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Hearing on

Reducing Unnecessary and Costly Red Tape through Smarter Regulations

Before the

Joint Economic Committee

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Statement of Professor Susan E. Dudley

Chairman Brady, Vice-Chairman Klobuchar, and distinguished members of the Committee, thank you for inviting me to testify today on smarter regulations. I am Director of the George Washington University Regulatory Studies Center, and Research Professor in the Trachtenberg School of Public Policy and Public Administration.[1] From April 2007 to January 2009, I oversaw executive branch regulations of the federal government as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). I have studied regulations and their effects for over three decades, from perspectives in government (as both a career civil servant and political appointee), the academy, non-profit organizations, and consulting.

In the 125 years since Congress created the first regulatory agency,[2] the number of regulatory agencies and the scope and reach of the regulations they issue has increased significantly. In 2013, there are over 70 federal agencies, employing over 300,000 people to write and implement regulation.[3] Every year, they issue thousands of new regulations, which now occupy over 168,000 pages of regulatory code. For over a century, concerns over the accountability of what some have called the "fourth branch" of government have led all three branches of government to take steps to exercise checks and balances on the development and enforcement of regulations.[4]

The Legislative Branch

Past congresses have passed several overarching laws governing regulatory practice, and establishing factors the executive branch must evaluate, information it must provide, and procedures for third-party review of regulations. Some of the most important regulatory review laws of the last few decades include:

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1 The George Washington University Regulatory Studies Center aims to improve regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

2 The Interstate Commerce Act established the Interstate Commerce Commission in 1887 to regulate railroad rates http://www.ourdocuments.gov/doc.php?flash=true&doc=49&page=pdf

3 Susan Dudley & Melinda Warren, FISCAL STALEMATE REFLECTED IN REGULATORS' BUDGET: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2012 AND 2013. The George Washington University Regulatory Studies Center and the Weidenbaum Center on the Economy, Government, and Public Policy. (2012) *available at* http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/Regulators_Budget_2012.pdf Note that "agencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report," so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc.

4 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

- the Regulatory Flexibility Act (RFA) of 1980, which requires agencies to assess the impact of a regulation on small businesses and provides for review by the Small Business Office of Advocacy.[5]
- the Paperwork Reduction Act (PRA) of 1980 (amended in 1995), which established OIRA within the OMB to review the paperwork and information collection burdens imposed by the federal government.[6]
- the Unfunded Mandates Reform Act (UMRA) of 1995, which limits regulatory agencies' ability to place burdens on state, local, and tribal governments[7]
- the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which enforces requirements for small business impact analyses under the RFA.[8]
- the Congressional Review Act (CRA) of 1996,[9] contained in the SBREFA, which requires rule-issuing agencies to send all mandated documentation that is submitted to the OMB to both houses of Congress as well. It also allows Congress to overturn regulations within a specified time with a congressional resolution of disapproval.
- the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (section 638(a)), which requires the OMB to report to Congress yearly on the costs and benefits of regulations and to provide recommendations for reform.[10]
- the Truth in Regulating Act of 2000, which gives Congress the authority to request that the GAO conduct an independent evaluation of economically significant rules at the proposed or final stages.[11]
- the Information Quality Act of 2000, which required the OMB to develop government-wide standards for ensuring and maximizing the quality of information disseminated by federal agencies. Under the guidelines, agencies must follow procedures for ensuring the utility, integrity, and objectivity of information used in rulemaking and elsewhere. They also must offer an administrative mechanism for responding to public requests to correct poor-quality information that has been or is being disseminated.[12]

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5 Available at: http://www.sbaonline.sba.gov/advo/laws/law_lib.html
6 Available at: http://www.archives.gov/federal-register/laws/paperwork-reduction/
7 Available at: http://www.gsa.gov/portal/content/245277
8 Available at: http://www.sba.gov/advocacy/825/12186
9 Available at: http://www.archives.gov/federal-register/laws/congressional-review/
10 OMB's annual reports are available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/
11 Available at: http://www.gpo.gov/fdsys/pkg/PLAW-106publ312/html/PLAW-106publ312.htm
12 Available at: http://www.gpo.gov/fdsys/pkg/PLAW-106publ554/pdf/PLAW-106publ554.pdf

