OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM UNDER THE OBAMA ADMINISTRATION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

MARCH 21, 2012

Serial No. 112–102

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
73–417 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
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MARCH 21, 2012

OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM UNDER THE OBAMA ADMINISTRATION

WEDNESDAY, MARCH 21, 2012

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

The Subcommittee met, pursuant to call, at 1:32 p.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Smith, Gowdy, Franks, Ross, Cohen, and Conyers.

Staff present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Johnny Mautz, Counsel; Allison Rose, Professional Staff Member; Rachel Dresen, Professional Staff Member; Bobby Cornett, Professional Staff Member; Omar Raschid, Professional Staff Member; Ashley Lewis, Clerk; (Minority) James Park, Subcommittee Chief Counsel; Susan Jensen-Lachmann, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. COBLE. This Subcommittee will come to order.

I am told that there will be a vote on or about 2 o'clock, and that will probably keep us on the floor about 30 to 45 minutes. So we will stand in recess during that time.

And I am furthermore told that a couple of our witnesses have airplane reservations. So we will try to accommodate that in due time.

The Judiciary Committee has approved a number of regulatory proposals—the Regulatory Flexibility Improvement Act, the Regulatory Accountability Act, and the Regulations in Need of Scrutiny Act, REINS—all of which have been approved by the House. Improving our regulatory system has been a top priority for the Subcommittee and the full Committee in the 112th Congress.

Now, as many of you likely know, there are a number of people in Congress who would reject every proposed regulation that surfaced regardless of its merit. They don't like regulations. Conversely, there is a group that would embrace every prospective regulation that surfaced, whether it had merit or not. They simply do like regulations. I believe those two groups, however, do not speak

for the majority of the Congress. I think there is some balance that must, indeed, be struck.

Some regulations are necessary. They protect our health and safety. They ensure that future generations will inherit a land and society that we hope is as bountiful as the one that we have inherited. But in order for our regulations to be successful, they must be effective and they must be efficient, and oftentimes effectiveness and efficiency is subject to personal interpretation. I think that goes without saying.

I am deeply concerned, however, about our regulatory process and perhaps our regulators have lost touch with the American people. There seems to be a lack of accountability, lack of oversight, too much influence by special interests, and some poor judgment. Time and again we read reports about unwise regulations. Typically they create unnecessary red tape, have futile or duplicative requirements, or ignore lower cost alternatives.

For instance, the EPA has proposed rules that would be an economic catastrophe for my district and perhaps other districts: the Boiler MACT rule, the Utility MACT rule, the Cement MACT rule, and greenhouse gas rules. Businesses in my district or representatives thereof have told me and the EPA that they would simply cease operations if some of these rules are implemented as proposed. Other larger businesses warned that they will likely move operations to another country. This is not a scare tactic. It is a reality. And my fear is that these plans may already be in the works due to the cost of energy which is also being driven by regulatory costs.

Rules such as these are being prepared by the Obama administration at an alarming rate. In President Obama's first 3 years in office, 78 more major rules were issued than were issued during the first 3 years of President Bush's administration. It is also important to note that the attacks on 9/11 occurred during this time and resulted in a dramatic increase in homeland security-related regulations.

The Heritage Foundation estimates that the Obama administration is responsible for $426 billion in new yearly regulatory costs. This estimate does not account for all the non-major rules.

In late August, the Obama administration notified the Congress that it has several multi-billion rules in development and an additional 3,118 rules in the pipeline. 167 of these rules are expected to have a major impact on the economy, this is in addition to the 1,010 regs that have already been completed.

Perhaps folks I may be old-fashioned, or perhaps my information may be inaccurate. But it appears that the Administration has become obsessed with regulations. There are countless polls and surveys that illustrate general dismay about our regulatory system. Businesses, large and small, routinely say the greatest economic challenge in America is our regulatory system. It is unpredictable and oftentimes inefficient.

Despite attempts by the Administration to implement policies through executive order and memoranda, our Federal regulators continue to impose and implement rules that oftentimes ignore the economic effect thereof. Many of these rules probably should not have been proposed, and while there may be no recourse to hold

the individuals who created the bad regulations accountable, the Administration can certainly control what rules are implemented. The bureaucracy is enormous and regulatory independence is a force to be reckoned with, even within the Administration.

I appreciate the effort of Administrator Sunstein to join us today, as well as our other witnesses, and I hope at the conclusion of the hearing, we will have a better grasp on how we can help the Office of Information and Regulatory Affairs prevent bad regulations from being proposed and implemented.

I am now pleased to recognize the distinguished gentleman from Michigan, the former full Committee Chairman, Mr. Conyers, for an opening statement.

Mr. CONYERS. Thank you, Chairman Coble.

I am going to be brief because I wanted to get the benefit of our witness, Professor Sunstein's remarks before a vote interrupts us.

But in summary, we marked up two bills yesterday: Regulatory Freeze for Jobs Act and the Sunshine for Regulatory Decrees and Settlement Act. Actually that was premature. We should have had this hearing today and then after today, we could have gone on to the bills after we have heard from you. We have done legislative work and now we are going to hear from not only our distinguished first witness, but other witnesses that are very important as well.

Now, we were able to get the title of the bill changed. I thank Chairman Coble for that.

What we are here today doing is trying to examine, among other things, why the Judiciary Committee has had more than 12 hearings on the subject of regulations. It has become an obsessive mania that I think we need to examine as we are moving through the titles.

I think the Administration has demonstrated a competent ability to balance the Government's obligation to protect the health, welfare, and safety of Americans. I do not know of anybody in the Congress that likes regulations and wants more of them as a matter of their philosophy.

And so the only other thing I might want to add before our witness begins is that the Office of Management and Budget has concluded that the net benefits of regulations issued during the third fiscal year of the current Administration exceeded $91 billion, including not only monetary savings but the value of the lives saved and the injuries prevented. This is far more than any other Administration.

And so it is important that we realize that some of the studies—and I can't help but mention the Crain and Crain study because it has been the subject of criticism by numerous sources, including the Congressional Research Service, the Center for Progressive Reform, the Economic Policy Institute, among others.

The Heritage Foundation has a regulations report, released only last week, and it was clear that the data and methodology were subject neither to peer review or public comment. Please. Some of the evidence cited is very important.

And the last thing I will ask to put in the record is a communication released by Professor Sunstein only yesterday that just came to our attention, and with the consent of the Chairman, I will include that in the record with the rest of my statement.

Mr. COBLE. Without objection.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

As some of you may know, the House Judiciary Committee yesterday marked up two bills intended respectively to restrain the rulemaking process by the imposition of an indefinite moratorium and to impose a series of burdensome requirements on agency consent decrees and settlement agreements.

Indeed, the markup of H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012," was premature.

At least we should have waited to hear what the Administration has been doing to address concerns about redundant or costly regulations before resorting to drastic statutory measures.

These bills are part of a series of anti-regulatory measures considered by the Committee during this Congress.

Indeed, today's hearing is the 12th regulatory hearing this Subcommittee has held on the regulatory and administrative law process.

I would, however, like to thank Subcommittee Chairman Coble for revising the title of today's hearing.

While the former title appeared to convey a predisposition against the Obama Administration's regulatory accomplishments, the present title better reflects what this hearing should be about, namely, to get the facts about the following matters.

To begin with, my colleagues and I want to know what the Administration has been doing to make the regulatory process better. I am sure Mr. Sunstein will be able to enlighten us about this matter.

I believe all of us on this Subcommittee can agree that good regulations are necessary and that unnecessary regulations are burdensome to all.

The Obama Administration has demonstrated a remarkable ability to balance the Government's obligation to protect the health, welfare, and safety of Americans with the need to foster economic growth. This accomplishment is all the more remarkable in light of the fact that it inherited the most devastating economic crisis since the Great Depression.

Just last week, the Office of Budget and Management, or OMB, issued a draft Report to Congress on the Benefits and Costs of Federal Regulations that reflects the numerous steps the Administration has undertaken to reduce unjustified regulatory costs.

For example, this Report finds that the anticipated annual benefits of major federal regulations range between $141 billion and $700 billion, which substantially dwarfs the anticipated costs that range between $43.3 billion and $67.3 billion.

The OMB report also concluded that the net benefits of regulations issued through the third fiscal year of the current Administration *exceed $91 billion.* This includes not only monetary savings, but reflects lives saved and injuries prevented.

And, this amount is *25 times more* than the net benefits of regulations for the same period for the prior Administration.

These are indeed laudable accomplishments, but, of course, more needs to be done, which leads me to my second thought.

How much should we trust the evidence used in debates about the proper way to regulate?

We have heard over the course of these prior 11 hearings from our friends on the other side of the aisle that the Nation's regulatory system is severely broken.

At nearly every hearing, we have heard serious complaints about the alleged costs of regulations and that they exceed $1.75 trillion, a number that comes from the Crain and Crain study.

Of course, I have repeatedly pointed out that the Crain study has been debunked by numerous sources, including the Congressional Research Service, the Center for Progressive Reform, and the Economic Policy Institute.

Even the authors of the study told CRS that it was never meant to be used in regulatory debates, as it did not consider any benefits of regulation.

We have heard that regulations kill jobs and result in crippling uncertainty.

And, just yesterday, we heard about a Heritage Foundation Report that claims the current Administration has "unleashed 106 new major regulations that increased regulatory burdens by more than $46 billion annually, five times the amount imposed" by the prior Administration.

While this report was released only last week, it is clear that its data and methodology were not subject to peer review or public comment. Therefore, its conclusions should be approached with skepticism.

Some of the evidence that has been cited in support of these arguments has already been thoroughly debunked. I hope all of the panelists will provide some more enlightenment on these allegations.

Finally, I want our witnesses to contribute their thoughts on *real* regulatory reform, concepts that our colleagues on both sides of the aisle can embrace.

Given the stature and experience of the witnesses on both panels, I am optimistic that they will have some pragmatic and meaningful recommendations for reform.

To that end, I am again encouraged that President Obama has preemptively begun this process by the issuance of Executive Order 13563, "Improving Regulation and Regulatory Review," which requires agencies to assess the costs of cumulative regulations.

In particular, this Order requires agencies to identify sectors and industries that face redundant, inconsistent, or overlapping regulations. In addition, it directs these agencies to promote "coordination, simplification, and harmonization."

And, just yesterday, Mr. Sunstein issued guidance pursuant to this Order that directs agencies to reduce cumulative costs. These directives ask agencies to:

- consult with affected stakeholders early in the process well in advance of proposing new rules;
- specifically consider with respect to small businesses and start-ups the cumulative effects of regulations on these entities;
- analyze the relationship between new regulations and those regulations currently in effect when determining costs and benefits; and
- identify opportunities to harmonize the requirements of new and existing rules in order to eliminate inconsistency, excessive cost, and redundancy.

I should also note that this guidance is immediately effective.

Efforts like these are to be applauded and encouraged by my colleagues on both sides of the aisle.

I would like to hear from our witnesses today additional ways that we can make our Nation's regulatory system even better.

ATTACHMENT

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 20, 2012

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Cass R. Sunstein
Administrator

SUBJECT: Cumulative Effects of Regulations

On January 18, 2011, the President issued Executive Order 13563, "Improving Regulation and Regulatory Review," which states that to the extent permitted by law, each agency must take into account "among other things, and to the extent practicable, the costs of cumulative regulations." Executive Order 13563 emphasizes that some "sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping," and it directs agencies to promote "coordination, simplification, and harmonization." Executive Order 13563 also states that to the extent permitted by law, each agency shall "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."

Executive Order 13563 directs that regulations "shall be adopted through a process that involves public participation," including an "open exchange of information and perspectives." Public participation can and should be used to evaluate the cumulative effects of regulations, for example through active engagement with affected stakeholders well before the issuance of notices of proposed rulemaking. The President's Council on Jobs and Competitiveness has emphasized the need for a smart and efficient regulatory system and has drawn particular attention to the cumulative effects of regulation. Cumulative burdens can create special challenges for small businesses and startups.

Consistent with Executive Order 13563, and to the extent permitted by law, agencies should take active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules. The goals of this effort should be to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations.

To promote consideration of cumulative effects, and to reduce redundant, overlapping, and inconsistent requirements, agencies should carefully consider the following steps, where appropriate and feasible, and to the extent permitted by law:

- Early consultation with, advance notice to, and close engagement with affected stakeholders to discuss potential interactions between rulemakings under consideration and existing regulations as well as other anticipated regulatory requirements;

- Early engagement with state, tribal, and local regulatory agencies to identify opportunities for harmonizing regulatory requirements, reducing administrative costs, avoiding unnecessary or inconsistent requirements, and otherwise improving regulatory outcomes;

- Use of Requests for Information and Advance Notices of Proposed Rulemaking to obtain public input on potentially overlapping rulemakings and on rulemakings that may have significant cumulative effects;

- Specific consideration of the cumulative effects of regulations on small businesses and start-ups;

- Identification of opportunities to increase the net benefits of regulations and to reduce administrative and other costs, while meeting policy goals and legal requirements;

- Careful consideration, in the analysis of costs and benefits, of the relationship between new regulations and regulations that are already in effect;

- Identification of opportunities to integrate and simplify the requirements of new and existing rules, so as to eliminate inconsistency and redundancy;

- Coordination of timing, content, and requirements of multiple rulemakings that are contemplated for a particular industry or sector, so as to increase net benefits; and

- Consideration of the interactive and cumulative effects of multiple regulations affecting individual sectors as part of agencies' retrospective analysis of existing rules, consistent with Executive Order 13563.

Where appropriate and feasible, agencies should consider cumulative effects and opportunities for regulatory harmonization as part of their analysis of particular rules, and should carefully assess the appropriate content and timing of rules in light of those effects and opportunities. Consideration of cumulative effects and of opportunities to reduce burdens and to increase net benefits should be part of the assessment of costs and benefits, consistent with the requirement of Executive Order 13563 that, to the extent permitted by law, agencies must "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits." Agencies should avoid unintentional burdens that could result from an exclusive focus on the most recent regulatory activities. As noted, the cumulative effects on small businesses and start-ups deserve particular attention.

This guidance is effective immediately.

Mr. CONYERS. I thank the Chair.

Mr. COBLE. I thank the distinguished gentleman from Michigan. We have been joined by Mr. Ross, the distinguished gentleman from Florida. Good to have you with us, Dennis.

Mr. ROSS. Thank you, Mr. Chairman.

Mr. COBLE. Our first witness is the Honorable Cass Sunstein, known to all of us. He is the Administrator of the Office of Information and Regulatory Affairs. Prior to becoming Administrator, he

was Felix Frankfurter Professor of Law at Harvard Law School. He clerked with Judge Benjamin Kaplan of the Massachusetts Supreme Judicial Court and Justice Thurgood Marshall on the U.S. Supreme Court and then worked as an attorney-advisor in the Office of the Legal Counsel of the U.S. Department of Justice. He was also a faculty member of the University of Chicago School of Law until 2008.

Mr. Sunstein has testified before congressional Committees on many subjects. He has been involved as an advisor in constitution making and law reform activities in a number of Nations. A specialist of administrative law, regulatory policy, and behavioral economics, Mr. Sunstein is the author of many articles and a number of books. The Honorable Mr. Sunstein graduated in 1975 from Harvard College and in 1978 from the Harvard Law School magna cum laude.

Mr. Sunstein, good to have you with us, but in the interim, we have been joined by our distinguished friend from Tennessee who is the Ranking Member of the Subcommittee. Mr. Cohen, good to have you with us and I recognize you for an opening statement before we hear from Mr. Sunstein.

Mr. COHEN. Thank you and I apologize for being a little bit late, but it is good to be here with each of you. And thank you, Mr. Chairman.

Mr. COBLE. Thank you.

Mr. COHEN. It has been about a year and a half since the last time Mr. Sunstein testified on the initiatives of OIRA, and we have had a lot happen since then.

On January 18 of 2011, the President issued Executive Order 13563 which supplemented, reaffirmed the principles of Executive Order 12866 issued by President Clinton. The most current recent executive order added emphasis on increasing public participation in the rulemaking process and identifying ways to reduce costs and simplify and harmonize rules through interagency coordination. And those are wonderful goals, and I think that is the reason Mr. Sunstein is where he is because he is doing those things and sometimes ruffling the feathers of people who you know would be his and the President's natural allies, but he calls things the way he wants to and the way he sees them, which should be to the favor of the Republican side too. So that is a wonderful thing.

This particular order clarifies that agencies must identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, including considering alternatives to mandates, prohibitions, and command-and-control regulation. Most significantly, it requires agencies to develop a plan and conduct a periodic review of existing significant regulations that may be outmoded, ineffective, insufficiently or excessively burdensome and to modify, streamline, expand, or repeal them in accordance with what has been learned.

Mr. Sunstein has issued a number of guidance memoranda regarding that order. In particular, it is a requirement that agencies conduct a periodic review of existing significant regulations, emphasize the need to consider strengthening, complementing, or modernizing rules where necessary or appropriate including, if relevant, undertaking new rulemaking.

As recently attorneys general as yesterday, Mr. Sunstein issued another guidance memorandum addressing this order and this requirement that agencies work to address the potential cumulative effects of regulations. I look forward to learning the results to date for the President's push to have agencies improve and modernize the existing regulatory system.

Based on some of the statements that I have heard recently from some of my colleagues, I imagine we will be discussing the volume and cost of regulations under the Obama administration, which has been part of the mantra that we have heard emanating from the other side of the aisle. I note that according to the Office of Management and Budget's 2012 draft budget, a report on the benefits and costs of Federal regulations, that the net benefits of regulations the first 3 years total $91 billion, 25 times greater than during the comparable period under the Bush, the second, Administration. Moreover, fewer final rules have been reviewed by OIRA and issued by an executive agency in the first 3 years of the Obama administration than the comparable period of the Bush administration. Interesting facts, considering what we hear.

As to the regulatory costs, the costs of economically significant rules reviewed by OIRA were highest in fiscal year 2007 which was during the Bush administration. In fact, the cost of regulations were higher in the last 2 years of the Bush administration than during the first 2 years of the Obama administration.

So, Mr. Sunstein has done his job.

Finally, I would like to know from all of our witnesses what steps Congress can take to better help OIRA to its job, including whether Congress should provide OIRA with more resources.

I will be asking Mr. Sunstein about some rules that have really hurt the citizens in my district greatly, some EPA rules that have required people not to be able to get their licenses to drive their cars because their check engine light does not go off. Even me, yes. My check engine light did not go off. It stayed on. I was told I cannot get my tags. I have to go to my mechanic. My mechanic said it would cost me $800 to get my check engine light off. So being that I am who I am, I asked the City of Memphis to let me go and have a tailpipe test, the old, traditional way of determining whether you were emitting carbon to ruin the atmosphere, which I am very concerned about. They put the rod in my tailpipe and that came out perfect. They said you are emitting nothing. You are great. I still had to pay to get my check engine light off.

That seems like a rule that is overly, overly, overly deemed toward some type of mechanical determination and not considering individuals that cannot afford it in my district to have to go get their engine light off. And we should not have machines controlling our lives and costing us to pay mechanics so we can get our licenses.

So at some point, I will continue on that theme. We want to get rid of that rule.

With that, I yield back the remainder of my time and look forward to Mr. Sunstein and his helping the poor people of Memphis who have check engine lights on not have to deal with that. I yield back the balance of my time.

Mr. COBLE. I thank the gentleman from Tennessee. And you echoed some of the comments I made prior to your arrival.

Folks, I think we have a vote on now, do we not?

We have been joined by the distinguished gentleman from South Carolina, Mr. Gowdy, and the distinguished gentleman from Texas, Mr. Smith, who I believe has an opening statement as well.

Mr. SMITH. Thank you, Mr. Chairman. I do. If I may be recognized.

Mr. COBLE. Pardon?

Mr. SMITH. Am I recognized for my opening statement?

Mr. COBLE. I think so.

Mr. COHEN. I recognize him. He is Lamar. [Laughter.]

Mr. COBLE. I will recognize him as well. I think we all recognize the Chairman.

Mr. SMITH. Thank you, Mr. Chairman.

Speaking of all this, I like Mr. Cohen's three "overlys" description of some regulation, and I concur with him in that regard.

Mr. Chairman, as America's small businesses and job creators work to recover from a slack economy, a tide of new regulations and red tape constantly threatens to set them back. In its first 3 years, the Obama administration has imposed 106 new major regulations on the private sector, which costs $46 billion annually. That is four times the number of major regulations the Bush administration imposed on the private sector in a similar period at more than five times the cost. It is no wonder that small business owners say that Government regulations are the single most important problem they face.

In 2011, the Obama administration's agenda had over 200 economically significant new rules, each of which typically affect the American economy $100 million or more each year.

I have sponsored regulatory reform bills that lighten this load. The Regulatory Accountability Act of 2011 builds on and codifies proven regulatory reform principles. It guarantees that the benefits of all new regulations will justify the cost and that agencies will choose less burdensome regulations when possible. It also increases accountability, public participation, and transparency in the rulemaking process.

The Regulatory Flexibility Improvements Act of 2011 reforms rulemaking specifically to help small businesses strained under the regulatory burden. It forces agencies to account for and minimize the impacts of new regulations on small businesses. It gives small business owners more opportunities to be heard as regulations are written, and it forces agencies to look harder at ways to cut the cost of regulations already on the books.

Finally, the REINS Act guarantees that Congress will vote up or down before new, major regulations can take effect. The REINS Act restores accountability for decisions to impose large, new burdens on small businesses and job creators.

Each of these bills passed the House of Representatives with bipartisan support and each enjoys companion legislation in the Senate. Yet, when the Judiciary Committee offered to work with the Administration to find mutually agreeable legislative terms, the Administration refused. And when each bill came to the House

floor, the Administration suggested that the President's advisors would recommend that he veto the bill.

This is inconsistent with the President's own statements on regulatory reform. In the January 25, 2011, State of the Union Address, the President said that, "when we find rules that put an unnecessary burden on businesses, we will fix them." The House-passed legislation does just that.

In his September 8, 2011, address to a joint session of Congress, the President agreed that, "there are some rules and regulations that do put an unnecessary burden on businesses at a time when they can least afford it." He also stated that, "we should have no more regulation than the health, safety, and security that the American people require. Every rule should meet that common sense test." I agree and the House-passed legislation assures that result.

I urge the Administration to reconsider its positions on these bills and work with Congress to make their reforms a reality. The Administration's unilateral efforts to achieve regulatory reform under executive orders and presidential memoranda have produced very few results. What is truly needed is legislative action. If Washington does not adopt definitive regulatory reform, new regulatory burdens will continue to keep private sector capital on the sidelines and we will not be able to expect new jobs.

Thank you, Mr. Chairman. I will yield back.

Mr. COBLE. I thank the Chairman. Thank you as well.

Mr. Sunstein, we are now pleased to recognize you for your statement.

TESTIMONY OF THE HONORABLE CASS R. SUNSTEIN, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Mr. SUNSTEIN. Thank you very much, Mr. Chairman and Members of the Committee.

Mr. COBLE. Mr. Sunstein, if you can pull that mic a little closer to you.

Mr. SUNSTEIN. One more time?

Mr. COBLE. That is better. Thank you.

Mr. SUNSTEIN. Thank you, Mr. Chairman, for that assist, and thank you, Members of the Committee, for your remarks and for hosting me on this very important topic.

It is an honor really to be here to talk about regulation, and my focus will be on the President's executive order known internally as Executive Order 13563, and our efforts in particular to try to look back at existing regulations to remove red tape and also to discipline the flow of new rules going forward.

As I am sure you are aware, the President ordered in January of last year an ambitious Government-wide review of rules on the books. The goal was to eliminate rules that do not make sense and to eliminate paperwork requirements that are—I think these are the President's words—just plain dumb.

In August of last year, no fewer than 26 agencies released their review plans. Those plans included over 500 reforms, many of which will reduce costs, simplify the regulatory system, and help

small business in particular. That is one of our principal concerns in this challenging economic time.

What I would like to emphasize is that just a small fraction of the reform initiatives, already finalized or formally proposed to the public, are expected to save more than $10 billion over the next 5 years. That is a small fraction of the reforms on the plans. Ultimately, we expect to be able to do a lot better than that.

In terms of what has happened in formal proposals or finalization, the Occupational Safety and Health Administration is often criticized for imposing too much red tape. Well, they heard the concerns and they have eliminated—this is final—over 1.9 million hours in annual red tape imposed on American employers.

The Department of Agriculture has for years been aware of concerns on the part of the agricultural community that the poultry inspection requirements are outdated, kind of 1950's carcass-by-carcass inspections. And they have said can you relieve us from this outdated requirement. The Department has proposed to do exactly that with a rule that would produce 5-year savings in excess of $1 billion. That is big money.

The Department of Health and Human Services is soon going to finalize rules to eliminate a series of regulatory requirements that have accreted on hospitals and doctors over many years. That will save over $5 billion over the next 5 years. And as I say, that is expected quickly.

All of the plans recognize that regulatory reform, our lookback exercise, is not just a one-time endeavor. Agencies are required now by recent guidance from my office to provide regular updates to the American people with time tables on reforms and to listen to the public about new ideas for streamlining rules on the books. And we heard from Representative Cohen an example that is a candidate.

If any Members of the Committee have ideas for rules on the books that should be eliminated or streamlined, we are all ears. That is a top priority for my office.

In terms of the flow of new regulations, the President has offered new discipline. He has asked agencies—not just asked—directed them—to take steps to harmonize and simplify and coordinate rules. He has asked them to consider flexible approaches that reduce burdens and maintain freedom of choice for the public, and he has placed new emphasis on our lodestar, which is careful consideration of costs and benefits and selection of the least burdensome alternative. That is built into the fabric of our regulatory system and it is newly reaffirmed by a guidance document issued by my office yesterday which is about cumulative burdens with particular reference to the cumulative burdens on small business.

There is a lot of concern about costs of regulations. I share that concern. That is motivating our lookback effort. I would just note, while there is more work to be done in eliminating unjustified costs, the Obama administration has yet to hit the highs reached respectively by the Reagan administration, the Clinton administration, the Bush administration, and the other Bush administration in their high years. Each of them in their high year was significantly above our high years. In fact, in the last decade, the highest costs were imposed in fiscal year 2007.

A final point. Many of your comments suggest the extraordinary importance of listening to public comments about rules that are creating problems, whether it is for individual citizens trying to operate their cars on the street, little businesses trying to work without having to deal with bureaucrats, or just ordinary citizens trying to understand what the Government is up to.

One of our top priorities is to alter the interface between the American people and the regulatory system through changing regulations.gov and reginfo.gov. Those are our principal portals. They are a whole lot better now than they were a few years ago, and we would love your help in making them better still.

We look forward to working with the Committee and with your constituents to reduce regulatory costs and to strengthen our economy while protecting public health and safety in an economically challenging time.

Thank you.

[The prepared statement of Mr. Sunstein follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
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Testimony of Cass R. Sunstein
Administrator, Office of Iuformation aud Regulatory Affairs
before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives
March 21, 2012

Mr. Chairman and Members of the Subcommittee:

I am grateful and honored to have the opportunity to appear before you today to discuss issues relating to regulation, with particular reference to Executive Order 13563, Improving Regulation and Regulatory Review, and the effort to minimize regulatory costs while maximizing net benefits.

Executive Order 13563 establishes our basic framework. It states that our regulatory system must. "Protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness and job creation." It adds that we must use the best available science and allow for public participation. It emphasizes that we must promote predictability and reduce uncertainty, consider both benefits and costs, and use the least burdensome tools to achieve ends.

In the recent past, and in the implementation of that Executive Order, we have made a great deal of progress. In the future, we expect to be able to do even more. I will begin by focusing on retrospective review of existing rules, or less formally, the "regulatory lookback," and then turn to our efforts to discipline the flow of new rules.

In section 6 of Executive Order 13563, the President ordered executive agencies to undertake an ambitious review of existing Federal regulations. Emphasizing that we must "measure, and seek to improve, the actual results of regulatory requirements," the President directed executive agencies to produce, within 120 days, preliminary plans to review their existing significant regulations to determine whether any such regulations should be modified, expanded, or repealed. As many people emphasize, sometimes rules stay on the books even though they have outlived their usefulness. Sometimes rules are rendered obsolete by changed circumstances. Sometimes rules accumulate, and the cumulative burdens are excessive; efforts to streamline them and to remove redundancy can be highly beneficial.

Last May, agencies released over two dozen preliminary plans, identifying reforms that will save billions of dollars in the coming years. At the same time, agencies asked members of the public to evaluate their preliminary plans, to identify new reforms, and to participate in the creation of an improved regulatory system, reducing costs and promoting economic growth and job creation.

In August, twenty-six agencies released their final regulatory review plans. The plans span 805 pages. They include over 500 initiatives that will reduce costs, simplify the regulatory system, and eliminate redundancy and inconsistency. Many of those initiatives will help small business.

A great deal has already been achieved. Just a small fraction of the reform initiatives, already finalized or formally proposed to the public, are expected to save more than $10 billion over the next five years. We expect that, ultimately, the savings from the numerous initiatives will greatly exceed that $10 billion figure.

Consider a few examples:

- The Department of Health and Human Services will soon finalize two rules to remove unnecessary paperwork and regulatory requirements now imposed on hospitals and other healthcare providers, with anticipated five-year savings in excess of $5 billion.
- The Environmental Protection Agency has proposed to allow states to eliminate redundant air pollution requirements for local gas stations because a large number of vehicles already have effective vapor control technologies. Over the next five years, the savings will exceed $400 million.
- The Department of Agriculture has proposed a rule to streamline cumbersome, outdated poultry inspection requirements, allowing companies to choose a more flexible approach that will better protect food safety while producing five-year savings in excess of $1 billion.
- The Department of Labor (DOL) Occupational Safety and Health Administration (OSHA) has finalized a rule eliminating 1.9 million hours in annual red tape formerly imposed on employers; OSHA is now working on a similar major initiative to reduce unnecessary burdens.
- In addition, OSHA has finalized a rule to simplify hazard warnings for workers, producing five-year benefits in excess of $2.5 billion, mostly from reduced costs.

As these examples suggest, the relevant reforms span a wide range. A number of them involve reducing paperwork and reporting burdens, which members of the public, and small businesses in particular, have asked us to address.

A number of the new reforms focus specifically on small businesses. For example, the Department of Defense issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, thus improving their cash flow in an economically difficult time. To help small business borrowers, the Small Business Administration is adopting a single electronic application to reduce the paperwork burden now imposed on certain lenders, which will in turn benefit borrowers who seek relatively small amounts of capital to grow and succeed. Over two dozen reforms from the Department of Transportation involve small businesses in particular.

Consistent with Executive Order 13563, all of the plans explicitly recognize that the regulatory lookback is not a one-time endeavor. Agencies will continue to revisit existing rules, asking whether they should be updated, streamlined, or repealed. And they will do so in close consultation with the public in general and with small business in particular. Ideas are welcome at any time. The Office of Information and Regulatory Affairs (OIRA) has issued guidance requiring agencies to provide regular updates to the public, with timelines on reforms, and to give priority to reforms that promise significant, quantifiable reductions in costs and in paperwork and reporting burdens.

We are aware that many people have suggested that independent regulatory agencies should participate in the lookback process. In Executive Order 13579, "Regulation and Independent Regulatory Agencies," the President said that they should do exactly that, and asked them to produce their own plans within 120 days. Sixteen independent agencies responded to his request. The Federal Communications Commission provided an especially impressive plan and has announced the repeal of 190 regulations (including the long-discussed fairness doctrine). We are hopeful that significant savings will result from these efforts as well. We are also hopeful that reform initiatives from independent agencies will reduce burdens on small businesses.

Many people have expressed concern with the "flow" of new rules, not merely with the "stock" of existing rules. With respect to new rules, Executive Order 13563 provides a series of important directives and requirements. As noted, the Executive Order makes explicit reference to "economic growth, innovation, competitiveness, and job creation," and it states that our regulatory system "must promote predictability and reduce uncertainty." Among other things, and to the extent permitted by law, the Executive Order:

- Requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternatives.
- Requires on agencies to encourage public participation in rulemaking. The order directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. It also directs agencies to act, even in advance of rulemaking, to seek the views of those, including small businesses, who are likely to be affected.
- Directs agencies to take steps to harmonize, simplify, and coordinate rules. In order to reduce costs and to promote simplicity, it calls for greater coordination within and across agencies.
- Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.

In response to Executive Order 13563, we have taken a number of steps to increase transparency, simplify rules, promote predictability, and discipline costs. Agencies have also withdrawn or are reconsidering a number of rules in order to address substantive concerns raised by the public. In this process of reconsideration, agencies are giving new attention to public concerns, especially those involving costs.

Ever since the Reagan Administration, the central focus has been placed on "maximizing net benefits" – on ensuring that for every rule, agencies select the approach that meets the statutory requirements and has the highest net benefits (meaning benefits minus costs). Through the third fiscal year of the Obama administration, the net benefits of regulations reviewed by OIRA and issued by executive agencies exceeded $91 billion – over twenty-five times the corresponding number in the George W. Bush Administration, and over six times the corresponding number in the Clinton Administration.

The benefits of recent and forthcoming rules are no mere abstractions. They are helping American families every day. The benefits include billions of dollars in savings for consumers, achieved through historic rules increasing the fuel economy of both cars and trucks. They include thousands of lives saved and tens of thousands of illnesses and accidents prevented, achieved through rules reducing the risk of salmonella, increasing safety on the highways, and making the air safer to breathe. They include billions of dollars in economic savings for businesses, achieved through regulatory reform.

I would add that with respect to rules reviewed by OIRA and issued by Federal agencies, the last three years of the George W. Bush Administration saw higher regulatory costs than the first three years of the Obama Administration. In the last ten fiscal years, the highest costs were imposed in 2007.

Responding to the President's emphasis on public participation in the rulemaking process, we have also made fundamental revisions in the two central websites through which members of the public interact with regulatory agencies, reginfo.gov and regulations.gov. On reginfo.gov, it is now possible to see, at a glance, the full set of rules under review at OIRA, including descriptions of relevant information, such as whether they are economically significant. The same website offers similar transparency for information collection requests.

Regulations.gov has recently seen numerous improvements designed to enable the American public to see and to comment on regulations. Time and again, proposed rules have been improved, rethought, reproposed, or even withdrawn in response to the comments that agencies have received. However well-motivated and expert, agencies may lack important information about the actual effects of rules. The process of public comment is an indispensable means of providing that information in advance. And the regulatory lookback is an effort to ensure that if errors are made, they are corrected.

A common concern is that regulations are too long and complex. In response, we have recently required all lengthy or complex rules to be accompanied by a clear, straightforward executive summary, separately listing every provision and also describing both costs and benefits.

As President Obama has said, "We can make our economy stronger and more competitive, while meeting our fundamental responsibilities to one another." There is a great deal more to be done. We will continue to eliminate unjustified regulatory costs, and thus strengthen our economy while protecting the health and safety of the American people in an economically challenging time.

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Mr. COBLE. Thank you, Mr. Sunstein. I appreciate your comment.

Mr. Sunstein, we try to impose the 5-minute rule against us and you almost met the 5-minute rule without imposition. So you are a jump ahead of the game.

The Obama administration, Mr. Sunstein, has issued many statements about the need to restrain unnecessary regulatory costs, but during the Administration's first 3 years in office, it issued 106 major rules that impose $46 billion in new annual regu-

latory burdens and $11 million more in one-time implementation costs.

Can you commit to us today that you will do everything within your power to at least slow down or de-accelerate the growth of new major rules and regulatory costs?

Mr. SUNSTEIN. Absolutely.

Mr. COBLE. And, sir, I am not talking about compromising health or safety features.

Mr. SUNSTEIN. Yes, I understand.

I would just make a little footnote as a former professor which is that $46 billion figure comes from a study which has, on the right-hand side, the words "talking points." And one thing that I have learned in Washington is that if there is a document that has "talking points" on the right-hand side, it might not be entirely accurate. And that particular study has a series of inaccuracies that suggest—that mean that the number is not reliable.

Nonetheless, I take your point and I am happy to make that commitment.

Mr. COBLE. And I thank you for that.

You mentioned that the Bush years had more regulations during a certain period of time as opposed to the Obama years. Am I correct—I am doing this from memory now, Mr. Sunstein, so it may be inaccurate. But I think the Bush trend as opposed to the Clinton trend was down, and I think President Obama's trend is up compared to the Bush years. Am I right about that?

Mr. SUNSTEIN. I believe that is correct. Sitting behind me are the OIRA administrators under President Bush and President Clinton, and I would defer to them on the numbers.

Mr. COBLE. We will visit that when they take your chair.

Mr. Sunstein, what have you done to make sure that the adverse jobs impact of some of these regulations were assessed and minimized before the regulations were issued?

Mr. SUNSTEIN. Okay, great. The President's executive order uses in the first sentence the words "job creation." That is an unprecedented emphasis on the importance of promoting job creation in the regulatory arena as everywhere else.

There are a few things we have done. We have not gone forward with certain regulations in part because of expressed concerns that seemed reasonable about job creation.

More particularly in response to your question, in rules that come from a multitude of agencies, there is careful analysis in what we call the regulatory impact analysis of the anticipated job impacts of rules, and that analysis is subject to public scrutiny. If there is any rule that we are issuing that looks like it is going to have adverse job impacts, to the extent permitted by law, that is something that is exposed to public scrutiny and carefully considered in deciding whether to go forward.

Mr. COBLE. I thank you, sir.

Throughout this Administration, Mr. Sunstein, we have seen effective unemployment rates approaching 20 percent. What have you and your office done to ensure that these 106 new major rules are based on the less burdensome regulatory alternative or impact?

Mr. SUNSTEIN. Okay. I would emphasize that at least of the category of rules called "major rules," a large number of them are ben-

efits programs, e.g., to farmers, as required by Congress and in some cases benefits programs under the Medicare and Medicaid statutes. So a lot of the major rules aren't regulatory in the standard sense, though they do go through our office.

We are acutely aware that the problem of economic growth is real and serious after the very difficult circumstances from which we are recovering and that the unemployment situation is as it is. What that means is that we look very carefully at two things in thinking about rules. One is the total costs and which way we can, as you suggest, identify to go forward while reducing those costs. There are a number of rules that have issued that were proposed, very expensive, and then were finalized much less expensive, or proposed in a way that the business community found vague and then finalized in a way that the business community found clear. And as I say, if there is a rule that finds adverse employment impacts, that is something that not only the public scrutinizes closely, that is something that we scrutinize closely.

Mr. COBLE. I thank you, sir.

I see my amber light has illuminated, so I recognize the distinguished gentleman from Tennessee.

Mr. COHEN. Thank you.

I am going to try to be real quick in the allotted 5-minute time in here.

The Heritage Foundation did a study that basically accused the regulations of Obama costing $46 billion annually, five times the amount during the Bush administration. OMB has come up with some studies that say that the benefits of regulation far outweigh the costs. And the Crain study says that regulations cost $1.75 billion. Tell us what your way that you—consider all three of those opinions and which one is more accurate than the other.

Mr. SUNSTEIN. Okay. A lot of numbers. There is a study done by two people, that might be related even, named Crain and Crain that says that the total costs of regulation are $1.75 trillion. That is an alarming number. It was criticized sharply by the Congressional Research Service in an explanation of why the number is in the nature of what I would call an urban legend. And one of the authors of the World Bank study on which Crain and Crain relied said this really is not the right use of our study. I will go into details if you want on that. The costs of regulation are not infinitesimal by any means, but that $1.75 trillion is an urban legend.

With respect to The Heritage Foundation study, I have a lot of respect for The Heritage Foundation and for the author, so I want to preface that. And I also want to emphasize that they are right to say that we have had fewer regulations in our period than the Bush administration did in its period. So they rightly say that.

The $46 billion number, as I say, did not go through public scrutiny or peer review, and it is based on a series of errors. There are a couple of rules that are in that $46 billion number that have actually been stayed or not issued by the relevant agencies, and there are other rules that The Heritage Foundation, while generally relying on the agency estimate—they have an estimate that is much higher than the agency estimate.

So the real number is—we are going through peer review and public scrutiny. So our draft number for 3 years is about $19.8 bil-

lion. So that is the number. The $19.8 billion for 3 years is in line with historical figures, and as I say, we have yet to have a year that is as high as the highest years under the previous four Presidents.

Mr. COHEN. Thank you, sir.

Yesterday this Committee marked up a bill called the Regulatory Freeze for Jobs Act. It would essentially impose a moratorium on most major rulemaking until the unemployment rate dips to 6 percent. It is alleged that you said a moratorium would not be a scalpel or machete, it would be more like a nuclear bomb in the sense that it would prevent regulations that cost very little and have very significant economic or public health benefits.

Would you like to explain your nuclear comment?

Mr. SUNSTEIN. That was colorful language.

Mr. COHEN. Explosive language.

Mr. SUNSTEIN. Okay. The motivation for a moratorium we appreciate, which is about excessive regulatory costs. So that is a shared concern.

There are a few problems with a moratorium. First, I just referred to three lookback initiatives that are de-regulatory. A moratorium could easily sweep up a series of de-regulatory initiatives that are actually cost savers and potentially beneficial for both growth and employment. An initiative of this sort, a moratorium, that is, could stop us from proceeding with a number of rules that industry actually actively seeks and comes to us saying will you please get this one out quickly under circumstances in which they need it in order to simplify their operations, say, by getting a general permit or to come up with some certainty in the face of, let's say, something coming from other States which will create complication until the Federal Government acts. So in a number of cases, rules are actually actively sought by industry.

