and then holds a meeting to let everyone know what that decision is. Discussion of whether there is a problem and whether federal regulation is the best way to solve that problem is “off the table.” That is, there is no discussion of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention. These are issues that are typically covered in the regulatory impact analysis. But that analysis is generally begun after the decision on how to regulate has been announced. That is a key part of the problem: the regulatory analysis analyzes a decision, not a problem.

One key part of the analysis that would be extremely helpful if done before a decision is a baseline analysis. Usually by the time the government has discovered a problem, the market is also moving to solve the problem. In the baseline analysis, economists will not just describe the state of the world as it is today, but what is likely to happen given the incentives created by the market.² Baseline analysis will describe how both knowledge and practices are likely to change for both producers and consumers in the near future in the absence of a regulation. So, for example, if there is an outbreak of food borne disease tied to a particular producer of a canned vegetable, then the producer’s sales will drop, its stock price will drop, and it will face court challenges. Other producers of that canned vegetable will examine their own plants to see if they if they can avoid similar problems because it is in their best interest to do so. If, for some reason, these incentives were missing, and there were repeated problems over time (i.e., systemic problems) with known solutions, then a regulation might help. A baseline analysis can help to sort out which problems are systemic and which ones are one-time problems that markets will solve.

¹ Robert Boyd, “A Hearing Examiner Comments on the APA and the Rule Making or Adjudication Controversy,” *William and Mary Law Review* 11, 2 (1960), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2796&context=wmlr&sei-redir=1#search=legislative+history+testimony+administrative+procedures+act+1946>.

² Market failures are often market opportunities for entrepreneurs who will seek to profit by finding and marketing remedies for those problems.

As the decision moves up the chain, more senior managers will typically ask questions about any potential political opposition they are likely to encounter. Discussion of regulatory options, which are often only about minor adjustments, occurs much later in the process, but it is rare for any major change from the early decision.

OPACITY NOT TRANSPARENCY

Federal agencies are contained in their own little microcosm. They need the vast supply of knowledge that comes from stakeholders. As the Administrator of OIRA Cass Sunstein says, “Government should actively solicit expertise from outside Washington so that it makes policies with the benefit of the best information.”³ But agencies do not seek stakeholder input, particularly stakeholder input that might suggest that no regulation is needed when “making policies.” This is not surprising. There is no incentive for them to do so.

The incentives that exist in the current system to take contrary stakeholder opinions into account are, at best, weak, and they don’t even apply until late in the rulemaking process. Most regulations today are passed by what is known as informal rulemaking, also known as notice and comment. Federal laws that gave us notice and comment have also made federal documents and meetings available to all stakeholders. But that access and transparency do not equate to having equal ability to influence rules. In informal rulemaking, agencies are required to respond to comments made to proposals. But too often responding to contrary arguments means dismissing them swiftly and easily. This doesn’t mean that no stakeholders have influence over the early decisions. Generally, those that have petitioned for and favor regulations are heard from early in the process to help shape the initial decisions.

In a rule on seafood processing that I worked on at FDA, the vast majority of commenters to the proposal disagreed with FDA’s approach. But the summary in the final rule said that “some people agree and some people disagree.” A common dismissal that rule writers use is the commenter did not provide “sufficient evidence to alter the agency’s conclusion.” A simpler one is just that “the agency disagrees with the commenter.” Having leapt the low hurdle, the agency proceeds to steamroll the decision made early on in the process.

A REAL SYSTEMIC PROBLEM

For virtually my entire career at FDA, I worked to improve the Center for Food Safety and Applied Nutrition’s (CFSAN) regulatory analysis to produce better, more informed rules. At one point, I designed a Standard Operating Procedure (SOP) for use in the development of new regulations. In its simplest form, the SOP sought to ensure that the agency would define the problem, identify the options for solving it, and conduct all the relevant analyses (e.g., scientific, economic, and legal) before initiating new rulemaking.

The SOP was included in a lengthy code of practices that was supposed to determine how regulations would be developed in CFSAN. However, once it was developed, agency program managers essentially ignored it by continuing to make decisions first and then starting the regulatory process. By making

³ Cass Sunstein, “The Power of Open Government” (speech, The Brookings Institution, Washington, DC, March 10, 2010) http://www.whitehouse.gov/omb/oira_speech_03102010/.

decisions first, the more basic questions about defining the problem, whether or not we actually needed a regulation, and a discussion of the options were completely precluded.

Curious as to whether other economists working in the health, safety and environmental areas had agencies similar to mine, I interviewed senior economists in all of the health, safety, environmental, and security agencies for information on how they conducted their respective regulatory processes and how policy makers used their analysis.⁴ The findings indicated that policy makers use regulatory analysis as a means to justify a pre-determined course of action, not a tool for problem-solving.

- 1) Agency policy makers commonly make decisions well prior to the completion of the regulatory analysis.
- 2) Agency managers often discourage comprehensive, quality economic analysis. As one economist put it, "I think it would have an immense difference if we were allowed to do good regulatory analysis."⁵
- 3) Some economists noted that their agencies often did not define the problem.
- 4) Another economist noted that agency policy makers "foreclose any discussion of meaningful options [for solving a problem] at a pretty early stage."⁶ Another said, "We do what we always do: just trotting out the same old thing. That's why we don't come up with better regulations; we just come up with the same regulations in different areas." Another described the atmosphere for those who try and talk about regulatory options as "oppressive."
- 5) Because they decide the course early in the process, agency policy makers put a lot of pressure on economists to come up with the "right" answer, one that justifies their premature decisions. The pressure works because the economists are organizationally under the people making the decisions. This is an enormous problem for federal regulatory economists. Within agency bureaucracies, pointing out potential flaws in one's superior's decision rarely helps the course of one's career.

INCENTIVES

These findings are not unexpected. Scholarly research evaluates and analyzes the incentives that drive agencies to produce regulations. And, to the best of my knowledge, there are no theories that hypothesize that there are incentives for agencies not to regulate.

Some examples of the theories of regulation include public interest theories that generally point to market failures and assume that governments can correct market problems (without any problems with the

⁴ Richard A. Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (working paper, Mercatus Center at George Mason University, Arlington, 2008) http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf.

⁵ Ibid.

⁶ Ibid.

operation of government).⁷ The “capture theory” suggests that industries will “capture” the agencies that regulate them, causing the agencies to produce regulations that benefit those industries. Industries are able to do this because the benefits of the regulation go to concentrated industries that can launch an effective lobbying campaign whereas the cost are spread out to a broad, a diffuse group, typically consumers. Dr. Bruce Yandle of Clemson University takes this idea a step further with his theory of “Bootleggers and Baptists.”⁸ This theory suggests that industries will tacitly join with activists seeking to advance a cause and align their interests to create regulation. For example, environmental activists may find an unexpected regulatory ally in the fight for clean air in a firm that sells smokestack scrubbers.

Private-interest theories hypothesize that politicians and bureaucrats are self interested and pass laws and regulations to reward themselves. It is certainly true that both agencies and bureaucrats within agencies have their own goals. Bureaucrats desire “salary, perquisites of the office, public reputation, power, patronage, ease of managing the bureau, and ease of making changes” and all areas are “positive monotonic function of the total budget of the bureau.”⁹ As one writer puts it, “Despite the absence of any obvious increase in social product on its part, the bureaucracy shows an insatiable appetite for consuming an increasing share of resources over time.”¹⁰ In fact, as another writer points out, “Budgets... are a recurring and pervasive need; indeed, they are often the ‘bottom line’ in the matter of survival.”¹¹

In all cases, there is an absence of incentives to use rational analysis based on exterior incentives such as is found in the private sector. In private firms, there is a reason to control costs and target specific markets. Businesses have an instantaneous feedback from the market, the effect on profits of poor decisions. For example, if costs are excessive, then revenue will not cover costs or generate a profit. Similarly, if marketing targets consumers or firms who are unlikely to buy the product, then costs will again exceed the revenue generated from those efforts. If a firm does not make a profit or cover its costs, it goes out of business.

Regulatory agencies do not have a similar feedback mechanism to help distinguish well-informed decision making from pre-determined decision making. Without feedback, there isn’t sufficient incentive to ensure that decisions are made after stakeholder input and rigorous analysis of the need for and consequences of regulation.

ALTERING INCENTIVES

Changing the incentives so that agencies regulate only when there is a systemic, significant problem that will not solve itself and needs to be addressed at the federal level will require major structural changes in the institutions that govern and reward agencies. One thing that will make a difference immediately is to decouple the agency’s decision from both early analysis of and democratic input into a problem. That is,

⁷ See, for example, Johan den Hertog, “General Theories of Regulation,” 224, <http://www.scribd.com/doc/239491/General-Theories-of-Regulation>.

⁸ Bruce Yandle, “Bootleggers and Baptists—The Education of a Regulatory Economist,” *Regulation* (May/June 1983): 12–16.

⁹ William A. Niskanen, “Nonmarket Decision Making, the Peculiar Economics of Bureaucracy,” *The American Economic Review* 58 (1968): 293–4. The hypothesis is challenged in Ronald N. Johnson and G. Libecap, “Agency Growth, Salaries and the Protected Bureaucrat,” *Economic Inquiry*, 27 (1989).

¹⁰ Daniel K. Benjamin, “A Users Guide to the Regulatory Bureaucracy,” in *Regulation and the Reagan Era*, eds.

Roger E. Meines and Bruce Yandle (New York: Holmes and Meirs, 1989), 253.

¹¹ Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton: Princeton University Press, 1981), 96.

initially, agencies should perform regulatory analysis and make that analysis available for public comment. There should be no discussion of the agency's preferred solutions in this document.

Specifically, this document should contain:

- 1) A clear definition of the problem that the agency seeks to solve and the evidence it relied on to define the problem. An agency could not satisfy this requirement by simply stating that it is issuing a rule in order to satisfy an enabling statute. Instead it must specify the contours of a significant, systemic problem and the evidence it used to identify those contours. If the problem involves risk, a risk assessment should be provided.
- 2) An explanation of and evidence for why a federal solution is required for this problem including:
 - i) Is the problem a failure of the market or other significant problem?
 - ii) Is it a large enough problem to warrant a federal solution, particularly given other priorities?
 - iii) Is it a problem better solved at the state or local level?
 - iv) Will normal market forces solve the problem within the relevant timeframe? The answer to this question comes from the above-described baseline analysis.
- 3) The possible ways to solve the problem. One answer may be to gather more information particularly if there are no solutions that are effective or cost-beneficial. Options generated should be broad including, for example, providing or requiring information, providing guidance, establishing performance objectives, and technology-based standards (command and control). Alternatives can also include levels of stringency, covering different sectors of the economy, different time frames for compliance, exemptions for certain sizes of firms, encouraging industry-established standards, or enhancing liability laws.
- 4) A preliminary estimate of the benefits and costs of each of the options listed.

All of this analysis should be of a regulatory problem, not a regulatory decision. This pre-proposal document should make all data and assumptions available to the public, and the agency should request public comments on all parts of the document. This publication would serve several purposes. First, it would make the agency's analysis and data transparent to interested parties and the public. Second, it would provide interested parties and the public with an opportunity to evaluate the agency's data and research and contribute data and information that the agency may not have identified. Third, it would reinforce the agency's focus on problem-solving rather than the narrower activity of promulgating regulation.

CONCLUSION

As an earlier Congressional testimony noted, "Often what occurs before a notice of proposed rulemaking has been published produces commitments that, in the words of President George H.W. Bush's General Counsel at the EPA, convert notice and comment rulemaking into a form of Kabuki theater—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."¹²

¹² Subcommittee on Courts, Commercial and Administrative Law Committee, *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs? Hearing before the Committee on the Judiciary, United States House of Representatives, 112th Cong., 1st sess.* (February 28, 2011).

Regulation though isn't a theatrical performance. Regulatory agencies, by virtue of their extensive reach into every aspect of American life, have become big business, and they are not well run. Decisions are made with minimal democratic input and analysis of whether or not regulations are necessary. Decisions are made this way because the institutions that govern agencies rulemaking create incentives to do so. If we change the institutions, we will get fewer, more effective, and more targeted regulations that will help to solve our serious social problems.

Mr. COBLE. We have been joined by the distinguished gentleman from Georgia, Mr. Johnson. Good to see you, Hank.

Professor Glicksman, good to have you with us.

TESTIMONY OF ROBERT L. GLICKSMAN, J.B. AND MAURICE C. SHAPIRO PROFESSOR OF ENVIRONMENTAL LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. GLICKSMAN. Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting me to testify today.

My name is Robert Glicksman. I am the J.B. and Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School, although I am here today strictly in my personal capacity.

The premise of the Mercatus Center's regulatory report card project is that the Federal rulemaking process is flawed, and the best way to fix it is for agencies to engage in more rigorous regulatory analysis to provide better justifications of the need for and content of. More regulatory analysis, the idea is, particularly at the initial stages of regulation, would help avoid unnecessary regulation. The report card also reflects the conviction that cost benefit analysis is essential for identifying counterproductive regulations.

My first response is that the framing of the problem is not one I would agree with. And to begin with, cost-benefit analysis, in my view, is itself a flawed technique for distinguishing between useful and counterproductive regulations. More fundamentally, the problems arising from the current regulatory process, for the most part, are not the result of regulations lacking justification or whose costs exceed their benefits. Instead, the primary problem is inadequate resources to allow agencies to fulfill their statutory responsibilities and fulfill their tasks of achieving public policy goals.

In addition, the regulatory process already allows those affected by regulation to identify flaws in agency regulatory proposals, and affords both regulated entities and agencies opportunities to fix problems, such as overly costly or unfair regulation.

I want to make five points.

First, I think the presumption that we can get better regulation if we make cost-benefit analysis more rigorous is just wrong. Cost-benefit analysis is inescapably limited by the difficulty of predicting and quantifying regulatory costs and benefits. Quantifies cost-benefit analysis requires agencies to reduce regulatory benefits, such as lives saved, to a crude dollar figure, so that the monetized benefits of regulation can be measured against its monetized costs. Some agency estimates of monetized regulatory benefits are absurdly low, and I have given some examples in my statement.

Beyond that, inconsistencies in how agencies monetize benefits cast doubt on the usefulness of the effort. Cost benefit figures, therefore, provide a misleading aura of precision and rationality. Monetization of benefits often depends on arbitrary assumptions that tend to undervalue social benefits of regulation that are hard to quantify. Efforts to reform the methodology for cost benefit analysis will at best yield only marginal improvements in regulatory decisionmaking. And, therefore, cost-benefit calculations should be

used with caution and with an acknowledgment of their limitations.

Second, the real problem to which Congress should be directing its attention is not insufficient agency focus on cost-benefit methodologies, but the destructive convergence of funding shortfalls, demonizing political attacks and outmoded legal authority, all of which have set the stage for ineffective enforcement and unsupervised industry self-regulation. Examples, some of which were pointed out by Representative Conyers and Representative Cohen already today, include the Deepwater Horizon spill in the Gulf of Mexico; the mine disaster at the Upper Big Branch Mine, West Virginia; a peanut products tank tainted by salmonella; glasses contaminated by cadmium sold to children at fast food restaurants; Code Red smog days when parents are warned to keep their children indoors; and the recall of widely used pharmaceutical drugs found to create risks of heart failure.

All of these instances reflect agencies unable to do their jobs in protecting the public interest. More analysis will not fix these flaws. If anything, more analysis will only make things worse by slowing agencies down without demonstrably improving the quality of their regulatory decisions.

Proponents of cost benefit analysis remain focused on perfecting formulas, assumptions, models, and data sets. If we really want to fix the regulatory system, we should, instead, focus on finding ways to help agencies effectively and efficiently achieve their statutory missions of protecting and the environment.

Measures that I think would move us in that direction include providing agencies with the resources they need and enhancing their legal authority in situations in which it has become outmoded.

Third, current law provides ample opportunities to address uncertainty, unnecessary or ill-advised regulation without heaping on agencies already stretched to the limit more onerous analytical responsibilities. The Administrative Procedure Act, in particular, provides notice and comment process which affords regulated entities and others opportunity to provide input before a regulation goes into effect.

Fourth, even if agencies get it wrong during initial rule promulgation, the regulatory process allows those affected by regulation in unintended or counterproductive ways to seek relief from the agency in the form of waivers and exceptions.