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866, but rarely do more.[13] While pursuant to the RFA and SBREFA, courts have overturned regulations that fail to consider impacts on small business,[14] agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."[15,16] Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace.[17]

OMB reports annually to Congress on the costs and benefits of major regulations, but a 2001 Congressional Research Service report observed that OMB's reports, "have been incomplete, and its benefits estimates have been questioned."[18] My own research corroborates those concerns, and shows that a large percentage of total reported benefit estimates are driven by a few questionable assumptions.[19] The General Accounting Office[20] and others[21] have noted that

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[13] See testimony of Susan Dudley and other witnesses before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, February 15, 2011, *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1129:qunfunded-mandates-and-regulatory-overreachq&catid=14:subcommittee-on-technology

[14] Northwest Mining Association v. Babbitt, 5 F.Supp. 2nd 9 (D.D.C. 1998), and Southern Fishing Association vs. Daley, 995 F.Supp. 1411 (M.D. Fla. 1998).

[15] American Trucking Assns v. EPA 175 F.3d 1027, 1043 (D.C. Cir 1999)

[16] 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*, 41 Wm. & Mary L. Rev. 1425 (2000).

[17] While several resolutions of disapproval have passed one house of Congress, only one joint resolution of disapproval has passed both. It overturned an OSHA regulation addressing ergonomics in the workplace. Though resolutions of disapproval require only a simple majority in Congress, they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation" issued amid much controversy at the end of the Clinton administration. The resolution disapproving the rule came at the beginning of the Bush administration (which did not support the rule), eliminating the veto threat. Richard S. Beth, Disapproval of Regulations by Congress, Congressional Research Service (2011). Available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P_%3D%22P%20%20%0A. Susan E. Dudley testimony http://judiciary.house.gov/hearings/pdf/Dudley02282011.pdf

[18] Rogelio Garcia, Cong. Research Serv., IB95035, Federal Regulatory Reform: An Overview (2001), *available at* http://www.thecre.com/pdf/2002-crs.pdf.

[19] Susan E. Dudley, "OMB's Reported Benefits of Regulation: Too Good to be True?" *Regulation.* Vol. 36 No. 2 (2013) available at: http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/6/regulation-v36n2-4.pdf

[20] U.S. Gen. Accounting Office, GAO/GGD-99-59, Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation (1999), *available at* http://www.gao.gov/archive/1999/gg99059.pdf.

[21] Susan E. Dudley, Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation, Business Economics (2012) **47,** 165–176. doi:10.1057/be.2012.14.

it is difficult for OMB to report objectively on estimates of regulatory benefits and costs. As discussed under Recommendations below, additional efforts are needed to ensure meaningful analysis of regulatory consequences.

The Executive Branch

The executive branch has also made efforts to improve regulatory analysis, accountability, and outcomes. President Carter built on initiatives of Presidents Nixon and Ford to create procedures for analyzing the impact of new regulations and minimizing their burdens,[22] and every subsequent president has expanded executive oversight of regulatory agency activities. (See table below.)

Executive Order 12866,[23] issued by President Clinton in 1993, continues to guide the development and review of regulations today. E.O. 12866, like its predecessor E.O. 12291 (issued by President Reagan), expresses the philosophy that regulations should (1) address a "compelling public need, such as material failures of private markets"; (2) be based on an assessment of "all costs and benefits of available regulatory alternatives, including the alternative of not regulating"; and (3) "maximize net benefits" to society unless otherwise constrained by law.

E.O. 12866 requires, among other things, that a regulatory analysis be performed on all rules deemed to be of significant economic impact (i.e., that have an effect of $100 million or more in a year). The regulatory analysis must include a statement of need for the regulation, an assessment of alternative regulatory approaches, and a benefit- cost analysis.