It is also the case, as you say, that there are rules that have very high net benefits and a moratorium would cut hard against those. It is a great achievement of both Republican and Democratic administrations that the number of deaths on highways in the United States right now is at an all-time low in recorded history. That is, in 60 years fewer people have died on the highways than ever before. That is in part a product of public/private partnership and safety rules and probably people that I am looking at right now—people and their family or close friends who avoided death or serious injury as a result of those rules which are typically, by the way, producing benefits far in excess of costs.

Mr. COHEN. So it is good. Even if you consider it good intent, the implementation would not work. It would mitigate against the intent.

Mr. SUNSTEIN. That is the nuclear point, which is provocative language, I acknowledge, but it cuts too crudely to come to terms sufficiently with what is admittedly something that we need to be very careful about.

Mr. COHEN. Thank you, sir.

I have got two more questions, but we have rules and regulations here and I do not want to get beyond them. And the wonderful Chairman is too nice. So I yield back the remainder of my time.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Florida, Mr. Ross, is recognized for 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman.

And thank you, Mr. Administrator, for being here.

Interesting on your comments there. I understand and, believe me, I think regulations have a limited role especially when it comes to protecting consumers. But I also understand that industries, such as auto industries, have done well because they realize that in order to have the best product out there, they have to make safety features. Even the insurance industry has complemented that well and market forces, market factors also enter into play where the regulatory environment did not need to enter into.

With that being said, as you know, I am from Florida, and in Florida we have had an issue going on called the Numeric Nutrient Water Criteria, which I am sure you are very familiar with, and I guess right now it is in a state of abeyance pending—now the Florida Department of Environmental Protection has passed its water standards, signed into law by the Governor. Hopefully the EPA will accept that and we can move on.

But my concern about that is how we even got to this point in the first place. Under the Numeric Nutrient Water Criteria, estimated impacts on Florida alone—Florida citrus would have a capital cost for compliance of $325 million, annual cost of compliance over $100 million. The dairy industry would have over $220 million of capital costs for compliance, annual costs of over $70 million. The impact was staggering. Annual cost, impact on Florida's economy was $1.148 billion and loss of full-time and part-time jobs, 14,545. And yet, I look at the executive order and it has, as you indicate, must consider both benefits and costs and use the least burdensome tools to achieve that end.

If that is the case, how did the NNC issue ever get to the extent it is? Were there job impact studies done on that?

Mr. SUNSTEIN. I appreciate the question. My recollection is that this particular regulation was issued before Executive Order 13563.

Mr. ROSS. Correct.

Mr. SUNSTEIN. That was one that was under a legal cloud; that is, the failure to issue the rule was under a legal cloud. The rule was very much influenced by the fact that there was a pending legal proceeding that put a great deal of pressure——

Mr. ROSS. And a consent decree eventually or a consent judgment was entered into that did not include the State of Florida as a party.

Mr. SUNSTEIN. I believe, though—correct me if I am mistaken—that the particular rule was preceded by a legal proceeding that had a deadline on it, and that put pressure on the Administration to act.

What I would say, with respect to the numbers you give, there are legal constraints both from the court and from the underlying statute on exactly what flexibilities there are. But as you began this very important point, my understanding is that this is currently in the process of discussion, and the circumstance to which you refer—it is a very unusual one where there is that level of legal pressure to issue something where the cost/benefit relationship isn't what we normally like——

Mr. ROSS. Correct.

And just getting back to my initial comments, I mean, as a native of the State of Florida, we are surrounded by water. We have salt water. We have tremendous fresh water. Recreational, commercial livelihoods are dependent on our water criteria. I firmly believe that there is no better steward of our resources than those whose livelihoods depend on it, and that is where I talk about market forces and market factors coming into play where the regulatory environment can be a watch dog but not an everyday intrusionary component.

Mr. SUNSTEIN. Well, I spent a lot of time at the University of Chicago where what you just said is our favorite song; that is, that market forces are often very beneficial to safety and public goals.

The only thing I would add is I was recently talking to some State and local officials in Colorado where there is a similar issue, as you are about to see. I mentioned our lookback. They did not know what I was talking about. But then I said remember that rule that came from a prior Administration that required street signs to be redesigned with different fonts and the traffic control devices to be altered with deadlines, and did you know we changed that? And everyone in the room knew what I was talking about because it is an analogous thing where it was a State and local issue that the Department of Transportation in good faith had affected. And Secretary LaHood, as part of the President's lookback, hearing the concerns, actually had a very ambitious set of revisions to what prior Administrations had done basically saying in this economically challenging time——

Mr. ROSS. Let me ask you a quick question before my time runs out because when we talk about economically challenging times and market forces, I look at it globally. I see some industries considering whether they can afford the investment of dollars and time of 3 to 4 years for the environmental impact studies to build or manufacture here and instead decide to go overseas or elsewhere outside the country. Are these factors not given consideration when promulgating and implementing these rules?

Mr. SUNSTEIN. Well, it is a great point, and I really appreciate it. And if there are rules that we are not doing properly for failure to consider that, please talk to us.

Mr. ROSS. I will.

Mr. SUNSTEIN. I will tell you the President's new executive order has the word "competitiveness" in the first sentence, and we just issued a rule that allows American companies not to meet separate standards with respect to hazard warnings for workers, whether they are in Canada or the United States. And the Chamber of Commerce had very favorable reactions to this because it takes down a trade barrier. So to the extent that there is a rule here that would make people not want to do business in the United States, if the law permits us to worry over that, gosh, we are going to worry over that.

Mr. ROSS. Then I look forward to working with you, Mr. Administrator. I thank you for your time and I yield back.

Mr. COBLE. Thank you, Mr. Ross.

The distinguished gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Chairman Coble.

Thank you for your testimony, sir. We are always pleased when you can come to the Congress.

How do you see the challenge of being at the head of the Office of Information and Regulatory Affairs? How do you see that as a challenge in a career as varied as yours and more than often not a governmental one?

Mr. SUNSTEIN. I will tell you a story. When I first went into Government, what I tried to do is write a document that maybe would be a guidance document from our office. I meant it as a very early draft for people to consider, and often it was about something that I thought would make regulation better, but people would look at it and think what is he doing. And I was finally given very good advice for someone who goes into Government on the executive branch side, and the advice was meet and then write. Meet with people first before you write because if you write something that is maybe not well thought out, they will think you mean it when in fact it is just an invitation to talk.

So what I have learned is the immense importance—and this bears on the topic of over-regulation and getting regulation right. You have got to listen to people. In academic life, you probably should listen to people, certainly your students, but it is not the kind of minute-by-minute imperative that it is for someone who is working for the American people.

Mr. CONYERS. Do you envision any recommendations for changes in the way the Office of Information and Regulatory Affairs works now, or do you think that it is set up in a way that meets your approval?

Mr. SUNSTEIN. Well, I would really give a tip of the hat to my predecessors in the office and this Committee in particular for its support of the office across partisan lines. I think the office is an extraordinarily important part of the operations of Government regardless of who is privileged to be its administrator.

I do think that there are improvements that can be made. Yesterday's guidance document emphasizing attending to cumulative burdens which are often a problem for small businesses, I am sure in Florida, as well as other States. And the point of that document is to say you have something that on its own makes sense but maybe in concert with other things starts to overwhelm people. If we can make progress on that one, that would be a big step forward.

Mr. CONYERS. Thank you.

Can you talk about the Administration's proactive approach toward addressing regulatory issues in terms of your views and theirs?

Mr. SUNSTEIN. I can tell you about mine, which is that the one thing, going to your first question as well as this one, that has been most vividly new to me is that public comments are crucially important to getting rules right. You all interact with constituents, so you know a lot more than some of us who are basically in our offices now. We need to know what things are going to mean on the ground. So in terms of my interactions with the operations of my office, I find it is crucial to read personally public comments on rules. So I need to read with my own eyes. If people are enthusi-

astic about a proposal, if they think it is going to be great for public safety and health and explain why, I need to know that. If there are companies who say there is a less restrictive—going to the Chairman's first point—less restrictive way of achieving your goal where you can protect safety but it will cost half as much, I need to read that. So the engagement with public comments on proposed rules is foremost for me.

Mr. CONYERS. I want to thank you for your refreshing point of view that you bring to OIRA. The Judiciary Committee looks forward to working closely with you in the future. Thank you very much.

Mr. SUNSTEIN. Thank you, sir.

Mr. COBLE. Thank you, Mr. Conyers.

Folks, we have votes on the floor. So we will stand in recess subject to the call of the Chair. We should be back within approximately 40 to 45 minutes. So if you all would just stand easy during that time, the Subcommittee stands in recess.

[Recess.]

Mr. COBLE. We need two Members on the podium before we can resume the hearing. So if you all bear with me. I see the Chairman over there now, so we can start. We will suspend the recess and we will come back to order.

And no one else is here. I am inclined to think our best bet is probably to excuse you, Mr. Sunstein, because no one else has come back. We will check again. I do not want to shut anybody off, but we will see if anybody is on their way.

John, I figure if you and I can make it, anybody can make it. Right? [Laughter.]

I am inclined to dismiss you, Mr. Sunstein, because you have given your testimony and only Mr. Conyers and I are back. So you may be excused. If further questions are forthcoming, we can communicate that to you and you can respond accordingly.

Mr. SUNSTEIN. Thank you, sir. Thank you for your kindness today.

Mr. COBLE. Thank you, sir. Thank you for being with us.

We will call our second panel to the table. Refresh my memory, folks, who has the travel commitments. Well, I think what we will do, without objection, is we will hear from the two travelers and then let them submit to examination. It is sort of irregular, but I do not want to slow them down. Does that suit you, Dr. Williams? You concur with that?

Well, let me read the bios on members of our second panel.

John Graham is Dean of the School of Public and Environmental Affairs at Indiana University, one of the largest public policy schools in the United States. Dr. Graham has a bachelor's degree in politics and economics from Wake Forest University and a master's degree in public affairs from Duke and a Ph.D. in urban and public affairs from the Carnegie-Mellon University.

Dean, do you have North Carolina connections other than those two institutions of higher learning?

Mr. GRAHAM. I have a feeble golf game.

Mr. COBLE. So do I and I represent Pinehurst and they have never forgiven me for not being a golf player.

Dr. Graham's professional experience in the field of cost/benefit analysis spans the theoretical and the practical. As a tenured professor in the Harvard School of Public Health, which he attained at the age of 34, Dr. Graham founded and led the Harvard Center for Risk Analysis, the author and editor of numerous books, articles and academic papers from 2001 to 2006. Dr. Graham served as the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget in this capacity. Dr. Graham furthermore worked to slow the growth in regulatory costs by 70 percent by simplifying hundreds of regulations and designing valuable new rules on clean air, auto fuel economy, and food safety.

Dr. Graham, good to have you with us.

Our second witness is Dr. Richard Williams, the Mercatus Center's Director of Policy Research. He served in the Office of Management and Budget for 27 years and as the Director of Social Sciences at the Center for Food and Applied Nutrition in the Food and Drug Administration. Dr. Williams is an expert in benefit/cost analysis and risk analysis, particularly relating to food safety and nutrition. He has published a risk analysis and general policy analysis and management and has consulted with foreign governments, including the United Kingdom, the South Korea, and Australia.

A Vietnam veteran, Dr. Williams received his Ph.D. and his M.A. in economics from Virginia Tech and his B.S. in business administration from the Old Dominion University. He has served as an advisor to the Harvard Center for Risk Analysis and taught economics at the Washington Lee University.

Good to have you with us as well, Dr. Williams.

Our third and final witness is Ms. Sally Katzen, who is Senior Advisor at the Podesta Group and visiting professor at New York University School of Law. Sally Katzen has enjoyed a distinguished career in legal practice, government services, and academia. The first female partner at the law firm of Wilmer, Cutler & Pickering, Ms. Katzen also has served as section chair of the American Bar Association's Admin Law and Regulatory Practice Group. Ms. Katzen served for 8 years in the Clinton administration, including 5 years as Administrator for the Office of Information and Regulatory Affairs and in the Office of Management and Budget.

Ms. Katzen holds a bachelor's degree from Smith College and a J.D. from the University of Michigan School of Law. She has taught law at George Washington University, the University of Michigan, George Mason University, the University of Pennsylvania, and Georgetown University schools of law and currently is a visiting professor at NYU School of Law.

Ms. Katzen, good to have you as well.

Dr. Graham, why don't you start us off? Then it will be followed by Ms. Katzen. Then we can have you all submit to examination, again if that sits with your itinerary, Dr. Williams. If you can, try to limit it to 5 minutes. When the red light illuminates, you will not be keel-hauled at that point, but it will be your warning that the ice on which you are skating is thin. Good to have you all with us. Dean Graham, you are recognized.

TESTIMONY OF JOHN D. GRAHAM, DEAN, INDIANA UNIVERSITY SCHOOL OF PUBLIC AND ENVIRONMENTAL AFFAIRS

Mr. GRAHAM. Thank you, Mr. Chairman.

Let me start with the congratulations to Professor Sunstein and the OMB staff for the hard work they have on their desks on regulatory reform. As a former OIRA Administrator, I have tire tracks on my chest to prove the difficulty of the job they faced, and I praise them for their efforts.

Question for reflection: If the benefits from regulation are so huge and the costs are so modest, as we have heard today, what is all the concern about? In my testimony, I try to explain some of that.

There is a vast network of regulatory activities outside of OMB oversight and outside of cost/benefit review that are experienced by businesses and the American people but are not in the numbers that OMB is telling you about. I will give two illustrations, one in the coal industry and one in the automotive industry.

Example one. There is currently being implemented a de facto ban on mountaintop mining for coal throughout the Appalachian States of West Virginia, Ohio, Kentucky, and Pennsylvania. This is a controversial issue and an interesting one. On the benefits side, you have valuable low sulfur coal for steel making and electric power, and you also have 14,000 direct jobs in rural Appalachia. On the risk side, you have mountaintops being leveled, rock and dirt being put into valley fills which are burying streams and creating aquatic toxicity and water problems. You have requirements for reclamation and mitigation that have uneven effectiveness depending on the particular site.

What is happening? The Army Corps, Interior, and EPA have adopted, at the beginning of this Administration, a major shift in energy policy to restrict mountaintop mining of coal.

How was it accomplished? Press release, memo, guidance document. No cost/benefit analysis, no rulemaking, and in fact permits began to be stopped for new mining operations and even existing mining operations, which had been previously approved—had their permits revoked.

There is now massive litigation underway. Basically the Federal regulators are at war with business and labor in Appalachia, and who knows where this issue is headed.

Example number two. Recent, very recent, California regulations requiring at least 15 percent of cars sold in California to have zero pollution by 2025. Now, you have to keep in mind what zero pollution means in a California regulatory setting. It means basically an electric car or maybe a fuel cell vehicle, but we know they are not zero pollution. There is pollution back at the power plant when these vehicles are actually recharged.

You might ask, well, why do we have to have these California regulations? The Obama administration already has a national policy toward electric vehicles. We are requiring 50-mile-per-gallon vehicles by 2025. We are offering compliance incentives for manufacturers. They can count an electric car twice compared to a gasoline-powered car when they calculate their compliance. And we have $7,500 Federal income tax credits for people who buy an electric

car, and President Obama wants to make it $10,000 in his latest proposal.

Is there any cost/benefit analysis behind this California zero emission vehicle mandate? Well, their own numbers from the California regulators are they expect 1.4 million electric cars at a cost premium of $10,000 per vehicle. That is a $14 billion regulation, larger than virtually everything that Professor Sunstein talked about, one regulation in the State of California.

Well, consumers want a payback for their investment in these vehicles. There is an effort in the California document to say that within 10 years consumers will save enough on energy to pay for this. But as I explained in my written testimony, if you look at the hard calculations, it does not add up. These vehicles are very unlikely to pay for themselves.

But won't we protect the environment with these electric cars? Well, if automakers are forced to sell more electric cars in California, they earn compliance credits under Obama administration rules under the national program. The result? Automakers are entitled to sell more high-emitting cars in all 50 States of the country. There is no basis for believing the environment is going to be any cleaner after California's regulation.

Which regions of the country will bear this cost? It won't be California because they don't assemble cars in California. But their own analysis shows there will be more jobs in California because they sell more recharging equipment from companies based in California.

Where will the costs be incurred? They will be in the Midwest and the South where automobiles are manufactured and assembled.

You might ask me, why blame Washington? This is a California problem. The Federal Government has the power, if they choose to use it, to prevent California from implementing this regulation, and they have never even analyzed it from a cost/benefit perspective. No document you will find in the Federal Government analyzes the zero emission vehicle rule in the State of California. And even if the executive branch can't, the Congress certainly would have the ability to rein in this type of regulation if they were motivated to do so.

Details are in the written testimony, but there is a lot going on in burdensome regulation that is not even covered in the numbers that you have heard today.

[The prepared statement of Mr. Graham follows:]

Prepared Statement of John D. Graham, Ph.D., Dean, Indiana University School of Public and Environmental Affairs

My name is John D. Graham. I am Dean of the School of Public and Environmental Affairs (SPEA) at Indiana University and former Administrator of the Office of Information and Regulatory Affairs, OMB in the George W. Bush administration (2001–2006). SPEA is one of the largest schools of public affairs in the country and, just one week ago, the new graduate-school rankings of U.S. News and World Report rated SPEA's Master's of Public Affairs (MPA) degree program as second in the country out of 266 total programs. Prior to serving at Indiana University and OMB, I was a tenured faculty member and founding director at the Center for Risk Analysis, Harvard School of Public Health (1985–2001). My technical expertise is in the application of risk analysis and benefit-cost analysis to health, safety and environmental issues. I have published eight books and over two hundred articles in this field. Several years ago, I was awarded the Distinguished Lifetime Achievement

Award by my professional society, the Society for Risk Analysis. I earned my BA degree (economics and politics) at Wake Forest University (1978), my MA in public affairs at Duke University (1980), and my Ph.D. in public affairs at Carnegie-Mellon University (1983). My doctoral dissertation was a benefit-cost analysis of automobile airbag technology. Before joining the faculty of the Harvard School of Public Health in 1985, I was a post-doctoral fellow at Harvard in environmental health (1983–84).

I have been asked to speak today about benefit-cost analysis of regulation and how the regulatory reform initiatives of the Obama administration can be buttressed and extended. The theme of my testimony is that a substantial amount of costly regulatory activity is occurring without any requirement for benefit-cost analysis or OIRA oversight. I shall illustrate my concerns with case studies of the coal, automotive and housing industries. To rectify the current situation, I recommend that Congress consider legislation that would broaden the scope of federal agency actions that are subject to cost-benefit justification and/or OIRA review.

First, federal regulators are issuing press releases, memoranda of understanding, policy statements, and guidance documents with burdensome impacts on specific industries, yet these quasi-regulatory actions are often not subject to any formal benefit-cost analysis and/or OIRA review.

A vivid illustration of this behavior is the recent use of quasi-regulatory documents by federal regulators to institute dramatic changes in the policy toward granting permits for surface coal mining operations in Appalachia, especially new mining projects in Kentucky, Ohio, Pennsylvania, and West Virginia. Before considering the policy change, I consider why mountaintop mining is undertaken in the first place.

Over the last twenty years, coal mining in Appalachia has changed due to new technology, efforts to minimize labor costs, and the safety concerns about underground mining. While the practice of underground mining still accounts for almost 60% of the coal mined in Appalachia, surface mining at the top of mountains—often called "mountaintop mining"—already accounts for more than 40% of the coal mined in Appalachia and 45% in West Virginia (NMA, 2009). The coal mined in Appalachia is used as fuel for electric power plants in the United States, as in input to iron making in the United States, and as a valuable export to countries in the world that cannot mine enough coal to meet their own needs for electric power and steel making.

Both forms of mining in Appalachia are associated with risk: underground mines, even when operated properly, entail a certain amount of risk to the safety of coal miners; mountaintop mining, even when conducted with proper reclamation practices, entails a risk of surface water contamination and ecosystem damage. Thus, there is no such thing as zero-risk coal mining.

Specific mining projects, including reclamation plans, need to be analyzed for benefit, risk, and cost, and this project-by-project analysis has historically occurred at the state level under guidance and oversight from federal officials at the Army Corps of Engineers/Department of Defense, the Department of Interior and the Environmental Protection Agency. From 2000 to 2008, for example, about 511 mining reclamation projects were approved in the state of West Virginia alone under procedures spelled out by the Army Corps of Engineers in Nationwide General Permit 21. A key principle of this Permit is that mountaintop mining may proceed as long as adverse aquatic impacts are minimized through reclamation and mitigation measures (Copeland, 2010).

Mountaintop mining is controversial because there are important stakes on both sides of the issue. It is estimated that the practice creates about 14,000 direct jobs and 60,000 indirect jobs, with average salaries ($66,000) that are relatively high for rural Appalachia. In the state of West Virginia alone, almost 10% of the state's tax revenue is linked to the economic stimulus of mountaintop mining (NMA, 2009).

On the other hand, by its very nature the practice of mountaintop mining has adverse ecological impact. The tops of mountains are leveled (to access coal seams) and the excess dirt and rock is disposed of in the valley fills on the sides of the mountains. Entire streams are often buried. Although only a small percentage of streams in Appalachia are impacted by mountaintop mining, the impacted streams are a significant environmental concern. In theory, mines are reclaimed and disrupted streams are mitigated on at least a one-to-one basis. Buried streams are replaced, or new streams are created in another location, or already degraded streams are improved. However, reclamation and mitigation efforts are sometimes inadequate, and continued damages are found after mines have been abandoned (GAO, 2010). Recent evidence suggests that even reclaimed areas can become a significant source of surface water contamination, and the extent of contamination is proportional to the amount of mountaintop mining in the area (Lindberg et al, 2011). In some cases, contamination continues almost two decades after reclamation plans were imple-

mented. The impacted streams have been shown to experience aquatic toxicity and other forms of ecological damage (GAO, 2010). More study is needed to determine how the precise placement and treatment of rock spoil in valleys affects the mobility and transport of pollutants in impacted watersheds.

A big change in regulatory policy occurred soon after President Obama took office. In June 2009 EPA issued a press release entitled "Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reform" (EPA, 2009). A memorandum of understanding signed by EPA, the Corps and the Office of Surface Mining and Reclamation and Enforcement (OSM) in the Interior Department accompanied the press release. Although the interagency plan contained a significant shift from existing regulatory policy defined in the Corps Nationwide General Permit 21, there was no prior request for public comment on the new plan and no benefit-cost analysis was conducted to support the major shift in policy toward more restrictions on mountaintop mining. While the Corps did formally propose a suspension of General Permit 21 (as applied to mountaintop mining) in July 2009 (EPA, 2009), the action was not finalized until June 2010, many months after regulators had changed their approach to issuing permits (EPA, 2010).

Basically, the Obama administration authorized EPA to make project-by-project determinations on water-quality issues rather than rely primarily on the states and the Army Corps of Engineers. Industry complained that the criteria for EPA's project-by-project determinations were not clear, and thus developers of mining projects did not know what was expected of them (Fahrenthold, 2010). Ultimately, after many months of uncertainty, on April 21, 2010, EPA issued a 31-page guidance document that did not prohibit mountaintop mining but called for minimal or no filling of valleys with mining debris (EPA, 2010). The guidance was effective immediately, even though no public comments were solicited and no benefit-cost analysis was undertaken. In particular, the new guidance expects mining projects to adhere to strict limits on conductivity levels in streams (a measure of salinity in water). But EPA's numeric approach was based on two draft scientific documents that were not yet finalized (Copeland, 2012).

A year earlier (October 2009), EPA also stunned the industry by reversing a 2007 decision of the Army Corps of Engineers to approve a 2,300-acre mining operation in Logan County, West Virginia (Ward, 2009; Copeland, 2010). The Spruce #1 Mine in Logan County, which had been scaled back to address environmental concerns, was still the largest mountaintop removal mine in West Virginia history (Ward, 2009). Meanwhile, EPA took more than a year to make decisions on 175 proposed mining sites. It ultimately signed off on only 48 (EPA IG, 2011; Quinones, 2011; Fahrenthold, 2010). EPA argued that it was using legal authority under the Clean Water Act and its new technical approach to assessing water quality impacts. The industry countered that EPA's new, unprecedented regulatory approach would effectively prohibit a majority of surface coal mining in Appalachia, and the entire matter is now the subject of expensive, time consuming litigation in multiple federal courts (Copeland, 2011).

A key lesson from this example is that changes in regulatory policy accomplished through press releases, memoranda of understanding, policy statements and guidance documents can have the same costly impact, at least in the short run, as an official rulemaking under the Administrative Procedure Act. Congress should require agencies, when making significant shifts in regulatory policy, to support those shifts with a benefit-cost analysis that is informed by a public comment process. In effect, what is now required for rulemakings should apply to regulatory policy shifts initiated through press releases, memoranda of understanding, policy statements, and guidance documents.

Second, federal regulators are refusing to use their power to restrict or reform regulatory activities by the states that are unnecessarily costly to industry. Of particular concern are arbitrary inconsistencies in state regulations that burden companies that sell products across state lines. In some cases, federal regulators collaborate with state regulators in the promulgation of overly costly rules that completely evade benefit-cost requirements and/or OIRA review.

A sobering example of this behavior is the recent decision of federal regulators to allow the State of California to require that automakers produce an increasing number of zero-emission vehicles (ZEVs) from 2018 to 2025. (As a practical matter, a ZEV under California criteria is likely to be a plug-in vehicle that is powered entirely or partly by electricity, though some hydrogen-powered vehicles also qualify). By 2025, each major automaker doing business in California is required to sell enough ZEVs to comprise at least 15% of their new-vehicle sales in California (CARB, 2011). Since the cost of producing a ZEV is currently $10,000 to $20,000 per vehicle greater than the cost of producing a similar gasoline-powered vehicle,

the ZEV program is certainly worth reviewing from a cost-benefit perspective. If California succeeds in compelling the sale of 1.4 million ZEVs by 2025 at an extra cost of $10,000 per vehicle, the overall cost to consumers will be in the neighborhood of $14 billion.

According to the State of California, the ZEV program is evolving from a traditional focus on public health protection from localized air pollution (smog and soot) to a new focus on control of greenhouse gases linked to the global phenomenon of climate change. Both rationales remain but, due to the dramatic progress in reducing smog and soot from new gasoline-powered vehicles, California regulators acknowledge that the future rationale for the ZEV program will be the control of greenhouse gases (CARB, 2011).

Under the national Clean Air Act, California regulators are given special regulatory privileges because of the poor air quality in southern California but California is not permitted to issue its own rules without permission from the federal government. Congress wanted to make sure that California's regulatory actions are necessary and appropriate, since automakers might be forced to design and produce a different fleet of cars and trucks for California than for other states. (There are about ten states that have chosen to align with California's standards but I shall simplify the presentation by referring to compliance in California). Moreover, the statute underpinning the Department of Transportation's Corporate Average Fuel Economy (CAFE) program prohibits all 50 states (including California) from adopting any regulatory programs "related to" the fuel economy of vehicles, since that is the province of CAFE. There may be creative legal arguments that can rescue an unnecessary and costly California ZEV program from litigation trouble, but surely Congress, through new legislation, has the power to subject California's ZEV program to serious cost-benefit analysis and OIRA review under a national regulatory reform statute. So the key legislative questions are: Is the California ZEV program necessary and appropriate, and does it have any plausible benefit-cost justification?

The case for the California ZEV rule is certainly questionable, given the force of the following arguments:

—California regulators cannot slow global climate change to a meaningful degree unless China and India control their greenhouse gas emissions but the California ZEV program does not—and cannot—cover China and India;

—The Obama administration, through a joint rulemaking of EPA and DOT, has already mandated a sharp reduction in greenhouse gases from new cars and light trucks for model years 2017 to 2025 through a performance standard, a numeric standard based on carbon emissions that allows automakers to undertake some averaging of low-emitting and high-emitting vehicles (EPA-NHTSA, 2011);

—The joint EPA-DOT rule already provides generous compliance incentives for manufacturers who offer ZEVs (e.g., a ZEV's "upstream" emissions at the electric power plant are ignored and each ZEV may be counted more than once in the compliance process) to supplement the federal government's generous $7500 income tax credit to purchasers of ZEV-like vehicles;

—The California ZEV program may not accomplish additional greenhouse-gas control (beyond the control achieved by the EPA-DOT joint rule) because any extra ZEVs produced and sold due to California's rule will be offset in the production plans of automakers by extra sales of more high-emitting vehicles in the 50 states covered by the EPA-DOT rule; and

—The California ZEV program, by forcing automakers to sell more expensive vehicles that are cheaper to operate, will exacerbate greenhouse gas emissions due to two perverse behavioral responses: some consumers will hold on to their old, high-emitting vehicles longer than they would otherwise (Gruenspecht, 2001), and those consumers who do purchase an expensive ZEV will drive them more miles each year because electricity is cheaper than gasoline (Tierney, 2011; Bialik, 2009).

Even if these arguments are overstated, and the ZEV program is determined to be a promising contributor to global greenhouse gas control, it is highly unlikely that the program would pass a cost-benefit test under the official technical guidance in OMB Circular A-4, which governs regulatory analysis in the federal government.

The staff of the California Air Resources Board released in December 2011 a rudimentary analysis aimed at providing some analytic justification for the tighter ZEV requirements for model years 2018 to 2025. The basic result of the staff analysis is that the energy savings provided by ZEVs, accumulated over the vehicle's life, are

about equal to the $10,000 additional cost of producing a ZEV (CARB, 2011, Table 5.7).

The State of California does not have an OIRA-like office and thus CARB staff have considerable analytic discretion, more than EPA or DOT analysts have. Based on a careful read of the CARB analysis, I noted several analytical assumptions that would be unlikely to survive a careful OIRA review under OMB Circular A-4.

1. The cost of producing ZEVs will decline by about 40% between today and 2025 due to learning by doing in the manufacturing process. The 40% figure is at the top of the range of estimates in the literature on learning by doing in the manufacturing sector. However, the battery advances necessary to satisfy the consumer's demand for driving range may cause the cost of future ZEVs to increase, not decline. CARB staff have also ignored the possible increase in prices of rare earths and lithium—these are inputs to lithium ion batteries and electric motors—that may result from Chinese actions, once the U.S. transport sector becomes significantly dependent on ZEVs. Rare earths and lithium currently account for a small percentage of the cost of producing a ZEV but that percentage could rise significantly in ways that are difficult for the United States to control. The Obama administration has recently joined with the EU and other nations in a WTO action against China, citing Chinese price manipulation of rare earths through export restrictions (Lee, 2012).

2. The ZEV will last for an average of 14 years and be driven for 186,000 miles. These figures are on the high end of the range of estimates of average light-duty vehicle lifetime and mileage.

3. A 5% real discount rate is applied to future fuel savings to express them in present value. A 7% discount rate is typically applied to future fuel savings. Changing this assumption alone is likely to reverse the conclusion of CARB's "payback analysis".

4. A long-term gasoline price of $4 per gallon is assumed. This figure could be too low or too high in the short run but fuel prices in the USA can be brought well below $4 per gallon over the 2018–2050 period if the US enacts enlightened energy policies (e.g., expanded oil and gas production in the USA in conjunction with the tighter CAFE standards and other consumer-focused conservation measures to reduce demand for oil).

Overall, based on the implausibility of CARB's assumptions, it seems unlikely that a ZEV mandate would pass a careful payback analysis from the consumer's perspective, at least not ZEVs produced in the pre-2025 period. Consumers may be further disinclined to purchase PEVs if the federal and state tax incentives are reduced for fiscal reasons (California has already reduced its ZEV rebate from $5,000 to $2,500 and the U.S. Congress has not renewed the $2,000 tax credit for the costs of installing a recharging system in one's home).

If ZEVs prove to be a loser in the eyes of the consumer, automakers and dealers will have a difficult time selling them. The early commercial experiences with the Nissan Leaf and the Chevrolet Volt suggest that commercialization of ZEVs will not be easy. Moreover, surveys of consumers indicate that they are not willing to pay a large price premium to obtain the advantages of a plug-in vehicle (White, 2012; Woodyard, 2011; Child and Sedgwick, 2012). Under these circumstances, either the ZEV mandate will have to be relaxed (as has occurred in the past) or automakers and dealers will have to cut prices of ZEVs, incur substantial losses on each ZEV that is sold, and raise prices on all non-ZEV products to cover the losses. In effect, the ZEV mandate will become a price increase on all new vehicles sold in the United States (a troubling scenario that is acknowledged in the CARB document). If this occurs, the result will be fewer new vehicle sales throughout the United States and fewer jobs at plants where new non-ZEV vehicles are produced and at plants of suppliers of non-ZEV vehicles.

The job losses from the ZEV mandate are unlikely to occur in the State of California because very few automotive suppliers and vehicle assembly plants are located in California. This is a point noted in the CARB document. Here are some examples of plants that might be adversely impacted, since they are busiest North American plants that assemble non-ZEV vehicles (measured by 2011 production levels).

1. VW/Puebla, Mexico	514,910
2. Ford/Kansas City, Missouri	460,338
3. Nissan/Aguascalientes, Mexico	410,693
4. GM/Oshawa, Ontario	380,149
5. Ford/Dearborn, Michigan	343,888
6. Hyundai/Montgomery, Alabama	342,162
7. Nissan/Smyrna, Tennessee	333,392

8.	Ford/Hermosillo, Mexico	328,599
9.	Toyota/Georgetown, Kentucky	315,889
10.	Ford/Louisville, Kentucky	310,270

The supplier community for non-ZEV vehicles also has a broad geographic distribution (including many plants outside the United States) but many suppliers locate their plants near assembly plants in the United States (e.g., in the Midwest and the South).

The CARB analysis does not make employment forecasts outside of California with and without the ZEV regulation. CARB does, however, forecast positive job impacts in California because a variety of the companies that makes recharging equipment for electric vehicles are located in California (CARB, 2011, 68–9). I think it is fair to say that the employment analysis of the California ZEV mandate, if had been conducted under OIRA review, would have looked at many more regions of the United States than the state of California.

In summary, federal regulators have permitted the State of California to promulgate a costly ZEV mandate that, in reality, may do little or nothing to protect the world against the forces of global climate change. The economic impacts of the California program are likely to be significant and nationwide in scope. A comprehensive benefit-cost analysis of the ZEV program has not yet been performed, yet the program is already on a clear path toward implementation.

Congress can address this problem in a general regulatory reform bill. In particular, federal agencies should be required to use their powers to restrict or reform state regulatory actions to ensure that regulatory benefits justify costs. When a federal agency decides to allow state regulators to issue rules with national economic ramifications, the agency should be required to justify the decision with a benefit-cost analysis under OMB Circular A-4.

Third, federal regulators are issuing hazard determinations that appear to be at tension with findings reported by committees of the U.S. National Research Council/National Academy of Sciences. A hazard determination is a claim that exposure to a technology or chemical substance is known to be hazardous to human health. Congress can address this problem by requiring OIRA and/or the White House Office of Science and Technology Policy (OSTP) to resolve disputes about hazard, at least in cases where there have been clear determinations by NRC/NAS.

The federal government's recent handling of formaldehyde illustrates this conundrum. Formaldehyde is a widely used industrial chemical that is useful in activities ranging from housing construction to health care services. Each year sales of formaldehyde are worth about $1.5 billion and products that make use of formaldehyde are linked to about four million jobs and $145 billion in economic activity. It is estimated that, if formaldehyde had to be substituted in the U.S. economy, consumers would incur costs of about $17 billion per year. The industrial sector where formaldehyde generates its largest economic value is the housing industry.

Human exposures to formaldehyde are already heavily regulated by multiple federal agencies because high doses of formaldehyde are known to cause irritation of the respiratory system and a rare form of nasal cancer. Spurred by a provocative report (IARC, 2004) from an international organization in Lyon, France, EPA—through the Integrated Risk Information System—made a preliminary determination in 2010 that formaldehyde exposure is known to cause leukemia as well as nasal cancer (EPA, 2010). If the scientific evidence is definitive, EPA should make a definitive hazard determination, since it may help trigger a variety of regulatory and market-based actions that offer additional protection to workers, consumers, and the general public.

A hazard determination should not, however, be based on inconclusive scientific information. An official determination that formaldehyde exposure causes leukemia has the potential to cause a variety of adverse impacts on industry (e.g., lawsuits among people who have leukemia and may have been exposed to formaldehyde, and voluntary product withdrawals), even before any new federal regulation is adopted. The stigma of a hazard determination, once imposed, is very difficult to erase, even if the technology or substance is completely exonerated through additional scientific research.

In this case, industrial scientists were skeptical of EPA's preliminary determination because the epidemiological literature on formaldehyde is difficult to interpret with confidence and the biological mechanism (i.e., how formaldehyde causes leukemia) is not clear. They persuaded Congress to compel EPA to subject their scientific evidence and reasoning to independent review by a panel of the National Research Council/National Academy of Sciences, an official scientific advisory group to the federal government. In a rather critical report, the NRC/NAS panel raised serious questions about EPA's theory that formaldehyde exposure causes leukemia

while reaffirming the known link between formaldehyde exposure and respiratory cancer (NRC, 2011; Jacobs, 2011). NRC/NAS also raised broader questions about the scientific credibility of EPA's IRIS process since there is a pattern of NRC/NAS questions about EPA's hazard determinations (e.g., in the cases of dioxin and perchlorate).

Before EPA could respond to the NAS/NRC report, an entirely different federal agency—the Department of Health and Human Services' National Toxicology Program (HHS-NTP)—included in its Annual Report to Congress an addendum on formaldehyde. The addendum makes a strong claim about the formaldehyde-leukemia link that is similar to the preliminary EPA claim (NTP, 2011). NTP makes a limited effort to reconcile its view with the view of NRC/NAS but ultimately acknowledges that it agrees with NRC/NAS's view that it is not known—from a biological mode of action perspective—how formaldehyde is causing leukemia. NTP takes the position that a substance can be known to cause cancer even if the biological mode of action is unknown.

A key question becomes who in the federal government should be in charge of managing and resolving these issues. The actions of EPA and HHS-NTP may not appear to be "regulations" but they are "science-policy" determinations that can have the practical impact of a regulation (e.g., economic burdens). Before making these kinds of determinations, agencies should be expected to make an assessment of whether significant economic impact may result. If the impact is likely to be significant, an independent review by an organization such as NRC/NAS should be required, and federal agency compliance with the findings of the NRC/NAS panel should be overseen by OIRA and/or OSTP in consultation with other interested federal agencies.

In order to play this role effectively, OIRA and OSTP will need a modest increase in scientific staffing above their current levels. However, it is important to recognize that the roles of OIRA and OSTP are not to redo the agency's hazard determination. Instead, the OIRA/OSTP role is to determine whether a hazard determination should be referred to NRC/NAS and, if so, whether the agency has adhered to the determinations made by NRC/NAS in the agency's final determination. OIRA and OSTP will also supervise interagency discussions of these matters, since multiple federal agencies may have an interest.

Finally, federal regulators, after being sued by pro- or anti-regulation activist groups, are entering into binding agreements with litigants that call for new rulemakings within specified deadlines. The rulemaking commitments are being made prior to any benefit-cost analysis or public comment and without OIRA review. Sometimes the deadlines are set in a manner that ensures that benefit-cost analysis and OIRA review will be compromised. Congress should constrain agency powers to enter into such settlements without first conducting appropriate analysis (to determine whether a rule is necessary and desirable) and seeking public comment. Congress should require that ample time be made available for OIRA review.

During my tenure at OMB, I experienced the consequences of "regulation by consent decree" on several occasions. For example, EPA entered into a litigation settlement that virtually committed the agency to an expensive rulemaking aimed at reducing mercury emissions from coal-fired power plants. When EPA staff briefed me on the benefit-cost basis for the mercury rule, it became clear that many of the emissions reductions expected from the mercury rule were already to be accomplished by another rule aimed at reducing nitrogen dioxide emissions from coal plants. (The same control technology that reduces nitrogen dioxide also reduces oxidized mercury but not elemental mercury). According to EPA staff, the residual benefits (of reducing elemental mercury) were not sufficient to justify the entire cost of the mercury rule, yet the agency was legally committed to issuing a rule by a fixed deadline, and expectations for a rule had been established in the environmental advocacy community. EPA tried to craft a different rationale for the mercury rule based on the "co-benefits" resulting from simultaneous control of a different pollutant, particulate matter. In principle, co-benefits should be considered in such a rulemaking. The obvious counterargument to this position is that direct regulation of particulate matter from many sources (not just coal plants) might be a more cost-effective method of capturing those benefits. With a judicial deadline forcing our hand, we did work with EPA to issue a mercury rule but it had a weak benefit-cost justification. The rule was ultimately overturned in court for reasons unrelated to the benefit-cost issue.

The lesson I drew from this example is that regulators are not necessarily reluctant, during settlement negotiations, to commit themselves to rulemakings that have not yet been analyzed from a cost-benefit perspective. If we are serious about regulatory reform, this practice needs to be restrained. I am pleased that legislators are already looking for solutions. For example, I understand that Congressmen Ben

Quayle, Dennis Ross and Howard Coble have introduced H.R. 3862 "Sunshine for Regulatees and Settlements Act of 2012" and this bill has already been discussed at a separate hearing.

Thank you for the opportunity to submit this testimony.

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Mr. COBLE. You beat the red light. I was asleep at the switch. I didn't know you had concluded. Thank you, sir.

Professor Katzen?

I mean, you were finished, were you not, Dean? You were through with your testimony, or did I cut you off?

Mr. GRAHAM. Yes, sir. I was through. I did not conclude very eloquently, though.

Mr. COBLE. Pardon?

Mr. GRAHAM. I did not conclude very eloquently.