Fifth, agencies can revise rules that don't work out as intended, either because they turn out to be too weak or too strong. And, finally, judicial review provides a check on unjustified regulation.

I will just close by quoting from two former EPA administrators, Ruckelshaus and Whitman, who made this statement just last Friday in an op-ed in the Post: Our country today needs what it needed in 1970: a strong, confident, scientifically driven, transparent, fair, and responsible set of protective agencies, such as the EPA. Congress should help America achieve that.

They also warned that those who do not support those goals should be aware that the American public will not long stand for an end to regulation that have produced their health and quality of life.

Thank you for the opportunity to talk to you today.
 Mr. COBLE. Thank you, Professor. And to all witnesses, thank
 you for your testimony.
 [The prepared statement of Mr. Glicksman follows:]

**Statement of Robert L. Glicksman
 to the House Judiciary Committee's Subcommittee on Courts, Commercial and
 Administrative Law**

**Raising the Agency's Grades — Protecting the Economy, Assuring Regulatory Quality and
 Improving Assessments of Regulatory Need**

March 29, 2011

My name is Robert L. Glicksman. I am the J.B. & Maurice C. Shapiro Professor of
 Environmental Law at The George Washington University Law School. I am also a member
 scholar at the Center for Progressive Reform. I graduated from the Cornell Law School and have
 practiced and taught environmental and administrative law for nearly 35 years.

.. IMPROVING COST-BENEFIT ANALYSIS WILL NOT IMPROVE REGULATORY DECISION-MAKING

The essential premise of the Mercatus Center's Regulatory Report Card project is that the
 output of federal regulatory agencies is flawed and that the best way to address that problem is
 for agencies to engage in more rigorous regulatory analysis to provide better justifications of the
 need for and content of regulation. Implicitly, the premise seems to be that agencies are engaged
 in excessive regulation and that regulatory analysis, particularly at the initial stages of regulation,
 would cure that problem by demonstrating that regulation is unnecessary. The Report Card
 project also reflects the conviction that cost-benefit analysis is an essential analytical tool
 capable of identifying regulations whose costs to society exceed their benefits and that are
 therefore counterproductive. My first response to that framing of the problem is that cost-benefit
 analysis is itself a flawed technique for distinguishing between useful and counterproductive
 regulations. More fundamentally, while the current regulatory process is indeed flawed, the
 problems for the most part are not the result of agencies adopting regulations without
 justification or regulations whose social costs exceed their benefits. Instead, the primary

problem is regulatory dysfunction resulting from providing agencies with inadequate resources to fulfill their statutory responsibilities, not giving agencies sufficient tools to address significant health, safety, and environmental risks, and burdening agencies with what are already excessive and unhelpful analytical obligations. Finally, the existing regulatory process already allows those affected by regulation to identify flaws in agency regulatory proposals and affords both regulated entities and agencies opportunities to fix problems such as overly costly or unfair regulation.

Let me say at the outset that I'm delighted to see that the Report Card project that is the focus of this hearing acknowledges that there are in fact benefits to regulation. We've heard a full-throated assault on regulation over the last couple of months, in which a grossly inflated dollar figure for the supposed cost of regulation has been bandied about frequently. Those who have assailed supposedly excessive regulatory costs almost never mention the benefits of regulation, however, even though ample data indicate that these benefits vastly exceed the costs. Even using the deeply flawed methodology of cost-benefit analysis, which is slanted heavily against protective regulations, the benefits of regulation vastly exceed the costs.

Putting aside the critics' tendency to ignore or give short shrift to the benefit side of the equation, I think the presumption that we can get better regulation if we make cost-benefit analysis more rigorous is just wrong. It sounds reasonable, but in the real world it will lead to longer delays in much-needed regulations, all in pursuit of some sort of mathematical ideal that is, in the end, illusory.

As a decision-making methodology, cost-benefit analysis is inescapably limited by what the academic literature refers to as indeterminacy. By that, I mean that it produces cost and

benefit estimates that are so ambiguous and uncertain that they can tell us very little about the economic efficiency, “smartness,” or quality of a regulation.

One of the biggest sources of indeterminacy in cost-benefit analysis comes from its reliance on monetization, the process by which the cost-benefit analyst attempts to reduce any value—no matter how complex or how important—to a crude dollar figure, so that the monetized benefits of regulation can be measured against its monetized costs. On their face, some agency estimates of monetized regulatory benefits are absurdly low. For the Environmental Protection Agency’s (EPA) air pollution regulations, for example, the prevention of a non-fatal heart attack in a person 0-24 years old is worth only \$84,000 and the prevention of an emergency room visit to treat an asthma attack is worth only \$363.¹ Protecting children’s developing brains against mercury pollution is worth only \$8,800 per IQ point saved.² Until recently, agencies assigned a value of \$0 to preventing catastrophic climate change, because this benefit was too hard to monetize.³ Beyond that, inconsistencies in how agencies monetize benefits cast serious doubt on the usefulness of the effort. EPA values each life saved through its regulations at \$9.1 million,⁴ but lives saved by Department of Transportation regulations are worth closer to \$6 million.⁵ Cost-benefit figures therefore provide the aura of precision and rationality. It may be possible to assess the impacts of regulation in monetary terms, although pre-regulation estimates of costs often turn out to be inflated in retrospect. Efforts to monetize

¹ Env’tl. Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020*, 5-18 to 5-19 (Table 5-4) (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

² Env’tl. Protection Agency, *Regulatory Impact Analysis of the Final Clean Air Mercury Rule 10-5* (Mar. 2005), available at http://www.epa.gov/ttnecas1/regdata/RIAs/mercury_ria_final.pdf.

³ See, e.g., U.S. Dep’t of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, Corporate Average Fuel Economy and CAFE Reform for MY 2008-2011 Light Trucks*, at VIII-64 to VIII-65 (March 2006), available at

http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Rulemaking/Rules/Associated%20Files/2006_FRIAPublic.pdf.

⁴ Env’tl. Protection Agency, *Regulatory Impact Analysis (RIA) for Existing Stationary Compression Ignition Engines NE/SHAP, Final Draft 7-6 n. 8* (Feb. 2010), available at http://www.epa.gov/ttn/atw/rice/rice_ncshap_ria2-17-10.pdf.

⁵ U.S. Dep’t of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, FMVSS 216, Upgrade Roof Crush Resistance 121* (Apr. 2009).

benefits often depend on arbitrary and unrevealed assumptions and serve to undervalue the social benefits of regulation as benefits that are difficult or impossible to quantify get ignored or downgraded in importance.

Indeterminacy is inherent to cost-benefit analysis. We've been using cost-benefit as a regulatory guide star for 30 years, and so we're in a position to draw that conclusion. The indeterminacy has been with us since day one, and it's not going away. Efforts to reform the methodology will at best yield only marginal improvements in its ability to improve regulatory decision-making. Cost-benefit analysis attempts to distill a large and complicated body of information into a few numbers. The information on which the analysis is based is always full of uncertainty and imperfections. Data are never complete. Scientific conclusions are never certain. And the process of converting intangible values into monetary terms is fraught with unsolvable theoretical conundrums. Over time, methodological improvements may chip away at some of the ambiguity and uncertainty underlying every cost-benefit analysis. However, cost-benefit analysis will never be able to adequately measure the net benefits of a particular regulatory option, much less to allow for a meaningful comparison of the net benefits of several regulatory options to determine which maximizes net benefits.

That doesn't mean that potential costs and benefits shouldn't be weighed by regulatory agencies. Agencies ought to assess costs and benefits. But such estimates ought to provide only one piece of the puzzle, and should be used with caution and with an acknowledgment of their limitations. Supporters of cost-benefit analysis sometimes seem to believe that these flawed estimates can be the sole basis for determining whether regulations are workable or worthwhile, as if a computer that has been fed all the details will just do the math and then crank out an

“optimal” decision for us. But if the data going into the computer are incomplete and flawed, as they inevitably are, the result of the process is bound to be flawed as well.

L. TO IMPROVE THE REGULATORY SYSTEM, THE PROTECTOR AGENCIES MUST BE RE-ENERGIZED

The real problem to which Congress should be directing its attention is not insufficient agency attention to cost-benefit methodologies. A recent series of catastrophic regulatory failures have brought to light the indisputably troubling condition of crucial regulatory agencies assigned to protect public health, worker and consumer safety, and the environment. The destructive convergence of funding shortfalls, demonizing political attacks, and outmoded legal authority has set the stage for ineffective enforcement and unsupervised industry self-regulation. From the Deepwater Horizon spill in the Gulf of Mexico that killed eleven and caused grave environmental and economic damage, to the worst mining disaster in 40 years at the Upper Big Branch mine in West Virginia with a death toll of 29, the signs of regulatory dysfunction abound. Peanut products tainted by salmonella, glasses contaminated by cadmium sold to children at fast food restaurants, Code Red smog days when parents are warned to keep their children indoors, the recall of widely used pharmaceutical drugs found to create risks of heart failure—all reflect agencies unable to do their jobs and companies that put economic self-interest above operating in ways consistent with the public interest.

More analysis—including analysis aimed at increasing regulatory report card scores—will not fix these flaws in the current regulatory system. If anything, more analysis only makes things worse by needlessly slowing agencies down without demonstrably improving the quality of their regulatory decisions. The Occupational Safety and Health Administration’s (OSHA) recently issued Cranes and Derricks Rule provides a concrete illustration of the pernicious effects of “paralysis by analysis.” Beginning in the mid-1990s, industry itself began petitioning

OSHA for stronger and more comprehensive regulations and in July of 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. Nevertheless, an understaffed, under-resourced, and over-stretched OSHA was not able to issue a final rule until August of 2010—more than 6 years later—because it was tied up by several burdensome analyses.⁶ By OSHA's own estimates, every year the rule remained stuck, 53 people died and another 155 were injured unnecessarily.⁷

Yet, proponents of cost-benefit analysis remain focused on perfecting formulas, assumptions, models, and data sets. But elaborate efforts to monetize heart attacks do not prevent heart attacks; EPA's air pollution regulations do. A rigorous cost-benefit analysis does not prevent workplace deaths; an energized and unencumbered OSHA does.

If we want to fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions of protecting people and the environment. Here are some places to start:

- **Providing agencies with the resources they need.** One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, thus forcing these agencies to effectively do more with less. And the situation is getting worse, not better. Just last week in an editorial published in the Washington Post on March 24, 2011, William Ruckelshaus and Christine Todd

⁶ Cranes and Derricks in Construction, 75 Fed. Reg. 47906 (Aug. 9, 2010) (to be codified at 29 C.F.R. pt. 1926), available at http://www.osha.gov/FedReg_osha_pdf/FED20100809.pdf. See Catherine O'Neill et al., *The Hidden Human and Environmental Costs of Regulatory Delay* 13-16 (Ctr. for Progressive Reform, White Paper 907, Oct. 2009), available at http://www.progressivereform.org/articles/CostofDelay_907.pdf.

⁷ Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926); O'Neill et al., *supra* note 6, at 15.

Whitman, who served as EPA Administrator under Republican Presidents Nixon, Reagan, and George W. Bush, recognized the threat and decried House proposals to cut EPA's budget by nearly a third, which they said would "impede [EPA's] ability to protect our air and water."

- **Providing agencies with enhanced legal authority.** For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. Again, the warnings of Administrators Ruckelshaus and Whitman ring true. "Amid the virulent attacks on the EPA driven by concern about overregulation," they noted, "it is easy to forget how far we have come in the past 40 years. We should take heart from all this progress and not, as some in Congress have suggested, seek to tear down the agency that the president and Congress created to protect America's health and environment." The same holds true for the other health, safety, and environmental watchdog agencies.
- **Freeing agencies from unnecessary analytical requirements.** Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making.

- L. THE TRADITIONAL ADMINISTRATIVE RULEMAKING PROCESS IS ALREADY DESIGNED TO IDENTIFY THE NEED FOR REGULATION AND ACCOUNT FOR REGULATORY IMPACTS

Although there is no evidence to support the charge that agencies routinely churn out ill-advised and counterproductive proposals, current law provides ample opportunities to fix those problems without heaping on agencies already stretched to the limit more onerous analytical responsibilities. A regulatory proposal is just that—a proposal. It reflects the best efforts of an agency to devise a regulatory solution to some environmental, health, or safety threat that is supported by applicable law and available science. The solution is the result of a broad inquiry into the nature of the threat and the available remedial options that is conducted by an interdisciplinary group of agency experts and policymakers.

Despite these best efforts, sometimes an agency overlooks some crucial issue when developing a rule. This is why, under traditional Administrative Procedure Act (APA) rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, it is strictly enforced by federal courts whenever those affected by a final rule challenge it in court. If the reviewing court finds that an agency ignored some relevant public comment without adequate explanation, it can vacate the rule and send the agency back to the drawing board. This prospect creates strong incentives for agencies to diligently consider all relevant information during development of the rule.

In essence, efforts to reform regulatory analysis through enhanced cost-benefit analysis ignore this well-calibrated process. Instead, these efforts would require agencies to embark on a time-consuming, resource-intensive, and ultimately fruitless search to uncover every impact that

a rule might have at the very beginning of the rulemaking process. This will not improve regulatory decision-making. At best, it wastes agencies time and resources. At worst, it stops the whole rulemaking process dead in its tracks.

IV. REGULATIONS CAN BE REVISED THROUGH INCREMENTAL ADJUSTMENTS

Even if agencies get it wrong during initial rule promulgation, the regulatory process provides ample avenues for those affected by the regulation in unintended or counterproductive ways to seek relief from the agency. Agencies spend much time and effort attempting to rationalize significant draft regulations before they are proposed and adopted. These efforts are certain to fail at times because of methodological and informational problems. It therefore makes more sense for regulators to make incremental adjustments to regulations at the “back-end” of the administrative process, by relying on exceptions, time extensions, variances, and waivers, rather than continuing the effort to rationalize regulation at the “front-end” of the process.⁸ By focusing on the back-end, administrators have the opportunity to adjust regulations in light of their actual impact, as compared to the unavoidable and significant guesswork used in front-end analysis such as cost-benefit analysis.

Congress has generally authorized most agencies to make these back-end adjustments. A back-end adjustment process has several advantages over efforts to craft a perfect and omniscient regulation at the outset. First, it permits agencies to preserve relatively stringent baseline risk-reduction standards while still accommodating concerns that the application of these stringent rules will cause irrational or unfair results in particular cases. Regulators can make case-by-case adjustments instead of initially watering down standards in anticipation that a general rule may be counterproductive or irrational in some circumstances. Second, a back-end

⁸ See Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004).

process addresses the delays caused by analysis requirements and the difficulty of undertaking analysis in light of informational and methodological problems. The availability of these adjustments can avoid delay in the issuance of a rule of widespread applicability because an agency can promulgate a rule and rely on regulated entities to alert it to implementation problems by filing individual requests for relief. Further, a back-end process gives regulated entities a strong incentive to produce evidence that an adjustment in a rule is justified. A process that relies on back-end adjustments to fix regulatory flaws places on those most likely to possess information bearing on how regulation has produced unintended consequences or unfair treatment—the regulated community—the incentive to bring that information to the agency’s attention. Unlike rulemaking, in which regulators must attempt to anticipate problems before they occur as they write general rules, incremental adjustments permit regulators to consider concrete problems, one at a time, in the context of specific circumstances. The back-end process allows agencies to make adjustments in response to circumstances that they did not anticipate when they wrote a rule.

Third, a back-end adjustment process can increase the legitimacy of the regulatory program that contains the back-end process by reducing the frustrations likely to result from the application of regulatory requirements in ways that produce harsh or anomalous results.

Finally, but hardly least of all, a back-end process is one of the ways that regulators can take costs into account. A back-end adjustment process that authorizes hardship-based adjustments makes cost a relevant consideration without relying on a cost-benefit test that yields a misleading impression of analytical precision.

It is important that agencies be accountable for how they make back-end adjustments.⁹ But this method of improving regulation makes far more sense than endless attempts to perfect the cost-benefit analysis that occurs at the front-end of the regulatory process.