Like presidents before him, President Obama has reinforced and expanded the principles and practices of regulatory analysis and executive oversight. He retained OIRA, and its staff of under fifty career civil servants who operate within the Executive Office of the President, reviewing regulations to ensure they are consistent with the President's priorities, and coordinating interagency review to avoid redundancy and conflict. With its mission to ensure regulations' benefits justify their costs, OIRA plays an important role. It is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line

[22] President Carter's E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978).

[23] Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf

agencies,[24] and provides what President Obama has called "a dispassionate and analytical 'second opinion' on agency actions."[25]

Executive Order 13563,[26] issued in January 2011, reaffirmed the regulatory principles and practices that have been in effect since 1981.[27] It reinforced E.O. 12866 and stressed the importance of conducting sound analysis of likely regulatory impacts, of providing public opportunities to engage in the process of developing new regulations, and of designing less-burdensome, more flexible approaches to achieve regulatory goals. It also required agencies to develop plans for periodically reviewing regulations already on the books, with an eye toward streamlining, repealing, or expanding them to make them more effective and less burdensome.

E.O. 13579, issued in July 2011, encouraged independent regulatory agencies to comply with E.O. 13563 requirements "concerning public participation, integration and innovation, flexible approaches, and science," to the extent permitted by law. E.O. 13579 also said that these agencies "should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned," and make such information public.[28]

While these executive branch efforts have done little to slow the growth in new regulation, they have focused attention on understanding the effects of regulations, and some argue they have resulted in "smarter regulation" that produces more benefits than costs.[29] Ultimately, however, statements of principles from the President are not enforceable in court, and will accomplish little unless the President is willing and able to enforce them in practice.

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[24] Susan E. Dudley, "Regulatory Reform: Lessons Learned, Challenges Ahead," *Regulation*, Vol. 32, Number 2, Summer 2009, available at http://www.cato.org/pubs/regulation/regv32n2/v32n2-1.pdf

[25] Memorandum of January 30, 2009—Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

[26] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[27] Press Release, The White House, Fact Sheet: The President's Regulatory Strategy (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/fact-sheet-presidents-regulatory-strategy.

[28] http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies

[29] See, for example, John D. Graham, Paul R. Noe, and Elizabeth L. Branch, Managing the Regulatory State: The Experience of the Bush Administration, Fordham L. Rev 33(2005), and Cass Sunstein, Smarter Regulation: Remarks from Cass Sunstein, AdLawRev 63 (2011)

Executive Orders on Regulatory Analysis and Oversight[30]

Executive Order	Title	President	Date Signed
EO 12044	"Improving Government Regulations" (revoked by EO 12291)	Carter	March 1978
EO 12174	"Paperwork" (revoked by EO 12291)	Carter	November 1979
EO 12291	"Federal Regulation" (revoked by EO 12866)	Reagan	February 1981
EO 12498	"Regulatory Planning Process" (revoked by EO 12866)	Reagan	January 1985
EO 12866	"Regulatory Planning and Review" (amended by EO 13258)	Clinton	September 1993
EO 13258	"Amending Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13497)	G. W. Bush	February 2002
EO 13422	"Further Amendment to Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13497)	G. W. Bush	January 2007
EO 13497	"Revocation of Certain Executive Orders Concerning Regulatory Planning and Review"	Obama	January 2009
EO 13563	"Improving Regulation and Regulatory Review"	Obama	January 2011
EO 13579	"Regulation and Independent Regulatory Agencies"	Obama	July 2011
EO 13609	"Promoting International Regulatory Cooperation"	Obama	May 2012
EO 13610	"Identifying and Reducing Regulatory Burdens"	Obama	May 2012

Recommendations for Improving Regulatory Policy

Recent Congresses have considered legislation to improve the quality of regulations, and make them more accountable to the American people. I have evaluated the possible consequences of different legislative initiatives elsewhere.[31] This section discusses several categories of reform that may prove useful.