Mr. COBLE. Well, you did it very well.

Professor Katzen, you are recognized for 5 minutes.

TESTIMONY OF SALLY KATZEN, VISITING PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Ms. KATZEN. Thank you, Mr. Chairman, and I do appreciate the opportunity to be here today.

As you noted in your opening comments, there have been a lot of polls and surveys and rhetoric about the increase of regulation under the Obama administration and the resulting drain on the economy. And apparently from the earlier discussion, everybody has a set of data that they can cite to with regard to the costs and the numbers of regulations. The credible data that I have looked at makes one point that I do not think was disputed earlier and that is that the net benefits of the regulations issued during the first 3 years of the Obama administration are quite substantial and that society is better off as a result.

Now, there are obvious difficulties of and limitations on quantifying and monetizing the consequences of regulation. But if one is going to talk about the costs and one is going to champion cost/benefit analysis, then I think equal attention should be paid to the benefits.

President Obama has taken several steps to ensure that the regulations that his Administration issues protect the public health, safety, and the environment while promoting economic growth. I believe the record of his Administration is strong and positive and the path charted during the last few years is the right path to pursue. He has put more emphasis and energy into the lookback initiative than any of the former Administrations that undertook such an effort, including the one that I served in and the one that Dr. Graham served in. And President Obama has been more aggressive than his predecessors in extending sound regulatory principles to the independent regulatory commissions, and this brings me to my second point.

Dr. Graham speaks of broadening the scope of Federal agency action and you asked what can the Congress do. I would suggest that the place to start is with the IRC's. There is considerable public

support across the spectrum for extending executive order requirements to the independent regulatory commissions. And the President's Council on Jobs and Competitiveness included this as one of its recommendations for regulatory reform, calling on Congress to take the lead rather than the President.

The concern is well documented, and that is that IRC's do not typically engage in the analysis that we have come to expect of executive branch agencies. This is troubling because there is likely to be a lot of regulations issued pursuant to the Dodd-Frank Act, much of which will be generated by the IRC's.

Past Presidents of both political parties have been reluctant to extend executive order requirements for economic analysis and OIRA review to the IRC's out of deference to Congress. So a sense of the Congress that such a course would be desirable would go a long way to ameliorate any concerns in this area, or Congress could simply pass a bill authorizing the President to take such action.

Third, President Obama has focused needed attention on the issue of cumulative costs of regulation. Often an industry or sector is subject to regulation under various programs from a single division, under various divisions within a single agency, or by several agencies. And over time, the risk of contradictory or inconsistent requirements or unreasonable cumulative requirements becomes more of a possibility. The President's Council noted its concern with cumulative costs of regulation, and you heard earlier that OIRA has now issued guidance to the agencies providing various steps for them to take, and factors for them to consider, to give more content to the words of the executive order.

In my written testimony, I suggest that OIRA could go further and use the planning process in section 4 of EO 12866 to construct a framework for addressing the problems of cumulative costs. Currently both executive branch agencies and IRC's provide semiannually a summary of the most important regulatory actions they expect to issue in proposed or final form in that fiscal year or thereafter. These are published in the regulatory agenda, but the exercise is more of a paper exercise than an analytical tool. I would hope that the Administration would use this tool to better assess cumulative burdens, and I spell this out in my written testimony, which brings me to my last point.

Resources. It was mentioned in a couple of the opening statements. When President Reagan tasked OIRA with the responsibility for centralized review of regulations, there were over 80 professionals at OIRA. The current number is roughly half of that. Meanwhile over the years, Congress has assigned OIRA substantial additional responsibilities, including administering various provisions of the Unfunded Mandates Reform Act, the Reg Flex Act, the Information Quality Act, and compiling and filing various reports to Congress. Now, the same can be said for the regulatory agencies; they have been asked to do more with the same or fewer resources as we straight-line or chip away their budgets.

But the focus of this hearing is on OIRA where the disparity between responsibilities and resources is very clear. In fact, each of us here is suggesting that OIRA do even more, and I think the answer is they need more. resources I understand the appeal for smaller Government, but having the privilege of having served as

an Administrator of OIRA, I believe that the OIRA staff is the best investment we have in further progress in the regulatory area. Again, the President's Council called for an increase in resources, and I strongly concur with that recommendation.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Katzen follows:]

Prepared Statement of Sally Katzen, Visiting Professor of Law, New York University School of Law, and Senior Advisor at the Podesta Group

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about the Office of Information and Regulatory Affairs (OIRA) and the state of federal regulatory policy and practice under the Obama Administration. The last oversight committee hearing was in July 2010, and much has happened since then. I believe that the record is strong and positive, and the path charted during the last few years is the right path to pursue.

I served as the Administrator of OIRA at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving the government in January 2001, I taught administrative and constitutional law courses at various law schools and courses in American Government at several undergraduate institutions. Currently I am teaching a seminar in advanced administrative law and a first-year course, the Administrative and Regulatory State, as a Visiting Professor at NYU School of Law. I am also a Senior Advisor at the Podesta Group here in Washington. Before entering government service in 1993, I was a partner at Wilmer, Cutler & Pickering, specializing in regulatory and legislative issues, and among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988–89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). Since leaving the government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

There has been a great deal of rhetoric about the increase of regulations, and the drain on the economy of the resulting regulatory burden, under the Obama Administration. There have, however, been very few facts to support these assertions or to put the available data in context. The data that I have seen—filed in Reports to Congress by OMB and in testimony and other statements by those who have compiled and analyzed the information—tell a very different story.

Last Friday, March 16th, OIRA posted to its website a draft of its 2012 Report to Congress on the benefits and costs of federal regulation, which contains the latest available data. [These Reports to Congress have been submitted annually for over a decade now, by administrations of both political parties, presenting consistent data sets compiled by the career staff using the same methodology over the years.] The draft 2012 Report shows that while the number of significant rules issued in the first three years of the Obama Administration was higher than the number issued during the last three years of the Bush Administration, the estimated total cost of those rules was virtually the same. More importantly, the total estimated benefits of the rules issued during the first three years of the Obama Administration was significantly greater than the costs of those rules, leading to substantial net societal benefits from the rules issued during the Obama Administration. The draft Report candidly discusses the difficulties of and limitations on monetizing costs and benefits, but clearly if one is going to speak of regulatory *costs,* and embrace cost/benefit analysis, then it is critical that one also acknowledge regulatory *benefits.*

It was interesting to note that, contrary to the claims of ever increasing regulatory activity by the Obama Administration, the data in the draft Report show that the number and costs (but not the benefits) of significant rules issued in 2011 was actually lower than those issued in 2010. It is possible that the number and/or cost of regulations would increase in 2012 (although I would be surprised if the net benefits would not also increase significantly). I say this because the 111th Congress enacted several major pieces of legislation, including the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, both of which include delegations of authority to federal agencies and called for hundreds of regulations to implement these laws. That is what the Constitution assigns to the Executive: "to take care that the laws be faithfully executed." (Art. II, Sec. 3.) There may be some in the current Congress who want to repeal these laws,

but their efforts to that end have so far been unsuccessful, and as long as the laws are on the books, the agencies are responsible for issuing implementing regulations giving effect to the legislative mandates.

Since the last oversight hearing, there have been other events involving OIRA that are worth mentioning. The most important is President Obama's signing Executive Order 13563, which called for restoring a proper balance in regulations (protecting public health, safety and the environment while promoting economic growth) and which reaffirmed the importance of centralized review and OIRA's role in that effort. It is obvious from a number of well publicized actions that these directives are having an effect. It is also obvious that the agencies are taking seriously the President's directive to engage in a retrospective review of existing regulations to reduce, improve or eliminate those regulations that are outmoded, ineffective or unduly burdensome. I should note that every recent President has called for a review of existing regulations, including Presidents Clinton and George W. Bush, but I have never seen the emphasis and energy that the current Administration is putting into this effort.

President Obama has also been more aggressive than his predecessors in extending sound regulatory principles to the Independent Regulatory Commissions (IRCs)—those multi-headed agencies, such as the SEC, FCC, FTC, FEC, etc., whose members do not serve at the pleasure of the President and can be removed only for cause. Since the inception of centralized regulatory review by OIRA, the IRCs were treated differently than Executive Branch agencies. Neither President Reagan's Executive Order (EO 12291) nor President Clinton's Executive Order (EO 12866) extended the requirements for economic analysis or OIRA review of proposed rules to the IRCs (although President Clinton did include the IRCs in Section 4's Planning Mechanism provisions of EO 12866). In both 1981 and 1993, the legal advisors to the executive order draftsmen concluded that the President had authority to impose these analytical requirements and review the rules of IRCs, but they decided not to do so for political reasons—namely, out of deference to the Congress.

Like his predecessors, President Obama did not extend centralized review to the IRCs in EO 13563. But he did issue an Executive Order in July 2011 (EO 13579) urging the IRCs to "promote th[e] goal" in EO 13563 of producing a regulatory system protecting "public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation." Moreover, he singled out the requirements concerning "public participation, integration and innovation, flexible approaches, and science" and stated that "[t]o the extent permitted by law, independent regulatory agencies should comply with these provisions." In addition, he directed the IRCs to develop plans within 120 days for retrospective review of their existing rules, "consistent with law and reflecting [their] resources and regulatory priorities and processes."

I would encourage the President to go further and extend the provisions of the applicable Executive Orders relating to economic analysis and OIRA review of proposed regulations to the IRCs. There is considerable support across the political spectrum for such an effort, and the President's Council on Jobs and Competiveness specifically included this as one of its recommendations for regulatory reform in both its interim and final reports (although it called on Congress, rather than the President, to take the lead on this issue). About a year ago, Resources for the Future (a centrist think tank) held an all-day conference where various scholars and former government officials (from both sides of the aisle) from five different IRCs explored the status of IRC analysis in rulemaking and the agencies' potential to do more. The materials compiled for that conference would provide a solid foundation for your further consideration of this issue.

The concern is that the IRCs do not typically engage in the analysis that has come to be expected for Executive Branch agencies. For example, in the draft 2012 OMB Report to Congress referred to earlier, it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits and costs; the draft cites the Government Accountability Office (GAO) for reporting that "none of the 17 rules [issued during FY2011] assessed both anticipated benefits and costs." This is very troubling because, as noted above, there is likely to be a large increase in regulations under the Dodd-Frank Act, the vast majority of which will be originating from IRCs.

While there appears to be a growing consensus on requiring IRCs to conduct economic analyses in developing their rules, there is less agreement on whether and, if so, what entity should review and critique those analyses the way OIRA reviews the work of Executive Branch agencies. It is generally accepted that nothing focuses the mind like knowing that someone will be reading (or listening) to your paper (or presentation), and that such review virtually always improves the product. For all

practical purposes, the way Executive Branch agencies and IRCs conduct rulemaking is the same, but the differences between the two types of agencies in terms of their structure and their relationship to the President have led me to conclude that the review process or the "enforcement" of any requirement for economic analysis should not—possibly, cannot—be the same without compromising the independence of the IRCs when they do not acquiesce in OIRA's assessment.

Congress confronted this very question in the Paperwork Reduction Act, where it provided for OIRA review of information collection requests (i.e., government forms) from all agencies, Executive Branch and IRCs. The solution Congress adopted was to authorize OIRA to approve or disapprove paperwork from Executive Branch agencies directly (Sec. 3507(b) and(c)), but to allow IRCs to void any disapproval by majority vote, explaining the reasons therefor (presumably in a public meeting) (Sec. 3507 (f)). A variation on that approach could be used for regulatory review, whereby OIRA would provide its views of the underlying analysis in writing to the IRC, and that document would be presented to the Commission (presumably in a public meeting), where the critiques/suggestions could be discussed and disposed of (accepted or dismissed) per the will of the Commission before final approval of the regulatory action.

As noted above, past presidents of both political parties have been reluctant to extend executive order requirements for economic analysis and centralized review by OIRA to the IRCs out of deference to Congress. A Sense of the Congress that such a course would be desirable would go a long way to ameliorate any concerns in that regard. Or Congress could pass a bill authorizing the President to take such action, which I think the President would likely sign. Alternatively, Congress could designate an entity outside the Executive Branch as the reviewer of the economic analysis undertaken by the IRCs. Two obvious candidates are the GAO and the Congressional Budget Office (CBO). The former was given a limited (check the box) role in reviewing and commenting (to Congress) on the regulations issued by IRCs under the Congressional Review Act, and the latter already has analytical capacity that could be directed to this effort. Both of these entities would need additional staff and resources if they were assigned this task, as would OIRA. While neither GAO nor CBO has OIRA's level of expertise or experience with reviewing economic analyses, both have the "virtue" of being identified with Congress rather than the President, which may be important to those who read "*independent* regulatory commission" as independent of only one and not the other political player.

President Obama has also focused needed attention on the issue of the cumulative costs of regulation. Often an industry or a sector of the economy is subject to regulation under various programs—indeed, under various offices or divisions within a single agency or by several agencies. Over time, the risk of contradictory or inconsistent requirements or unreasonable cumulative requirements becomes more of a possibility. EO 12866 mentioned "the costs of cumulative regulations" toward the end of a statement of principles governing rulemaking. (Sec.1 (b) (11).) EO 13563 gave it more prominent attention. (Sec.1 (b) (2).) But more can and should be done to give content to these words.

OIRA has traditionally focused virtually all of its time and resources on the review of individual regulatory actions developed by the agencies—one at a time (except where two or three arrive in close proximity to one another). While this review is critical not only in providing a dispassionate and analytical "second opinion" on an agency's significant regulatory actions and in ensuring that each new significant regulatory action is consistent with the President's policies and priorities (as well as coordinating regulatory policy within the Executive Branch through the interagency process over which it presides), I think OIRA should do more than just one-by-one reviews. The issues plaguing our country are not likely to be solved by a single regulatory action, nor do they always fit neatly in one agency. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues that are of concern, it is often essential to look beyond the specific proposal du jour and consider the broader picture—in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution.

The mechanism for embarking on and developing such an approach is already in place—Section 4 of Executive Oder 12866, "Planning Mechanism." Under sub-section (c), "The Regulatory Plan," both Executive Branch agencies and IRCs must send to OIRA (for OIRA review and circulation to other interested agencies) a document that includes a statement of the agency's regulatory objectives and priorities as well as a summary of "the most important significant regulatory actions that the agency expects to issue in proposed or final form in that fiscal year or thereafter." These materials are published in the semi-annual *Unified Regulatory Agenda,* but the process itself has become more of a paper exercise than an analytical tool. This

is not new; before, during and after my tenure at OIRA, the focus was on the transactions. But it does not have to be that way. Professor Peter Strauss of Columbia law School and others have called for OIRA to put meat on the bones of this planning process. I concur.

This initiative and extending OIRA review to the IRCs are, in my view, definitely worth pursuing. But OIRA cannot take on these tasks with its existing resources. When President Reagan signed EO 12291, there were over 80 professionals at OIRA; the current number is roughly half of that. I understand the widespread appeal for smaller government as an abstract concept. But it would, in my opinion, be penny-wise and pound foolish to seek to apply that concept indiscriminatorily across all programs and agencies. As the President's Council on Jobs and Competitiveness stated in its final report: "Thorough review by OIRA improves the quality of regulatory analysis and decisions . . . . Even modest improvements in regulations can yield billons of dollars in benefits to the public." Having had the privilege of serving as Administrator of OIRA, I am convinced that the staff of OIRA is one of the best investments we can make to continue progress in the regulatory arena. For that reason, I agree with the Council's recommendation that "OIRA's staff be increased to a level that will permit it to conduct meaningful review of both executive branch and independent agency regulations."

Thank you again for inviting me to participate in this hearing, and I look forward to answering any questions you may have.

Mr. COBLE. Thank you, Professor Katzen.

Good to have all three of you with us.

Dean Graham, the Obama administration and OIRA—it has been said that they have failed to assess both the cost and the benefits of new major regulations. Is that because of lack of—well, first of all, do you agree with it? Is it because of lack of techniques to identify costs and benefits, a lack of willpower at OIRA, or a lack of adequate staff at OIRA, or a combination of all of the above?

Mr. GRAHAM. Well, the easy answer is it is a combination of all of the above.

And having heard the testimony from earlier in the hearing, I think one thing that is important to keep in mind is a lot of the impetus for this regulation—and I do not mean to say this too loudly since we are in the Congress, but it does come from the Congress. When I came to OIRA as an administrator, it was 2001, and I was with a team of conservative deregulators and we were going to get rid of all this regulation. And then what happened? 9/11 happened, and all of a sudden I was approving all kinds of regulations. So the political winds go back and forth on this subject.

But it is without question, if you just look at the raw data, that you are seeing a lot of regulatory activity in the Obama administration. And I think the thing that is particularly concerning given where we are in the economic recovery is you have a lot in the pipeline, whether it be through Dodd-Frank, whether it be the environmental regulations, whether it be the Obamacare regulations. And that is the part of it that is concerning because you have got a lot of that coming down the pike and we are not really sure what its impact is going to be.

Mr. COBLE. I thank you, Dean.

Professor Katzen, I agree with your well-made suggestion that independent agencies be brought within the scope of the OIRA regulatory review process. Do you think that Congress should consider extending OIRA's authority to independent agencies through legislation?

Ms. KATZEN. I think the President has the authority to do it, but past Presidents—and there have been several now, including the

current President—have not taken that step. President Reagan was told he had the legal authority and he declined to do it. President Clinton was told he had the legal authority and he declined to do it. And President Obama has declined to do it. I think that is because of deference to Congress. Independent agencies are some strange creatures that we have in our administrative state, and I think that a sense of the Congress, a joint resolution by the Congress that the President could do it, would help, or Congress could do the legislation itself as long as it was targeted on just that one issue. What has happened with many of the regulatory bills that we have seen is that they begin attracting a lot of other issues and that could bog it down, but if it were limited to the IRC's only, I believe that it would have support across the spectrum and probably would be signed by the President.

Mr. COBLE. Thank you, Professor.

Dean, you may recall my comment to Mr. Sunstein regarding the trend, the President's trend—strike that—President Bush's trend as opposed to the Clinton number of regulatory bills versus the Obama trend compared with the Bush. And my conclusion was—and I was doing it from memory—that the Bush trend is lower than President Obama's trend. Is that accurate?

Mr. GRAHAM. I would have to go back and look at the specific numbers. One thing to keep in mind here is that the two Administrations—they were implementing regulations with different types of legislation behind them, and how much of it was the executive branch and how much of it was Congress, and the two situations I think has to be looked at carefully. To be honest with you, I do not have a firm answer for you on that.

Mr. COBLE. Okay.

Mr. GRAHAM. Give me a question and I will do best to figure it out for you.

Mr. COBLE. I thank you, sir.

The distinguished gentleman from South Carolina is recognized, Mr. Gowdy, from the land of the palmetto.

Mr. GOWDY. Thank you, Chairman Coble, my friend from the great State of North Carolina. And, Mr. Chairman, I had some questions for Professor Sunstein and it is my fault, not his, that I was detained coming back from votes.

But I may, nonetheless, since we have a panel of equally bright people on the second panel—I may try to go ahead and ask them anyway. Mr. Graham, I will start with you.

I seem to remember the President in his State of the Union saying he had identified 500 rules or regulations that could be rescinded. Did I dream that or was that actually said?

Mr. GRAHAM. First of all, it is good to see you again.

Mr. GOWDY. Thank you.

Mr. GRAHAM. It has been a good 8 or 10 years. You are looking extremely good. I wish I could say the same for myself.

I remember vividly working on 500 existing regulations for President Bush that we had identified, and I believe they were predominantly in the manufacturing sector of the economy. And in the final analysis, my recollection is after all of our battles with the agencies and trying to get it done, we had about one in four success rate on those 500 regulations.

You know, in this town, you think OMB, OIRA—they can just do whatever they want and these people are so powerful. But in reality, the agencies, you know, both at the career level and the political level—they are very savvy. They have a lot invested in a lot of these regulations, and even when you have a President who is deeply interested in it, you have an OIRA staff who is charged to do it, and you work on these things, it is a pretty tough slog. That is a one in four hit rate. It would be interesting to compare that to what we have going in this Administration.

Mr. GOWDY. Just for purposes of the record, something came up—I cannot recall when—earlier with respect to a bill—the chief sponsor is the gentleman from Arkansas, former United States Attorney Tim Griffin. And, Mr. Chairman, just for the record, I wanted to make it clear because I think Professor Sunstein cited one of the problems with the bill would be the inability to do what you and I were just discussing, which is to rescind a rule or regulation, but the bill was prescient enough to take care of that because it specifically says that it does not prohibit any substantive action by an agency for repealing a rule. It also allows the President to make exceptions if he wants to.

I want to ask you about another bill. Sue and settle agreements where you file the complaint with a settlement agreement contemporaneous. Nobody has a chance to object to it. There is a bill that we marked up yesterday. What are your thoughts on that as a form of rulemaking to sue a friendly agency and settle it before anybody knows what is going on?

Mr. GRAHAM. Well, I think it is an excellent question, and I will share an experience I had as OIRA Administrator with what we used to call the "Mercury Rule" that dealt with mercury emissions from coal-fired power plants. I think they now call it the Utility MACT Rule or something like that.

But basically we were on a judicially set deadline to do that regulation before there had been a cost/benefit analysis of whether a regulation was even appropriate or whether or not the existing regulations that we were implementing on nitrogen dioxide and sulfur dioxide would have sufficient control on mercury as well, so that you wouldn't even need to have a separate regulation. Yet ultimately, to be candid, we ended up signing off and clearing a substantial mercury rule that really have a very solid cost/benefit analysis behind it because we had basically an agency that had signed a judicial order or a consent decree with a deadline that basically jammed OIRA in its ability to review a regulation like that. It does happen with some frequency.

So I think the general idea of trying to find a way to get some public comment in the process before you sign one of these deals and making sure that a judge respects OIRA review time when they do these types of orders—I think both of those would be extremely helpful.

Mr. GOWDY. I was trying to think back to the old job I had where the tool that was used most often to try to elucidate the truth was cross-examination. I cannot imagine having a trial where defense counsel was not able to cross-examine the lead case agent.

But in a hearing not similar to this and with none of the participants that we have now—I will make that very clear—there was

a witness from the minority who said that science matters should not be subject to cross-examination, that we should just accept them because somehow science—the truth has already been elucidated, which I found amazing because my guess is that fingerprint experts, DNA experts, blood spatter experts, all of which fall under science would be cross-examined.

My time is up, but can you comment on what is the down side of allowing cross-examination during the rule or regulatory process because I think it is not always used? So why would we create a system where you couldn't use the power of cross-examination?

Mr. GRAHAM. Well, I think it is another good question. I guess I would start by saying in the history of regulation, there were periods when so-called formal rulemaking with cross-examination was more common. And my understanding is that agencies currently have the ability to go that direction if they really want to, but they find it much more efficient, meaning get more regulations out faster, to do the informal rulemaking process.

I think it would be interesting to touch base with the key interest groups, both pro-regulation interest groups and groups that are burdened by regulation and have them give their views on whether they feel the process of merely electronic comment is sufficient or adequate compared to the cross-examination you are talking about.

One thing is clear that would be very different. A scientist or an economist at a regulatory agency cannot really be subject to cross-examination in an informal rulemaking context. So really, you change the dynamics significantly in the burden on the agency—their technical people—to defend what they are doing when you have that cross-examination opportunity.

Mr. GOWDY. Mr. Chairman, thank you for calling this hearing. Again, we had a wonderful panel, both sets of panels who are experts in the field.

Mr. COBLE. And, Trey, I thank you, sir. You will be pleased to know we are going to keep the record open 5 days so you and Mr. Sunstein will be able to communicate.

Mr. GOWDY. I am sure he will be glad to hear that, Mr. Chairman. Thank you.

Mr. COBLE. Now, let me say to our two travelers, you all are invited to stay while Dr. Williams testifies, or if you must depart, you may be excused, but that will be your call.

Ms. KATZEN. We will stay till 4.

Mr. COBLE. And we appreciate that.

Dr. Williams, good to have you, and we will hear from you now.

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

Mr. WILLIAMS. Good afternoon and thank you, Mr. Chairman, for the opportunity to testify today. I am Richard Williams, Director of Policy Research at the Mercatus Center at George Mason University. My testimony today is based on 30 years of experience and research on regulations, 27 of which were spent at the Food and Drug Administration. Today I want to address why we cannot solely look to the executive branch to improve regulations.

During the last year of his presidency, President Carter said although he knew from the beginning that dealing with the Federal bureaucracy would be one of the worst problems he would have to face, the reality had been even worse than he had anticipated.

President Obama may be drawing the same conclusion. Despite his expectations that careful consideration will be given to the benefits and costs of proposed regulations, he acknowledged just a few months ago that sometimes these rules have gotten out of balance, placing unreasonable burdens on business, burdens that have stifled innovation and have had a chilling effect on growth and jobs.

Why have Presidents been so unsuccessful at managing executive branch agencies? One reason is that agencies have a monopoly on analyzing their own regulatory decisions. Oftentimes this results in decisions more about what is perceived as good for the agency than fulfilling the President's goals or meeting the needs of the American public. Nevertheless, for the past 15 years, OMB has provided Congress with reports on the combined annual benefits and costs of Federal agency regulatory programs. All have reported benefits exceeding costs. But these reports are misleading for two reasons. I am putting a chart up.

First, in every year, the actual number of regulations that have quantified benefits and costs is a tiny fraction of the overall number of final rules. For example, in the fiscal year 2010 report, there were over 3,000 final rules and only 18 of them had quantified benefits and costs.

The second reason is for those that they do analyze, the quality of the analysis is low. Since 2008, the Mercatus Center has been analyzing all of the economically significant proposed regulations, 127 of them so far. The standard for our review is based on the executive branch's own guidance to agencies. Over this 4-year period, which covers two Administrations, the average score is 28 points out of a possible 60 points. And despite good intentions, the Obama administration had an average score last year of 29, again out of 60.

But why should the agencies try to do good quality analysis? After all, good analysis can expose regulations that only benefit special interests and aren't necessarily good for the public at large.

In 1981, 30 years ago, President Carter created the Office of Information and Regulatory Affairs, otherwise known as OIRA, to try and capture some measure of control over the agencies, particularly ensuring that they do a good job on regulatory analysis. While OIRA has enjoyed some success, our report card shows it is clearly not sufficient. In fact, as Professor Katzen said, OIRA staff has been made harder. They have been reduced from a staff of about 90 to 45 while staffing at the executive branch that they oversee has more than doubled to 277,000 employees.

In my written testimony, I have outlined a number of steps that Congress can take toward remedying this situation.

First, make regulatory impact analysis mandatory under law. If agencies had a statutory obligation to produce complete regulatory analysis, they would pay more attention to it. A current example is the Securities and Exchange Commission. Congress made it a law that they analyze the economic consequences of their rules. And after having lost three court cases in a row based on poor

analysis, they must now take action to seriously measure and consider the benefits and costs of their rules.

Second, give stakeholders and OIRA a chance to comment early on the really big rules before the agencies choose a course of action and dig their heels in. This can be accomplished by requiring agencies to publish an advance notice of the problem they are trying to solve, along with the benefits and costs associated with various ways to solve it.

Third, Congress can also establish a minimum review time for OIRA to review economically significant rules. For some of the most significant rules that this Administration has passed, eight interim final rules implementing the health care law, OIRA had an average review time of only 5 days. Is it because the Department of Health and Human Services did great analysis? No. The average score for these economically significant rules was 18 points out of 60. This is truly regulating in the dark.

Despite repeated attempts to use small legislative fixes and executive orders to improve the regulatory process, the improvements have not materialized. It is time to establish statutory standards that can incentivize agencies to produce quality regulatory analysis and use them to advance social welfare.

I finished before my time.

[The prepared statement of Mr. Williams follows:]

WRITTEN TESTIMONY OF

RICHARD A. WILLIAMS, PH.D. DIRECTOR OF POLICY STUDIES

MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Submitted to the

Subcommittee on Courts, Commercial and Administrative Law

Committee on the Judiciary

United States House of Representatives

Hearing on "Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration"

March 21, 2012

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify today. My name is Richard Williams. 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.[1] For more than three decades, I have worked on rulemaking and regulatory analysis, first as an analyst at the Food and Drug Administration (FDA), then as a supervisor of all social science analyses at FDA's Center for Food Safety and Applied Nutrition. I also worked for a short time at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) reviewing rules from other agencies.

CONTROLLING THE EXECUTIVE BRANCH

For nearly 70 years, presidents have recognized the difficulty of managing regulatory agencies. Harry Truman complained: "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."[2] During the last year of his presidency, Jimmy Carter commented that, although he knew from the beginning that "dealing with the federal bureaucracy would be one of the worst problems [he] would have to face," the reality had been even "worse than [he] had anticipated."[3]

So why is it so difficult for a president to manage federal agencies? After all, the economic executive orders have the force and effect of law on federal employees and instruct agency heads on the major components of analysis they should use for decision-making. Moreover, agency heads are

[1]This testimony reflects only the views of its author and does not represent an official position of George Mason University.
[2]Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2000-2001):2272–73.
[3] Ibid.
[4]Williams, Richard A., "The Influence of Regulatory Economists in Federal Health and Safety Agencies," Mercatus

appointed by, and presumably accountable to, the president. On the other hand, there are about 277,000 employees in 26 executive branch agencies, most of whom are career staff who see presidents come and go. Extensive research on the behavior of regulatory agencies shows how federal employees focus more on the welfare of their agency and less on the president's agenda. Other than career economists, few working on federal regulations pay attention to benefit-cost analysis or other aspects of regulatory analysis unless it is absolutely necessary.[4] In fact, agencies have a lackluster record in the analysis of either benefit-cost trade-offs or risk-risk trade-offs.[5]

With these factors in mind, every president since Ronald Reagan has relied on OIRA as a regulatory gatekeeper. OIRA's primary duty is to enforce the presidential economic executive orders, which have barely changed since Reagan's Executive Order 12291. In doing so, OIRA labors in relative obscurity and, over the years, has produced a record of mixed results.

PRESIDENTIAL PROMISES

Like his predecessors, President Barack Obama has defined the quality standard for rulemaking by executive order. In January 2011, the president said, "Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."[6] In that same month, the president issued Executive Order 13563, which states –

> Our regulatory system must … take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in

[4] Williams, Richard A., "The Influence of Regulatory Economists in Federal Health and Safety Agencies," Mercatus Working Paper, July 2008.
[5] Worse, despite the decade-old requirement of the Government Performance and Results Act, agencies rarely are able to articulate the progress they are making at solving the problems under their purview.
[6] Barack Obama, "Toward a 21st Century Regulatory System," *Wall Street Journal*, January 18, 2011.

> plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.[7]

OIRA Administrator Cass Sunstein, charged with overseeing this order, likewise has stated –

> Since I was confirmed in September, OIRA has devoted special attention to working with agencies in three areas: promoting open government, improving regulatory analysis, and improving disclosure policies and increasing simplification. The unifying goal is to ensure that regulation is evidence based and data driven and that it is rooted in the best available work in science (including social science).[8]

So what does the record say about these efforts? As past presidents and administrators have discovered, setting standards for transparency and quality analysis is one thing—achieving agency compliance with those standards is another.

THE RECORD

As a measure of regulatory quality, many point to OMB's annual report to Congress on the benefits and costs of federal regulations and unfunded mandates. The first report issued in 1997 estimated annual benefits at or greater than $298 billion and costs at $279 billion.[9] OMB's reports have consistently shown benefits exceeding costs for the last 15 years.[10] Because of this, some regulatory scholars have argued that no institutional regulatory reforms are necessary. For example, one prominent scholar argues -

> ...all indications are that the rules being developed by Executive Branch agencies generally meet the "benefits justify costs" standard of the Executive Order. For

[7] Executive Order 13563, *Improving Regulation and Regulatory Review*, January 18, 2011.
[8] Cass Sunstein, Testimony before the Committee on the Judiciary, Courts, Commercial and Administrative Law Subcommittee, U.S. House of Representatives, July 27, 2010, http://judiciary.house.gov/hearings/pdf/Sunstein100727.pdf /.
[9] OMB, *Report to Congress on the Costs and Benefits of Federal Regulation*, September 30, 1997, http://www.whitehouse.gov/omb/inforeg_chap2#tacp /.
[10] The latest report is *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, found at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf /.

> example, in OMB's 2010 Report to Congress, OMB included data on the cost ($43–$55 billion) and the benefits ($128–616 billion) of major rules issued by Executive Branch agencies over the most recent ten-year period (FY 1999–2009). Even if one uses the highest estimate of costs and the lowest estimate of benefits, the regulations issued over the past ten years have produced net benefits of $73 billion to our society.[11]

This argument, however, does not address the question of whether or not these reports are accurate and reliable. There are several reasons to suspect they are not.

1. The agencies have a monopoly on analysis.

The estimates used in OMB's report are prepared by the agencies themselves, which means that the agencies are analyzing their own decisions. Research shows that agencies often make decisions early in the regulatory process and agency economists are pressured to make their analyses support those decisions.[12] In fact, agencies do an overall poor job of preparing economic analysis for new rules. Since 2008, the Mercatus Center at George Mason University has conducted a project known as the Mercatus Regulatory Report Card (Report Card) that evaluates federal agencies' economic analyses, called Regulatory Impact Analyses (RIAs), for economically significant rulemakings. Rulemakings evaluated by the Report Card receive a score ranging from 0 (no useful content) to 5 (comprehensive analysis content with potential best practices) on questions based on requirements imposed under Executive Order 12866, as well as RIA guidelines laid out in the OMB's Circular A-4.

Unfortunately, the Report Card findings have not been reassuring. Agencies consistently do a poor job on economic analysis. The average Report Card score was 28 out of a total of 60 points for the

[11] Sally Katzen, Testimony before the Committee on the Judiciary, Courts, Commercial and Administrative Law Subcommittee, U.S. House of Representatives, May 4, 2011.
[12] Williams, Richard A., "The Influence of Regulatory Economists in Federal Health and Safety Agencies," Mercatus Working Paper, July 2008.

period 2008 to 2010.[13] That's an F. In 2011, the average score is a disappointing 29. Analysis by other researchers in the past confirms the poor quality of federal regulatory impact analyses.[14]

Research indicates there are no significant differences in the quality of economic analysis across administrations, suggesting the problem is institutional, rather than just a case of a few bad apples. Some of the most problematic areas the Report Card data identify are a failure to define the systemic problem or market failure the agency sought to solve through regulation, a lack of consideration of serious alternatives to the regulation being proposed, and a failure to set forth procedures to track results of the regulation once it has been implemented.[15]

Another area of concern is the underlying science supporting the economic arguments. For example, one way to support decisions is to find new benefits. For rulemakings proposed in the last few years, many of the benefits are either co-benefits (primarily reductions in PM 2.5 included in clean air rules targeted at other pollutants), or benefits based on assumptions that individual preferences are incorrect (people are not buying energy-efficient cars or appliances to the extent that the government believes they should).[16]

Another way to generate excessive benefits is by using conservative assumptions in risk assessments. A recent report by the National Research Council (NRC) of the National Academy of Science raises the point that there may be systemic problems with some risk assessments -

[13] Ellig, Jerry and John Morrall, "Assessing the Quality of Regulatory Analysis," Mercatus Working Paper, December 15, 2010.

[14] See, for example, Winston Harrington, "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews," (Discussion Paper 06-39, Resources for the Future) and Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?" *Journal of Economic Perspectives*, 22 no.1 (Winter): 67–84.

[15] See, for example, James Broughel and Jerry Ellig, "Regulatory Alternatives: Best and Worst Practices," *Mercatus on Policy*, February 21, 2012.

[16] Susan Dudley, cited in "The Rule of More," *The Economist*, February 18, 2012. See also, Michael L. Marlow and Sherzod Abdukadirov, "Fat Chance: An Analysis of Anti-Obesity Efforts," Mercatus Working Paper, March 1, 2012.

> Overall, the committee noted some recurring methodologic problems in the draft IRIS assessment of formaldehyde. Many of the problems are similar to those that have been reported over the last decade by other NRC committees tasked with reviewing EPA's IRIS assessments for other chemicals. Problems with clarity and transparency of the methods appear to be a repeating theme over the years, even though the documents appear to have grown considerably in length… .
>
> …The committee found that EPA's draft assessment was not prepared in a logically consistent fashion, lacks clear links to an underlying conceptual framework, and does not sufficiently document methods and criteria used to identify evidence for selecting and evaluating studies.[17]

A recent examination of United States Department of Agriculture's catfish inspection rule also found issues with the science behind the benefits analysis. In 1991, ten cases of *Salmonella* Hadar had been possibly associated with catfish consumption. However, the risk assessment multiplied that evidence into a finding that there were approximately 2,500 cases per year.[18]

Early on, the Government Accountability Office noted the problems with the OMB reports -

> …the experts said that OMB's 1998 upper-bound estimate of total regulatory benefits was questionable or implausible and they were particularly critical of OMB's unadjusted use of EPA's Clean Air Act benefit estimate; (8) they also said that OMB should not have simply accepted agencies' cost and benefit estimates for the major and economically significant rules, and should have provided new regulatory reform recommendations; (9) however, the experts said they understood why OMB could do little to discuss the other statutory requirement regarding the indirect regulatory effects on particular sectors; (10) overall, they said OMB should have been more than a clerk, transcribing the agencies' and others' estimates of costs and benefits;… .[19]

2. OMB's reports to Congress are not representative of all rules.

The estimates presented in OMB's reports are a tiny fraction of all final rules issued in any given year. For example, in 2010 agencies issued 3,083 final rules but only 16 had quantified

[17] National Research Council of the National Academy of Sciences, "Review of the Environmental Protection Agency's Draft IRIS Assessment of Formaldehyde," May 2011, p. 4, http://books.nap.edu/catalog.php?record_id=13142#toc /.
[18] Richard A. Williams and Sherzod Abdukadirov, "Regulatory Monsters," *Regulation Magazine*, 34 no. 3 (Fall 2011).
[19] Government Accountability Office, "Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation" (GGD-99-59) April 20, 1999, p.5.http://www.gao.gov/products/GGD-99-59 /.

OMB REPORTS TO CONGRESS

Report Year	# of Major Rules	# of Major Rules that have Monetized Costs and benefits	% of Major Rules that have Monetized Costs and benefits
2001	31	6	19
2002	87	12	14
2003	31	3	10
2004	37	6	16
2005	45	11	24
2006	45	13	29
2008	40	12	30
2009	42	13	31
2010	66	16	24
2011	66	18	27

benefits and costs (or about ½ of 1 percent). OMB reported the sum of benefits and costs for those 16 rules as the total costs and benefits for all final rules issued that year. As in 2010 when there were 66 major rules, in the best of cases, OMB does not receive quantified benefits and costs for seven out of every 10 of the major rules they review (see chart below).

Drawing any conclusion from such a skewed data set is highly questionable at best.

3. Oversight by OIRA is insufficient.

At the inception of OIRA in 1981, the executive branch regulatory agencies had total staffing of 115,047. In 2012, it is 248,965 for social regulation alone, and about 277,000 in the executive branch overall.[20] This is an increase of 240 percent. At the same time, the OIRA professional staff declined from about 77 at its inception to 50, a decline of 38 percent. In addition, only about 30

[20]Susan Dudley and Melinda Warren , "Fiscal Stalemate Reflected in Regulators' Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012," *Regulator's Budget Report* (Weidenbaum Center on the Economy, Government, and Public Policy Washington University St. Louis, and Regulatory Studies Center Trachtenberg School of Public Policy and Public Administration, The George Washington University Washington, DC), 33 (May 2011).

OIRA staff members work on regulations at any one time. In 1981, there were about 63,554 pages in the Federal Register; in 2011, there were 82,419 pages in the Federal Register, an increase of almost 30 percent.[21] So right now, 30 OIRA staff members are charged with examining the work of more than 270,000 people in the regulatory agencies.

OIRA staff members today review about 90 major (proposed and final) rules per year, about 600 non-major rules, and about 3,000 Paperwork Reduction Act requests each year.[22] These rules take time to review as many are quite large. The Mercatus Regulatory Studies Program looked at OIRA review times in the first three years of the George W. Bush administration and compared this data to the first three years of the Obama administration. We found that the average review time in both periods for economically significant regulations was 44 days. However, this number is misleading because the average is skewed upwards by a small number of rules with very long review times. In general, most regulations are reviewed in much shorter periods. For example, in the six-year period reviewed, nearly 15 percent of economically significant rules had OIRA review times under five days, 25 percent were reviewed in under 10 days, and nearly 38 percent were reviewed in under 20 days. In comparison, agencies may take five years or longer preparing rules before they publish a proposal.

Recent Mercatus research suggests that short review times may be related to lower quality analysis. In a new study by Jerry Ellig of the Mercatus Center and Chris Conover of Duke University, the authors found that eight interim final rules associated with the Patient Protection and Affordable Care Act issued by the Department of Health and Human Services (HHS) in 2010 had considerably

[21] Office of the Federal Register, www.llsdc.org/attachments/wysiwyg/544/fed-reg-pages.pdf.
[22] Curtis W. Copeland, "Federal Rulemaking: the Role of the Office of Information and Regulatory Affairs," Congressional Research Service Report for Congress RL32397, June 9, 2009.

lower quality analysis than previous rules issued by HHS. This may be related to the fact that these rules had an average review time of just five days.[23]

A FEW SOLUTIONS

Based on the evidence, continuing the status quo cannot change the incentives that cause agencies to place a low priority on quality economic analysis. There are options, however, that could get us better regulatory analysis and better regulations.