V. REGULATIONS CAN BE REVISED THROUGH SUBSEQUENT RULEMAKINGS

At least one other aspect of current regulatory practice functions as a device for weeding out flawed regulations. On occasion, a rule imposes burdens without providing much benefit. Much more frequently, the agency discovers that the rule is not strong enough, as illustrated by EPA's 1973 Clean Air Act regulation that required refineries to reduce the amount of lead in gasoline by about 80 percent. Subsequent epidemiological studies confirmed that the rule significantly reduced blood lead levels in children, preventing countless cases of learning disabilities and impaired brain development, while imposing relatively little cost on refineries. These studies also confirmed that the 1973 lead rule did not go far enough in protecting the public health (specifically, in protecting children exposed to lead from cognitive impairment). In 1985, EPA tightened the standard even more, and Congress eventually banned the use of lead as a gasoline additive in the 1990 Clean Air Act Amendments. EPA was convinced in 1973 that lead was harmful to public health, but because of the state of the science at the time, it underestimated its adverse impacts. When EPA acquired that knowledge later, it amended its rules to better advance the fundamentally precautionary mission of the Clean Air Act.¹⁰

Problematic regulations of either variety (excessive or inadequate) can be fixed through subsequent rulemaking actions. Some statutes contemplate this eventuality, requiring periodic

⁹ See Sidney A. Shapiro & Robert L. Glicksman, *The APA and the Back-End of Regulation*, 56 ADMIN. L. REV. 1159 (2004).

¹⁰ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc) ("A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat. As should be apparent, the 'will endanger' language of [the Clean Air Act] makes it such a precautionary statute.").

review and revision of existing rules. For example, the Clean Air Act requires EPA to revisit its National Ambient Air Quality Standards (NAAQSs) for criteria pollutants at least once every five years and revise them as necessary. The same law requires EPA to assess whether technology-based controls on emissions of hazardous air pollutants provide sufficient health protection. If not, EPA must recommend supplemental regulation to Congress and adopt it if Congress does not.

Efforts to reform cost-benefit analysis ignore the regulatory system's capacity for self-correction. If anything, these efforts undermine this capacity by tying up the regulatory process in knots. Instead, the cost-benefit analysis reform movement aims at perfection at the front end of the regulatory process, with the inevitable result that agencies will not have time and resources to issue many regulations and those that are issued will tend to underprotect health and safety as regulatory benefits are undervalued. If cost-benefit analysis had been the order of the day in 1973, it is highly unlikely that EPA would have been able to issue its important lead rule due to the absence of an established connection between automotive lead emissions and health problems in children.¹¹ If the cost-benefit analysis reform movement succeeds, one can only imagine all the important future safeguards that will be unnecessarily delayed and diluted.

I will close by returning to the recent admonitions of Administrators Ruckelshaus and Whitman. They recognized what is obvious but that nevertheless bears repeating: "Our country needs today what it needed in 1970: a strong, confident, scientifically driven, transparent, fair and responsible" set of protective agencies such as EPA. "Congress should help America

¹¹ Frank Ackerman, Lisa Heinzerling, & Rachel Massey, *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 161 (2005) ("Thus, the cost-benefit analysis of the 1980s phase down of lead in gasoline would not have been possible in the absence of the more important 1970s-era regulation—which was not itself based on cost-benefit analysis. Had we waited in the 1970s, as some argue we should do in policy disputes today, for cost-benefit analysis to show us the way, we might still be waiting now.").

achieve that.” They also fired a shot across the bow of those antagonistic to these goals: “The American public will not long stand for an end to regulations that have protected their health and quality of life.”

Mr. COBLE. Gentlemen, as I said, we try to apply the 5-minute rule to us, so if you all can keep your response to a terse manner, we would appreciate that.

Failure is unfortunate. Some people indicate that those of us who want to refine the regulatory system or improve it, including Presi-

dent Obama has said that, we are not trying to compromise safety in doing this. At least that is my take on it. I think that needs to be fully appreciated.

Dr. Ellig, in 2008, the average Bush administration agency score on your report was a failing 27.31 out of 60 possible points. In 2009, the average Obama administration score was also a failing mark of 27.02 out of 60. Is it fair then to conclude that the failure of good decisionmaking is a systematic problem across the Republican and Democratic administrations?

Mr. ELLIG. Yes. Statistically, there is no difference between those two figures. We are getting about the same results for both years.

Mr. COBLE. Thank you, sir.

Professor Glicksman, in your book, *Risk Regulation At Risk*, you write that agencies are more acquainted with the day-to-day details and difficulties of regulatory decisions than the communities of inquiry that operated the White House, Congress and the Federal judiciary, which are not specialized in the same way. Because agencies are much less accountable than the other branches of government, should we not be doing even more to ensure that their decisions are made transparently and on the record?

Mr. GLICKSMAN. I certainly support transparent decisionmaking by agencies, and the tools that are provided by the Administrative Procedure Act to ensure transparency. Beyond that, both of the other branches of government, the Congress and the courts, do have ways of holding agencies accountable through, for example, amending statutes that Congress decides agencies have implemented in ways that don't conform to congressional intent. The courts are often called upon to review regulations issued by agencies, and they have the responsibility, as well as the authority, to overturn regulations that lack adequate justification or are not supported by scientific evidence. And they do so on a regular basis.

Mr. COBLE. Thank you, sir.

Dr. Williams, under your view, agencies really don't have an incentive to seek and heed input from those who suggest no regulation is needed. Instead, all of the incentives are to listen and those who want more regulation, whether or not more is needed. What are the most important ways in which we can reform the APA to restore agencies' incentives to solve problems rather than just regulate for the sake of regulating?

Mr. WILLIAMS. Thank you for the question. I think what happens now is that agencies are rewarded with budgets for passing regulations, and they are not penalized for passing regulations that are ineffective or unwanted. I think the first thing you have to look at are what are the incentives that need to be changed with agencies. I would start with the process that I outlined earlier where you separate out agencies, defining the problem and taking public input on what the problem is before they go ahead and make a decision. But somewhere down the road, you are going to have to address the incentives that agencies face, and particularly with budgets.

Mr. COBLE. Dr. Ellig, let me try to beat that red light. The first and most important step in any good decisionmaking is to identify the problem one is attempting to solve. Is it really true that you found agencies did the worst job of all at this most basic step of decisionmaking?

Mr. ELLIG. Yes. The average score on our criterion for evaluating the systemic problem was around a 1.8 out of 5. So on average, that was with the worst criterion. And about half of the time we found it wasn't really that well addressed at all.

Mr. COBLE. I will now recognize the gentleman from Tennessee for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

Has the Mercatus group ever studied the Justice Department's regulations or policies?

Mr. WILLIAMS. Not to my knowledge, sir.

Mr. ELLIG. We included several Justice Department regulations in our regulatory report card if they were proposed in 2008 or 2009. And at some time in the past, one of many independent scholars at Mercatus may have done some comments on Justice Department some time in the past 20 years.

Mr. COHEN. Mercatus has been around for 20-30 years; right? When did you start your report card?

Mr. ELLIG. This regulatory report card project started with the year 2008 a couple of years ago. A precursor project examined the quality of analysis of all regulations issued by the Department of Homeland Security since its inception. And that was done a couple of years ago.

Mr. COHEN. So you had a report card in 2008?

Mr. ELLIG. We started with the proposed regulations for 2008.

Mr. COHEN. Did you have a report card for the year 2008? Or was the first report card in 2009?

Mr. ELLIG. Just to clarify, we don't have really a single document that we call a report card. The project is a wide variety of evaluations of individual regulations which are all available on our Web site, along with a set of notes which justify each score. This is the most transparent way this kind of a project has ever been done in the United States. We have that.

For the past 2 years, we have produced a paper summarizing the results for the year, and we have a paper from 2008 and a paper from 2009 that also compares the 2008 and 2009 results.

Mr. COHEN. Who is on your board of directors?

Mr. ELLIG. Who is on our board of directors?

Mr. COHEN. Yes.

Mr. ELLIG. I can name a few folks. Honestly, I can't name them all.

Mr. COHEN. Name a few of them.

Mr. ELLIG. I can name a few. Vernon Smith, Nobel Laureate in economics.

Mr. COHEN. From industry, which industry people are on your board?

Mr. ELLIG. From industry, the last time I looked, Charles Koch was on the board. Industry, I am not sure if a former Fed vice chairman counts as industry.

Mr. COHEN. No, it doesn't.

Is Charles Koch your largest funder?

Mr. ELLIG. I honestly don't know. I don't care and it is not—

Mr. COHEN. I care. The issue is I care. Is he your largest funder?

Mr. ELLIG. I do not know.

Mr. COHEN. Is he one of your largest funders?

Mr. ELLIG. I do not know, and it is not relevant to my work. On our Web site, we have a policy on the independence of research from funding.

Mr. COHEN. Dr. Williams, do you know who your largest funders are, the largest funders of the Center?

Mr. WILLIAMS. No, sir. I am also on the analytical side, and we have a very strict separation of who funds us and how we choose our analysis. I basically do analysis that I care deeply about, and most of it stems from the work I did at the Food and Drug Administration. And I still work intensively on those issues because I care about the food and safety issues.

Mr. COHEN. The issues of food and drug, we have had spinach scares and we have had lettuce scares and chickens we had to get rid of and the Asian flu. We have had other problems with food. Are you concerned that a lessening of regulation might not subject the American people to more and more contaminated foods?

Mr. WILLIAMS. No, sir.

Mr. COHEN. You are not?

Mr. WILLIAMS. My concern is when too often the agency either wants to or is forced to regulate before we have solutions to problems. What that means is we end up putting out regulations, people have to comply with those regulations, and we don't solve the problem. For the 27 years I was in the Food and Drug Administration, we did not see food-borne illness decrease by one food-borne illness. We put out a number of regulations that were ineffective. What I am here to do today is to try to get effective regulations; not more, not less, effective regulations.

Mr. COHEN. Professor Glicksman, Robert Reich, former Labor Secretary, said that those who argue that regulations kill jobs ignore an important fact: lack of adequate regulation kills people. You made some reference to that in studying effects, whether it is just dollars and cents or human lives. Do you think some of the changes in regulations that have been proposed might affect people's lives in having more contaminated food?

Mr. GLICKSMAN. Certainly, I think watered-down regulation or repeal of regulation is likely to have adverse effects on the public health and safety and the environment, which can translate into a downturn in economic productivity. There is often a dichotomy that is set up between regulation that is designed to protect the health and safety and the environment and economic productivity. I think it is a false dichotomy. They go hand in hand in the same direction in many instances.

Mr. COHEN. Thank you.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from South Carolina, Mr. Gowdy, is recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Dr. Ellig, in the course of 5 minutes, it struck me that both the motive and the methodology have been questioned by some of my distinguished colleagues from the other side. If you would, please, would you tell us about your methodology? Why who is on your board doesn't influence your research? Go ahead and say what you wanted to say when my colleague from Tennessee was questioning you.

Mr. ELLIG. Basically, the way we are set up at Mercatus, fundraising is separate from research. And those of us who do research have the freedom to call them as we see them. That is what I like about working there. If it were organized in some other way, I probably wouldn't want to work there.

Now, as far as the scorecard goes, let me take off on the use of the word "subjectivity," since the Ranking Member mentioned that in his introduction of our scorecard.

We said in the paper we wrote that a critic might claim that this evaluation method is subjective and we have gone to great pains to try to minimize the problems that might occur as a result of that. And the actual word we used in our 2008 paper was "inter-subjective," which is a term from philosophy of science which means different people may be doing an evaluation and rendering a subjective opinion, but what counts for a 2 when I look at a regulation is the same as what counts for a 2 when Richard looks at, what counts for a 2 when our colleague John Morrall, a 29-year veteran of the Office of Information and Regulatory Affairs, looks at it, and so forth. So we try to get a common understanding of what types of performance in these analyses counts for what kind of a score.

Then we put the scoring notes and the scores all up on our Web site so anybody can go look at it, and we welcome other folks to look at it, to read it and dialogue with us. And if they think we missed something, tell us. That is what it is about in academia. We won't get upset; but just tell us what the specific issue or the problem is.

Mr. GOWDY. Well, it strikes me that you gave equally abysmal scores to both Administrations. So the notion that you are biased in favor of one Administration or the other, I would be embarrassed at either score that was given. Let me ask you this to hopefully end on a happy note. The Department of Justice got the highest ranking that you gave. What are they doing that the Social Security Administration is not?

Mr. ELLIG. I don't think we have enough data yet to say well, this agency generally does a good job; and this agency generally does a bad job. We have a small number of agencies that will issue six or seven or 10 big regulations a year. But a lot of the other ones will be one or two or three, and there are different sub-entities within the agencies, some of which may do better or worse analysis than others. I don't know that we can generalize from our results at this point to say this agency does a good job and this agency does a not-so-good job.

Mr. GOWDY. Mr. Chairman, in a rare move, I yield back the balance of my time.

Mr. COBLE. I thank the distinguished gentleman from South Carolina.

The distinguished gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Members of the panel, I appreciate your comments.

Do you have any familiarity with legislative Acts that are attempting to reform the regulatory process by the Congress?

Mr. ELLIG. My understanding is all kinds of stuff have been introduced.

Mr. CONYERS. Anything in particular?

Mr. GLICKSMAN. I am somewhat familiar with the proposed REINS Act.

Mr. CONYERS. What about you, Dr. Williams?

Mr. WILLIAMS. I also heard about the REINS Act as well.

Mr. CONYERS. Have you heard anything good about it?

Mr. WILLIAMS. My understanding, sir, is that Congress, a number a years ago, voted itself the right to turn back regulations, and that they have used that authority one time in something like 15 years. And that the Reins Act would reverse that.

Mr. CONYERS. Do you have any particular recollection, Dr. Ellig, about any proposals currently before the Congress, in this 112th Session?

Mr. ELLIG. I have heard of the REINS Act. I have heard of a piece of legislation that essentially took President Clinton's Order 12866 and wants to write that into law so it is a requirement for all agencies rather than just an executive order.

I remember hearing a few days ago there was a piece of legislation introduced that would have—that would essentially almost overturn a key Supreme Court precedent on direct wine shipment and give the States more latitude in how they choose to regulate interstate commerce in alcohol. So, yes, a lot of different things have been introduced.

Mr. CONYERS. For experts in regulatory reform, your attention to some of the excessive amounts of time we spend on the debates is a little bit disturbing to me. This is the fourth hearing—this is the fifth hearing on regulatory reform. Have you ever heard anything about our hearings in this Committee, in the Judiciary Committee?

Mr. ELLIG. I am aware of one previous hearing. I have to say as a regulatory specialist who used to work in a Federal regulatory agency where the general—a lot of issues of regulation I work on rarely get much attention in Congress, so I am delighted that it is finally going to get some attention.

Mr. WILLIAMS. My expertise is actually in regulatory agencies for 27 years. And the things I testified about today are things I came to realize over really three decades. I pay some attention to the bills that are going on in Congress. But also as an analyst, I am familiar with the fact that many bills are introduced but not passed.

So my concern today is to try to fix the problems where agencies are making decisions first, and then getting stakeholder input.

Mr. CONYERS. Well, I am a little perplexed about your expertise, but in the storm that is going on these first 3 months about regulatory reform, this Committee has spent more time on this subject than anything else. You spent your careers working in the field. And now we meet here this afternoon and you know almost little or nothing about what is being contemplated. How can we be expected to take your advice seriously if you don't even have any knowledge of what we are doing to try to improve the regulatory process of which you complain pretty strenuously?

Mr. WILLIAMS. It is not my understanding that we were called here to talk about individual, proposed statutes. In fact, because of

our status, we actually can't advocate for or against any particular law.

Mr. CONYERS. You can't? Well, let me ask you this: Who are the agencies that are doing so poorly that they get zero or one ratings? Are you able to reveal that?

Mr. ELLIG. Well, it is all revealed on our Web site. So, it is certainly already public knowledge.

Mr. CONYERS. Yes, but you are here in front of me right now. Let's talk about it.

Mr. ELLIG. The zeros or the ones were just on one criterion which was——

Mr. CONYERS. Mr. Chairman, I ask unanimous consent for one additional minute.

Mr. COBLE. Without objection, one additional minute.

Mr. CONYERS. Thank you very much.

Mr. ELLIG. The zeroes and the ones were on one particular criterion which was definition of the systemic problem.

Mr. CONYERS. Just name the agencies you are talking about?

Mr. ELLIG. An agency that had a lot of regulations that were zeros or ones was Department of Health and Human Services. Typically in the annual regulations, the Department issues recalculation of Medicare payment rates and various other things like that.

Mr. CONYERS. Thank you for that one.

Name a second one?