[30] www.RegulatoryStudies.gwu.edu

[31] Susan Dudley, "Prospects for Regulatory Reform," *Engage* Vol 12, Issue 1 (2011), available at: http://www.fed-soc.org/doclib/20110603_DudleyEngage12.1.pdf, and prepared statement before the Senate Homeland Security and Government Affairs Committee, July 2011, available at: http://www.tspppa.gwu.edu/docs/20110720_testimony_dudley.pdf

Improving Regulatory Impact Analysis

One focus of regulatory reform legislation has been on improving the quality of the analysis agencies conduct before issuing regulation. Given that presidents of both parties for over 30 years have supported ex ante impact analysis of regulations, the creation of a statutory obligation for doing so is probably not necessary to ensure continued analysis, however, codifying the requirements could have several advantages.

- First, such legislation would lend Congressional support to these nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.[32]

- Second, legislation could apply these requirements to independent agencies (which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President). Senators Portman, Warner and Collins have recently introduced the Independent Agency Regulatory Analysis Act of 2013, which has received bipartisan support from former OIRA administrators, former heads of independent regulatory agencies, and legal academics.[33]

- Third, Congress could make compliance with them judicially reviewable. Judicial review could be valuable, not because the courts have a particular expertise in regulatory analysis, but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and Congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis. (Judicial review is discussed further below.)

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[32] Section 1(a) of Executive Order 12866 states the regulatory philosophy as follows: "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative 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."

[33] The legislation and letters of support are available at: http://www.portman.senate.gov/public/index.cfm/press-releases?ID=dd889275-da52-4764-b2c9-f02ab26fc881

Requiring better regulatory impact analysis before regulations are issued is important, but will not guarantee "smarter regulation" for several reasons.

- First, unless the cross-cutting analytical requirements supersede the decision criteria expressed in individual authorizing statutes, such as Section 109 of the Clean Air Act,[34] many regulations will continue to be based on limited information. Statutes that ignore or explicitly prohibit analysis of tradeoffs lead to regulations with questionable benefits that divert scarce resources from more pressing issues.[35]

- Second, ex ante regulatory impact analysis necessarily rests on hypotheses of how the regulatory action will alter outcomes and what they will cost. It is easy for regulators to fall prey to the "planner's paradox"[36] without appreciating that efforts to address perceived problems often have unintended consequences. Planned solutions always look better on paper than unplanned solutions, because the planner sees only his "data, assumptions, biases, and understandings of the way the world works…. All of the unseen difficulties with the planned solution — the data, assumptions, biases, and understandings of the world that turn out to be wrong — are invisible to the analyst because the data he considers are his own." Even the most carefully analyzed regulations may result in unanticipated changes in behavior that undermine the desired effects of the regulation.

- Third, agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, them. In principle, a benefit-cost analysis should be "complete." It should include all the significant consequences of a policy decision: direct and indirect, intended and unintended, beneficial and harmful. In practice, all such analyses must to some degree fall short of completeness. My review of agencies' analyses as reported through OMB's annual reports suggests that regulatory agencies are not approaching the problem objectively. On the benefit side of the equation, they quantify or list every conceivable good thing that they can attribute to a decision to issue new regulations, while on the cost side they only consider the most

[34] The Administrative Conference of the United States has conducted studies and provided recommendations on applications of these decision criteria that the Committee may find useful, including: 79-4 Cost-Benefit Analysis in Regulatory Decision-Making; 85-2 Regulatory Analysis of Agency Rules; 88-9 Presidential Review of Agency Rulemaking [60 Fed. Reg. 56312 (Nov 8, 1995)]; and Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, Duke L.J. 213 (1982).

[35] See Susan Dudley and George Gray, "Improving the Use of Science to Inform Environmental Regulation," in *Institutions and Incentives in Regulatory Science*, Lexington Books, Jason Johnston ed. (2012)

[36] Brian Mannix, "The Planners' Paradox," *Regulation*, Summer 2013, available at: http://www.cato.org/sites/cato.org/files/serials/files/regulation/2003/7/mannix.pdf

obvious direct and intended costs of complying with the regulation.[37] (This is a problem of "confirmation bias," discussed further below.)