1. Increase Government Oversight

As agency staffs have more than doubled, one could argue that OIRA's staff should be doubled from its original capacity, from 77 to 160. More important, OIRA urgently needs more trained risk assessors so that it has sufficient capacity to critically review every aspect of benefits analyses, including risk assessments. To be useful, risk assessments must be compatible with benefit assessments, but too often they are either the wrong form, such as safety assessments (for example, reference doses, reference concentrations, or acceptable daily intakes), or they are conservative estimates of risk.[24] As with all analysis, risk assessments must be, to the extent possible, objective. In fact, they are expected to comply with the Data Quality Act, which says that agencies must ensure and maximize the "quality, objectivity, utility and integrity of information." Objectivity

[23] Conover, Chris and Jerry Ellig, "Rushed Regulation Reform," *Mercatus on Policy*, January 9, 2012, http://mercatus.org/publication/rushed-regulation-reform ; Conover and Ellig, "The Poor Quality of Affordable Care Act Regulations," *Mercatus on Policy*, January 9, 2012, http://mercatus.org/publication/poor-quality-affordable-care-act-regulations ; Chris Conover and Jerry Ellig, "Beware the Rush to Presumption, Part A," Mercatus Working Paper, January 9, 2012, http://mercatus.org/publication/beware-rush-presumption-part ; Conover and Ellig, "Beware the Rush to Presumption, Part B," Mercatus Working Paper, January 9, 2012), http://mercatus.org/publication/beware-rush-presumption-part-b.

[24] Richard A. Williams and Kim Thompson, "Combining Risk and Economic Assessments While Preserving the Separation of Powers," *Risk Analysis*, 24 no. 6 (2004).

refers to the fact that independent observers using the same procedures will come to consensus and that personal opinions, values, and biases will not change the outcome. OIRA must be in a position to evaluate the suitability and objectivity of risk assessments to determine their effect on the benefit side of the equation.

If staffing is to be increased, OIRA's scope should also be increased to cover the increasingly active independent agencies whose economic analysis is either absent or has been repeatedly found to be poor (for example, the Securities and Exchange Commission).[25]

In addition to needing more staff, OIRA needs to adjust its review time as some rules appear to be rushed through the process. A minimum review time should be placed on economically significant rules so that OIRA has sufficient time and resources to review economically significant regulations. A minimum of at least 60 days should be required to review those rules that have an impact of $100 million dollars or more on the economy. This reform should help ensure that regulations are well informed by quality economic analysis before agencies move forward with a final regulation.

Finally, an alternative to giving OIRA more staff is to create an independent office to either prepare analyses for the Executive Branch or to act as a second set of reviewers after OIRA.

2. Open the Process Earlier

OIRA has tried for many years to get agencies to come to OIRA early in the process to discuss proposals. The reason, as is well known, is that by the time agencies have produced a proposal, an enormous amount of work has gone into it and the decision is normally on a conveyor belt to final

[25] Sarah N. Lynch and Christopher Doering, "Analysis: Bruised regulators brace for Dodd-Frank Court Fights," *Reuters*, August 4, 2011, http://www.reuters.com/article/2011/08/04/us-financial-regulation-courts-idUSTRE7730K220110804/.

rule. The game that some agencies play with OIRA is to throw some things in their proposals that they don't care about. This allows OIRA to have some small victories in eliminating costly or ineffective provisions while the agencies keep their true proposals largely intact. As mentioned above, there is very little time for OIRA to review these rules, and agencies will typically dig in their heels to prevent significant changes to their rules. Besides giving OIRA more time and staff to review rules, give OIRA advanced notices for economically significant rules.

This kind of advanced notice would include the definition and evidence of the systemic problem the agency intends to address, along with some possible ways of solving the problem and a preliminary estimate of the benefits and costs of those alternatives. This would give both stakeholders and OIRA analysts a chance to weigh in early before agencies have cemented their position.

3. Increase Oversight by Stakeholders

One way to increase oversight would be to allow for "crowd sourcing." Crowd sourcing refers to groups of people who, for any given issue, have significant information that should be factored into the decision. Currently, the only option open to people with this kind of information is to submit comments to the agencies. However, they cannot challenge the agency if the agency simply disagrees with them. Relying only on OIRA is not likely to work as OIRA faces the challenges of being too small and not being able to comment on politically sensitive rules. If the analyses were judicially reviewable, then stakeholders with knowledge of benefits and costs could challenge the agencies in court.[26]

[26] Williams, Richard A. and Sherzod Abdukadirov, "Blueprint for Regulatory Reform" Mercatus Working Paper, February, 2012, http://mercatus.org/sites/default/files/publication/Blueprint_For_regulatory_Reform.pdf /.

CONCLUSION

Every president has struggled to improve his management of agency regulatory authority. For 30 years, OIRA has served as a gatekeeper with limited authority. Six administrations have supported the use of quality economic analysis to inform regulatory decision-making. Simply restating this principle in executive orders and public statements has not and will not achieve the objective, all good intentions notwithstanding. Without definitive action, we risk doing the same thing over and over again expecting different results, an approach that Albert Einstein logically concluded to be the definition of insanity.

No. 10-75
December 2010

WORKING PAPER

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

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

December 15, 2010

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* In addition to the research team that helped us evaluate agency Regulatory Impact Analyses and *Federal Register* preambles, we gratefully acknowledge research assistance from Dan Claybaugh, Gwen D'Luzansky, and Krista Speicher. We thank Randy Lutter and participants at the Society for Government Economists and Society for Risk Analysis meetings in 2010 for helpful comments and discussions on earlier drafts of this paper.

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–.

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[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 use of more "best practices"
4	Reasonably thorough analysis of most aspects, similar scores at least some "best practices"
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
End Stage Renal Disease Prospective Payment System	*0938-AP57*	*HHS*	*32*	*12*	*9*
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
School Improvement Grants	*1810-AB06*	*ED*	*31*	*13*	*7*
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
Prospective Payment Skilled Nursing Facilities	*0938-AP46*	*HHS*	*26*	*11*	*8*
Electronic Health Record Incentive Program	*0938-AP76*	*HHS*	*25*	*13*	*7*
Home Health Prospective Payment System	*0938-AP55*	*HHS*	*25*	*11*	*8*
Prospective Payment System for Inpatient Rehabilitation Facilities	*0938-AP56*	*HHS*	*25*	*15*	*5*
Hospital Inpatient and Long Term Care Prospective Payment System	*0938-AP39*	*HHS*	*24*	*14*	*5*
Hazard Communications Standard	1218-AC20	DOL	24	13	7
Outpatient Prospective Paymen'	*0938-AP41*	*HHS*	*24*	*13*	*6*
Race to the Top Fund	*1810-AB07*	*ED*	*23*	*9*	*5*
Revisions to Payment Policies Under the Physician Fee Schedule	*0938-AP40*	*HHS*	*23*	*11*	*6*
State Fiscal Stabilization Fund Program	*1810-AB04*	*ED*	*23*	*13*	*5*
Renewable Fuels Program	2060-AO81	EPA	21	11	6
Special Community Disaster Loans Program	*1660-AA44*	*DHS*	*20*	*11*	*6*
Investing in Innovation	*1855-AA06*	*ED*	*19*	*11*	*4*
Hospice Wage Index for FY 2010	*0938-AP45*	*HHS*	*18*	*9*	*4*
Housing Trust Fund Program	*2506-AC23*	*HUD*	*18*	*10*	*3*
Revisions to the Medicare Advantage Program	*0938-AP77*	*HHS*	*18*	*9*	*4*
Credit Assistance for Surface Transportation Projects	*2105-AD70*	*DOT*	*17*	*11*	*5*
Expansion of Enrollment in the VA Health Care System	*2900-AN24*	*VA*	*17*	*11*	*3*
Children's Health Insurance Program (CHIP)	*0938-AP53*	*HHS*	*15*	*8*	*1*
General and Non-Loan Programmatic Issues	*1840-AC99*	*ED*	*14*	*8*	*2*
Weatherization Assistance Program	*1904-AB97*	*DOE*	*10*	*6*	*3*
Loan Guarantees for Projects that Employ Innovative Technologies	*1901-AB27*	*DOE*	*5*	*3*	*2*
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.

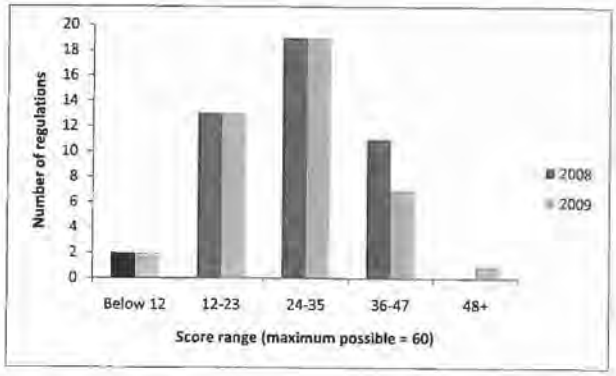
Figure 2 shows that the distribution of scores was roughly the same in both years. The only differences are that the joint DOT/EPA regulation received a score of 48 in 2009, and several more regulations in 2008 received scores in the 36–47 range.

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 Quality × 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 that 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

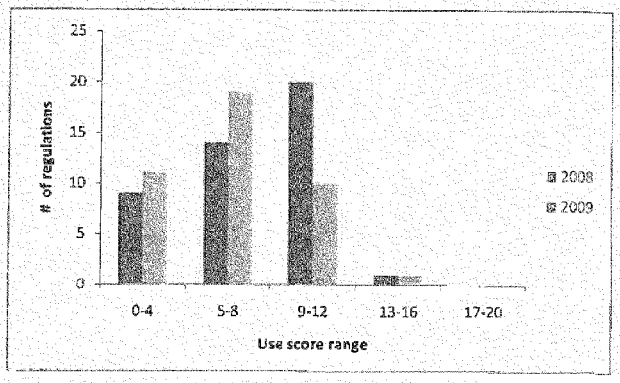


Table 9: Quality of Analysis vs. Separate Scores for Ex-Ante and Retrospective Analysis

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.

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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?	Criterion 2: How verifiable are the data used in the analysis? Criterion 3: How verifiable are the models or assumptions used in the analysis? Criterion 4: Was the analysis comprehensible to an informed layperson? *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.*
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?	Criterion 1 takes the first step by assessing how easily the RIA itself can be found on the Internet. 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 *Federal Register* notice.
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)?	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?
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?
Goals and measures to assess results of the regulation in the future – No content.	Criterion 11: Does the proposed rule establish measures and goals that can be used to track the regulation's results in the future?
Provisions for gathering data to assess results of the regulation in the future – No content.	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	1.65	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	1.52	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	0.93	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 [2.21**]	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

No. 101
January 2012

MERCATUS ON POLICY

THE POOR QUALITY OF AFFORDABLE CARE ACT REGULATIONS

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WILL THE PATIENT Protection and Affordable Care Act (ACA) improve the performance of the U.S. health care system? The quality of the major interim final regulations issued under the ACA in 2010 gives three main reasons for pessimism on this score.

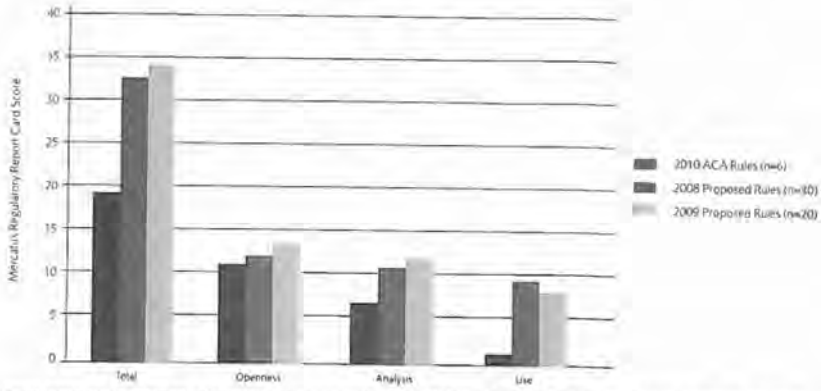
First, the quality of analysis for these regulations is measurably lower than for other major regulations proposed in 2008 and 2009. Second, the analyses supporting these regulations tended to overestimate the rules' benefits and underestimate their costs, in some cases by amounts exceeding billions of dollars. Third, the analyses often ignored more effective or less costly alternatives.

Had these regulations been accurately analyzed, it is likely that at least some would have failed a simple cost-benefit test. The challenge for Congress is to ensure that future ACA regulations yet to be issued do not repeat such flaws.

HOW THESE REGULATIONS WERE EVALUATED

WE USED THE Mercatus Center's Regulatory Report Card scoring system to compare the first eight major regulations issued under the ACA with all major proposed regulations issued in 2008 and 2009. Report Card criteria fall into three categories: Openness (how accessible, clear, and well-documented is the analysis?); Analysis (how well does the analysis identify the desired outcomes, systemic problem, alternatives,

FIGURE 1. REPORT CARD SCORES FOR PRESCRIPTIVE REGULATIONS



Source: Authors' calculations from data in Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part A: Material Omissions in Regulatory Analyses for the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

costs, and benefits?); and Use (to what extent did the agency claim to use the analysis or make provisions for retrospective analysis of the regulation?).[1]

As Figure 1 shows, the quality and use of analysis for the ACA interim final regulations falls well below the standards set by other agencies and by the Department of Health and Human Services itself in conventional notice-and-comment rulemakings in previous years. However, the regulatory impact analyses for the eight ACA interim final rules is comparable to the analysis that accompanied a series of interim final homeland security regulations issued by the Bush administration following 9/11. This suggests that the institutions, not the people or party in power, explain the decline in quality of regulatory analysis when agencies implement significant presidential priorities on short deadlines.[2]

In general, the health regulations were less transparent than the major proposed rules issued by the Bush and Obama administrations in 2008 and 2009. This means it was difficult for the lay public or even experts to understand how the analysis calculated at least some of its estimates of benefits or costs. In some cases, the rules inadequately assessed the expected benefits or failed to demonstrate how the rule would achieve them. In other cases, the analysis failed to demonstrate that there was some market failure or other systematic problem that could be addressed only through federal government action. Some rules also failed to identify alternative, less expensive approaches to regulation or failed to adequately assess costs and compare these to benefits. In fact, not one of these rules sought to monetize expected benefits, making it unclear why the agency concluded that the rule had benefits that exceeded its costs.

The lowest scores were for use of the analysis. Apparently, agencies used analysis as a post hoc justification of a regulatory approach already decided upon. The analyses did not always explain why the agency chose a particular option. Little thought was given to establishing measures, goals, or data sources that would permit the agency to evaluate the rule's future impact.

We examined in greater detail how well these regulations evaluated benefits, costs, equity, and regulatory alternatives. We found that the regulatory impact analyses were seriously incomplete or inaccurate, often omitting or mismeasuring significant benefits, costs, or regulatory alternatives. This resulted in a general pattern of exaggerated benefits and understated costs. Analysis of equity was cursory at best. In short, the regulatory analyses for these regulations were insufficient to guide decisions or inform the public.[3]

WHAT DIFFERENCE DOES IT MAKE?

ONE EXAMPLE ILLUSTRATES the kinds of problems we found in the ACA regulatory analyses. None of the eight rules mentions moral hazard, even though this is an inherent feature of health insurance. Moral hazard simply means that when someone else is paying the bill, people are less likely to avoid a

risk. In the context of health insurance, this means that people with insurance may be more likely to use medical care or less likely to care for their own health.

The size of this commonsense effect on behavior has been measured scientifically. The RAND Corporation performed a randomized, controlled trial of health insurance coverage. People randomly assigned to a plan that gave them completely free health care had medical expenses 50 percent higher than those randomly assigned to plans with modest cost sharing.[4]

Clearly, some of this additional care was of value to patients in the free care plan. But at least some of it was waste, meaning that the cost of the added care exceeded its worth to patients. RAND calculated that fully 30 percent of the total annual cost of medical spending for the free care group was wasted in this fashion. Yet for the average patient, this additional spending did not lead to any improvement in health status. The waste due to moral hazard ranges from 10 percent of spending for patients in plans with modest cost sharing to 28 percent for those on Medicare[5] to 44 percent for the additional spending induced by the Medicare prescription drug plan.[6] By ignoring an effect of this magnitude, the analyses understate the potential costs of various ACA regulations by double-digit percentages.

For at least three rules, the magnitude of such estimation errors is large enough that more accurate measurement of benefits and costs might well have reversed the presumption that benefits exceeded costs. These include the early retiree reinsurance program (where costs appear to have been understated by $9–$10 billion over four years), dependent coverage for children up to age 26 (where costs were underestimated by at least 20 percent) and the preexisting-condition insurance plan (where benefits appear to have been overestimated by at least $1.5 billion and costs underestimated by at least $6 billion).

This does not imply that these rules confer no benefits on the individuals whose health costs will be subsidized by taxpayers or policyholders. But reasonable people may conclude such transfers are not worthwhile if society bears an often hidden cost of $1 or $2 or $3 for every dollar of health benefits delivered to patients.

KEY LESSONS

A combination of top-down direction from the White House and tight deadlines imposed by Congress appears to have contributed to an abbreviated regulatory process that severely impaired the ability and willingness of agencies to produce high-quality regulatory impact analyses.

We have no way of determining whether the administration's process for developing these high-priority regulations was the sole reason for their poor quality or whether the tight deadlines imposed by Congress alone would have produced the same result. These rules spent much less time in the Office of Information and Regulatory Affairs (OIRA) review than rules typically do. But the involvement of both White House and high-ranking agency staff in the promulgation of these rules suggests that the administration likely got the rules it wanted written, in which case additional time for OIRA review would have made little or no difference in their quality.

POLICY RECOMMENDATIONS

There are several steps Congress could take to help ensure that the final versions of these regulations—and subsequent regulations implementing other provisions of the ACA—reflect a more careful assessment of their consequences.

First, Congress could conduct more diligent oversight. This could be accomplished through oversight hearings or confirmation hearings for the heads of regulatory agencies; individual members of Congress also may meet with agency officials, write letters, or file public comments on rules.

Second, Congress could use the Congressional Review Act to overturn the final versions of these rules if it believes the analysis is insufficient. Senator Mike Enzi attempted this approach in the form of S.J. 39, introduced September 22, 2010, to disapprove the rule related to grandfathered health plans; the resolution was defeated by a vote of 40–59. This helps illustrate that such legislation is difficult to pass in a Congress divided along party lines. Moreover, since the president can veto the congressional resolution of disapproval, Congress is unlikely to overturn a rule issued by one of the president's own Cabinet departments. In the absence of more sweeping reforms—such as a requirement that Congress affirmatively approve major regulations—oversight is likely the more effective option.

Third, Congress can and often has used the text of appropriations bills either to direct or preclude the development of particular proposed rules, place restrictions on implementation or enforcement of certain provisions, or otherwise restrict certain types of regulatory activity. This same mechanism can be used to require the use of certain procedures before or after a rule is issued. Because of the urgency required in passing appropriations bills, such language can be used to steer the course of rulemaking even when the president is in the opposition party.[7]

CONCLUSION

Policy makers cannot eradicate politics from the regulatory process. But they can better ensure that politics does not trump good policy. This may require better congressional

checks and balances on the executive branch, a strategy the Founding Fathers would have understood well.

ENDNOTES

1. For a full explanation of the Report Card methodology and 2008 scoring results, see Jerry Ellig and Patrick McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* (forthcoming 2012). A prepublication version of this article is available at http://mercatus.org/publication/quality-and-use-regulatory-analysis-2008.

2. This section summarizes a much longer analysis in Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part C: A Public Choice Analysis of the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

3. Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part A: Material Omissions in Regulatory Analyses for the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

4. Emmett B. Keeler, Joan L. Buchanan, John E. Rolph, Janet M. Hanley, and David M. Reboussin, *The Demand for Episodes of Medical Treatment in the Health Insurance Experiment* (Santa Monica, CA: RAND Corporation, 1988).

5. Amy Finkelstein and Robin McKnight, "What Did Medicare Do (and Was It Worth It)?" (National Bureau of Economic Research Working Paper no. 11609, Cambridge, MA, 2005).

6. Mark V. Pauly, "Medicare Drug Coverage and Moral Hazard," *Health Affairs* 23, no. 1 (2004): 113–22.

7. Curtis W. Copeland, *Congressional Influence on Rulemaking and Regulation through Appropriations Restrictions* (Washington, DC: Congressional Research Service, 2008).

The Mercatus Center at George Mason University is a research, education, and outreach organization that works with scholars, policy experts, and government officials to connect academic learning and real-world practice.

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No. 102
January 2012

MERCATUS ON POLICY

RUSHED REGULATION REFORM

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WHAT DO THE Obama administration's first few major health care regulations and the Bush administration's first few major homeland security regulations have in common? Both reflected a president's signature high-priority issue. Both took the form of "interim final rules" issued under tight legislative deadlines. Both exemplify "fire, ready, aim" rulemaking at its worst. And both were accompanied by low-quality regulatory analysis that reads more like an attempt to justify decisions than an attempt to *inform* decisions.

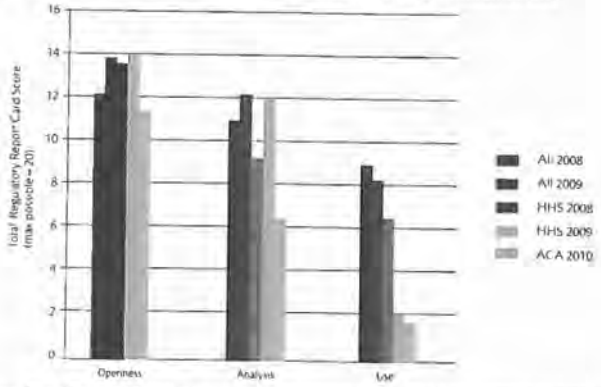
When the White House directs agencies to fast-tracked rulemakings, many of the usual checks that should ensure that good analysis informs decisions get short-circuited. Regulatory process reforms would prevent this problem.

THE SYSTEMIC PROBLEM

EXECUTIVE ORDER 12866 requires federal agencies to produce regulatory impact analyses (RIAs) when they propose regulations.[1] The analysis requirements are most comprehensive for the most important regulations: those termed "economically significant." When proposing a regulation, an agency must assess the systemic problem the regulation is supposed to solve, define the outcomes the regulation is supposed to produce for the public, examine a wide variety of alternative solutions, and assess the pros and cons (benefits and costs) of the alternatives. The agency must publish the RIA along with the proposed regulation for public comment, and the agency must consider the comments when they write the final version of the regulation.

Many of the first health care and homeland security regulations, however, were interim final rules. This means the agencies decided on, wrote, and published the rules without first publishing a proposal or RIA for public comment. The Department of Health and Human Services (HHS) and other agencies published eight economically significant interim

FIGURE 1: ACA INTERIM FINAL REGULATIONS HAVE WORSE ANALYSIS THAN OTHER REGULATIONS



Source: Jerry Ellig and Christopher J. Conover, "Beware the Rush to Presumption, Part B: Substandard Regulatory Analyses for the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

final rules implementing the Patient Protection and Affordable Care Act (ACA) in 2010. The Department of Homeland Security (DHS) published seven economically significant interim final rules between 2003 and 2007.

The RIAs accompanying both sets of regulations were seriously incomplete, and they fell far short of federal agencies' normal practice.

Incomplete Regulatory Analysis

THE HEALTH CARE RIAs presented no monetary estimates of benefits, often overestimated the number of people who would benefit, and usually underestimated costs, often by hundreds of millions or billions of dollars. Despite the importance of fairness and equity in the health care debate, analysis of equity was even more superficial—usually consisting of mere assertions that some result would improve "equity" without even defining the term.[3]

The Bush administration's early homeland security regulations tended to overestimate benefits and underestimate costs.[4] They rarely identified the systemic problem the regulation was supposed to fix or evaluated alternatives to the proposed regulation. Nor did they explain why federal action was necessary to safeguard facilities and assets where the private sector had substantial investments at stake.[5]

Analysis Fails to Meet Normal Standards

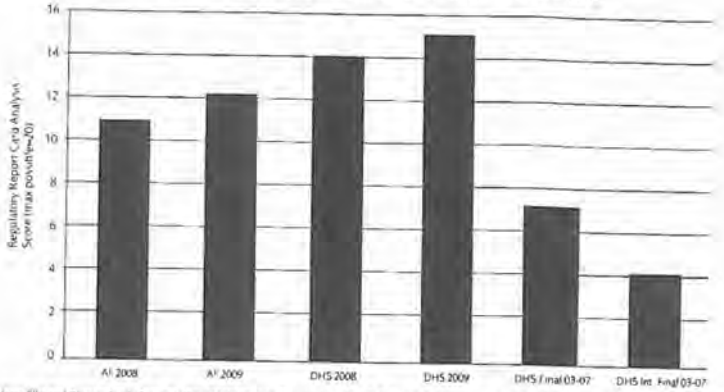
THE MERCATUS REGULATORY Report Card evaluates the quality and use of regulatory analysis based on criteria derived from Executive Order 12866 and Office of Management and Budget (OMB) guidance. Report Card criteria fall into three categories: Openness (how accessible, clear, and well documented is the analysis?); Analysis (how well does the analysis identify the desired outcomes, systemic problem, alternatives, costs, and benefits?); and Use (to what extent did the agency claim to use the analysis or make provisions for retrospective analysis of the regulation?). A regulation can earn a maximum of 20 points for each category.[6]

Figure 1 compares the quality and use of analysis for six prescriptive interim final ACA regulations with that for economically significant regulations proposed by all agencies and by HHS in 2008 and 2009.[7]

- The ACA regulations perform best on the openness criteria. These are the easiest criteria to do well on.
- The ACA regulations fare poorly on the analysis criteria, earning fewer than half the possible points.
- The ACA regulations score much worse than other regulations on the use criteria with virtually no evidence that the departments used the analysis to make decisions.

A pilot study that preceded the Regulatory Report Card assessed DHS regulations according to the four analysis criteria. Figure 2 compares the six prescriptive interim final rules issued by DHS during its first few years with other regulations. The interim final DHS regulations earned only one-quarter of the possible points for quality of analysis—well below the quality of other federal regulations, recent DHS

FIGURE 2: EARLY DHS INTERIM FINAL REGULATIONS HAVE WORSE ANALYSIS THAN OTHER REGULATIONS



Source: Jerry Ellig and Christopher J. Conover, "Beware the Rush to Presumption, Part II: Substandard Regulatory Analyses for the Affordable Care Act's Interim Final Rules," working paper, Mercatus Center at George Mason University, Arlington, VA, 2012.

regulations, and regulations issued by DHS in its first five years that were not interim final regulations.

The ACA and DHS interim final regulations earned similar scores for quality of analysis. The analysis falls far short of the analyses normally conducted, which generally falls well below the standards outlined in Executive Order 12866 and OMB's Circular A-4.[7]

THE ROOT CAUSES[8]

THE ACA RULES analyzed encompassed nearly all the major components of the ACA scheduled to go into effect prior to 2014. Congress gave the agencies deadlines that ensured the regulations would be written before control of Congress changed hands after the 2010 elections and implemented before the 2012 elections. Similarly, Congress explicitly told DHS to issue five of the homeland security rules as soon as practicable as interim final rules.

Health care and homeland security are the signature initiatives of the Obama and Bush administrations, respectively. In her classic 2001 *Harvard Law Review* article on "Presidential Administration," Elena Kagan revealed how the Clinton White House proactively set the regulatory agenda for agencies and directed development of high-priority regulations.[9] She predicted future presidents would continue this practice, and subsequent scholarship has proven her prediction accurate.[10]

At least for some presidential regulatory priorities, many key decisions are already made before the regulatory analysis is done. Thus, it is unlikely agency analysts will put much effort into the analysis, as it will have little effect on decisions. It is also unlikely that OMB's Office of Information and Regulatory Affairs (OIRA) could block the regulation, so OIRA has little leverage to prompt improvements in the analysis.

Consistent with this hypothesis, the interim final health care regulations received rapid review at OIRA, averaging just five days. The DHS rules received somewhat longer review, averaging 22 days. By comparison, OIRA took an average of 27 days to review proposed economically significant regulations in 2009 and 56 days in 2008.[11]

The poor quality and use of analysis for these regulations is an institutional problem that requires an institutional solution. Both the Bush and the Obama administrations pledged to improve the quality of regulatory analysis. Both appointed noted regulatory scholars as OIRA administrators—John Graham and Susan Dudley in the Bush administration and Cass Sunstein in the Obama administration. The Bush administration published an updated, extensive, peer-reviewed guidance for regulatory analysis (Circular A-4) and sought to rein in "midnight regulations." The Obama administration issued a memorandum urging departments to respect scientific integrity, sought public comments on revising Executive Order 12866, and ultimately reaffirmed it with Executive Order 13563. Deficiencies in the quality and use of analysis occurred despite these good intentions.

REGULATORY REFORM SOLUTIONS

ALTERNATIVE CHECKS ARE needed to insulate analysis from presidential and congressional politics:

- Require agencies to publish an assessment of the systemic problem, its root cause, and the pros and cons of alternative solutions for public comment before writing a proposed rule. The public would have an opportunity to replicate, improve, or comment upon the agency's analysis before it is used to make decisions.

- Designate an independent authority to review RIAs produced by the executive branch. Such review could be competently performed in a nonpartisan manner by the Congressional Budget Office or Government Accountability Office, provided that they are clearly empowered and staffed to conduct an objective review.

- Mandate external peer review with systematic monitoring. Without systematic monitoring by OIRA or Congress (e.g., random audits of RIAs), there may be little incentive for agency staff to incorporate the suggestions of peer reviewers.

- Explicitly rein in the use of interim final rulemaking. In principle, an agency can amend an interim final rule based on public comments, but this happens less frequently than for rules issued under the normal process.[11] Interim final rules should be reserved for genuine emergencies or routine, uncontroversial administrative decisions.

ENDNOTES

1 Executive Order 12866, *Federal Register* 58, no. 190 (October 4, 1993): 51, 735–44.

2 Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part A: Material Omissions in Regulatory Analyses for the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

3 John Mueller and Mark G. Stewart, "Evaluating the Risks, Costs, and Benefits of Homeland Security Spending" (paper presented at the American Political Science Association, 2011 Annual Meeting, Seattle, WA, September 1–4, 2011).

4 Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?" *Rutgers Law Journal* 40, no. 1 (2008): 1–96.

5 A full explanation of the Report Card methodology and 2008 scoring results are in Jerry Ellig and Patrick McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* (forthcoming 2012). A prepublication version of this article is available at http://mercatus.org/publication/quality-and-use-regulatory-analysis-2008.

6 Prescriptive regulations do what most people think of when they think of regulation; they specify what individuals, firms, or other levels of government can and cannot do. Budget regulations implement spending or revenue collection programs. Some of the interim final ACA and DHS regulations were budget regulations and are not included in these charts.

7 If Regulatory Report Card scores were letter grades, the best analysis produced in 2008 or 2009 would receive a B−, and the average would be an F+. See 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, Arlington, VA, 2010), http://mercatus.org/sites/default/files/publication/wp1075-assessing-the-quality-of-regulatory-analysis.pdf.

8 This section summarizes a much longer analysis in Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part C: A Public Choice Analysis of the Affordable Care Act's Interim Final Rules" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2012).

9 Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2,246–385.

10 For examples, see John D. Graham, "Saving Lives through Administrative Law and Economics," *University of Pennsylvania Law Review* 157 (2008): 395–540 and Sidney A. Shapiro and Ronald F. Wright, "The Future of the Administrative Presidency: Turning Administrative Law Inside-Out" (working paper no. 1738491, Wake Forest University Legal Studies, Winston-Salem, NC, 2011).

11 Review time data gathered from Office of Information and Regulatory Affairs (OIRA), "EO 12866 Regulatory Review," http://www.reginfo.gov/public/do/eoPackageMain.

12 Administrative Conference of the United States, "Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking," *Recommendations of the Administrative Conference of the United States, 1995*; and Curtis W. Copeland, "Initial Final Rules Implementing the Patient Protection and Affordable Care Act (P.L. 111-148)," Congressional Research Service Report, December 10, 2010, 11.

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No. 12-07
February 2012

WORKING PAPER

BLUEPRINT FOR REGULATORY REFORM

By Richard Williams and Sherzod Abdukadirov

MERCATUS CENTER
George Mason University

Blueprint for Regulatory Reform

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Regulations affect nearly every aspect of our daily lives. By the time you brush your teeth, eat breakfast, and drive to work, you will be subject to dozens of federal regulations. The Food and Drug Administration (FDA) sets standards for the jam on your toast,[1] and the U.S. Department of Agriculture inspects the plant that processes and packages your bacon.[2] The Federal Communications Commission issues the broadcast license for your morning news TV channel.[3] And the Environmental Protection Agency, the Department of Energy, and the Department of Transportation all regulate your car and the roads on which you drive.[4]

Regulations are supposed to improve our lives by solving problems that otherwise would not be fixed. But even if a problem needs government to fix it, there may be multiple solutions. Federal agencies have to choose the regulatory alternative—the solution—that best meets society's needs. How these agencies choose matters.

Think about how you choose options in your daily life. Say you were looking to buy a new PC. If you were to go online to find a PC tablet, you would find dozens of options that vary in price, technical specifications, and available software. In order to find the one that suits you best, first, you would have decide what you would use it for. Next, you would analyze the options and qualities of each tablet relative to the cost. After doing that research, you would choose one that you would think comes the closest to meeting your computing needs for the best price.

Of course, there is a difference between choosing regulations and choosing PC tablets. With regulations, government agents choose for us. We hope they make the best choices, but there are no guarantees. Like online shopping, regulatory policy has many options, from establishing performance standards all the way to detailing prescriptive rules that tell people precisely what they must do to comply. Each option yields benefits, but each one also generates costs. So the decision to pursue a specific regulatory solution depends on judgment. There are always trade-offs between the benefits and costs of policy options.

Like careful shoppers, federal agencies need to do the following in order to make good decisions about regulations:

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[1] Food and Drug Administration (FDA), "Fruit Preserves and Jams," *Code of Federal Regulations*, title 21, sec. 155.160.

[2] U.S. Department of Agriculture, "Regulatory Requirements under the Federal Meat Inspection Act and the Poultry Products Inspection Act," *Code of Federal Regulations*, title 9, parts 416–500.

[3] Federal Communications Commission, "Rules Applicable to All Broadcast Stations," *Code of Federal Regulations*, title 47, part 73, subpart H.

[4] See, e.g., Environmental Protection Agency and Department of Transportation, "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," *Federal Register* 75, no. 88 (May 7, 2010): 25,324—25,728; Department of Energy, "Advanced Technology Vehicles Manufacturing Incentive Program," *Federal Register* 73, no. 219 (November 12, 2008).

- define the problem they are trying to solve;
- consider a suitable range of alternatives;
- estimate the costs and benefits of each alternative; and
- choose an option that gives the best value to consumers (benefits) for the resources to be used (costs).

In practice, most regulations fall substantially short of these guidelines.[5] Unfortunately, Congress and the federal agencies have few incentives to push for better regulatory decisions. Lawmakers often use regulations as an alternative to earmarks in order to reward their supporters, and agencies' tunnel vision and incentives to expand their reach often lead them to overlook the broader impact of their regulations. As a result, a growing number of regulations fail to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."[6]

The problem is not new. Over the last few decades, Congress and the executive branch have adopted several statutes and executive orders seeking to increase transparency in the rulemaking process and to improve the analytical quality of regulatory decisions. These efforts produced mixed results since they did not address the incentives that Congress and federal agencies face. The pattern of poor regulatory choices persists across administrations, indicating that the problem is institutional, not political.[7] Institutional problems need legislative fixes to change the incentives in the institutions if we want better outcomes.

Faced with some of the toughest economic challenges in generations, Congress is taking a closer look at the balance between the burden and benefits of regulation and what reforms could embed the principles of good regulatory decision-making in agencies. To aid in that effort, this paper proposes a cornerstone of foundational reforms on which to build comprehensive regulatory reform.

Well-Designed Regulations

Regulations are specific standards and instructions guiding the actions of individuals, businesses, and other organizations. The executive branch produces them to implement legislation passed by Congress. Regulations cannot be passed without an authorizing statute from Congress. Congressional statutes may apply to all agencies (e.g., the Administrative Procedures Act) or to specific agencies (e.g., the Clean Air Act, implemented primarily by the Environmental Protection Agency). The president is charged by the

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[5] 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, Arlington, VA, December 2010), http://mercatus.org/sites/default/files/publication/wp1075-assessing-the-quality-of-regulatory-analysis.pdf; Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?," *Journal of Economic Perspectives* 22, no. 1 (2008): 67–84; Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (working paper, Mercatus Center at George Mason University, Arlington, VA, July 2008), http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf.

[6] Executive Order no. 13,563 - Improving Regulation and Regulatory Review, *Federal Register* 76, no. 14 (January 18, 2011): 3,821.

[7] Ellig and Morrall, "Assessing the Quality of Regulatory Analysis."

Constitution with implementing and enforcing laws passed by Congress and with appointing the individuals in charge of federal agencies.

Executive Order no. 12,866 expresses and Executive Order no. 13,563 reaffirms the principles of efficient and cost-effective regulation.[8] Federal agencies are supposed to be governed by the regulatory philosophy and principles expressed in these executive orders when drafting new regulations. In particular, a federal regulation should have the following qualities:

1. *The rule should address a significant and systemic problem that has persisted over time and is appropriately addressed at the federal level.*
   Systemic: The rule should address the failure of private markets or public institutions to solve social problems. The problem should be institutional, occurring over time, and expected to continue.
   Significant: Government resources should not be spent on trivial issues. The FDA's trans-fat labeling requirement represents a use of resources that has significantly improved peoples' lives.[9] However, the agency's painstaking description of what qualifies as a can of green beans (down to the shape, color, and cut of pods) hardly justifies the use of federal resources.[10]
   Persistent: The rule is necessary only if the evidence indicates that there are no incentives in the marketplace to address the problem in the near future. Often, when the government discovers a problem, market actors do as well. Consequently, markets produce remedies even without government action. For example, corporations in some industries shifted from opposing environmental regulation to actively adopting environmental standards that exceed federal requirements.[11] In cases where market actors take initiative to solve significant and systemic problems, issuing new regulations that duplicate private market efforts wastes resources.
   Federal: Federal regulations should address problems that involve interstate commerce or that states or localities cannot address on their own.[12]
   Actual: The rule should address actual rather than potential problems. There are an infinite number of low-probability potential problems that may but are not likely to occur. Chasing after them diverts resources from more pressing needs. For example, the Net Neutrality rule proposed by the Federal Communications Commission would restrict the ability of Internet providers to prioritize the traffic over their networks. The commission justified its rule by

[8] Executive Order no. 12,866 - Regulatory Planning and Review, *Federal Register* 58 no. 190 (October 4, 1993): 51,735; Executive Order no. 13,563.
[9] FDA, "Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims," *Federal Register* 68, no. 133 (July 11, 2003): 41,433–41,506.
[10] FDA, "Canned Green Beans and Canned Wax Beans," *Code of Federal Regulations*, title 21, sec. 155.120 (April 1, 2011). The FDA would certainly argue that it is required by statute (the 1938 Food, Drug and Cosmetic Act) to set these "identity" or recipe standards for foods. Nevertheless, about half of all foods are standardized and about half are not. For example, catsup is standardized, but salsa is not.
[11] Marc Allen Eisner, "Corporate Environmentalism, Regulatory Reform, and Industry Self-Regulation: Toward Genuine Regulatory Reinvention in the United States," *Governance* 17, no. 2 (April 1, 2004): 145–167.
[12] For example, to the extent that air pollution moves across multiple states, it would be difficult for individual states to negotiate air standards between their multiple jurisdictions.

claiming that Internet providers *might* discriminate against some types of content. Yet, it could show no evidence that such a problem exists.[13]

2. *There should be evidence that the rule will actually solve some significant part of the problem.*
   Real Solutions: Agencies should have a theory of precisely how their proposed remedies will work. The causation links from rule to behavioral changes to solution should be clearly laid out and backed by evidence. The evidence should be grounded in high-quality scientific research (research that shows cause and effect for the proposed solution) or real-world examples from pilot, state, or international programs. Further, the rule should not rely on society to invent a solution that does not yet exist, as in the case of the technology-forcing environmental regulations.[14] Evidence suggests that such regulations are less efficient than regulations relying on market incentives.[15] If innovation is necessary, the government should consider funding research instead of promulgating regulation.
   Focus on Outcomes: The rule should focus on outcomes instead of outputs. The result of regulation must be something that people value, such as reducing the level of food-borne illness. For example, a requirement that manufacturers produce more paperwork on their processes would generate outputs, but it would not necessarily reduce food-borne illness.
3. *The rule should not create more problems than it solves.*
   Risk Tradeoffs: There should be a quantified analysis of a proposed rule's potential risk tradeoffs. Often, regulation reduces the risk of one hazard only to see another risk increase. For example, the inconvenience of baggage-screening procedures introduced after the 9/11 attacks prompted 6 percent of passengers nationwide to drive to their destinations instead of flying.[16] Yet, because flying involves far fewer risks than driving, this regulation has likely led to more than 100 driving-related fatalities.[17]
4. *The rule should solve the problem at a reasonable cost.*
   Measurement: In general, all costs and benefits should be quantified as much as possible. Measurement enables federal agencies and the general public to make better-informed decisions.
   Net Benefits: At minimum, the combination of qualitative and quantitative benefits of each provision of the rule should be such that a reasonable person would conclude that benefits exceed costs.
   Cost-effectiveness: If it is not possible to maximize net benefits, the rule should achieve the goal at the lowest possible cost.
   Alternatives: The rule should choose the most efficient alternative. When that is not possible, or

[13] Jerry Brito et al., "Net Neutrality Regulation: The Economic Evidence," *SSRN eLibrary* (April 12, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587058.
[14] A technology-forcing regulation is one where a standard for safety, such as an emission standard, is set to apply in the future, when there is no technology available to meet the standard at the time it is established. The idea is to force the market to create the new technology.
[15] Adam B. Jaffe, Richard G. Newell, and Robert N. Stavins, "Environmental Policy and Technological Change," *Environmental and Resource Economics* 22, no. 1–2 (2002): 47–70.
[16] Garrick Blalock, Vrinda Kadiyali, and Daniel H. Simon, "The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel," *Journal of Law and Economics* 50, no. 4 (November 1, 2007): 731–755.
[17] Ibid.