Mr. ELLIG. Let's see. In 2008, there was a Social Security Administration regulation on setting the time and place for appearances before administrative law judges that just didn't say anything about the issue.

Mr. CONYERS. What agency are you referring to, sir.

Mr. ELLIG. Social Security Administration.

Mr. CONYERS. You have got a list of maybe about 15, I will just ask you to submit them for the record.

Mr. ELLIG. Each year there were about half of the regulations that got zeroes or ones, so that would be about 20 to 25 a year.

Mr. CONYERS. Right. Thank you very much, Mr. Chairman.

Mr. COBLE. You are welcome. The distinguished gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. With all due respect, I must wonder why it is that we are holding this hearing today. Purportedly, it is going to give the Members an opportunity to discuss ways in which Federal agencies can improve their grades on the regulatory report cards issued by the Mercatus Center. And this Mercatus Center was founded by Rich Fink, correct? Do you know who Rich Fink is?

Mr. ELLIG. Yeah, yes. I know who Dr. Fink is.

Mr. JOHNSON. And Dr. Fink is former president for the Koch Family Foundation, isn't that correct?

Mr. ELLIG. I don't know what title, I know he works for Koch Industries. I don't know what other titles he might have accumulated.

Mr. JOHNSON. Now Koch Industries is led by the brothers David and Charles Koch, and it is a \$100 billion per year conglomerate. Isn't that a fact?

Mr. ELLIG. It is a big company, yes.

Mr. JOHNSON. The second largest private industry in the United States of America.

Mr. ELLIG. Yes. Sometimes the news reports say second, sometimes they say first.

Mr. JOHNSON. A \$35 billion fortune that the brothers control, and out of that 35 billion, isn't it a fact that they contributed about \$30 million to the George Mason University, much of which went into funding for the Mercatus Center?

Mr. ELLIG. I don't know because we keep research separate from fundraising, and I am on the research side of—

Mr. JOHNSON. You wouldn't disagree with that, would you?

Mr. ELLIG. I am saying I do not know.

Mr. JOHNSON. Okay, well, I will tell you if it is true, and I have reason to believe that it is, doesn't that put the credibility of the Mercatus Center and its report card at issue? Is that something that the public should be able to understand who is doing the grading and perhaps the fact that they are grading is influenced by their monetary interest in what they are grading?

Mr. ELLIG. Well, I don't pay any attention to it. And as far as whether that has any effect on the credibility, I am quite happy to have the credibility of this project stand on the quality of the research results we produce, the quality of the process we put together, and the reviews and comments that we get as we submit the papers from this project for peer review in academic journals.

Mr. JOHNSON. Well, Dr. Williams, you have said pretty much essentially that agencies justify their very existence by issuing regulations. And oftentimes, there is no justification for the regulation that they promulgate. And you are saying, or can it be said also that legislators justify their existence by introducing legislation some of which may not be prudent, is that correct?

Mr. ELLIG. Well, what I know about is regulatory agencies. I have 27 years in the Food and Drug Administration.

Mr. JOHNSON. Do you mean to tell me that you think that the average agency employee comes to work every day with the sole purpose of deciding what kind of regulation I am going to propose today?

Mr. WILLIAMS. I can't testify to all agencies. I know that the employees of the Food And Drug Administration are some of the finest people I have ever meet. However, I do know—

Mr. JOHNSON. It is the Department of Energy, though, that you really want to get at. Tell me this. If you really want to get, since the Kochs are in the energy business, have a lot of concerns in the energy business, you are trying to make it more difficult for the Department of Energy and other departments to issue regulations which would govern the conduct of this for-profit corporation.

Mr. WILLIAMS. Far from it. What I am concerned about, the same thing I was concerned about throughout my entire career is that we get effective regulations, that we not have ineffective regulations that crowd up compliance with the effective ones so that we can actually solve our social problems. That is my concern.

Mr. JOHNSON. Thank you, sir.

Mr. COBLE. We have been joined by the distinguished gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Dr. Ellig, could you maybe give us a little assessment about what steps the Congress should take to ensure agencies consider the economic impact of all regulations, report regulations are imposed?

Mr. ELLIG. Well, I don't think there is a silver bullet because the regulatory process is complex but there are some things that could help. One is to find some way to ensure that agencies actually do the analysis before they make decisions about regulations.

Now, I know some folks say, oh, that is going to slow down the process, paralysis by analysis. I only know of one empirical investigation that tried to figure out whether that is actually true or not. It is a classic little article by a gentleman named Tim Muris. He is a distinguished law professor at George Mason. He was chairman of the Federal Trade Commission. And back in the 1980s, he wrote an article in which he looked at Federal Trade Commission rulemaking and pointed out that one of the most famous regulations in which the FTC took its time to develop a theory of the systemic problem and then investigate empirical evidence, the eyeglass rule to prevent bans on advertising of eyeglasses, the rule was done in 3 years.

Another rule, a famous rule the FTC issued that was not really accompanied by a very good systemic theory of what the consumer harm was and didn't have much empirical analysis and was essentially based on some anecdotes, was the FTC funeral rule. It took 10 years to issue this thing. So I would suggest that maybe, just maybe, agencies can sometimes do a quicker job or at least a better job of regulating when they actually have to take the steps to understand what they are doing before they do it.

Mr. GALLEGLY. When you mentioned the concern for slowing down the process, I am not sure that that is necessarily a bad thing sometimes. In fact, it would almost appear to me that without doing some of this analysis, it is almost a ready-shoot-aim type situation. And ultimately, the cure may be worse than the disease. So maybe there should be more of an attempt to understand the consequences, not that in the end the results may be the same, but at the same time, I would think that should be an integral part of the equation. I hope somebody agrees with that.

Dr. Williams?

Mr. WILLIAMS. I agree. I certainly agree and as I said in my testimony, I think that too frequently we are making decisions first without knowing what the impacts of those decisions are, we are basically regulating in the dark.

Mr. GALLEGLY. Professor Glicksman.

Mr. GLICKSMAN. I would just remark the regulations which I am most familiar the ones issues by EPA and Federal land management issues the BLM, the Forest Service and the Park Service are not characterized by lack of identification of regulatory objectives. It is quite clear when you read the preamble to an EPA regulation that seeks to control emissions of a cancer-causing pollutant that what the Agency is trying to do is to limit exposure to dangerous chemicals emitted by companies that, absent regulation, have little or no incentive to control their emissions in ways that will increase the regulatory compliance costs.

When an agency like the Forest Service issues regulations, it is quite clear that what they are trying to do is to enhance recreational opportunities for people like hikers, hunters, fishermen. So I just, in my experience, have not seen this problem of regulating without understanding what the objective of the regulation is going to be.

Mr. GALLEGLY. I don't know that any of us would really object to the objectives that you have just identified with. However, there sometimes are other issues that the economic impact could be more applicable than maybe the examples that you used.

Thank you very much, Mr. Chairman.

Mr. COBLE. You are indeed welcome, sir. We have been joined by the distinguished gentleman from New York, Mr. Reed. You are recognized for 5 minutes.

Mr. REED. I am going to yield at this point in time, Mr. Chairman.

Mr. COBLE. Thank you, sir. Gentlemen, we thank you for your testimony today. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as properly as they can do so and that their answers may be made a part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Again, gentlemen, thanks to each of you, and this hearing stands adjourned.

[Whereupon, at 5:05 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Post-Hearing Questions from Jerry Ellig, Senior Research Fellow,
Mercatus Center, George Mason University; and Richard A. Williams, Director of
Policy Research, Mercatus Center, George Mason University

Questions for the Record

Rep. Howard Coble

Chairman

Subcommittee on Courts, Commercial and Administrative Law

For the Hearing on “Raising the Agencies’ Grades – Protecting the Economy, Assuring
Regulatory Quality and Improving Assessments of Regulatory Need”

March 29, 2011

For Dr. Ellig:

1. During the hearing it was alleged that the Report Card Project is entirely subjective and was not subjected to external review. Is this true?

In Washington political debates, the term “subjective” is regularly equated with “arbitrary.” The term means something entirely different in the social sciences. In the social sciences, “subjective” refers to the perceptions and thought processes occurring inside a person’s mind, as opposed to physical phenomena one can directly observe. Saying that thoughts and perceptions occur inside the human mind is not the same thing as saying that they can be dismissed as arbitrary. As we state in our June 2010 paper that outlines the full evaluation methodology, “As any professor who has graded papers knows, ‘subjective’ is not the same thing as ‘arbitrary.’”¹ Because we are human, we can understand each others’ subjective judgments and assess their reasonableness.

The Regulatory Report Card is a qualitative evaluation, in which multiple experts assign scores to agency regulatory analyses based on consistent application of a common set of standards. We employ a qualitative evaluation to address the problem that the Office of Management and Budget pointed out in its 2008 report to Congress on the benefits and costs of federal regulations: “Objective metrics can measure whether an agency performed a particular type of analysis, but may not indicate how well the agency performed this analysis.”²

We point out that a qualitative evaluation runs the risk of being more subjective than a “check-the-box” evaluation. This is not a problem, as long as all of the scorers use a common frame of reference so that they share the same understanding of what kind of analysis deserves a 5, a 4, or any other score. Our paper explains the measures we have taken to mitigate this potential problem and ensure consistency in scoring. All scorers undergo training and practice evaluations to ensure that they share a common frame of

¹ Jerry Ellig and Patrick McLaughlin, “The Quality and Use of Regulatory Analysis in 2008,” Mercatus Center Working Paper (June 2010), p. 8. <http://mercatus.org/publication/quality-and-use-regulatory-analysis-2008>.

² Office of Management and Budget, *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities* at 19.

reference. This shared understanding allows us to compare one regulatory analysis with another and identify best practices. The evaluation method is patterned after the Mercatus Center's *Performance Report Scorecard*, a highly-regarded 10-year project that evaluated the quality of federal agencies' annual performance reports produced under the Government Performance and Results Act.³

The Regulatory Report Card methodology and findings have been presented for review and critique at several professional and scholarly meetings attended by regulatory experts and government analysts, including the Society of Government Economists and Society for Risk Analysis. We presented the scoring methodology and results to several federal agencies and to the staff of the Office of Information and Regulatory Affairs, and we received many helpful comments and criticisms. We also received comments in one-on-one meetings with former OIRA and regulatory agency officials whose combined experience in the federal government exceeds 100 years. Several academic working papers based on the Regulatory Report Card data are under review at peer-reviewed scholarly journals.

Finally, the fact that our findings are broadly consistent with what other regulatory scholars have found when they have evaluated regulatory impact analyses gives us more confidence that our method contains no serious flaws.

2. You stated during the hearing, "at Mercatus, fundraising is separate from research." Would you care to elaborate on this point?

Mercatus researchers are committed to the highest standards of academic quality and credibility for our research procedures and products. Mercatus emphasizes a free and open inquiry into understanding social problems and their remedies. Mercatus research projects are not directed research or research for hire, and financial supporters have no role in the selection or conduct of our research. We use internal and external review to ensure that any research product is constructed logically and credibly and that there is a thorough comprehension of existing economic literature. All conclusions belong solely to the author(s).

While the credibility of the research any organization produces should stand on the quality and reliability of that research alone, more is often necessary. Mercatus strictly adheres to a stated Policy Regarding Independence of Research, which is as follows (and is available at <http://mercatus.org/about/research-policy>):

³ For more information, see <http://mercatus.org/publication/10th-annual-performance-report-scorecard-which-federal-agencies-best-inform-public>.

1. The Mercatus Center engages in research and educational activities that advance the mission of the organization. This includes research and educational activities that may run counter to the interests of organizations and individuals that provide financial support to Mercatus.
2. Mercatus accepts financial support from numerous sources for research and educational activities that support its mission, endeavoring to maintain a broad and diverse base of support. All Mercatus work product has to be capable of withstanding rigorous peer review of its quality and reliability. Therefore Mercatus financial supporters have absolutely no influence or control over the research design, methodology, analysis, or findings of Mercatus research projects, nor do they have influence or control over the content of educational programs. Offers of financial support predicated on such expectations are not accepted.
3. Mercatus will not engage in research or educational activities that are co-sponsored with non-academic organizations that support Mercatus financially.
4. The following paragraph will be furnished to all organizations that provide or are considering providing Mercatus with financial support to ensure that supporters understand our commitment to independent research:

The Mercatus Center is committed to the highest standards of academic quality and credibility and to ensuring that our work stands up to rigorous peer review. Mercatus scholars independently pursue a research agenda and educational activities that advance our mission. Mercatus does not engage in research or educational activities directed or influenced in any way by financial supporters. To view our full policy regarding independent research, visit our Policy Regarding Independence of Research Page on our Web site at <http://www.mercatus.org/about/research-policy>.
5. This policy and Mercatus practices are reviewed annually to ensure that Mercatus is in compliance with its provisions and faithful to its intent.

For Dr. Williams:

1. Professor Glicksman suggests that we should allow agencies to err on the side of over-regulating at the outset, and then later modify promulgated regulations if they don't actually work.
 - a. Shouldn't we demand that agencies get their regulatory decisions right to begin with?

Yes. One of the best ways that agencies can accomplish this objective is to do a thorough regulatory analysis before they decide on a course of action. An agency needs to:

1. identify precisely what the problem is and present evidence of that problem;
2. determine whether the market or another level of government could solve the problem;
3. identify a broad range of approaches for solving the problem;
4. examine the benefits and costs of each of those approaches; and
5. determine if any of the options can solve the problem in a cost-beneficial manner.

Of course, there is no way to guarantee that regulatory agencies will select the right solution every time. But that doesn't mean that agencies cannot do a much better job of regulating than they are doing now. As the Mercatus Regulatory Report Card project shows, agencies today are not doing a very good job of trying to figure out what will happen as a result of their regulations. There are ineffective regulations, regulations with unintended consequences, and regulations that impose excessive costs for less than satisfactory results on the books. As a result, the United States is experiencing overregulation.

Today, the Code of Federal Regulations exceeds 163,000 pages. Agencies have failed to examine most of these rules by asking questions like: Which regulations are working and still necessary? Which ones are important and which ones are not? Which are directed at a problem that never materialized? Standards requiring retrospective review by agencies simply haven't worked.

This creates a terrible situation. The persistence of ineffective regulations absorbs so much time and resources that few can focus on those rules that truly are necessary and effective for protecting the public health, the environment, and the financial system. Even with the best of intentions, it is increasingly difficult for existing or new businesses to know if they are in full compliance with all the regulations applicable to them.

In general, there is not much of an incentive for agencies to expend resources to identify and remove ineffective regulations from the Code of Federal Regulations. If agencies do not have the incentives or institutions to identify and remove those regulations that do not work, at the very least they can ensure, to the extent possible, that any new regulations are likely to accomplish their goals at reasonable costs.

- b. Wouldn't Professor Glicksman's approach require more, wasteful and redundant government spending on regulatory activity?

The cost to agencies to regulate, although not insignificant, is a tiny fraction of what regulated entities and consumers must spend to comply with ill-considered rules.

- c. Wouldn't Professor Glicksman's approach also lead to unnecessary and wasteful compliance costs for regulated entities?

A very large portion of compliance costs for regulated entities are one-time expenditures, usually what are referred to as "fixed" and "sunk" costs. "Fixed" means that the costs do not vary with output. "Sunk" costs are one-time costs that firms do not get back later if the regulation changes. Once a regulation is enacted, firms are obligated to comply. Thus, once firms have made those compliance investments, taking those requirements off of the books later does not help. Under an approach that errs on the side of regulation only to find it to be unnecessary, those resources have been spent and wasted. Such an approach, therefore, siphons limited resources away from efficient and effective investments in regulatory compliance and essential business operations.

2. Have you ever felt pressured in any way to reach a particular conclusion in your research? How does the Mercatus Center endeavor to protect your academic freedom?

When I worked for government, I absolutely felt pressured to reach specific conclusions. I was often told to ensure that benefits exceed costs—not by changing decisions, but by changing my analysis.

Unfortunately, my experience was not unique. In interviews with senior federal economists for a paper, I found that this type of pressure (to provide analysis showing benefits exceed costs) was a frequent occurrence. Sometimes the pressure was subtle, affecting one's possibility for promotions. Other times it was overt.

I have never felt pressured in any way to reach a specific conclusion at the Mercatus Center. Mercatus adheres to a Policy Regarding Independence of Research, as explained above.