Only Congress can address the first problem by amending language in existing legislation that precludes reliance on sound decision criteria or hinders APA procedures (such as requirements that agencies issue interim final regulations that limit public comment).[38] New statutes that authorize executive agencies to issue regulations should require them to conduct careful analysis of likely effects, both intended and unintended, and provide them adequate time to research, deliberate, and consult with the public before issuing new rules.

A minimum step toward addressing the second problem would be to require agencies to present evidence that the identified problem requires a federal regulatory solution, as well as an objective evaluation of alternative solutions. To this end, it is essential that analytical requirements not be limited to conducting benefit-cost analysis, but rather capture the broader philosophy and principles articulated in E.O. 12866. Legislation should require that regulatory decisions be based on the identification of a compelling public need (a material failure of private markets), an objective review of alternatives (including the alternative of not regulating), and an understanding of the distributional impacts of different approaches.

To truly address the latter two problems, however, institutional changes are needed to alter incentives for conducting analysis and making decisions. Despite requirements for public comment and practices for executive oversight, regulatory decision-making is often insulated from different perspectives. Regulatory agency staff are smart and motivated, but, like everyone else, they are susceptible to what behavioral psychologists call "confirmation bias,"[39] and their single-mission focus leads them to discount data, research, values and perspectives that do not corroborate their preferred regulatory action. As a result, as Justice Stephen Breyer observed in his 1993 book *Breaking the Vicious Circle*, "well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results."[40] Breyer referred to this institutional phenomenon as "tunnel vision," where agencies single-

[37] See Susan Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics* Vol. 47, No. 3, August 2012.

[38] See Susan Dudley, "GAO Report: Agencies Circumvent Public Comment on Major Rules," available at: http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/GAO%20report%20Dudley.pdf and Sofie Miller, "What the Unified Agenda Tells Us About Notice and Comment Rulemaking," available at: http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/2012agenda_Miller.pdf

[39] For a short description of confirmation bias, see http://skepdic.com/confirmbias.html.

[40] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, Harvard University Press, 1993.

mindedly pursue a particular goal to a point that "the regulatory action imposes high costs without achieving significant additional safety benefits."[41]

Institutional changes that provide for more checks and balances, and harness the "wisdom of crowds"[42] are needed to counter these natural incentives. As discussed below, congressional oversight, judicial oversight, and opportunities for public involvement could provide greater accountability and improve the reasoning underlying regulatory decisions as well as the decisions themselves.

Enhanced Congressional Oversight

Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient.[43] Congress may also want to consider legislation that would strengthen its own ability to control regulation. One approach would require a Congressional vote before major new regulations can become effective, and another would establish a Congressional office to review and evaluate regulations.

Congressional Approval of New Rules

The Regulations from the Executive In Need of Scrutiny (REINS) Act[44] would provide a tool for Congress to "increase accountability for and transparency in the federal regulatory process."[45] It is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations, but it changes the default outcome. Rather than requiring Congress to enact a "joint resolution of disapproval" to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative "joint resolution of approval."[46]

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41 Susan E. Dudley, "Regulatory Reform: Lessons Learned, Challenges Ahead," *Regulation*, Vol. 32, Number 2, Summer 2009, available at http://www.cato.org/pubs/regulation/regv32n2/v32n2-1.pdf

42 James Surowiecki, *The Wisdom of Crowds*. Anchor Books, 2005.

43 Susan Dudley, "Congress Needs its own Regulatory Oversight Office," Penn RegBlog, http://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html (2011)

44 S. 15 available at: http://beta.congress.gov/bill/113th-congress/senate-bill/15

45 Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. § 2 (2011).

46 See my analysis of the advantages and disadvantages of REINS in a GW Regulatory Studies Center working paper available at: http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u38/regreform_dudley_workingpaper_20110405.pdf

Congressional Regulatory Oversight Office

A Congressional office responsible for reviewing regulations would have several benefits.[47] Most importantly, it would serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.[48] While a Congressional office would not have the same authority OIRA exercises to affect agency draft regulations, it would be able to devote resources to areas OIRA does not, such as examining the effects of regulations issued by independent regulatory agencies. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation.[49]

Judicial Branch Oversight of Regulation

Under the APA, after a regulatory agency issues a final rule, an affected party may challenge it in court. Reviewing courts may reverse or remand the rule to the agency for reconsideration on constitutional grounds, on procedural grounds (whether the agency followed the procedures specified in the APA), or on the basis of the agency's interpretation of the authorizing statute.