> when there is a compelling reason for doing so, the agencies should state clearly the reasons for choosing a less efficient alternative. [18]

These principles have existed for decades, yet regulations routinely violate them.[19] Regulations that fail to achieve these principles should be considered "poor" regulations.

Reasons for Poor Regulations

Virtually all of the groups involved in regulations, including the regulated industries, activists, Congress, and federal agencies, have some perverse incentives that lead them to demand or create poor regulations. This section discusses some of those incentives.

Regulated Industries

Regulated firms or groups of firms tend to be the strongest advocates for economic regulation (although they frequently oppose social regulations relating to workplace safety or the environment when they do not stand to gain financially from those regulations). There are many reasons for companies to favor regulation. Increasing regulatory costs for competing firms both creates barriers to entry for new companies and drives smaller companies out of business.[20] For example, ARCO, the largest gasoline retailer in California, supported more stringent regulation for reformulated gasoline, which increased refining costs. Following the adoption of regulation, ARCO's market share increased by 34 percent, mostly at the expense of small refiners.[21] Regulation may also create new markets for existing industries by mandating specific products. The Renewable Fuel Standard in the Energy Independence and Security Act of 2007 set a minimum share of fuel consumption that must come from biofuels.[22] This standard drastically increased the demand for corn, which is used to produce ethanol, the main source of biofuels.

Firms push for regulation to put their rivals at a competitive disadvantage, to charge consumers higher prices, or to force consumers to buy products they may not want. While companies may benefit from such regulations, their profits come at the general public's expense.

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[18] Agencies often have statutes that require particular outcomes for rules that are not necessarily cost-beneficial. There are other reasons that agencies may pick regulatory options for which costs exceed benefits, such as where there is great uncertainty in either or both benefit and cost estimates or where there is a desire to protect a high-risk subpopulation.

[19] Ellig and Morrall, "Assessing the Quality of Regulatory Analysis."

[20] Steven C. Salop and David T. Scheffman, "Raising Rivals' Costs," *American Economic Review* 73, no. 2 (May 1, 1983): 267–271.

[21] Jennifer Lynn Brown, "Three Essays on Raising Rivals' Costs via California's Environmental Regulations" (dissertation, University of California, Santa Barbara, 2006).

[22] Tom Capehart, *Ethanol: Economic and Policy Issues*, CRS Reports (Washington, DC: Congressional Research Service [CRS], April 2, 2009).

Activists

In pushing for favorable regulation, industries often receive inadvertent help from activists.[23] Since the impact of regulation tends to be broad, the interests of industries and activists occasionally overlap. In the previous example, both environmental activists and agricultural businesses supported the regulatory requirement for the ethanol content of fuels.[24] Environmentalists supported the regulation in the belief that it would reduce greenhouse gas emissions; agricultural businesses enjoyed windfall profits from the higher demand for corn. In this alliance, environmentalists provided the public face for the initiative, while the agricultural lobbies acted behind the scenes to push the legislation through Congress. The regulation persisted even after scientists and environmentalists started to question whether the regulation, as it is currently written, may actually lead to higher greenhouse gas emissions.[25]

In contrast to regulated industries, activists push for regulation in pursuit of what they perceive as the public interest. But their mission's narrow focus often leads them to overlook the trade-offs and larger negative impacts of regulation, resulting in inefficient regulations. For example, in California, environmentalists strongly advocate against housing development along the coastline in order to preserve its pristine nature. Yet, according to recent evidence, houses in California's moderate coastal climate have some of the lowest carbon emissions in the nation due to low heating and cooling costs.[26] By trying to preserve the coastline, the environmental groups advocate regulatory policies that push construction inland into areas with considerably higher carbon emissions. The unintended consequence of such regulation is an increase in the carbon footprint of housing development. By focusing narrowly on preserving the coastline, environmental activists overlook the regulation's larger negative impact on the environment.

Congress

Congress often facilitates poor regulation in authorizing legislation. While recognizing the legitimacy of elected members of Congress to decide when government action is necessary and justified, there is a great deal of room for improvement by measures which might hold members more accountable for the end of the process following executive branch implementation. Legislators face a harder constraint on their spending than on regulatory legislation. Their spending is kept (somewhat) in check by the public's willingness to incur higher taxes. In contrast, while regulatory costs are borne by the public and in many

[23] Bruce Yandle, "Bootleggers and Baptists: The Education of a Regulatory Economist," *Regulation* 7, no. 3 (1983): 12–17.
[24] Bruce Yandle, "Bootleggers and Baptists in Retrospect," *Regulation* 22, no. 3 (1999): 5–7.
[25] Robert Bonnie, "Corn Ethanol: Importance of Performance Standards," *Environmental Defense Fund: Climate 411*, April 29, 2008, http://blogs.edf.org/climate411/2008/04/29/corn_ethanol_standards/; David Pimentel and Tad W. Patzek, "Ethanol Production Using Corn, Switchgrass, and Wood; Biodiesel Production Using Soybean and Sunflower," *Natural Resources Research* 14 (March 2005): 65–76; Timothy Searchinger et al., "Use of U.S. Croplands for Biofuels Increases Greenhouse Gases Through Emissions from Land-Use Change," *Science* 319, no. 5,867 (February 29, 2008): 1,238–1,240.
[26] Edward L. Glaeser, *Triumph of the City: How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier* (New York: Penguin, 2011).

ways act as a form of taxation,[27] they do not appear on the federal government's balance sheet. Consequently, legislators find it easier to appease their key constituents by imposing new regulations, especially when their spending ability is limited.[28] For example, much of the cost of regulation requiring the Transportation Security Administration to screen passengers in airports falls on passengers. The hassle of going through the security check pushes 6 percent of passengers to forgo flying altogether and drive instead.[29] For the remaining passengers, the value of the time lost to screening added up to $2.76 billion in 2005 alone.[30] Yet, these numbers are not included in the cost estimates of regulation.

Congress is rarely held accountable for imposing regulatory costs on the public. Unlike budgets, regulatory costs remain hidden from the public view. The government seldom estimates the full costs of regulation, even for major regulations. Of the 66 major regulations passed in 2010, only 18 quantified and monetized both benefits and costs.[31] Thus, legislators face few constraints in adopting statutes that authorize new regulation, and they have no incentive to look for more efficient or more cost-effective alternatives.

Agencies

The regulatory agencies themselves are another major source of inefficient regulations. Federal agencies face complex incentives, some of which lead them to produce poor regulations. For example, there are strong incentives for agencies to expand their reach, which in turn expands their budgets. Expanding their reach implies greater control over the economy and an expanding budget means that agency officials move up the promotional pyramid. Thus, federal agencies may pass regulations that add substantial costs without yielding commensurate benefits.[32]

Also, like activists, agencies often suffer from tunnel vision. A narrow focus on the agency's mission leads regulators to overlook the broader impacts, tradeoffs, and burdens that regulations place on the economy. Examples of agency tunnel vision abound. In 1991, the Fifth Circuit Court struck down the EPA

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[27] Richard A. Posner, "Taxation by Regulation," *Bell Journal of Economics and Management Science* 2, no. 1 (1971): 22–50.

[28] Noel D. Johnson, Matthew Mitchell, and Steven Yamarik, "Pick Your Poison: Do Politicians Regulate When They Can't Spend?" (working paper, Mercatus Center at George Mason University, Arlington, VA, June 2011), http://mercatus.org/sites/default/files/publication/Partisan_Policies_Johnson_Mitchell_Yamarik_WP1128_0.pdf.

[29] Blalock, Kadiyali, and Simon, "The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel."

[30] Jerry Ellig, Amos Guiora, and Kyle McKenzie, *A Framework for Evaluating Counterterrorism Regulations*, Mercatus Policy Series (Arlington, VA: Mercatus Center at George Mason University, 2006), http://mercatus.org/sites/default/files/publication/20060908_PS_terrorism_Complete.pdf.

[31] U.S. Office of Management and Budget (OMB), *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: U.S. Government Printing Office [GPO], 2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[32] Supreme Court Justice Stephen Breyer calls situations where most risk can be eliminated at a reasonable cost but eliminating the last bit requires a prohibitively high expense in return for very little improvement "the last 10 percent." Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, MA: Harvard University Press, 1993).

ban on products containing asbestos.[33] The ban would have saved seven or eight lives over 13 years at a cost of $200–$300 million. The Fifth Circuit Court noted in its opinion,

> As the petitioners point out, the EPA regularly rejects, as unjustified, regulations that would save more lives at less cost. For example, over the next 13 years, we can expect more than a dozen deaths from ingested toothpicks--a death toll more than twice what the EPA predicts will flow from the quarter-billion-dollar bans of asbestos pipe, shingles, and roof coatings.[34]

Similarly, in their drive to reduce risk in one area, agencies often increase risks elsewhere. For instance, as the FDA became increasingly concerned about the health risk posed by the mercury in commercial fish, it issued an advisory in 2001 instructing at-risk people (i.e., pregnant women, nursing mothers, and young children) to reduce their consumption of certain fish and shellfish.[35] While well intentioned, the rule may have had adverse effects on public health. Recent evidence indicates that at-risk consumers reduced their consumption of all fish, not only species with high mercury levels.[36] Yet, fish is a primary source of substances such as omega-3 fatty acids that have health benefits, particularly in infants and young children. By consuming less fish, at-risk consumers may have actually increased their health risks—the opposite of what the FDA intended. The FDA's narrow focus on one risk led it to overlook the other risks its actions introduced.[37]

In addition to tunnel vision, agencies suffer from risk aversion. In the case of risk tradeoffs, the public often holds agencies accountable for risks that are highly visible and easily identifiable, but largely ignores hidden risks. Thus, agencies have strong incentives to "regulate first, ask questions later."[38] In the case of the FDA's drug approval process, for instance, there are clear risk tradeoffs between approving a risky drug that may lead to fatalities and delaying a drug that could save lives. However, the risks associated with approving an unsafe drug are highly visible and embarrassing for the agency. For example, the FDA recall of Vioxx, a painkiller produced by Merck, led to a public outrage and congressional inquiries of the FDA.[39] On the other hand, the risks of delaying an experimental drug are

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[33] *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).
[34] Ibid., 1223 n. 23.
[35] "F.D.A. Warns Women Not to Eat Some Fish," *New York Times*, January 14, 2001, Health, http://www.nytimes.com/2001/01/14/us/fda-warns-women-not-to-eat-some-fish.html.
[36] Jay P. Shimshack and Michael B. Ward, "Mercury Advisories and Household Health Trade-Offs," *Journal of Health Economics* 29, no. 5 (September 2010): 674–685.
[37] The FDA may be well on its way to remedying this problem based on its recent risk assessment, which looks at both risks and benefits. FDA, "Draft Risk & Benefit Assessment Report, Draft Summary of Published Research, Peer Review Report," January 15, 2009, http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/Seafood/FoodbornePathogensContaminants/MethylMercury/ucm088758.htm.
[38] Hale, Borys, and Adams, *Regulatory Overload*; Russell S. Sobel and Peter T. Leeson, "Government's Response to Hurricane Katrina: A Public Choice Analysis," *Public Choice* 127 (April 2006): 55–73.
[39] Richard Horton, "Vioxx, the Implosion of Merck, and Aftershocks at the FDA," *Lancet* 364, no. 9,450 (December 4, 2004): 1,995–1,996.

largely hidden. Given that the drug's effectiveness is uncertain, estimating the lives lost due to delays is always more challenging. Consequently, the FDA responds disproportionately to the visible risks.[40]

In some cases, agencies become more responsive to the interests of the industries they regulate than to the interests of the general public, particularly for economic regulation (regulation that controls prices or output directly), and they target regulations narrowly so that specific sectors of industry benefit. For example, one of the earliest federal regulatory agencies, the Interstate Commerce Committee, set the maximum rates for rail freight under the influence of agricultural interests.[41] Later, the same agency set the minimum rates under the influence of the rail industry, purportedly to prevent overproduction and "ruinous competition."[42]

All the major participants in the regulatory process have incentives to produce both more and poorly crafted regulations. Some of these incentives are the result of individual behavior (e.g., firms' pursuit of favorable regulation). These incentives are likely to persist, as it is hardly probable that firms will stop lobbying for their interests. Activists favor regulation to advance narrow agendas without taking into account the risk and economic trade-offs involved. Congress and the federal agencies, rather than acting as checks on the private sector participants, are the largest source of inefficient regulations. Congress passes legislation without considering the economic merits of the regulations likely to be passed. Agencies fail to produce high-quality regulatory analysis or even to use analysis in their decision-making. The incentives leading Congress and federal agencies to push for poor regulations are institutional. Lack of accountability and check mechanisms lead both groups to disregard the broader public interest in favor of special interests or narrowly defined missions.

Previous Regulatory Reforms

To date, regulatory reform has focused on two key areas: (1) process, or how to make the regulatory process more transparent and inclusive, and (2) analysis, or how to improve the quality of regulatory analysis. The primary reforms to date are summarized below.

Procedural Reforms

- Administrative Procedures Act of 1946 (APA) – establishes minimum rulemaking standards that federal agencies must follow. It also establishes judicial review standards for agencies' actions. In addition, the APA requires federal agencies to offer the public a chance to comment on proposed rules.

[40] Michael D. Greenberg, "AIDS, Experimental Drug Approval, and the FDA New Drug Screening Process," *New York University Journal of Legislation and Public Policy* 3 (1999): 295–350.
[41] Marc Allen Eisner, Jeffrey Worsham, and Evan J. Ringquist, *Contemporary Regulatory Policy* (Boulder: Lynne Rienner Publishers, 2006).
[42] Ibid.

- Regulatory Flexibility Act (RFA) – requires agencies to perform an analysis that states the reasons for the proposed rule, to list the small entities affected by the rule, and to describe the steps the agency has taken to minimize the rule's impact on small entities.
- Small Business Regulatory Enforcement Fairness Act (SBREFA) – amends the RFA to provide, among other things, for judicial review of the agencies' compliance with the RFA.
- Congressional Review Act (CRA) – an SBREFA provision that provides Congress with a mechanism to review and disapprove new regulations proposed by federal agencies.
- Government Performance and Results Act (GPRA) – requires agencies to articulate goals and objectives, identify measures, and report annually on progress.
- GPRA Modernization Act of 2010 – requires agencies to identify high-priority goals, requires the Office of Management and Budget (OMB) to identify high-priority government-wide goals, requires quarterly reporting on progress toward those goals, and requires agencies and the OMB to identify every program, regulation, and tax expenditure that contributes to each high-priority goal.
- Freedom of Information Act – requires that agency records be published in the Federal Register, be made available for public inspection, or be provided upon written request, depending on the type of record.
- Federal Advisory Committee Act – limits committees to a strictly advisory role, requires a balanced representation of views, and requires that nearly all committee meetings be advertised in the Federal Register and be open to the public.
- Government in the Sunshine Act – requires that, with few exceptions, every agency meeting be open to the public. Agencies must give sufficient notice to the public regarding the proposed meetings.
- Negotiated Rulemaking Act – supplements the traditional rulemaking process. The negotiated rulemaking process allows agencies to collaborate with representatives of affected parties by establishing a committee to develop the text of proposed rules.

Regulatory Analysis Reform

- Paperwork Reduction Act (PRA) – requires agencies to justify the collection of any information from the public. The PRA established the Office of Information and Regulatory Affairs (OIRA) within the OMB and entrusted the OIRA with leading the effort to reduce the unnecessary paperwork burden related to the federal government's information-gathering activities.
- Regulatory Flexibility Act (RFA) – Although this act is a procedural act, it also requires agencies to do analysis; in particular, it requires agencies to assess the impact of regulation on small entities, including small governments and firms. In addition, the RFA requires agencies to review within 10 years of publication the rules that impact a significant number of small entities to determine whether these rules should be continued.
- Unfunded Mandates Reform Act (UMRA) – imposes an informational requirement on regulations resulting in direct costs for intergovernmental or private sectors (covered mandates) not covered by the federal government. The informational requirement calls for the

Congressional Budget Office (CBO) to estimate the mandated costs. It also requires issuing agencies to estimate the cost of regulation to the regulated entity.

- Information Quality Act (IQA) – requires the OMB to issue guidelines for federal agencies to ensure the quality, integrity, and utility of the information agencies disseminate. It also requires agencies to create their own guidelines for information quality and to establish procedures allowing affected persons to seek corrections to disseminated information that does not comply with OMB guidelines.
- Executive Order no. 12,866 – requires OIRA to review regulatory analysis of major rules. Major rules include all executive branch rules with an economic impact exceeding $100 million, as well as rules that may have an adverse impact on the U.S. economy or budget. In addition, the order requires agencies to produce a regulatory impact analysis for economically significant rules. The executive order's scope is somewhat limited, however, as it does not apply to independent regulatory agencies. This order was reaffirmed by Executive Order no. 13,563 in January 2011.[43]

The reforms have enjoyed limited success with regard to both the transparency of the process and the quality of analysis. Proposed rules generally receive substantial feedback during the public comment period. Agencies do respond to public comments and modify proposed rules as a result. Yet, most of these changes deal with definitions, deadlines, and other minor issues.[44] Agencies rarely change the substance of their rules in response to public comments and are generally free to dismiss comments that do not support agency decisions. Judicial review requirements also have had limited success. While some small businesses have successfully challenged federal agencies in court, many small business find the process intimidating.[45]

Improvements in the quality of regulatory analysis have been marginal. Agencies routinely perform regulatory impact analyses (including benefit-cost analysis) for major regulations, but these analyses are hardly complete. In 2010, of the 66 major rules, only 18 quantified and monetized both benefits and costs.[46] In addition, the quality of analysis is still poor,[47] and even that analysis is often ignored in the final decision-making.[48]

Several shortcomings have limited the reform efforts' effectiveness. According to Government Accountability Office (GAO) reports, statutes attempting to limit the burden of regulation are often vague, leaving agencies substantial freedom in interpreting compliance requirements.[49] Further, many

[43] Executive Order no. 13,563.
[44] William West, "Administrative Rulemaking: An Old and Emerging Literature," *Public Administration Review* 65, no. 6 (2005): 655–668.
[45] Jeffrey J. Polich, "Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies," *William and Mary Law Review* 41, no. 4 (2000): 1,425–1,461; Christopher M. Grengs, "Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform," *Minnesota Law Review* 85 (2001): 1,957–2,006.
[46] OMB, *2011 Report to Congress*.
[47] Ellig and Morrall, "Assessing the Quality of Regulatory Analysis."
[48] Hahn and Tetlock, "Has Economic Analysis Improved Regulatory Decisions?"
[49] U.S. Government Accountability Office (GAO), *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified* (Washington, DC: GPO, April 24, 2001), http://www.gao.gov/new.items/d01669t.pdf; GAO, *Federal Mandates: Few*

of these statutes lack strong oversight and enforcement mechanisms, making it difficult for affected parties and the general public to challenge federal agencies' regulatory activities. In its recommendations to Congress, the GAO suggested fixing the shortcomings by clarifying the existing guidelines and providing for stronger oversight.

Strengthening the oversight and enforcement mechanisms would be beneficial but not sufficient. For reforms to be effective, they must seek to change the institutional incentives of Congress and federal agencies in the rulemaking process, something that GAO suggestions fail to address. Reforms should seek to increase the accountability of not just federal agencies but Congress as well. In addition, they should seek to strengthen the system of checks and balances with regard to regulations' analytical quality. Finally, they should provide the federal agencies with incentives to continuously improve the efficiency and cost-effectiveness of their regulations.

Regulatory Reform Alternatives

The potential avenues for regulatory reform fall into three broad categories:

1. Strengthen congressional oversight of regulatory activity.
2. Improve the quality of regulatory analysis.
3. Eliminate inefficient regulations.

Reforms that change the institutional incentives have a higher chance of success. Reforms that require congressional legislation, as opposed to reforms that would be appropriate for an executive order, would likely be the most effective for several reasons.

First, Congress has the power to expand regulatory reforms to include independent agencies, which account for an increasing share of major regulations. Second, Congress can alter and streamline the existing statutory requirements that govern the regulatory process and analysis. Third, it can make analysis judicially reviewable. The advantages of this approach are discussed in more detail below. Appendix 1 lists other reform suggestions.

1. Strengthen Congressional Oversight

Goal: Make both Congress and federal agencies accountable for producing efficient and cost-effective regulations. One of the biggest challenges of the current regulatory process is that the public does not hold Congress accountable for either the regulatory costs it imposes on the public or for the achievement of actual benefits. To the contrary, legislators often claim the mere passing of regulatory laws as victories. Consequently, legislators have no incentive to push for efficient or cost-effective regulations.

Rules Trigger Unfunded Mandates Reform Act (Washington, DC: GPO, February 15, 2011), http://www.gao.gov/new.items/d11385t.pdf.

Strengthening congressional oversight would require Congress to authorize the full cost of regulation imposed by congressional statutes. Since regulatory costs of legislation become part of the congressional voting record, members of Congress would likely pass legislation only if benefits were expected to exceed costs. Similarly, agencies would be forced to consider the full costs of their regulatory activities when faced with more oversight from Congress and would have to prioritize regulation and choose more cost-effective options. The proposed reforms would also require Congress to empower the CBO (or a similar congressional institution) to check the agency analysis to ensure compliance.

Drawbacks: These reforms would apply only to new regulations. They provide no incentives for either Congress or federal agencies to review and improve existing regulations. This approach may also impose substantial burdens on Congress. In addition, accounting for the full costs of regulation is challenging. Indirect costs of regulation are often difficult to estimate, particularly when regulatory agencies have yet to work out the details. Differentiating between the compliance costs imposed by the legislation and the costs that businesses would have incurred voluntarily (in the absence of legislation) is equally tricky.

Implementation Alternatives: (1) establish a regulatory budget; (2) estimate the regulatory costs of each bill; (3) require congressional approval of major regulations.

1.1. Establish a Regulatory Budget

To implement a regulatory budget, Congress would set a ceiling for all regulatory costs imposed on the economy each year. It would further allocate a regulatory budget among individual agencies. The process would operate in a manner quite similar to the fiscal budgeting process. Agencies would request a regulatory budget (which would include both agency costs and the social costs the regulation was expected to impose on the private sector) at the beginning of the year. These budget requests would then be compiled into a unified regulatory budget, presumably by the OMB. Congress would review and modify the budget to fit congressional regulatory priorities. The final approved budget would limit the total cost of regulations issued for that year. Should agencies wish to exceed their allotted limits, they would have to return to Congress for authorization for specific regulatory actions.

Note that the regulatory budget is not set arbitrarily by Congress but is based on agency requests. Agencies would request sufficient amounts to operate and fulfill their mandates. They would have to justify their requests to Congress.

The main drawback of a regulatory budget is its complexity. Of the three alternatives for increasing congressional accountability, the regulatory budget imposes the highest burden of cost-accounting.

1.2. Estimate Regulatory Costs of Legislation

An alternative to a regulatory budget would be to set a ceiling for the regulatory costs of each new piece of legislation. Thus, for every new piece of legislation, the CBO would estimate the full cost of implementation. Agencies implementing the legislation would have to stay within an allocated budget. Should agencies exceed their budgets, they would have to explain why they were unable to accomplish

their missions within the given budget. If they believe that the mission should change, agencies would have to explain why in their requests for reauthorization.

The CBO already analyzes the spending or revenue effects of some legislative proposals under the Unfunded Mandates Reform Act (UMRA) of 1995. However, these estimates do not represent the full social cost of implementing regulations. The estimates include only the direct costs of regulation to government entities and the private sector. In contrast, the full cost of regulation should account for changes in incomes, prices, and the choices of consumers and businesses, which together can easily exceed the expenditures associated with compliance efforts.[50] Furthermore, UMRA only applies to a small subset of legislation. Congress does not estimate costs for most legislation. A statute expanding on UMRA requirements would enhance congressional accountability in the regulatory process.

One advantage of legislation cost estimates over a regulatory budget is relative simplicity. The task of calculating an agency-wide budget for the entire year is daunting. Estimating the costs for a single statute may be easier. Legislation cost estimates would also go to the root of many inefficient regulations—the congressional statutes that require them. If the CBO scores every new piece of legislation, Congress may be more cognizant of the regulatory costs it imposes on citizens. It might be less likely to push for inefficient regulations and more likely to pay attention to legislation whose costs can be justified.

On the downside, this approach does not allow for a comprehensive comparison of alternatives—each piece of legislation is considered in isolation. Hence, Congress and federal agencies would have no incentive to prioritize their regulatory activities.

1.3. Congressional Approval of Major Regulations

Another way to ensure that Congress and federal agencies pass laws and regulations that work would be to require congressional approval for all proposed major rules.[51] Currently, under the Congressional Review Act (CRA), Congress reserves the right to review major rules and disapprove them through an expedited legislative process. In addition, it may control regulatory activities through its control over regulatory budgets and by holding oversight hearings. Consequently, Congress provides some legislative oversight of federal regulatory activity. However, critics have argued that the oversight mechanism is too weak to make a substantial difference. Under the CRA, proposed rules are approved by default; it takes a congressional action to disapprove a proposed rule. To date, Congress has exercised its right to review major rules only once in 15 years with OSHA's ergonomics rule.[52] In contrast, under this alternative, proposed rules would require an affirmative vote in Congress to be enacted. This solution

[50] Maureen L. Cropper and Wallace E. Oates, "Environmental Economics: A Survey," *Journal of Economic Literature* 30, no. 2 (1992): 675–740.

[51] To the extent that this proposal reverses the established practice of delegation of legislative powers from Congress to the executive agencies, its impact is far reaching and subject to vigorous debate. However, this paper is concerned primarily with changes in institutional incentives. Legal aspects of delegation of legislative powers are outside the scope of this paper.

[52] Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade* (Washington, DC: Congressional Research Service, May 8, 2008).

would create a voting record for members of Congress in regard to the quality of regulations they have chosen to approve.

This alternative for establishing congressional accountability is the simplest of three discussed. It only requires that members make themselves aware of regulations that stem from the rules they have passed to ensure that the regulations are consistent with congressional intent and that the agencies have done due diligence in designing rules that are cost-beneficial.

On the downside, this option covers only a portion of regulatory activity—it only applies to major rules. It also imposes the highest burden on Congress in that legislators would have to vote on major rules in addition to passing legislation. In 2010, OIRA classified 66 rules as major. If each major rule required congressional approval, Congress would need to approve two regulations each week. However, with an affirmative vote required to pass the regulation, there would likely be fewer rules passed as the threshold for a successful rule was raised.

2. Improve the Quality and Use of Regulatory Analysis

Goal: Increase the transparency of the regulatory decision-making process by improving the quality of regulatory analysis. With high-quality regulatory analysis, inefficiencies of regulation become immediately apparent.

One possible reform would open up the agency rulemaking process to outside challenges. Currently, the executive branch has a monopoly on estimating both regulatory costs and benefits. Agencies produce the analysis (sometimes) and OIRA does its best to ensure the quality and use of analyses in regulatory decisions. But the constraints on OIRA in achieving this goal are widely known.[53] Consequently, agencies have strong incentives to tailor their analyses to support decisions that have already been made. If the public could challenge rules based on flawed or incomplete analysis or failure to use the analysis to inform the decision, rules might be more efficient and cost-effective.

Drawbacks: Alone, this reform only addresses incentives for federal agencies. It does not change Congress's incentives for mandating legislation that forces inefficient regulations. Particularly when congressional statutes are very prescriptive, agencies have little choice but to comply.[54]

Implementation: (1) require regulatory analysis by statute; (2) require congressional review of regulatory analysis; (3) make regulatory analysis judicially reviewable; (4) require formal rulemaking; (5) require publication of preliminary regulatory analysis.

2.1. Require Regulatory Analysis by Statute

Since 1994, Congress has made numerous attempts to mandate regulatory impact analysis (RIA) by statute rather than by executive order. A statutory requirement for analysis could accomplish several

[53] GAO, *Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation* (Washington, DC: GPO, April 1999), http://www.gao.gov/archive/1999/gg99059.pdf.
[54] Richard B. Stewart, "United States Environmental Regulation: A Failing Paradigm," *Journal of Law and Commerce* 15 (1996): 585–591.

goals depending on how it was implemented. For example, it could apply RIA requirements to both executive and independent regulatory agencies, streamline the multiple analytical requirements, and expand the analytical requirements beyond current RIA requirements.

To date, Executive Order no. 12,866 requiring agencies to conduct RIA for major rules has been applied only to executive branch agencies but not necessarily effectively.[55] Examination of regulatory impact analyses of economically significant rules since 2008 has shown that, in general, these analyses are not well done.[56] Independent agencies are encouraged but not required to consider regulation's costs and benefits. Numerous regulations are therefore not subject to the executive's economic efficiency requirements. For example, in 2010, independent agencies issued 17 major rules, compared to 66 major rules issued by the executive agencies.[57] None of these rules provides fully monetized cost and benefit estimates.[58] Since independent agencies are becoming a bigger factor in regulation (e.g., new Dodd-Frank mandates and new requirements for the Consumer Product Safety Commission), requiring economic analysis make sense. While this requirement may impose additional costs on independent agencies, the better quality of analysis would almost certainly be worth the cost.

The statutory requirement for analysis could also streamline the rulemaking process. At present, congressionally mandated requirements for agency rulemaking are spread over several statutes. The RFA requires agencies to estimate the impact of their regulations on small entities; the UMRA requires agencies to estimate the mandated costs regulations impose on state, local, or tribal governments; and the PRA requires agencies to justify any additional paperwork burden imposed on the public. Streamlining all these requirements in a single statute would remove redundancy in some of these statutory requirements, reduce confusion over their applicability, and make it easier for agencies to comply and harder to dismiss the requirements.

A different set of goals can be targeted by expanding analytical requirements to include, where appropriate, federalism analysis, risk/risk analysis, and competition analysis. Federalism analysis would ensure that the problem is appropriately addressed at the federal level—one of the main criteria for efficient analysis discussed earlier in this paper. Risk/risk analysis would ensure that regulation aiming to reduce risk in one area does not increase risks elsewhere. As discussed earlier, risk tradeoffs can be a major issue with regulations. Finally, agencies ought to consider the impact of proposed regulations on market competition. As noted previously, regulation sought by the private sector often benefits businesses at consumers' expense. Agencies should question whether a regulation's benefits exceed the

[55] For example, Administrator Browner under the EPA in the 1990s made a speech on the 30th anniversary of Earth Day and remarked, "The nation committed itself to the task of eliminating pollution, to restoring our lands and waters to their uses, and to protecting public health without regard to cost. Let me repeat those last four words—*without regard to cost*." Cited in Robert W. Hahn, Sheila M. Olmstead, and Robert N. Stavins, "Environmental Regulation in the 1990s: A Retrospective Analysis," *Harvard Environmental Law Review* 27 (2003): 377–415.
[56] Ellig and Morrall, "Assessing the Quality of Regulatory Analysis."
[57] OMB, *2011 Report to Congress*.
[58] It is unclear precisely how many independent agency rules are major given that these agencies are not required to estimate the impacts of their rules.

welfare loss to consumers (whether domestic or international) and whether the rule can be tailored to reduce any impact on free-market competition.[59]

The primary drawback of this approach is the increased cost of analysis for the federal agencies. On the other hand, more comprehensive analysis would allow agencies to improve the quality of their rulemaking.

2.2. Require Congressional Review of Regulatory Analysis

To increase federal agencies' accountability, Congress could charge an independent body such as the GAO or the CBO with checking the quality and use of analyses as a further check beyond OIRA. As mentioned in the previous section, this alternative would be required if Congress chooses to implement regulatory budgets or to require congressional approval for major regulations. Unlike the federal agencies, these independent reviewers are expected to be less biased and less likely to tilt the analysis toward supporting a pre-chosen regulatory option. Agencies themselves are likely to improve the quality of the analysis for fear of challenge to their estimates.

Congress must ensure the reviewing agency's independence. Expanding the role of OIRA, which is already charged with evaluating economically significant regulations, would still leave the function entirely within the executive branch. Politically, it is difficult for an executive-branch agency to publically challenge another agency's estimate.[60] Adding an additional check by a congressional agency, such as the GAO, the CBO, or a new congressional agency, would provide a check on federal agencies' regulatory activity independent of the executive branch.[61]

The main drawback of this approach is its cost. It requires additional funding for an existing agency or the establishment of a new agency.

2.3. Make Regulatory Analysis Judicially Reviewable

Another way to make agencies accountable for their regulatory decision-making is to make all data and analysis used in rulemaking judicially reviewable. This proposal would allow affected parties to challenge the quality of agency analysis and data (scientific and economic) in court. It would help to ensure the scientific integrity of agency analysis and expose analysis that is tailored toward a particular outcome for political reasons. This proposal does not envision federal judges evaluating the quality of analysis.

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[59] Deborah Platt Majoras, "Opening Remarks" (presented at the Role of Competition Analysis in Regulatory Decisions workshop, Washington, DC, AEI/Brookings Joint Center, May 15, 2007), http://www.ftc.gov/speeches/majoras/070515aei.pdf.

[60] GAO, *Regulatory Accounting*.

[61] House Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary, *APA at 65 - Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?* 112th Cong., 1st sess., 2011, http://judiciary.house.gov/hearings/printers/112th/112-17_64854.PDF.

Rather, it relies on the larger scientific community for expertise. Judges' role is to check whether agency analysis is clearly biased.[62]

The advantage of this approach is that it introduces crowdsourcing into the process. Crowdsourcing allows numerous outside experts to review, assess, and challenge the validity of the data and theoretical models used in the regulatory analysis. As shown by the success of public websites like Wikipedia, virtually any subject has a subgroup of people interested in promoting accurate information. Judicial challenge would force federal agencies to examine and respond to these disputes. Agencies would not be able to dismiss public comments with a perfunctory statement as they commonly do in informal rulemaking.[63] Consequently, the scientific quality of agency analysis will face considerably higher review standards.

The main disadvantage of this approach is that some incentives would not change. Mounting a successful challenge to federal agencies in courts is costly. The benefits to the public from better regulatory analysis are generally dispersed. The general public is unlikely to be interested in the better analysis as any benefit to an individual from a good economic analysis is fairly small. For any individual regulation, the only group interested in getting the analysis right would be stakeholders who are adversely affected; but, equally, if there is a group of stakeholders who stand to gain from the regulation, they will not want better analysis. Thus, there is not much of a constituency for consistently good economic analysis. One group of stakeholders who often bear most of the costs of regulation is small businesses. Because of that, Congress passed two laws, the RFA and SBREFA, to ensure that small businesses' interests are represented. One provision of the SBREFA allows small entities to challenge poor regulatory flexibility analysis. But even in this case, where there is something to gain by challenging the agencies, the laws have not been effective because of the considerable costs of litigation and judicial deference shown to federal agencies.[64]

2.4 Require Formal Rulemaking

As an alternative or in addition to judicial review, Congress could require a formal rulemaking process for all major regulations. Formal rulemaking provides for trial-type hearings in which interested parties may testify on the proposed regulation and cross-examine adverse witnesses. Most importantly, substantial evidence must support decisions. An agency official or an administrative law judge presides over the hearings.

One key factor that should improve with formal rulemaking is the administrative record. Under informal rulemaking, agencies control how they respond to comments, and they often dismiss substantive

[62] It should be noted, however, that recent Securities and Exchange Commission court rulings have taken a fairly sophisticated look at the quality of their economic analysis. See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *American Equity Investment Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).
[63] *Business Roundtable v. SEC*.
[64] Polich, "Judicial Review and the Small Business Regulatory Enforcement Fairness Act."

comments.[65] With formal rulemaking, agencies must respond with reasoned arguments as to why, for example, a suggested option is not relevant or why a scientific study should be dismissed.

The main drawback of the formal rulemaking process is that it can be hijacked by special interests, leading to drawn-out hearings that could last years.[66] It could also increase the costs of agency rulemaking, although, if it leads to fewer judicial challenges later in the process, it could actually lower costs.

2.5 Require Early Publication of Preliminary Regulatory Impact Analysis

A less adversarial approach to increasing transparency and accountability in the rulemaking process would be to require agencies to publish their draft RIAs prior to making a proposal that contained their preferred alternative. This approach would give interested parties a chance to examine the evidence and potential options prior to decisions becoming a *fait accompli*. Since RIA findings are preliminary at this stage, agencies may be more responsive to public comments alerting them to errors, omissions, or additional information crucial to making better decisions. All too often, agencies ignore public comments that challenge agency data because the agencies have already made up their minds and believe the costs of rethinking the proposed alternatives are too high. Currently, to the degree that agencies take public comments into consideration, the changes are often cosmetic.[67]

In addition, this proposal would push agencies to view cost–benefit analysis as an integral part of the rulemaking process rather than an afterthought used to justify a decision that has already been made. As a result, they might take a broader public-interest view of regulation rather than focus narrowly on options favored by individual program managers or options that reflect the status quo.[68]

The main disadvantage of this proposal is that agencies would still be free to ignore preliminary comments. To the degree that agencies have strong incentives to favor inefficient regulation, this proposal is unlikely to have much impact if not accompanied by other reforms.

3. Eliminate Inefficient Regulations

Goal: Improve the quality of existing regulations. The alternatives discussed in the preceding sections focus primarily on the flow of new regulations. Yet, there is already a substantial stock of inefficient regulations in the Code of Federal Regulations. A separate set of regulatory reforms would focus on eliminating or restructuring the regulations that are already on the books.

Drawbacks: a retrospective review of the entire stock of existing regulations could be a daunting challenge and would require substantial effort and expense. In addition, it may provide little relief to the public. If most of the costs of an inefficient regulation are upfront and the public has already invested in complying with the regulation, eliminating such regulations will not increase public welfare.

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[65] Williams, "Influence of Regulatory Economists."
[66] Ernest Gellhorn, *Administrative Law and Process in a Nutshell* (St. Paul, MN: West, 1997); Richard J. Pierce, *Administrative Law* (New York: Foundation Press, 2008).
[67] West, "Administrative Rulemaking."
[68] See Williams, "Influence of Regulatory Economists."

Implementation: Congress could adopt either a big-bang or an incremental approach to eliminating inefficient regulations. In particular, it could consider the following: (1) designating a panel of experts to eliminate or modify existing regulations; (2) establishing regulatory PAYGO to require agencies to eliminate an existing rule before establishing a new rule.

3.1 Designate a Panel of Experts

One approach to reforming the current stock of regulations is to replace the key actors (regulatory agencies) who are now charged with reviewing their own rules instead of trying to change their incentives. In a process modeled after Base Realignment and Closure (BRAC), a program created to navigate the contentious process of military base closures and consolidation, Congress could appoint a panel of independent experts to select inefficient programs and packages of regulations for modification or elimination. The experts' plans would be enacted by default unless Congress voted in a joint resolution to overturn the entire plan. Congress would not be able to modify any part of the plan and would vote on the entire package. This system would prevent legislators from trying to shield their pet projects and undermining the entire endeavor. It would also allow them to shift the blame for unpopular decisions onto the expert panel, making the process more palatable for the legislators.

The advantage of this approach is that it allows for a comprehensive overhaul of inefficient regulations. Furthermore, it resolves the problem of incentives for key actors by replacing them with an independent expert panel. One way to accomplish this is to select panel members, perhaps jointly by the executive and legislative branches, based on their subject matter expertise, not on their vested interest in the outcome. In addition, the panel would not include current office holders or government officials. Since the panel would not be beholden to special interests or federal agencies, it would be less likely to be biased in its approach.

On the downside, this approach may not be sustainable in the long run. The sense of urgency necessary for this approach is often predicated on a widespread perception of crisis. As the crisis passes, public resolve to reform the regulatory system may fade, and all the culprits will revert to business as usual.

While in most countries the approach to regulatory reform has been incremental, there are a few examples of a "big-bang" approach, most notably in South Korea in the wake of the Asian financial crisis in 1997.[69] Faced with a dire economic situation, the president ordered government agencies to slash the number of regulations by half within a year. Each agency was charged with submitting a full inventory of its existing regulations and presenting a plan to reduce it by half to the newly formed Regulatory Review Committee. The agencies also had to justify the remaining regulations. The plan was reasonably successful, reducing the number of regulations from 11,125 in 1997 to 7,127 in 1999. However, it focused solely on the number of regulations and not on their quality or economic impact, and it was later abandoned for an incremental approach.

[69] OECD, *OECD Reviews of Regulatory Reform Korea: Progress in Implementing Regulatory Reform* (Paris: OECD Publishing, 2007).

The United Kingdom also has an approach to eliminating multiple regulations.[70] It publishes regulations affecting individual industries as well as regulations of general effect and asks for comments. The default presumption for every regulation published is that it will be eliminated unless Cabinet ministers decide to keep it. However, this program only applies to those regulations passed by the U.K. government, not by those coming from the European Union.