Both:

Questions for Richard Williams and Jerry Ellig

1. How many members of Mercatus' Board of Directors and officers have a relationship in any respect with Koch Industries or any of its related companies or foundations?

Information regarding the membership of the Mercatus Center's Board of Directors is available on our Web site, <http://mercatus.org/all-people/1285>.

2. According to an August 30, 2010 article in *The New Yorker* about the political activities of David and Charles Koch, the Koch Family Foundations founded and continue to run the Mercatus Center.

What is your response to that statement?

George Mason University Professor of Economics Tyler Cowen is the general director and chairman of the board of directors for the Mercatus Center at George Mason University. The research and the testimony we provided are our own. We refer you again to the Mercatus Center's Policy Regarding Independence of Research above.

3. The *New Yorker* article quotes a Democratic political strategist describing the Mercatus Center as "ground zero for deregulation policy in Washington" and an environmental lawyer is also quoted in the article as saying the Mercatus Center is "a means of laundering economic aims."

What are your responses to these observations?

Those opinions are misinformed and hence erroneous. The Mercatus Center seeks to ensure that sound and thorough economic analysis informs federal regulatory decision making. We assess the quality of agencies' analyses via the Regulatory Report Card in order to highlight best practices and identify gaps. We also seek to supply missing information and analysis via research publications as well as Public Interest Comments submitted in regulatory proceedings by Mercatus scholars with relevant expertise.

We engage in research driven analysis to question and test the role that different institutions play in creating prosperity. There are times when our findings encourage the role of government and times when they indicate that other institutions are more effective.

4. What portion of Mercatus' funding is derived from the Koch Family Foundations and other Koch-financed entities?

We do research, not fundraising. Therefore, we do not know details of any giving to Mercatus.

5. You admit that Mercatus' score card is subjective or certainly gives the appearance of being so. Wouldn't it be more useful to have an objective, impartial score card prepared by a totally independent entity?

The Mercatus Center at George Mason University is an entirely independent entity that adheres to the highest academic standards. As explained above, the Regulatory Report Card is "subjective" according to standards for academically rigorous qualitative research. A

trained group of evaluators assess the quality and use of regulatory analysis according to a shared understanding of what kind of analysis deserves a 5, a 4, or any other score.

The Regulatory Report Card was designed to fill a gap between two different approaches employed in prior scholarly evaluations of agency regulatory impact analysis.

Some previous scholarly literature on “regulatory scorecards,” pioneered by the Government Accountability Office and by outside scholars such as Robert Hahn, used an objective “check the box” evaluation methodology that identified whether an agency’s analysis did various things enumerated in executive orders and OMB guidance.⁴ This approach is informative and allows the researchers to compare large numbers of regulations. But it has a significant limitation: Checking off whether an agency did something does not tell us anything about the quality of what the agency did. The Office of Management and Budget explicitly noted this drawback in its discussion of regulatory scorecards in its 2008 report to Congress on the benefits and costs of federal regulations.⁵ We designed the Regulatory Report Card to respond to OMB’s concern.

Much more intensive (and “subjective”) evaluations of the quality of individual regulatory analyses can be found in case studies that assess several individual regulatory analyses in depth.⁶ This approach has produced some excellent studies that evaluate quality in depth. The disadvantage of the case study method is that it is very resource-intensive, making it extremely difficult to compare the analyses of all economically significant regulations proposed in a year or over multiple years.

The Mercatus Regulatory Report Card offers a more in-depth evaluation of quality than a purely objective check-the-box approach, but less depth than a case study. The advantage of this “middle ground” approach is that we can offer a qualitative evaluation of a large set of regulations. This allows us to highlight best practices and identify gaps in analysis that could benefit from further research.

Any scholar or organization that wants to evaluate agency regulatory analysis faces this fundamental choice between breadth and depth. We think all of the approaches—the objective “check-the-box” approach, the case study approach, and our middle ground approach—have produced useful knowledge about the quality and use of regulatory analysis

⁴ We cite a list of these studies in the report that was attached to Dr. Ellig’s written testimony. See Jerry Ellig and John Morrall, “Assessing the Quality of Regulatory Analysis: A New Evaluation and Data Set for Policy Research,” Mercatus Center Working Paper (December 2010), p. 2.

⁵ Office of Management and Budget, *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities*.

⁶ The most recent is Winston Harrington, Lisa Heinzerling, and Richard D. Morgenstern, *Reforming Regulatory Impact Analysis*, Resources for the Future (April 2009).

in federal agencies. For that reason, we disagree that any one methodology should have a privileged position in the discourse over regulation.

The question also asks if an “independent entity” should conduct an assessment like ours. The Mercatus Center at George Mason University is an academic research center unaffiliated with any federal agency, so we have no reason to favor one agency over another.

We realize the question may be motivated by concern that the evaluators’ policy preferences may influence their evaluations of a regulation. When training the scoring team, we emphasize that all scorers should leave their own policy preferences at the door. The Regulatory Report Card is an assessment of how well federal agencies conduct and use regulatory analysis, not an assessment of whether any Mercatus researcher agrees with the agency’s decisions about the regulation or the underlying law. The paper submitted as part of Dr. Ellig’s testimony explicitly notes this:

“Criteria 1-8 only evaluate the quality of regulatory analysis. We do not evaluate whether the proposed rule is economically efficient, fair, or otherwise good public policy.

The same caveat applies to the Use criteria. Criteria 9 and 10 assess the extent to which analysis of the regulation’s outcomes or benefits, the systemic problem, the alternatives, and costs informed the agency’s decisions about the regulation. On these criteria, we took great pains to avoid imposing the value judgment economists often make: that the agency should choose the most economically efficient alternative, as determined by a comparison of quantified benefits and costs. If an agency used some analysis of a regulation’s benefits to make decisions, even if it did not consider costs or efficiency, it could receive some points on Criterion 9. Similarly, if an agency demonstrated that it was fully cognizant of the net benefits of alternatives, but explicitly rejected the alternative with the greatest net benefits in favor of some other alternative for clearly articulated reasons, it could receive points on Criterion 10.”⁷

6. Can you explain what the difference is in agency performance that you’ve graded a “0” versus a “1”? What about the difference between a “1” and a “2”? A “2” and a “3”?

Page 7 of the paper submitted as part of Dr. Ellig’s written testimony includes a table that explains what each numerical score means. The table is reproduced below:

⁷ Ellig and Morrall, *supra* note 4, at 8.

5	Complete analysis of all or almost all aspects, with one or more "best practices"
4	Reasonably thorough analysis of most aspects and/or shows at least one "best practice"
3	Reasonably thorough analysis of some aspects
2	Some relevant discussion with some documentation of analysis
1	Perfunctory statement with little explanation or documentation
0	Little or no relevant content

The paper submitted as part of Dr. Ellig's testimony also notes that a more in-depth explanation of the scoring methodology is contained in a paper available on the Mercatus Center Web site that presents the 2008 results. This paper includes examples of regulations that achieved a high score on the "outcomes" criterion (EPA National Ambient Air Quality Standards for Lead), a low score (Dept. of Veterans Affairs Post 9/11 GI Bill), and a middling score (Labor Dept. Cranes and Derricks).⁸

We also have videos that we use for training scorers. In these videos, Dr. Ellig explains each criterion and presents examples. The videos are available at <http://mercatus.org/content/regulatory-report-card-video-training>.

7. You gave the Fish and Wildlife Service (FWS) low scores with regard to its 2009 to 2010 Migratory Game Bird Hunting Regulations on several items that seem pretty arbitrary. For example, it gets a 1/5 on "Does the analysis adequately assess uncertainty about the outcomes?" What does that mean in this context? If FWS sets the hunting season, people will go out and buy shotgun shells and orange vests and shoot birds, and if it doesn't, then people won't. Please clarify what you meant by this assessment.

The relevant uncertainty is not whether hunting will occur if the regulation is issued, but how much hunting will occur and how that will impact the bird population. These uncertainties affect the amount of consumer surplus the regulation can be expected to produce each year

⁸ Ellig and McLaughlin, *supra* note 1, at 7-12.

and the sustainability of bird populations over time. The regulatory analysis, however, does not take these uncertainties into account. This omission is especially glaring given that (1) the agency re-uses the same regulatory impact analysis over several years and only updates it when new National Hunting and Fishing Survey data become available, (2) the regulation only provides “outside limits” for season lengths, bag limits, and locations; states establish the actual limits, and (3) the regulatory impact analysis considers only duck hunting, not all of the birds covered by the rule. Given these sources of uncertainty, some qualitative assessment of the range of possible outcomes and factors that influence them should have been possible. Since the department has taken a similar approach to this regulation and to the analysis for a number of years, some quantitative analysis of the accuracy of past predictions should have been possible. The analysis did receive 1 point because it acknowledged uncertainty about the amount of hunters’ willingness to pay for hunting and used a range of values for that variable.

- FWS gets a 0/5 on "Does the analysis adequately assess uncertainty about the existence or size of the problem?" You said there was "No relevant content." However, in earlier sections of the your report card, you gave FWS's analysis a high score for having established the need for the rule (market failure) and that there have been studies of bird populations for more than 50 years. So how was FWS supposed to show with certainty why the rule is needed, AND to show uncertainty about the need for the rule?

The Regulatory Report Card contains three questions about uncertainty related to outcomes, the systemic problem, and costs. To receive points on any of the Report Card questions about uncertainty, the regulatory impact analysis must explicitly consider possible uncertainties. The analysis does not have to identify big uncertainties in order to receive credit for analyzing uncertainty. If, after explicit consideration, the analysis concludes that the uncertainties are small or unimportant, and it presents evidence that backs up this claim, it can receive credit for analyzing uncertainty. If the analysis does not explicitly consider relevant uncertainties, then it does not receive credit for evaluating them.

The regulatory impact analysis for the bird hunting regulation acknowledged no uncertainty about the existence or the size of the problem. Therefore, we could give no credit on the uncertainty question because the analysis did not appear even to have considered uncertainty about the existence or size of the problem. If the regulatory impact analysis had explicitly explained what uncertainties about the existence or size of the problem were considered and then presented evidence that they were small or unimportant, it would have received a better score on this criterion. Based on the information presented in the analysis, we cannot tell if the FWS analysts assessed

possible uncertainties about the existence or size of the problem and concluded they were small or if they neglected to consider these uncertainties at all.

A critic might suggest that we should give agencies the benefit of the doubt and assume uncertainty is irrelevant if the agency did not explicitly analyze uncertainty. However, this approach would generate the absurd result of giving the same score to an analysis that ignored the uncertainty issue and an analysis that made a solid attempt at analyzing uncertainty. That approach would certainly not be fair to the agencies that actually do analyze possible uncertainties.

- FWS gets a 0/5 on “Does the analysis identify how the regulation would likely affect the prices of goods and services?” Mercatus said the analysis “estimates hunters’ expenditures on goods and services, but not effects of the regulation on prices.” So FWS is supposed to know how much Winchester is going to charge for shotgun shells this year? And is the price of shotgun shells (or orange vests, or decoys) really affected by a rule in which FWS sets hunting seasons?

Considering that no legal bird hunting can occur unless FWS issues this rule, the rule probably does have a significant effect on the demand for and therefore the price of shotgun shells, vests, and decoys. This is, however, a very unusual regulation, and these kinds of price effects may be less important for evaluating this regulation than for evaluating most other economically significant regulations.

Typically, regulations require or prohibit certain types of behavior. The requirements or prohibitions generate costs for the regulated entity, and some or all of these costs get passed on to consumers in the form of price increases. The price increases induce consumers to cut back consumption of the good or service whose price has increased. The increase in price, plus the value that consumers sacrifice when they use less of the good or service, is a cost associated with the regulation. Thus, the change in prices and the consumer response are important effects of typical regulations. They affect the total cost, and they also affect how costs are divided up between regulated entities and consumers.

The bird hunting regulation is very atypical in this regard. It neither prohibits nor compels hunting; it merely allows the hunting season to occur. In a sense, this regulation reduces the “price” of hunting from very high (the risk of being caught hunting illegally if hunting is not permitted) to very reasonable (the price of a hunting permit). This is likely the biggest price change associated with the regulation, but it

affects benefits rather than costs. The quality of the benefits analysis is addressed under criterion 5, outcomes.

A critic might argue that we should refrain from scoring a regulatory analysis on its analysis of price effects when the agency issues a “permissive” regulation that does not contain price-increasing prohibitions or mandates. The broader issue is whether we should refrain from scoring an analysis on any criterion or sub-question that seems less relevant to the particular regulation. We considered this generic issue numerous times when evaluating individual regulations, whenever a particular criterion or question seemed less relevant to the particular regulation under review. We concluded that omitting some criteria for particular regulations would make the evaluation process less transparent and less informative.

To ensure that all Regulatory Report Card evaluations are comparable, every regulation is evaluated on every criterion. We do not omit criteria or pass on evaluating a regulation on a criterion based on ad hoc judgments about how important we may think that criterion is for evaluating that particular regulation. The Report Card provides a description of what the regulatory analyses do and what they don’t do.

We publicly furnish scores on each individual criterion (and each sub-question scored separately under the Analysis criteria). Readers who feel a particular criterion is not relevant, or not relevant for some regulations, are free to omit that criterion and recalculate the scores to see if the omission changes the results materially.

8. In concluding that the Department of Transportation failed to adequately identify the problem it sought to address in promulgating the Motorcoach Crash Protection rule that would have required lap and shoulder seatbelts for passenger seats on new motorcoaches, you noted among other things that there was no demand for seatbelts among motorcoach users. Should “demand” for seatbelts on motorcoaches drive safety regulations?

This question misstates what the Regulatory Report Card evaluation actually says on this topic. The Report Card evaluation of this regulation does not claim that there is no demand for seat belts among motorcoach users. The actual statement is, “The analysis does not show that motorcoach users are demanding seatbelts on motorcoaches and not being provided with them. The analysis even mentions that some motorcoach companies have started providing seatbelts in their motorcoaches.”⁹ This statement merely reports what is in the regulatory impact analysis. The regulatory impact analysis does not show there is an unmet demand, and

⁹ <http://mercatus.org/reportcards/motorcoach-crash-protection>.

in fact, it suggests some evidence that at least some motorcoach users want seatbelts and manufacturers are supplying them.

In asking whether consumer demand for seatbelts “should” drive safety regulations, the question steps well beyond the scope of the Regulatory Report Card. The Mercatus Regulatory Report Card is an assessment of how well federal agencies conduct and use regulatory analysis, not an assessment of whether any Mercatus researcher agrees with the agency’s decision-making criteria or decisions about the regulation. Section 1(b)(1) of Executive Order 12866 requires agencies to “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.” In reporting that the regulatory impact analysis did not consider whether consumers “are demanding seatbelts on motorcoaches and not being provided with them,” we merely report that the regulatory impact analysis did not analyze whether there is a market failure.

Decision makers ought to know whether consumers are getting the level of safety they are willing to pay for. Willingness-to-pay studies estimate how much consumers are willing to pay to obtain the benefits offered by regulation. Information on willingness-to-pay need not determine the regulator’s decision, but it is important information every decision maker ought to consider. If customers are not receiving the level of safety they are willing to pay for, this would likely indicate a market failure. The regulatory agency ought to find out why not, so the regulation can address this problem. A regulatory agency that did a thorough job of tracing this problem back to its root cause, using a coherent theory consistent with human behavior and empirical evidence that suggests the theory is true, would receive a high score on criterion 5, identification of the systemic problem.

That does not mean this is the only definition of the systemic problem or way of analyzing the systemic problem that would receive a high score. Congress or the agency may decide (as the question below implies) that all customers should receive an equal level of safety regardless of their ability to pay. In that case, a relevant analysis of the systemic problem might compare the level of safety or safety features available on motorcoaches that primarily serve high-income passengers (perhaps charters) with the level of safety or safety features available on motorcoaches that primarily serve low-income passengers. If low-income passengers travel on less safe buses, and the analysis presented evidence that this reduced safety stems from their lower ability to pay for such safety, then the analysis could score well on definition of the systemic problem.

Congress or the agency may also decide that consumer preferences for safety are essentially irrelevant; all consumers should be forced to pay for safety even if few consumers want to. In

this case, analysis of the systemic problem would start by identifying and justifying the level of safety Congress or the regulatory agency believes is appropriate and then explain and provide evidence why this level of safety is not achieved.