Recent courts have overturned several regulations of the Securities and Exchange Commission as being arbitrary and capricious and in violation of the APA, finding that compliance with the Commission's statutory criteria demanded a more rigorous analysis of benefits and costs to evaluate the rule's effects on efficiency, competition, and capital formation.[50]

Courts defer to agency expertise when evaluating regulatory records,[51] however, and presidential executive orders governing regulatory impact analysis have stated that their requirements are not

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[47] See Testimony of Robert W. Hahn and Robert E. Litan before the House Government Reform Committee, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, March 2003, *available at:* http://www.brookings.edu/testimony/1999/04_righttoknow_litan.aspx

[48] GAO noted "It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government." U.S. Gen. Accounting Office, GAO/GGD-99-59, Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation (1999), *available at* http://www.gao.gov/archive/1999/gg99059.pdf.

[49] Susan Dudley, "Congress Needs its own Regulatory Oversight Office," Penn RegBlog, http://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html (2011)

[50] For a discussion of recent cases, see Jane Luxton, *An Uncomfortable Wake-Up Call For Dodd-Frank Regulators*, Futures & Derivatives Law Report (Vol. 32, Issue 1) available at: http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2296

[51] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-step test for determining whether to grant deference to a government agency's interpretation of a statute. Under the second

enforceable by law.[52] The Regulatory Accountability Act attempts to alter the deference to agencies by subjecting regulations issued under APA notice-and-comment rulemaking procedures to a "substantial evidence" standard of judicial review, which directs a reviewing court to set aside an agency action unless the record provides "such relevant evidence as a reasonable person would accept as adequate to support a conclusion."[53] This is arguably a more exacting standard than "arbitrary and capricious" standard of review.[54]

The small business community has been frustrated that courts have interpreted the Regulatory Flexibility Act's requirements to assess economic impact as applying only to direct compliance costs. They argue that agencies should consider reasonably foreseeable indirect economic impacts on small entities, such as increases in input prices (e.g., electricity, natural gas, or transportation) or state-level regulations issued pursuant to federal rules. This latter issue is particularly important for environmental regulations, where the "duty of regulating is passed on to the states without any corresponding analysis or requirements for states to consider less burdensome alternatives for small business."[55]

Enhanced Public Input

It is popular to talk about the possibility of using modern technology to improve regulatory policy by engaging the wisdom of crowds. While there are some promising ideas on this front, it is important to keep in mind that the most powerful technology for effectively using the decentralized wisdom of crowds is a very old one: the market.[56] There are countless opportunities to improve regulatory policy by giving greater deference to the wisdom of the market. Regulatory agencies continue to issue energy efficiency standards for appliances,

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step, if Congressional intent is not clear, "the issue for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

[52] See EO 12866 Sec. 11. "*Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."

[53] Mareno v. Apfel, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999) ("more than a scintilla but less than preponderance").

[54] 5 U.S.C. § 706(2)(A).

[55] *Hearing on Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 110th Cong. (2007) (testimony of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration), *available at* http://archive.sba.gov/advo/laws/test07_1206.html.

[56] See John O. McGinnis, *Accelerating Democracy: Transforming Governance through Technology*. Princeton University Press, 2013.

vehicles, and businesses, all of which depend on a falsehood: the theory that regulators know more than consumers about consumers' own welfare.[57]

Apart from greater reliance on the market, engaging the wisdom of crowds to improve regulatory outcomes could take several forms. Requiring pre-rulemaking disclosure of key information related to problem formulation, risk assessment, and impact analysis, would engage broad public comment on the proper choice of studies, models, assumptions, etc. long before any policy decisions are framed, and positions established.[58] The bicameral Regulatory Accountability Act (RAA)[59] would further these objectives by amending the Administrative Procedure Act to codify and extend some of the analytical requirements in presidential executive orders and also provide for more extensive opportunities for public involvement, particularly for rules designated as "high impact." Depending on their expected impacts, rules and guidance documents would be subject to procedures beyond the notice and comment procedures currently embodied in the APA, and could bring greater transparency to the basis for regulatory decisions, and engage broader public input earlier in the regulatory process.