In the United States, BRAC provides an example of a successful big-bang approach.[71] Traditionally, members of Congress would vocally oppose Department of Defense (DOD) plans for base closures in their districts because base closure spells substantial job losses for most districts. In addition, legislators accused the DOD of using base-closure decisions to reward or punish specific members of Congress.[72] The compromise solution was to create an expert panel charged with drawing up a list of bases to be moved or closed. The president and Congress could either approve or reject the plan in its entirety, but neither could change the specifics of the commission's recommendations. The BRAC process resulted in five consecutive rounds of base closures in 1988, 1991, 1993, 1995, and 2005. The last round was the most extensive and complex round of base closures to date. It called for the closure or realignment of 182 bases and is expected to save $13.7 billion by 2025.[73]

BRAC's success was in many ways predicated on the DOD's sustained support of the program. The military had no use for the bases and could use the savings elsewhere. The primary resistance in this case came from the legislators in Congress whose districts would be affected by the closures. BRAC allowed the military to circumvent this resistance. Another key factor in the program's success was the silent approval process, which meant that the commission's recommendations became law unless they were overturned by a joint resolution.[74]

In contrast, many in Congress and the federal agencies may resist the regulatory cleanup we propose and, at a minimum, support for this program is likely to diminish over time. However, this approach is likely to be useful as a one-time tool for streamlining and improving the existing stock of regulations. Nevertheless, given the large number of existing inefficient regulations, this measure may yield substantial benefits even if it only operates for a short time. It should, of course, be combined with long-term measures to improve the quality of future regulations.

3.2. Establish Regulatory PAYGO

An incremental approach to eliminating inefficient regulations would be to enact regulatory PAYGO, which would require that for each new rule, agencies eliminate an existing rule or a set of rules of

[70] HM Government Cabinet Office, "How It Works," Red Tape Challenge, http://www.redtapechallenge.cabinetoffice.gov.uk/how-it-works/.
[71] GAO, *Military Base Realignments and Closures: DOD Faces Challenges in Implementing Recommendations on Time and Is Not Consistently Updating Savings Estimates* (Washington, DC: GPO, January 30, 2009), http://www.gao.gov/new.items/d09217.pdf.
[72] Kenneth R. Mayer, "The Limits of Delegation: The Rise and Fall of BRAC," *Regulation* 22, no. 3 (1999): 32–39.
[73] GAO, *Military Base Realignments and Closures*.
[74] Jerry Brito, "The BRAC Model for Spending Reform," *Mercatus on Policy* 70 (Arlington, VA: Mercatus Center at George Mason University, 2010), http://mercatus.org/sites/default/files/publication/The%20BRAC%20Model%20for%20Spending%20Reform.pdf.

similar cost.[75] Alternatively, an agency could negotiate with another agency to eliminate an existing rule on its behalf (like a tradable permit).[76] As with the regulatory budget, the agency estimate would have to be verified by an independent reviewer. The goal of regulatory PAYGO would be to provide federal agencies with an incentive to review existing rules and eliminate inefficient ones.

The main advantage of this option is its relative simplicity. The only costs that need to be estimated are the costs of new and eliminated regulations.[77] Agencies, faced with a PAYGO constraint, would be forced to prioritize regulations.[78] They would have to evaluate the effectiveness and necessity of existing regulations and identify the less effective regulations for elimination. Failure to do so would prevent them from passing new, higher-priority regulations. Consequently, this alternative would provide agencies with a strong incentive for retrospective review of existing regulations. According to a GAO study, retrospective reviews are most effective when initiated internally by the agencies.[79] Giving agencies an incentive for such reviews may be an effective means to incremental improvement in the current stock of regulations.

The main disadvantage of this proposal is that it does not address the large stock of existing regulations. It also applies only to the federal agencies; the incentives for legislators remain unchanged. Congress would have strong incentives to carve out exceptions to this rule.

The United Kingdom adopted a version of this approach, called the "one-in, one-out" principle, in 2010. However, it is too soon to tell whether it has improved the regulatory process. In the Netherlands, the Dutch government successfully implemented a four-year program to reduce the administrative burdens for businesses by 25 percent between 2003 and 2007.[80] The government measured the 25 percent cost reduction with reference to a calculated baseline cost of administrative burdens. The reduction targets, distributed among the government agencies, were tied to budgets, providing agencies with additional incentives to meet their goals. Since the program focused primarily on regulation's administrative costs, it did not run into political opposition. In a follow-up program, the Dutch government has expanded its focus to include compliance costs in addition to the administrative burden. Its goal is to reduce regulatory compliance costs by €544 million ($805 million) from 2007 to 2011.[81] The government's latest

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[75] Clyde Wayne Crews, "Promise and Peril: Implementing a Regulatory Budget," *Policy Sciences* 31, no. 4 (January 1, 1998): 343–369.

[76] Tradable permits are used in environmental regulation. Firms buy permits to pollute from other firms who can reduce their own pollution more cost-efficiently.

[77] Costs for existing rules are the costs that incumbent firms continue to pay and costs that new entrants into an industry would have to pay (start-up costs). These costs would be compared with the costs of new rules, which include start-up and on-going costs for both incumbents and, in the future, new entrants.

[78] Better Regulation Task Force (BRTF), *Regulation - Less is More: Reducing Burdens, Improving Outcomes*, BRTF Report to the Prime Minister (London: BRTF, March 2005), http://www.bis.gov.uk/files/file22967.pdf.

[79] GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* (Washington, DC: GPO, July 16, 2007), http://www.gao.gov/new.items/d07791.pdf.

[80] OECD, *Better Regulation in Europe: Netherlands* (Paris: OECD Publishing, 2010).

[81] Ministry of Economic Affairs, Agriculture and Innovation, *Regulatory Burdens on Business Progress Report* (The Hague, Netherlands: Ministry of Economic Affairs, Agriculture and Innovation, November 2009), http://english.mininv.nl/txmpub/files/?p_file_id=2001870. We calculated the U.S. dollar equivalent using an

report indicated that it is on schedule to meet its target. Yet, there is some evidence that the follow-up program may enjoy less political support.[82]

Regulatory Reform: The Path Forward

No single approach will comprehensively overhaul the regulatory system. The ideal reform would improve the existing stock of regulations as well as ensure the high quality of future regulations. It would also improve the quality and use of regulatory analysis, since the primary goals of regulatory reform cannot be achieved without accurate and reliable estimates of regulation's impact. Comprehensive regulatory reform will require a combination of the approaches described in this paper.

Based on our assessment of the potential impact and expected costs of each reform proposal, we recommend an initial reform package that includes the following three options:

1. **Require congressional approval of major regulations.**
   The main goal of this reform proposal would be to make Congress and federal agencies accountable for regulatory decision-making. Congress would be especially sensitive to whether agencies have shown that the rules they have passed will achieve the benefits they claim at a reasonable cost. This proposal goes to the heart of the problem by changing the institutional incentives for Congress, and of the three proposals that address congressional incentives, this one is by far the simplest to implement. In contrast, regulatory budgets would impose considerably higher analytical burdens and administrative costs on both the federal agencies and an independent congressional reviewer.
2. **Require regulatory analysis by statute.**
   This reform would extend the rigorous analytical requirements for major regulations to the independent agencies. Given that independent agencies account for a substantial portion of major rules, it is crucial to improve the quality of their regulatory analysis. The statutory requirement would make the analyses open to judicial challenge by the public, which would bring crowdsourcing into assuring the quality and use of these analyses. Creating such a statute would also facilitate the combination and expansion of analytical requirements, particularly to cover risk/risk trade-offs and competition analysis. This analysis should be presented to the public for review well before the agency produces a proposed rule. Early presentation will give the public adequate time to react and to help develop proposed rules. It also may produce better analysis that is not constrained by agency decision makers hoping to find a preselected option in the analytically preferred option.
3. **Include independent agencies in requirements for regulatory impact analysis and congressional approval.**
   Given the passage of Dodd Frank and other significant legislation, it makes sense to apply these reforms to independent agencies and to bring them into OIRA review.

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exchange rate of EUR/USD = $1.48, effective at the time the *Regulatory Burdens on Business Progress Report* was published.

[82] OECD, *Better Regulation in Europe*.

Having members of Congress accrue a voting record for major regulations should change the incentives for members to vote for ineffective or inefficient regulations, particularly for those members who expect to still be in Congress when new regulations are enacted.[83] In addition, statutorily required regulatory impact analysis that is reviewable by courts is likely to produce much better analyses, particularly because stakeholders would be able to challenge all economic and scientific data to ensure that agencies soundly analyze their decisions. Challenges could reduce incentives for agencies to pay for scientific or economic data and analysis that will not hold up to public scrutiny and should also force agencies to better define problems and to explore all relevant alternatives.

Better analysis presents Congress with a more comprehensive record upon which to base its decisions. Rules that have costs that are not justified by the benefits are unlikely to survive unless there are very strong reasons for promulgating them. Having the suggested reforms in place should reduce the influence of those who seek rules to advance their own interests. Better regulatory analysis exposes not only the overall benefits and costs of each provision, but shows who benefits and who pays for the rules. Exposing those parties makes it more difficult for Congress to reward special interests through laws and regulations. Including independent agencies provides much-needed oversight by the other two branches of government as well as by the public.

The proposed reform package, however, does not provide for a review of the existing stock of regulations. A more aggressive approach to reviewing and streamlining the existing stock of regulations involves creating a BRAC-style independent panel of experts. An incremental approach, on the other hand, would be modeled on the Dutch or British experience by enacting regulatory PAYGO. Further research is necessary to understand what approach would be most effective in improving existing regulations.

Americans should care about regulation because it affects almost every aspect of our lives. We should care because the outcomes of regulatory policy affect the quality of the environment, the safety of consumer goods and industrial processes, and the adoption of quality-of-life-enhancing technology. All of these depend to a great degree on the implementation of regulatory policy.

We should also care because regulations impose a significant cost on the economy and on our ability to be competitive in an increasingly globally linked world. Better regulatory policy will solve social problems at lower cost, which will, in turn, keep the United States competitive—and that affects everyone.

[83] The average tenure for a senator now is about 13 years; for a Congressman, it is about 10 years. CRS, *Congressional Careers: Service Tenure and Patterns of Member Service, 1789–2011* (Washington, DC: CRS, January 7, 2011), http://opencrs.com/document/R41545/. These typical term lengths mean that, on average, members would face voting for regulations that are passed within five and six years from the passage of the authorizing legislation.

Appendix 1. Regulatory Reform Alternatives

Reform Options	Intended Results	Change in Incentives for Congress and Agencies
BUDGETS	*Reward or punish agencies, programs, people*	
Tie funding to the success of specific programs	Improve the quality of existing regulations	Incentives for agencies to improve the regulatory quality of underperforming programs No incentives for Congress to enforce the rule
Tie funding to agency successes	Improve the quality of existing regulations	Incentives for agencies to improve regulatory quality No incentives for Congress to enforce the rule
Introduce regulatory budgets	Control the costs of new regulations	Forces both Congress and agencies to consider the costs of regulation
Stop rewarding senior staff in agencies for passing new regulations	Reduce the number of new regulations	Reduces incentives for agencies to create new regulations Does not alter incentives for Congress
ELIMINATION	*Cut regulations*	
Enforce moratorium on new regulation	Reduce the number of new regulations	Does not alter incentives for either Congress or agencies Both wait out moratorium
Enforce regulatory PAYGO	Reduce (or at least keep constant) the cost of regulation	Incentives for agencies to improve regulatory quality Does not alter incentives for Congress
Sunset rules	Reduce the number of existing regulations	No incentive for either Congress or agencies to enforce the rule
Eliminate regulations through BRAC-style commission	Reduce the number of existing regulations	Replace key actors. Strong incentive for commission members Incentives for Congress may depend on the political environment
Eliminate agencies	Reduce the number of regulatory agencies	No incentives for either Congress or agencies
OVERSIGHT	*Introduce more checks and balances into the system*	

Increase the size of OIRA	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
Require congressional approval of major regulations	Reduce the number of new regulations	Incentives for agencies to improve regulatory quality Incentives for Congress to control the costs of regulation
Require GAO to complete a competing analysis of major rules	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
ANALYSIS	*Increase the quality and use of regulatory analysis beyond what is required now by executive order*	
Require cost–benefit analysis by statute	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress Incentives for affected entities to challenge agencies in court
Give SBA the authority to return rules based on poor RIA	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
Apply executive order to independent agencies	Improve the quality of regulation from independent agencies	Some incentives for independent agencies to improve analysis quality Does not alter incentives for Congress
Require risk/risk analysis	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
Require competition and federalism analysis	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
PROCESS	*Improve rulemaking process by opening it up to challenge*	
Require formal rulemaking for major rules	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress

Require challenges to science under the IQA to be judicially reviewable	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
Shift public comment period to the beginning of the rulemaking process	Improve the quality of regulatory impact analysis	Some incentives for agencies to improve analysis quality Does not alter incentives for Congress
Require Congress to do cost–benefit analysis of rules requiring or allowing for regulations	Reduce the number of new regulations	Incentives for Congress to limit areas of rulemaking for agencies

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Mr. COBLE. Thank you, Dr. Williams. I appreciate that. I appreciate the testimony from all of you.

Doctor, what do you believe would be the benefits of allowing OIRA to perform cost/benefit and other review of new rules from independent agencies?

Mr. WILLIAMS. As Professor Katzen says, I think there would be a tremendous benefit. Right now, as we get ready to implement the

Dodd-Frank law—in fact, it is already taking place now. They are producing like one rule a day. None of those rules are going to be analyzed unless they come from the Department of Treasury. So I think it would make sense to either have the agencies review them, do them, or to give OIRA a chance to review them.

I will say I do think it is always a problem when the agencies are analyzing their own decisions. Their incentives are not to do otherwise than to define the benefits exceeding costs. So the decisions they tend to make very early.

Mr. COBLE. Doctor, I have heard criticism—and perhaps you all have as well—alleging that the Obama administration has not been as diligent as it could in the matter of regulatory reform. Between the Obama administration's executive orders, presidential memoranda, and guidance on regulations and regulatory review, has the Obama administration added anything new to the regulatory review process that has teeth or has muscle?

Mr. WILLIAMS. I would say no. In fact, the most recent executive order, the one that requires an analysis of cumulative costs—that is just a repetition of the executive order that was produced under President Clinton. Apparently the agencies are not paying any attention to it. They have not paid any attention to it since 1993. I can't imagine they are going to pay much attention to it now.

So I don't think that anything new has been added, and I think that is the problem. The executive orders that the President issued are never going to solve the problems that we have. We have to change the underlying institutions if we are going to begin to address these problems.

Mr. COBLE. Thank you, Dr. Williams.

Dean Graham or Professor Katzen, do you all have any closing remarks prior to departure?

Ms. KATZEN. I would like to address a few things, if you will permit me.

First of all, I think there have been real results. We saw this summer a major Environmental Protection Agency regulation was withdrawn. I am speaking of the Ozone NAAQS. It was sent back to EPA to be reconsidered and it was withdrawn. There was a noise regulation that was proposed by OSHA that was withdrawn. And these are just two of the most well publicized withdrawals. There have been a series of individual transactions that have made a difference, and I think that the regulatory lookback itself, as I said in my comments, has gotten far more emphasis and energy than under any of the previous Administrations, all of whom tried it.

And lastly, I would like to state for the record that the amount of time for review may be important; it may be telling, but it is not necessarily dispositive. In many of the instances, especially the ones that Dr. Williams referred to from the Affordable Care Act, these come from a very prescriptive statute with very tight dates due for the resulting regulations. There would not be a lot of opportunity to make a lot of changes, even if there were the most robust and most technically proficient cost/benefit analyses attached to them.

Similarly, his figure that there were 18 regulations out of 3,000 final rules is off the mark. Of the 3,000 final rules, fewer than 100

are economically significant. Most of the 3,000 are relatively mundane, if not ministerial, and it would not make any sense in a cost/benefit calculation to do a cost/benefit analysis for whether you want to change the time for filing your tax returns from April 15th to April 16th if the 15th falls on a Sunday. You do not need to do cost/benefit analyses for a lot of these final rules.

Looking at the rules where CBA is required, my recollection is that there were roughly 50 that were economically significant—rounding—of which 30 were transfer rules. These transfer rules were rules that did not impose any costs on the private sector. They were giving benefits to people from taxpayer money, and they are specified by Congress. So a cost/benefit analysis for a transfer rule does not make sense.

If we could focus on where the problems are, I think that would be highly beneficial. And while there are some poster children, I think they should be addressed individually.

I thank you for your patience.

Mr. COBLE. Thank you, Professor.

Dr. Williams or Dean Graham, any final words?

Mr. GRAHAM. Very quickly just to endorse Sally's comment about the need for some attention to OIRA staffing. It may be at the 45 level close to its all-time low, maybe not exactly low, but very, very low compared to historically.

And the second point is Sally did mention appropriately the return of the ozone rule that casted at the instruction of President Obama—I read very carefully the language in that because it is the only return letter that I have seen in this Administration. And basically what it says is not that the cost/benefit analysis wasn't done well or not that the costs and benefits weren't in sync, but that politically this is not a good time to do this kind of regulation. I mean, so basically you don't have a single case yet where OIRA has said in a return letter this regulation has costs in excess of benefits. We are not going to do this one. I must have had like 2 dozen of those in the first 6 months that I was at OIRA. So it is a totally different kind of situation. It should be concerning.

Mr. COBLE. Pardon?

Mr. GRAHAM. It should be of concern.

Mr. COBLE. Thank you, Dean.

Dr. Williams, a final word?

Mr. WILLIAMS. Yes, just two points on the health care rules. Our analysis showed that they did, in fact, miss significant opportunities, alternatives that would have been much more efficient than the ones they chose. So it was not just that those things were statutorily defined and they didn't have much wiggle room.

The second thing is basically on the lookback. We now have 165,000 pages of rules in the Code of Federal Regulations. If you sat down to read them, it would take you approximately 3 and a half years. I don't think that requiring agencies to look at them rule by rule is ever going to get us very far. I think we have got to find an alternative measure.

Mr. COBLE. Well, folks, you all will recall, as I said at the outset, I am not anti regulations. I am anti sloppy regulations. And I think we can do better.

And I think this has been a very distinguished panel. I apologize again for the delay with voting, but you assume that risk when you come to this Hill. You may have a delay put together. But I thank you again.

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 promptly as they can so 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 the record.

And prior to adjournment, I would like to, without objection, introduce four articles applicable to regulatory matters from the Forbes Magazine, from Gallup, from The Heritage Foundation, and two from the Economist, and the Washington Times. I think that is all of them.*

Again, thanks to you all and I thank the witnesses. Have safe travels, particularly to my travelers. Dr. Williams, you arrive safely as well.

We stand adjourned.

[Whereupon, at 3:53 p.m., the Subcommittee was adjourned.]

*See Appendix.

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

It has been a little over a year and a half since the last time we had Cass Sunstein before us to testify about the initiatives of the Office of Information and Regulatory Affairs, and a lot has happened since then in terms of the President's efforts to enhance review of regulations.

On January 18, 2011, President Obama issued Executive Order 13563, which supplemented and reaffirmed the principles of Executive Order 12866, issued by President Clinton. EO 13563 added an emphasis on increasing public participation in the rulemaking process and identifying ways to reduce costs and simplify and harmonize rules through inter-agency coordination.

EO 13563 clarifies that agencies must identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, including considering alternatives to mandates, prohibitions, and command-and-control regulation.

Perhaps most significantly, EO 13563 requires agencies to develop a plan to conduct a periodic review of existing significant regulations that "may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

Mr. Sunstein issued a number of guidance memoranda regarding EO 13563 and particularly its requirement that agencies conduct periodic review of existing significant regulations, emphasizing the need for agencies to "consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking."

Just yesterday, Mr. Sunstein issued another guidance memorandum, this time addressing another aspect of EO 13563, which is the requirement that agencies work to address the potential cumulative effects of regulations.

I look forward to learning the results to date of the President's push to have agencies improve and modernize the existing regulatory system.

Based on some of the statements I have heard recently from some of my colleagues, I imagine we will also be discussing the volume and costs of regulations under the Obama Administration.

I note that according to the Office of Management and Budget's 2012 Draft Report on the Benefits and Costs of Federal Regulations, the net benefits of regulations in the first three years of this Administration totaled $91 billion, which is 25 times greater than during the comparable period under the Bush Administration.

Moreover, fewer final rules have been reviewed by OIRA and issued by executive agencies during the first three years of the Obama Administration than in the comparable period of the Bush Administration.

As to regulatory cost, the costs of economically significant rules reviewed by OIRA were highest in fiscal year 2007, during the Bush Administration. In fact, the costs of regulation were higher during the last two years of the Bush Administration than during the first two years of the Obama Administration.

Finally, I would like to know from all of our witnesses what steps Congress can take to better help OIRA do its job, including whether Congress should provide OIRA with more resources.

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

Response to Post-Hearing Questions from the Honorable Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs

Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on the
"Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration"

March 21, 2012

Questions for Cass Sunstein

1. **In his written testimony, Richard Williams asserts that OMB's Reports to Congress should be discounted for a number of reasons, including that they are based on exaggerated estimates of regulatory benefits and that they represent only a tiny fraction of all final rules issued.**

What is your response?

In its Reports to Congress, OMB uses agency estimates where available to estimate the costs and benefits of regulations. While some people believe that agencies exaggerate the benefits and understate the cost of the rules that they promulgate, others believe that agencies exaggerate the costs and understate the benefits of their rules. Whether the predictions are accurate is an empirical question. Harrington (2006) found that agencies show a tendency to overestimate both benefits and costs (with approximately equal frequency); he did not find a systematic tendency to overestimate the benefit-cost ratio. In its 2005 Report to Congress, OMB presented a meta-analysis of a number of retrospective studies. This analysis found a tendency to overestimate both benefits and costs. We continue to investigate the relationship between prospective and retrospective estimates of benefits and costs.

OMB's Reports to Congress catalogue the costs and benefits of only those economically significant regulations issued by executive agencies. It is true that economically significant regulations (generally those with an annual economic impact of at least $100 million) are only a small fraction of all regulations, but we believe they represent the large majority of costs and benefits imposed by executive agencies.

2. **What is your response to the allegations that regulations:**

- **kill jobs**
- **lead to business uncertainty**
- **lead to higher prices**
- **are forcing American companies to move off-shore?**

The effects of regulations on employment, the risk that regulations will lead American companies to move offshore, the economic effects of regulations in general, and the issue of uncertainty are discussed in our most recent draft Report to Congress on the Costs and Benefits of Federal Regulations, available at

http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf. We would refer you to chapter 1 of that report for responses, with references to the empirical literature.

Many regulations protect the health, safety, and welfare of the American public. As you are aware, the Obama Administration continues to take steps to minimize unjustified regulatory burdens and promote economic growth and job creation, while maintaining these critical protections. Our regulatory lookback is one such effort, and has resulted in reforms and reform proposals that will significantly reduce unjustified regulatory burdens.

3. What can Congress do to improve the regulatory system?

Within the context of our role, we note that the views and perspectives of Members of Congress on proposed and existing rules can be exceedingly helpful. We welcome views on how best to improve rules that have been formally proposed, and also ideas about candidate for retrospective review, and for potential streamlining, improvement, or elimination, under Executive Order 13563.

4. Should the cost-benefit analysis requirements of EO 12866 be extended to independent regulatory agencies? If so, who should review their rules?

We believe that cost-benefit analysis provides important information about regulatory approaches and that it can be useful, consistent with existing law, for all agencies of the federal government, including independent regulatory agencies.

In July 2011, the President signed Executive Order 13579, which called on independent agencies to follow the same cost-saving and burden-reducing principles as executive agencies and to engage in retrospective review, or "lookback," of existing rules to identify those that should be streamlined, changed, or repealed.

As you are undoubtedly aware, whether the Executive Orders governing regulatory review could or should be applied to independent agencies raises much-discussed and long-debated questions of both law and policy. OIRA does not have an official position on those questions.

Response to Post-Hearing Questions from John D. Graham, Dean, Indiana University School of Public and Environmental Affairs

Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on the
"Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration"

March 21, 2012

Questions for John Graham

1. Do you agree with Richard Williams that OMB's estimates of the net benefits of regulation should be discounted because of purported methodological problems?

   OMB's estimates of the net benefits of federal regulation are more accurately characterized as summaries of agency estimates of regulatory net benefits. The validity of the estimates varies from rule to rule and thus I would not recommend a universal discounting of all of the numbers.

2. Many of your concerns appear to center around actions that are currently outside the scope of OIRA review authority. Do you have a view as to how OIRA itself has performed during the Obama Administration?

   I have not performed a study of OIRA's performance during the Obama administration.

3. What is your view of EO 13563 and the Administration's efforts to implement it, in particular its retrospective review requirement and its focus on cumulative costs?

   I believe that EO 13563 is a modest step in the right direction and it should be rigorously evaluated over time.

4. Should there be a moratorium on significant regulatory actions until the average quarterly unemployment rate reaches 6%?

   I have not studied the question of whether regulatory actions should be linked to the national rate of unemployment.

5. John Cruden, who served as the head of the Justice Department's Environment and Natural Resources Division for 20 years under two Republican and two Democratic Administrations, testified before this Subcommittee about a month ago that he was not aware of any instance where the government colluded with a plaintiff to enter into a consent decree under which the government committed itself to a rulemaking.

   What is your response?

   I have not studied the consent decree process.

6. Have you reviewed the 2012 draft report to Congress prepared by OMB on the benefits and costs of federal regulations?

Do you concur with the report's findings?

No.

7. Do you support allowing any entity that claims to be "affected" by a proposed consent decree to intervene in a court challenge to such decree?

I have no opinion on this subject.

8. Hypothetically, if the consent decree pertains to air quality standards under the Clean Air Act, should anyone who breathes air be able to intervene and be heard on such decree?

I have not studied this aspect of the consent decree process.

Response to Post-Hearing Questions from Sally Katzen, Visiting Professor of Law, New York University School of Law

Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on the
"Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform Under the Obama Administration"

March 21, 2012

Questions for Sally Katzen

1. Mr. Williams asserts that OMB's Reports to Congress should be discounted for a number of reasons, including that they are based on exaggerated estimates of regulatory benefits and that they represent only a tiny fraction of all final rules issued.

   What is your response?

Response to Congressman Cohen's Question for Sally Katzen:

A: With respect, I disagree with Mr. Williams on this issue.

Given that estimating costs and benefits of regulatory actions is not a precise science (although much constructive work has been done by economists in the field over the last several decades), no number (or set of numbers) offered by anyone is free of criticism. Nonetheless, the data sets presented year after year by OMB in its Report to Congress on the Benefits and Costs of Federal Regulations are, by far, the most reliable and most informative information that we have.

The OMB data sets include only the economically significant regulations (those with "an annual effect on the economy of $100 million or more or adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities), but these actions account for the vast majority of the costs and benefits imposed on or received by the private sector from rules issued each year by the federal agencies. This is so even though some of the Independent Regulatory Commissions are not required to undertake any economic analysis when issuing their rules, and some of the Executive Branch agencies, such as the Department of Homeland Security, face very difficult challenges in quantifying and monetizing the benefits of some of their rules (indeed, many of the DHS rules are listed as simply "reducing the risk of a terrorist attack").

In addition, it is worth noting that the OMB estimates are compiled each year not by partisan officials but rather by the career staff at OMB, using a consistent approach and employing a consistent methodology. As a result, these data provide comparable information on a longitudinal basis covering both Democratic and Republican Administrations.

Response to Post-Hearing Questions from Richard A. Williams, Director of Policy Research, The Mercatus Center, George Mason University

Questions for the Record from
Ranking Member Steve Cohen
for the
Hearing on the Office of Information and Regulatory Affairs:
Federal Regulations and Regulatory Reform
Under the Obama Administration

March 21, 2012

Questions for Richard Williams

1. You served with the FDA's Center for Food Safety and Applied Nutrition. Undoubtedly, you saw the March 14 *Wall Street Journal* article about the increase in outbreaks of illness linked to imported foods.

   Should there be more inspections and heightened regulatory standards for such foods?

   There is a limit to the effectiveness of regulatory standards and inspections. We have made very little progress using these tools for the last thirty years and it is imperative that we identify new tools. The goal of our food safety program should be to ensure that producers are sufficiently incentivized to take reasonable, effective precautions against food becoming contaminated with physical, chemical, or microbiological contaminants. Trying to catch up with new developments in food types, processing, packaging, and distribution will continue to make establishment of generalized standards challenging. In general, regulatory standards take about four years to produce and remain unchanged for decades. In addition, there are over one million producers and retailers in this country, and the United States continues to increase food imports from hundreds of thousands of plants from around the world. Of all imported food, the federal government currently samples about 2 percent. Under any realistic budget scenario, it is unlikely that inspection and prescriptive regulation alone will ever be sufficient to prevent the importation of unsafe food.

   In order to make a quantitative leap forward in food safety, it is important to place the incentives back on the people who produce the food. This is an effort that the FDA, USDA, and CDC are beginning to pursue through the use of new and improved trace-back systems. By having more effective trace-back capabilities, including DNA fingerprinting for food pathogens, producers have stronger incentives to monitor for and prevent the distribution of unsafe foods. Otherwise, they face the consequences of lawsuits and loss of sales. For imported food, it is important that the incentives for preventing the production and sale of contaminated food extend to foreign producers, including the same probabilities of detection and similar market penalties (e.g., recall costs, lost sales, and lawsuits).

To read more about this, go to: http://mercatus.org/publication/new-role-fda-food-safety

Wouldn't you agree that other countries have lower regulatory standards for food and manufactured items than the United States?

The question that is important to U.S. consumers is what U.S. standards are for products consumed in the U.S. I am not expert in the standards from the numerous countries that export food to the U.S.

Would you serve your child powdered milk manufactured in China?

The broad question is, do we have a system that most efficiently reduces the risk to foods consumed in the U.S.? Referring to my answer above, I think we can change the system and greatly improve it.

2. We, on this side of the aisle, constantly hear that our regulatory regime puts American manufacturers at a disadvantage with their overseas counterparts.

Would you recommend that the United States lower its regulatory requirements to that of China so American manufacturers could compete more fairly?

I believe that it is time that we review our regulatory system for effectiveness. At this time, the rules governing our regulatory process date back primarily to the passage of the Administrative Procedure Act, about sixty-five years ago. Despite having over thirty years of experience with executive orders that require federal agencies to evaluate the benefits and costs of multiple regulatory options, we find that they do so only infrequently and do poor quality analysis (which is then often ignored). By using our knowledge of the problems inherent in our regulatory system, we can produce better, more effective regulations that efficiently solve our pressing social problems. The situation requires institutional fixes that only Congress can accomplish.

The United States should be a leader in regulatory quality, but we see that other countries are moving to reform their regulatory systems while we do nothing. If we had a more effective regulatory system, the United States would be more competitive in the world. To do this we need to have stringent standards for passing regulations to ensure that they will work, and work cost effectively, and we need to stop making the same mistakes with respect to existing rules by asking the agencies that promulgated them to review them. We need outside qualified bodies to review regulatory programs, not just individual regulations.

What about making America's air quality standards equivalent to that of China?

See above.

How about importing China's mine safety standards to America?

See above.

If China has a higher level for lead in children's toys, should the United States have a comparable level?

See above.

3. You allege that "federal employees focus more on the welfare of their agency and less on the president's agenda." You go on to conclude that "few working on federal regulations pay attention to benefit-cost analysis or other aspects of regulatory analysis unless it is absolutely necessary." For this proposition, you cite your own paper.

Is there anyone else – besides yourself – who has published on this issue and drawn the same conclusion?

Yes, this is a well-recognized position. In fact, more than twenty years ago, Tom McGarity[1] concluded that "many agency analysts view program office resistance as the single most important impediment to the effective use of regulatory analysis in regulatory decision making." He added, "Program office staffers also feel threatened by analysis, because it can represent a direct challenge to status quo approaches to regulatory problem solving that they have historically established and dominated." As for upper-level decision makers, he wrote, "The fact that regulatory analysis plays any role at all in controversial rulemaking actions should be counted as a victory for the analysts."

Should federal career staff be replaced with political appointees more attuned to the wishes of the then-serving president?

My testimony illustrates that the regulatory problems are institutional, rather than associated with a particular political party or particular personnel. It will not be a change in personnel that will improve the regulatory system, it will be a change in the institutions that govern the regulatory process.

4. You state in your prepared testimony that "research shows that agencies often make decisions early in the regulatory process and agency economists are pressured to make their analyses support those decisions." You then cite your own paper for this proposition.

Is there anyone else – besides yourself – who has published on this issue and drawn the same conclusion?

Yes, again this is an old issue. One of the first to examine this problem was William R. Allen in his article "Economics, Economists, and Economic Policy: Modern American Experiences."[2]

Some of the quotations from this article include:

"It seems to me, over and over again, we get awfully close to the point of position-taking before there is staff input." (Allen, p. 240)

"It's futile to say that government economists should not pay attention to what their bosses want. They simply won't survive...and they will be replaced with non-economists who will carry out these functions." (Allen, p. 248)

"We were told...you can't make policy based on economic theory.... It was clear they weren't willing to listen to an analytical argument....You can go all the way through the regulatory aspects of the government, and you just see that the basic choices are getting filtered out by some other mechanisms than what I would call economic sense. And the role of the economist there is a stopgap—keep them from doing something completely dumb, just completely dumb." (Allen, p. 267)

The staff economist is to "develop the best possible arguments" for his administrative superior, and most economists "will offer some counterargument" when the superior's position is deemed to be wrong. But this will not generally have much "impact...in changing policies on important matters." (Allen, p. 265)

1. Thomas McGarity, *Reinventing Rationality* (Cambridge: Cambridge University Press, 1991), 160–61.

2. William R. Allen, "Economics, Economists, and Economic Policy: Modern American Experiences," in *History of Political Economy*, vol. 9, no. 1 (Durham, NC: Duke University Press, 1977), 248–88.

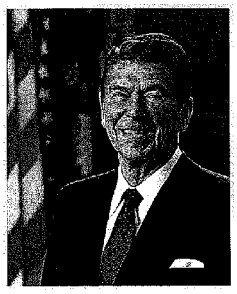
Material submitted by the Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Courts, Commercial and Administrative Law

Forbes

Wayne Crews, Contributor
I'm vp for policy at CEI, and I beat down the Regulatory State

OP/ED | 3/21/2012 @ 11:56AM | 47 views

Why Regulations Aren't Good -- Again



Česky: Oficiální portrét amerického prezidenta Ronalda Reagana Deutsch: Offizielles Porträt des US-amerikanischen Präsidenten Ronald Reagan English: Official Portrait of President Ronald Reagan (Photo credit: Wikipedia)

The first week of Spring is also "hooray, regulation" week at the White House.

Regulatory policy chief Cass Sunstein, one of the most accomplished and cited legal scholars of all time, has been busy. He penned a *Chicago Tribune* oped called "Why Regulations are Good — Again"; issued guidance to Federal agencies on "Cumulative Effects of Regulations; appeared on an hour-long Politico breakfast-time panel with Mike Allen, and testified as lead witness in a House Judiciary Committee hearing on regulatory policy.

An explicit cumulative or redundancy burden assessment of regulation is welcome. We do, as Sunstein argues "need to ensure that regulations are based not on intuitions and anecdotes, but on careful analysis of the likely consequences."

Net Benefits?

Sunstein invoked Reagan on "maximizing net benefits" (benefits minus costs). But twice in the Tribune oped, Sunstein's phrasing noted that regulatory benefits must "justify costs." That's different from exceed, and derives from former president Clinton's Executive Order 12866.

It was President Reagan's prior Executive Order 12291 that emphasized strict OMB-overseen net benefits, while the newer order returned rulemaking primacy to the agencies and reduced OMB's oversight authority.

Still, the over-emphasis on potentially self-serving, agency-assessed net benefits rather than costs underscores yet again the reality that improving regulatory outcomes (minimal costs, maximum benefits) fundamentally requires Congress to answer for rule impacts via expedited approval of "economically significant" or "major" ($100-million-plus) rulemakings, such as the REINS Act.

As I noted yesterday upon learning of Sunstein's directive, there's a clash of visions that undermines the net-benefit premise:

> What would actual net-beneficial cybersecurity regulation entail? A sweeping liberalization of infrastructure industries that's not even on the table; What would net-beneficial Internet access "regulation" have been? It would have banned net neutrality rather than mandate it; What might a Transportation Safety Administration have done to secure air travel? Perhaps use biometric identification on pilots rather than grope the public at large; What would expanded health access have entailed? Increasing market supply of services, relaxed licensing, and a spanking for the FDA's drug delays; What will net-beneficial privacy regulation entail? Ensuring that privacy and anonymity remain competitive, not dictated, features; What does sound environmental "regulation" require? Bringing environmental amenities into the wealth-enhancing voluntary sector rather than government mis-management of contrived scarcity.

Agencies should focus on minimizing costs within some defensible "regulatory budget" constraint bounded by potential benefits, *as determined by Congress within the scope of the Entire Regulatory Enterprise*, not just an agency alone.

I can write a rule requiring NASCAR-style safety features in automobiles and make benefits "justify" costs. I can show the benefits of requiring elevators in multi-story homes.

Also, entire classes of costs are ignored by agencies' focus on isolated rules' net benefits, such as job impacts of rules at large, the damage of restricting access to energy, and antitrust regulatory adventurism. Sunstein pointed to "lives saved" from fuel economy standards; but statistical lives *lost* by automobile downsizing doesn't rate as a cost.

Such omissions are why claims like this one are dubious: "Over the Obama administration's first three years, the net benefits of regulations reviewed by OIRA and issued by executive agencies exceeded $91 billion – 25 times the corresponding number in the Bush administration and more than eight times the corresponding number in the Clinton administration."

The actual number of rules reviewed is a few hundred out of thousands, and note the use of the phrase "executive agencies." Independent agencies like the Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission and the Federal Communications commission don't get reviewed. Sunstein's figures also include only rules for which both costs and benefits were available, further narrowing the universe of clarity. OMB's annual *Report to Congress on the Benefits and Costs of Federal Regulations* presents quantitative data on at most a few dozen rules.

Costs:

Costs rarely get the measurement they need, so making sweeping net-benefit assessments has always been somewhat illusory anyway; of 4,128 completed, active and long-term rules in the recent *Unified Agenda* pipeline, 212 were "economically significant" and theoretically subject to analysis, and 418 were subject to small-business Regulatory Impact Analyses of varying quality.

Yet Sunstein claimed, "In the last 10 fiscal years, the highest costs were imposed in 2007. The last three years of the Bush administration saw higher regulatory costs than the first three years of the Obama administration."

I agree that President Bush was happy to regulate. But the high costs of 2007 primarily were due to a Clean Air particulate matter rule that this administration surely favors. In any event, according to the OMB data I compiled in this chart, Obama's first two years alone cost more than Bush's first four years. Again, these comparisons are only the few rules for which both benefits and costs exist, omit independent agency rules, and cannot serve as the basis for claims made in the Tribune oped. The truth is nobody knows anything about the overall benefits and costs of the regulatory enterprise.

Cost estimates also require, but do not, account for how regulation undermines emergence of superior non-governmental institutions and disciplines (insurance, liability) that serve the public better. If the market is muscled out, that is a *cost* and a dilution of real regulatory discipline.

Counts:

Sunstein claimed "there has been a decrease, not an increase, in federal rulemaking during this administration. During the first three years of the Obama administration, the number of final rules reviewed by OIRA and issued by executive agencies was actually lower than during the first three years of the Bush administration." President Obama made this same claim during the State of the Union Address.

As for total rules finalized during their first three years, including independent agencies, Obama did indeed finalize fewer by my count (see Historical Tables: Part B here in *Ten Thousand Commandments*) -- an average of 3,603 yearly (2009-11) compared with Bush's 4,196 three-year (2001-03) average.

On the other hand, Bush started from Clinton-era heights of an average of 4,671 during that president's eight years, and Bush reduced that to 3,830 during 2008. His overall trend was down in that regard -- but Obama's trend is up -- from 3,503 in 2009 to 3,807 in 2011.

Also, Obama had the most rules during his first three years when it comes to "economically significant" rules in the Unified Agenda Pipeline: Bush had fewer: 149, 136 and 127 compared to Obama's 184, 224 and 212.

Obama's economically significant rules in the "active" and "completed" categories shown here are significantly above Bush's. As for the "Long-term" rules of both presidents, they are about the same; but guess what? Sunstein told agencies on March 12: "In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as 'Long-Term.' Please consider terminating the listing of such entries until some action is likely to occur."

That doesn't bode well for advance warning to anticipate "cumulative effect of regulation."

Finally, Obama's rules impacting small business, those requiring a Regulatory Flexibility Analysis, are becoming more numerous. For Bush's first three years the counts were 388, 362 and 370. For Obama, 372, 428 and

418.

Sunstein advocated "using low-cost 'nudges'" to get the government's bidding done. I prefer to nudge, maybe even shove, the bureaucracies instead. I don't say any of these measures are perfect; I employ them instead to cite the need for an official regulatory report card on transparency.

Something big has to happen to make this new OMB guidance more tractable.

Wednesday, March 21, 2012 Updated 04:00 AM ET

February 15, 2012

Health Costs, Gov't Regulations Curb Small Business Hiring

Nearly half of small-business owners name these issues

by Dennis Jacobe, Chief Economist

PRINCETON, NJ -- U.S. small-business owners who aren't hiring -- 85% of those surveyed -- are most likely to say the reasons they are not doing so include not needing additional employees; worries about weak business conditions, including revenues; cash flow; and the overall U.S. economy. Additionally, nearly half of small-business owners point to potential healthcare costs (48%) and government regulations (46%) as reasons. One in four are not hiring because they worry they may not be in business in 12 months.