Any of these three approaches could have earned a high score on criterion 5 if accompanied by a coherent theory and empirical evidence.

9. With respect to the Department of Transportation's Motorcoach Crash Protection rule, one of the reasons you provided for giving the DOT a low score for identifying and demonstrating the existence of a market failure or other systemic problem is that DOT did not provide an explanation of "why passengers are not getting the amount of safety they have shown themselves willing to pay for." Should an individual's willingness to pay for safety be a consideration at all, given that such an inquiry assumes an ability to pay?

For reasons explained above, a high quality regulatory analysis should consider whether individuals are receiving the level of safety they are willing to pay for. If they are not, then there may be a market failure that regulation can correct. As we explain above, systemic problems may take forms other than market failures, and so there are multiple ways the regulation could have achieved a higher score for analysis of the systemic problem even though it did not identify a market failure.

10. Are you familiar with the Administrative Conference of the United States? Do you think that entity would be able to prepare an independent analysis of the costs and benefits of regulations and of agencies' cost-benefit analyses?

Although we are familiar with ACUS, our understanding is that it is not currently staffed with any economists. For an independent analysis by any entity, it is necessary to have economists who are thoroughly familiar with benefit-cost analysis and, more generally, the laws, executive orders and guidance (particularly OMB Circular A-4) that guide production of these documents. It should be noted that regulatory impact analyses are much more than just benefit-cost analysis. They also include, for example:

- a. A description of the problem, including evidence that the problem is significant, systemic, and the result of a failure that necessitates government intervention. It should also assess where this condition exists and whether another level of government might be better for solving the problem.
- b. A baseline analysis that shows whether normal market activity is likely to solve the problem within a reasonable length of time. A baseline analysis examines the likely changes in consumer and producer knowledge and behavior (and resulting risk changes) from the current period into the near future. Changes in consumer

and producer behavior from the baseline form the basis for estimation of benefits and costs.

- c. A risk assessment. In order to do a benefit analysis for a regulation intended to reduce risk, it is necessary to know the beginning risk and how much each option would reduce the risk.
- d. A regulatory flexibility analysis.
- e. An analysis of the distributional effects of the regulation. This is particularly important to demonstrate where special interests may be driving unwarranted regulation.

11. With respect to the precise criteria that Mercatus uses in making its Report Card evaluations, they appear to not match up to the requirements of Executive Order 12866 or OMB Circular A-4 on Regulatory Analysis, as they purport to do.

Why did Mercatus chose to depart from the criteria outlined in those documents?

In what respects did Mercatus did depart from existing criteria?

What additional criteria did Mercatus consider?

Is it fair to score an agency based on criteria that it was not required to follow?

All of the criteria in the Regulatory Report Card are based on requirements in the presidential executive orders on regulatory analysis and OMB Circular A-4.

In November 2010, OMB issued a Regulatory Impact Analysis Checklist for agencies to follow. The paper submitted as part of Dr. Ellig's written testimony contains a crosswalk chart that shows how the criteria in the Regulatory Report Card correspond to the OMB checklist. Ten of the 12 criteria in the Regulatory Report Card have direct analogs in the OMB checklist, which is based on Executive Order 12866 and Circular A-4. We have reproduced this crosswalk table below.

Crosswalk of 2010 OMB Regulatory Impact Analysis Checklist with Mercatus Regulatory Report Card evaluation criteria

OMB Checklist	Mercatus Evaluation Criteria
Does the RIA include a reasonably detailed description of the need for the regulatory action?	Criterion 6: How well does the analysis demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?
Does the RIA include an explanation of how the regulatory action will meet that need?	Criterion 5: How well does the analysis identify the desired outcomes and demonstrate that the regulation will achieve them?

OMB Checklist	Mercatus Evaluation Criteria
Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?	Criterion 7, question D: Does the analysis adequately assess the baseline (what the state of the world is likely to be in the absence of further federal action)?
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?	<p>Criterion 2: How verifiable are the data used in the analysis</p> <p>Criterion 3: How verifiable are the models or assumptions used in the analysis?</p> <p>Criterion 4: Was the analysis comprehensible to an informed layperson?</p> <p><i>Criterion 3 includes an assessment of whether the models and assumptions are based on peer-reviewed or otherwise reliable publications. However, the Mercatus evaluation does not assess the quality of the underlying science.</i></p>
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?	<p>Criterion 1 takes the first step by assessing how easily the RIA itself can be found on the Internet.</p> <p>Criteria 3 and 4 include an assessment of how easily the reader could find the underlying data, sources, and methods from information or links provided in the RIA or the <i>Federal Register</i> notice.</p>
To the extent feasible, does the RIA quantify and monetize the anticipated benefits from the regulatory action?	Criterion 5, question 2: How well does the analysis identify how the outcomes are to be measured?
To the extent feasible, does the RIA quantify and monetize the anticipated costs?	Multiple questions under Criterion 8 (Benefits and Costs) assess how well the analysis identifies, quantifies, and monetizes costs.
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)?	<p>Criterion 8, question F: Does the analysis identify the approach that maximizes net benefits?</p> <p>Criterion 8, question G: Does the analysis identify the cost-effectiveness of each alternative considered?</p>
Does the RIA assess the potentially effective and reasonably feasible alternatives?	Criterion 7: How well does the analysis assess the effectiveness of alternative approaches?

OMB Checklist	Mercatus Evaluation Criteria
Does the preferred option have the highest net benefits (including potential economic, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires a different approach?	Criterion 10: Did the agency maximize net benefits or explain why it chose another option?
Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?	Criterion 9: Does the proposed rule or RIA present evidence that the agency used the Regulatory Impact Analysis? Criterion 10: Did the agency maximize net benefits or explain why it chose another option?
Does the RIA use appropriate discount rates for the benefits and costs that are expected to occur in the future?	Considered under Criterion 5, question 2 (How well does the analysis identify how the outcomes are to be measured?), as well as in several questions about measurement and comparison of benefits and costs under Criterion 8 (Benefits and Costs).
Does the RIA include, if and where relevant, an appropriate uncertainty analysis?	Criterion 5, question E: Does the analysis adequately assess uncertainty about the outcomes? Criterion 6, question D: Does the analysis adequately assess uncertainty about the existence and size of the problem? Criterion 8, question E: Does the analysis adequately address uncertainty about costs?
Does the RIA include, if and where relevant, a separate description of the distributive impacts and equity (including transfer payments and effects on disadvantages or vulnerable populations)?	Criterion 8, question H: Does the analysis identify all parties who would bear costs and assess the incidence of costs? Criterion 8, question I: Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?
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?	Criterion 4: Was the analysis comprehensible to an informed layperson?

OMB Checklist	Mercatus Evaluation Criteria
Does the analysis include a clear and transparent table presenting (to the extent feasible) anticipated benefits and costs (qualitative and quantitative)?	Criterion 4: Was the analysis comprehensible to an informed layperson?
<i>Goals and measures to assess results of the regulation in the future – No content.</i>	Criterion 11: Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?
<i>Provisions for gathering data to assess results of the regulation in the future – No content.</i>	Criterion 12: Did the agency indicate what data it will use to assess the regulation's performance in the future and establish provisions for doing so?

Each of the four Analysis criteria (Criteria 5-8) has a series of sub-questions that are separately scored and then averaged to produce the total score for that criterion. Each of these sub-questions is derived from Executive Order 12866 or Circular A-4. This is documented in a published pilot study that used these criteria to evaluate the quality of homeland security regulations finalized in the years 2003 to 2007.¹⁰ We reproduce these questions and documentation below:

Criterion 5: Outcomes

- Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?¹¹
- Does the analysis identify how these outcomes are to be measured?¹²
- Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?¹³
- Does the analysis present credible empirical support for the theory?¹⁴
- Does the analysis adequately assess uncertainty about the outcomes?¹⁵

Criterion 6: Systemic Problem

¹⁰ Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* 40:1 (Fall 2008).

¹¹ "In constructing measures of 'effectiveness,' final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided." Circular A-4 at 12.

¹² "Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively." Circular A-4 at 9.

¹³ "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 or guidance document." Exec. Order 12866, Sec. 1.7. "Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks." Circular A-4 at 2.

¹⁴ Exec. Order 12866, Sec. 1.7.

¹⁵ "[Y]our analysis should include two fundamental components: a quantitative analysis characterizing the probabilities of the relevant outcomes and an assignment of economic value to the projected outcomes." Circular A-4 at 40.

- Does the analysis identify a market failure or other systemic problem?¹⁶
- Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?¹⁷
- Does the analysis present credible empirical support for the theory?¹⁸
- Does the analysis adequately address uncertainty about the existence or size of the problem?¹⁹

Criterion 7: Alternatives

- Does the analysis enumerate other alternatives to address the problem?²⁰
- Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?²¹
- Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?²²
- Does the analysis adequately address the baseline, that is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?²³

¹⁶ “(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

(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.” Exec. Order 12866 Sec. 1.

¹⁷ “If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively ... For other interventions, you should also provide a demonstration of compelling social purpose and the likelihood of effective action. Although intangible rationales do not need to be quantified, the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values.” Circular A-4 at 4.

¹⁸ *Id.*

¹⁹ “The precise consequences (benefits and costs) of regulatory options are not always known for certain, but the probability of their occurrence can often be developed. The important uncertainties connected with your regulatory decisions need to be analyzed and presented as part of the overall regulatory analysis.” Circular A-4 at 38.

²⁰ (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. Exec. Order 12866 Sec. 1. “Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.” Circular A-4 at 6.

²¹ *Id.*

²² Agency regulatory analysis is to include “An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits.” Exec. Order 12866 Sec. 6(a)(3)(C)(i). “A regulation may be appropriate when you have a clearly identified measure that can make government operate more efficiently. In addition, Congress establishes some regulatory programs to redistribute resources to select groups. Such regulations should be examined to ensure that they are both effective and cost-effective.” Circular A-4 at 5.

Criterion 8: Costs and Benefits

- Does the analysis identify and quantify incremental costs of all alternatives considered?²⁴
- Does the analysis identify all expenditures likely to arise as a result of the regulation?²⁵
- Does the analysis identify how the regulation would likely affect the prices of goods and services?²⁶
- Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?²⁷
- If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?²⁸
- Does the analysis identify the alternative that maximizes net benefits?²⁹
- Does the analysis identify the cost-effectiveness of each alternative considered?³⁰
- Does the analysis identify all parties who would bear costs and assess the incidence of costs?³¹

²⁴ “This baseline should be the best assessment of the way the world would look absent the proposed action.” Circular A-4 at 15.

²⁵ “When you have identified a range of alternatives (e.g., different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements.” Circular A-4 at 11.

²⁶ Agency regulatory analysis is to include “An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs.” Exec. Order 12866, Sec. 6(a)(3)(C)(ii).

²⁷ *Id.* OMB Circular A-4 adds, “You should include these effects in your analysis and provide estimates of their monetary values when they are significant:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers’ or producers’ surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings.” Circular A-4 at 37.

²⁸ *Id.*

²⁹ “It is usually necessary to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to plausible changes in the main assumptions and numeric inputs.” Circular A-4 at 3. Rules with annual benefits or costs exceeding \$1 billion require a quantitative analysis of uncertainty. Circular A-4 at 41-42.

³⁰ “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.” Exec. Order 12866 Sec. 1.6.

³¹ “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.” Exec. Order 12866 Sec. 1.5. “Both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA) provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices. A major rulemaking should be supported by both types of analysis wherever possible. Specifically, you should prepare a CEA for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes.” Circular A-4 at 9.

³² “Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency.” Circular A-4 at 14.

- Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?³²

The only Regulatory Report Card criteria not mentioned in the OMB checklist are two criteria that assess whether the agency provided for retrospective analysis of the regulation's actual effects after adoption: Criterion 11 (measures and goals) and Criterion 12 (retrospective data). Although ex post, retrospective analysis has not received as much attention as ex ante analysis of proposed regulations, Section 5 of Executive Order 12866 states that agencies should conduct retrospective analysis. Section 6 of President Obama's executive order on regulatory review requires agencies to develop plans for periodic retrospective review of regulations. The Government Performance and Results Act arguably requires retrospective analysis of regulations,³³ and the GPRA Modernization Act of 2010 appears to require retrospective analysis of regulations that contribute toward high-priority agency or government goals. The GPRA Modernization Act requires identification of every program, tax expenditure, and regulation that contributes toward high priority goals, and progress toward these goals must be reviewed quarterly.

The regulatory impact analysis is an agency's best attempt at projecting the expected outcomes and costs of a proposed regulation. It seems logical that the regulatory impact analysis is also the right place to lay the groundwork for retrospective analysis. Since the regulatory impact analysis predicts benefits and costs, it provides a basis for setting goals and establishing measures. Since the regulatory impact analysis is supposed to be based on empirical analysis, it is the logical place to identify data that could be used for retrospective analysis.

Some agencies do this. For example, in the 2008 regulatory impact analysis on collection of biometric data under the US-VISIT program, the Department of Homeland Security explained how the regulation advances departmental strategic goals and indicated the measures that would be used to track the performance of the regulation.³⁴ This regulation received a score of 5 on both retrospective analysis criteria.

The Regulatory Report Card gives partial credit on the retrospective analysis criteria when the outcomes or costs projected in the regulatory impact analysis could readily be used to establish goals for or measure the regulation's results, even if the agency did not commit to doing so. It also gives partial credit if the agency committed to reexamining the regulation's

³² *Id.*

³³ Jerry Brito and Jerry Ellig, "Toward a More Perfect Union: Regulatory Analysis and Performance Management," 8 *Florida State University Business Review* 1 (2009).

³⁴ Department of Homeland Security, "Air-Sea Biometric Exit Project regulatory Impact Analysis" (April 17, 2008), Appendix D and E.

results sometime in the future, even if the agency did not explicitly identify the goals, measures, or data it will use.

Finally, readers who are still not convinced that the two retrospective analysis criteria are useful or appropriate are free to recalculate the scoring results without them. We publish each regulation's score on each criterion separately, so that readers who do not think a particular criterion is relevant can see if omitting that criterion substantially changes the scoring results.

12. Professor Glicksman observes that mechanisms like variances, exceptions, and waivers already exist that allow stakeholders to seek adjustments to rules after they have been promulgated on a case-by-case basis, allowing agencies to respond to concrete problems raised by a particular rule in a particular context, rather than being forced to speculate about myriad potential problems with rules that have not yet been promulgated.

What is your response?

This position is based on three presumptions. One, in all cases the basic regulatory approach chosen by the agency is the correct one and that only minor adjustments would sufficiently address any problem that may arise. Two, agencies have the capacity to respond to, in some cases, hundreds of thousands of firms across the United States after promulgation of a rule. Three, small- and medium-size firms affected by the rule would ask for a variance.

These considerable presumptions are simply not warranted. For instance, during the course of Dr. William's career he had opportunities to work with small- and medium-sized firms. In many cases, they showed a marked reluctance to engage government authorities. Thus, these mechanisms should not be relied upon as substitutes for high quality analysis that informs decision makers regarding the likely effects of a regulatory proposal.

13. Professor Glicksman notes that cost-benefit analysis is indeterminate, making costs and benefits difficult to predict on the front-end of the rulemaking process.

What is your response?

First, characterizing benefit-cost analysis as indeterminate is only a problem if one believes that this or any other kind of analysis will be used as the sole basis for making dispositive decisions. We do not agree that the results of a benefit-cost analysis (or, more correctly, a regulatory impact analysis) should replace an informed decision making process. We do believe agencies should analyze before they decide.

More generally, this characterization of benefit-cost analysis as being uncertain can be applied to all science, not just economics. Science always contains uncertainty; that is the

nature of science. In fact, virtually all inputs into the regulatory process have some degree of uncertainty.

For example, risk assessments based on animal models may contain estimates of risk that vary by many orders of magnitude (e.g., the risk may vary from 1/100,000 to 1/100,000,000). This does not mean that risk assessments are not useful in helping to reach a decision. Uncertainty in science can be reduced by more research. In fact, for regulations that are likely to have large impacts on the economy, additional research to reduce uncertainty is often the right choice as it may help to make a more informed decision.

As another example, regulatory agencies are concerned with whether or not their interpretation of statutes will survive judicial review. Agency attorneys advise decision makers about the likelihood of an agency prevailing if its regulatory strategy is subject to legal challenge. As with scientific input, this legal advice contains some degree of uncertainty, but that uncertainty does not eviscerate its value.