Incentives to Reexamine Existing Regulations

Most legislative and executive branch reforms have focused on analyzing and improving new regulations, and agencies seldom look back to evaluate whether existing regulations are having their intended effects. Initiatives to require ex post evaluation of regulations that are in effect have met with limited success[60] largely because they did not change the underlying incentives.

Several initiatives would seek to alter those incentives. Senator Angus King is seriously considering a proposal by the Progressive Policy Institute for a Regulatory Improvement Commission, patterned after the Base Realignment and Closing Commission, that would review public recommendations for removing existing regulations and present a package recommendation to Congress for an up or down vote.[61]

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[57] Susan E. Dudley, Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation, Business Economics (2012) **47,** 165–176. doi:10.1057/be.2012.14.

[58] See Dudley and Gray 2012 for more ideas related to engaging a wide range of resources to expand regulatory information.

[59] S. 1029 (available at: http://www.govtrack.us/congress/bills/113/s1029/text) and H.R. 2122 (available at: http://www.govtrack.us/congress/bills/113/hr2122)

[60] Susan E. Dudley prepared statement before the Senate Homeland Security and Government Affairs Committee, July 2011, available at: http://www.tspppa.gwu.edu/docs/20110720_testimony_dudley.pdf

[61] Based on discussion with Sen. King's staff. The Progressive Policy Institute's analysis of the problem of accumulating regulation and its proposal is available at: http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/

Congress is considering using budgeting concepts to alter regulatory agencies' incentives to issue new regulations and examine the effectiveness of existing regulations.[62] The United Kingdom's "one-in-one-out" approach to regulation forces agencies to make tradeoffs when issuing new regulation,[63] and members of the U.S. Senate are considering similar legislation.[64] Under a strict "regulatory paygo" or "one-in-one-out" approach, regulatory agencies would be required to eliminate an outdated or duplicative regulation before issuing a new regulation of the same approximate economic impact. While subject to analytical challenges, this has the potential to impose some needed discipline on regulatory agencies, and to generate a constructive debate on the real impacts of regulations.[65]

The Regulatory Accountability Act would require all final rules to include a plan for review at least every 10 years, to "determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives."[66]

Conclusion

Regulatory impact analysis is a longstanding and important element of US regulatory policy, but a variety of institutional obstacles prevent regulatory impact analysis from being a silver bullet for producing smarter regulation. As long as agencies themselves conduct the analysis, selected actions will suffer from confirmation bias. Analyses are often used to justify, rather than inform, decisions, and intentionally or unintentionally become tools for advocacy (by agencies and others). Current procedures do not provide other participants incentives to invest in careful, objective analysis, nor to conduct ex-post evaluation of regulatory outcomes (or empirical verification of ex ante estimates of impacts).

Institutional changes that provide for more effective checks and balances, and engage the wisdom of crowds are needed to counter these incentives. Greater congressional oversight, judicial oversight, and opportunities for public involvement could provide greater accountability and improve the reasoning underlying regulatory decisions as well as the decisions themselves.

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[62] See statement of Senator Portman before Homeland Security and Government Affairs Committee, June 23, 2011, *available at http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i*.

[63] http://www.bis.gov.uk/policies/bre/one-in-one-out

[64] See statement of Senator Mark Warner before Homeland Security and Government Affairs Committee, June 23, 2011, *available at* http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i.

[65] Susan E. Dudley prepared statement before the Senate Homeland Security and Government Affairs Committee, July 2011, available at: http://www.tspppa.gwu.edu/docs/20110720_testimony_dudley.pdf

[66] Regulatory Accountability Act Sec. 3((f)(4)(G)