Why are you NOT looking for new employees?

Among small-business owners who say they are not currently looking for new employees

	%
Don't need any additional employees at this time	76%
Worried revenues or sales won't justify adding employees	71%
Worried about the current status of the U.S. economy	66%
Worried about cash flow or ability to make payroll	53%
Worried about the potential cost of healthcare	48%
Worried about new government regulations	46%
Worried you may no longer be in business in 12 months	24%
Some other reason	20%

Wells Fargo/Gallup Small Business Index, Jan. 9-13, 2012

GALLUP

Companies typically hold back on hiring when the economy is weak and when their operating environment is not providing sufficient revenues or cash flows. This appears to be the case right now, as the economy has been weak for more than four years. Less typical is for many owners to point to such things as potential healthcare costs and government regulations.

Wells Fargo and Gallup survey 600 small-business owners quarterly to assess conditions within their companies as well as their outlook. Small-business owners' hiring intentions are currently the best they have been since January 2008, though the percentage who plan to hire new employees still represents a minority of small-business owners.

Better Business Conditions Encourage Hiring

Small-business owners who are currently hiring are most likely to say they are doing so because their business operations expanded, consumer or business demand increased, sales and revenues justify adding more employees, and they need to replace an employee who left. Thirteen percent of owners point to their ability to get new capital, while 7% indicate they were influenced by government tax incentives.

Why are you looking for new employees?

Among small-business owners who say they are currently looking for new employees

	%
Expanding business operations	54%
Increased consumer or business demand	54%
Sales and revenues justify adding more employees	55%
To replace an employee who left	44%
Secured additional capital to fund my business	13%
Gov't tax incentives allow me to hire	7%
Some other reason	43%

Wells Fargo/Gallup Small Business Index, Jan. 9-13, 2012

GALLUP

Hiring Mostly the Old-Fashioned Way

Small-business owners search for new employees most commonly through the old-fashioned ways of word-of-mouth (65% say it is a "major way" they find employees) and employee referrals (48%). One in five owners say the Internet is a major way -- up in recent years -- while 9% say the same about newspaper ads, down in recent years.

When you look for new employees, is each of the following a major way you find new employees, a minor way, or not a way?

	Major way	Minor way	Not a way
Word of mouth	65%	24%	8%
Employee referrals	48%	32%	18%
Internet	19%	26%	52%
Newspaper ads	9%	30%	57%
Recruiters	3%	18%	75%

Wells Fargo/Gallup Small Business Index, Jan. 9-13, 2012

GALLUP

Hiring Fewer Employees Than Needed

One in three small-business owners who have hired employees in the last year say they have hired fewer employees than they need, while 65% have hired as many as they need. Five percent of owners report hiring more employees than they need. While this leaves a gap between small-business owners' perceived needs and their hiring during the last year, it is an improvement from November 2010, when 42% of owners said they had hired fewer employees than they needed.

Have you hired as many employees as you need, more than you need immediately, or fewer than you need?

Based on those who have hired new employees in the past 12 months

	As many as needed	More than immediately needed	Fewer than needed
January 2012	65%	5%	29%
November 2010	48%	9%	42%

Wells Fargo/Gallup Small Business Index, Jan. 9-13, 2012

GALLUP

When small-business owners can't hire the new employees they need, they often turn to others for unpaid help. Most often, they seek the help of a spouse (21%) or help from their friends (16%) or children (15%). One in 10 get help from a relative who is not a spouse or a child, while 1 in 20 use an unpaid intern. Three in 10 say they don't turn to anyone.

Thinking about times when you can't afford to hire new employees, who do you turn to MOST for unpaid help?

	%
Don't turn to anyone	30%
Your spouse	21%
A friend	16%
Your child or children	15%
A relative other than a child or spouse	11%
A student or intern	5%

Wells Fargo/Gallup Small Business Index, Jan. 9-13, 2012

GALLUP

Implications

The debate over why U.S. small-business owners aren't hiring more aggressively tends to hinge on whether overall business conditions, including a lack of growth and revenue, are the primary culprit

as opposed to the potential cost of healthcare and government regulations. Apparently, both sides of the debate are correct.

Small-business owners hire when they need to respond to increased business activity and have the opportunity to grow. Although some small businesses in selected industries and markets have been growing, the weak economy of the past four years has limited overall small-business growth. Further, many small businesses continue to feel financially vulnerable, with 66% saying they are worried about the current status of the U.S. economy and nearly one in four telling Gallup they fear they may not be in business 12 months from now.

Given this difficult operating environment, it is not surprising that many small-business owners also worry about potential new healthcare costs and government regulations. While small businesses are always finding ways to deal with their changing operating environment, including government regulations and healthcare, these added challenges can be seen as exacerbating an already uncertain and difficult situation. In turn, they become additional reasons to hold back on hiring.

Right now, economic confidence is approaching its highest levels in the last four years. U.S. small-business owners are also about as optimistic about their business and their future hiring as they've been at any point during that time. Congress can't do much in the immediate term to significantly improve small-business revenues and growth. However, lawmakers could place a moratorium on new regulations for some period of time. In turn, this might provide the extra push needed to get small-business owners to decide to hire the employees they actually need and get the economy growing at a pace the average American can recognize as an economic recovery.

About the Wells-Fargo Small Business Index

Since August 2003, the Wells Fargo/Gallup Small Business Index has surveyed small-business owners on current and future perceptions of their business financial situation. Visit the Wells Fargo Business Insight Resource Center to access the full survey report and listen to Wells Fargo Senior Economist, Dr. Scott Anderson, in his quarterly Small Business Index podcast.

Survey Methods

Results for the total dataset are based on telephone interviews with 600 small-business owners, conducted Jan. 9-13, 2012. For results based on the total sample of small-business owners, one can say with 95% confidence that the maximum margin of sampling error is ±4 percentage points.

Sampling is done on an RDD basis using Dun & Bradstreet sampling of small businesses having $20 million or less of sales or revenues. The data are weighted to be representative of U.S. small businesses within this size range nationwide.

In addition to sampling error, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public opinion polls.

For more details on Gallup's polling methodology, visit www.gallup.com.

The Heritage Foundation
LEADERSHIP FOR AMERICA

BACKGROUNDER

No. 2663 | MARCH 13, 2012

Red Tape Rising: Obama-Era Regulation at the Three-Year Mark

James L. Gattuso and Diane Katz

Abstract
During the first three years of the Obama Administration, 106 new major federal regulations added more than $46 billion per year in new costs for Americans. This is almost four times the number—and more than five times the cost—of the major regulations issued by George W. Bush during his first three years. Hundreds more regulations are winding through the rulemaking pipeline as a consequence of the Dodd–Frank financial-regulation law, the Patient Protection and Affordable Care Act, and the Environmental Protection Agency's global warming crusade, threatening to further weaken an anemic economy and job creation. Congress must increase scrutiny of regulations—existing and new. Reforms should include requiring congressional approval of major rules and mandatory sunset clauses for major regulations.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2663**

Produced by the Thomas A. Roe Institute for Economic Policy Studies

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In January 2011, President Barack Obama announced, with much fanfare, a new get-tough policy on overregulation. Acknowledging that "rules have gotten out of balance" and "have had a chilling effect on growth and jobs," he pledged a comprehensive review of regulations imposed by the federal government.[1] Despite this promise of restraint, however, the torrent of new rules and regulations from Washington continued throughout 2011, with 32 new major regulations.[2] These new rules increase regulatory costs by almost $10 billion annually along with another $6.6 billion in one-time implementation costs.

During the three years of the Obama Administration, a total of 106 new major regulations[3] have been imposed at a cost of more than $46 billion annually, and nearly $11 billion in one-time implementation costs. This amount is about five times the cost imposed by the prior Administration of George W. Bush.

This regulatory tide is not expected to ebb anytime soon. Hundreds of new regulations are winding through the rulemaking pipeline as a consequence of the vast Dodd–Frank financial-regulation law (the Wall Street Reform and Consumer Protection Act), Obamacare, and the

Talking Points

- The regulatory burden on Americans continued to increase throughout 2011, with 32 new major regulations that increase regulatory burdens imposed at a cost of almost $10 billion annually. This regulatory excess is evident in lackluster job creation and anemic economic growth.
- During its first three years in office, the Obama Administration unleashed 106 new major regulations that increased regulatory burdens by more than $46 billion annually, five times the amount imposed by the George W. Bush Administration during its first three years.
- Hundreds more costly new regulations are in the pipeline, many of which stem from the Dodd–Frank financial regulation statute and Obama's health care legislation.
- President Obama's "retrospective review" initiative, intended to rein in unnecessary rules, has yielded few meaningful results.
- Congress must increase scrutiny of regulations—both old and new—including requiring congressional approval of major rules and sunset clauses for each major regulation.

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Environmental Protection Agency's global warming crusade, threatening to further weaken an anemic economy and job creation.

Regulatory Burdens Harm Everyone

In much the same way that high taxes hamper investment and innovation, escalating regulatory costs undermine the American economy. Small businesses in particular are under siege. When surveyed in December 2011 about their single biggest problem by the National Federation of Independent Business, 19 percent of respondents cited "regulations and red tape," up from 15 percent a year ago, and second only to "poor sales."[4]

But regulations are not just a problem for entrepreneurs. American workers and their families have been hit hard by the persistent lack of job creation that results, in part, from regulatory excess. Meanwhile, regulatory costs are passed on to consumers in the form of higher prices and limited product choices. For example, last year's price controls on the fees that banks may charge to process debit-card transactions have prompted cancellation of customer rewards programs and free services, as well as higher fees on checking accounts and credit cards.[5]

Tracking the New Burdens. Neither Congress nor the Administration keeps tabs on the total number and cost of regulations. But by mining the Federal Register and various government databases, new regulations may be identified and regulatory costs calculated. During 2011, the Obama Administration completed a total of 3,611 rulemaking proceedings, according to the Federal Rules Database maintained by the Government Accountability Office (GAO), of which 79 were classified as "major," meaning that each had an expected economic impact of at least $100 million per year.[6] Of those, 32 increased regulatory burdens (defined as imposing new limits or mandates on private-sector activity).[7] Just five major actions decreased regulatory burdens. The remainder of the rules adopted were non-regulatory in nature, such as those setting spending criteria for government programs.

Regulations adopted in 2011 cost Americans some $10 billion in new annual costs, according to estimates by the regulatory agencies.[8]

Overall, from the start of the Obama Administration to January 20, 2012, a total of 10,215 rulemaking proceedings were completed. Those included 244 rulemakings classified as "major," of which 106 increased burdens on private-sector activity. Only 11 major rulemaking actions decreased regulatory burdens. The estimated cost of these new burdens tops $46 billion.[9]

Obama v. Bush. The total number of rulemaking proceedings during the first three years of the Obama Administration (10,215) is slightly less than the total undertaken during the first three years of the Bush Administration (10,674). This led President Obama to assert in his January 2012 State of the Union address that "I've approved fewer regulations in the first three years of my presidency than my Republican predecessor did in his."[10] But looking only at the total number of rulemakings provides a misleading picture. While some have substantial impact, the vast majority of the thousands of

1. "Presidential Documents: Executive Order 13563 of January 18, 2011—Improving Regulation and Regulatory Review," *Federal Register*, Vol. 76, No. 14, January 21, 2011, pp. 3821–3823, at *http://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf* (March 1, 2012).
2. Rules classified as "major" in the Government Accountability Office's Federal Rules Database, and which impose a mandate or restriction on private-sector activity. See Appendix A.
3. *Ibid.*
4. William C. Dunkelberg and Holly Wade, NFIB Small Business Economic Trends *Monthly Report*, December 2011, at *http://www.nfib.com/Portals/0/PDF/sbet/sbet201112.pdf* (March 1, 2012).
5. Diane Katz, "Here Comes the Durbin Tax," Heritage Foundation *The Foundry*, September 30, 2011, at *http://blog.heritage.org/2011/09/30/here-comes-the-durbin-tax/* (March 1, 2011).
6. "Major" is the term used in the Congressional Review Act of 1995 to designate rules which must be transmitted by the Government Accountability Office to Congress for review. It is similar, but not identical, to the term "economically significant," which is used in to designate executive branch rules for which regulatory impact analyses must be prepared by agencies and reviewed by the Office of Management and Budget.
7. See Appendix A for the methodology.
8. New costs totaled $10.1 billion. Minus $212 million from rulemaking proceedings which lessened burdens, the total net new burden is $9.9 billion.
9. New costs over the three-year period totaled $48.1 billion. Minus $1.8 billion from rulemaking proceedings which lessened burdens, the total net new burden is $46.3 billion.

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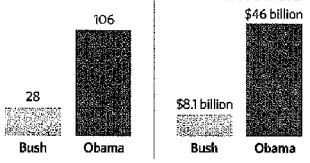
CHART 1

Major Regulations Under Obama: More and Costlier than Under Bush

Figures shown are for first three years of the George W. Bush and Obama Administrations.



Source: Heritage Foundation calculations based on data from the U.S. Government Accountability Office, GAO Federal Rules Database Search, at *http://www.gao.gov/legal/congressact/fedrule.html* (February 21, 2012). See Appendix A for methodology.

B2663 ☎ heritage.org

rules adopted each year are routine actions, such as setting payment rates for Medicare or aviation maintenance bulletins.

It is also important to distinguish between rulemakings that increase regulatory burdens on businesses and individuals and those that do not. During the early 2000s, for example, the Federal Communications Commission adopted hundreds of rules related to freeing radio spectrum for commercial use, actions that generally *eased* government constraints on the private sector. Those rulemakings alone erase most of the gap in total rulemaking between Obama and Bush.

Taking these factors into account, a far clearer picture of relative regulatory activity emerges. According to Heritage Foundation calculations using the GAO database, the George W. Bush Administration adopted 28 major regulations in its first three years, barely a quarter of the 106 imposed by the Obama Administration during its first three years. In terms of cost, the gap was even wider, with the Bush Administration imposing $8.1 billion in new annual regulatory costs compared to the $46 billion imposed during the Obama years to date, a five-to-one ratio.[11]

Excessive regulation, of course, cannot be blamed on the White House alone. A great many of the rules and regulations imposed each year are mandated by Congress, and many others are made possible by intentionally ambiguous statutory language. Others are promulgated by so-called independent agencies not subject to White House control (although they are run by presidential appointees). Regardless of responsibility, the result is the same: more burdens for Americans and the U.S. economy.

The New Regulations of 2011

The 32 regulations that increased regulatory burdens adopted by federal agencies in 2011 covered a broad range of activity, including energy standards for fluorescent ballasts, refrigerators, freezers, clothes dryers, and air conditioners; testing and labeling requirements for toys; limits on automotive emissions of "greenhouse gases"; employer requirements for posting federal labor rules; more explicit warnings for cigarette packaging; health plan eligibility standards under Obama's health care legislation; expanded employment requirements for the disabled; and higher minimum wages for foreign workers.

The largest proportion of regulations by far stemmed from the 2010 Dodd–Frank financial-regulation statute, which was responsible for 12 major rules increasing burdens in 2011, including six from the Securities and Exchange Commission, five from the Commodity Futures Trading Commission, and one from the Federal Reserve. Hundreds more Dodd–Frank rules remain to be written.

The most expensive regulation of 2011 was imposed by the Environmental Protection Agency (EPA), which issued a total of five major regulations at a cost of more than $4 billion annually. Among the new regulations are three that impose stricter limits on industrial and commercial boilers and incinerators, at a total cost of $2.6 billion annually for compliance and $5.8 billion for one-time implementation costs. The EPA had postponed the new rules pending reconsideration by the agency and court review. However, in a legal challenge

10. Technically, the President only "approves" rules which are reviewed by the Office of Management and Budget, which only looks at certain rules, and none by independent agencies. Of those, 2,010 were approved during the first three years of President Obama's' term, four fewer than the 2,014 approved during President Bush's first three years. See Office of Management and Budget, Office of Information and Regulatory Affairs, at *http://www.reginfo.gov/public/*.

11. This includes $9.0 billion in total new annual costs, minus $920 million in rulemaking proceedings lessening burdens.

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by environmental groups, the U.S. District Court for the District of Columbia vacated the agency's administrative stay in January, making the National Emission Standards for Hazardous Air Pollutants (the Boiler MACT) immediately enforceable (although EPA officials have stated that they would not enforce it while the agency modifies the regulation).[12]

In other court action, the Court of Appeals for the D.C. Circuit has delayed implementation of more stringent limits on emissions from coal-fired power plants pending court review. The Cross-State Air Pollution Rule, issued in August, is estimated by the EPA to cost $810 million annually. The State of Texas challenged the rule, claiming that the EPA used faulty assumptions in devising the standards.[13]

More stringent energy conservation standards for refrigerators and freezers also rank among the most costly regulations of 2011. Imposed by the Department of Energy, the mandatory standards will increase regulatory costs by nearly $1.4 billion annually. Energy conservation standards for furnaces and air conditioners will cost an additional $650 million per year, while requirements for fluorescent ballasts will add $363 million more in costs annually.

Agencies Understate Costs. The actual cost of these new regulations is almost certainly higher than the totals reported here. This is largely because the agencies that perform the analyses have a natural incentive to minimize or obfuscate the costs of their own regulations. For some, costs are only partially quantified; for others, not quantified at all. But even quantified costs may often fail to capture the true impacts, as regulators cannot estimate intangibles, the costs of which could dwarf the direct compliance burden. Such undefined costs are inherent in many of the regulations adopted under Dodd–Frank. For instance, in the analysis for its rule providing for shareholder approval of executive compensation, the cost of holding a proxy vote is estimated, but the far larger cost is the risk of losing executive talent, a cost that is probably unquantifiable, but has very real impact. Other intangibles, such as the Fairness Doctrine's infringement on free speech or loss of religious liberty associated with Obamacare insurance mandates, are even more difficult to quantify.

Moreover, some rules categorized as "non-major" by regulators are in fact quite substantial. For instance, last September, the Federal Communications Commission (FCC) adopted "net neutrality" rules, which impose broad restrictions on Internet service providers. These new rules, which have been vigorously debated for years, will have vast impact on how the Internet is managed, yet the FCC did not flag them as "major."

In many cases, the quality of the cost analysis is substandard. In his final act last January as inspector general of the Securities and Exchange Commission (SEC), David Kotz bluntly criticized the SEC's cost-benefit analyses as "ambiguous" and "internally inconsistent."[14] In a case decided in 2011, the U.S. Court of Appeals for the D.C. Circuit threw out the SEC's regulation on proxy voting after concluding that

> [T]he Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.[15]

This is no small matter considering that the SEC issued 21 percent of the new major regulations in 2011 that increased burdens, and reported less than 1 percent of the costs.

The EPA is also notorious for understating costs. Last July, the agency finalized its Cross-State Air Pollution Rule, which imposed more stringent emissions limits on power plants in 27 states, estimating the cost at $800 million annually. A number of other sources—some tied to the affected industry, some not—forecast much worse impacts. According to the Brattle Group, an economic consulting firm that works with the electrical power industry,

12. David L. Rieser, Neal J. Cabral, Gordon R. Alphonso, D. Cameron Prell, and Dana P. Palmer, "United States: Boiler MACT: Now What?" Mondaq, January 18, 2012, at *http://www.mondaq.com/unitedstates/x/161326/Clean+Air+Emissions/Boiler+MACT+Now+What* (March 1, 2012).
13. Eileen O'Grady, "Court Delays EPA Rule on Coal Plants," Reuters, December 31, 2011, at *http://uk.reuters.com/article/2011/12/31/us-utilities-epa-idUKTRE7BT1Z420111231* (March 1, 2012).
14. Sarah N. Lynch, "Exiting Watchdog Sees Flaws in SEC's Rulewriting," Reuters, January 30, 2012, at *http://www.reuters.com/article/2012/01/30/us-sec-cost-benefit-report-idUSTRE80T01V20120130* (March 1, 2012).
15. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir., 2011).

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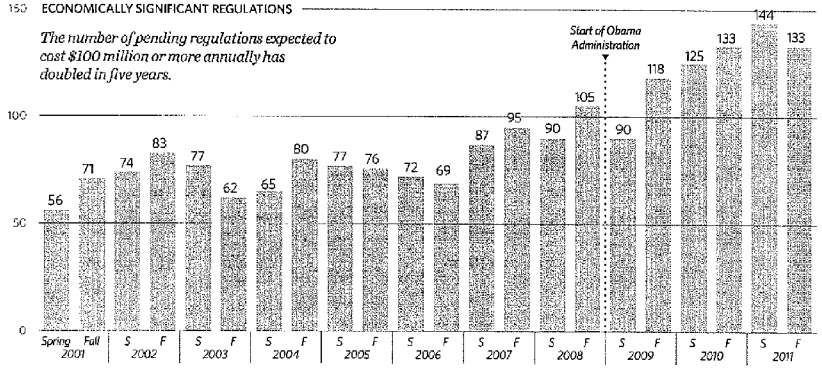
CHART 2

More Costly Regulations in the Pipeline



Source: Data obtained from Office of Information and Regulatory Affairs, Office of Management and Budget, "Unified Agenda and Regulatory Plan Search Criteria," at *http://www.reginfo.gov/public/do/eAgendaAdvancedSearch* (February 21, 2012). (Note: Under "Agency or Agencies," select "All," then "Continue." Under the "Priority" subheading, select "Economically Significant." Under "Agenda Stage of Rulemaking," select "Proposed Rule Stage" and "Final Rule Stage.")

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for instance, the costs of the regulation would total $120 billion by 2015.[16]

Similarly, the EPA pegged the costs of the Boiler MACT at $2.6 billion annually. The Council of Industrial Boiler Owners, on the other hand, estimates that the regulation will entail compliance costs of $14.5 billion.[17]

The National Labor Relations Board (NLRB) likewise minimized the cost of its new rule requiring additional notifications to employees about employment laws. The board contended that the regulation will impose a mere $64.40 per employer, on average, in the first year (for a national total of $386.4 million). An analysis by the law firm of Baker & McKenzie estimated that each private-sector employee will spend at least one hour in meetings related to the regulation, resulting in a productivity loss to the economy of $3.5 billion—almost 10 times the NLRB figure.[18]

Hundreds of New Rules Looming. Dozens more regulations were slated for 2011, but the Administration failed to meet statutory deadlines. According to business consultancy Davis Polk, 225 Dodd–Frank rulemaking deadlines have passed.[19] Of those, 164—more than seven of 10—have been missed. Regulators have not yet even released proposals for 24 of the 164 missed rules.

The most recent Unified Agenda (also known as the Semiannual Regulatory Agenda)—a bi-annual compendium of planned regulatory actions as reported by agencies lists 2,576 rules (proposed and final) in

16. Metin Celebi, Frank Graves, Gunjan Bathla, and Lucas Bressan, "Potential Coal Plant Retirements Under Emerging Environmental Regulations," The Brattle Group, December 8, 2010, at *http://www.brattle.com/_documents/UploadLibrary/Upload898.pdf* (March 7, 2012).
17. Robert D. Bessette, "Comments of the Council of Industrial Boiler Owners on EPA Proposed Reconsidered Rule 'National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers,'" February 21, 2012, at *http://www.cibo.org/pubs/0790_feb21.pdf* (March 7, 2012).
18. "Notification of Employee Rights Under the National Labor Relations Act," *Federal Register*, Vol. 76, No. 168, August 30, 2011.
19. Davis Polk Regulatory Tracker, "Dodd–Frank Progress Report," February 2012, at *http://www.davispolk.com/files/Publication/37a0b7ea-d818-4da0-b097-9903faaef2ec/Presentation/PublicationAttachment/42334bdb-7f53-41b8-bdc0-9f3160e415b2/Feb2012_Dodd.Frank.Progress.Report.pdf* (March 1, 2012).

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the pipeline. The largest proportion—505 rulemakings—is from the Treasury Department, the SEC, and the Commodity Futures Trading Commission—all tasked with issuing hundreds of rules under the massive Dodd–Frank statute. The Environmental Protection Agency is responsible for 174 others, while 133 are from the Department of Health and Human Services, reflecting, in part, the regulatory requirements of Obamacare.

Of the 2,576 pending rulemakings in the fall 2011 agenda, 133 are classified as "economically significant." With each of these expected to cost at least $100 million annually, they represent a total additional burden of at least $13.3 billion every year.

This continues the high levels of the Unified Agenda that started in the last two years of the Bush Administration. In the past decade, the number of economically significant rules in the agenda has increased by more than 137 percent, rising from 56 in spring 2001 to 133 in fall 2011.

Meanwhile, rulemaking related to Obama's health care legislation encompasses more than 150 federal agencies, bureaus, and commissions. And, it appears that the rules are changing faster than regulators can write them. Administrators have granted nearly 2,000 waivers to the new health care regulations, for instance, while the long-term-care insurance plan called for in the legislation has been dropped as completely unworkable.

Rule Books Bulging. Other measures of regulatory activity have also shown an increase in recent years. One of the most commonly cited measures is the size of the *Federal Register*, the official daily chronicle of regulatory changes. Before any new rule can take effect, it must be published in the *Federal Register*. In 2009, the *Federal Register* was 68,598 pages long. In 2010, it expanded sharply to 81,405. In 2011, the number of pages hit 82,415, a new record.[20]

The Myth of Retrospective Review

In January 2011, responding to criticism that the nation's regulatory burden had grown too onerous, and acknowledging the need to eliminate ineffective and harmful regulations, President Obama issued an executive order calling for an agency-by-agency "retrospective review" of regulations. On January 3, 2012, the Administration released progress reports from the agencies.[21]

The Administration claimed that its reforms would, if implemented, reduce regulatory costs by $10 billion per year. But little or none of this reduction has materialized. Of the four major actions in 2011 that reduced regulatory burdens, none were the product of the regulatory review initiative. Three—involving air cargo screening, family investment advisors, and debit-card price controls—were modifications of recently imposed regulatory burdens. The fourth, the exemption of milk from "oil spill" regulations, was highlighted in the President's State of the Union speech as an example of the success of the review. In reality, it had been proposed by the EPA in January 2009, and put on hold when the Obama Administration came into office.

The Administration also claims a number of lesser successes, and many of these are dubious as well. The Department of Energy has listed the development of new energy standards for battery chargers as progress. Department officials say the new federal regulation would ease burdens by replacing state standards. However, it appears that California is the only state that has such a regulation.

Meanwhile, the Environmental Protection Agency cites as progress its imposition of emissions rules in tandem with the fuel-efficiency standards from the National Highway Traffic Safety Administration. It is hard to argue that an additional $8.5 billion in new annual costs constitutes regulatory relief. But agency officials claim that the joint standards "will allow the auto manufacturers to more efficiently produce one vehicle fleet to meet the requirements of the National Program." *In fact*, there have never been two different federal rules, so one new one hardly counts as progress.

Many of the claimed reforms are the low-hanging fruit of regulatory excesses that should have been picked long ago. The Department of Transportation only agreed to reform its mandates on anti-collision systems after the railroad industry sued over the issue more than a year ago. The FCC's official repeal of the Fairness Doctrine cleared the books of a rule that has not been enforced since the late 1980s.

20. Data from the U.S. National Archives and Records Administration, Office of the Federal Register.
21. The White House, "Campaign to Cut Waste: Regulation Reform," at *http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system* (March 1, 2012).

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Steps for Congress

Additional congressional oversight is necessary to protect Americans and the economy from runaway regulation. Congress should take steps to increase scrutiny of new and existing regulations to ensure that each is necessary, and that costs are minimized, including:

1. **Require congressional approval of new major regulations promulgated by agencies.** Under the 1996 Congressional Review Act, Congress has the means to veto new regulations. To date, that authority has been used successfully only once, in 1993, on a Department of Labor rule imposing ergonomics standards. The review process would be strengthened by requiring congressional approval before any major regulation takes effect, as called for under the proposed REINS Act, approved by the House late last year (H.R. 10), and a companion bill by the same name (S. 299), which is pending in committee. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself.[22]

2. **Establish a Congressional Office of Regulatory Analysis.** While Congress receives detailed information from the Congressional Budget Office on the state of the budget and on proposals that would affect the budget, it has no independent source of information on regulatory costs. A non-partisan Congressional Office of Regulatory Analysis would help to fill this gap. Such an office could review the impact of legislative proposals, as well as analyze the cost and effectiveness of regulations adopted by agencies. In this way, a congressional regulation office would act as both a complement and counterweight to the Office of Information and Regulatory Affairs.[23]

   The cost of such an office would be minimal, and would pay for itself even if it only reduced the cost of new regulation by 0.5 percent each year.[24] To ensure that it would not increase federal expenditures, it should be paid for through a 0.1 percent reduction in the $50 billion budgeted each year for regulatory agencies.[25]

3. **Establish a sunset date for federal regulations.** While every new regulation promulgated by executive branch agencies undergoes a detailed review, there is no similar process for reviewing the need for regulations already on the books. Old regulations tend to be left in place, even when they are no longer useful.

   This tendency can be particularly harmful when, as now, there is a flood of new and untested regulations. To ensure that substantive review occurs, regulations should automatically expire if they are not explicitly reaffirmed by the agency through a notice and comment rulemaking. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Sunset clauses already exist for some new regulations. Regulators, and if necessary, Congress, should make them the rule, not the exception.[26]

Conclusion

Despite the weak economy, the Obama Administration continued to increase the regulatory burden on Americans in 2011, adding 32 major regulations that increase regulatory burdens, almost $10 billion in annual costs, and $6.6 billion in one-time implementation costs. From the beginning of the Obama Administration through 2011, a staggering 106 major regulations that increase regulatory burdens have been issued, with costs exceeding $46 billion. While the President has acknowledged the need to rein in regulation, the steps taken to date have been meager.

The President cannot have it both ways—having identified overregulation as a problem, he must take real and significant steps to rein it in. At the same time, Congress—which shares much of the blame for excessive regulation—must establish critical mechanisms to ensure that unnecessary and excessively costly regulations are not imposed on

22. James L. Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo* No. 3394, October 13, 2011, at *http://thf_media.s3.amazonaws.com/2011/pdf/wm3394.pdf*.
23. Legislation to establish such an office, H.R. 214, has been introduced in the House by Representative Don Young (R-AK).
24. Assumes a cost of $50 million, approximately the same amount that the Congressional Budget Office assumes.
25. As estimated in Susan Dudley and Melinda Warren, "Fiscal Stalemate Reflected in Regulators' Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012," George Washington University Regulatory Studies Center and Washington University in St. Louis Weidenbaum Center, *Regulators' Budget Report* No. 33, May 11, 2011, at *http://wc.wustl.edu/files/wc/2012_Regulators_Budget_2.pdf* (March 1, 2012).
26. Legislation to require agencies to conduct such periodic review, H.R. 3392, has been introduced in the House by Representative Benjamin Quayle (R-AZ).

the U.S. economy and Americans. Without decisive steps, the costs of red tape will continue to grow, and the economy—and average Americans—will be the victims.[27]

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27. This paper is the sixth in an ongoing series of reports measuring trends in regulatory activity. The previous reports are: (1) James L. Gattuso, "Reining in the Regulators: How Does President Bush Measure Up?" Heritage Foundation *Backgrounder* No. 1801, September 28, 2004, at *http://www.heritage.org/Research/Regulation/bg1801.cfm*; (2) Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation *Backgrounder* No. 2116, March 25, 2008, at *http://www.heritage.org/research/regulation/bg2116.cfm*; (3) Gattuso and Stephen A. Keen, "Red Tape Rising: Regulation in the Obama Era," Heritage Foundation *Backgrounder* No. 2394, updated April 8, 2010, at *http://www.heritage.org/Research/Reports/2010/03/Red-Tape-Rising-Regulation-in-the-Obama-Era*; (4) Gattuso, Diane Katz, and Keen, "Red Tape Rising: Obama's Torrent of New Regulation," Heritage Foundation *Backgrounder* No. 2482, October 26, 2010, at *http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation*; and (5) Gattuso and Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounder* No. 2586, July 25, 2011, at *http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report*.

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Appendix A

Methodology

Data on the number and cost of regulations are based on rules reported to Congress by the Government Accountability Office (GAO) pursuant to the Congressional Review Act of 1996 and available from the GAO's Federal Rules Database (*http://www.gao.gov/legal/congressact/fedrule.html*). Rules included are those categorized as "major." All such rules appearing in the database as of February 29, 2012, are included. Rules adopted before that date, but not yet posted in the GAO database, are not included.

Rules that do not limit activity or mandate activity by the private sector were excluded from the totals provided. Thus, for instance, budgetary rules that set reimbursement rates for Medicaid or conditions for receipt of agricultural subsidies are excluded.

The GAO database includes rulemakings from all agencies, including independent agencies, such as the Federal Communications Commission and the Securities and Exchange Commission, which are not required to submit analyses to the Office of Management and Budget for review. If an agency did not prepare an analysis, or did not quantify costs, no amount was included, although the rule was included in the count of major regulations.

Cost figures are based on Regulatory Impact Analyses conducted by agencies issuing each rule. The agencies' totals were then adjusted to constant 2010 dollars using the GDP deflator at Areppim's "Current to Real Dollars Converter" (*http://stats.areppim.com/calc/calc_usdlrxdeflator.php*). Adjustments for rules adopted in 2009 and 2010 were made in July 2011; all others were made in February 2012, which result in slight variances due to changes in GDP estimates.

Where applicable, a 7 percent discount rate was used. Where a range of values was given by an agency, costs were based on the most likely scenario if so indicated by the agency; otherwise the mid-point value was used. The date of a rule was based, for classification purposes, on the date of publication in the *Federal Register*. Rules were attributed to particular Administrations based on the Federal Register publication date.

As this study focuses on the cost of major regulations, rather than the cost-benefit trade-off, no benefits or "negative costs" were included. We believe that an awareness of the total costs of regulation being imposed is itself a critical factor in regulatory analysis, in the same way that accounting for federal spending is a critical factor in expenditure analysis. Inclusion of a regulation in our totals, however, is not meant to indicate that it is unjustified. For actions reducing regulatory burdens, we used estimates provided by agencies that described the savings to consumers or society from the action.

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Appendix B

Major Rules Increasing Private-Sector Burdens January 1, 2011–January 20, 2012 (All figures in constant 2010 dollars)

- **January 19, 2011: Employment and Training Administration, Department of Labor, "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program."** Increased minimum-wage rates for foreign workers employed under the H-2B visa program. The final rule was strongly opposed by employers. In a letter to the Department of Labor, the U.S. Chamber of Commerce wrote: "There is nothing in the content of the Final Rule that in any way assists...employers to expand their business and increase hiring. In fact, the effect of the Final Rule is exactly the opposite and will dramatically drive up costs for...employers, in many cases by more than 50%, which will end up destroying jobs for U.S. workers."[28]
  Annual Cost: $847.4 million

- **January 19, 2011: National Highway Traffic Safety Administration, Department of Transportation, "Federal Motor Vehicle Safety Standards, Ejection Mitigation."** Required modification of air bags and window design to reduce the possibility of vehicle occupants being ejected in a crash. New standards will increase the average sticker price of cars and light trucks by $53 to $200.
  Annual Cost: $511.8 million

- **January 25, 2011: Securities and Exchange Commission, "Issuer Review of Assets in Offerings of Asset-Backed Securities."** Implemented a provision of Dodd–Frank requiring issuers who register the offer and sale of an asset-backed security (ABS) to review the assets underlying the ABS. Critics argued that the new rule will "only cause the market to seize up further, rather than get credit flowing again as intended."[29]
  (Note: The SEC's cost figure only represents the cost of "outside" professional help, and not the estimated 286,016 additional work hours necessary to comply, or three-quarters of the total "internal" work required).
  Annual Cost: $8.4 million

- **January 26, 2011: Securities and Exchange Commission, "Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act."** Required securitizers of asset-backed securities to disclose fulfilled and unfulfilled repurchase requests. Adopted concurrently with the asset-backed security rule above.
  Annual Cost: $2.2 million
  Initial Cost: $23 million

- **February 2, 2011: Securities and Exchange Commission, "Shareholder Approval of Executive Compensation and Golden Parachute Compensation."** Implemented section 951 of Dodd–Frank requiring companies to conduct a separate shareholder advisory vote to approve executive compensation. Many predict that such requirements will make it more difficult for U.S. companies to recruit and retain executives.
  Annual Cost: $7.8 million

- **March 21, 2011: Environmental Protection Agency, "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units."** Established new standards of performance and emission limits for solid waste incinerators. A petition to stay the rule by a number of industry associations noted "substantial uncertainty as to the applicability of the final rules"; "key elements... not supported by the underlying data"; and "several of the emissions standards are so stringent that companies predict that no

28. Letter from Randal K. Johnson and Michael W. Dendas, U.S. Chamber of Commerce, to William L. Carlson, U.S. Department of Labor, March 21, 2011, at *http://www.uschamber.com/sites/default/files/comments/US%20Chamber%20H-2B%20Wage%20Phase-In%20Comments%20Final%203-21-11.pdf* (March 1, 2012).
29. Ben Protess, "S.E.C. Approves New Rules for Asset-Backed Securities," *Dealbook (The New York Times)*, January 20, 2011, at *http://dealbook.nytimes.com/2011/01/20/s-e-c-approves-new-rules-for-asset-backed-securities/* (March 1, 2012).

viable means of complying with them will be devised."[30]
Annual Cost: $286.2 million
Initial Cost: $721.7 million

- **March 21, 2011: Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters."** Established new emissions standards for hundreds of thousands of commercial, institutional, and industrial boilers. The Council of Industrial Boiler Owners pegged the total cost of the regulation at $14.5 billion. The U.S. Small Business Administration warned that the rules would cause "significant new regulatory costs" for businesses, institutions, and municipalities across the country. A Commerce Department analysis reportedly concluded that the rules as originally configured would cause job losses of 40,000 to 60,000—much greater than the EPA had claimed.[31]
Annual Cost: $1.8 billion
Initial Cost: $5.2 billion

- **March 21, 2011: Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers."** Same as above, but for smaller facilities.
Annual Cost: $546.9 million

- **March 25, 2011: Equal Employment Opportunity Commission (EEOC), "Regulations to Implement the Equal Employment Provisions of the Americans with Disability Act, As Amended."** Expanded the definition of the term "disability," and delineated the extra accommodations that employers must provide to disabled employees and customers. Critics note that the commission, for the first time, listed specific medical conditions that will "virtually always" count as covered impairments, thereby unilaterally categorizing tens of millions of Americans as disabled. Moreover, the new regulation treats any impairment—no matter how brief in duration—as a covered disability. Employment attorneys say the changes will burden employers with compliance challenges as well as with litigation that will inevitably follow the EEOC's expansive approach.[32]
Annual Cost: $121.5 million

- **April 21, 2011: Office of Energy Efficiency and Renewable Energy, Department of Energy, "Energy Conservation Program: Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners."** Increased energy conservation standards for residential clothes dryers and room air conditioners. Will raise the cost of home appliances.
Annual Cost: $161.8 million

- **April 25, 2011: Federal Reserve Board, "Truth in Lending."** Instituted a higher APR threshold for determining whether "jumbo" mortgage loans secured by a first lien on a consumer's principal dwelling are higher-priced mortgage loans for which an escrow account must be established. According to the Small Business Administration's Office of Advocacy, "These burdensome changes may lead to small entities leaving the mortgage industry which could have a negative impact on the availability of mortgages, competition and the consumer."[33]
Annual Cost: No estimate provided by the Federal Reserve Board.

- **June 3, 2011: Office of the Secretary, Department of the Treasury, "Regulations Governing Practice Before the Internal Revenue Service."** Required IRS certification of tax preparers.
Annual Cost: $47.5 million

30. Petition to the EPA, April 27, 2011, at *http://shopfloor.org/wp-content/uploads/2011/04/Boiler-MACT-CISWI-Administrative-Stay-Request-4-27-11-w-Appx.pdf* (March 1, 2012).
31. Diane Katz, "EPA's Boiler MACT Rules Still a Threat," Heritage Foundation *WebMemo* No. 3271, May 25, 2011, at *http://www.heritage.org/research/reports/2011/05/epas-boiler-mact-rules-still-a-threat*.
32. Seyfarth Shaw, LLP, "New AOA Regulations Issued: EEOC Rules Mean Virtually Everyone Is Disabled," *Uncomplicating Management*, April 3, 2011, at *http://nckdocri.wordpress.com/2011/04/03/new-aoa-regulations-issued-eeoc-rules-mean-virtually-everyone-is-disabled/* (March 1, 2012).
33. Letter from Winslow Sargeant, chief counsel for advocacy, to The Honorable Jennifer J. Johnson, Federal Reserve, December 23, 2010, at *http://www.sba.gov/content/letter-dated-122310-board-governors-federal-reserve-system* (March 1, 2012).

- **June 22, 2011: Department of Health and Human Services, "Required Warnings for Cigarette Packages and Advertisements."** Required stark illustrations of smoking risks to be displayed on cigarette packages and in cigarette advertisements. However, Judge Richard Leon of the U.S. District Court for the District of Columbia ruled in February that the mandate violates the First Amendment, finding that the required images constitute direct advocacy to not buy the product rather than warnings that inform consumers about the effects of smoking.[34]
  Annual Cost: None
  Initial Cost: $342.7 million

- **June 27, 2011: Office of Energy Efficiency and Renewable Energy, Department of Energy, "Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps."** Set more stringent efficiency standards for home heating and cooling appliances. The regulation is expected to drive up the price of heating and air conditioning equipment. Although the Energy Department claims that these costs will be offset by lower utility bills, others disagree. According to the Air Conditioning Contractors Association, "DOE has created a new regulatory scheme that is ripe for abuse without fully considering the costs of compliance or the exposure to problems."[35]
  Annual Cost: $657.5 million

- **June 30, 2011: Department of Housing and Urban Development, "SAFE Mortgage Licensing Act: Minimum Licensing Standards and Oversight Responsibilities."** Set minimum standards for state licensing and registration of residential mortgage loan originators and requirements for operating the Nationwide Mortgage Licensing System and Registry.
  Annual Cost: $377.1 million
  (Cost estimate assumes no state regulation; the incremental cost will be lower for companies operating under state regulation. The full amount is counted here because the regulation establishes a cost floor).