Whether related to markets or ecologies, prediction is a difficult exercise. Benefit-cost analysis is somewhat easier than more macro or global models because it limits the scope of the predictive model to small changes in relatively few markets. The fact that it is difficult does not negate its usefulness. If we do not have information on what the likely impacts of our rules are, we are just regulating in the dark, hoping for a good outcome but as likely to fail as to succeed.

Benefit-cost analysis serves decision makers by asking and answering questions that many in the regulatory process fail to ask. For example, to do a benefit-cost analysis, economists must answer questions such as: How is this solution (mechanism) expected to solve part or all of a problem? How much of the problem will it solve and how long will it take? How much will consumers be willing to pay for this kind of solution? What other kinds of risk will emerge as a result of this action and how large will they be? What will the cost be, both now and in the future? How will it affect domestic competition and international competitiveness? Is there a better way to do this? What if we don't do anything, will the problem solve itself? Who is likely to benefit from this regulation; who will lose? Do the benefits outweigh the costs? Are there parts of the regulations we could change and not reduce much of the benefits but a lot of the costs? These are valid questions that help us to be more certain the action we are taking will help to solve social problems.

Good economists, like good risk assessors, will identify their assumptions and assess how changing them will change the answers. They will identify how much uncertainty is contained in each key parameter. In many cases, it is possible to quantify uncertainty, and this should be done for significant regulations. These types of analyses (uncertainty) can be

invaluable for telling decision makers when it is worthwhile to obtain more information before making a decision.

14. The GOP's budget proposal includes slashing \$99 million from the Occupational and Safety Health Administration, a 40 percent reduction in the budget of the federal agency most responsible for making sure the nation's workplaces are safe -- Democrats claim that translates into 8,000 fewer workplace hazard inspections and 740 fewer whistleblower discrimination probes.

What is your response?

We believe budgeting decisions should be made based on outcome-oriented performance measures, rather than just good intentions or measures of activity like inspections or enforcement actions. Congress first needs to understand whether past regulatory expenditures have actually improved workplace safety. This should be proven with data, not just accepted on faith. That is one reason why sound retrospective analysis of regulation is important, and presumably why Congress, in the GPRA Modernization Act, directed agencies to identify regulations that contribute to achievement of high priority goals.

If past expenditures have not been effective, legislators cannot presume that additional expenditures will be effective. If past expenditures have been effective, legislators need to know if *additional* expenditures can be expected to produce *additional* benefits. Once Congress obtains this information, it is then in a position to consider what effect budget cuts or increases are likely to have on workplace deaths or injuries, and lawmakers can weigh these expected results against other spending priorities.

15. There are various regulations that impose standards for coal dust in mines. As you know, coal dust, which is highly flammable, may have been a contributing cause of the Massey coal mine explosion in West Virginia, which took the lives of 29 miners. In fact, next month will mark the one-year anniversary of that explosion.

Would better regulatory analysis have saved those miners' lives?

We have not studied the specific facts of the Massey tragedy, so our answer must necessarily be general.

Sound, thorough regulatory analysis would help identify whether this is a systemic, nationwide problem in all coal mines, a problem unique to mines in West Virginia, or an isolated case. If it is not a nationwide, systemic problem, regulatory analysis could help improve safety by focusing agency attention on the types of coal mines where the problem is most likely to exist.

One of the regulations reviewed as part of the Mercatus Regulatory Report Card project is a proposed 2010 regulation intended to lower miners' exposure to respirable coal mine dust.³⁵ The regulatory impact analysis did not consider the potential effect of coal mine dust on explosions. If this effect turned out to be a significant "co-benefit" from reducing respirable coal mine dust, it might have justified a different approach to the regulation.

16. Do you think better regulatory analysis could have prevented the Triangle Shirtwaist Fire that occurred in New York City 100 years ago this month that resulted in the deaths of 146 individuals?

We have not studied the specific facts of the Triangle Shirtwaist Fire, so our answer must necessarily be general.

Regulatory analysis is a process for organizing and evaluating information about the pros and cons of alternative policy tools. Sound regulatory analysis helps in evaluating the effectiveness and cost-effectiveness of the alternatives identified to address to public policy objectives, such as improved public and workplace safety.

17. Should agencies be compelled to wait until a tragedy like the Triangle Shirtwaist Fire occurs before they can act?

Regulatory analysis does not require inaction. Risk can be estimated either by examining systemic epidemiologic evidence or underlying structural conditions for large, rare events. The latter would be done for nuclear power plants, for example, and would also make sense for assessing the risk factors for catastrophic fires. These types of evidence are also used in regulatory analysis. Agencies can do risk assessments and benefit-cost analysis using the tools we have discussed even without epidemiological data (e.g., accidents, poisonings) to see if there is a potential problem; whether markets are addressing the problem; which level of government should handle the problem (if markets are not addressing it); what other risks might arise from addressing the problem; and which options appear to be the best to prevent the problem from manifesting.

18. Do you think better regulatory analysis could have prevented the BP oil spill?

We have not studied the specific facts of the BP oil spill, so our answer must necessarily be general. As stated in response to earlier questions, we believe that sound, thorough analysis can be extremely valuable in helping to solve problems effectively and efficiently.

³⁵ <http://mercatus.org/reportcards/lowering-miners-exposure-respirable-coal-mine-dust>.

19. Please provide a list of every agency scoring a “0” or a “1” in your assessment of whether the agency properly identified a problem needing a regulatory solution.

The Regulatory Report Card assesses the quality and use of analysis for individual regulations. We have submitted complete sets of scoring data for 2008 and 2009 for the record. Below, we attach a list of regulations that received a score of 0 or 1 in 2008 or 2009 on criterion 6, identification of the systemic problem. Also listed is the department that issued each regulation. We include the scores on the four sub-questions (A-D). Scores on the four sub-questions are averaged and then rounded to produce the overall score for the criterion.

Proposed_Rule_08	RIN_08	Dept_08	Q6_08	Q6A_08	Q6B_08	Q6C_08	Q6D_08
Nondiscrimination in State/Local Government Services	1190-AA46	DOJ	0	0	1	0	0
Nondiscrimination by Public/Commercial Facilities	1190-AA44	DOJ	0	0	1	0	0
Hospital Inpatient Prospective Payment Systems	0938-AP15	HHS	0	1	0	0	0
Abandoned Mine Land Program	1029-AC56	Interior	0	0	0	1	0
Federal Perkins Loan Program	1840-AC94	ED	0	1	0	0	0
Prospective Payment System for Long-Term Care Hospitals	0983-AO94	HHS	0	1	0	0	0
Medicaid Program Premiums and Cost Sharing	0938-AO47	HHS	0	0	0	0	0
Prospective Payment System for Skilled Nursing Facilities	0938-AP11	HHS	0	0	0	0	0
Post-9/11 GI Bill	2900-AN10	VA	0	1	0	0	0
Time and Place for a Hearing before an Administrative Law Judge	0960-AG61	SSA	0	1	0	0	0
HIPAA Code Sets	0958-AN25	HHS	1	3	1	1	0
Refuge Alternatives for Underground Coal Mines	1219-AB58	Labor	1	1	1	1	0
Energy Conservation Standards for Fluorescent Lamps	1904-AA92	Energy	1	2	1	1	0
Changes to the Outpatient Prospective Payment System	0938-AP17	HHS	1	1	1	0	0
Oil Shale Management - General	1004-AD90	Interior	1	2	1	0	0
HIPAA Electronic Transaction Standards	0938-AM50	HHS	1	1	1	1	0
Employment Eligibility Verification	9000-AK91	FAR	1	1	1	0	0
Teacher Education Assistance Grant Program	1840-AC93	ED	1	1	0	1	0
Medicare Program: Revisions to Physician Fee Schedules	0938-AP18	HHS	1	1	2	2	0

Proposed_Rule_08	RIN_08	Dept_08	Q6_08	Q6A_08	Q6B_08	Q6C_08	Q6D_08
State Flexibility for Medicaid Benefit Packages	0938-AO48	HHS	1	2	0	0	0
Proposed Hospice Wage Index for Fiscal Year 2009	0938-AP14	HHS	1	2	2	1	0
Schedule of Fees for Consular Services	1400-AC41	State	1	1	0	1	0
CHAMPUS/TRICARE	0720-AB22	Defense	1	1	1	2	1

Proposed_Rule_09	RIN_09	Dept_09	Q6_09	Q6A_09	Q6B_09	Q6C_09	Q6D_09
General and Non-Loan Programmatic Issues	1840-AC99	ED	0	0	0	0	0
Children's Health Insurance Program (CHIP)	0938-AP53	HHS	0	0	0	0	0
Housing Trust Fund Program	2506-AC23	HUD	0	1	0	0	0
Expansion of Enrollment in the VA Health Care System	2900-AN23	VA	0	0	0	0	0
State Fiscal Stabilization Fund Program	1810-AB04	ED	0	0	0	0	0
Positive Train Control	2130-AC03	DOT	0	0	0	1	0
Portland Cement NESHAP	2060-AO15	EPA	0	1	0	0	0
Hospice Wage Index for FY 2010	0938-AP45	HHS	1	1	0	1	0
Loan Guarantees for Projects that Employ Innovative Technologies	1901-AB27	DOE	1	2	1	1	0
Weatherization Assistance Program	1904-AB97	DOE	1	3	2	0	0
Hospital Inpatient and Long-Term Care Prospective Payment System	0938-AP39	HHS	1	1	1	0	0
Outpatient Prospective Payment	0938-AP41	HHS	1	1	1	0	0
Revisions to Payment Policies Under the Physician Fee Schedule	0938-AP40	HHS	1	1	0	1	0
Revisions to the Medicare Advantage Program	0938-AP77	HHS	1	2	1	2	0

Proposed_Rule_09	RIN_09	Dept_09	Q6_09	Q6A_09	Q6B_09	Q6C_09	Q6D_09
Credit Assistance for Surface Transportation Projects	2105-AD70	DOT	1	1	1	0	0
Investing in Innovation	1855-AA06	ED	1	1	1	0	0
Renewable Fuels Program	2060-A081	EPA	1	0	0	1	2
Race to the Top Fund	1810-AB07	ED	1	1	1	0	0
Electronic Health Record Incentive Program	0938-AP78	HHS	1	1	1	0	0
School Improvement Grants	1810-AB06	ED	1	2	1	2	0
Motor Vehicle Safety Standards, Ejection Mitigation	2127-AK23	DOT	1	0	0	1	1

Response to Post-Hearing Questions from Robert L. Glicksman, J.B. and Maurice C. Shapiro Professor of Environmental Law, George Washington University Law School

Questions for the Record

Rep. Howard Coble

Chairman

Subcommittee on Courts, Commercial and Administrative Law

For the Hearing on "Raising the Agencies' Grades – Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need"

March 29, 2011

1. How much of your testimony is informed by your own, real-world experience gained first-hand in a government agency?

I have acquired extensive experience studying statutes and the issues that arise when agencies implement them in my 30 years as a law professor specializing in environmental and administrative law. The following is a partial list of my publications:

Books

ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT (Foundation Press 2010) (with R. Levy).

PUBLIC NATURAL RESOURCES LAW (4 volumes, Thomson/West, updated three times annually) (2d ed. 2007) (with G. Coggins) (1st edition published in 1991).

RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (Stanford University Press 2003) (with S. Shapiro).

ENVIRONMENTAL PROTECTION: LAW AND POLICY (6th ed. Aspen Publishers 2011) (with D. Markell, B. Buzbee, D. Mandelker, & D. Bodansky) (previous editions published in 1999, 2003, 2007).

POLLUTION LIMITS AND POLLUTERS' EFFORTS TO COMPLY: THE ROLE OF GOVERNMENT MONITORING AND ENFORCEMENT (Stanford University Press, forthcoming 2011) (with D. Earnhart).

MODERN PUBLIC LAND LAW IN A NUTSHELL (3d ed. West Group) (2006) (with G. Coggins) (previous editions published in 1995, 2001).

REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTE: CASES, MATERIALS, NOTES, AND QUESTIONS (1992) (unbound) (awarded Postlethwaite Research Prize, May 1992).

A PROPOSED STRATEGY TO PREVENT GROUNDWATER CONTAMINATION IN KANSAS (University of Kansas 1986) (with G. Coggins) (report prepared under contract to the Kansas Department of Health and Environment).

Book Chapters

The Role of Executive Power in Environmental Law: The Take Care Clause and the Unitary Executive Theory, in CONTEMPORARY PRINCIPLES IN CONSTITUTIONAL ENVIRONMENTAL LAW (James May ed., American Bar Ass'n & Environmental Law Inst.) (forthcoming).

Facing Unprecedented Stewardship Challenges: Climate Change and Federal Land Management, in GLOBAL WARMING: A READER (W. Rodgers et al., eds.) (forthcoming).

The Failure of U.S. Climate Change Policy (with C. Schroeder) and Anatomy of Industry Resistance to Climate Change: Running the Script, in ECONOMIC THOUGHT AND U.S. CLIMATE CHANGE POLICY (The MIT Press, D. Driesen, ed. 2010).

Federal Preemption by Inaction, in PREEMPTION CHOICE: THE THEORY, LAW AND REALITY OF FEDERALISM'S CORE QUESTION (W. Buzbee ed., 2009).

Securing Judicial Review of Agency Inaction (and Action) in the Wake of *Norton v. Southern Utah Wilderness Alliance* in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE (M. Wolf, ed.) (2005).

A NEW PROGRESSIVE AGENDA FOR PUBLIC HEALTH AND THE ENVIRONMENT ©. Schroeder & R. Steinzor eds. 2005) (listed as one of ten "primary authors").

NEPA Litigation and The Environmental Review Process, in D.MANDELKER, NEPA LAW AND LITIGATION (revised chapters for 2004-2007 releases)

Scope of the Environmental Impact Statement, in D.MANDELKER, NEPA LAW AND LITIGATION (revised chapters for 2006-2007 releases).

The CEC's Biodiversity Conservation Agenda in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (D. Markell & J. Knox, eds.) (2003).

Municipal Regulation of Hazardous Waste in A. RATHKOPF, THE LAW OF ZONING AND PLANNING chapter 7A (Release # 72, 6/2000) (with A. Dan Tarlock).

Wildlife and Habitat Protection in ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW chapter 24 (M. Gerrard ed., 2d ed. 1998).

The Impact of Federal Environmental Protection Laws on Water Allocation in the 26TH ANNUAL INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN chapter 7 (1996), *reprinted in* 34 PUBLIC LAND & RESOURCES LAW DIGEST 309 (1997).

Public Resources in ENVIRONMENTAL LAW AND PRACTICE: COMPLIANCE/LITIGATION/FORMS chapter 14 (D. Stever & E. Dolin eds., 1995) (with G. Coggins).

Federal Groundwater Quality Control Law and Policy in proceedings of the Natural Resources Law Center conference on Water Quality Control: "Integrating Beneficial Use and Environmental Protection" (1988).

Municipal Regulation of Hazardous Waste in A. RATHKOPF, THE LAW OF ZONING AND PLANNING, chapter 7A (4th ed. 1987) (with A. Dan Tarlock).

Interstate Compacts for Low-Level Radioactive Waste Disposal: A Mechanism for Excluding Out-of-State Waste in LOW-LEVEL RADIOACTIVE WASTE REGULATION - SCIENCE, POLITICS, AND FEAR chapter 3 (M. Burns ed., 1987).

Law Review Publications

Agency-Specific Precedents, 89 TEXAS L. REV. 499 (2011) (with R. Levy).

Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations, 40 ENVTL. L. 1159 (2010).

The Constitution, the Environment, and the Prospect of Enhanced Executive Power, 40 ENVTL. L. REP. 1102 (2010).

Science, Politics, Law and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark, 32 WASH. U. J.L. & POL'Y 99 (2010) (with M. Batzel).

Access to Courts and Preemption of State Remedies in Collective Action Perspective, 59 CASE. W. RES. U. L. REV. 919 (2009) (with R. Levy).

Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management, 87 NEB. L. REV. 833 (2009).

Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principal, 44 TULSA L.J. 147 (2008).

A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 N.W. U. L. REV. 579 (2008) (with R. Levy).

Coal-Fired Power Plants, Greenhouse Gases, and State Statutory Substantial Endangerment Provisions: Climate Change Comes to Kansas, 56 U. KAN. L. REV. 517 (2008).

Effectiveness of Government Interventions at Inducing Better Environmental Performance: Does Effectiveness Depend on Facility of Firm Characteristics?, 35 B.C. ENVTL. AFF. L. REV. 479 (2008) (with D. Earnhart).

Bridging Data Gaps through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act, 83 IND. L.J. 465 (2008).

Balancing Mandate and Discretion in the Institutional Design of Federal Climate Change Policy, 102 NW. U. L. REV. COLLOQUY 196 (2008).

Nothing Is Real: Protecting the Regulatory Void through Federal Preemption by Inaction, 26 VA. ENVTL. L.J. 5 (2008).

The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry, 26 STANFORD ENVTL. L.J. 317 (2007) (with D. Earnhart).

Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based v. Cooperative Enforcement, 31 WM. & MARY ENVTL. L. & POL'Y REV. 603 (2007) (with D. Earnhart).

Global Climate Change and the Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing, 52 LOYOLA L. REV. 1127 (2006).

From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy, 41 WAKE FOREST L. REV. 719 (2006).

Justice Rehnquist and the Dismantling of Environmental Law, 36 ENVTL. L. REP. 10585 (2006) (with J. May).

Improving Regulation Through Incremental Adjustment, 52 KAN. L. REV. 1179 (2004) (with S. Shapiro).

Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations, 34 ENVTL. L. 1143 (2004).

The APA and the Back-End of Regulation: Procedures for Informal Adjudication, 56 ADMIN. L. REV. 1159 (2004) (with S. Shapiro).

The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties, 10 WIDENER L. REV. 353 (2004).

Chevron, State Farm, and the EPA in the Courts of Appeals During the 1990s, 31 ENVTL. L. REP. 10371 (2001) (with C. Schroeder), *reprinted in* 32 LAND USE AND ENV'T L. REV. 327 (2002).

Making A Nuisance of Takings Law, 3 WASH. U. J. L. & POL'Y 149 (2000).

Goals, Instruments, and Environmental Policy Choice, 10 DUKE ENVTL. L. & POL'Y F. 297 (2000) (with S. Shapiro).

Federal Environmental Law in the "New" Federalism Era, 30 ENVTL. L. REP. 11122 (2000) (with S. McAllister).

State Liability for Environmental Violations: The U.S. Supreme Court's "New" Federalism, 29 ENVTL. L. REP. 10665 (1999) (with S. McAllister).

Wilderness in Context, 76 DENV. U. L. REV. 383 (1999) (with G. Coggins).

Hardrock Minerals, Energy Minerals, and Other Resources on the Public Lands: The Evolution of Federal Natural Resources Law, 33 TULSA L.J. 765 (1998) (with G. Coggins).

Concessions Law and Policy in the National Park System, 74 DENV. U. L. REV. 729 (1997) (with G. Coggins).

Fear and Loathing on the Federal Lands, 45 U. KAN. L. REV. 647 (1997).

Regulatory Reform and (Breach of) the Contract With America: Improving Environmental Policy or Destroying Environmental Protection?, 5 KAN. J. L. & PUB. POL'Y # 2 (Winter 1996), at 9 (with S. Chapman).

Pollution on the Federal Lands IV: Liability for Hazardous Waste Disposal, 12 UCLA J. ENVT'L. & POL'Y 233 (1994).

Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management, 13 STANFORD ENVT'L. L.J. 3 (1994).

Pollution on the Federal Lands II: Water Pollution Law, 12 UCLA J. ENVT'L. L. & POL'Y 61 (1993).

Pollution on the Federal Lands I: Air Pollution Law, 12 UCLA J. ENVT'L. L. & POL'Y 1 (1993).

Watching the River Flow: The Prospects for Improved Interstate Water Pollution Control, 43 WASH. U. J. URB. & CONTEMP. L. 119 (1993) (awarded Postlethwaite Research Prize, May 1994).

EPA and the Courts: Twenty Years of Law and Politics, 54 J. OF LAW & CONTEMP. PROBS. 249 (1991) (with C. Schroeder), reprinted in 24 LAND USE & ENV'T L. REV. 289 (1993) (awarded Postlethwaite Research Prize, May 1992).

Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions, 42 VANDERBILT L. REV. 343 (1989) (with R. Levy) (chosen in W. RODGERS, ENVIRONMENTAL LAW 48 (2d ed. 1994) as one of the 25 best law review articles on environmental law ever written).

To the Promised Land: A Century of Wandering and A Final Homeland for the Due Process and Taking Clauses, 68 OREGON L. REV. 393 (1989) (with M. Davis), reprinted in 22 LAND USE & ENV'T L. REV. 211 (1991) (awarded the Rice Prize as the best University of Kansas law faculty article in 1990).

Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 DUKE L.J. 819 (with S. Shapiro).

A Retreat from Judicial Activism: The Seventh Circuit and the Environment, 63 CHI.-KENT L. REV. 209 (1987).

Groundwater Pollution II: An Immodest Proposal for a Strategy to Prevent Future Groundwater Pollution, 35 U. KAN. L. REV. 241 (1987) (with G. Coggins).

Groundwater Pollution I: The Problem and the Law, 35 U. KAN. L. REV. 75 (1986) (with G. Coggins).

Federal Preemption and Private Legal Remedies for Pollution, 134 U. PA. L. REV. 125 (1985) (awarded the Rice Prize as the best University of Kansas law faculty article in 1986).

A Guide to Kansas Common Law Actions Against Industrial Pollution Sources, 33 U. KAN. L. REV. 621 (1985) (awarded the Rice Prize as the best University of Kansas law faculty article in 1985).

Allocating the Cost of Constructing Excess Capacity: "Who Will Have to Pay for It All?", 33 U. KAN. L. REV. 429 (1985), reprinted in VIII PUBLIC UTILITIES LAW ANTHOLOGY (1984- 85).

Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions, 36 HASTINGS L.J. 1 (1984).

Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund, 9 COLUM. J. ENVTL. L. 125 (1984) (with G. Coggins).

2. Please respond to Mr. Ellig's statement that regulatory impact analysis is "nothing more than Decision Making 101 applied to regulation."

Strict cost-benefit analysis is not Decision Making 101. Strict cost-benefit analysis involves the quantification and monetization of all costs and benefits regardless of whether the costs and benefits can suitably be quantified and then reduced to monetary terms (e.g., lives saved or endangered species protected). Then, the analyst must compare various regulatory alternatives to determine the one that maximizes net benefits (a fairly complicated economics concept).

Conveniently, proponents of cost-benefit analysis strategically alternate between which "kind" of cost-benefit analysis they are advancing. In some contexts, they describe cost-benefit analysis as a kind of harmless, rough, apples-to-oranges comparison of benefits and costs. I agree that this would be more akin to Decision Making 101. But, when it comes to attacking agency decision-making, suddenly the cost-benefit analysis they are using is the strict cost-benefit analysis described above—quantification, monetization, and identification of the alternative that maximizes net benefits. As I explained above, this is nothing like Decision Making 101, and is instead an approach to analysis that is employed by a small field of highly trained professionals.

Even a cursory inspection of the Mercatus Center's Regulatory Report Card project reveals that the project is about ensuring that regulatory agencies engage in strict cost-benefit analysis, rather than the kind of rough, apples-to-oranges balancing connoted by Decision Making 101.

For a fuller discussion of these issues, see:

FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

SIDNEY A. SHAPIRO & ROBERT GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* (2003).

3. Please respond to Mr. Ellig's suggestion that Congress should require all agencies to explain "how major elements of regulatory analysis affected decisions about regulation."

Federal agencies are already required to provide such explanations by myriad statutes and executive orders, and they do so in the preamble to every major federal regulation. Requiring still more explanation of this sort would not only be duplicative and wasteful, but would delay agency regulatory decisionmaking without improving the quality of agency regulatory decisions.

4. Please respond to Mr. Ellig's contention that agencies essentially use regulatory analyses as post-hoc rationalizations for the decision to regulate, rather than as a basis for deciding whether to regulate.

I subscribe to a different view of the role that regulatory impact analyses play in regulatory decisionmaking. The factors that agencies are supposed to consider when making regulatory decisions are very clear: Congress spells out these factors in the relevant authorizing statute, pursuant to which an agency issues a regulation. These factors might include the costs of a proposed action, its feasibility, its fairness, and the benefits it will achieve for members of the public in both qualitative and quantitative terms. The agency's analysis of these factors is demanding and involves careful consideration of the public comments it receives, which often number in the hundreds or thousands. To conduct this analysis, agencies employ an interdisciplinary team of professionals with expertise on each of the issues relevant to the decisionmaking—scientists, lawyers, and economists, for example. The explanations that accompany proposed rules routinely and that are derived from this process set forth various alternatives means of achieving the agency's goals and solicit public comment on which of these or other alternatives the agency has not yet considered are preferable. Agencies then choose from among the alternatives based in part on public comments and the experts' reactions to them. Hypothetically speaking, if an agency's views were to have solidified before the issuance of a

proposed rule, it is then the function of judicial review to remedy the situation. Specifically, the reviewing court can remand back to the agency any rule that does not reflect a legitimate consideration of relevant statutory factors or that ignored relevant public feedback, and courts take this rule seriously.

Unfortunately, when it comes time to prepare the regulatory impact analysis, the relevant statutory factors included in the statute and the interdisciplinary expertise of the agency's rulemaking team are often shoved aside, as economists with a myopic perspective prepare a distorted, purely economic analysis of the rule.

For more information about how the regulatory impact analysis process interferes with the proper functioning of agency regulatory decisionmaking, see Rena Steinzor et al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* (Ctr. for Progressive Reform, White Paper 909, 2009), available at http://www.progressivereform.org/articles/PRIA_909.pdf.

5. Mr. Ellig says that the goal of regulatory analysis is to "produce knowledge about reality that can inform decisions." You've said that regulatory analysis is indeterminate. What is your response to Mr. Ellig's assertion?

As explained in my testimony, cost-benefit analysis necessarily requires predictions about how a particular regulation will affect a future, complex world. While some of these impacts can be anticipated, it is impossible to identify them with the specificity required for cost-benefit analysis. In the end, the form of analysis involves so much uncertainty, that it produces very little useful "knowledge about reality."

6. If mechanisms currently exist to help cure any problems with rules after they are promulgated, why do you think there has been such a push to add analytical requirements to the front-end of the rulemaking process?

The push to add analytical requirements to the front-end of the rulemaking process that either duplicate pre-existing statutory requirements or force agencies to consider factors that are irrelevant under the substantive statute arises largely not from any legitimate concern about improving the quality of regulation, but instead from efforts to delay the rulemaking process—a phenomenon referred to as "paralysis by analysis." Often, regulated industries support efforts to delay the rulemaking process because they benefit from such delay. Every day that a regulation is delayed is literally money in the bank for regulated industry because the need to incur compliance costs is pushed into the future.

These additional analytical requirements also provide regulated industries with additional avenues for weakening rules, thereby reducing compliance costs. These avenues are particularly attractive to regulated industries because they tend to be less transparent than back-end processes, better enabling industry to leverage its extensive resources to pursue regulatory relief.

7. Mr. Williams says that regulatory agencies lack the kind of feedback mechanism that exists in the private sector that would help agencies distinguish between well-informed decisionmaking and “pre-determined” decisionmaking. What is your response?

As I explained in my testimony, the traditional Administrative Procedure Act (APA) rulemaking process provides several effective feedback mechanisms to help guide and inform agency regulatory decisionmaking. These mechanisms include the notice-and-comment process and the judicial review process. Furthermore, I described how agencies can use feedback they receive during the rulemaking process to make incremental adjustments to regulations at the “back-end” of the process. These adjustments can include the grant of exceptions, time extensions, variances, and waivers. Finally, agencies can use feedback they receive once a regulation has been implemented for several months or years to revise the rule through a subsequent rulemaking action. In some cases, statutes actually require agencies to periodically review and revise existing rules, as is the case with the Clean Air Act’s National Ambient Air Quality Standards (NAAQS) program for criteria air pollutants.

I also question whether the private sector’s feedback mechanisms are an appropriate model for informing agency decisionmaking. For example, the National Commission on the Deepwater Horizon Oil Spill and Offshore Drilling final report found that BP had received several warning signs that it was in danger of losing control of its well. Nevertheless, BP failed to heed these warning signs, and as a result its action led to one of the costliest environmental disasters in U.S. history.

8. Mr. Williams suggests that agencies should make their regulatory analyses publicly available for public comment. What is your response?

Agencies already make their regulatory analyses available for public comment, as part of the APA notice-and-comment rulemaking process. For example, the Center for Progressive Reform recently commented on the EPA’s cost-benefit analysis for its proposed coal ash disposal rule. The problem is that these regulatory analyses are hypertechnical documents beyond the ken of the general public. Very few members have the required expertise to read and comment effectively on these documents, allowing regulated entities, who can afford to hire costly experts, to dominate the notice-and-comment process.

For discussion of the ways in which access to agencies before, during, and after the promulgation of regulations is skewed heavily in favor of regulated entities, see Wendy E. Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMINISTRATIVE LAW REVIEW 99 (2011).

9. Please explain the costs of hamstringing an agency's ability to promulgate health and safety regulations with needless analytical requirements.

In my testimony, I provided an example of the costs that arose when the Occupational Safety and Health Administration's (OSHA) Cranes and Derricks Rule was delayed for several years while the agency struggled to complete all the unnecessary analytical requirements. By OSHA's own estimates, every year the rule remained stuck, 53 people died and another 155 were injured unnecessarily.

10. Why do you suppose two former EPA Administrators who served under Republican presidents felt compelled to publicly decry House Republicans' attempts to gut the EPA?

I think the two former Administrators were appalled at the efforts being made by some House Republicans to turn back the clock on more than 40 years of environmental improvement achieved by the EPA under statutes such as the Clean Air and Clean Water Acts. I think they wanted to make it clear that protecting the health and safety of the American people should be a predominant, bipartisan concern of both parties (as it was throughout much of the 1970s), rather than having vocal elements of the Republican Party reflexively oppose any and all environmental protection initiatives and disguise their contempt for those initiatives by inaccurately demonizing them as "job-killing regulations." In their *Washington Post* op-ed, the two former EPA Administrators said they were upset that Republicans in Congress were focusing only on the costs of the EPA's regulations without also considering the benefits of these regulations. Whether one conducts a strict cost-benefit analysis or a less quantified analysis, it is quite clear that the benefits of these regulations far outweigh their costs. In March 2011, for example, the EPA's Office of Radiation concluded that its centralized benefits estimate for Clean Air Act regulations issued by the agency under the 1990 amendments to the statute exceed costs by a factor of more than 30 to one, and that its high benefits estimate exceeds costs by 90 times. Env'tl. Protection Agency, Office of Radiation, *Final Report, The Benefits and Costs of the Clean Air Act from 1990 to 2020* (March 2011). In other words, the EPA's regulations have been a wonderful bargain for the United States. Nevertheless, Republicans were focusing entirely on costs in order to advance their agenda of gutting the EPA's budget and legal authority to address pressing environmental issues such as global climate change. The two former EPA Administrators were concerned that Republican's misguided attacks on the EPA risked undoing many of the environmental successes the United States has achieved over the last 40 years.

11. Last October, Rep. Fred Upton, who is now Chairman of the House Energy and Commerce Committee, said that the EPA's revised ozone standard would cost 7 million jobs and about \$1 trillion annually and Senate Republicans warned that "nursing homes, schools and even doughnut chains could suffer under EPA climate regulations." Is this typical of the kind of "costs" that would be assessed on the front-end of the rulemaking process, especially by those who oppose regulation in principle?

The numbers cited by Rep. Fred Upton sound like the kind of inflated or apocalyptic numbers that regulated industry and regulatory opponents often bandy about in order to halt or weaken health, safety, and environmental protection regulations. Invariably, when these numbers are analyzed in greater detail, they are found to be completely flawed. Inflated cost estimates have become more common in recent years, and I expect to see even more of them in the future. The problem with these kinds of numbers is that they interfere with rational assessment of regulatory decisionmaking, rather than advance it, which I take to be the point of cost-benefit analysis. Unfortunately, the Mercatus Center's Regulatory Report Card project does nothing to address this problem. If anything, the project makes it worse by attempting to elevate the importance of the role that *ex ante* cost-benefit analyses play in regulatory decisionmaking.