- **July 8, 2011: Department of Health and Human Services, "Administrative Simplification: Adoption of Operating Rules for Eligibility for a Health Plan and Health Care Claim Status Transactions."** As required by Obamacare, established operating standards for the health care industry to facilitate electronic transactions.
  Annual Cost: $547.5 million

- **July 19, 2011: Securities and Exchange Commission, "Rules Implementing Amendments to the Investment Advisers Act of 1940."** As called for under Dodd–Frank, expanded the registration threshold for investment advisers, required advisers to hedge funds, and increased reporting requirements for investment advisers.
  Annual Cost: $0.9 million
  Initial Cost: $49.1 million

- **July 20, 2011: Federal Reserve Board, "Debit Card Interchange Fees and Routing."** Imposed price controls on the fees banks may charge to process debit-card transactions, as authorized under Dodd–Frank. Banking industry claims that losses of $6.6 billion annually will force cancellation of rewards programs, higher fees on checking accounts, and annual fees for credit cards.[36]
  Annual Cost: No estimate provided by the Federal Reserve Board.

- **August 3, 2011: Securities and Exchange Commission, "Large Trader Reporting."** Required large traders to register with the SEC, and to comply with new reporting and record-keeping requirements. Aimed at preventing "flash crashes" of the stock markets, such as that occurring in May 2010. There was "significant opposition" to this rule, based on the cost and the effect on foreign competition.[37]
  Annual Cost: $18 million
  Initial Cost: $37 million

34. *R. J. Reynolds Tobacco Co. v. FDA*, __ F. Supp 2d __ (D. D.C. 2012).
35. "Comments of the Air Conditioning Contractors of America (ACCA) on the Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps," U.S. Department of Energy, Docket No. EERE-2011-BT-STD-0011, at *https://www.acca.org/Files/?id=788* (March 1, 2012).
36. Katz, "Here Comes the Durbin Tax."
37. Nina Mehta, "Cloak Comes Off Biggest Stock Traders in SEC Monitoring Mandate," Bloomberg, August 18, 2011, at *http://www.bloomberg.com/news/2011-08-18/cloak-comes-off-biggest-stock-traders-in-sec-monitoring-mandate.html* (March 1, 2012).

- **August 8, 2011: Environmental Protection Agency, "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals."** Mandated 27 eastern, midwestern, and southern states to achieve more stringent emissions reductions from power plants. The rule has been challenged by Texas as threatening the reliability of the electrical supply.
  Annual Cost: $846.3 million

- **August 30, 2011: National Labor Relations Board, "Notification of Employee Rights Under the National Labor Relations Act [NLRA]."** Required employers to post notices informing employees of their rights under the NLRA, and established the size, form, and content of the notice. The U.S. Chamber of Commerce has filed a lawsuit alleging that the regulation violates federal labor and regulatory laws, as well as the First Amendment.[38]
  Annual Cost: No estimate provided by the NLRB.
  Initial Cost: $378.4 million

- **September 1, 2011: Commodity Futures Trading Commission, "Swap Data Repositories: Registration Standards, Duties and Core Principles."** Established registration requirements and other obligations for registered swap data repositories, as called for under Dodd–Frank.
  Annual Cost: $60.8 million (This figure reflects only partial costs. Commission officials say they are unable to estimate the cost accurately "given existing technologies, the current state of the swaps market and the potential growth in the future.")
  Initial Cost: $118 million

- **September 15, 2011: National Highway Traffic Safety Administration, Environmental Protection Agency and Department of Transportation, "Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles."** Set fuel-efficiency and emissions standards for combination tractors, heavy-duty pickups and vans, and vocational vehicles. The regulation is expected to drive up prices for trucks by as much as $6,000, with the added burden falling heavily on small, independent owner-operators.[39]
  Annual Cost: $606.9 million

- **September 15, 2011: Department of Energy, "Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers."** Set more stringent energy-efficiency standards for appliances. The Department of Energy claims that the greater efficiency will save consumers money. But critics say the added costs may dissuade consumers from purchasing new appliances, and that it is not the proper role of government to dictate supposed energy savings for consumers that consumers do not bother to capture themselves.[40]
  Annual Cost: $1.4 billion

- **November 8, 2011: Commodity Futures Trading Commission, "Derivatives Clearing Organization General Provisions and Core Principles."** Among other things, established regulatory standards for financial resources; participant and product eligibility; risk management; settlement procedures; treatment of funds; default rules and procedures; rule enforcement; system safeguards; reporting; recordkeeping; public information; information sharing; antitrust considerations; and legal risk.
  Annual Cost: $5.7 million (This figure reflects only reporting costs. No other cost estimate provided by the commission.)

- **November 8, 2011: Consumer Product Safety Commission, "Testing and Labeling Pertaining to Product Certification."** Established standards for certification, testing, and labeling of children's products.
  Annual Cost: $192.9 million (This figure refers only to "recordkeeping." The actual testing costs are estimated as $4.7 million

38. News release, "U.S. Chamber Sues NLRB to Block Notification Rule," U.S. Chamber of Commerce, September 20, 2011, at *http://www.uschamber.com/press/releases/us-chamber-sues-nlrb-block-notification-rule* (March 1, 2012).
39. "New Emissions Rule to Drive Truck Prices Higher," *Truckers News*, August 9, 2011, at *http://www.truckersnews.com/new-emissions-rule-to-drive-truck-prices-higher/* (March 1, 2012).
40. "Energy Conservation Standards for Residential Refrigerators," Mercatus Center, George Mason University, Regulatory Report Card, September 27, 2010, at *http://mercatus.org/search/apachesolr_search/residential%20refrigerator* (March 1, 2012).

per year for each large manufacturer; $467,015 per year for each small manufacturer; and $6,222 per year for a small-batch manufacturer.)

- **November 14, 2011: Department of Energy, "Energy Conservation Standards for Fluorescent Lamp Ballasts."** Established energy-efficiency standards and testing and labeling requirements for fluorescent lamp ballasts. As with other energy conservation standards, critics contend that the touted energy savings are overly optimistic and that it is not the proper role of government to dictate energy savings for consumers.
  Annual Cost: $363 million

- **November 16, 2011: Securities and Exchange Commission, "Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF."** Required investment advisers registered with the SEC that advise one or more funds and have at least $150 million in private-fund assets under management to comply with filing and record-keeping requirements.
  Annual Cost: $59.3 million
  Initial Cost: $58.8 million

- **November 18, 2011: Commodity Futures Trading Commission (CFTC), "Position Limits for Futures and Swaps."** Under Dodd–Frank, established federal position limits and limit formulas for 28 physical commodity futures and option contracts and physical commodity swaps that are economically equivalent to such contracts. This regulation was intended to stop excessive speculation in futures markets, but critics question whether speculation is a problem. According to Democratic CFTC member Michael Dunn, the regulation "may actually make it more difficult for farmers, producers and manufacturers to hedge the risks they take in order to provide the public with milk, bread and gas."[41]
  Annual Cost: $96.4 million
  Initial Cost: $4.1 million

- **December 19, 2011: Commodity Futures Trading Commission, "Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions."** Amended CFTC regulations on investment of customer-segregated funds and others related to permitted investments, liquidity requirements, removal of rating requirements, and expansion of concentration limits.
  Annual Cost: No estimate provided by the CFTC.

- **December 27, 2011: Federal Motor Carrier Safety Administration, Department of Transportation, "Hours of Service of Drivers."** Revised the hours of service regulations to limit the use of the 34-hour restart provision to once every 168 hours, and required that anyone using the 34-hour restart provision have as part of the restart two periods that include 1 a.m. to 5 a.m. The American Trucking Associations has filed suit in federal court to overturn the rule, arguing that even [the DOT's] "own analyses show that even when they overstate the safety benefits of these changes, the costs created by their rule still outweigh those benefits."[42]
  Annual Cost: $470 million

- **December 29, 2011: Securities and Exchange Commission, "Net Worth Standard for Accredited Investors."** As required by Dodd–Frank, amended the accredited investor standards to define "accredited investor" to exclude the value of a person's primary residence on the basis of having a net worth in excess of $1 million. Other technical amendments.
  Annual Cost: No estimate provided by the SEC.

- **January 9, 2012: Commodity Futures Trading Commission, "Real-Time Public Reporting of Swap Transaction Data."** As required by Dodd–Frank, established standards and requirements for real-time reporting and public availability of swap transaction and pricing data.
  Annual Cost: No figures provided by the CFTC.

- **January 10, 2012: Office of the Secretary, Department of Health and Human Services, "Administrative Simplification:**

41. Asjylyn Loder and Silla Brush, "Top U.S. Regulator Approves New Limit on Commodity Speculation in 3-2 Vote," Bloomberg, October 18, 2011, at *http://www.bloomberg.com/news/2011-10-18/cftc-votes-3-2-to-approve-new-limits-on-commodity-speculation.html* (March 1, 2012).
42. William B. Cassidy, "ATA Takes Anti-Fatigue Driver Work Rule to Court," *The Journal of Commerce*, February 14, 2012, at *http://www.joc.com/regulation/ata-takes-anti-fatigue-driver-work-rule-court* (March 1, 2012).

Adoption of Standards for Health Care Electronic Funds Transfers and Remittance Advice." As required by President Obama's health care legislation, established adoption of standards for electronic funds transfers.
Annual Cost: $33 million

- **January 13, 2012: Commodity Futures Trading Commission, "Swap Data Recordkeeping and Reporting Requirements."** As called for under Dodd–Frank, the rule instituted recordkeeping and reporting requirements for swap data repositories, derivatives-clearing organizations, designated contract markets, swap execution facilities, swap dealers, major swap participants, and swap counterparties who are neither swap dealers nor major swap participants.
Annual Cost: $1.1 billion
Initial Cost: $2.5 billion

BACKGROUNDER | NO. 2663
MARCH 13, 2012

Major Rules Decreasing Regulatory Burdens on the Private Sector January 1, 2011–January 20, 2012 (All figures in constant 2010 dollars)

- **April 18, 2011: Environmental Protection Agency, "Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure (SPCC) Rule—Amendments for Milk and Milk Product Containers."** Exempted all milk and milk product containers and associated piping and appurtenances from spill prevention and control requirements.
  Annual Savings: $147.68 million

- **June 29, 2011: Securities and Exchange Commission, "Family Offices."** Under Dodd–Frank, excluded family offices from definition of investment advisers and redefined family offices for the purposes of that exclusion.
  Annual Savings: No figures provided by the SEC.

- **July 20, 2011: Federal Reserve Board, "Debit Card Interchange Fees and Routing."** Allowed a debit-card issuer to receive an adjustment of 1 cent to its interchange transaction fee if the issuer develops, implements, and updates policies and procedures to identify and prevent fraudulent electronic debit transactions. Adopted concurrently with underlying price control rules on interchange fees.
  Annual Savings: No figures provided by the Federal Reserve Board.

- **August 18, 2011: Department of Homeland Security, "Air Cargo Screening."** Removed third-party validations of cargo screening programs in favor of TSA conducting all assessments for cargo-screening certification.
  Annual Savings: $68.65 million

- **October 25, 2011: Department of Labor, "Investment Advice—Participants and Beneficiaries."** Largely confirmed exemption to limits on the provision of investment advice to participants and beneficiaries in individual accounts, such as 401(k) plans.
  Annual Savings: None

The Economist

Measuring the impact of regulation

The rule of more

Rule-making is being made to look more beneficial under Barack Obama

Feb 18th 2012 | WASHINGTON, DC | from the print edition

IN

DECEMBER Barack Obama trumpeted a new standard for mercury emissions from power plants. The rule, he boasted, would prevent thousands of premature deaths, heart attacks and asthma cases. The Environmental Protection Agency (EPA) reckoned these benefits were worth up to $90 billion a year, far above their $10 billion-a-year cost. Mr Obama took a swipe at past administrations for not implementing this "common-sense, cost-effective standard".

A casual listener would have assumed that all these benefits came from reduced mercury. In fact, reduced mercury explained none of the

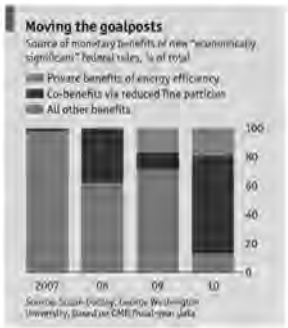
purported future reduction in deaths, heart attacks and asthma, and less than 0.01% of the monetary benefits. Instead, almost all the benefits came from concomitant reductions in a pollutant that was not the principal target of the rule: namely, fine particles.

The minutiae of how regulators calculate benefits may seem arcane, but matters a lot. When businesses complain that Mr Obama has burdened them with costly new rules, his advisers respond that those costs are more than justified by even higher benefits. His Office of Information and Regulatory Affairs (OIRA), which vets the red tape spewing out of the federal apparatus, reckons the "net benefit" of the rules passed in 2009-10 is greater than in the first two years of the administrations of either George Bush junior or Bill Clinton.

But those calculations have been criticised for resting on assumptions that yield higher benefits and lower costs. One of these assumptions is the generous use of ancillary benefits, or "co-benefits", such as reductions in fine particles as a result of a rule targeting mercury.

Mr Obama's advisers note that co-benefits have long been included in regulatory cost-benefit analysis. The logic is sound. For instance, someone may cycle to work principally to save money on fuel, parking or bus fares, but also to get more exercise. Both sorts of benefit should be counted.

The controversy arises from the overwhelming role that co-benefits play in assessing Mr Obama's rule-making. Fully two-thirds of the benefits of economically significant final rules reviewed by OIRA in 2010 were thanks to reductions in fine particles brought about by regulations that were actually aimed at something else, according to Susan Dudley of George Washington University, who served in OIRA under George Bush (see chart). That is double the share of co-benefits reported in Mr Bush's last year in office in 2008.



If reducing fine particles is so beneficial, it would surely be more

transparent and efficient to target them directly. As it happens, federal standards for fine-particle concentrations already exist. But the EPA routinely claims additional benefits from reducing those concentrations well below levels the current law considers safe. That is dubious: a lack of data makes it much harder to know the effects of such low concentrations.

Another criticism of the Obama administration's approach is its heavy reliance on "private benefits". Economists typically justify regulation when private market participants, such as buyers and sellers of electricity, generate costs—such as pollution—that the rest of society has to bear. But fuel and energy-efficiency regulations are now being justified not by such social benefits, but by private benefits like reduced spending on fuel and electricity.

Private benefits have long been used in cost-benefit analysis but Ms Dudley's data show that, like co-benefits, their importance has grown dramatically under Mr Obama. Ted Gayer of the Brookings Institution notes that private benefits such as reduced fuel consumption and shorter refuelling times account for 90% of the $388 billion in lifetime benefits claimed for last year's new fuel-economy standards for cars and light trucks. They also account for 92% and 70% of the benefits of new energy-efficiency standards for washing machines and refrigerators respectively.

The values placed on such private benefits are highly suspect. If consumers were really better off with more efficient cars or appliances, they would buy them without a prod from government. The fact that they don't means they put little value on money saved in the future, or simply prefer other features more. Mr Obama's OIRA notes that a growing body of research argues that consumers don't always make rational choices; Mr Gayer counters that regulators do not make appropriate use of that research in their calculations.

Under Mr Obama, rule-makers' assumptions not only enhance the benefits of rules but also reduce the costs. John Graham of Indiana University, who ran OIRA under Mr Bush, cites the new fuel-economy standards as an example. They assume that electric cars have no carbon emissions, although the electricity they use probably came from coal. They also assume less of a "rebound effect"—the tendency of

people to drive more when their cars get better mileage—than was the case under Mr Bush.

Mr Bush's administration was sometimes accused of the opposite bias: understating benefits and overstating costs. At one point his EPA considered assigning a lower value to reducing the risk of death for elderly people since they had fewer years left to live; it eventually backed down. Mr Obama's EPA has considered raising the value of cutting the risk of death by cancer on the ground that it is a more horrifying way to die than others.

More consistent cost-benefit analysis would reduce such controversies. Michael Greenstone of the Hamilton Project, a liberal-leaning research group, thinks that could be done through the creation of a non-partisan congressional oversight body using the best evidence available to vet regulations, much as the Congressional Budget Office vets fiscal policy. It would also re-evaluate old regulations to see if the original analysis behind them was still valid. Rule-making would still require judgment, but it would be less subject to the whims of the people in power.

from the print edition | Finance and economics

The Economist

United States' economy

Over-regulated America

The home of laissez-faire is being suffocated by excessive and badly written regulation

Feb 18th 2012 | from the print edition

AMERICANS love to laugh at ridiculous regulations. A Florida law requires vending-machine labels to urge the public to file a report if the label is not there. The Federal Railroad Administration insists that all trains must be painted with an "F" at the front, so you can tell which end is which. Bureaucratic busybodies in Bethesda, Maryland, have shut down children's lemonade stands because the enterprising young moppets did not have trading licences. The list goes hilariously on.

But red tape in America is no laughing matter. The problem is not the rules that are self-evidently absurd. It is the ones that sound

reasonable on their own but impose a huge burden collectively. America is meant to be the home of laissez-faire. Unlike Europeans, whose lives have long been circumscribed by meddling governments and diktats from Brussels, Americans are supposed to be free to choose, for better or for worse. Yet for some time America has been straying from this ideal.

Consider the Dodd-Frank law of 2010. Its aim was noble: to prevent another financial crisis. Its strategy was sensible, too: improve transparency, stop banks from taking excessive risks, prevent abusive financial practices and end "too big to fail" by authorising regulators to seize any big, tottering financial firm and wind it down. This newspaper supported these goals at the time, and we still do. But Dodd-Frank is far too complex, and becoming more so. At 848 pages, it is 23 times longer than Glass-Steagall, the reform that followed the Wall Street crash of 1929. Worse, every other page demands that regulators fill in further detail. Some of these clarifications are hundreds of pages long. Just one bit, the "Volcker rule", which aims to curb risky proprietary trading by banks, includes 383 questions that break down into 1,420 subquestions.

Hardly anyone has actually read Dodd-Frank, besides the Chinese government and our correspondent in New York (see article (http://www.economist.com/node/21547784)). Those who have struggle to make sense of it, not least because so much detail has yet to be filled in: of the 400 rules it mandates, only 93 have been finalised. So financial firms in America must prepare to comply with a law that is partly unintelligible and partly unknowable.

Flaming water-skis

Dodd-Frank is part of a wider trend. Governments of both parties keep adding stacks of rules, few of which are ever rescinded. Republicans write rules to thwart terrorists, which make flying in America an ordeal and prompt legions of brainy migrants to move to Canada instead. Democrats write rules to expand the welfare state. Barack Obama's health-care reform of 2010 had many virtues, especially its attempt to make health insurance universal. But it does little to reduce the system's staggering and increasing complexity. Every hour spent treating a patient in America creates at least 30 minutes of paperwork,

and often a whole hour. Next year the number of federally mandated categories of illness and injury for which hospitals may claim reimbursement will rise from 18,000 to 140,000. There are nine codes relating to injuries caused by parrots, and three relating to burns from flaming water-skis.

Two forces make American laws too complex. One is hubris. Many lawmakers seem to believe that they can lay down rules to govern every eventuality. Examples range from the merely annoying (eg, a proposed code for nurseries in Colorado that specifies how many crayons each box must contain) to the delusional (eg, the conceit of Dodd-Frank that you can anticipate and ban every nasty trick financiers will dream up in the future). Far from preventing abuses, complexity creates loopholes that the shrewd can abuse with impunity.

The other force that makes American laws complex is lobbying. The government's drive to micromanage so many activities creates a huge incentive for interest groups to push for special favours. When a bill is hundreds of pages long, it is not hard for congressmen to slip in clauses that benefit their chums and campaign donors. The health-care bill included tons of favours for the pushy. Congress's last, failed attempt to regulate greenhouse gases was even worse.

Complexity costs money. Sarbanes-Oxley, a law aimed at preventing Enron-style frauds, has made it so difficult to list shares on an American stockmarket that firms increasingly look elsewhere or stay private. America's share of initial public offerings fell from 67% in 2002 (when Sarbox passed) to 16% last year, despite some benign tweaks to the law. A study for the Small Business Administration, a government body, found that regulations in general add $10,585 in costs per employee. It's a wonder the jobless rate isn't even higher than it is.

A plea for simplicity

Democrats pay lip service to the need to slim the rulebook—Mr Obama's regulations tsar is supposed to ensure that new rules are cost-effective. But the administration has a bias towards overstating benefits and underestimating costs (see article (http://www.economist.com/node/21547772)). Republicans bluster that they will repeal Obamacare and Dodd-Frank and abolish whole government agencies, but give only a sketchy idea of what should

replace them.

America needs a smarter approach to regulation. First, all important rules should be subjected to cost-benefit analysis by an independent watchdog. The results should be made public before the rule is enacted. All big regulations should also come with sunset clauses, so that they expire after, say, ten years unless Congress explicitly re-authorises them.

More important, rules need to be much simpler. When regulators try to write an all-purpose instruction manual, the truly important dos and don'ts are lost in an ocean of verbiage. Far better to lay down broad goals and prescribe only what is strictly necessary to achieve them. Legislators should pass simple rules, and leave regulators to enforce them.

Would this hand too much power to unelected bureaucrats? Not if they are made more accountable. Unreasonable judgments should be subject to swift appeal. Regulators who make bad decisions should be easily sackable. None of this will resolve the inevitable difficulties of regulating a complex modern society. But it would mitigate a real danger: that regulation may crush the life out of America's economy.

from the print edition | Leaders

The Economist

Excessive regulation

Tangled up in green tape

The EPA, Congress, activists, the courts and power companies themselves all share the blame for the chaotic nature of environmental regulation in America

Feb 18th 2012 | WASHINGTON, DC | from the print edition

PITY the

engineers responsible for keeping America's coal-fired power plants up to standard. Late last year a court halted the adoption of new regulations on interstate air pollution that would have affected lots of them—just two days before they were due to go into force. The suspended regulations, in turn, were themselves a replacement for an earlier set of rules which had been thrown out by the courts in 2008. The older lot have now been temporarily reinstated, while the court hears various challenges to the new ones. What the outcome will be is

anyone's guess.

Similar chaos surrounds another set of rules, these ones governing ozone, which will also affect lots of power plants. In 2010 the Environmental Protection Agency (EPA) proposed tightening restrictions on ozone—a surprise in itself, since the rules were not due for review until 2013. Late last year the White House overruled the EPA, and junked the new rules. Since the previous set, dating to 2008, had never been implemented, a standard first adopted in 1997 still applies. But environmentalists have sued to put a fiercer one into force. Whatever happens, the Clean Air Act obliges the EPA to reopen the whole subject again next year.

Last year the EPA also issued rules on mercury and soot from power plants. In theory that marked the culmination of a decades-long, on-again-off-again process first initiated by amendments to the Clean Air Act in 1990—although further lawsuits seem inevitable. Also in the pipeline are restrictions on emissions of greenhouse gases, new rules regarding cooling water and the possible declaration of coal ash as hazardous waste, from which a stream of new requirements would flow.

Confused? So are the power generators. Conforming to these rules often involves installing new kit or changing the way plants are run, and on occasion shutting them down altogether. That is expensive, utilities complain. The EPA itself estimates that meeting the new mercury standards will cost businesses $10 billion a year. Electricity prices, it reckons, will initially rise by 3% a year as a result. It puts the cost of the interstate air pollution rule at $2.4 billion a year, and of the ozone rule (if it is ever implemented) at $20 billion a year at least. Industry groups, naturally, have far higher estimates of the costs.

Perhaps even worse, from the utilities' point of view, is the unpredictable and inconclusive manner in which rules are proposed, modified, rescinded and reinstated by the bureaucracy and the courts. This can make investment in pollution-control gear, let alone new power plants, an especially risky business. Ralph Izzo, the boss of PSEG, a big power-provider, describes how his firm lost millions in the 1990s building natural-gas plants that were not in the end needed, in part because some of the EPA's standards ended up more lenient than originally anticipated.

The EPA retorts that the benefits of all these regulations, largely in the form of diseases and deaths averted, far outweigh the costs, at least by its reckoning. Others question both the inclusion in its sums of ancillary benefits, such as the reduction in fine particles that will accompany cuts in mercury emissions, and the value it assigns to improved public health (see article (http://www.economist.com/node/21547772)). Moreover, the EPA did not dream up the seemingly haphazard process by which most of these rules are formulated and applied: that is dictated by the Clean Air Act, which was approved by Congress in 1970 and updated in 1990, both times with strong bipartisan support.

That bipartisanship has since evaporated. Republicans in Congress now argue that many of the EPA's standards are too onerous for businesses and have introduced legislation to rescind some of them. Newt Gingrich, one of the Republican candidates for president, thinks the EPA is so anti-business as to be beyond repair. He wants to abolish the entire agency and start again. Business lobbying groups are only slightly less vehement in their criticism. The American Chamber of Commerce, for example, routinely denounces EPA regulations as "job-killing".

Barack Obama and his underlings seem acutely sensitive to this charge, and have made several attempts to limit the toll of new regulations on business. In the face of widespread complaints, they withdrew not only the EPA's more exacting ozone standards but also its proposed restrictions on emissions from industrial boilers. They have twisted the Clean Air Act to exempt all but the biggest sources from the coming curbs on greenhouse gases, and have delayed issuing rules even for them, adding to the confusion. When they have pressed ahead with new regulations, they have tried to be flexible, providing for an extended grace period to meet the mercury standards, for example, and preserving a trading scheme for interstate air pollution despite hostility from the courts.

The courts, in fact, are the source of the worst uncertainty surrounding environmental regulation. They have repeatedly forced the EPA to revise its rules, rejecting decisions reached under both Mr Obama and his predecessors. It is now assumed, says Kyle Danish of Van Ness Feldman, a law firm, that any important rule issued by the EPA will

prompt multiple legal challenges. It does not help that the Clean Air Act does not allow the cost of pollution controls to be taken into account when setting certain standards. Nor is it really designed to handle so pervasive and subtle a pollutant as carbon dioxide—a flaw the Obama administration readily concedes.

There seems little hope of updating the Clean Air Act amid the current shouting match about environmental regulation, however, and utilities are far from unanimous about its deficiencies. Mr Izzo, of PSEG, argues that the EPA's standards are scientifically grounded, and that to water them down would be to penalise responsible firms like his which have gone ahead and made the necessary investments. Moreover, it is not clear whether the EPA's critics really would like to see a more predictable rule-making process. Many of the utilities that complain most vociferously about the uncertainty involved actually contribute mightily to it by backing endless legal challenges to new regulations.

from the print edition | United States

The Economist

Deleting regulations

Of Sunstein and sunsets

Many barriers impede regulatory reform. The poor quality of the laws Congress produces is among the biggest

Feb 18th 2012 | NEW YORK | from the print edition

CHEERS greeted Barack Obama's hiring of Cass Sunstein away from the University of Chicago. Mr Sunstein, a lawyer, now head of the Office of Information and Regulatory Affairs, is in charge of lifting the heavy hand of regulation from America's economy. Known for his clever economics, Mr Sunstein favours a "libertarian paternalism"; policies that nudge, but do not force, people to do the right things. For example, making people opt out instead of opting in to pension plans makes many more sign up, to their benefit. And Mr Sunstein has been involved in redesigning dietary recommendations and fuel-efficiency stickers for cars, making formerly confusing information more useful.

The busy nudgemeister

Mr Sunstein is now in charge of overseeing a year-old executive order from Mr Obama telling every agency to slim its rule book. Mr Sunstein says every one has complied, with 580 proposals received from the

departments under his purview. (Independent agencies like the Securities and Exchange Commission are not among them.) And he says real savings are on the way. Lifting a requirement for states to require pollution vapour-recovery systems will save $400m in five years. Making it easier for doctors and hospitals to participate in the Medicare programme for the elderly will save $5 billion. He adds that agencies have responded not grudgingly (the old stereotype of bureaucrats loth to surrender cash or power), but eagerly.

But the Obama administration has added to the rule book at the same time as it is trimming. And many of the rules are big: 194 of them, each with an economic impact (not necessarily a net cost) of $100m or more, have been published in the Federal Register. In George Bush's first three years, 141 hit the books. Even if most have more benefits than costs, as the agencies' economists calculate, the scope of regulation is not shrinking. The overall cost of regulation is unknown, and measurement controversial. One study for the Small Business Administration found that regulation cost $1.75 trillion a year in 2008, though many object to the analysis. It relies on a methodology, invented at the World Bank, which one of the bank's researchers says was misused, and Mr Sunstein dismisses it as "an urban myth".

Meanwhile, the executive agencies are accused of minimising costs by counting only hours spent on paperwork or money spent on kit to comply with regulation. The real costs may be found in the hard-to-calculate perversion of behaviour that over-regulation causes. At the same time, the benefits tallied up by regulators may be overvalued (see article (http://www.economist.com/node/21547772)). The agencies calculate their own numbers, using their own methodologies. But what no one doubts is that compliance with the ever-expanding rule book is wearisome and hard.

Furthermore, the politics of removing regulations is harrowing. Each removal must go through the same cumbersome process it took to put the regulation in place: comment periods, internal reviews and constant behind-the-scenes lobbying. Ironically, regulated industries may actually not want regulations removed. They have sunk costs into compliance, and do not want those costs taken away to the benefit of upstart competitors.

Many proposals are floated to deal with this last problem. One, supported by the Republican candidate Mitt Romney, is to remove one regulation for each new one that is proposed. A second idea is to create a truly independent scorer for regulatory costs and benefits, modelled on the widely respected Congressional Budget Office. A third is to create a board of outside grandees to help break political deadlocks, like the Base Realignment and Closure commission, which was able to prod Congress to shut down military bases. And yet another is creating a full-time advocate for regulatory rollback: one state, Kansas, has created an "Office of the Repealer", which aggregates complaints and suggests repeals to the governor and legislature. Lastly, automatic "sunsets" of laws have their fans, though Congress could mindlessly reauthorise laws gathered up in omnibus bills (and a bitterly divided Congress might allow good laws to lapse).

Finally, one bad idea is the REINS bill. Passed by the House, it would involve Congress more heavily in rule-making. If there is a body worse than the executive agencies at this kind of thing, it is Congress. A 1999 study by the OECD found that poorly written laws, not subsequent rule-writing, were at the heart of America's regulatory woes. (No one has been foolish enough to suggest that Congress has become wiser since then.) Jim Cooper, a Democratic House member from Tennessee, says of his colleagues: "People vote on things they have not read, do not have the time to read, and cannot read." He further despairs of the power of special interests to bend Congress's will: "There is a pimento lobby," he says of those who fight for the interests of those who grow the small red peppers served inside olives. "You do not want to cross the pimento people." In such an environment, getting things undone is at least as hard as getting them done, and perhaps harder still.

from the print edition | United States

The Washington Times

FEULNER: Red ink on the rise

Obama still drowning business in ocean of rules

By Ed Feulner

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The Washington Times

Monday, March 12, 2012

When it comes to regulations, President Obama's message to his conservative critics seems to be: Message received. Early last year, he vowed to crack down on overzealous rule-making, noting that the "rules have gotten out of balance" and "have had a chilling effect on growth and jobs." He's right - they have.

But actions speak louder than words, don't they? Regardless of how tough the president may talk on regulation, his administration has enacted far more major regulations - and significantly more expensive ones - over the first three years of his presidency than the George W. Bush administration enacted during its first three years.

This runs counter to what we've heard from the president's apologists. Over the past several months, they've been bragging about his rule-making record. As the president himself said during his most recent State of the Union address: "I've approved fewer regulations in the first three years of my presidency than my Republican predecessor did in his."

But a new report from the Heritage Foundation, "Red Tape Rising," shows just the opposite is true. This administration has been on a rule-making tear.

Specifically, during the three years of the Obama administration, 106 new major regulations have been imposed at a price tag of more than $46 billion annually - and that's on top of nearly $11 billion in one-time implementation costs.

How does this compare to the number of major regulations that were imposed under President Bush? It's almost four times higher. And the cost? About five times higher. Something's "gotten out of balance," all right. With so many rules being laid on the backs of businesses both large and small, is it any surprise that job creation has been so slow for much of the latest economic recovery?

In December, the National Federation of Independent Business asked small-business owners to name their single biggest problem. The No. 1 choice, named by 19 percent of those who responded, was "regulations and red tape." It came in ahead of "poor sales" (though it's easy to see how all these new rules depress sales). That's up from 15 percent a year ago. Clearly, the regulatory burden is getting heavier.

You can be sure that the weight of that burden is being shared. The costs of these regulations are passed on to consumers in the form of higher prices and limited product choices. Take the price controls that bureaucrats slapped last year on the fees that banks may charge to process debit-card transactions. They prompted banks to cancel many rewards programs and free services. They also led to higher fees on checking accounts and credit cards.

Hardly an area of our lives goes untouched by regulation. The new rules for last year alone cover many consumer items, including refrigerators, freezers, clothes dryers, air conditioners and energy standards for fluorescent lights. There were new testing and labeling requirements for toys, limits on automotive emissions of "greenhouse gases," requirements for posting federal labor rules and more explicit warnings for cigarette packages. The list goes on.

The main troublemaker? The 2010 Dodd-Frank financial regulation law. It alone is responsible for 12 major rules - so far, that is. Hundreds more Dodd-Frank rules remain to be written. Then there are the rules still to come from Obamacare and the Environmental Protection Agency's global-warming crusade.

That's why it's crucial for Congress to take some common-sense steps now. It can start by requiring congressional approval of any new major regulations that agencies promulgate. Another why-haven't-they-thought-of-it-sooner solution: requiring that all major regulations have an expiration (sunset) date.

"This regulatory tide is not expected to ebb anytime soon," warns "Red Tape Rising." Let's act now - before we're all under water.

Ed Feulner is president of the Heritage Foundation (heritage.org).

AMERICAN ACTION FORUM

2011: The Year in Regulation Executive Summary

Mon, 2012-01-02 15:20 | Economy & Regulation | Sam Batkins [1]
[2]

Executive orders, congressional attempts to rescind rules, and a flood of novel rulemakings made 2011 the year of regulation.

In 2010, the administration published 82,480 pages of regulations, passed two comprehensive legislative packages (the Affordable Care Act and Dodd-Frank), and scheduled to regulate greenhouse gases (GHG) for the first time in history. In 2011, the President attempted to preempt critics of his regulatory state when he signed Executive Order (EO) 13563, which reaffirmed many of the principles in President Clinton's EO 12866, and called for a retrospective analysis of "outdated, ineffective, insufficient, or excessively burdensome" regulations. He followed EO 13563 with EO 13579, a request that independent agencies conduct the same review.

Agencies responded with a series of retrospective review plans [3]. In 2011, agencies finalized $187 million in deregulatory actions, and proposed more than $1.1 billion in rescissions. The largest regulatory measure, CMS's "Reform of Hospital and Critical Access," could save $942 million and 9.6 million hours, but the action will not become final until 2012.

These deregulatory measures, however, were dwarfed by the new regulations that the administration published this year. For proposed or final rules, the administration published $231.4 billion in regulatory burdens and 133 million paperwork burden hours. Assuming a 2,000 hour work year, it would take 66,730 employees just to file federal paperwork.

In addition, more than 20.3 million of those hours had no associated cost estimate. Using the Bureau of Labor Statistics (BLS) mean hourly wage for federal "compliance officer" of $29.88, the unassociated labor costs of federal regulations actually total $608.41 million. Thus, the total published regulatory burden for 2011 is closer to $232 billion.

Here is a snapshot of the most expensive regulations in 2011:

Cost	Hours

CAFE Standards for Light-Duty Vehicles: $141.4 billion	Employee Rights Notification: 12 million
Utility MACT Rule: $10.9 billion	Medicaid Eligibility Changes Under ACA: 11.07 million
Greenhouse Gas Standards for Trucks: $8.1 billion	Railroad Conductor Certification: 10.99 million
Conservation Standards for Lamp Ballasts: $6.9 billion	Investment Advice Changes: 8.8 million
Federal School Lunch Standards: $6.8 billion	CHIP Annual Transparency Reporting: 7.99 million

Methodology: This year the Forum tracked approximately 7,000 proposed and final rules. For each entry in the Federal Register we determined if the regulation contained a private-sector cost, a burden on state or local governments, or paperwork reporting requirements. The Forum recorded those burdens in our database. For proposed rules that became final in 2011, the Forum noted the total costs of the final rule and omitted any earlier burdens from the proposed rule. Generally, Federal Register entries contained only annualized costs but for larger regulatory overhauls where compliance takes several years, the Forum recorded total programmatic costs, if the agency provided those estimates. Occasionally, the Forum catalogued notable rulemakings under Dodd-Frank, the Patient Protection and Affordable Care Act (PPACA), and other impactful federal programs. The Forum recorded these rules even though they did not contain cost estimates or paperwork requirements. The methodology for the Dodd-Frank and PPACA databases is the same but some rulemakings date back to 2010.

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Obama's Anti-Jobs Agenda

Midyear regulatory reform report card doesn't look good

By Clyde Wayne Crews
September 02, 2011
Originally published in The Washington Times
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Though President Obama is nowhere to be seen on ground-level job-creation efforts apart from the golf course, he did issue an early 2011 executive order to streamline the federal regulatory process by a fraction of a percent in advance of his still-unannounced jobs agenda.

The president will present that jobs agenda to a joint congressional session, but meanwhile, his policies - such as tolerating the National Labor Relations Board's dictating where a firm can build a plant - actively rip jobs away.

Sadly, the primary job-planning happening now in the private sector is planning to cancel job creation and to de-employ.

Mr. Obama's slate of yet more regulations is beyond merely alarming in this tense environment. The FederalRegister already stands at more than 54,000 pages so far this year.

Among new incursions are the Environmental Protection Agency's (EPA) Maximum Achievable Control Technology pollutant standards for fossil-fuel utilities, for cement plants and boilers like the ones factories and hospitals use. Other EPA standards await for ozone, for dust kicked up by farming and for power-plant coal ash.

Far from a jobs agenda, Mr. Obama advances an explicit anti-jobs program, one totaling hundreds of billions of dollars in costs and hundreds of thousands in jobs lost and jobs that can never appear. On top of an orgy of rule-making, our government, as deliberate public policy, prohibits access to safe and efficient extraction of fossil fuels on land and offshore.

The UnifiedAgendaofFederal Regulations is our snapshot of the regulatory pipeline, detailing proposed and final rules on which federal agencies expect to act, plus rules completed recently.

From spring 2009 (Mr. Obama's first year) to this year's Unified Agenda, the total number of regulations in the pipeline rose 7 percent - from 3,989 to 4,257. Mr. Obama's "modifying," "streamlining" and "repeal" of regulations are not part of the picture, despite administration rhetoric. (See chart.)

"Economically significant" rules in the pipeline - those the feds admit will cost at least $100 million annually and the most ominous for job creation - are up an inconceivable 27 percent since 2009, from 172 to 219. Of these, the ones recently completed or in final-rule phase are up from 87 to 95.

How about rules impacting small businesses, the oft-noted engines of job creation? Those stood at 768 in the spring 2009 UnifiedAgenda; now they're at 876, 14 percent higher during one of the worst recessions the country has faced.

The EPA, long known as a regulatory leviathan and source of many horror stories before the new fear-fest noted above, increased its rules in the Agenda pipeline from 322 to 358 during

the past three years.

Alarmingly, of the 358 rules anticipated from the EPA, 24 are considered "economically significant," compared to 19 before Mr. Obama streamlined regulation. These regulatory costs, of course, are off-budget charges that will come on top of the EPA's annual appropriation from taxpayers, which will be about $9 billion this year.

Of EPA rules impacting small business, those have grown from 86 to 93 during the three-year period. Rules affecting small business account for 26 percent of the EPA's Agenda entries. Of these 93 rules impacting small business, 14 are designated as "economically significant."

Back in the early 1990s, the proportion of all regulations impacting small business stood at 14 percent of the total number of regulations. Today, 21 percent of rules impact small business - up 3 percent from 2009. Regulatory burdens shouldn't shift to those least able to bear them.

As for the thousands of federal rules that don't qualify as economically significant, it is anybody's guess how many may cost up to $99 million and thus escape the "significant" designation. Congress needs to assure that no significant portion of the regulatory enterprise escapes mandatory cost scrutiny.

With that record, perhaps the president could have someone else deliver his upcoming speech. It would have more credibility.

Numerous reform proposals are on the table. Unfortunately, the immediate reality is torrents of new proposed rules, including the Dodd-Frank financial tsunami and health care rules that haven't even hit the books yet. If the federal agencies could be made to un-regulate, to undo and to establish regulatory cost budgets as proficiently as they have regulated of late, real progress could be made.

But more important, because voters have no recourse against unelected bureaucrats in the regulatory fourth branch of government, which the Constitution somehow fails to mention, Congress must be made accountable for every dollar of regulatory costs. In particular, no economically significant regulation should take effect until Congress approves it.

The Regulations From the Executive In Need of Scrutiny (REINS) Act would implement a version of this policy. Such rediscovery of representative democracy, not a jobs-agenda speech detached from reality, will help get the federal government's boot off the throat of American business.

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